



**A g r e e m e n t**

**between**

**the Government of the Republic of South Africa**

**and**

**the Swiss Federal Council**

**on the Promotion and Reciprocal Protection**

**of Investments**

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**Preamble**

The Government of the Republic of South Africa and the Swiss Federal Council,

Desiring to create favourable conditions for greater investment by investors of one Contracting Party in the territory of the other;

Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in the territories of both Contracting Parties;

Have agreed as follows:

## Article 1

### **Definitions**

For the purpose of this Agreement:

- (1) "Investments" means every kind of assets and in particular, though not exclusively, includes:
  - (a) movable and immovable property as well as any other rights in rem such as mortgages, liens, pledges;
  - (b) shares in and stock and debentures of a company and any other form of participation in a company;
  - (c) claims to money or to any performance under contract having an economic value;
  - (d) intellectual property rights, goodwill, technical processes and know-how;
  - (e) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of the authority in accordance with the law.

A change in the form in which assets are invested does not affect their character as investments.

- (2) "Returns" means the amounts yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties and fees;
- (3) "Investor" means with regard to either Contracting Party:
  - (a) natural persons who, according to the law of that Contracting Party, are considered to be its nationals;

- (b) companies, including corporations, business associations and other organisations, established under the law of that Contracting Party and having their seat in the territory of the same Contracting Party;
  - (c) companies not established under the law of that Contracting Party but effectively controlled by natural persons, as defined in (a) above or by companies as defined in (b) above.
- (4) "Territory" means the territory of each Contracting Party and includes the maritime areas adjacent to the coast of the State concerned, i.e. the exclusive economic zone and the continental shelf, to the extent to which that State may exercise sovereign rights or jurisdiction in those areas according to international law.

## Article 2

### **Promotion, Admission**

- (1) Each Contracting Party shall, within the framework of its laws and regulations, encourage investors of the other Contracting Party to make investments in its territory by creating favourable conditions for such investments and, subject to its right to exercise powers conferred by its laws, shall admit such investments.
- (2) Each Contracting Party shall grant, in accordance with its laws and regulations, the necessary permits in connection with such an investment and with the carrying out of licensing agreements and contracts for technical, commercial or administrative assistance.

### Article 3

#### **Protection, Treatment**

- (1) Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension or disposal of investments in its territory of investors of the other Contracting Party.
- (2) Each Contracting Party shall in its territory accord investments or returns of investors of the other Contracting Party treatment not less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State, whichever is more favourable to the investor concerned.
- (3) Each Contracting Party shall in its territory accord investors of the other Contracting Party treatment not less favourable than that which it accords to its own investors or to investors of any third State, whichever is more favourable to the investor concerned.
- (4) If a Contracting Party accords special advantages to investors of any third State by virtue of an agreement establishing a free trade area, a customs union, a common market or a similar regional organisation or by virtue of an agreement on the avoidance of double taxation, it shall not be obliged to accord such advantages to investors of the other Contracting Party.
- (5) For the avoidance of doubt it is confirmed that the principles provided for in paragraphs (2) and (3) of this Article shall not be applicable in relation to special advantages, such as in the field of taxation, accorded to development finance institutions.

**Article 4**

**Compensation for Losses**

- (1) Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses 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 its own investors or investors of any third State whichever is more favourable to the investor concerned. Resulting payments shall be freely transferable at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force.
- (2) Without prejudice to paragraph (1) of this Article, investors of one Contracting Party who in any of the situations referred to in that paragraph suffer losses in the territory of the other Contracting Party resulting from:
  - (a) requisitioning of their property by the forces or authorities of the latter Contracting Party, or
  - (b) destruction of their property by the forces or authorities of the latter Contracting Party, which was not caused in combat action or was not required by the necessity of the situation,

shall be accorded restitution or adequate compensation. Resulting payments shall be freely transferable at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force.

## Article 5

### **Expropriation**

- (1) Investments of investors 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 related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the real value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realisable and be freely transferable at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force. The investor affected shall have the 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 his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.
- (2) 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 investors of the other Contracting Party own shares, it shall, to the extent necessary and subject to its laws, ensure that compensation according to paragraph (1) of this Article will be made available to such investors.

## Article 6

### **Repatriation of Investment and Returns**

- (1) Each Contracting Party shall in respect of investments guarantee to investors of the other Contracting Party the unrestricted transfer of their investments and returns abroad.

- (2) Each Contracting Party shall also guarantee to investors of the other Contracting Party the unrestricted right to transfer funds to maintain or increase the investment or to repay loans contracted or to meet other contractual obligations undertaken in connection with the investment.
- (3) Transfers of currency shall be effected without delay in any convertible currency. Unless otherwise agreed by the investor transfers shall be made at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force.

#### Article 7

##### **Other Obligations**

- (1) If provisions in the legislation of either Contracting Party or in international agreements entitle investments by investors of the other Contracting Party to treatment more favourable than is provided for by this Agreement, such provisions shall to the extent that they are more favourable prevail over this Agreement.
- (2) Each Contracting Party shall observe any other obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party.

#### Article 8

##### **Pre-agreement Investments**

The present Agreement shall also apply to investments in the territory of a Contracting Party made in accordance with its laws and regulations by investors of the other Contracting Party prior to the entry into force of this Agreement.



## **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 by legal transaction of all the rights and claims of the indemnified investor and that the former Contracting Party or its designated Agency is entitled to exercise such rights and enforce such claims by virtue of subrogation, to the same extent as that investor.
- (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 indemnified investor 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 transferable at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force. Such payments shall also be freely available to the former Contracting Party or its designated Agency for the purpose of meeting any expenditure incurred in the territory of the latter Contracting Party.

## **Article 10**

### **Settlement of Disputes between an Investor and a Host State**

- (1) Disputes between an investor of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of three months from written notification of a claim, be submitted to international arbitration if the investor concerned so wishes.

- (2) Where the dispute is referred to international arbitration, the investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to:
- (a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington DC on 18 March 1965 and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or
  - (b) the Court of Arbitration of the International Chamber of Commerce; or
  - (c) an international arbitrator or ad hoc arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.
- (3) If after a period of three months from written notification of the claim there is no agreement to one of the above alternative procedures, the dispute shall at the request in writing of the investor concerned be submitted to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The parties to the dispute may agree in writing to modify these Rules.
- (4) In the event of both Contracting Parties having become members of the Convention of Washington mentioned in paragraph (2), letter (a) above, disputes under this Article may, as an alternative to the procedure mentioned in paragraph (3) above, be submitted by the investor to the International Centre for the Settlement of Investment Disputes.

**Article 11**

**Disputes between the Contracting Parties**

- (1) Where a dispute arises concerning this Agreement, the Parties agree to consult and negotiate on any matter related to its interpretation or application. The Parties shall accord the necessary consideration and opportunity for such consultations and negotiations. Should the Parties agree on the controversial issue, a written agreement shall be drafted and accorded between the Parties.
- (2) In the event that the consultations and negotiations fail to resolve the dispute within a period of six months from the date of request for consultations and negotiations, any of the Parties may, unless they have otherwise agreed, submit the dispute to an arbitral tribunal composed of three members. Each Party shall appoint one arbitrator. The third arbitrator, who will be the Chairman of the arbitral tribunal and a national of a third State, shall be appointed by agreement of the other two arbitrators. If any of the arbitrators are unable to perform the duties, a substituting arbitrator shall be appointed as provided for in this Article.
- (3) Should one of the Parties fail to appoint its arbitrator within two months after the other Party has submitted the dispute to arbitration and has appointed its arbitrator, the latter Party may request the President of the International Court of Justice to make the corresponding appointment. If the latter is prevented from making such appointment or is a national of either Party, the Vice President or the most senior member of the Court shall make such an appointment.
- (4) In the event that the two arbitrators appointed by the Parties are unable to reach an agreement concerning the third arbitrator within two months after their appointment, either Party may request the President of the International Court of Justice to make the corresponding appointment. If the latter is prevented from making such an appointment or is a national of either Party, the Vice President or the most senior member of the Court shall make such an appointment.

- (5) The tribunal shall determine its own procedures, unless the Parties agree otherwise. The tribunal shall decide the dispute according to this Agreement and to the other rules of international law. The tribunal shall reach its decision by a majority of votes. Such a decision shall be final and binding for both Parties.
- (6) Each 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 Parties.

### **Article 12**

#### **Entry into Force**

This Agreement shall enter into force thirty days after the date on which the Parties have notified each other in writing that their respective constitutional requirements for the entry into force of this Agreement have been complied with.

### **Article 13**

#### **Duration and Termination**

- (1) This Agreement shall remain in force for a period of ten years. Thereafter it shall continue in force until the expiration of twelve months from the date on which either Contracting Party shall have given written notice of termination to the other.
- (2) In respect of investments made before the date of termination of the present Agreement the provisions thereof shall continue to be effective for a further period of twenty years from that date.

In witness whereof the undersigned, duly authorised thereto by their respective Governments, have signed this Agreement.

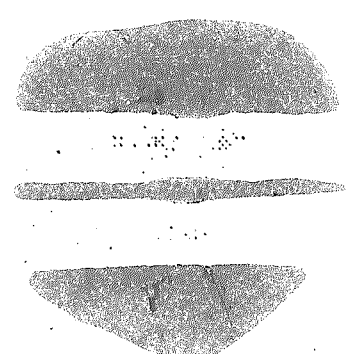
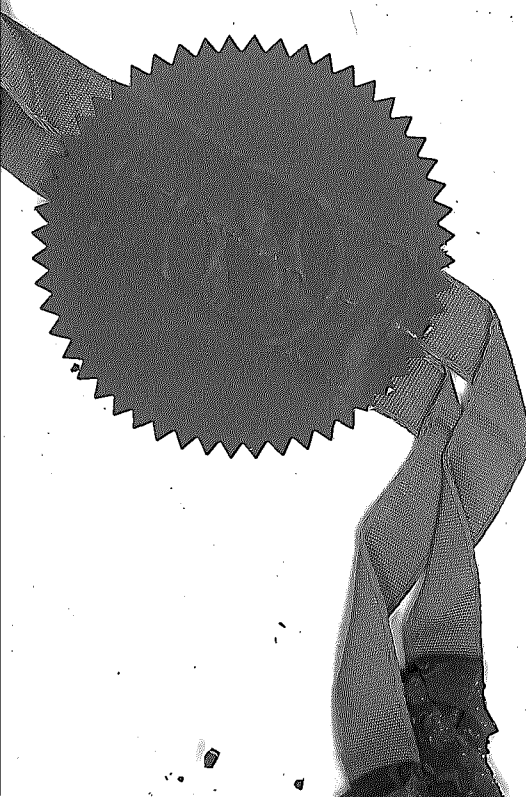
Done in duplicate at Berne, on 27 June 1995, in the English and French languages, each text being equally authentic.

For the Government of the Republic  
of South Africa

*Mabo Mbeli*

For the Swiss Federal Council

*Blanc*



## PROTOCOL

On signing the Agreement between the Government of the Republic of South Africa and the Swiss Federal Council concerning the Promotion and Reciprocal Protection of Investments, the undersigned plenipotentiaries have, in addition, agreed on the following provisions, which shall be regarded as an integral part of the said Agreement:

### Ad Articles 4, 5 and 6

- a) With regard to the Republic of South Africa the provisions relating to transfers under those Articles do not apply to natural persons who are nationals of the Swiss Confederation (Article 1, paragraph (3), litera (a)) and are permanent residents in the Republic of South Africa, and have completed the required Exchange Control Form once a five year period from the date of immigration has lapsed.
- b) This provision shall terminate upon removal of the relevant Exchange Control limitations by the Republic of South Africa, for which early removal the Republic of South Africa will undertake every effort possible.
- c) In no case shall Swiss investors in this matter be treated less favourably than investors of any third State.

In witness thereof the undersigned, duly authorized thereto by their respective Governments, have signed this Agreement.

Done in duplicate at Berne, on 27 June 1995, in the English and French languages, each text being equally authentic.

For the Government of the Republic  
of South Africa

For the Swiss Federal Council

*Mabo Mbeli*

*U. G. G. G.*