

No. 45050*

**South Africa
and
Botswana**

Memorandum of understanding between the Government of the Republic of Botswana and the Government of the Republic of South Africa on the development of the Mmamabula Coal Fired Power Station (MCFPS). Gaborone, 18 August 2006

Entry into force: *18 August 2006 by signature, in accordance with article 18*

Authentic texts: *English*

Registration with the Secretariat of the United Nations: *South Africa, 18 June 2008*

**Afrique du Sud
et
Botswana**

Mémorandum d'accord entre le Gouvernement de la République du Botswana et le Gouvernement de la République sud-africaine relatif au développement de la Centrale à charbon de Mmamabula (MCFPS). Gaborone, 18 août 2006

Entrée en vigueur : *18 août 2006 par signature, conformément à l'article 18*

Textes authentiques : *anglais*

Enregistrement auprès du Secrétariat des Nations Unies : *Afrique du Sud, 18 juin 2008*

* *The text reproduced below is the original text of the agreement as submitted. For ease of reference, it was sequentially paginated. The final UNTS version of it is not yet available. Le texte reproduit ci-dessous est le texte authentique de l'accord tel que soumis pour enregistrement. Pour référence, il a été présenté sous forme de la pagination consécutive. La version finale RTNU n'est pas encore disponible.*

[ENGLISH TEXT – TEXTE ANGLAIS]

PREAMBLE

WHEREAS the Government of the Republic of Botswana (hereinafter referred to as “Botswana”) and the Government of the Republic of South Africa (hereinafter referred to as “South Africa”) (hereinafter referred to in the singular as “a Party” and in the plural as “the Parties”) expressed their willingness to co-operate in relation to the possible development and construction of a thermal power station in the Republic of Botswana, to supply electricity to the Republic of Botswana, the Republic of South Africa and the Southern African Power Pool (hereinafter referred to as the SAPP);

AND WHEREAS at a meeting held in Johannesburg on the 21st October 2004 amongst the Minerals and Energy Ministers of Botswana and South Africa, the Finance Minister of Botswana, representatives of Eskom and BPC, the possible cooperation on the development of the Mmamabula Coal Fired Power Station was discussed;

AND WHEREAS the Government of the Republic of Botswana desires to work with all stakeholders, among which is the Government of the Republic of South Africa, on this development;

AND WHEREAS the Parties desire to promote bilateral cooperation between their countries, as part of the promotion of the Pan African development objectives under the aegis of the various instruments of cooperation on the African Continent, such as the New Partnership for Africa’s Development (hereinafter referred to as “NEPAD”) and the Southern African Development Community (hereinafter referred to as “SADC”);

AND WHEREAS BPC and Eskom intend to conclude an inter – utility Memorandum of Understanding for the implementation of this MOU

NOW THEREFORE the Parties agree as follows:



**ARTICLE 1
DEFINITIONS**

In this Memorandum of Understanding (hereinafter referred to as the "MOU" unless the context otherwise indicates -

"BPC" means the Botswana National Power Utility named Botswana Power Corporation;

"Concession" means the authority granted by Botswana to develop, build, own, and operate the MCFPS and to export power;

"Eskom" means the South African National Power Utility named Eskom Holdings Limited;

"MCFPS" means the Mmamabula Coal Fired Power Station supplied by the Mmamabula coal field or any viable coal source;

"Project" means the studies, design, insurance, financing, construction, ownership, operation and maintenance of the MCFPS and Transmission Integration.

"The Joint Commission" means the Commission to be established under Article 4 of this MOU.

"Utility" means either BPC or Eskom.

**ARTICLE 2
PURPOSE OF MOU**

The purpose of the MOU is to provide a general framework to -

- (a) create an enabling environment for the carrying out of the pre-feasibility study, feasibility study and business case for possible investment in the MCFPS;



- (b) provide guidelines for project investment, construction and operations within the MCFPS project;
- (c) provide an enabling agreement, or reference agreement, from which all subsequent agreements will be guided;
- (d) set out the key rights and responsibilities of each Party; and
- (e) set out principles agreed to by each Party.

**ARTICLE 3
COMPETENT AUTHORITIES**

The competent authorities responsible for the implementation of this MOU shall be:

- (a) in the case of Botswana, its Permanent Secretary, Ministry of Minerals Energy and Water Resources; and
- (b) in the case of South Africa, its Director General, Department of Minerals, and Energy.

**ARTICLE 4
ESTABLISHMENT OF THE JOINT COMMISSION**

- (1) In order for both the MOU and the Project to be implemented and for the performance of the functions and the achievement of objects referred to in Articles 6 and 8, the Parties shall establish a Joint Commission which shall comprise:
 - (a) The Ministerial Authority; and
 - (b) The Technical Committee.

**ARTICLE 5
THE MINISTERIAL AUTHORITY**

- (1) The Ministerial Authority shall consist of the two respective Ministers of Energy of each Party.

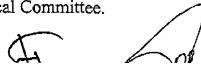


- (2) The Ministerial Authority shall meet annually or more frequently depending on the urgency of issues tabled for discussion. The Ministerial authority may meet in extraordinary session at the request of a Party.
- (3) The first annual meeting of the Ministerial Authority shall be held in Botswana.
- (4) All subsequent meetings of the Ministerial Authority will be held alternatively in the Republic of South Africa and the Republic of Botswana.
All non-annual meetings of the Ministerial Authority will be held at venues to be decided upon and on a rotational basis.
- (5) A Minister of the Party in whose state an annual meeting is held will assume the chairpersonship of the Ministerial Authority at such meeting on a rotational basis and shall function in such capacity until the annual ordinary session of the following year.
- (6) Decisions of the Ministerial Authority shall be by consensus.
- (7) The quorum for meetings of the Ministerial Authority shall be the two members of the Ministerial Authority.

ARTICLE 6

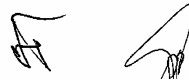
FUNCTIONS AND POWERS OF THE MINISTERIAL AUTHORITY

- (1) The functions of the Ministerial Authority shall be to:
 - (a) Provide the broad framework for the implementation on the MOU and of the Project;
 - (b) Monitor progress on the implementation of the MOU and of the Project;
 - (c) Ensure the performance of functions and the achievement of objects referred to in Article 8; and
 - (d) Consider any matter bearing on the implementation of the MOU and of the Project brought to its attention by a Party or the Technical Committee.



ARTICLE 7
THE TECHNICAL COMMITTEE


- (1) There shall be established a Technical Committee.
- (2) Each Party shall appoint three (3) representatives to the Technical Committee, one of which shall be a representative of the respective utility. Each Party shall also nominate two (2) alternate representatives.
- (3) Each Party shall within one (1) calendar month of the entry into force of this MOU appoint its representatives and alternatives on the Technical Committee and shall within such period communicate the names of such nominees to the other Party through the diplomatic channel. Each Party may at any time terminate such nomination for whatever reason provided written notice is communicated to the other Party, including notice of the replacement nominee.
- (4) The Technical Committee shall meet monthly or less frequently or more frequently depending on the urgency of issues tabled for discussion. The Technical Committee may meet in extraordinary session at the direction of the Ministerial Authority.
- (5) The First meeting of the Technical Committee shall be convened by Botswana within two (2) months of entry into force of this MOU.
- (6) All subsequent monthly meetings of the Technical Committee will be held alternatively in the Republic of Botswana and the Republic of South Africa.
- (7) All extra-ordinary meetings of the Technical Committee will be held in either Botswana or South Africa and on a rotational basis.
- (8) Decisions of the Technical Committee shall be by consensus but if the Committee fails to reach such consensus on a matter, the matter shall be referred to the Ministerial Authority by the Technical Committee for a decision within thirty (30) calendar days.



- (9) The quorum for meetings of the Technical Committee shall be four members two, of whom shall be representatives of each Party. One of the two representatives of each Party shall also be a representative of the respective utility.
- (10) The representative of the Party in whose State the meeting is held shall in respect of that meeting be the chairperson.

ARTICLE 8
FUNCTIONS OF THE TECHNICAL COMMITTEE

- (1) The functions of the Technical Committee shall be to:
 - (a) Implement the policies and decisions of the Ministerial Authority and perform such other tasks as may be assigned by the Ministerial authority from time to time;
 - (b) Develop the strategic plan for implementation of the MOU and the Project;
 - (c) Prepare reports and make recommendations on matters for decision by the Ministerial Authority;
 - (d) Facilitate the acquisition of approvals, authorities, licences, environmental or health and safety standards and such other requirements that must be complied with;
 - (e) Assist the parties and also utilities in dealing with issues that may arise relating to the Project;
 - (f) Advise on measures that may be implemented by the Parties to alleviate problems resulting from interruptions of the Project, taking into account the resources available to each Party;
 - (g) Advise on the necessary steps that may be taken to protect the functioning of the Project; and



- (h) Advise and give assistance in respect of bilateral and multilateral international funding agencies with regard to funds or other resources which may be accessed for the implementation of the Project.

**ARTICLE 9
MEETINGS OF THE JOINT COMMISSION**

- (1) The Ministerial Authority may convene joint meetings of members of both the Ministerial Authority and the Technical Committee whenever it deems it convenient and appropriate.
- (2) Such meetings may be held around the same time and in the same state with those of the Ministerial Authority or Technical Committee.
- (3) Decisions at such meetings shall be made by members of the Ministerial Authority.
- (4) Meetings of the Joint Commission shall be chaired by the Minister who in terms of Article 5(5) is the chairperson of the Ministerial Authority.

**ARTICLE 10
MEETING COSTS**

- (1) The Party in whose state a meeting of the Ministerial Authority or the Technical Committee or the Joint Commission is held shall be responsible for the preparation and timeous distribution of the proposed agenda, the recording and distribution of the minutes, to make available a suitable venue and for all other secretarial services. The Party shall also bear all costs of these services.
- (2) Each Party shall in respect of all such meetings be responsible for its own costs incurred as a result of its attendance of and participation in such meetings.
- (3) The Ministerial Authority or Technical Committee will adopt its own rules of procedure and governance insofar as its meetings are concerned.



ARTICLE 11
RESPONSIBILITIES OF BOTSWANA AND SOUTH AFRICA

- (1) The Parties shall be jointly responsible for –
- (a) facilitating a pre-feasibility study on the project and if proven viable a feasibility study will be undertaken;
 - (b) facilitating the creation of well defined regulatory frameworks within the two countries;
 - (c) fostering further co-operation between them;
 - (d) facilitating business case development and investment in the project as required once the viability of the project has been proven; and
 - (e) ranking and advising on programming of this project relative to other regional projects to assess economic viability.
- (2) BOTSWANA shall be responsible for -
- (a) granting a concession to the MCFPS should it prove to be economically viable within a reasonable period ;
 - (b) facilitating the participation of BPC and others;
 - (c) facilitating the application of necessary and reasonable resources to investigate the viability of the MCFPS;
 - (d) facilitating the granting of fiscal incentives to the MCFPS that would assist the project's viability; and
 - (e) rendering any other reasonable assistance that would facilitate the implementation and operations of the MCFPS.
- (3) SOUTH AFRICA shall be responsible for -
- (a) facilitating the participation of Eskom in the MCFPS initiative;
 - (b) facilitating the application of necessary and reasonable resources to investigate the viability of the MCFPS; and
 - (c) rendering any other reasonable assistance that would facilitate the implementation and operations of the MCFPS.



**ARTICLE 16
AMENDMENT**

This MOU may be amended by mutual consent of the Parties through an Exchange of Notes between the Parties through the diplomatic channel.

**ARTICLE 17
DURATION AND TERMINATION**

This MOU shall remain in force until terminated by either Party giving 12 months written notice in advance to the other Party through the diplomatic channel of its intention to terminate this Agreement.

**ARTICLE 18
ENTRY INTO FORCE**

This MOU shall enter into force on the date of signature by the two Parties.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto by their Governments have signed and sealed the MOU in duplicate in the English language, both texts being equally authentic.

DONE at GABORONE on this 18 day of AUGUST 2006.



FOR THE GOVERNMENT OF
THE REPUBLIC OF BOTSWANA



FOR THE GOVERNMENT OF
THE REPUBLIC OF SOUTH AFRICA