

# **AGREEMENT ON THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS BETWEEN THE REPUBLIC OF NAMIBIA AND THE SOCIALIST REPUBLIC OF VIETNAM**

THE REPUBLIC OF NAMIBIA AND THE SOCIALIST REPUBLIC OF VIETNAM (hereinafter referred to as "Contracting Parties");

DESIRING to intensify economic co-operation between both States;

INTENDING to create and maintain favorable and equitable conditions for investments by investors of either State in the territory of the other State;

RECOGNIZING that the encouragement and contractual protection of such investments are apt to stimulate private initiative and to increase the prosperity of both nations;

RECOGNIZING the important complementary role of foreign investment in the economic development process and the right of either Contracting Party to determine this role and to define the conditions under which foreign investment would participate in this process;

MINDFUL of the Agreed Minutes on the Cooperation and the Promotion of Trade and Investment Activities dated 25 October 2002.

HAVE AGREED as follows:

## **Article 1. Definitions**

For the purpose of the present Agreement:

1) The term "investment" means every kind of asset invested or re-invested by an investor of one Contracting Party in the territory of the other Contracting Party, provided that the investment has been made in accordance with the laws and regulations of the other Contracting Party, and includes in particular, though not exclusively:

(a) movable and immovable property and any other property rights such as mortgages, liens or pledges;

(b) shares and other kinds of interest or participation in a company;

(c) title to money which has been used to create an economic value, or to any performance under contract having an economic value, and associated with an investment;

(d) intellectual and industrial property rights such as patents, copyrights, trademarks, industrial designs and utility models, technical processes, know-how, trade names and goodwill;

(e) business concessions conferred by law or under contract, including concessions to search for, extract or exploit natural resources.

The extension or alteration of an investment, in accordance with the applicable law, is considered to be a new investment.

2) The term "investor" means with regard to either Contracting Party:

(a) any legal person incorporated or constituted under the law of a Contracting Party and having its seat in the territory of either Contracting Party;

(b) any legal person not incorporated or constituted under the law of a Contracting Party, having its seat in a third country, with a predominant interest of an investor of either Contracting Party

making an investment in the territory of the other Contracting Party.

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

4) The term "territory" includes the maritime areas adjacent to the coast of the Contracting Party concerned, to the extent to which that Contracting Party exercises sovereignty, sovereign rights or jurisdiction in those areas in conformity with international law.

## **Article 2. Promotion and Protection of Investments**

(1) Each Contracting Party shall, within the framework of its laws and regulations, promote investment through the protection in its territory of investments of investors of the other Contracting Party. Subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments.

(2) Investments admitted in accordance with paragraph (1) of Article 2 shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by arbitrary or discriminatory measures the management, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.

## **Article 3. Treatment of Investments**

(1) Each Contracting Party shall accord to investments treatment no less favorable than that accorded in like situations to investments of its own investors or of investors of a third State, subject to the right of each Contracting Party, in pursuance of domestic legislation,

(a) to reserve specific economic sectors and activities for, and

(b) to grant special incentives in order to stimulate the creation of local industries to, and

(c) to maintain separate regulations on investment licensing for a Contracting Party's own investors.

(2) Neither Contracting Party shall in its territory impose mandatory measures on investments by investors of the other Contracting Party concerning purchase of materials, means of production, operation, transport, marketing of its products or similar orders having unreasonable or arbitrary effects.

(3) The provisions of paragraph (1) Article 3 shall not be construed as to oblige one Contracting Party to extend to the investors of the other Contracting Party the present or future benefit of any treatment, preference or privilege resulting from

(a) any customs or economic union, common market, free trade area, monetary union or similar institution;

(b) any international agreement or arrangement or domestic legislation relating wholly or mainly to taxation;

(c) any regulation to facilitate economic activity in frontier regions.

## **Article 4. Expropriation, Compensation for Losses**

(1) Neither Contracting Party shall take, either directly or indirectly, measures of expropriation, nationalization or any other measure having the same nature or the same effect against investments by investors of the other Contracting Party, unless such measures are taken in the public interest, on a non-discriminatory basis and under due process of law, and provided that provisions be made for prompt, adequate and effective compensation. The compensation shall amount to the market value of the investment affected by such measures, immediately before such measures became public knowledge. The investor affected shall have the right, under the law of the Contracting Party which make the expropriation, to prompt review by a judicial or other independent authority of that Party, of the legality of the measure taken against the investment and of the valuation of the investment in accordance with the principles set out in this paragraph.

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

(3) Payments resulting from any provision in this Article shall be made without delay, in freely convertible currency, at the prevailing market rate of exchange on the date of payment with respect to spot transactions in the currency to be transferred and shall include interest at a commercial rate established on a market basis for such currency, be effectively

realizable and freely transferable.

## **Article 5. Transfers**

(1) Each Contracting Party shall without delay allow the transfer of

(a) returns;

(b) the proceeds in case of total or partial sale or disposal of the investment;

(c) funds required for the repayment of approved loans related to the investment;

(d) an approved part of the earnings and other remuneration of foreign nationals engaged from abroad, accrued in connection with an investment, and additional funds used for the management of the investment.

(2) Transfers of currency pursuant to paragraph (1) of Article 5 shall be made in the currency of origin of the investment or in any convertible currency if so agreed by the investor, at the prevailing market rate of exchange on the date of transfer with respect to spot transactions in the currency to be transferred.

(3) A transfer shall be deemed to have been made "without delay" within the meaning of paragraph (8) of Article 4 and paragraph (1) of Article 5 if effected within such period as is normally required for the completion of transfer formalities. The said period shall commence on the date on which application for transfer is made and may not exceed three (3) months.

(4) If and insofar as necessitated by grave balance of payment difficulties, either Contracting Party may, on the decision of the competent authority, restrict for a limited period of time the transfer of the proceeds in the event of a total or partial sale or disposal of the investment. In any case an annual minimum transfer of twenty per cent of such proceeds shall be allowed. The transfer shall be carried out at a rate of exchanges no less favorable than the rate of exchange applicable on the date on which application for transfer is made.

(5) Notwithstanding the provisions of paragraphs (1), (2) and (4) of Article 5, either Contracting Party may maintain laws and regulations

(a) requiring reports of currency transfer; and

(b) imposing income taxes by such means as a withholding tax applicable to dividends or other transfers.

Either Contracting Party may protect the rights of creditors, or ensure the satisfaction of judgments in ad judicatory proceedings, through the equitable, non-discriminatory and good faith application of its law.

## **Article 6. Subrogation**

If a Contracting Party or its designated agency effects a payment under any financial security against non-commercial risks given in respect of an investment by an investor in the territory of the other Contracting Party, the latter Contracting Party shall recognize the assignment of any right or claim of such investor to the former Contracting Party or its designated agency, and the right of the former Contracting Party or its designated agency to exercise by virtue of subrogation any such right or claim, to the same extent as its predecessor in title.

## **Article 7. Settlement of Disputes between an Investor and a Contracting Party**

(1) Any legal dispute arising directly out of an investment between an investor of one Contracting Party and the other Contracting Party should be settled amicably between the parties concerned.

(2) If such dispute has not been settled within three (3) months from the date of written notification of such dispute by the aggrieved party to the other, the dispute may, at the choice of the investor, be submitted:

(a) to the competent courts of the Contracting Party in whose territory the investment is made; or

(b) to arbitration by the International Centre for the Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, opened for signature at Washington, DC (USA) on 18 March 1965, in the event that both Contracting Parties shall have become party to this Convention; or

(c) to arbitration by the Additional Facility of the International Centre for the Settlement of Investment Disputes, if only one of the Contracting Parties is a signatory to the Convention referred to in sub-paragraph (b) above; or

(d) to ad hoc arbitration in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) as at present in force.

(3) Each Contracting Party hereby irrevocably consents to the submission of a dispute to international arbitration as provided for in paragraph 2 of this Article.

(4) During arbitration proceedings or the enforcement of an award, the Contracting Party being party to the dispute may not raise the objection that the investor party to the dispute has received compensation under an insurance in respect of all or part of the damage.

(5) The award shall be final and binding on the parties to the dispute and shall be enforced in accordance with national law.

## **Article 8. Settlement of Disputes between the Contracting Parties**

(1) The Contracting Parties irrevocably consent that any dispute concerning the interpretation or application of the present Agreement which is not resolved through consultations, be submitted, upon the request of either Contracting Party, to an arbitral tribunal composed of three members for final and binding decision. Such arbitral tribunal shall be constituted ad hoc as follows: each Contracting Party shall appoint one member and the two members thus appointed shall select a national of a third State who upon approval by the Contracting Parties shall be appointed chairperson of the tribunal.

(2) If one of the Contracting Parties fails to appoint a member to the tribunal and has not proceeded to do so within three months after an invitation from the other Contracting Party to make such appointment, the latter Contracting Party may invite the President of the International Court of Justice to make the necessary appointment.

(3) If the two members of the arbitral tribunal are unable to reach agreement within two months following their appointment on the choice of the chairperson, either Contracting Party may invite the President of the International Court of Justice to make the necessary appointment.

(4) If, in the cases provided for in paragraphs (2) and (8) of this Article, the President of the International Court of Justice is a national of either Contracting Party or is otherwise prevented from discharging the said function, the member next in seniority of the Court who is not a national of either Contracting Party or is not otherwise prevented from discharging the said function shall be invited to make the necessary appointments.

(5) The arbitral tribunal may at any stage of the proceedings propose to the Contracting Parties that the dispute be settled amicably. The foregoing provisions shall not prejudice settlement of the dispute ex aequo et bono if the Contracting Parties so agree.

(6) Unless the Contracting Parties decide otherwise, the arbitral tribunal shall determine its own procedure.

(7) The arbitral tribunal shall reach its decision by a majority of votes. Such decision shall be final and binding on the Contracting Parties. Each Contracting Party shall bear the cost of its own member of the arbitral tribunal and of its representation in the arbitral proceedings. The cost of the chairperson and the remaining costs shall be borne in equal parts by the Contracting Parties. The arbitral tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the Contracting Parties, and this award shall be binding on both Contracting Parties.

(8) Issues subject to dispute referred to in paragraph (1) of this Article shall be decided in accordance with the provisions of this Agreement and the generally accepted principles of international law.

## **Article 9. Amendments**

The provisions of the present Agreement may be amended at any time and in such manner as may be agreed between the Contracting Parties. Such amendment shall enter into force in accordance with the provisions of Article 12.

## **Article 10. Consultations**

Either Contracting Party may propose to consult on any matter affecting the application of the present Agreement. The consultation shall be held on the proposal of one of the Contracting Parties at a place and at a time agreed upon through diplomatic channels.

## **Article 11. Application of the Agreement**

The present Agreement shall also apply to investments in the territory of a Contracting Party made in accordance with its legislation by investors of the other Contracting Party prior to the entry into force of the present Agreement.

## **Article 12. Entry Into Force**

The present Agreement shall be subject to ratification and shall enter into force on the first day of the second month following the date on which the Contracting Parties have notified each other in writing that the constitutional requirements in their respective countries for the conclusion and entry into force of international agreements have been complied with.

## **Article 13. Duration and Termination**

(1) The present Agreement shall remain in force for a period of fifteen years.

(2) Unless notice of termination has been given by either Contracting Party at least six months before the date of the expiry of its validity, the present Agreement shall be extended tacitly for periods of ten years, whereby each Contracting Party reserves the right to terminate the Agreement upon notice of at least six months before the date of expiry of the current period of validity.

(3) In respect of investments made prior to the date of termination of the present Agreement the foregoing Articles shall continue to be effective for a further period of fifteen years from that date.

IN WITNESS WHEREOF, the undersigned representatives, duly authorized thereto, have signed the present Agreement. Done at Ha Noi, on this 30 day of May 2003 in duplicate in the English and Vietnamese languages, both texts being equally authentic.

**FOR THE REPUBLIC OF NAMIBIA**

**Jesaya Nyamu, M.P.**

**Minister of Trade and Industry**

**FOR THE SOCIALIST REPUBLIC OF VIETNAM**

**Vo Hong Phuc**

**Minister of Planning and Investment**

## **Protocol to the agreement on the encouragement and reciprocal protection of investments between the republic of namibia and the socialist republic of vietnam**

At the occasion of the signing of the Agreement on the Encouragement and Reciprocal Protection of Investments Between the Republic of Namibia and the Socialist Republic of Vietnam, the Contracting Parties have agreed on the following provisions which shall be regarded as an integral part of the said Agreement:

### **Ad Article 3 Paragraph 2:**

The Socialist Republic of Vietnam wishes to qualify paragraph 2 by adding the words: "Except as otherwise provided for under its domestic legislation", which qualification shall cease to apply once the Socialist Republic of Vietnam has acquired member status of the World Trade Organization (WTO).

Done at Ha Noi, on this 30 day of May 2003 in duplicate in the English and Vietnamese languages, both texts being equally authentic.

**FOR THE REPUBLIC OF NAMIBIA**

**Jesaya Nyamu, M.P.**

**Minister of Trade and Industry**

**FOR THE SOCIALIST REPUBLIC OF VIETNAM**

**Vo Hong Phuc**

**Minister of Planning and Investment**