[ENGLISH TEXT — TEXTE ANGLAIS]

AGREEMENT ON THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS BETWEEN THE KINGDOM OF SPAIN AND THE REPUBLIC OF SOUTH AFRICA

PREAMBLE

The Kingdom of Spain and the Republic of South Africa, hereinafter referred to as "the Contracting Parties";

Desiring to intensify their economic cooperation for the mutual benefit of both countries;

Intending to create favourable conditions for investments made by investors of each Contracting Party in the territory of the other Contracting Party; and

Recognizing that the promotion and reciprocal protection of investments under this Agreement will stimulate initiatives in this field;

Have agreed as follows:

Article 1. Definitions

For the purposes of the present Agreement,

1. The term "investor" means with regard to either Contracting Party:

a) Any natural person who is a national of a Contracting Party according to its law;

b) Any legal entity, including companies, associations, partnerships, corporations, branches and any other organization which is incorporated, duly constituted or otherwise organized under the law of that Contracting Party.

2. The term "investment" means every kind of asset and in particular, although not exclusively, includes the following:

a) Shares in and stock and debentures of a company, or any other form of participation or interest in companies;

b) Claims to money or to any performance having economic value, including loans;

c) Movable and immovable property as well as other property rights such as mortgages, liens and pledges;

d) Intellectual property rights, technical processes, know-how and goodwill;

e) Rights or permits to engage in economic and commercial activities conferred by law or by virtue of a contract, including concessions to search for, cultivate, extract or exploit natural resources.

Investments made in the territory of one Contracting Party by any legal entity of that same Contracting Party but actually controlled by investors of the other Contracting Party shall likewise be considered as investments of investors of the latter Contracting Party if

they have been made in accordance with the laws and regulations of the former Contracting Party.

Any change in the form in which assets are invested or reinvested shall not affect their character as an investment.

3. The term "returns" means the amounts yielded by an investment and includes, in particular, although not exclusively, profits, dividends, interest, capital gains, royalties and fees.

4. The term "territory" designates the land territory and territorial waters of a Contracting Party, as well as the exclusive economic zone and the continental shelf that extend from the outer limits of the territorial waters of that Contracting Party, over which the Contracting Party has or may have jurisdiction and/or sovereign rights for the purposes of exploitation, exploration and conservation of natural resources, pursuant to international law.

Article II. Promotion and Admission

1. Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its territory. Each Contracting Party shall admit such investments in accordance with its laws and regulations.

2. In order to encourage mutual investment flows, each Contracting Party shall endeavour to inform the other Contracting Party, at the request of the latter Contracting Party, on the investment opportunities in its territory.

3. Each Contracting Party shall grant, in accordance with its laws, the necessary permits, including work permits, relating to these investments and shall allow the execution of contracts related to manufacturing- licences and technical, commercial, financial and administrative assistance.

4. This Agreement shall likewise be applicable to investments made before its entry into force by investors of one Contracting Party in the territory of the other Contracting Party.

Article III. Protection

1. Each Contracting Party shall extend in its territory full protection and security to investments and returns of investors of the other Contracting Party. Neither Contracting Party shall impair, by arbitrary or discriminatory measures, the management, development, maintenance, use, enjoyment, expansion, sale, and if it is the case, the liquidation of such investments. Either Contracting Party shall observe any other obligation it may have entered into in writing with regard to investments of investors of the other Contracting Party.

2. Investments or returns of investors of either Contracting Party in the territory of the other Contracting Party shall at all times be accorded fair and equitable treatment in accordance with international law.

Article IV. National Treatment and Most Favoured Nation Treatment

1. Each Contracting Party shall in its territory accord to investments made by investors of the other Contracting Party fair and equitable treatment which in no case shall be less favourable than that accorded to the investments made by its own investors or by investors of any third State, whichever is more favourable to the investor concerned.

2. Each Contracting Party shall accord, in its territory, to investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investment, fair and equitable treatment which in no case shall be less favourable than that accorded to its own investors or to investors of any third State, whichever is more favourable to the investor concerned.

3. The treatment granted under paragraphs 1 and 2 of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party and their investments the benefit of any treatment, preference or privilege resulting from:

a) Membership of any existing or future customs union, economic union, monetary union or any other regional economic integration organisation, and

b) Any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.

4. If a Contracting Party accords special advantages, in addition to the treatment referred to in paragraphs 1 and 2 of this Article, to development finance institutions, that Contracting Party shall not be obliged to accord such special advantages to development finance institutions or other investors of the other Contracting Party.

Article V. Expropriation

1. Investments and returns of investors of either Contracting Party in the territory of the other Contracting Party shall not be nationalized, expropriated or subjected to measures having an equivalent effect to nationalization or expropriation (hereinafter referred to as "expropriation") except for public purposes, under due process of law, in a non discriminatory manner and against the payment to the investor or his legal beneficiary of prompt, adequate and effective compensation.

2. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or impending expropriation became public knowledge, whichever is the earlier. It shall include interest, at a normal commercial rate, until the date of payment, be paid without delay in freely convertible currency, be effectively realizable and be freely transferable.

3. The investor affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a court of law or other competent authority of that Contracting Party, of his or its case to determine whether such expropriation and any compensation thereof conforms to the principles set out in this Article.

4. 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 ensure that the provisions of this

Article are applied so as to guarantee prompt, adequate and effective compensation in respect of their investment to such investors of the other Contracting Party who are owners of those shares.

Article VI. Compensation for Losses

1. Investors of one Contracting Party whose investments or returns in the territory of the other Contracting Party suffer losses owing to war, other armed conflicts, revolution, a state of national emergency, revolt, riot or other similar circumstances, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or other settlement, treatment no less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State whichever is more favourable to the investor concerned.

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.

3. Any payment made under this Article shall be prompt, adequate, effective and freely transferable.

Article VII. Transfers

1. Each Contracting Party shall guarantee to investors of the other Contracting Party the free transfer of payments relating to their investments and returns, including particularly, but not exclusively, the following:

a) The capital, payments and additional amounts needed for the maintenance or development of an investment;

b) Investment returns, as defined in Article 1;

c) The compensation provided for under Articles 5 and 6;

d) The proceeds of the total or partial sale or liquidation of an investment;

e) Funds in repayment of loans;

f) Earnings and other remuneration of personnel engaged from abroad in connection with an investment and

g) Payments arising out of the settlement of a dispute.

2. Transfers under the present Agreement shall be effected without delay, in freely convertible currency at the market rate of exchange applicable on the date of transfer.

3. The Contracting Parties agree to accord to transfers referred to in the present Article a treatment no less favourable than that accorded to transfers originated from investments made by investors of any third State.

Article VIII. More Favourable Terms

1. If the legislation of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties, in addition to this Agreement, contain a regulation, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Agreement, such regulation shall to the extent that it is more favourable prevail over this Agreement.

2. More favourable terms than those of this Agreement which have been agreed to by one of the Contracting Parties with investors of the other Contracting Party shall not be affected by this Agreement.

Article IX. Subrogation

1. If a Contracting Party or its designated Agency grants any guarantee against non-commercial risks in respect of an investment made by any of its investors in the territory of the other Contracting Party and makes payments to this investor under the guarantee, the latter Contracting Party shall recognize the assignment, whether by law or by legal transaction, to the former Contracting Party or its designated Agency of any rights and claims of this investor. This subrogation will make it possible for the former Contracting Party or its designated Agency to be the direct beneficiary of all the payments for compensation to which the investor could be entitled.

2. In respect of property rights, use, enjoyment or any other property right, subrogation will only take place after having met the relevant legal requirements of the host Contracting Party.

Article X. Settlement of Disputes between the Contracting Parties

1. Any dispute between the Contracting Parties relating to the interpretation or application of this Agreement shall, as far as possible, be settled through diplomatic channels.

2. If it is not possible to settle the dispute in this way within six months from the start of the negotiations, it shall be submitted, at the request of either of the two Contracting Parties, to an arbitral tribunal.

3. The tribunal shall be set up in the following way: each Contracting Party shall appoint an arbitrator and these two arbitrators shall elect a national of a third country as Chairman. The arbitrators shall be appointed within three months and the Chairman within five months from the date on which either of the two Contracting Parties informed the other Contracting Party of its intention to submit the dispute to a court of arbitration.

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 agree-

ment, invite the President of the International Court of Justice to make any necessary appointments. If the President is a national of either Contracting Party or 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 also 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 tribunal shall issue its decision on the basis of respect for the law, the rules contained in this Agreement or in other agreements in force between the Contracting Parties, as well as for the principles of international law.

6. Unless the Contracting Parties decide otherwise, the tribunal shall lay down its own procedure.

7. The tribunal shall reach its decision by a majority of votes and that decision shall be final and binding on both Contracting Parties.

8. Each Contracting Party shall bear the expenses of the arbitrator appointed by that Contracting Party and those connected with representing it in the arbitration proceedings. The other expenses, including those of the Chairman, shall be borne in equal parts by the two Contracting Parties.

Article XI. Disputes between One Contracting Party and Investors of the Other Contracting Party

I. Disputes that may arise between one of the Contracting Parties and an investor of the other Contracting Party with regard to an investment in the sense of the present Agreement, shall be notified in writing, including detailed information, by the investor to the former Contracting Party. As far as possible, the parties concerned shall endeavour to settle these differences amicably.

2. If these disputes cannot be settled amicably within six months from the date of the written notification mentioned in paragraph 1, the dispute may be submitted, at the choice of the investor, to:

- The competent court of the Contracting Party in whose territory the investment was made; or

- An ad hoc court of arbitration established under the Arbitration Rules of the United Nations Commission on International Trade Law; or

- The International Centre for Settlement of Investment Disputes (ICSID) set up by the "Convention on Settlement of Investment Disputes between States and Nationals of other States", opened for signature at Washington on 18 March 1965, in case both Contracting Parties become members of this Convention. As long as a Contracting Party which is party to the dispute has not become a party to the Convention mentioned above, the dispute may be dealt with pursuant to the Additional Facility for the Administration of proceedings by the Secretariat of the Centre.

3. The arbitration shall be based on:

- The provisions of this Agreement and of the other agreements in force between the Contracting Parties;

- The rules and the universally accepted principles of international law; and

- The national law of the Contracting Party in whose territory the investment was made, including the rules relative to conflicts of law.

4. The arbitration decisions shall be final and binding on the parties in the dispute.

Each Contracting Party undertakes to execute the decisions in accordance with its national law.

Article XII. Entry into Force, Extension and Termination

1. This Agreement shall enter into force on the date on which the Contracting Parties shall have notified each other that their respective constitutional formalities required for the entry into force of international agreements have been completed. It shall remain in force for an initial period of ten years and, thereafter, by tacit renewal, for consecutive periods of two years.

2. Either Contracting Party may terminate this Agreement by prior notification in writing, six months before the date of its expiration.

3. With respect to investments made or acquired prior to the date of termination of this Agreement and to which this Agreement otherwise applies, the provisions of all of the other Articles of this Agreement shall thereafter continue to be effective for a further period of ten years from such date of termination.

4. The terms of this Agreement may be amended by negotiated agreement between the Contracting Parties. Such amendments shall enter in force when the Contracting Parties have notified each other that the constitutional requirement for the entry into force have been fulfilled.

In witness whereof, the undersigned, duly authorised thereto, have signed this Agreement.

Done in two originals in the Spanish and English languages, both texts being equally authentic, in Pretoria on this the 30th day of September, 1998.

For the Kingdom of Spain:

ELENA PISONERO RUIZ
Secretary of State of Commerce, Tourism and SMSE

For the Republic of South Africa:

ALEC ERWIN
Minister of Trade and Industry

PROTOCOL

At the signing of the Agreement between the Kingdom of Spain and the Republic of South Africa on the Promotion and Reciprocal Protection of Investments, the two Contracting Parties have also agreed upon the following provisions which shall form an integral part of the said Agreement:

With regard to the Republic of South Africa it is confirmed that the provisions relating to transfers under Articles V.2, VI and VII do not apply to nationals of the Kingdom of Spain who have obtained permanent residence in the Republic of South Africa and who have decided to immigrate to the Republic of South Africa by completing the required Exchange Control Form once a five year period from the date of immigration has lapsed.

This provision shall automatically 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.

Done in two originals in Spanish and English languages, both texts being equally authentic, in Pretoria on this the 30th day of September, 1998.

For the Kingdom of Spain:

ELENA PISONERO RUIZ
Secretary of State of Commerce, Tourism and SMSE

For the Republic of South Africa:

ALEC ERWIN
Minister of Trade and Industry