

BIT MODEL 2008

AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF GHANA AND THE GOVERNMENT OF THE REPUBLIC OF FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

The Government of the Republic of Ghana and the Government of the Republic of (hereinafter referred to as the “Contracting Parties”),

Desiring to create favourable conditions for greater investment by nationals and companies of one state in the territory of the other,

Recognizing that the encouragement and reciprocal protection of investment under this agreement will be conducive to the stimulation of individual business initiative and will contribute to increasing long term sustainable economic growth and development in both States,

Recognizing the importance of transfer of technology and human resources development arising from such investments.

Have agreed as follows:

ARTICLE 1 **Definitions**

1. For the purpose of this Agreement:
 - (a) “investments” means every kind of asset invested in accordance with the laws and regulations of the host State, by a national or company and in particular, though not exclusively, includes:
 - (i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
 - (ii) shares in and stocks and debentures of a company and any other form of participation in a company;
 - (iii) claims to money or to any performance under contract having a financial value;
 - (iv) intellectual property rights,

- (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract, or exploit natural resources;

but "investments" does not mean:

- (vi) claims to money that arise solely from:

- commercial contracts for the sale of goods or services, or

- credits in connection with a commercial transaction, where the original maturity date is less than three years;

- (vii) any other claims to money arising from:

- a. operations of external credit undertaken in accordance with the laws and regulations of the Contracting Party (undertaking it).

- b. operations of public debt

- (viii) real estate or other property, tangible or intangible, other than acquired in the expectation or used for the purpose of economic benefit or other business purposes.

A change in the form in which assets are invested does not affect their character as investments, provided such change is not contrary to the laws of the Contracting Party in whose territory the investment has been made.

- (b) "returns" means the amount yielded by an investment and includes, in particular, though not exclusively, profits, interest, capital gains, dividends, royalties and fees;
- (c) "nationals" means:
 - (i) in respect of the Republic of Ghana: natural persons deriving their status as Ghanaian nationals from the law in force in the Republic of Ghana;
 - (ii) in respect of the natural persons deriving their status as nationals within the meaning of.....
- (d) "companies" means:

- (i) in respect of the Republic of Ghana: any corporations, firms and associations incorporated or constituted under the law in force in the Republic of Ghana;
 - (ii) in respect of the, corporations, firms and associations incorporated or constituted under the law in force in any part of
- (e) "territory" means:
- (i) in respect of Ghana: the present territory of the Republic of Ghana including, the airspace, the territorial sea and any maritime area situated beyond the territorial sea of Ghana which has been or might in the future be designated under the national law of Ghana in accordance with international law as an area within which Ghana may exercise rights with regard to the sea-bed and subsoil and the natural resources;
 - (ii) in respect of the Republic of, the present territory of the Republic of including the territorial sea and any maritime area situated beyond the territorial sea of which has been or might in the future be designated under the national law of in accordance with international law as an area within which may exercise rights with regard to the seabed and subsoil and the natural resources;

ARTICLE 2
Admission of Investments

1. Each Contracting Party shall encourage and create favourable conditions for nationals and companies of the other Contracting Party to invest in its territory and shall admit such investments in accordance with its laws, regulations and policies.
2. Each Contracting Party shall subject to its laws, regulations and policies relating to the entry of foreign nationals facilitate the entry and stay in its territory to the investor and to key personnel employed by the investor in connection with an investment.

ARTICLE 3
Protection of Investments

1. Investments of nationals and companies of each Contracting Party shall be accorded fair and equitable treatment and full protection and security in the territory of the other Contracting Party.
2. It is understood that the concepts of “fair and equitable treatment” and “full protection and security” means treatment that meets the standard required by customary international law and does not require treatment in addition to, or beyond such a standard.
3. Neither Contracting Party shall, in any way, impair by unreasonable or discriminatory measures, the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party.

ARTICLE 4
National Treatment and Most-Favoured-Nation Provisions

1. Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords, in like circumstances, to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third state.
2. Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which is accorded, in like circumstances, to its own nationals or companies or to nationals or companies of any third state.

3. The most favoured nation treatment referred to in paragraphs (1) and (2) shall not extend to provisions on investor-State disputes.

ARTICLE 5

Exceptions to Non-Discrimination

1. The provisions of this Agreement relative to the grant of treatment not less favourable than that accorded to the nationals or companies of any third State shall not be construed so as to oblige one Contracting Party to extend to the nationals or companies of the other, the benefit of any treatment, preference or privilege resulting from:

- (a) any existing or future customs union, common market, free trade area, or regional economic organization or measures leading to the formation of a customs union or free trade area of which either Contracting Party is a member; or to which it is associated;
- (b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation; or

2. The provisions of this Agreement relative to the grant of treatment not less favourable than that accorded to the nationals or companies of either Contracting Party shall not be construed so as to oblige one Contracting Party to extend to the nationals or companies of the other, the benefit of any treatment, preference or privilege resulting from any special policies or measures intended to address the specific internal needs of identified disadvantaged groups, persons or regions in the territory of either Contracting Party.

ARTICLE 6

Repatriation of Investments and Returns

1. Each Contracting Party shall in respect of investments permit nationals and companies of the other Contracting Party the unrestricted transfer in freely convertible currency of their investments and of the earnings from it to the country designated by those nationals. Transfers shall be effected without delay in a freely convertible currency at the rate of exchange applicable on the date of transfer, subject to any exchange regulations in force.

2. Where, in exceptional circumstances, payments and capital movements cause or threaten to cause serious balance of payments difficulties, each Contracting Party may temporarily restrict transfers, provided that such restrictions are imposed on the basis of equity, non-discrimination and in good faith.

ARTICLE 7
Expropriation

1. Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party, except for a public purpose and in a non-discriminatory manner.
2. The expropriation or the measures having effect equivalent to expropriation shall be accompanied by the payment of compensation amounting to the fair market value of the investment immediately before the expropriation or before the impending expropriation became public knowledge whichever is the earlier.
3. The compensation shall be paid without undue delay and in a freely convertible currency. If the compensation is not paid within six months from the date of its determination, it shall after that date attract interest at the normal commercial rate until the date of payment.
4. A national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of its investment in accordance with the principles set out in paragraph (1), (2) and (3) of this Article.
5. Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which nationals or companies of the other Contracting Party own shares, the provisions of paragraphs (1) to (4) of this Article shall apply.
6. Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as national security, public health, safety, and the environment, do not constitute indirect expropriations.

ARTICLE 8
Compensation for Losses

Nationals or companies of one Contracting Party whose investments suffer losses in the territory of the other Contracting Party owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to nationals and companies of any third State. Resulting payments shall be freely transferable.

ARTICLE 9

Subrogation

1. If one Contracting Party or its designated agency makes a payment under an indemnity given in respect of an investment in the territory of the other Contracting Party, the latter Contracting Party shall recognise the assignment to the former Contracting Party or its designated agency by law or any legal transaction of all the rights and claims of the party indemnified and that former Contracting Party or its designated agency is entitled to exercise such rights and enforce such claims by virtue of its subrogation, to the same extent as the party indemnified.
2. The former Contracting Party or its designated Agency shall be entitled in all circumstances to the same treatment in respect of the rights and claims acquired by it by virtue of the assignment and any payments received in pursuance of those rights and claims as the party indemnified was entitled to receive by virtue of this Agreement in respect of the investment concerned and its related returns.
3. Any payments received by the former Contracting Party or its designated Agency in pursuance of the rights and claims acquired shall be freely available to the former Contracting Party for the purpose of meeting any expenditure incurred in the territory of the latter Contracting Party.

ARTICLE 10

Essential security interests

Nothing in this Treaty shall be construed to preclude a Contracting Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential public order or security interests.

ARTICLE 11

Denial of benefits

1. A Contracting Party may deny the benefits of this Agreement to a national or a company and their investments if nationals or companies of a third party substantially owns or controls the investment or the denying Contracting Party adopts or maintains measures with respect to the third party that prohibit or restrict transactions with nationals or companies of this third party.
2. A Contracting Party may deny the benefits of this Agreement to a national or a company of a third party or to an investment of such national or company, if a national or company of a third party owns or controls the investment and the national or company and/or its investment has no substantial business activities in the territory of the Contracting Party under whose laws it is constituted or organized.

ARTICLE 12
Responsibilities of Nationals and Companies of a Contracting Party in the Territory of the other Contracting Party

1. Nationals and companies of one Contracting Party in the territory of the other Contracting Party shall be bound by the laws and regulations in force in the host State, including its laws and regulations on labour, health and the environment.
2. Nationals and companies of one Contracting Party in the territory of the other Contracting Party shall to the extent possible, encourage human capital formation, local capacity building through close cooperation with the local community, create employment opportunities and facilitate training opportunities for employees, and the transfer of technology.
3. Nationals and companies of one Contracting Party in the territory of the other Contracting Party shall behave in accordance with relevant guidelines and other internationally accepted standards applicable to foreign investors.

Article 13
Investment Promotion and Joint Commission

1. The Contracting Parties hereby agree to establish a Joint Commission on Investment comprising cabinet-level representatives. The Joint Commission shall:
 - (a) Supervise and review the implementation of this Agreement;
 - (b) Give joint interpretations of the Agreement if required;
 - (c) Exchange information on investment opportunities and conditions with a view to encourage and facilitate investments between the Contracting Parties;
 - (d) Encourage joint investment promotion activities between the Contracting Parties such as the organization of joint conferences, seminars and workshops;
 - (e) Encourage and monitor the administrative procedures concerning the admission and operation of foreign investment;
 - (f) Promote technological cooperation with a view to fostering the transfer of technology and know-how;
 - (g) Facilitate the establishment of links between research and training centres, specialized investment promotion agencies and business organizations;
 - (h) Coordinate the implementation of capacity building programmes and technical assistance missions with a view to enhance human resources development and to raise awareness about investment opportunities in the territory of the Contracting Parties;

- (i) Consider any other matter that may affect the operation of this Agreement;
2. The Commission may also discuss and suggest appropriate amendments to the Agreement to be adopted by the Contracting Parties.
3. The Commission shall meet on a regular basis, and at least once a year.

ARTICLE 14

Settlement of Investment Disputes between a national or a company of a Contracting Party and another Contracting Party

1. Consultation, negotiation or mediation:

Disputes arising from the application and interpretation of the Agreement shall be to the extent possible settled through consultation, negotiation or mediation upon written request submitted by either party.

2. Administrative review

In order to submit a claim for settlement, internal administrative remedies of the Member State in whose territory the investment has been made shall be exhausted if required by and in accordance with applicable laws and regulations. Such procedure shall in no case exceed six months from the date of its initiation by the investor and shall not prevent him from initiating consultation, negotiation or mediation as provided under paragraph 1.

3. Scope of the claim

a) In the event that a dispute arising from the application and interpretation of the Agreement cannot be settled by consultation, negotiation or mediation within 6 months from the written request as provided under (1) [or Administrative Review as provided under (2) of this article], the investor may submit a claim, in writing (written notice) to the other disputing party that the latter has breached an obligation under this Agreement and that the investor has incurred loss or damage by reason of, or arising out of, that breach;

b) No claim may be submitted to either a national court or to arbitration if more than three years have elapsed from the date on which the investor acquired, or should have first acquired, knowledge of the breach and knowledge of the loss or damage arising from that breach.

4. Written notice

The written notice shall specify the name and address of the investor, evidence establishing that it is an investor of the other Contracting Party, the provisions of this Agreement alleged to have been breached, the issues and factual basis for the claim and the approximate amount of damages claimed.

5. Submission of a claim

1. If the dispute cannot be settled through consultation, negotiation or mediation within 6 months from the date of the written request for consultation, the disputing party may submit a claim either to:

(a) the national courts or administrative tribunals of the Contracting Party in whose territory the investment has been made;

(b) an ad-hoc tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL);

(c) the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both Contracting Parties are members of the ICSID Convention and that there is an explicit written consent between the investor and the contracting party to submit the dispute to the ICSID according to Article (25/1) of the ICSID convention; or under the ICSID Additional Facility Rules, provided that one Contracting Party is a party to the ICSID Convention;

(d) The Ghana Arbitration Centre;

(e) any other national or international arbitration institution or;

(f) under any other arbitration rules subject to agreement by the disputing parties.

2. Once the disputing party has submitted the dispute to the competent national courts of the Contracting Party in whose territory the investment has been made, or to international arbitration, that election is final.

6. Selection of arbitrators / Constitution of the arbitral tribunal

Unless the disputing parties otherwise agree, the arbitral tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.

7. Interim measures of protection

An arbitral tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to facilitate the conduct of arbitral proceedings, including an order to preserve evidence in the possession or control of a disputing party.

8. State contracts

In the case where the investor and the Contracting Party in whose territory the investment is made have signed a State contract or an investment agreement, the

procedure relating to the settlement of disputes foreseen in that contract or investment agreement shall apply to the settlement of disputes arising from the breach or violation of that contract or investment agreement.

9. Governing law

(a) The arbitral tribunal shall reach its decision on the basis of the provisions of this Agreement, national laws and regulations of the Contracting Party which is a party to the dispute and applicable rules of international law.

(b) Any interpretation adopted by the Joint Commission shall be binding upon any tribunal established under this Agreement, and any award must be consistent with such interpretation.

10. Final award

Where the tribunal makes a final award against a party, the tribunal may award, separately or in combination, only:

(a) monetary damages and any applicable interest;

(b) restitution of property, in which case the award shall provide that the party may pay monetary damages and any applicable interest in lieu of restitution.

The tribunal may also award costs and attorneys' fees in accordance with this Agreement and the applicable arbitration rules. The tribunal may not award punitive damages.

11. Finality and enforcement of an award

(a) An award made by a tribunal shall be final and binding on the disputing parties in respect of the particular case.

(b) Subject to the applicable revision, annulment or set aside procedures, a disputing party shall abide by and comply with an award without delay.

(c) Each Contracting Party shall provide for the enforcement of an award in its territory in accordance with its national law and regulations.

(d) If a disputing party fails to abide by or comply with a final award within 3 months, the Contracting Party whose investor was a party to the arbitration may have recourse to the provision for the settlement of disputes between the Contracting Parties under article 15.

ARTICLE 15
Disputes Between the Contracting Parties

1. Disputes between the Contracting Parties concerning the interpretation or application of this Agreement should, if possible, be settled through diplomatic channels.
2. If a dispute between the Contracting Parties cannot thus be settled within six months, it shall upon the request of either Contracting Party be submitted to an arbitral tribunal.
3. Such an arbitral tribunal shall be constituted for each individual case in the following way: Within two months of the receipt of the request for arbitration, each Contracting Party shall appoint one member of the tribunal. Those two members shall then select a national of a third State who on approval by the two Contracting Parties shall be appointed Chairman of the tribunal. The Chairman shall be appointed within two (2) months from the date of appointment of the other two members.
4. If within the periods specified in paragraph 3 of this Article the necessary appointments have not been made, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make the necessary appointments. If the President is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting Party or if he too is prevented from discharging the said function, the member of the International Court of Justice next in seniority who is not a national of either Contracting Party shall be invited to make the necessary appointments.
5. The arbitral tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both Contracting Parties. Each Contracting Party shall bear the cost of its own member of the tribunal and of its representation in the arbitral proceedings; the cost of the Chairman and the remaining costs shall be borne in equal parts by the Contracting Parties. The tribunal may, however, in its decision, direct that a higher proportion of costs shall be borne by one of the two Contracting Parties, and this award shall be binding on both Contracting Parties. The tribunal shall determine its own procedure.

ARTICLE 16
Amendments

At the time of entry into force of this Agreement or at any time thereafter, the provisions of this Agreement may be amended in such manner as may be agreed between the Contracting Parties. Each Contracting Party shall notify the other Contracting Party of the completion of the constitutional formalities in its territory for entry into force of the said amendments. Such amendments shall enter into force on the date of the latter of the two notifications.

ARTICLE 17
Scope of application

1. This Agreement shall apply to all investments made before or after its entry into force by nationals or companies of either Contracting Party in the territory of the other Contracting Party. However, the provisions of this Agreement shall not apply to claims arising out of events which occurred or to claims which have been settled prior to its entry into force.

2. The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party. Such matters shall be governed by the domestic laws of each Contracting Party and the terms of an agreement relating to taxation concluded between the Contracting Parties

ARTICLE 18
Entry into Force, Duration and Termination

1. Each Contracting Party shall notify the other Contracting Party of the completion of the constitutional formalities in its territory for the entry into force of this Agreement. This Agreement shall enter into force on the date of the latter of the two notifications.

2. This Agreement shall remain in force for a period of ten (10) years. After the expiration of the initial period, it shall continue in force thereafter until either Contracting Party notifies the other Contracting Party in writing of its decision to terminate this Agreement. The notice of termination shall become effective one year after the date of notification.

3. In respect of investments made prior to the date of termination of this Agreement, the provisions of Articles 1 to 18 of this Agreement shall remain in force for a further period of ten (10) years from the date of termination.

IN WITNESS WHEREOF, the undersigned, duly authorised thereto by their respective Governments, have signed this Agreement.

Done in duplicate at this day of..... in English Language.

FOR THE GOVERNMENT OF THE REPUBLIC OF GHANA

FOR THE GOVERNMENT OF THE REPUBLIC OF.....