

1997 Income and Capital Gains Tax Convention

Treaty Partners: South Africa; United States

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Status: In Force

CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF SOUTH AFRICA FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME AND CAPITAL GAINS

The Government of the United States of America and the Government of the Republic of South Africa desiring to promote and strengthen the economic relations between the two countries have agreed as follows:

Article 1 General Scope

1. This Convention shall apply only to persons who are residents of one or both of the Contracting States, except as otherwise provided in the Convention.
2. The Convention shall not restrict in any manner any benefit now or hereafter accorded:
 - a) by the laws of either Contracting State; or
 - b) by any other agreement between the Contracting States.
3. Notwithstanding the provisions of subparagraph 2(b):
 - a) the provisions of Article 25 (Mutual Agreement Procedure) of this Convention exclusively shall apply to any dispute concerning whether a measure is within the scope of this Convention, and the procedures under this Convention exclusively shall apply to that dispute; and
 - b) unless the competent authorities determine that a taxation measure is not within the scope of this Convention, the non-discrimination obligations of this Convention exclusively shall apply with respect to that

measure, except for such national treatment or most-favored-nation obligations as may apply to trade in goods under the General Agreement on Tariffs and Trade. No national treatment or most-favored-nation obligation under any other agreement shall apply with respect to that measure.

- c) For the purpose of this paragraph, a "measure" is a law, regulation, rule, procedure, decision, administrative action, or any other form of measure.
4. Notwithstanding any provision of the Convention except paragraph 5, the United States may tax its residents (as determined under Article 4 (Residence)), and by reason of citizenship may tax its citizens, as if the Convention had not come into effect. For this purpose, the term "citizen" shall include a former citizen or long-term resident whose loss of such status had as one of its principal purposes the avoidance of tax (as defined under the laws of the United States), but only for a period of 10 years following such loss.
5. The provisions of paragraph 4 shall not affect:
- a) the benefits conferred by a Contracting State under paragraph 2 of Article 9 (Associated Enterprises), paragraphs 2, 4, 5, 6 and 7 of Article 18 (Pensions and Annuities), and under Articles 23 (Elimination of Double Taxation), 24 (Non- Discrimination), and 25 (Mutual Agreement Procedure); and
 - b) the benefits conferred by a Contracting State under Articles 19 (Government Service), 20 (Students, Apprentices and Business Trainees), and 27 (Diplomatic Agents and Consular Officers), upon individuals who are neither citizens of, nor have been admitted for permanent residence in, that State.

Article 2

Taxes Covered

1. The existing taxes to which the Convention shall apply are in particular:
- a) in the United States: the Federal income taxes imposed by the Internal Revenue Code of 1986 (but excluding social security taxes), and the Federal excise taxes imposed with respect to private foundations;

(hereinafter referred to as "United States tax");
 - b) in South Africa:

- i) the normal tax;
- ii) the secondary tax on companies;

(hereinafter referred to as "South African tax").

2. This Convention shall also apply to any identical or substantially similar taxes which are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes that have been made in their respective taxation laws or other laws affecting their obligations under the Convention, and of any official published material concerning the application of the Convention, including explanations, regulations, rulings, or judicial decisions.

Article 3 General Definitions

1. In this Convention, unless the context otherwise requires:

a)

- i) the term "United States" means the United States of America; and
- ii) when used in a geographical sense, the term "United States" means the States thereof and the District of Columbia.

Such term also includes:

- aa) the territorial sea thereof;
 - bb) the seabed and subsoil of the adjacent submarine areas beyond the territorial sea over which the United States exercises sovereign rights in accordance with international law for the purpose of exploration and exploitation of the natural resources of such areas, but only to the extent that the person, property or activity to which this Convention is being applied is connected with such exploration or exploitation;
- b) the term "South Africa" means the Republic of South Africa and, when used in a geographical sense, includes the territorial sea thereof as well as any area outside the territorial sea which has been or may hereafter be designated, under international law and the laws of South Africa, as areas within which South Africa may exercise sovereign rights or jurisdiction with regard to the exploration or exploitation of natural resources;

- c) the term "person" includes an individual, an estate, a trust, a partnership, a company and any other body of persons;
 - d) the term "company" means any body corporate or any entity which is treated as a company or body corporate for tax purposes according to the laws of the Contracting State in which it is organized;
 - e) the terms "enterprise of a Contracting State" and "enterprise of the other Contracting State" mean respectively an enterprise carried on by a resident of a Contracting State and an enterprise carried on by a resident of the other Contracting State;
 - f) the term "nationals" means all individuals having the citizenship of a Contracting State and all legal persons, partnerships, associations and other entities deriving their status as such from the laws in force in a Contracting State;
 - g) the term "competent authority" means:
 - i) in the case of the United States, the Secretary of the Treasury or his delegate; and
 - ii) in the case of South Africa, the Commissioner for Inland Revenue or his authorized representative;
 - h) the term "international traffic" means any transport by a ship or aircraft, except when such transport is solely between places in a Contracting State.
2. As regards the application of this Convention at any time by a Contracting State any term not defined therein shall, unless the context otherwise requires or the competent authorities agree to a common meaning pursuant to the provisions of Article 25 (Mutual Agreement Procedure), have the meaning which it has at that time under the law of that State concerning the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.

Article 4 Residence

1. For the purposes of this Convention the term "resident of a Contracting State" means:
- a) in the case of the United States,

- i) any person who, under the laws of the United States, is liable to tax therein by reason of his domicile, residence, citizenship, place of incorporation, or any other criterion of a similar nature, provided, however, that this term does not include any person who is liable to tax in the United States in respect only of income from sources therein or of profits attributable to a permanent establishment in the United States; and
 - ii) a legal person organized under the laws of the United States and that is generally exempt from tax in the United States and is established and maintained in the United States either:
 - aa) exclusively for a religious, charitable, educational, scientific, or other similar purpose; or
 - bb) to provide pensions or other similar benefits to employees pursuant to a plan;
 - b) in the case of South Africa, any individual who is ordinarily resident in South Africa and any legal person which is incorporated or has its place of effective management in South Africa;
 - c) that State, and any political subdivision or local authority thereof;
 - d) in the case of an item of income, profit or gain derived through an entity that is fiscally transparent under the laws of either Contracting State, that income shall be considered to be derived by a resident of a State to the extent that the item is treated for purposes of the taxation law of such Contracting State as the income, profit or gain of a resident.
2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:
- a) he shall be deemed to be a resident of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (centre of vital interests);
 - b) if the State in which he has his centre of vital interests cannot be determined, or if he does not have a permanent home available to him in either State, he shall be deemed to be a resident of the State in which he has an habitual abode;

- c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident of the State of which he is a national;
 - d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.
3. Where by reason of the provisions of paragraph 1 a company is a resident of both Contracting States, then it shall be deemed to be a resident of the State in which it is incorporated.
4. Where by reason of the provisions of paragraph 1 a person other than an individual or a company is a resident of both Contracting States, the competent authorities of the Contracting States shall by mutual agreement endeavour to settle the question and to determine the mode of application of the Convention to such person.

Article 5 **Permanent Establishment**

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.
2. The term "permanent establishment" includes especially:
- a) a place of management;
 - b) a branch;
 - c) an office;
 - d) a factory;
 - e) a workshop;
 - f) a mine, an oil or gas well, a quarry or other place of extraction of natural resources;
 - g) a warehouse, in relation to a person providing storage facilities for others;
 - h) a store or premises used as a sales outlet;

- i) a ship, drilling rig, installation or other structure used for the exploration or exploitation of natural resources, but only if it lasts more than twelve months;
 - j) a building site or construction, installation or assembly project or supervisory activities in connection therewith, where such site, project or activities lasts more than twelve months; and
 - k) the furnishing of services, including consultancy services, within a Contracting State by an enterprise through employees or other personnel engaged by the enterprise for such purposes, but only if activities of that nature continue (for the same or a connected project) within that State for a period or periods aggregating more than 183 days in any twelve month period commencing or ending in the taxable year concerned.
3. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:
- a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
 - b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
 - c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
 - d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or for collecting information, for the enterprise;
 - e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character; and
 - f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs (a) to (e).
4. Notwithstanding the provisions of paragraphs 1 and 2, where a person -- other than an agent of an independent status to whom paragraph 5 applies -- is acting on behalf of an enterprise and has and habitually exercises in a Contracting State an authority to conclude contracts in the name of the enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the

activities of such person are limited to those mentioned in paragraph 3 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.

5. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other Contracting State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.
6. The fact that a company which is a resident of a Contracting State controls or is controlled by a company that is a resident of the other Contracting State, or that carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company as a permanent establishment of the other.

Article 6
Income From Immovable Property (Real Property)

1. Income derived by a resident of a Contracting State from immovable property (real property), including income from agriculture or forestry, situated in the other Contracting State may be taxed in that other State.
2. The term "immovable property (real property)" shall have the meaning which it has under the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources. Ships, boats and aircraft shall not be regarded as immovable property.
3. The provisions of paragraph 1 shall apply to income derived from the direct use, letting or use in any other form of immovable property.
4. The provisions of paragraphs 1 and 3 shall also apply to the income from immovable property of an enterprise and to income from immovable property used for the performance of independent personal services.

Article 7
Business Profits

1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.
2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and independent enterprise engaged in the same or similar activities under the same or similar conditions.
3. In the determination of the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment including a reasonable allocation of executive and general administrative expenses, research and development expenses, interest, and other expenses so incurred, whether in the Contracting State in which the permanent establishment is situated or elsewhere. However, no such deduction shall be allowed in respect of amounts, if any, incurred (otherwise than towards reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission or other charges for specific services performed or for management or by way of interest on moneys lent to the permanent establishment. Likewise, no account shall be taken, in the determination of the profits of a permanent establishment, for amounts charged (otherwise than towards reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission or other charges for specific services performed or for management or by way of interest on moneys lent to the head office of the enterprise or any of its other offices.
4. No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

5. Where profits include items of income which are dealt with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article.
6. For the purposes of the preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good reason to the contrary.
7. In applying paragraphs 1 and 2 of Article 7 (Business Profits), paragraphs 4 and 6 of Article 10 (Dividends), paragraph 3 of Article 11 (Interest), paragraph 3 of Article 12 (Royalties), paragraph 3 of Article 13 (Capital Gains), Article 14 (Independent Personal Services) and paragraph 2 of Article 21 (Other Income), any income or gain attributable to a permanent establishment or fixed base during its existence is taxable in the Contracting State where such permanent establishment or fixed base is situated even if the payments are deferred until such permanent establishment or fixed base has ceased to exist.

Article 8 **Shipping and Air Transport**

1. Profits of an enterprise of a Contracting State from the operation of ships or aircraft in international traffic shall be taxable only in that State.
2. For the purposes of this Article, profits from the operation of ships or aircraft in international traffic include profits derived from the rental of ships or aircraft if such ships or aircraft are operated in international traffic by the lessee or if such rental profits are incidental to other profits described in paragraph 1.
3. Profits of an enterprise of a Contracting State from the use or rental of containers (including trailers, barges and related equipment for the transport of containers) used in international traffic shall be taxable only in that State.
4. The provisions of paragraphs 1 and 3 shall also apply to profits from the participation in a pool, a joint business or an international operating agency.

Article 9 **Associated Enterprises**

1. Where:
 - a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or

- b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State, and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.
2. Where a Contracting State includes in the profits of an enterprise of that State -- and taxes accordingly -- profits on which an enterprise of the other Contracting State has been charged to tax in that other State and the profits so included are profits which would have accrued to the enterprise of the first-mentioned State if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other State shall make an appropriate adjustment to the amount of the tax charged therein on those profits if it agrees with the adjustment made by the first-mentioned State. In determining such adjustment, due regard shall be had to the other provisions of this Convention and the competent authorities of the Contracting States shall if necessary consult each other.

Article 10 Dividends

1. Dividends paid by a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other Contracting State.
2. However, such dividends may also be taxed in the Contracting State of which the payor is a resident, and according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed:
 - a) 5 per cent of the gross amount of the dividends if the beneficial owner is a company which holds directly at least 10 per cent of the voting stock of the company paying the dividends; and
 - b) 15 per cent of the gross amount of the dividends in all other cases.

The provisions of this paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

Subparagraph (a) shall not apply in the case of dividends paid by a United States person that is a Regulated Investment Company or a Real Estate Investment

Trust. Subparagraph (b) shall apply in the case of dividends paid by a Regulated Investment Company. In the case of dividends paid by a Real Estate Investment Trust, subparagraph (b) shall apply only if the dividend is beneficially owned by an individual holding a less than 10 percent interest in the Real Estate Investment Trust; otherwise, the rate of withholding applicable under domestic law shall apply.

3. The term "dividends" as used in this Article means income from shares or other rights, not being debt-claims, participating in profits, as well as income that is subjected to the same taxation treatment as income from shares under the laws of the State of which the payor is a resident.
4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State of which the payor is a resident, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the dividends are attributable to such permanent establishment or fixed base. In such case, the provisions of Article 7 (Business Profits) or Article 14 (Independent Personal Services), as the case may be, shall apply.
5. Where a resident of a Contracting State derives profits or income from the other Contracting State, that other State may not impose any tax on the dividends paid by that resident except in so far as such dividends are paid to a resident of that other State or in so far as the dividends are attributable to a permanent establishment or a fixed base situated in that other State, even if the dividends paid consist wholly or partly of profits or income arising in such other State.
6. A company that is a resident of one of the Contracting States and that has a permanent establishment in the other Contracting State or, if the United States is the other Contracting State, that is subject to tax in the United States on a net basis on its income that may be taxed there under Article 6 (Income from Immovable Property (Real Property)) or under paragraph 1 of Article 13 (Capital Gains), may be subject in the other Contracting State to a tax, but;
 - a) in the case of the United States, such tax may not exceed, in addition to the tax on profits, 5 percent of the portion of the profits of the corporation subject to tax in the United States that represents the dividend equivalent amount of such profits; and
 - b) in the case of South Africa, such tax may be imposed at a rate that does not exceed the normal rate of corporate tax by more than 5 percentage points.

7. The term "dividend equivalent amount" as used in paragraph 6, refers to the portion of the profits of a permanent establishment subject to a tax under Article 7 (Business Profits), or that portion of the profits of a resident of one State subject to tax on a net basis in the other State under Article 6 (Income from Immovable Property (Real Property)) or under paragraph 1 of Article 13 (Capital Gains), that is comparable to the amount that would be distributed as a dividend if such income were earned by a locally incorporated subsidiary. The term "dividend equivalent amount" shall have the same meaning that it has under the law of the United States as it may be amended from time to time without changing the general principle of this paragraph.
8. Notwithstanding paragraph 2, dividends may not be taxed in the Contracting State of which the payor is a resident if the beneficial owner of the dividends is:
 - a) a Contracting State, and any political subdivision or local authority thereof; or
 - b) a pension trust or fund of an entity described in subparagraph (a) that is constituted and operated exclusively to administer or provide pension benefits described in Article 19 (Government Service) and that does not control the payor of the dividend.

Article 11

Interest

1. Interest derived and beneficially owned by a resident of a Contracting State shall be taxable only in that State.
2. The term "interest" as used in this Convention means income from debt-claims of every kind, whether or not secured by mortgage, and whether or not carrying a right to participate in the debtor's profits and, in particular, income from government securities and income from bonds or debentures, including premiums or prizes attaching to such securities, bonds or debentures, and all other income that is subjected to the same taxation treatment as income from money lent by the taxation law of the Contracting State in which the income arises. Income dealt with in Article 10 (Dividends) and penalty charges for late payment shall not be regarded as interest for the purposes of this Convention.
3. The provisions of paragraph 1 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the interest is attributable to such permanent establishment or fixed base. In such case, the

provisions of Article 7 (Business Profits) or Article 14 (Independent Personal Services), as the case may be, shall apply.

4. Where, by reason of a special relationship between the payor and the beneficial owner or between both of them and some other person, the amount of the interest, having regard to the debt-claim for which it is paid, exceeds the amount which would have been agreed upon by the payor and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.
5. Notwithstanding the provisions of paragraph 1:
 - a) interest that is contingent interest of a type that does not qualify as portfolio interest under United States law may be taxed at a rate not exceeding the rate prescribed in subparagraph (b) of paragraph 2 of Article 10 (Dividends); and
 - b) interest that is an excess inclusion with respect to a residual interest in a real estate mortgage investment conduit may be taxed by the United States in accordance with its domestic law.

Article 12 **Royalties**

1. Royalties derived and beneficially owned by a resident of a Contracting State shall be taxable only in that State.
2. The term "royalties" as used in this Convention means:
 - a) any consideration for the use of, or the right to use, any copyright of literary, artistic, scientific or other work (including computer software, cinematographic films, audio or video tapes or disks, and other means of image or sound reproduction), any patent, trademark, design or model, plan, secret formula or process, or other like right or property, or for information concerning industrial, commercial, or scientific experience; and
 - b) gain derived from the alienation of any property described in subparagraph (a), provided that such gain is contingent on the productivity, use, or disposition of the property.

3. The provisions of paragraph 1 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State, in which the royalties arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the royalties are attributable to such permanent establishment or fixed base. In such case, the provisions of Article 7 (Business Profits) or Article 14 (Independent Personal Services), as the case may be, shall apply.
4. Where, by reason of a special relationship between the payor and the beneficial owner or between both of them and some other person, the amount of the royalties, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payor and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.

Article 13 Capital Gains

1. Gains derived by a resident of a Contracting State that are attributable to the alienation of real property situated in the other Contracting State may be taxed in that other State.
2. For the purposes of this Convention the term "real property situated in the other Contracting State" shall include:
 - a) real property referred to in Article 6 (Income from Immovable Property (Real Property));
 - b) a United States real property interest; and
 - c) an equivalent interest in real property situated in South Africa.
3. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State, or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise) or of such fixed base, may be taxed in that other State.

4. Gains of an enterprise of a Contracting State from the alienation of ships, aircraft or containers operated in international traffic or movable property pertaining to the operation of such ships, aircraft or containers, shall be taxable only in that State.
5. Gains from the alienation of any property other than that referred to in the preceding paragraphs shall be taxable only in the Contracting State of which the alienator is a resident.

Article 14 **Independent Personal Services**

Income derived by an individual who is a resident of a Contracting State in respect of professional services or other activities of an independent character shall be taxable only in that State unless such services are performed in the other Contracting State and such individual has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities. If he has such a fixed base, the income may be taxed in the other State but only so much of it as is attributable to that fixed base. For the purposes of this Convention, where an individual who is a resident of a Contracting State stays in the other Contracting State for a period or periods exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned, he shall be deemed to have a fixed base regularly available to him in that other State and the income that is derived from his activities that are performed in that other State shall be attributable to that fixed base.

Article 15 **Dependent Personal Services**

1. Subject to the provisions of Articles 16 (Directors' Fees), 18 (Pensions and Annuities) and 19 (Government Service), salaries, wages and other remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised such remuneration as is derived therefrom may be taxed in that other State.
2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:
 - a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned;

- b) the remuneration is paid by or on behalf of an employer who is not a resident of the other State; and
 - c) the remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other State.
3. Notwithstanding the preceding provisions of this Article, remuneration derived by a resident of a Contracting State in respect of an employment as a member of the complement of a ship or aircraft operated in international traffic may be taxed only in that State.

Article 16 Directors' Fees

Directors' fees and other remuneration derived by a resident of a Contracting State for services rendered in the other Contracting State in his capacity as a member of the board of directors of a company which is a resident of the other Contracting State may be taxed in that other State.

Article 17 Entertainers and Sportsmen

1. Income derived by a resident of a Contracting State as an entertainer such as a theatre, motion picture, radio or television artiste, or a musician, or as a sportsman, from his personal activities as such exercised in the other Contracting State, which income would not be liable to tax in that other Contracting State under the provisions of Articles 7 (Business Profits), 14 (Independent Personal Services) and 15 (Dependent Personal Services), may be taxed in that other State except where the amount of the gross receipts derived by such entertainer or sportsman from such activities, including expenses reimbursed to him or borne on his behalf, does not exceed seven thousand five hundred United States dollars (\$7,500) or its equivalent in South African rand for the taxable year concerned.
2. Where income in respect of personal activities exercised by an entertainer or a sportsman in his capacity as such accrues not to the entertainer or sportsman himself but to another person, that income may, notwithstanding the provisions of Articles 7 (Business Profits), 14 (Independent Personal Services) and 15 (Dependent Personal Services), be taxed in the Contracting State in which the activities of the entertainer or sportsman are exercised, unless it is established that neither the entertainer or sportsman nor persons related to such entertainer or sportsman participate directly or indirectly in the profits of that other person in any manner, including the receipt of deferred remuneration, bonuses, fees, dividends, partnership distributions or other distributions.

3. Income referred to in the preceding paragraphs of this Article, derived by a resident of a Contracting State in respect of activities exercised in the other Contracting State, shall not be taxed in that other State if the visit of the entertainers or sportsmen to that other State is supported wholly or mainly from the public funds of the Government of the first-mentioned State or of a political subdivision or local authority thereof.
4. The Contracting States may, through the exchange of diplomatic notes, agree to increase the amount referred to in paragraph 1 to reflect economic or monetary developments.

Article 18 Pensions and Annuities

1. Subject to the provisions of Article 19 (Government Service), pension distributions and other similar remuneration derived from sources within a Contracting State and beneficially owned by a resident of the other Contracting State, whether paid periodically or as a single sum, may be taxed by the first-mentioned State under the following conditions:
 - a) where the United States is the first-mentioned Contracting State, the tax imposed on the pension or similar remuneration may not exceed 15 percent of the gross amount of the pension or similar remuneration, provided that such pension or similar remuneration is not subject to a penalty for early withdrawal; and
 - b) where South Africa is the first-mentioned Contracting State:
 - i) the beneficial owner of the pension or similar remuneration has been employed in South Africa for a period or periods aggregating two years or more during the ten year period immediately preceding the date from which the pension first became due; and
 - ii) the beneficial owner of the pension or similar remuneration was employed in South Africa for a period or periods aggregating ten years or more.
2. Notwithstanding paragraph 1 of this Article and paragraph 2 (b) of Article 19 (Government Service), social security benefits and other similar public pensions paid by a Contracting State to a resident of the other Contracting State or to a citizen of the United States shall be taxable only in the first-mentioned State.
3. Annuities beneficially derived by a resident of a Contracting State shall be taxable only in that State unless the annuity was purchased in the other

Contracting State while such person was a resident of that other State, in which case the annuity may also be taxed in that other state. The term "annuities" as used in this paragraph means a stated sum paid periodically at stated times during life or during a specified number of years, under an obligation to make the payments in return for adequate and full consideration (other than services rendered).

4. Alimony paid by a resident of a Contracting State, and deductible therein, to a resident of the other Contracting State shall be taxable only in the first-mentioned State. Alimony paid by a resident of a Contracting State, and not deductible therein, to a resident of the other Contracting State shall be exempt from tax in both States. The term "alimony" as used in this paragraph means periodic payments made pursuant to a written separation agreement or a decree of divorce, separate maintenance or compulsory support.
5. Periodic payments, not dealt with in paragraph 4, for the support of a minor child made pursuant to a written separation agreement or a decree of divorce, separate maintenance or compulsory support, paid by a resident of a Contracting State to a resident of the other Contracting State, and not deductible in the first-mentioned State, shall be exempt from tax in both Contracting States.
6. For purposes of this Convention, where an individual who is a participant in a pension plan that is established and recognized under the legislation of one of the Contracting States performs personal services in the other Contracting State:
 - a) Contributions paid by or on behalf of the individual to the plan during the period that he performs such services in the other State shall be deductible (or excludible) in computing his taxable income in that State. Any benefits accrued under the plan or payments made to the plan by or on behalf of his employer during that period shall not be treated as part of the employee's taxable income and shall be allowed as a deduction in computing the profits of his employer in that other State.
 - b) Income earned but not distributed by the plan shall not be taxable in the other State until such time and to the extent that a distribution is made from the plan.
 - c) Distributions from the plan to the individual shall not be subject to taxation in the other Contracting State if the individual contributes such amounts to a similar plan established in the other State within a time period and in accordance with any other requirements imposed under the laws of the other State.

- d) The provisions of this paragraph shall not apply unless:
 - i) contributions by or on behalf of the individual to the plan (or to another similar plan for which this plan was substituted) were made before he arrived in the other State; and
 - ii) the competent authority of the other State has agreed that the pension plan generally corresponds to a pension plan recognized for tax purposes by that State.

The benefits granted under this paragraph shall not exceed the benefits that would be allowed by the other State to its residents for contributions to, or benefits otherwise accrued under a pension plan recognized for tax purposes by the other State.

- 7. For purposes of this Convention, a pension or similar remuneration is deemed to arise from sources within a Contracting State to the extent that the pensionable service to which it relates is performed in that State.

Article 19 Government Service

- 1. (a) Remuneration, other than a pension, paid by, or out of funds created by, a Contracting State or a political subdivision or a local authority thereof to an individual in respect of services rendered to that State or subdivision or authority thereof, shall be taxable only in that State.
- (b) However, such remuneration shall be taxable only in the other Contracting State if the services are rendered in that other State and the individual is a resident of that other State who:
 - i) is a national of that other State; or
 - ii) did not become a resident of that other State solely for the purpose of rendering the services.
- 2. (a) Any pension paid by, or out of funds created by, a Contracting State or a political subdivision or a local authority thereof to an individual in respect of services rendered to that State or subdivision or authority thereof, shall be taxable only in that State.
- (b) However, such pension shall be taxable only in the other Contracting State if the individual is a resident of, and a national of, that State.

3. The provisions of this Article shall not apply to payments in respect of services rendered in connection with any trade or business carried on by either of the Contracting States, a political subdivision or a local authority thereof.

Article 20
Students, Apprentices and Business Trainees

A student, apprentice or business trainee who is present in a Contracting State for the purpose of his full-time education or training and who is, or immediately before being so present was, a resident of the other Contracting State, shall be exempt from tax in the first-mentioned State on payments which arise from sources outside that first-mentioned State for the purposes of his maintenance, education or training. The exemption from tax provided by this Article shall apply to an apprentice or trainee for a period of time not exceeding one year from the date he first arrives in the first-mentioned Contracting State for the purpose of his apprenticeship or training.

Article 21
Other Income

1. Items of income beneficially owned by a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Convention shall be taxable only in that State.
2. The provisions of paragraph 1 shall not apply to income, other than income from immovable property as defined in paragraph 2 of Article 6 (Income from Immovable Property (Real Property)), if the beneficial owner of the income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the income is attributable to such permanent establishment or fixed base. In such case, the provisions of Article 7 (Business Profits) or Article 14 (Independent Personal Services), as the case may be, shall apply.

Article 22
Limitation on Benefits

1. A resident of a Contracting State shall be entitled to benefits otherwise accorded to residents of a Contracting State by this Convention only to the extent provided in this Article.
2. A resident of a Contracting State shall be entitled to all the benefits of this Convention if the resident is:

- a) an individual;
- b) a Contracting State, political subdivision or local authority thereof;
- c) a company, if:
 - i) all the shares in the class or classes of shares representing more than 50 percent of the voting power and value of the company are regularly traded on a recognized stock exchange, or
 - ii) at least 50 percent of each class of shares in the company is owned directly or indirectly by companies entitled to benefits under clause i), provided that in the case of indirect ownership, each intermediate owner is a person entitled to benefits of the Convention under this paragraph;
- d) a legal person organized under the laws of a Contracting State that is generally exempt from tax in that State under laws relating to charitable and other similar organizations;
- e) a legal person organized under the laws of a Contracting State that is generally exempt from tax in that State, and is established and maintained in that State to provide pensions or other similar benefits to employees pursuant to a plan, provided that more than 50 percent of the beneficiaries, members or participants are individuals resident in either Contracting State;
- f) a person other than an individual or a trust, if:
 - i) on at least half the days of the taxable year persons described in subparagraphs a), b), c), d) or e) own, directly or indirectly (through a chain of ownership in which each person is entitled to benefits of the Convention under this paragraph), at least 50 percent of each class of shares or other beneficial interests in the person, and
 - ii) less than 50 percent of the person's gross income for the taxable year is paid or accrued, directly or indirectly, to persons who are not residents of either Contracting State (unless the payment is attributable to a permanent establishment situated in either State), in the form of payments that are deductible for income tax purposes in the person's State of residence;
- g) a trust, if:

- i) on at least 274 days of the taxable year persons described in subparagraphs a), b), c), d), e) or f) own, directly or indirectly (through a chain of ownership in which each person is entitled to benefits of the Convention under this paragraph), at least 80 percent of the aggregate beneficial interests in the trust, and
 - ii) less than 50 percent of the trust's gross income for the taxable year is paid or accrued, directly or indirectly, to persons who are not residents of either Contracting State (unless the payment is attributable to a permanent establishment situated in either State) in the form of payments that are deductible for income tax purposes in the trust's State of residence.
- 3. a) A resident of a Contracting State not otherwise entitled to benefits shall be entitled to the benefits of this Convention with respect to an item of income derived from the other State, if:
 - i) the resident is engaged in the active conduct of a trade or business in the first-mentioned State,
 - ii) the income is connected with or incidental to the trade or business, and
 - iii) the trade or business is substantial in relation to the activity of the resident (and any related parties) in the other State generating the income.
- b) For purposes of this paragraph, the business of making or managing investments will not be considered an active trade or business unless the activity is banking, insurance or securities activity conducted by a bank, insurance company or registered securities dealer, respectively.
- c) Whether a trade or business is substantial for purposes of this paragraph will be determined based on all the facts and circumstances. In any case, however, a trade or business will be deemed substantial if, for the preceding taxable year, or for the average of the three preceding taxable years, the asset value, the gross income, and the payroll expense that are related to the trade or business in the first-mentioned State equal at least 7.5 percent of the resident's (and any related parties') proportionate share of the asset value, gross income and payroll expense, respectively, that are related to the activity that generated the income in the other State, and the average of the three ratios exceeds 10 percent.

- d) Income is derived in connection with a trade or business if the activity in the other State generating the income is a line of business that forms a part of or is complementary to the trade or business. Income is incidental to a trade or business if it facilitates the conduct of the trade or business in the other State.
4. A resident of a Contracting State not otherwise entitled to benefits may be granted benefits of the Convention if the competent authority of the State from which benefits are claimed so determines.
5. For purposes of this Article the term "recognized stock exchange" means:
- a) the NASDAQ System owned by the National Association of Securities Dealers, Inc. and any stock exchange registered with the U.S. Securities and Exchange Commission as a national securities exchange under the U.S. Securities Exchange Act of 1934;
 - b) the Johannesburg Stock Exchange; and
 - c) any other exchange agreed upon by the competent authorities of the Contracting States.
6. Notwithstanding the other provisions of this Convention:
- a) where an enterprise of South Africa derives income from the United States;
 - b) that income is attributable to a permanent establishment which that enterprise has in a third jurisdiction; and
 - c) the enterprise is not liable to tax in South Africa on the profits attributable to the permanent establishment;

the United States tax benefits that otherwise would apply under the other provisions of this Convention will not apply to any item of income on which the combined tax in South Africa and in the third jurisdiction is less than 50 percent of the tax that would be imposed in South Africa if the income were earned by the South African enterprise and were not attributable to the permanent establishment in the third jurisdiction. Any interest or royalties to which this paragraph applies will be subject to United States tax at a rate not exceeding 15 percent of the gross amount thereof.

The preceding sentences of this paragraph shall not apply:

- a) to interest derived in connection with or incidental to the active conduct of a trade or business carried on by the permanent establishment in the third jurisdiction (other than the business of making or managing investments, unless these activities are banking or insurance activities carried on by a bank or insurance company, respectively);
- b) to royalties that are received as a compensation for the use of, or the right to use, intangible property produced or developed by the permanent establishment itself; and
- c) to income derived by an enterprise of South Africa if the United States taxes the profits of such enterprise according to the provisions of subpart F of part III of subchapter N of chapter 1 of subtitle A of the Internal Revenue Code of 1986, as it may be amended from time to time without changing the general principle thereof.

Article 23
Elimination of Double Taxation

1. In accordance with the provisions and subject to the limitations of the law of the United States (as it may be amended from time to time without changing the general principle hereof), the United States shall allow to a resident or a citizen of the United States as a credit against the United States tax on income:
 - a) the South African tax paid or accrued by or on behalf of such citizen or resident; and
 - b) in the case of a United States company owning at least 10 per cent of the voting stock of a company which is a resident of South Africa and from which the United States company receives dividends, the South African tax paid by or on behalf of the distributing company with respect to the profits out of which the dividends are paid.
2. Where a United States citizen is a resident of South Africa:
 - a) with respect to items of income that under the provisions of this Convention are exempt from United States tax or that are subject to a reduced rate of United States tax when derived by a resident of South Africa who is not a United States citizen, South Africa shall allow as a credit against South African tax, only the tax paid, if any, that the United States may impose under the provisions of this Convention, other than taxes that may be imposed solely by reason of citizenship under the saving clause of paragraph 4 of Article 1 (General Scope);

- b) for purposes of computing United States tax on those items of income referred to in subparagraph (a), the United States shall allow as a credit against United States tax the tax paid to South Africa after the credit referred to in subparagraph (a); the credit so allowed shall not reduce the portion of the United States tax that is creditable against the South African tax in accordance with subparagraph (a); and
 - c) for the exclusive purpose of relieving double taxation in the United States under subparagraph (b), items of income referred to in subparagraph (a) shall be deemed to arise in South Africa to the extent necessary to avoid double taxation of such income under subparagraph (b).
3. United States taxes paid by South African residents in respect of income taxable in the United States, in accordance with the provisions of this Convention, other than taxes that may be imposed solely by reason of citizenship under paragraph 4 of Article 1 (General Scope), shall be deducted from the South African taxes due according to South African fiscal law. Such deduction shall not, however, exceed an amount which bears to the total South African tax payable the same ratio as the income concerned bears to the total income taxable in South Africa.

Article 24 Non-Discrimination

- 1. The nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances are or may be subjected. This provision shall, notwithstanding the provisions of Article 1 (General Scope), also apply to persons who are not residents of one or both of the Contracting States. However, for the purposes of United States taxation, United States nationals who are subject to tax on a worldwide basis are not in the same circumstances as South African nationals who are not residents of the United States.
- 2. The taxation on a permanent establishment or fixed base that a resident or enterprise of a Contracting State has in the other Contracting State shall not be less favorably levied in that other State than the taxation levied on enterprises or residents of that other State carrying on the same activities.
- 3. Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned State to any taxation or any requirement connected therewith which is other or more

burdensome than the taxation and connected requirements to which other similar enterprises of that first-mentioned State are or may be subjected.

4. Nothing in this Article shall be construed as obliging a Contracting State to grant to residents of the other Contracting State any personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents.
5. Except where the provisions of paragraph 1 of Article 9 (Associated Enterprises), paragraph 4 of Article 11 (Interest) or paragraph 4 of Article 12 (Royalties) apply, interest, royalties and other disbursements paid by a resident of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable profits of the first-mentioned resident, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned State.
6. Nothing in this Article shall be construed as preventing either Contracting State from imposing a tax as described in paragraph 6 of Article 10 (Dividends).
7. The provisions of this Article shall, notwithstanding the provisions of Article 2 (Taxes Covered), apply to taxes of every kind and description imposed by a Contracting State or a political subdivision or local authority thereof.

Article 25 **Mutual Agreement Procedure**

1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of either Contracting State. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of this Convention (or in the case of tax collected at source within three years from the date of collection).
2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits or other procedural limitations in the domestic law of the Contracting States.

3. The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of this Convention. They may also consult together for the elimination of double taxation in cases not provided for in this Convention.
4. The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs. The competent authorities, through consultations, shall develop appropriate bilateral procedures, conditions, methods and techniques for the implementation of the mutual agreement procedure provided for in this Article. In addition, a competent authority may devise appropriate unilateral procedures, conditions, methods and techniques to facilitate the above-mentioned bilateral actions and the implementation of the mutual agreement procedure.
5. In particular the competent authorities of the Contracting States may agree:
 - a) to the same attribution of income, deductions, credits, or allowances of an enterprise of a Contracting State to its permanent establishment situated in the other Contracting State;
 - b) to the same allocation of income, deductions, credits, or allowances between persons;
 - c) to the same characterization of particular items of income;
 - d) to the same characterization of persons;
 - e) to the same application of source rules with respect to particular items of income; and
 - f) to a common meaning of a term.

Article 26

Exchange of Information and Administrative Assistance

1. The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes covered by this Convention in so far as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Article 1 (General Scope). Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts

and administrative bodies) involved in the assessment, collection or administration of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by this Convention. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

2. In no case shall the provisions of paragraph 1 be construed so as to impose on a Contracting State the obligation:
 - a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
 - b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
 - c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (ordre public).
3. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall obtain the information to which the request relates in the same manner and to the same extent as if the tax of the first-mentioned State were the tax of that other State. If specifically requested by the competent authority of a Contracting State, the competent authority of the other Contracting State shall provide information under this Article in the form of depositions of witnesses and authenticated copies of unedited original documents (including books, papers, statements, records, accounts and writings), to the same extent such depositions and documents can be obtained under the laws and administrative practices of that other State with respect to its own taxes.
4. Each of the Contracting States shall endeavour to collect on behalf of the other Contracting State such amounts as may be necessary to ensure that relief granted by the Convention from taxation imposed by that other State does not inure to the benefit of persons not entitled thereto.
5. Paragraph 4 of this Article shall not impose upon either of the Contracting States the obligation to carry out administrative measures which are of a different nature from those used in the collection of its own taxes, or which would be contrary to its sovereignty, security, or public policy.

6. For the purposes of this Article, the Convention shall apply, notwithstanding the provisions of Article 2 (Taxes Covered), to taxes of every kind administered by the competent authorities (but not including customs duties).
7. The competent authority of the requested State shall allow representatives of the applicant State to enter the requested State to interview individuals and examine books and records with the consent of the persons subject to examination.

Article 27
Diplomatic Agents and Consular Officers

Nothing in this Convention shall affect the fiscal privileges of members of diplomatic missions or consular posts under the general rules of international law or under the provisions of special agreements.

Article 28
Entry Into Force

1. The Contracting States shall notify each other that the constitutional requirements for the entry into force of this Convention have been complied with.
2. This Convention shall enter into force thirty days after the date of the later of the notifications referred to in paragraph 1 and its provisions shall apply:
 - a) with regard to taxes withheld at source, in respect of amounts paid or credited on or after the first day of January next following the date upon which the Convention enters into force; and
 - b) with regard to other taxes, in respect of taxable periods beginning on or after the first day of January next following the date upon which the Convention enters into force.

Article 29
Termination

1. This Convention shall remain in force until terminated by a Contracting State. Either Contracting State may terminate the Convention by giving notice of termination, through the diplomatic channel, at least six months before the end of any calendar year starting five years after the year in which the Convention entered into force.
2. In such event, the Convention shall cease to have effect:

- a) with regard to taxes withheld at source, in respect of amounts paid or credited on or after the first day of January next following the year in which the notice is given; and
- b) with regard to other taxes, in respect of taxable periods beginning on or after the first day of January next following the year in which the notice is given.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at Cape Town in duplicate in the English language, this seventeenth day of February of the year 1997.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

Albert A. Gore, Jr.
Vice President

FOR THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA:

Thabo Mbeki
Deputy President



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