

# AGREEMENT FOR THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS BETWEEN THE GOVERNMENT OF THE REPUBLIC OF NICARAGUA AND THE GOVERNMENT OF THE REPUBLIC OF EL SALVADOR

The Government of the Republic of Nicaragua and the Government of the Republic of El Salvador, hereinafter referred to as the "Parties";

Desiring to consolidate economic cooperation between the two States and to create favorable conditions for Salvadoran investments in Nicaragua and Nicaraguan investments in El Salvador;

Convinced that the promotion and protection of such investments leads to stimulate transfers of capital and technology between the two countries, in the interest of their economic development.

Have agreed as follows:

## Article 1. Definitions

For the purposes of this Agreement, the following definitions shall apply:

**Enterprise:** any entity duly constituted or organized under applicable law, whether or not for profit and whether privately or state owned or controlled, such as: corporations, trusts, partnerships, sole proprietorships, branches, joint ventures, associations or other enterprises;

**Investment:** all types of assets and rights of any nature, legally acquired with resources transferred to the territory of a Party, or reinvested in it, by investors of the other Party, such as:

- a) shares and any other form of participation in the capital stock of companies incorporated or organized under the laws of the other Party;
- b) rights derived from all types of contributions, made for the purpose of creating economic value (or obligations, credits and rights to any benefit having economic value);
- c) movable and immovable property, as well as other rights in rem, such as mortgages, pledges, usufruct and similar rights;
- d) rights in the field of intellectual property; and
- e) rights to carry out economic and commercial activities, granted by the applicable legislation or by virtue of a contract;

but shall not be understood as an investment:

- a) an obligation to pay, nor the granting of a credit to the State or a State enterprise;
- b) pecuniary claims arising exclusively from:
  - (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of the other Party;
  - (ii) or the extension of credit in connection with a commercial transaction, the maturity date of which is less than three years.

The term "**investor**" means, for each Party, the following persons who have made investments in the territory of the other Party in accordance with this Agreement:

- a) Natural persons who, under the laws of that Party, are considered nationals of that Party;
- b) Legal entities, including partnerships, corporations, business associations or any other entity incorporated or otherwise duly organized under the laws of that Party, that have their principal place of business, as well as their effective economic activities, in the territory of that Party.

**Nationals:** means all natural persons who possess the nationality of one of the Parties, in accordance with its national legislation.

**Territory:** means the territory of each Party, under its jurisdiction and sovereignty, in accordance with its national legislation and International Law.

## **Article 2. Scope of Application and Extent of Obligations**

1) This Agreement shall apply to measures adopted or maintained by a Party relating to:

- a) investors of the other Party in all matters directly related to their investment;
- b) investments of investors of the other Party made in the territory of the Party after the entry into force of this Agreement. However, it shall also apply to investments made prior to its entry into force and which have the quality of foreign investment, in accordance with the provisions of paragraph "2 c)" of this Article;

2) This Agreement shall not apply to:

- a) economic activities reserved to each Party, in accordance with its legislation in force on the date of signature of this Agreement.
- b) measures adopted by a Party to restrict the participation of investments of investors of the other Party in its territory, for reasons of public order or national security.
- c) disputes or claims arising prior to its entry into force, or related to events occurring prior to its entry into force, even if their effects remain even after its entry into force.

## **Article 3. National Treatment**

Each Party in its territory shall accord to investments made by investors of the other Party fair and equitable treatment which in no case shall be less favorable than that which it accords to its own investors or investors of any third State, whichever is more favorable from the standpoint of the investor.

## **Article 4. Most Favoured Nation Treatment**

1) Each Party shall accord to investors of the other Party and to investments of investors of the other Party treatment no less favorable than that it accords to investors and investments of investors of the other Party or of any non-Party, except as provided in paragraph (2) of this Article.

2) If a Party has accorded special treatment to investors or their investments from another non-Party by virtue of conventions establishing provisions for the avoidance of double taxation, free trade areas, customs unions, common markets, economic or monetary unions, that Party shall not be obliged to accord the treatment in question to investors or investments of the other Party.

## **Article 5. Performance Requirements**

1) Neither Party may impose any of the following requirements with respect to the permission for the establishment or acquisition of an investment, or impose any of the following requirements with respect to the subsequent regulation of that investment:

- a) export a specified level or percentage of goods or services;
- b) to achieve a specified level or percentage of domestic content.
- c) to purchase, use or accord preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;

d) to establish any kind of relationship between the volume or value of imports and the volume or value of exports or with the volume of foreign exchange inflows related to such investments; or

e) to transfer technology, a production process or other proprietary knowledge to a person in its territory not related to the transferor, except where the requirement, commitment or obligation is imposed or enforced by a court, administrative tribunal or competition authority, either to remedy an alleged violation of competition laws or to act in a manner inconsistent with other provisions of this Agreement;

2) Nothing in the preceding paragraph shall prevent a Party from offering benefits and incentives conditioned on the requirements set forth in that paragraph.

## **Article 6. Migratory Status of Investors**

Subject to its domestic legislation regarding the entry and stay of foreigners, each Party shall permit the entry and stay in its territory of investors of the other Party and persons employed by them, by virtue of occupying senior management positions or by virtue of their expertise, for the purpose of establishing, developing, managing or advising on the operation of the investment, in which such investors have committed capital or other resources.

## **Article 7. Transfers**

1) Each Party shall permit all transfers relating to an investment of an investor of one Party in the territory of the other Party to be made freely and without delay in accordance with its domestic law. Such transfers include:

a) profits, dividends, interest, capital gains, royalty payments and other amounts derived from the investment;

b) amounts allocated to cover expenses related to the administration of the investment;

c) amounts derived from the sale or liquidation, in whole or in part, of the investment;

d) payments made under a contract to which an investor is a party in connection with its investment, including payments made under a loan agreement;

e) payments arising from compensation for expropriation; and

f) payments arising from the application of the dispute settlement provisions of this Agreement;

2) Each Party shall allow transfers to be made in freely convertible currencies at the prevailing market exchange rate on the date of transfer in accordance with the domestic legislation of each country.

3) Notwithstanding the provisions of this Article, a Party may prevent transfers through the equitable and non-discriminatory application of its legislation in the following cases:

a) Bankruptcy, insolvency or protection of creditors' rights;

b) Criminal or administrative offenses;

c) Guarantee of compliance with judgments in a contentious proceeding;

d) Non-compliance with tax obligations;

e) Non-compliance with labor obligations; or

f) Balance of payments problems.

## **Article 8. Expropriation and Compensation**

1) Neither Party shall expropriate or nationalize an investment covered, directly or indirectly, by the application of measures tantamount to expropriation or nationalization ("expropriation"), except for public utility or social interest purposes, in an impartial manner, upon payment of prompt, adequate and effective compensation, in accordance with due process of law under the laws of each Party.

2) Compensation shall be paid without delay, shall be equal to the fair market value of the expropriated investment immediately before the expropriatory action was taken ("the date of expropriation") and shall be fully realizable and freely transferable. The fair market value will not be affected by any change in value due to the expropriation action becoming

known prior to the expropriation date.

3) If the fair market value is expressed in a freely usable currency, the compensation payable shall not be less than the fair market value on the date of expropriation, plus interest at a justified commercial bank rate for that currency from the date of expropriation to the date of payment.

4) If the fair market value is expressed in a currency that is not freely usable, the compensation payable - converted into the currency of payment at the exchange rate prevailing in the market on the date of payment - shall not be less than:

a) The fair market value on the date of expropriation, converted into a freely usable currency at the exchange rate prevailing in the market on such date, plus.

b) Interest at a justified commercial bank rate for such freely usable currency, accrued from the date of expropriation until the date of payment.

## **Article 9. Compensation for Losses**

Each Party shall accord to investors of the other Party, in respect of investments which suffer losses in its territory due to war or any other armed conflict, a state of national emergency, civil disturbance and other similar events, non-discriminatory treatment and shall receive in respect of redress, compensation or other settlement, treatment no less favorable than that accorded by the other Party to domestic investors or investors of any Third State. These amounts shall be freely transferable.

## **Article 10. Measures Relating to the Environment**

Each Party may adopt, maintain, or enforce any measure consistent with the provisions of this Agreement that it considers appropriate to ensure that investments in its territory comply with the environmental laws of that Party.

## **Article 11. Promotion and Protection of Investments**

1) Each Party shall, in accordance with its laws and regulations, promote economic cooperation through the protection in its territory of investments of nationals of the other Party. Subject to the right to exercise the powers conferred by its laws or regulations, each Party shall admit such investments.

2) Investments made in accordance with the laws and regulations of the Party in the territory where they have been made enjoy the protection of this Agreement.

3) Each Party shall protect within its territory investments made by investors of the other Party, in accordance with its laws and regulations, and shall not hinder the management, use, enjoyment, extension, sale and liquidation of such investments by unjustified or discriminatory measures. Income derived from an investment, as well as income derived from the reinvestment thereof, shall enjoy the same protection as the investment itself.

## **Article 12. Subrogation**

1) Where a Party or an agency authorized by it has granted an insurance contract or other financial guarantee against non-commercial risks in respect of an investment of one of the investors in the territory of the other Party, the latter Party shall recognize the rights of the former Party to subrogate itself to the rights of the investor, where it has made a payment under such contract or guarantee.

2) Where a Party has paid its investor and thereby assumed his rights and benefits, such investor may not claim such rights and benefits from the other Party, unless expressly authorized by the first Party.

## **Article 13. Settlement of Disputes between an Investor and a Party of the other Party**

1) Disputes arising within the scope of this Agreement between a Party and an investor of the other Party who has made investments in the territory of the first Party shall, to the extent possible, be settled by means of friendly consultations.

2) If such consultations fail to bring about a settlement within five months from the date of the request for settlement, the investor may refer the dispute

a) to the competent courts of the Party in whose territory the investment was made; or

b) to international arbitration by] the International Centre for 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 on March 18, 1965; or

c) the Additional Facility Rules for the administration of conciliation, arbitration and fact-finding proceedings by the ICSID Secretariat.

3) To this end, each Party gives its advance and irrevocable consent that any dispute may be submitted to this arbitration.

4) Once the investor has referred the dispute to the competent national court of the Party in whose territory the investment was made or to the arbitral tribunal, the choice of either procedure shall be final.

The arbitral tribunal shall rule on the basis of:

a) The provisions of this Agreement;

b) the national law of the Party in whose territory the investment has been made, including the terms of any special agreements concluded in connection with the investment; and

c) the universally recognized rules and principles of international law.

5) Arbitral awards shall be final and binding on the disputing Parties and shall be enforced in accordance with the domestic law of the Party in whose territory the investment has been made.

6) The Parties shall refrain from dealing, through diplomatic channels, with matters related to disputes submitted to judicial proceedings or to international arbitration, in accordance with the provisions of this Article, until the corresponding proceedings are concluded, except in the case in which the other party to the dispute has not complied with the judicial award or the decision of the Arbitral Tribunal, in the terms established in the respective judgment or decision.

## **Article 14. Differences between the Parties**

1) Any differences arising between the Parties concerning the interpretation or application of this Agreement shall, as far as possible, be settled through diplomatic channels.

2) If a dispute between the Parties cannot be settled in this way, it shall be submitted to an arbitral tribunal at the request of one or other of the Parties.

3) Such arbitral tribunal shall be constituted for each individual case as follows: each Party shall, within two months of receipt of the request for arbitration, appoint one member of] the tribunal. The two members shall then elect a national of a third State, who with the approval of both Parties shall be appointed President of the Tribunal. The Chairman shall be appointed within two months from the date of the appointment of the other two members. The Chairman of the Arbitral Tribunal shall be a national of a State with which both Parties maintain diplomatic relations.

4) If within the time limits provided for in the preceding paragraph of this Article the necessary appointments have not been made, either Party may, in the absence of other arrangements, invite the Chairman of the International Court of Justice to make the necessary appointments. If the President is a national of one of the two Parties or is otherwise unable to perform this function, the Vice-President shall be invited to make the necessary appointments. If the Vice-Chairman is a national of one of the two Parties or if he is also unable to perform this function, the member of the International Court of Justice next in order of rank who is not a national of the two Parties shall be invited to make the necessary appointments.

5) The Arbitral Tribunal shall make its decision by majority vote. Such decision shall be binding on both Parties. Each Party shall bear the expenses of its own member of] the Tribunal and of its representation in the arbitral proceedings; the expenses of] the Chairman and other expenses shall be borne equally by the Parties. However, the Tribunal may, in its decision, provide that a greater proportion of the expenses shall be borne by one of the two Parties and this award shall be binding on both Parties. The Tribunal shall determine its own procedure.

## **Article 15. Entry Into Force and Duration**

1) This Agreement shall enter into force thirty days after the date on which the Parties have notified each other in writing that the procedures required by the Constitutions of their respective countries have been complied with and shall remain in force for a period of ten years.

2) Unless one of the Parties has given notice of determination at least twelve months prior to the date of expiration of its

validity, this Agreement shall be tacitly extended for an additional period of ten years, whereupon each Party reserves the right to terminate the Agreement by giving notice at least twelve months prior to the date of termination of the current period of validity.

3) With respect to investments made before the date of expiration of this Agreement, the above Articles shall continue in force for the additional period of ten years from that date.

4) This Agreement shall apply whether or not diplomatic relations exist between the Parties.

In witness whereof, the undersigned representatives, duly authorized to that effect, have signed this Agreement in Managua, Nicaragua on the twenty-third day of January, nineteen hundred and ninety-nine, in two equally authentic copies.