

**THE ZAMBIA DEVELOPMENT AGENCY**

**and**



**INVESTMENT PROMOTION AND PROTECTION AGREEMENT**

**relating to**



**ZAMBIA**



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**THIS INVESTMENT PROMOTION AND PROTECTION AGREEMENT** is made the -----  
day of ----- 201.

**BETWEEN:**

- (1) The Zambia Development Agency, established under section 4 of the Zambia Development Agency Act, No. 11 of 2006 (“ZDA” or the “Designated Agency”) of the one part; AND
- (2) ....., a private limited company incorporated under the Companies Act, Chapter 388 of the Laws of Zambia, with its principal/registered office located at Plot No. -----, ----- Road, ----- (the “Company”) of the other part.

**WHEREAS:**

- (A) The Designated Agency is keen to advance the social and economic development of the Republic of Zambia and as a matter of national policy, has committed itself to encouraging and promoting the sustainable development and use of the natural resources of the Republic of Zambia through local and foreign investment, particularly through major projects which involve the development of land, water and other natural resources for the benefit of local and foreign investors as well as for the benefit of Zambian nationals.
- (B) The Company intends to undertake the Development Project that will involve various development activities with an approximate expenditure of US\$----- (----- million United States dollars) to be spent, *inter alia*, on:
  - (a) -----;
  - (b) -----;
  - (c) -----;
  - (d) -----;
  - (e) -----;
  - (f) -----; and
  - (g) -----.
- (C) Consistent with the Government's policies, the Development Project has been identified by the Designated Agency as contributing to the overall goal of wealth and job creation as set

out in the Six National Development Plan (SNDP), and in particular, the Designated Agency recognise that the Company has already accomplished the following:

- (i) -----;
- (ii) -----;
- (iii) -----;
- (iv) -----; and
- (v) -----.

(D) It is a central objective of the Designated Agency to promote the development of rural enterprises and the continued investment in rural communities through sustainable economic activities.

(E) The Designated Agency and the Company have agreed to enter into this Agreement to ensure the successful implementation of the Development Project under the auspices of the Zambia Development Agency Act, No 11 of 2006 (the “ZDA Act”).

**NOW THEREFORE THE PARTIES HEREBY AGREE AS FOLLOWS:**

**1. Interpretation**

**Definitions**

Unless otherwise expressly provided in this Agreement –

“**access routes**” means all routes, easements and other rights to access which are necessary or expedient to gain and maintain access to the Development Project sites and facilities;

“**affected party**” has the meaning given to it in Clause 10.1;

“**affiliate**” means, in relation to a specified Person (the “First Person”), any other person who, directly or indirectly through one or more intermediaries, controls or is controlled by or is under common control with the First Person. For these purposes “control” (including the terms “controlled by” and “under common control with” and “controls”) means the possession, directly or indirectly, of the ability to direct management decisions. Without limiting the generality of the above, such direction is presumed to exist if a First Person possesses, directly or indirectly, the power to direct or cause the direction of management and policy decisions of another person, whether through the ownership of voting securities, by contract or otherwise;

“**Agreement**” means this Investment Promotion and Protection Agreement (together with all annexures and schedules hereto) as varied from time to time in accordance with the terms hereof;

“**ancillary facilities**” means any facilities constructed by or on behalf of the Company, or which the Company otherwise acquires ownership of or rights in, for or in connection with the Development Project;

“**business day**” means a day (other than Saturday, Sunday or public holiday);

“**change in law**” means the amendment or repeal of any Law by the Government of the Republic of Zambia;

“**company default**” has the meaning given to it in Clause 12.1;

“**construction**” means the design, procurement and building of the infrastructure and ancillary facilities;

“**day**” means a calendar day;

“**debt service**” means for any period the aggregate of all principal, interest, fees and any other amount payable during such period under the financing documents;

“**development benefits**” means the benefits accruing to every province and district of Zambia;

“**development project**” means the project cited in recital (B) above;

“**development sites**” means the sites for the construction of the Development Project specifically identified in Annexure III;

“**dispute**” means any dispute or disagreement of any kind whatsoever arising under or in connection with this Agreement, but excluding anything requiring the mutual agreement of the Parties;

“**effective date**” means the date of the Agreement;

“**environmental consents**” means all authorisations, notifications, reports, improvement programmes and assessments required under any Environmental Regulation prescribed by the Laws of Zambia in connection with the Development Project;

“**environmental regulations**” means any Law of Zambia which has as a purpose or effect the protection or the prevention, of harm or damage to the environment or to provide remedies in relation to harm or damage to the environment;

“**expatriates**” means individuals who are not Zambian nationals but who live or work at some time in the Republic of Zambia for the implementation and operation of the Development Project;

“**facilities**” shall include but not be limited to the Development Sites and all equipment, machinery assets and other infrastructure belonging to or operated by the Company;

“**financing documents**” means all loan agreements, notes, indentures, security agreements, guarantees and other documents required by the Company for the financing (including any bridge financing or re-financing) of the Development Project or any part thereof;

“**force majeure event**” means an event, condition or circumstance, or combination of events or circumstances occurring after the date of this Agreement which is not reasonably foreseeable, beyond the reasonable control and arising without the fault or negligence of the Party claiming force majeure which, despite all reasonable efforts to prevent or mitigate its effects, makes it impossible for a Party to perform its obligations under this Agreement. Subject to the foregoing, force majeure events shall include:

- (a) acts of terrorism or sabotage;
- (b) nuclear or radioactive explosion ionising radiation or contamination;
- (c) fire, explosion, lightning, earthquake, storm, hurricane, flood, landslide or other natural calamity or act of God;
- (d) epidemic or plague;
- (e) blockade, embargo, any closing of borders, roads, rail links, airports or other assistance to or adjuncts of transport to the Republic of Zambia;
- (f) act of war (whether declared or undeclared), invasion, armed conflict, act of foreign enemy, revolution, riot, mutiny, rebellion, insurrection, state of siege or civil commotion, in each case in the Republic of Zambia;

but shall not include:

- (i) failure by the Company to obtain or renew any required approval, consent, concession, decree, permit, licence, waiver, privilege and exemption from, or filing with, or notice to any Government Authority relating to the performance of any of its obligations under this Agreement; or

- (ii) the existence of any rights in favour of a person, which conflict, or are incompatible, with the rights of the Company in respect of the Development Project;

“**foreign currency**” means any currency other than the Zambian Kwacha;

“**Government default**” has the meaning given to it in Clause 14.3 as well as any act of compulsory acquisition as set out in section 19 of the ZDA Act;

“**Government representatives**” means the persons notified to the Company by the Government who are authorised to bind the Government;

“**judicial authority**” means any court or judicial body established under the Laws of Zambia for the purposes of adjudication of any matter, whether or not such matter when so determined is subject to appeal to any other authority or body;

“**Kwacha**” and “**K**” means the lawful currency of the Republic of Zambia;

“**Laws of Zambia**” means all national, provincial and local laws, regulations or other legal instruments, having the force of law;

“**licence**” means licence No. ZDA/-----/-----/----- issued by the Designated Agency to the Company in accordance with section 68 of the ZDA Act;

“**Local Business Development Programme**” means the plan set out in Annexure II hereto that encourages the participation of Zambians in the provision of goods and services to the Company;

“**materials and equipment**” means any goods, supplies, plant, materials and equipment of any kind, including, machinery, vehicles, consumables, parts and components and any spare parts and replacements;

“**market value**” in relation to the value of any asset, property or rights including rights of action, means the value price or consideration which a willing buyer would be prepared to pay to a willing seller of such asset, property rights or right of action in an open market at the relevant date, on the assumed basis that there is no coercion between the parties operating at arms length, and where such parties are fully informed of the subject and market conditions and where the parties are legally able to enter into a binding legal transaction relative to such asset, property, rights or right of action;

“**material breach**” means any change or action taken by any Party to this Agreement that renders this Agreement ineffective except where there is a force majeure event;

“**month**” means a calendar month on the Gregorian calendar;

“**notice**” means a written notice complying with the requirements of Clause 13;

“**operations**” means the ongoing operations of the Company from time to time and any operations carried out in order to implement the Development Project;

“**parties**” means the Company, and the Designated Agency and their successors and permitted assignees and “party” means any of them;

“**permits**” means all authorisations, approvals, permissions, licences or consents which are, or may from time to time become, necessary or appropriate pursuant to the Laws of Zambia for, or ancillary to, the Project, the operations of the Company or for or ancillary to the fulfilment of the purposes and intents of this Agreement, the financing documents or the development, operation, maintenance and financing of the Development Project;

“**person**” means any individual, partnership or corporation, wherever organised or incorporated, and all other juridical recognised entities, including the Government, other governments, governmental bodies and associations whether or not incorporated and includes references to their respective successors and permitted assignees;

“**prescribed fee**” means with respect to a particular permit, the charge or fee, if any, prescribed by the Laws of Zambia;

“**prescribed form**” means with respect to a particular permit, the form, if any (including all information and details), prescribed by the Laws of Zambia for the application for, or renewal of, such permit;

“**project assets**” means the facilities and all assets required for the purposes of, or in connection with, the Development Project (including land, plant, machinery, buildings and intellectual property rights) wherever they are situated;

“**project documents**” means the various agreements for the financing and construction of the Development Project namely:

- (a) the financing documents;
- (b) construction contracts; and
- (c) the permits.

“**project expenses**” means, in relation to any period, the expenses of the Company during such period for the operation and maintenance of the Development Project, including debt service, capital expenditure, depreciation, administration, insurance, maintaining permits, royalties, salaries and overheads, legal, accounting and other professional fees;

“**quarter date**” means the 31 March, 30 June, 30 September and 31 December of each year respectively;

“**shareholder**” means any person entered in the register of members of the Company or holding a beneficial interest in the equity in the Company;

“**shareholder loans**” means amounts advanced to the Company by any Shareholder for the purposes of implementing the Development Project and shall include debentures, quasi equity and internal funding provided by the Company from shareholders equity in order to implement the Development Project;

“**stability period**” means a period of five years from the grant of the licence, permit or certificate, or such period as the Minister responsible for finance may prescribe, in accordance with section 55 of the ZDA Act;

“**tax exemption**” means tax or duty relief provided under the Income Tax Act and Customs and Excise Act after the Board of the Designated Agency has certified under section 60 of the ZDA Act;

“**term**” has the meaning given to it in Clause 2;

“**termination date**” means the date on which this Agreement expires or is terminated in accordance with its terms; and

“**year**” means a calendar year in accordance with the Gregorian calendar.

1.1 In this Agreement, unless the context otherwise requires:

1.1.1 words importing the singular include the plural and vice versa;

1.1.2 words importing a gender include every gender;

1.1.3 references to any document (including this Agreement) are references to that document as amended, consolidated, supplemented, novated or replaced from time to time, and to all annexes, Schedules, attachments, supplements and the like which form part thereof; and

- 1.1.4 terms defined in any number, gender or tense shall have the correlative meaning when used in any other number, gender or tense, and the terms “includes” or “including” mean including without limitation.
- 1.2 In this Agreement, references to Clauses and Annexures are references to Clauses of and Annexures to this Agreement.
- 1.3 Headings are inserted for convenience only and shall not affect the interpretation or construction of this Agreement.
- 2. Term**
- 2.1 The term of this Agreement shall commence on the effective date and shall, save where this Agreement is terminated at an earlier date in accordance with its terms, continue for as long as any licence, permit or certificate of registration issued by the Designated Agency under the ZDA Act remains in force including any period of renewal thereof in terms of the ZDA Act.
- 3. Obligations of Designated Agency**
- 3.1 The Designated Agency:
- 3.1.1 shall in accordance with section 60 of the ZDA Act certify that the Company is eligible for tax and duty exemptions under Part VIII;
- 3.1.2 subject to compliance by the Company with the ZDA Act may renew the Licence, prior to the expiration of the initial term of the licence; and
- 3.1.3 shall assist the Company to obtain expeditiously all Permits required by the Company in relation to the Project on generally applicable and reasonable conditions prior to or at the time when required pursuant to the Laws of Zambia, subject to compliance by the Company with the provisions in Clause 4.2.
- 3.2 The Designated Agency shall with effect from the effective date, during the term:
- 3.2.1 facilitate applications for work permits, employment passes, visas, travel authorisations rights of entry and residence, and other permits, as necessary for individuals involved in the Development Project, their dependants and their personal effects, in accordance with the Laws of Zambia, in a manner that does not adversely affect the implementation of the Development Project.

- 3.2.2 take all actions as are required under this Agreement in a timely manner so as not to cause delay to the implementation of the Development Project.
- 3.3 The Designated Agency confirms that there shall be no fiscal terms or tax schedule provided in any investment promotion and protection agreement and that all fiscal matters shall be as provided for in the respective tax codes, the ZDA Act and also as provided for by any authority established by law for the purposes of local government power to impose taxation within the area for which that authority is established and to alter taxation so imposed, in accordance with Article 114 (4) of the Constitution of Zambia. Fiscal matters shall therefore be only cross-referenced in the relevant agreement in order to prevent any attempt to secure fiscal incentives outside the tax law.

#### **4. Obligations of Company**

##### **4.1 The Company shall:**

- 4.1.1 comply with the Laws of Zambia and with this Agreement and shall ensure that it applies for all permits and that it maintains, and complies with the terms and conditions of all such permits at all times.
- 4.1.2 undertake the Development Project and pursuant to this, the Company shall:
- 4.1.2.1 adhere to and observe at all times laws and regulation, including standards and practices concerning the protection of health and safety and the environment which are in force from time to time;
- 4.1.2.2 employ Zambian Nationals who are suitably and appropriately qualified and experienced to undertake the relevant task and to transfer relevant skills to Zambian employees. The Company shall observe labour laws on employment and engagement practices and undertake to continue to operate within the provisions of the labour laws.
- 4.1.2.3 support the Local Business Development Programme attached hereto as Annexure II with a view to encouraging and assisting businesses within Zambia with a particular emphasis on businesses directly or indirectly majority owned by Zambian citizens within the content of the Local Business Development Programme; and

- 4.1.2.4 inform the Designated Agency on the implementation and results of the Local Business Development Plan through the annual submission of progress reports during the period of the Development Project not later than 30<sup>th</sup> January of the following year.
    - 4.1.3 undertake to complete the necessary environmental impact assessment required by the Zambia Environmental Management Agency where applicable
  - 4.2 The Company shall make or cause to be made, in a timely fashion, all applications (whether initial or renewal applications) for permits in the prescribed form and with the prescribed fee. The information supplied by the Company in the applications shall be complete and accurate and shall satisfy the substantive and procedural requirements of the applicable Laws of Zambia.
  - 4.3 During the term, the Company shall afford and facilitate access by Government Representatives to all elements of the Development Project being carried on in the Republic of Zambia for the purpose of allowing such Government Representatives to observe and inspect the implementation of the Development Project on behalf of the Government;
  - 4.4 The Company will promptly provide full details to the Designated Agency of all environmental tests, environmental impact assessments and studies carried out in relation to the Development Project in accordance with the applicable Environmental Regulations; and
  - 4.5 The Company shall be solely responsible for the economic and technical feasibility, operational capacity and reliability of the Development Project.

## **5. Insurance**

- 5.1 The Company shall take out and maintain in full force and effect throughout the term such insurance policies and coverages with respect to the project assets and otherwise in respect of its obligations under this Agreement with financially strong and reputable underwriters or insurance companies to such extent and against such risks as prudent companies engaged in businesses similar to those of the Company normally insure.
- 5.2 The Company shall provide to the Agency from time to time and upon request certificates evidencing that the insurance policies are at all times in full force and effect.
- 5.3 All insurance proceeds received under any physical damage policy shall be applied to repair, reinstate and replace each part or parts of the project assets in respect of which the proceeds were received to at least the condition they were immediately preceding the physical damage.

**6. Incentives**

6.1 The Company may apply for incentives referred to in the ZDA Act for the stability period. Qualification for incentives shall be assessed in accordance with the ZDA Act. The Board shall recommend to the Commissioner General the suspension or withdrawal of incentives granted to the company where the company fails to honour its pledge of employment creation and training of employees who are citizens of Zambia.

**7. Reporting**

7.1 The Company shall perform its obligations under and observe all the terms of the project documents to which it is a Party and shall not:

- 7.1.1 terminate or permit the termination of any project document to which it is a Party;
- 7.1.2 make or agree to any material amendment or variation of any project document to which it is a Party;
- 7.1.3 in any material respect depart from, or waive or fail to enforce any rights it may have under, any project document to which it is a Party; or
- 7.1.4 enter into any agreement or document which would materially affect the interpretation or application of any project document;

unless the relevant document or proposed course of action has been notified in advance to the Designated Agency and there has been no objection by the Designated Agency in accordance with Clause 9.2 save that where the monetary value of such termination, amendment, departure from or entry into an Agreement has a financial impact of less than US\$ -----,000 (----- Thousand United States dollars), this Clause shall not apply.

7.2 Within twenty-one (21) business days of receipt of such notification the Designated Agency may object on the basis that the proposed financing document or project document or any change to such documents, will or may reasonably be expected to give rise to the result that:

- 7.2.1 The credit-worthiness or financial or other resources available to the Company are or may reasonably be expected to be materially adversely affected and for practical purposes cannot be replaced within a reasonable time;
- 7.2.2 The performance by the Company under such financing document or project document, or modification thereto, shall contravene the Laws of Zambia;

7.2.3 The terms of such financing document or project document shall be incompatible or in conflict with the provisions of this Agreement or materially impair its performance or implementation; or

7.2.4 Any costs which are passed through to or borne by the Government under the terms of this Agreement are or may reasonably be expected to be materially increased.

7.2.5 The objection, non-objection or approval by the Government of any amendment or variation of a provision or of the termination of any financing document or project document or the creation of a new financing document or project document shall be without any liability whatsoever on the part of the Government and shall not lessen, diminish or affect in any way the obligations of the Company under this Agreement.

7.2.6 The Company shall keep the Government advised of its activities in respect of the Development Project through the Designated Agency by the submission of reports as to the progress of the Company's activities under this Agreement. These progress reports shall be submitted within ten Business Days after each Quarter Date up to the date of commissioning of the Company Projects.

7.2.7 The Company and the Government Representatives shall (unless otherwise agreed) meet twice every year to discuss the progress of the Development Project.

7.2.8 The Company shall, as soon as available, furnish to the Government a report on any factors that materially and adversely, or that might materially and adversely, affect the Development Project.

7.2.9 The Company, shall, within five (5) business days of receipt thereof, provide, a copy of any notice that may be served on the Company, to Government and the Designated Agency, and all information in respect of any further actions, in relation to the winding-up or insolvency of the Company or other analogous event.

## **8. Confidentiality**

8.1 Each Party shall keep confidential any information whether written or oral, concerning the other Party/Parties or their respective, directors, officers or employees, or the Development Project, which either Party shall receive from the other Party and which shall be marked (if the information is delivered in written form) or otherwise designated as or indicated to be "confidential" at the time of disclosure or which must be understood to be confidential by reason

of the circumstances applicable to its disclosure and shall not divulge the same to any third party (save insofar as may be necessary for the purpose of carrying out this Agreement) and save in respect of disclosure to either Party's professional advisers, lenders or as may otherwise be required under the Laws of Zambia .

8.2 The provisions of this Clause shall not apply to:

8.2.1 any information in the public domain otherwise than by breach of this Agreement;

8.2.2 information in the possession of the recipient Party which was not obtained under any obligation of confidentiality; and

8.2.3 information obtained from a third party who is free to divulge the same, and which is not obtained under any obligation of confidentiality.

8.3 Each Party shall use reasonable endeavours to ensure that their respective directors, officers, employees, subcontractors, agents and affiliates are bound by the requirements of this Clause

8.4 This Clause 8 shall survive the termination of this Agreement.

## **9. Right of First Refusal**

9.1 Zambian registered companies shall be granted a right of first refusal on any equipment used in connection with the Development Project and sold or to be sold by the Company in the Republic of Zambia.

## **10. Force Majeure**

10.1 If any Party (the "affected Party") is prevented or hindered in its performance of any of its obligations pursuant to this Agreement by a force majeure event, the Affected Party shall be excused from the performance of such obligations (other than any obligation to pay money as and when due) during the existence of such event and shall not be responsible for any damages suffered by the other Party as a result of such suspended performance, and any performance deadline that the Affected Party is obliged to meet under this Agreement shall be extended day-for-day so long as the force majeure event continues.

10.2 The affected Party shall as soon as reasonably practicable after it has occurred give notice to the other Party of the force majeure event, and shall keep the other Party informed of subsequent developments in such circumstances as they occur. The notification shall include details of the force majeure event, including evidence of its effect on the obligations of the affected Party and

any action taken or proposed to mitigate its effect. The affected Party shall continue to take any actions within its power to comply with this Agreement.

- 10.3 As soon as practicable following receipt of the notice in Clause 10.2, the Parties shall consult with each other in good faith and use all reasonable endeavours to agree appropriate terms to mitigate the effects of the force majeure event and facilitate the continued performance of this Agreement.
- 10.4 If any force majeure event continues for longer than six (6) months from the date of the notice referred to in Clause 10.2, on the basis that either of the Parties will be unable (within six (6) months of the occurrence of the said force majeure event) to comply with any of its obligations, then either Party shall be entitled, upon giving to the other Party two (2) weeks written notice, to terminate this Agreement.
- 10.5 Notwithstanding Clauses 10.1 to 10.4 the following events or circumstances shall not constitute a force majeure event:
- 10.5.1 late delivery to a Party of materials and equipment or spare parts unless such late delivery is itself caused by a force majeure event;
- 10.5.2 the failure or inability to make payments under this Agreement except where there is a dispute in respect of such payment and the paying Party is permitted to withhold such payment under this Agreement;
- 10.5.3 any event or occurrence to the extent that it could have been prevented, overcome or remedied by the exercise of reasonable due diligence and due care.
- 10.6 Where the force majeure event has been eliminated or no longer affects a party, a party shall give notice in writing to the other Parties, within seven (7) days when it ceases to be affected by the force majeure, and the obligations in this Agreement shall re-commence forthwith and the applicable period for the performance of the obligation shall be extended by a period equal to the duration of the force majeure event, or such a period as may be agreed to by the Parties to this Agreement.

## **11. Arbitration**

- 11.1 The Parties shall use their best efforts to amicably settle all disputes, differences and questions whatsoever which may at any time hereafter arise between the parties hereto out of the construction of or concerning anything contained in or arising out of this Agreement through good faith, discussion and negotiation.

- 11.2 If resolution is not reached within thirty (30) business days (or such longer period as the Parties may agree in writing prior to the expiration of such 30 day period) from the date of notice issued by any Party in accordance with Clause 11 that a dispute has arisen, then the dispute shall be settled by arbitration.
- 11.3 If a dispute is not resolved by amicable settlement or negotiation as provided in Clause 13.1 above, a Party referring the dispute to arbitration shall serve on the other(s) a request in accordance with the Arbitration Act No. 19 of 2000 and the Rules made there under.
- 11.4 The Parties agree that three Arbitrators shall conduct the Arbitration. The Designated Agency (as the case may be) of the one part and the Company of the other will each appoint one Arbitrator, and the two Arbitrators thus appointed shall appoint the third Arbitrator (each such part constituting a Party for the purposes of this Clause). In the event that the two Arbitrators are unable to agree upon a third Arbitrator within 10 days of their appointment, any Party may apply in writing to the President of the Zambia Association of Arbitrators requesting the appointment of the third Arbitrator within 30 days.
- 11.5 An arbitrator shall not be a Party, a lender, or any affiliate of any Party. The arbitral tribunal may request and obtain the services of a technical or legal expert to assist in the duties hereunder; provided, however, that any such expert shall not be an employee, lender, or affiliate of a Party to the arbitration.
- 11.6 The arbitral tribunal shall decide all questions strictly in accordance with the terms of this Agreement and shall give effect to the same but shall not be authorised to exceed a limit of liability established hereunder or expand a guarantee made herein. The arbitral tribunal will, in all cases, have the power to make provisional awards and to order on a provisional basis, any relief which it would have power to grant in a final award.
- 11.7 The decision of the arbitral tribunal shall be in writing and shall state the reasons for the decision and all facts and circumstances relied upon.
- 11.8 The award of the arbitral tribunal shall be final and binding upon the Parties to the arbitration who shall give effect to any such award.
- 11.9 The seat of arbitration shall be in Lusaka, Zambia.
- 11.10 The arbitration shall be conducted using the English language. All documents or evidence presented at such arbitration in a language other than in English shall be accompanied by a certified English translation thereof, the cost of which shall be borne by the Party relying on the document.

- 11.11 The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of this Clause 11. For such purpose, this Clause 11 shall be treated as an agreement independent of the other terms of this Agreement and any decision by the arbitrator that all or any part of this Agreement is invalid, illegal or unenforceable shall not entail the invalidity, illegality or enforceability of this Clause 11.
- 11.12 The Parties waive any rights to appeal or to any review of such award by any court or tribunal on any grounds whatsoever other than fraud or manifest bad faith or error in the decision or other grounds permitted under the procedural laws of arbitration. The Parties further undertake to carry out without delay the provisions of any arbitral Award or decision.
- 11.13 The cost of such arbitration shall be determined and allocated as between the Parties by the arbitral tribunal in its award.
- 11.14 During the term, arbitration pursuant to this Clause 11 shall be the exclusive means of settling disputes between the Parties arising under or in connection with this Agreement, and each Party hereby waives any right to resort to any other means of resolving such Disputes provided that the provisions of this Clause 11 shall not be deemed to:
- 11.14.1 preclude either Party from bringing any claim in a court having jurisdiction to enforce any award by the arbitrator;
- 11.14.2 preclude either Party from bringing in a court having jurisdiction any claim as a result of a breach by the other Party of its obligation to refer disputes to arbitration and/or to carry out actions to give effect to this Clause 11; or
- 11.14.3 preclude the arbitral tribunal or either Party with the approval of the tribunal from seeking from any court having jurisdiction assistance in the taking and disclosure of evidence or the provision of protection for the subject matter of the dispute or security for the amount in dispute.
- 11.15 The provisions of Clause 11 shall survive the termination of this agreement.
- 11.16 For purposes of determining any dispute the arbitral tribunal shall take into account the entire Agreement.

## **12. Defaults, Remedies and Termination**

- 12.1 Each of the following shall be a company default which if not cured by the Company within the time permitted (if any) for cure, shall give the Designated Agency the right, pursuant to Clause

12.4, to terminate this Agreement and claim compensation (provided that no such event shall be a company default if it results from a breach by the Government of this Agreement or it occurs as a result of or during a force majeure event):

12.1.1 failure to pay any sum due to the Government, including any taxes, under this Agreement on the due date and such failure to pay continues for sixty (60) days from the Company's receipt of a final written demand from the Government; or

12.1.2 material breach of any of the Company's obligations under this Agreement and such breach has been notified to the Company and has not been remedied within a period of sixty (60) days of notification, or such longer period as the Government shall in its reasonable discretion allow for the remedy of such breach;

12.1.3 termination of any project document resulting from a breach by the Company hereunder;

12.1.4 forthwith on notice to the Company where:

12.1.4.1. any proceeding (including the appointment of a provisional liquidator) is instituted by or against the Company seeking to adjudicate the company as insolvent or to wind-up the Company (and such proceeding is not disputed in good faith by the Company within forty-five (45) days of such proceeding first being instituted);

12.1.4.2. a court makes an order adjudicating the Company as insolvent;

12.1.4.3. a resolution is adopted for the voluntary winding-up of the company;

12.1.4.4. a receiver or a trustee is appointed over the whole or any part of the assets of the company and such appointment is not vacated within seventy-five (75) days; or

12.1.4.5. the Company makes an assignment for the benefit of the general body of its creditors.

12.2 For the avoidance of doubt, if the failure to make any payment under Clause 12.1.1 is a result of a good faith dispute between the parties concerning the amount to be paid then such failure to pay shall not be a Company Default. If the Parties cannot reach a mutually acceptable

resolution within sixty (60) days of such dispute arising, the matter may be referred by either party to arbitration pursuant to Clause 13. The undisputed portion shall be paid when due.

- 12.3 No act or event referred to in Clause 12.1 and 12.2 shall constitute a Company default or a Government default (as the case may be) until five (5) business days following the delivery of a notice to the defaulting Party of such breach, unless the breach is capable of remedy in which case the defaulting Party shall take all reasonable actions to remedy the breach within sixty (60) days of delivery of the notice. If the breach is not remedied within such sixty (60) day period the non-defaulting Party may terminate this Agreement by notice with immediate effect and this Agreement shall stand terminated save as provided in Clause 14.1 below and save further for the obligation of any Party duly to discharge any liability or obligation or to pay any amount outstanding by such Party immediately prior to such termination, which shall survive such termination.
- 12.4 In the event that any Party disputes the existence of a default or the value of damages suffered in accordance with the provisions of Clause 12.1 and 12.2 the matter shall be referred to arbitration in accordance with the provisions of Clause 11.
- 12.5 The provisions of Clause 11 and this Clause 12 shall survive the termination of this Agreement.
- 12.6 The rights and remedies given in this Clause 12 shall be in addition to and not in substitution for any other rights or remedies which may be available to any Party against any other Party, which has committed a material default. Any termination of this Agreement shall not relieve a Party which has committed a material default from any obligations accrued up to termination date.
- 12.7 Where, notwithstanding a breach of this Agreement, it is still possible for this Agreement to be performed or continued in substantially the form originally intended and provided for in this Agreement, the Party not in breach shall be entitled to have this Agreement carried out, observed and enforced in accordance with all of its terms by the remaining Party.
- 12.8 In the event that the Company fails to comply with any award made against it (in accordance with the terms of such award), the Government shall be entitled subject always to the Laws of Zambia to execute against the Company.

### **13. Notices**

- 13.1 Any notice, demand, request, report or other communication to be given by any Party to the other Party or to a shareholder pursuant to this Agreement (a “notice”) shall be:

13.1.1 in writing;

13.1.2 in the English language;

13.1.3 addressed to the address or facsimile number specified in this Clause 15, and shall be deemed to have been given:

13.1.3.1 if presented personally, at the time of being presented to the addressee thereof;

13.1.3.2 if deposited in a regularly maintained and serviced depository for mail for dispatch by registered or certified (or the equivalent) airmail, postage prepaid, return receipt requested, ten (10) business days after such deposit; or

13.1.3.3 if transmitted by fax, at the time actually received by the addressee on receipt of a proof of delivery by the person sending the fax; or

13.2 Notices shall be addressed to:

Zambia Development Agency  
Privatisation House  
Nasser Road  
Fairview  
P O Box 30819  
Lusaka  
Zambia  
Attention : The Director General  
Fax : +260 211 225270

if given to the Company be addressed to it at :

----- LIMITED

-----, ----- Road,

P O BOX -----,

-----

ZAMBIA

Attention : The Managing Director

Fax : +260 -----

13.3 A Party may notify the other Parties of a change to its name, name of relevant addressee, address or facsimile number, provided that such notification shall only be effective as from the date on which the notice is deemed given in accordance with Clause 13.1.

**14. Waiver**

14.1 The failure by any Party to exercise, enforce or insist upon strict performance by any other Party of any provision of this Agreement shall not constitute or be deemed a waiver of that Party's rights to enforce this Agreement with respect to any subsequent failure of performance.

**15. Transfer**

15.1 The Company may, with the consent of the Board of the Designated Agency ("the Board") in accordance with Section 75 of the ZDA Act, transfer the Licence or an interest in the Licence together with the benefit of this Agreement. The Designated Agency covenants that the consent of the Board to such a transfer shall not be withheld unreasonably save that no transfer of any interest in a Licence may be made without the transfer to such person of a concomitant interest in this Agreement and vice versa.

15.2 If the Company transfers its entire interest in the Licence and its rights under this Agreement in accordance with Clause 15.1, then upon the transferee becoming a Party to this Agreement, the Company shall be discharged from any further liability in respect of any obligation which accrues after the date of that transfer, without prejudice to pre-existing rights accrued by the Government against the Company and vice versa.

15.3 Pursuant to clause 15.1, the Board shall not withhold its consent in circumstances where the proposed transferee has demonstrated its financial capacity and technical ability to meet obligations hereunder or in the case of a change of control of the Company, the acquiring party has demonstrated that it is of appropriate financial standing provided that in no circumstances shall the Board be obliged to grant consent were the proposed transferee or the acquiring party, as the case may be, has previously liquidated, stripped down, closed or abandoned any of its investments in Zambia or elsewhere or has threatened to do so other than in accordance with the ZDA Act.

## **16. Compulsory Acquisition**

- 16.1 The investment under this Agreement shall not be compulsorily acquired or subjected to measures having the effect equivalent to compulsory acquisition except for a public purpose on a non discriminatory basis. There shall be prompt compensation as provided under Section 19 of the ZDA Act;
- 16.2 The affected Party shall have the right, under the Laws of Zambia, to prompt review, by judicial or other independent authority, and the valuation of the investment done in accordance with the principles set out in this Clause.

## **17. Affirmation**

- 17.1 The Company declares and affirms that the Company and its shareholders, directors, officers, employees, and agents have not paid or received, nor undertaken to pay or receive, any bribe, pay-off, kick-back, or unlawful commission and that the Company and its shareholders, directors, officers, employees, and agents have not in any other way or manner paid any sums, whether in Kwacha or Foreign Currency and whether in the Republic of Zambia or abroad, given or offered to give any gifts and presents in the Republic of Zambia or abroad, to any person or company to procure this Agreement. The Company undertakes not to engage in any of these or similar acts during the term of this Agreement.
- 17.2 The Parties shall not be complicit in any act described in Clause 17.1 including inciting, aiding and abetting and conspiracy to commit or authorisation of such acts, and any such acts shall be subject to appropriate criminal enforcement and sanctions in accordance with the Laws of Zambia.

## **18. Entire Agreement**

- 18.1 This Agreement constitutes the entire agreement and understanding of the Parties and all prior negotiations and understandings relating to the subject matter of this Agreement are superseded and cancelled by this Agreement.
- 18.2 No consensual cancellation or variation of, or addition to any of the provisions of this Agreement shall be of any force or effect unless it is expressly agreed in writing and signed by the Parties.
- 18.3 If any of the terms of this Agreement is held to be invalid, illegal or unenforceable, whether in whole or in part, such invalidity, illegality or unenforceability shall not prejudice the effectiveness of the remainder of this Agreement, and shall be severable therefrom or the scope

of the relevant provision shall be deemed to have been limited to exclude such illegality, invalidity or unenforceability.

18.4 The Parties may from time to time by mutual agreement in writing add to, substitute for, cancel or vary any of the provisions of this Agreement.

**19. International Law Obligations**

19.1 The Designated Agency on behalf of Government acknowledges and undertakes to remain bound by its obligations under international law relating to international investment promotion and protection.

**20. Applicable Law**

20.1 This Agreement shall be governed by the Laws of Zambia.

**21. Warranty by Signatories**

21.1 Each of the signatories to this Agreement hereby warrants that he is duly authorised to conclude this Agreement by the Party on whose behalf he appends his signature hereunder, and that such Party is duly authorised to enter into this Agreement.

21.2 The Government warrants that the execution of this Agreement by and/or on behalf of the Government is authorised by law.

**IN WITNESS WHEREOF** the Parties hereto or their representatives, duly authorised, have signed this Agreement the day and year first before written

**SIGNED** for and on behalf of )

THE ZAMBIA DEVELOPMENT AGENCY )

by: Mary Ncube  
Board Chairperson

In the presence of:

WITNESS:

Signature .....

Name:.....

Address:.....

Occupation: .....

**SIGNED** \_\_\_\_\_ )

For and on behalf of )

----- LIMITED )

by: Managing Director

In the presence of:

WITNESS:

Signature .....

Name:.....

Address:.....

Occupation: .....

## **Annexure I Project Brief**

## **Annexure II – Financial Progression of Project**

## **Annexure III Development Sites**

## **Annexure IV – Local Business Development Programme**

## **Annexure V - Employment Plan**