Agreement between the Government of the Republic of Finland and the Government of the Republic of Namibia on the Promotion and Protection of Investments

The Government of the Republic of Finland and the Government of the Republic of Namibia, hereinafter referred to as the "Contracting Parties",

RECOGNISING the need to protect investments of the investors of one Contracting Party in the territory of the other Contracting Party on a non-discriminatory basis;

DESIRING to promote greater economic co-operation between them, with respect to investments by nationals and companies of one Contracting Party in the territory of the other Contracting Party;

RECOGNISING that agreement on the treatment to be accorded such investments will stimulate the flow of private capital and the economic development of the Contracting Parties;

AGREEING that a stable framework for investments will contribute to maximising the effective utilisation of economic resources and improve living standards;

RECOGNISING that the development of economic and business ties can promote respect for internationally recognised labour rights;

AGREEING that these objectives can be achieved without relaxing health, safety and environmental measures of general application; and

Having resolved to conclude an Agreement concerning the promotion and protection of investments;

HAVE AGREED AS FOLLOWS:

Article 1. Definitions

For the purpose of this Agreement:

1. The term "investment" means every kind of asset established or acquired by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter Contracting Party, including in particular, though not exclusively:

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

(b) shares, stocks, debentures or other form of participation in a company;

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

(d) intellectual property rights, such as patents, copyrights, technical processes, trade marks, industrial designs, business names, geographical indications, know-how, and goodwill; and

(e) concessions conferred by law, by an administrative act or under a contract by a competent authority, including concessions to search for, develop, extract or exploit natural resources.

Investments made in the territory of one Contracting Party by any legal entity of that same Contracting Party but actually owned or controlled by investors of the other Contracting Party shall likewise be considered investments of investors of the latter Contracting Party if they have been made in accordance with the laws and regulations of the former Contracting Party.

Any change in the form in which assets are invested or reinvested does not affect their character as investments provided that such change is in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made.

2. The term "returns" means the amounts yielded by investments and shall in particular, though not exclusively, include profits, dividends, interest, royalties, capital gains or any payments in kind related to an investment.

Reinvested returns shall enjoy the same treatment as the original investment.

3. The term "investor" means for either Contracting Party, the following subjects who invest in the territory of the other Contracting Party in accordance with the laws of the latter Contracting Party and the provisions of this Agreement:

(a) any natural person who is a national of either Contracting Party in accordance with its laws and domiciled within the territory of either Contracting Party or

(b) any legal entity such as company, corporation, firm, partnership, business association, institution or organisation, incorporated or constituted in accordance with the laws and regulations of the Contracting Party and registered and having its seat within the jurisdiction of that Contracting Party, irrespective of whether or not for profit and whether its liabilities are limited or not.

4. The term "territory" means the land territory, internal waters and territorial sea of the Contracting Party and the airspace above them, as well as the maritime zones beyond the territorial sea, including the seabed and subsoil, over which that Contracting Party exercises sovereign rights or jurisdiction in accordance with its national laws in force and international law, for the purpose of exploration and exploitation of the natural resources of such areas.

Article 2. Promotion and Protection of Investments

1. Each Contracting Party shall promote in its territory investments by investors of the other Contracting Party and shall, in accordance with its laws and regulations, admit such investments.

2. Each Contracting Party shall in its territory accord to investments and returns of investments of investors of the other Contracting Party fair and equitable treatment and full and constant protection and security.

3. Neither Contracting Party shall in its territory impair by unreasonable or arbitrary measures the acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposal of investments of investors of the other Contracting Party.

Article 3. Transparency

1. Each Contracting Party shall publish or otherwise make publicly available its laws, regulations, administrative rulings where applicable and judicial decisions of general application as well as international agreements which may affect the investments of investors of one Contracting Party in the territory of the other Contracting Party.

2. Nothing in this Agreement shall require a Contracting Party to furnish or allow access to any confidential or proprietary information, including information concerning particular investors or investments, the disclosure of which would impede law enforcement or be contrary to its laws protecting confidentiality or prejudice legitimate commercial interests of particular investors.

Article 4. Treatment of Investments

1. Each Contracting Party shall accord to investors of the other Contracting Party and to their investments, a treatment no less favourable than the treatment it accords to its own investors and their investments with respect to the acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposal of investments.

2. Each Contracting Party shall accord to investors of the other Contracting Party and to their investments, a treatment no less favourable than the treatment it accords to investors of the most favoured nation, and to the investments of investors of the most favoured nation, with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment, and sale or other disposal of investments.

3. Each Contracting Party shall accord to investors of the other Contracting Party and to their investments the better of the treatment required by paragraph 1 and paragraph 2 of this Article, whichever is the more favourable to the investors or investments.

4. 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.

5. Notwithstanding the provisions of paragraph 1 of this Article, neither Contracting Party shall be precluded from designating, in accordance with its laws and regulations a business or category of business as reserved for its own investors provided that such designation:

(a) is made for the purpose of promoting small and medium sized businesses only; and

(b) shall not negatively affect the rights which at the time of designation have already accrued to an investment or an investor of the other Contracting Party.

Article 5. Exceptions

The provisions of this Agreement shall not be construed so as to oblige one Contracting Party to extend to the investors and to the investments by investors of the other Contracting Party the benefit of any treatment, preference or privilege by virtue of any existing or future:

(a) free trade area, customs union, common market, economic and monetary union or other similar regional economic integration agreement, including regional labour market agreements to which one of the Contracting Parties is or may become a party;

(b) agreement for the avoidance of double taxation or other international agreement relating wholly or mainly to taxation;

(c) multilateral agreement relating wholly or mainly to investments;

(d) arrangement to facilitate economic activity in frontier regions.

Article 6. Expropriation

1. Investments by investors of a Contracting Party in the territory of the other Contracting Party shall not be expropriated, nationalised or subjected to any other measures, direct or indirect, having an effect equivalent to expropriation or nationalisation (hereinafter referred to as "expropriation"), except for a purpose which is in the public interest, on a non-discriminatory basis, in accordance with due process of law and against prompt, adequate and effective compensation.

2. Such compensation shall amount to the value of the expropriated investment at the time immediately before the expropriation or impending expropriation was taken or became public knowledge, whichever is the earlier. The value shall be determined in accordance with generally accepted principles of valuation taking into account, inter alias, the capital invested, replacement value, appreciation, current returns, the projected flow of future returns, goodwill and other relevant factors.

3. Compensation shall be fully realisable and shall be paid without delay. It shall include interest at a commercial rate established on a market basis for the currency of payment from the date of dispossession of the expropriated property until the date of actual payment.

4. Where a Contracting Party expropriates the assets of a company which was incorporated or constituted under the law in force in its own territory, and in which investors of the other Contracting Party own shares, it shall ensure that the provisions of paragraph 1 to 3 of this Article are applied to the extent necessary to ensure compensation in respect of their investments to such investors of the other Contracting Party who are owners of those shares.

5. In case that the object of expropriation is a joint-venture constituted in the territory of one of the Contracting Parties, the compensation to be paid to the investor of the other Contracting Party shall be calculated taking into account the share of such investor in the joint-venture in accordance with its basic documents.

6. The investor whose investments are expropriated shall have the right to prompt review of its case and of valuation of its investments by a judicial or other competent authority of that Contracting Party, in accordance with the principles set out in this Article.

Article 7. Compensation for Losses

1. Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, a state of national emergency, revolt, insurrection or riot in the territory of the latter

Contracting Party, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or other settlement, a treatment no less favourable than the one accorded by the latter Contracting Party to its own investors or investors of the most favoured nation, whichever, according to the investor, is the more favourable to him.

2. Without prejudice to paragraph 1 of this Article, investors of one Contracting Party who, in any of the situations referred to in that paragraph, suffer losses in the territory of the other Contracting Party, resulting from:

(a) requisitioning of its investment or a part thereof by the latter's armed forces or authorities, or

(b) destruction of its investment or a part thereof by the latter's armed forces or authorities, which was not caused in combat action or was not required by the necessity of the situation,

shall be accorded by the latter Contracting Party a restitution or compensation which in either case shall be prompt, adequate and effective and, with respect to compensation, shall include interest at a commercial rate established on a market basis for the currency of payment from the date of requisitioning or destruction until the date of actual payment.

3. Investors whose investments suffer losses in accordance with this Article, shall have the right to prompt review of its case and of valuation of its investments by a judicial or other competent authority of that Contracting Party, in accordance with the principles set out in this Article.

Article 8. Free Transfer

1. Each Contracting Party shall ensure to investors of the other Contracting Party the free transfer, into and out of its territory, of their investments. Transfer payments related to investments shall include in particular, though not exclusively:

(a) principal and additional amounts to maintain, develop or increase the investment;

(b) returns;

(c) proceeds obtained from the total or partial sale or disposal of an investment, including the sale of shares;

(d) amounts required for the payment of expenses which arise from the operation of the investment, such as management fees, licence fees or other similar expenses;

(e) repayment of loans; in the case of the Republic of Namibia after the repayment schedule has been approved by the Bank of Namibia or other competent authority;

(f) compensation payable pursuant to Articles 6 and 7;

(g) payments arising out of the settlement of a dispute;

(h) legitimate earnings of foreign nationals engaged from abroad and working in connection with an investment.

2. Each Contracting Party shall further ensure that transfers referred to in paragraph 1 of this Article shall be made without any restriction or delay in a freely convertible currency and at the prevailing market rate of exchange applicable on the date of transfer with respect to the currency to be transferred and shall be immediately transferable.

3. A transfer shall be deemed to have been made "without delay" within the meaning of Article 6 and Article 8 if effected within such a period as is normally required for the completion of transfer formalities.

4. In the absence of a market rate of exchange, the rate to be used shall be the most recent exchange rate for the conversion of the currencies into Special Drawing Rights.

5. In case of delay in transfer caused by the host Contracting Party, transfers shall also include interest at a commercial rate established on a market basis for the currency in question from the date on which the transfer was requested until the date of actual transfer.

6. Notwithstanding the provisions of this Article, either Contracting Party may maintain laws and regulations requiring reports of currency transfer.

7. Either Contracting Party may protect the rights of creditors or ensure the satisfaction of judgements in adjudicatory proceedings, through the equitable, nondiscriminatory and good faith application of its law.

Article 9. Subrogation

If a Contracting Party or its designated agency makes a payment under an indemnity, guarantee or contract of insurance given in respect of an investment of an investor in the territory of the other Contracting Party, the latter Contracting Party shall recognise the assignment of any right or claim of such an 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 and claim to the same extent as its predecessor in title.

Article 10. Consultations

The Contracting Parties shall, at the request of either Contracting Party, hold consultations for the purpose of reviewing the implementation of this Agreement and studying any issue that may arise from this Agreement. Such consultations shall be held between the competent authorities of the Contracting Parties at a place and at a time agreed on through appropriate channels.

Article 11. Disputes between an Investor and a Contracting Party

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

2. If the dispute has not been settled within three (3) months from the date on which it was raised in writing, 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 on 18 March 1965; or

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

(d) to an ad hoc arbitration tribunal which, unless otherwise agreed on by the parties to the dispute, is to be established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

3. An investor who has submitted the dispute to a national court may nevertheless have recourse to one of the arbitral tribunals mentioned in paragraphs 2 (b) to (d) of this Article if, before a judgement has been delivered on the subject matter by a national court, the investor declares not to pursue the case any longer through national proceedings and withdraws the case.

4. Each Contracting Party hereby gives its irrevocable consent to the submission of a dispute to international arbitration in accordance with the provisions of this Article.

5. Neither of the Contracting Parties, which is a party to a dispute, can raise an objection, at any phase of the arbitration procedure or of the execution of an arbitral award, on account of the fact that the investor, which is the other party to the dispute, has received an indemnification covering a part or the whole of its losses by virtue of an insurance.

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

Article 12. Disputes between the Contracting Parties

1. Disputes between the Contracting Parties concerning the interpretation and application of this Agreement shall, as far as possible, be settled through diplomatic channels.

2. If the dispute cannot thus be settled within six (6) months following the date on which such negotiations were requested by either Contracting Party, it shall at the request of either Contracting Party be submitted to an Arbitral Tribunal.

3. Such an Arbitral Tribunal shall be constituted for each individual case in the following way. Within two (2) months of the receipt of the request for arbitration, each Contracting Party shall appoint one member then select a national of a third State who on approval by the two Contracting Parties shall be appointed Chairman of the Tribunal.

The Chairman shall be appointed within four (4) months from the date of appointment of the other two members.

4. If any necessary appointment has not been made within the periods specified in paragraph 3 of this Article, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to

make the necessary appointments. If the President is a national of either Contracting Party or is otherwise prevented from discharging the said function, the Member of the International Court of Justice next in seniority 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 shall reach its decision by a majority of votes. The decisions of the Tribunal shall be final and binding on both Contracting Parties. Each Contracting Party shall bear the costs of the member appointed by that Contracting Party and of its representation at the arbitral proceedings.

Both Contracting Parties shall assume an equal share of the cost of the Chairman, as well as any other costs. The Tribunal may make a different decision regarding the sharing of the costs. In all other respects, the Arbitral Tribunal shall determine its own rules of procedure.

6. 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 recognised principles of international law.

Article 13. Permits

1. Each Contracting Party shall, subject to its laws and regulations, treat favourably any applications relating to investments and favourably consider granting the necessary permits required in its territory in connection with investments by investors of the other Contracting Party.

2. Subject to its laws and regulations relating to the entry and sojourn of aliens, individuals working for an investor of one Contracting Party, as well as members of their household, shall be permitted to enter into, remain on and leave the territory of the other Contracting Party for the purpose of carrying out activities associated with investments in the territory of the other Contracting Party.

Article 14. Application of other Rules

1. If the provisions of law of either Contracting Party or obligations under international law, existing at present or established hereafter between the Contracting Parties in addition to this Agreement, contain a regulation, whether general or specific, entitling investments made by investors of the other Contracting Party to a treatment more favourable than is provided by this Agreement, such provisions shall, to the extent that they are more favourable to the investor, prevail over this Agreement.

2. Each Contracting Party shall observe any other obligation it may have with regard to a specific investment of an investor of the other Contracting Party.

Article 15. Application of the Agreement

1. This Agreement shall apply to all investments made by investors of either Contracting Party in the territory of the other Contracting Party, whether made before or after the entry into force of this Agreement, but shall not apply to any dispute concerning an investment which arose or any claimcwhich was settled before its entry into force.

2. The provisions of this Agreement shall apply irrespective of the existence of diplomatic or consular relations between the Contracting Parties.

Article 16. General Exceptions

1. Nothing in this Agreement shall be construed as preventing a Contracting Party from taking any action necessary for the protection of its essential security interests in time of war or armed conflict, or other emergency in international relations.

2. Provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination by a Contracting Party, or a disguised investment restriction, nothing in this Agreement shall be construed as preventing the Contracting Parties from taking any measure necessary for the maintenance of public order or in circumstances of a threat to the life or health of humans, animals or plants.

3. The provisions of this Article shall not apply to Article 6, Article 7 or paragraph 1 (f) of Article 8 of this Agreement.

Article 17. Entry Into Force, Duration and Termination

1. The Contracting Parties shall notify each other when their constitutional requirements for the entry into force of this Agreement have been fulfilled. The Agreement shall enter into force on the thirtieth day following the date of receipt of the last notification.

2. This Agreement shall remain in force for a period of twenty (20) years and shall thereafter remain in force until either Contracting Party notifies the other in writing of its intention to terminate the Agreement in twelve (12) months.

3. In respect of investment made prior to the date of termination of this Agreement the provisions of Articles 1 to 16 shall remain in force for a further period of fifteen (15) years from the date of termination of this Agreement.

IN WITNESS WHEREOF, the undersigned representatives, duly authorised thereto, have signed the present Agreement.

Done in duplicate at Helsinki on the 31st of October 2002 in the English language.

For the Government of the Republic of Finland

For the Government of the Republic of Namibia