

APPENDIX A

ANTI TRUST AND CONFIDENTIALITY PROTOCOL

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RECITALS

- A. The Parties are (i) Participants in the Initiative as well as (ii) the Initiative itself, by virtue of its separate juristic personality.
- B. Each Party may accordingly disclose its Confidential Information to other Parties, and may in turn receive another Party's confidential information. Accordingly, every Party hereto may be both a Disclosing and Receiving Party.
- C. The Parties wish to regulate the disclosure of Confidential Information
- D. As regards Anti-Trust or Competition Law, the Initiative has been established with the keen involvement and support of the South African Government as a result of identified strategic imperatives. The South African Government has indicated that it is fully supportive of and encourages the domestic coal producers to become Participants in the Initiative in order to achieve the Objectives.
- E. The Participants acknowledge that they are aware of the fact that Industry Associations involving competing entities may expose such members of such Industry Association to the risk that commercially sensitive information may be exchanged between the competitors and that such exchange may lead to contraventions of the Competition Act.
- F. Moreover, the Participants also acknowledge that exchange of certain commercially sensitive information between competitors may also contravene anti-trust or competition law in other jurisdictions.
- G. The Parties record their express intent and determination to ensure that each Party's involvement in the Initiative achieves the Objectives in such a manner that no Party is exposed to the risk of an impermissible exchange of information between competitors and any violation of the Competition Law of South Africa of any nature, or similar laws in other jurisdictions.

H. This is particularly the case as the Government is seeking to introduce criminal penalties for contraventions of section 4(1)(b) of the South African Competition Act.

The Parties agree as follows -

1 DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Protocol and the above recitals, unless clearly inconsistent with or otherwise indicated by the context -

“Act” means The Competition Act of 89 of 1998 and Section 4(1)(b) of the Act provides that *"[an] agreement between or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if ... (b) it involves any of the following restrictive horizontal practices(i) directly or indirectly fixing a purchase or a selling price or any other trading condition, (ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or (iii) collusive tendering."*

“Assign” means in relation to a Party, its professional advisors, sub-contractors and agents, or any person or entity acting at the direction or behest of such Party in pursuit of the Objectives of the Initiative;

1.1.1 **"Associated Company"** means in relation to a Party, and to the extent applicable –

1.1.1.1 its Holding Company;

1.1.1.2 any company or entity which is a Subsidiary of, or is for the time being directly or indirectly controlled by, the Holding Company; or

1.1.1.3 in the case of a Party which does not have a Holding Company, any company which is a Subsidiary of such Party or is, for the time being, directly or indirectly controlled by that Party,

and for this purpose –

- 1.1.1.4 a company or entity is directly controlled by another company or entity if that other company beneficially holds shares carrying the majority of votes at a general meeting (or similar body) of the first mentioned company or entity; and
- 1.1.1.5 a company or entity is indirectly controlled by the Holding Company if a series of companies or entities can be specified, beginning with the Holding Company and ending with the particular company or entity, as so related that each company of the series (except the Holding Company) is directly controlled by one or more of the preceding companies or entity;

“Confidential Information” means –

- 1.1.1.1 All information or data, in whatever form contained and in whatever manner disclosed, relating directly or indirectly to a Party or its Associated Companies or its Assigns, and that is disclosed or acquired in any way directly or indirectly from such Party, any of its Associated Companies or any of its Assigns, by the Receiving Party pertaining to, but in no manner limited to:-
 - 1.1.1.1.1 Intellectual Property and Geological Data;
 - 1.1.1.1.2 business information (including, without limitation, any closed or dormant businesses) as well as such business plans, proposals, and past, present and envisaged policies;
 - 1.1.1.1.3 environmental policies, plans and practices including without limitation, rehabilitation policies, plans and practices;
 - 1.1.1.1.4 liabilities (including, without limitation, environmental liabilities);
 - 1.1.1.1.5 safety and health including, without limitation, all records as well as policies, plans and practices;

- 1.1.1.2 but excluding:-
- 1.1.1.2.1 all information that is in, or has after disclosure or acquisition entered, the public domain otherwise than as a consequence of any breach of any undertaking contained in or given pursuant to this Protocol;
- 1.1.1.2.2 all information that is properly and lawfully in the possession of the Receiving Party (including to the extent independently developed or acquired in a manner not in contravention of this Protocol) as evidenced by its written records prior to the time that it is disclosed by or acquired from the Disclosing Party, and was not acquired in any way directly or indirectly from the Disclosing Party or any of its Associated Companies or Representatives by the Receiving Party further
- 1.1.1.2.3 any information that is known or reasonably suspected of being subject to any duty of confidentiality owed to any third party;
- 1.1.2 “**Charter**” means the Charter of the Initiative and any capitalised term herein (save where defined in this clause 1.1) shall bear the meaning ascribed to it in the Charter;
- 1.1.3 “**Disclosing Party**” a Party to this Protocol disclosing its Confidential Information the Receiving Party;
- 1.1.4 “**Effective Date**” means in relation to a Party the Effective Date of the Charter;
- 1.1.5 “**Geological Data**” means all information including (without limitation) all geological data, exploration, feasibility, commercial and technical information, drill cores, logs of drill cores, samples, books, files, reports, surveys, assays, analyses, maps, mosaics, metallurgical information, aerial photographs, electromagnetic tapes, records, correspondence, documents and other material and all information relating to technology, processes, products,

specifications, inventions and designs, trade secrets and know-how of a commercially sensitive nature;

1.1.6 **"Holding Company"** means a holding company as defined in the Companies Act, No. 61 of 1973;

1.1.7 **"Intellectual Property"** "means all intellectual property rights of any kind whatsoever, including without limitation, patents, trade marks, rights in designs, trade names, present and future copyrights, trade secrets, know-how, and all rights or forms of protection of a similar nature or having equivalent or similar effect to any of these, whether or not any of these is registered, is capable of registration and including applications for any such right or registration thereof;

1.1.8 **"Parties"** means a Participant in the Initiative and **"Party"** shall mean any one or all of them, as the context may indicate;

1.1.9 **"Permitted Purpose"** means the sole purpose for which the Confidential Information of each Disclosing Party may be used, disclosed or distributed by and within each Receiving Party, namely and solely in order to participate in the Initiative;

1.1.10 **"Prohibited Information"** means current or future information that is detailed (as opposed to aggregated) but is not in the public domain and pertains to:-

1.1.10.1 data (historical, present or future) relating to prices, output, production, sales, capacity, costs, profit margins or the identity of customers or suppliers;

1.1.10.2 information relating to negotiation with individual customers or suppliers (including negotiation strategies, pricing models or methods, discounts or rebates);

1.1.10.3 information relating to marketing strategies;

1.1.10.4 information relating to research and development plans;

- 1.1.10.5 information relating to expansion plans, including in respect of output, capacity, export destinations, domestic marketing and procurement;
- 1.1.10.6 information relating to stock levels;
- 1.1.10.7 information relating to service levels and trading terms (including credit terms),
- 1.1.10.8 information relating to the financial position of customers or potential customers); and
- 1.1.10.9 information relating to production costs.
- 1.1.11 **"Receiving Party"** a Party to this Protocol receiving Confidential Information from a Disclosing Party;
- 1.1.12 **"Representative"** means any director, officer, employee or Assign of a Party;
- 1.1.13 **"Subsidiary"** means a subsidiary as defined in Section 1(3) of the Companies Act, No 61 of 1973, as amended;

1.2 Interpretation

- 1.2.1 In this Protocol and the recitals, unless clearly inconsistent with or otherwise indicated by the context -
 - 1.2.1.1 any reference to the singular includes the plural and *vice versa*;
 - 1.2.1.2 any reference to a person includes a legal person, association, group, partnership and trust and *vice versa*;
 - 1.2.1.3 any reference to a gender includes the other genders.
- 1.2.2 Where appropriate, meanings ascribed to defined words and expressions in 1.1, shall impose substantive obligations on the Parties.

- 1.2.3 The clause headings in this Protocol have been inserted for convenience only and shall not be taken into account in its interpretation.
- 1.2.4 Where any term is defined within the context of any particular clause or sub-clause, the term so defined shall, unless it appears clearly from such clause or sub-clause that such term has limited application to the relevant clause or sub-clause, bear the meaning ascribed to it for the purposes in terms of this Protocol, notwithstanding that such term has not been defined in 1.1.
- 1.2.5 The provisions of this protocol shall be governed by and construed and interpreted in accordance with the laws of the Republic of South Africa.

2 CONFIDENTIALITY UNDERTAKINGS

2.1 Confidentiality

Each Receiving Party shall treat and keep all Confidential Information it has received from a Disclosing Party (regardless of whether such information was received before the Effective Date) in confidence and as secret and confidential and shall further, limit the disclosure of the Confidential Information to the extent required in furtherance of the Permitted Purpose and will not, without the prior written consent of the Disclosing Party in question, directly or indirectly, communicate, disclose, grant access to, sell or trade or in any manner whatsoever impart or cause to be imparted (whether orally or in any other manner) the Confidential Information to any other person.

2.2 Confidentiality of Information and its Use

2.2.1 Accordingly, each Receiving Party undertakes towards the Disclosing Party, that it shall not and it shall procure that none of its Associated Companies or Representatives shall–

2.2.1.1 disclose any Confidential Information other than as permitted by this Protocol;

2.2.1.2 use any Confidential Information other than for the Permitted Purpose;

- 2.2.1.3 use any Confidential Information for its own benefit or that of a third party, other than pursuant to its obligations to the Initiative;
- 2.2.1.4 copy, reproduce or reduce to writing any parts thereof except as may be reasonably necessary for the Permitted Purpose provided that any copies, reproductions or reductions to writing so made, shall remain the property of the Disclosing Party; and
- 2.2.1.5 disclose any Confidential Information to any party (or person within the Receiving Party) other than a person or party who requires such confidential information for purposes of the Proposed Protocol and then only when the provisions of 2.2.2 have been complied with.
- 2.2.2 A Receiving Party shall procure that before any Confidential Information is disclosed by it to an Assign, and before such Assign is permitted to participate, such Assign agrees in writing to be bound, *mutatis mutandis*, to the provisions relating to Confidential Information detailed in this Protocol.

2.3 **Return of Confidential Information**

A Disclosing Party may at any time, in writing request a Receiving Party to-

- 2.3.1 within 10 (ten) Business Days of receipt of such notice, return to the Disclosing Party or destroy, all the Confidential Information in the possession of the Receiving Party and certify, in writing to Disclosing Party that it has complied with the requirements of this 2.3.1; and
- 2.3.2 notwithstanding its compliance with 2.3.1, the Receiving Party shall continue to be bound by the undertakings set out in this Protocol.

2.4 **Disclosure without Breach**

If a Receiving Party is requested and obliged to disclose all or any part of the Confidential Information, under the terms of a valid and effective order of court of competent jurisdiction or judicial or administrative agency or regulatory body, such

disclosure shall not constitute a breach of this Protocol, provided that prior to making the disclosure the Receiving Party -

- 2.4.1 promptly notifies the Disclosing Party of the existence, terms and circumstances surrounding such request;
- 2.4.2 consults with the Disclosing Party on the advisability of taking available legal steps to resist or reduce the scope of the requested disclosures; and
- 2.4.3 if disclosure of such Confidential Information is required or deemed advisable, exercises its best efforts to obtain an order or other reliable assurance that confidential treatment will be accorded to such portion of the Confidential Information as is to be disclosed.

3 ANTI TRUST UNDERTAKINGS

- 3.1 In order to ensure that the Initiative does not contravene any provision of the Act, including but in no manner limited to a contravention of section 4(1)(b), each Party shall at all times ensure that:
 - 3.1.1 detailed agendas will be circulated (in advance) for each meeting arising from or in relation to the Initiative and discussions at the relevant meetings will be confined to the topics described in the agenda;
 - 3.1.2 no informal meetings prior to, or after, the meetings associated with the Initiative are held;
 - 3.1.3 any person representing a Party at any meeting or function relating to the Initiative shall have received adequate training in relation to the Act and such person is not involved directly in marketing or sales;
 - 3.1.4 its representatives at the relevant meetings are limited in number and that, to the extent possible, the same representative will represent it on the Board, Steering Committee and any sub-Committee of either of the Board or the Steering Committee;

3.1.5 Prohibited Information will not be disclosed or discussed or in any manner exchanged save and unless legal advice has been provided in advance of such discussions and such advice confirms that the information may be exchanged and circumscribing the manner in which the information is provided.

4 **WARRANTEE AND INDEMNITY**

4.1 Each Party warrants to each of the other Parties that any information it provides or discloses (including, but not limited to Confidential Information) ("**Information**") is-

4.1.1 not known nor is reasonably suspected of being subject to any duty of confidentiality owed to a third party nor does such disclosure or use constitute an unauthorised use of a third parties Intellectual Property, nor is such Information, in any manner whatsoever, directly or indirectly subject to any claim or right by any third party; and

4.1.2 not Prohibited Information.

4.2 Each Party hereby indemnifies and shall hold each other harmless for any breach by it of the warrantee provided in 4.1 as against all loss, harm, damage and cost incurred (including but not limited to any and all legal fees and related expenses) ("**compensation**") by any Party (other than suffered by the Party in breach of the Warrantee). The Party in breach of the warrantee acknowledges that such compensation may not adequately compensate the indemnified Party and that an indemnified Party shall be entitled to seek injunction, specific performance or any other form of remedy so as to enforce its rights. Rights to relief shall be cumulative and not exhaustive.

5 **DISCLOSURE OF INFORMATION AND USE OF IP**

5.1 No Party may reveal, disclose or otherwise communicate any Information pertaining to this Initiative in the form of any general release without prior consultation with and express written approval of the final version of such press release (as issued) of both the Steering Committee and the Board.

- 5.2 If in any press release the Intellectual Property (including but not limited to Trademark) of a Party is used, the written consent of such party shall be obtained in writing prior to the use of such Party's Intellectual Property.

6 **DISCLAIMER**

A Disclosing Party reserves all rights in all its information disclosed (including but not limited to Confidential Information) ("**Information**") and no rights or obligations other than those expressly stated herein, are granted or to be implied from this Protocol. No Party makes any representation or warranty as to the accuracy or completeness of its Information. Further, no licence is hereby granted, directly or indirectly, by a Disclosing Party to any Receiving Party as regards use of the Information save as expressly permitted herein.

7 **BREACH**

- 7.1 The Parties record that should a Party ("Breaching Party") commit a breach of any of the provisions of this Protocol, the aggrieved Party ("Aggrieved Party") shall always, and in the first instance, be entitled to apply for an urgent relief or interdict against the Breaching Party, before any court of competent jurisdiction.
- 7.2 The Aggrieved Party shall furthermore be entitled to claim specific performance by the Breaching Party of all of the Breaching Party's obligations, whether or not the due date for performance shall have arrived, in either event without prejudice to the Aggrieved Party's rights to claim damages.
- 7.3 The foregoing is without prejudice to all such other rights as the Aggrieved Party may have in law.

8 **DURATION**

Save to the extent otherwise provided herein, the undertakings as regards the disclosure and use of Confidential Information by a Receiving Party (and all further provisions to give effect to such obligations) contained in this Protocol shall continue in full force and

effect and shall continue to bind the Receiving Party for ten (10) years as measured from the date in which the Party ceases to be a Adherent or Member of the Initiative.

9 DISPUTE RESOLUTION

9.1 The Parties agree that the terms of this Protocol shall be performed in the spirit of mutual co-operation, trust and confidence. The Parties further agree to use their reasonable endeavours to resolve, through mutual consultation, without involving any third party or parties, any dispute which may arise under, out of, or in connection with or in relation to this Protocol. If following such mutual consultation, the dispute still remains outstanding, the matter shall be referred to the chief executive officer of the Party in question or in the case of the Initiative, the Chairperson or their appointed representative, and one appointed representative of each of the other Parties to whom the dispute is relevant, who shall negotiate for a period of up to 5 (five) Business Days in an attempt to resolve such dispute. If following the expiry of such 5 (five) Business Day period, the dispute is still unresolved, then, save where otherwise provided in this Protocol, the matter may be referred to arbitration in accordance with the remaining provisions of this 9.

9.2 This 9 is a separate, divisible Protocol from the rest of this Protocol and shall -

9.2.1 not be or become void, voidable or unenforceable by reason only of any alleged misrepresentation, mistake, duress, undue influence, impossibility (initial or supervening), illegality, immorality, absence of consensus, lack of authority or other cause relating in substance to the rest of this Protocol and not to this 9. The Parties intend that any such issue shall be subject to arbitration in terms of this 9; and

9.2.2 remain in effect even if this Protocol terminates or is cancelled.

9.3 Save to the extent to the contrary provided for in this Protocol, any dispute arising out of or in connection with this Protocol or the subject matter of this Protocol including, without limitation, any dispute concerning –

9.3.1 the existence of this Protocol apart from this 9;

- 9.3.2 the interpretation and effect of this Protocol;
- 9.3.3 the Parties' respective rights or obligations under this Protocol;
- 9.3.4 the rectification of this Protocol;
- 9.3.5 the breach, termination or cancellation of this Protocol or any matter arising out of such breach, termination or cancellation; and/or
- 9.3.6 damages in contract, in delict, compensation for unjust enrichment or any other claim, whether or not the rest of this Protocol apart from this 9 is valid and enforceable,

shall be decided by arbitration as set out in this 9.

- 9.4 The Parties shall agree on the arbitrator. If agreement is not reached within 10 (ten) Business Days after any Party in writing calls for agreement, the arbitrator shall be an attorney or advocate of at least 15 (fifteen) years standing on the panel of arbitrators of the Arbitration Foundation of Southern Africa ("**AFSA**") nominated at the request of any Party by the Registrar of AFSA for the time being.
- 9.5 The request to nominate an arbitrator shall be in writing outlining the claim and any counterclaim of which the Party concerned is aware and, if desired, suggesting suitable nominees for appointment, and a copy shall be furnished to the other Parties who may, within 5 (five) Business Days, submit written comments on the request to the addressor of the request.
- 9.6 The arbitration shall be held in Sandton and the Parties shall endeavour to ensure that it is completed within 90 (ninety) Business Days after notice requiring the claim to be referred to arbitration is given.
- 9.7 The proceedings in the arbitration shall as far as practicable take place *in camera* and shall be kept confidential.
- 9.8 The arbitrator shall be obliged to furnish his award with his reasons for it in writing.

- 9.9 The arbitration shall be governed by the Arbitration Act, No. 42 of 1965, as amended, or any replacement act and shall take place in accordance with the Commercial Arbitration Rules of AFSA.
- 9.10 The decision resulting from such arbitration shall be subject to a right of appeal to a panel of 3 (three) arbitrators as provided for in the Commercial Arbitration Rules of AFSA whose decision shall, or, in the event that the single arbitrator's decision shall not have been taken on appeal, the decision of the simple arbitrator shall, in the absence of manifest error, be final and binding upon the Parties to the dispute, and may be made an order of any court of competent jurisdiction.
- 9.11 This 9 shall in no manner function to frustrate or preclude a Party from approaching a court of competent jurisdiction at any time for injunctive relief or an order for specific performance. The provisions of this 9 shall at all times be subordinated to the provisions of 7.

10 REPRESENTATIONS

The Parties acknowledge that, save as may otherwise be agreed in any binding documents as may later be executed by the Parties, no Party, nor any of its Associated Companies or Representatives nor any other person makes any representation, warranty or undertaking, express or implied, as to the accuracy, completeness or reasonableness of its (i) Confidential Information or (ii) any information supplied in terms of this Protocol, together ("**the Information**"), and no Party (save in the event of fraud) will have any liability to any other Party for the use by such Party or any other person, of the Information.

11 LIABILITY

Each Party will be responsible for any breach of any of the terms of this Protocol by it, any of its Associated Companies or any of its Representatives, to the other Party.

12 MISCELLANEOUS

12.1 Severability

The provisions of this Protocol shall be severable in the event that any provision is held by a court of competent jurisdiction to be invalid, void or otherwise unenforceable, and the remaining provisions shall remain enforceable to the fullest extent permitted by law.

12.2 Warranty of Authority

Each Party warrants to the other Party that it has power, authority and legal right to sign and perform this Protocol and that this Protocol has been duly authorised by all necessary actions of its directors or representatives and constitutes valid and binding obligations on it in accordance with the terms of this Protocol.

12.3 Whole Protocol

This Protocol constitutes the whole agreement between the Parties as to the subject-matter hereof and no agreement, representations or warranties between the Parties other than those set out herein are binding on the Parties.

12.4 Variation

No addition to or variation, consensual cancellation or novation of this Protocol and no waiver of any right arising from this Protocol or its breach or termination shall be of any force or effect unless reduced to writing and signed by all the Parties or their duly authorised representatives.

12.5 Relaxation

No latitude, extension of time or other indulgence which may be given or allowed by any Party to any other Party in respect of the performance of any obligation hereunder or enforcement of any right arising from this Protocol and no single or partial exercise of any right by any Party shall under any circumstances be construed to be an implied consent by such Party or operate as a waiver or a

novation of, or otherwise affect any of that Party's rights in terms of or arising from this Protocol or estop such Party from enforcing, at any time and without notice, strict and punctual compliance with each and every provision or term hereof.

12.6 **Assignment**

No Party may assign, or otherwise cede or delegate any rights, benefits or obligations pursuant to this Protocol without the prior written consent of the other Parties.