Agreement between the Swiss Confederation and the Republic of Namibia on the Promotion and Reciprocal Protection of Investments

The Swiss Federal Council and the Government of the Republic of Namibia, hereinafter referred to as "the Contracting Parties";

Desiring to intensify economic cooperation to the mutual benefit of both States;

Intending to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party;

Recognizing the need to promote and protect foreign investments with the aim to foster the economic prosperity of both States;

Have agreed as follows:

Article 1. Definitions

For the purpose of this Agreement:

(1) The term "investor" refers with regard to either Contracting Party to

(a) Natural persons who, according to the law of that Contracting Party, are considered to be its nationals;

(b) Legal entities, including companies, corporations, business associations and other organisations, which are constituted or otherwise duly organised under the law of that Contracting Party and have their seat, together with real economic activities, in the territory of that same Contracting Party;

(c) Legal entities not established under the law of that Contracting Party but effectively controlled by natural persons as defined in (a) above or by legal entities as defined in (b) above.

(2) The term "investments" shall include every kind of assets and more particularly:

(a) Movable and immovable property as well as any other rights in rem, such as servitudes, mortgages, liens, pledges;

(b) Shares, parts or any other kinds of participation in companies;

(c) Claims to money or to any performance having an economic value;

(d) Copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin), know-how and goodwill;

(e) Concessions under public law, including concessions to search for, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of the authority in accordance with the law.

(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 State concerned, to the extent to which that State may exercise sovereign rights or jurisdiction in those areas according to international law.

Article 2. Scope of Application

The present Agreement shall apply to investments in the territory of one Contracting Party made in accordance with its laws and regulations by investors of the other Contracting Party, whether prior to or after the entry into force of the Agreement.

It shall, however, not be applicable to divergencies or disputes the causes of which have arisen prior to its entry into force.

Article 3. Promotion, Admission

(1) Each Contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting Party and admit such investments in accordance with its laws and regulations.

(2) When a Contracting Party shall have admitted an investment on its territory it shall grant, in accordance with its laws and regulations, the necessary permits in connection with such an investment and with the carrying out of licensing agreements and contracts for technical, commercial or administrative assistance. Each Contracting Party shall, whenever needed, endeavour to issue the necessary authorizations concerning the activities of consultants and other qualified persons of foreign nationality.

Article 4. Protection, Treatment

(1) Investments of investors of each Contracting Party 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.

(2) Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments of its own investors or to investments or returns of investors of any third State.

(3) Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own investors or to investors of any third State.

(4) If a Contracting Party accords special advantages to investors of any third State by virtue of an agreement establishing a free trade area, a customs union or a common market or by virtue of an agreement on the avoidance of double taxation, it shall not be obliged to accord such advantages to investors of the other Contracting Party.

Article 5. Free Transfer

(1) Each Contracting Party in whose territory investments have been made by investors of the other Contracting Party shall grant those investors the free transfer of the payments relating to these investments, particularly of:

(a) Returns;

(b) Repayments of loans;

(c) Royalties and other payments deriving from rights enumerated in Article 1, paragraph (2), letters (c), (d) and (e) of this Agreement;

(d) Additional contributions of capital necessary for the maintenance or development of the investment;

(e) The proceeds of the sale or of the partial or total liquidation of the investment, including possible increment values.

(2) Transfers of currency shall be effected without delay in a freely convertible currency. Such transfers shall be made at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force.

Article 6. Dispossession, Compensation

(1) Neither of the Contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization, or any other measures having the same nature or the same effect against investments of 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 effective and adequate compensation. The amount of compensation, interest included, shall be settled in the currency of the country of origin of the investment and paid without delay to the person entitled thereto without regard to its residence or domicile.

(2) The investors of one Contracting Party whose investments have suffered losses due to a war or any other armed conflict, revolutions, state of emergency or rebellion, which took place in the territory of the other Contracting Party shall benefit, on the part of the latter, from a treatment in accordance with Article 4 of this Agreement as regards restitution, indemnification, compensation or other settlement.

Article 7. Principle of Subrogation

Where one Contracting Party has granted any financial guarantee against non-commercial risks in respect to an investment by one of its investors in the territory of the other Contracting Party, the latter shall recognize the rights of the first Contracting Party by virtue of the principle of subrogation to the rights of the investor when payment has been made under this guarantee by the first Contracting Party.

Article 8. Other Obligations

(1) If provisions in the legislation of either Contracting Party or obligations under international law entitle investments by investors of the other Contracting Party to treatment more favourable than is provided for by this Agreement, such provisions or obligations shall to the extent that they are more favourable prevail over this Agreement.

(2) Each Contracting Party shall observe any other obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party.

Article 9. Disputes between a Contracting Party and an Investor of the other Contracting Party

(1) For the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party and without prejudice to Article 10 of this Agreement (Disputes between Contracting Parties), consultations will take place between the parties concerned.

(2) If these consultations do not result in a solution within twelve months and if the investor concerned gives a written consent, the dispute shall be submitted to the arbitration of the International Centre for Settlement of Investment Disputes, instituted by the Convention of Washington of March 18, 1965, for the settlement of disputes regarding investments between States and nationals of other States.

Each party may start the procedure by addressing a request to that effect to the Secretary-General of the Centre as foreseen by Article 28 and 36 of the above-mentioned Convention. Should the parties disagree on whether the conciliation or arbitration is the most appropriate procedure, the investor concerned shall have the choice. The Contracting Party which is party to the dispute can, at no time whatsoever during the settlement procedure or the execution of the sentence, allege the fact that the investor has received, by virtue of an insurance contract, a compensation covering the whole or part of the incurred damage.

(3) A company which has been incorporated or constituted according to the laws in force in the territory of the Contracting Party and which, prior to the origin of the dispute, was under the control of nationals or companies of the other Contracting Party, is considered, in the sense of the Convention of Washington and according to its Article 25 (2) (b), as a company of the latter.

(4) Neither Contracting Party shall pursue through diplomatic channels a dispute submitted to the arbitration of the Centre, unless

(a) The Secretary-General of the Centre or a commission of conciliation or an arbitral tribunal decides that the dispute is beyond the jurisdiction of the latter, or

(b) The other Contracting Party does not abide by and comply with the award rendered by an arbitral tribunal.

Article 10. Disputes between Contracting Parties

(1) Disputes between Contracting Parties regarding the interpretation or application of the provisions of this Agreement shall be settled through diplomatic channels.

(2) If both Contracting Parties cannot reach an agreement within twelve months after the beginning of the dispute between themselves, the latter shall, upon request of either Contracting Party, be submitted to an arbitral tribunal of three members. Each Contracting Party shall appoint one arbitrator, and these two arbitrators shall nominate a chairman who shall be a national of a third State.

(3) If one of the Contracting Parties has not appointed its arbitrator and has not followed the invitation of the other Contracting Party to make that appointment within two months, the arbitrator shall be appointed upon the request of that Contracting Party by the President of the International Court of Justice.

(4) If both arbitrators cannot reach an agreement about the choice of the chairman within two months after their appointment; the latter shall be appointed upon the request of either Contracting Party by the President of the International Court of Justice.

(5) If, in the cases specified under paragraphs (3) and (4) of this Article, the President of the International Court of Justice is prevented from carrying out the said function or if he is a national of either Contracting Party, the appointment shall be made by the Vice-President, and if the latter is prevented or if he is a national of either Contracting Party, the appointment shall be made by the most senior Judge of the Court who is not a national of either Contracting Party.

(6) Subject to other provisions made by the Contracting Parties, the tribunal shall determine its procedure.

(7) The decisions of the tribunal are final and binding for each Contracting Party.

Article 11. Final Provisions

(1) This Agreement shall enter into force on the day when both Governments have notified each other that they have complied with the constitutional requirements for the conclusion and entry into force of international agreements, and shall remain binding for a period of ten years. Unless written notice of termination is given six months before the expiration of this period, the Agreement shall be considered as renewed automatically for further periods of two (2) years each.

(2) In case of official notice as to the termination of the present Agreement, the provisions of Articles 1 to 10 shall continue to be effective for a further period of ten years for investments made before official notice was given.

Done at Windhoek, on 1.8.1994, in duplicate, in French and English, each text being equally authentic.

For the Swiss Federal Council

For the Government of the Republic of Namibia

On signing the Agreement between the Swiss Confederation and the Republic of Namibia on the Promotion and Reciprocal Protection of Investments, the undersigned plenipotentiaries have agreed on the following clarifications, which shall be regarded as an integral part of the said Agreement.

Ad Article 1

(1) An investor according to paragraph (1), letter (c) may be required to submit proof of such control in order to be recognized by the Contracting Party in the territory of which the investment has been or is to be made as an investor of the other Contracting party.

(2) Investors referred to in paragraph (1); letter (c) may not raise a claim based on Article 6 of this Agreement if compensation has been paid pursuant to a similar provision in another Investment Protection Agreement conducted by the Contracting Party in the territory of which the investment has been made.

Ad Article 4

(1) The principle of national treatment, as referred to in paragraphs (2) and (3), shall not prevent the Namibian Government, in accordance with applicable law, from reserving certain categories of business to Namibian investors, provided such measure does not affect any rights that may have accrued to Swiss investments within the scope of this Agreement.

(2) The principle of national treatment, as referred to in paragraphs (2) and (3), shall not prevent the Namibian Government, in accordance with applicable law, from allocating preferential rights to its own investors for the exploitation of natural ressources, provided such measure does not affect any rights that may have accrued to Swiss investments within the scope of this Agreement.

Ad Article 5

(1) The free transfer relating to Swiss investments in the territory of the Republic of Namibia may; for the time being, be subject to the following modalities:

(a) For transfers in repayment of loans according to letter (b) of paragraph (1) the Bank of Namibia may require the approval

of the repayment plan;

(b) The transfer of royalties and fees according to letter (c) of paragraph (1) may be made dependent on the approval of the relevant agreement (licencing agreement) by the competent Namibian authority;

(c) With respect to the transfer of the proceeds of a sale or liquidation of an investment according to letter (e) paragraph (1), the Bank of Namibia may, where such transfer would have a significant adverse effect on Namibia's external payments liabilities, limit transfers to a minimum of 33 1/3 per year. At the investor's request, amounts not transferred shall be paid into an account in convertible currency and shall accrue interest at the rate quoted on the international market for the currency concerned.

(2) The above-mentioned modalities shall, upon request of either Contracting Party, be reviewed after a period of five years following the date of the entry into force of this Agreement

(3) In no case shall Swiss investors be treated less favourable than investors of any third State.

Done at Windhoek, on 1.8.1994, in duplicate, in French and English, each text being equally authentic.

For the Swiss Federal Council

For the Government of the Republic of Namibia