



GOVERNMENT GAZETTE

OF THE

REPUBLIC OF NAMIBIA

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Proclamation

by the

PRESIDENT OF THE REPUBLIC OF NAMIBIA

No. 1

1999

**AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF
NAMIBIA AND THE GOVERNMENT OF THE FEDERAL REPUBLIC OF
GERMANY FOR THE AVOIDANCE OF DOUBLE TAXATION AND
PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON
INCOME AND CAPITAL**

In terms of Article 32(8) of the Namibian Constitution, read with section 100(1) of the Income Tax Act, 1981 (Act No. 24 of 1981), I hereby announce that the Government of the Republic of Namibia on 29 May 1996 entered into an agreement with the Government of the Federal Republic of Germany for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital.

The agreement, setting out the arrangements made, is published under the Schedule to this Proclamation.

Given under my Hand and the Seal of the Republic of Namibia at Windhoek this 14th day of December, One Thousand Nine Hundred and Ninety-eight.

SAM NUJOMA
President
BY ORDER OF THE PRESIDENT-IN-CABINET

SCHEDULE

AGREEMENT

BETWEEN

THE REPUBLIC OF NAMIBIA

AND

THE FEDERAL REPUBLIC OF GERMANY

FOR THE AVOIDANCE OF DOUBLE TAXATION

WITH RESPECT TO TAXES ON INCOME AND CAPITAL

The Republic of Namibia and the Federal Republic of Germany desiring to promote their mutual economic relations by removing fiscal obstacles, have agreed as follows:

Article 1
PERSONAL SCOPE

This Agreement shall apply to persons who are residents of one or both of the Contracting States.

Article 2
TAXES COVERED

(1) This Agreement shall apply to taxes on income and on capital imposed on behalf of a Contracting State, of a Land or a political subdivision or local authority thereof, irrespective of the manner in which they are levied.

(2) There shall be regarded as taxes on income and on capital all taxes imposed on total income, on total capital, or on elements of income or of capital, including taxes on gains from the alienation of movable or immovable property, the payroll tax, and taxes on capital appreciation.

(3) The existing taxes to which this Agreement shall apply are in particular:

- (a) in the Federal Republic of Germany:

the Einkommensteuer (income tax),
the Körperschaftsteuer (corporation tax),
the Vermögensteuer (capital tax), and
the Gewerbesteuer (trade tax)
(hereinafter referred to as "German tax"):

- (b) in the Republic of Namibia:

the normal tax,
the non-resident shareholders' tax,
the petroleum income tax
(hereinafter referred to as "Namibian tax").

(4) The Agreement shall apply also to any identical or substantially similar taxes which are imposed after the date of signature of the Agreement in addition to, or in place of, the existing taxes. At the end of each year, the competent authorities of the Contracting States shall - if necessary - notify each other of changes which have been made in their respective taxation laws.

Article 3 GENERAL DEFINITIONS

- (1) For the purposes of this Agreement, unless the context otherwise requires:

- (a) the terms "a Contracting State" and "the other Contracting State" mean the Federal Republic of Germany or the Republic of Namibia, as the context requires, and, when used for the purposes of this Agreement in a geographical sense, the area in which the tax law of the Contracting State concerned is in force, as well as the continental shelf adjacent to the territorial sea, insofar as the State concerned exercises there in conformity with international law sovereign rights to explore the continental shelf and exploit its natural resources;
- (b) the term "person" means an individual (male or female) and a company;
- (c) the term "company" means any body corporate or any entity which is treated as a body corporate for tax purposes;
- (d) the term "immovable property" has the meaning which it has under the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources; ships, boats and aircraft shall not be regarded as immovable property;
- (e) the terms "enterprise of a Contracting State" and "enterprise of the other

Contracting State mean respectively an enterprise carried on by a resident of a Contracting State and an enterprise carried on by a resident of the other Contracting State;

- (f) the term "national" means:
- (aa) in respect of the Federal Republic of Germany any German within the meaning of Article 116, paragraph (1), of the Basic Law for the Federal Republic of Germany and any legal person, partnership and association deriving its status as such from the law in force in the Federal Republic of Germany;
 - (bb) in respect of the Republic of Namibia any national of Namibia and any legal person, partnership and association deriving its status as such from the law in force in the Republic of Namibia;
- (g) the term "international traffic" means any transport by a ship or aircraft operated by an enterprise which has its place of effective management in a Contracting State, except when the ship or aircraft is operated solely between places in the other Contracting State;
- (h) the term "competent authority" means in the case of the Federal Republic of Germany the Federal Ministry of Finance, and in the case of the Republic of Namibia the Ministry of Finance.

(2) As regards the application of the Agreement by a Contracting State any term not defined therein shall, unless the context otherwise required, have the meaning which it has under the law of that State concerning the taxes to which the Agreement applies.

Article 4 RESIDENT

(1) For the purposes of this Agreement, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any criterion of a similar nature. But this term does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.

(2) Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:

- (a) he shall be deemed to be a resident of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (centre of vital interests);
- (b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident of the State in which he has an

habitual abode;

- (c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident of the State of which he is a national;
- (d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

(3) Where by reason of the provisions of paragraph 1 a company is a resident of both Contracting States, then it shall be deemed to be a resident of the State in which its place of effective management is situated.

Article 5

PERMANENT ESTABLISHMENT

(1) For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

(2) The term "permanent establishment" includes especially

- (a) a place of management;
- (b) a branch;
- (c) an office;
- (d) a factory;
- (e) a workshop, and
- (f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

(3) A building site or construction or installation project constitutes a permanent establishment only if it lasts more than six months.

(4) Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include

- (a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
- (b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
- (c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
- (d) the maintenance of a fixed place of business solely for the purpose of

purchasing goods or merchandise or of collecting information, for the enterprise;

- (e) the maintenance of a fixed place of business solely for any combination of activities mentioned in sub-paragraphs a) to e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

(5) Notwithstanding the provisions of paragraphs 1 and 2, where a person - other than an agent of an independent status to whom paragraph 6 applies - is acting on behalf of an enterprise and has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.

(6) An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.

(7) The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

Article 6

INCOME FROM IMMOVABLE PROPERTY

(1) Income derived by a resident of a Contracting State from immovable property (including income from agriculture or forestry) situated in the other Contracting State may be taxed in that other State.

(2) The provisions of paragraph 1 shall apply to income derived from the direct use, letting, or use in any other form of immovable property.

(3) The provisions of paragraphs 1 and 2 shall also apply to the income from immovable property of an enterprise and to income from immovable property used for the performance of independent personal services.

Article 7

BUSINESS PROFITS

(1) The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.

(2) Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

(3) In determining the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere.

(4) Insofar as in a Contracting State and in exceptional cases the determination of the profits to be attributed to a permanent establishment in accordance with paragraph 2 is impossible or gives rise to unreasonable difficulties, nothing in paragraph 2 shall preclude the determination of the profits to be attributed to a permanent establishment by means of apportioning the total profits of the enterprise to its various parts; the method of apportionment adopted shall, however, be such that the result shall be in accordance with the principles contained in this Article.

(5) No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

(6) For the purposes of the preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

(7) Where profits include items of income which are dealt with separately in other Articles of this Agreement, then the provisions of those Articles shall not be affected by the provisions of this Article.

Article 8 **SHIPPING AND AIR TRANSPORT**

(1) Profits from the operation of ships or aircraft in international traffic shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

(2) If the place of effective management of a shipping enterprise is aboard a ship, then it shall be deemed to be situated in the Contracting State in which the home harbour of the ship is situated, or, if there is no such home harbour, in the Contracting State of which the operator of the ship is a resident.

(3) The provisions of paragraph 1 shall also apply to profits from the participation in a pool, a joint business or an international operating agency.

Article 9
ASSOCIATED ENTERPRISES

Where

- (a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or
- (b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State,

and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

Article 10
DIVIDENDS

(1) Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but the tax so charged shall not exceed:

- (a) 10 per cent of the gross amount of the dividends if the recipient is a company (excluding partnership) which owns directly at least 10 per cent of the capital of the company paying the dividends;
- (b) in all other cases, 15 per cent of the gross amount of the dividends, if the recipient is the beneficial owner of the dividends.

This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

- (2) The term "dividends" as used in this Article means
 - (a) dividends on shares including income from shares, "jouissance" shares or "jouissance" rights, mining shares, founders' shares or other rights, not being debt-claims, participating in profits, and
 - (b) other income which is subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident, and, for the purpose of taxation in the Federal Republic of Germany, income derived by a sleeping partner "stiller Gesellschafter") from his participation as such and distributions on certificates of an investment fund or investment trust.

(3) The provisions of paragraph 1 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State of which the company paying the dividends is a resident, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 14, as the case may be, shall apply.

(4) Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other State may not impose any tax on the dividends paid by the company, except insofar as such dividends are paid to a resident of that other State or insofar as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment or a fixed base situated in that other State, nor subject the company's undistributed profits to a tax on the company's undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State.

Article 11 INTEREST

(1) Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed only in that other State.

(2) The term "interest" as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures. Penalty charges for late payment shall not be regarded as interest for the purpose of this Article.

(3) The provisions of paragraph 1 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 14, as the case may be, shall apply.

(4) Interest shall be deemed to arise in a Contracting State when the payer is that State itself, a Land, a political subdivision, a local authority or a resident of that State. Where, however, the person paying the interest, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establishment or fixed base, then such interest shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

(5) Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the

interest, having regard to the debt-claim for which it is paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Agreement.

Article 12 ROYALTIES

(1) Royalties arising in a Contracting State and paid to a resident of the other Contracting State may also be taxed in the Contracting State in which they arise and according to the laws of that State, but the tax so charged shall not exceed 10 per cent of the gross amount of the royalties if the recipient is the beneficial owner of the royalties.

(2) The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial, or scientific equipment, or for information concerning industrial, commercial or scientific experience.

(3) The provisions of paragraph 1 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 14, as the case may be, shall apply.

(4) Royalties shall be deemed to arise in a Contracting State when the payer is that State itself, a Land, a political subdivision, a local authority or a resident of that State. Where, however, the person paying the royalties, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or fixed base in connection with which the liability to pay the royalties was incurred, and such royalties are borne by such permanent establishment or fixed base, then such royalties shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated.

(5) Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount, in such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Agreement.

Article 13
CAPITAL GAINS

(1) Gains derived by a resident of a Contracting State from the alienation of immovable property situated in the other Contracting State may be taxed in that other State.

(2) Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise) or of such fixed base, may be taxed in that other State.

(3) Gains from the alienation of ships or aircraft operated in international traffic or movable property pertaining to the operation of such ships or aircraft shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

(4) Gains from the alienation of any property other than that referred to in paragraphs 1 to 3 shall be taxable only in the Contracting State of which the alienator is a resident.

Article 14
INDEPENDENT PERSONAL SERVICES

(1) Income derived by a resident of a Contracting State in respect of professional services or other activities of an independent character shall be taxable only in that State unless he has a fixed base available to him in the other Contracting State for the purpose of performing his activities or he is present in the other Contracting State for a period or periods exceeding in the aggregate 183 days in the tax year concerned. If he has such a fixed base or remains in that other State for the aforesaid period or periods the income may be taxed in that other State but only so much of it as is attributable to that fixed base or is derived in that other State during the aforesaid period or periods.

(2) The term "professional services" includes especially independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants.

Article 15
DEPENDENT PERSONAL SERVICES

(1) Subject to the provisions of Articles 16, 18 and 19, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable in the other Contracting State only if the employment is exercised there.

(2) Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the

other Contracting State shall be taxable only in the first-mentioned State if:

- (a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in the tax year concerned, and
- (b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and
- (c) the remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other State.

(3) Notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic may be taxed in the Contracting State in which the place of effective management of the enterprise is situated.

Article 16 DIRECTORS' FEES

Directors' fees and similar payments derived by a resident of a Contracting State in his capacity as a member of the board of directors of a company which is a resident of the other Contracting State may be taxed in that other State.

Article 17 ARTISTES AND ATHLETES

(1) Notwithstanding the provisions of Articles 7, 14 and 15, income derived by a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as an athlete, from his personal activities as such exercised in the other Contracting State, may be taxed in that other State.

(2) Where income in respect of personal activities exercised by an entertainer or an athlete in his capacity as such accrues not to the entertainer or athlete himself but to another person, that income may, notwithstanding the provisions of Articles 7, 14 and 15, be taxed in the Contracting State in which the activities of the entertainer or athlete are exercised.

(3) However, such income shall not be taxed in the State mentioned in paragraph 1 if the underlying activities are exercised during a visit to that State by a resident of the other Contracting State and where such visit is financed directly or indirectly by that other State, a Land, a political subdivision or a local authority thereof or by an organisation which in that other State is recognized as a charitable organisation.

Article 18 PENSIONS

Subject to the provisions of paragraph 1 of Article 19, pensions and other similar remuneration paid to a resident of a Contracting State in consideration of past employment shall be taxable only in that State.

Article 19
GOVERNMENT SERVICE

(1) Remuneration including pensions paid by a Contracting State, a Land, a political subdivision or a local authority thereof to an individual in respect of services rendered to that State, Land, subdivision or authority shall be taxable only in that State. However, such remuneration shall be taxable only in the other Contracting State if the services are rendered in that State, if the individual is a resident of that State and not a national of the first-mentioned State.

(2) The provisions of Articles 15, 16, 17 and 18 shall apply to remuneration and pensions in respect of services rendered in connection with a business carried on by a Contracting State, a Land, a political subdivision or a local authority thereof.

(3) The provisions of paragraph 1 shall likewise apply in respect of remuneration paid, under a development assistance programme of a Contracting State, a Land, a political subdivision or a local authority thereof, out of funds exclusively supplied by that Contracting State, Land, political subdivision or local authority, to a specialist or volunteer seconded to the other Contracting State with the consent of that other State.

Article 20
TEACHERS, STUDENTS AND TRAINEES

(1) An individual who visits a Contracting State at the invitation of that State or of a university, college, school, museum or other cultural institution of that State or under an official programme of cultural exchange for a period not exceeding two years solely for the purpose of teaching, giving lectures or carrying out research at such institution and who is, or was immediately before that visit, a resident of the other Contracting State shall be exempt from tax in the first-mentioned State on his remuneration for such activity, provided that such remuneration is derived by him from outside that State.

(2) An individual who is present in a Contracting State solely

(a) as a student at a university, college or school in that Contracting State,

(b) as a business apprentice (including in the case of the Federal Republic of Germany a "Volontär" or a "Praktikant"),

(c) as the recipient of a grant, allowance or award for the primary purpose of study or research from a religious, charitable, scientific or educational organisation, or,

(d) as a member of a technical cooperation programme entered into by the Government of that Contracting State,

and who is, or was immediately before visiting that State, a resident of the other Contracting State, shall be exempt from tax in the first-mentioned Contracting State in respect of remittances from abroad for the purposes of his maintenance, education or training.

Article 21
OTHER INCOME

(1) Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Agreement shall be taxable only in that State.

(2) The provisions of paragraph 1 shall not apply to income, other than income from immovable property, if the recipient of such income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the income is paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 14, as the case may be, shall apply.

Article 22
CAPITAL

(1) Capital represented by immovable property, owned by a resident of a Contracting State and situated in the other Contracting State, may be taxed in that other State.

(2) Capital represented by movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or by movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, may be taxed in that other State.

(3) Capital represented by ships and aircraft operated in international traffic and by movable property pertaining to the operation of such ships or aircraft, shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

(4) All other elements of capital of a resident of a Contracting State shall be taxable only in that State.

Article 23
RELIEF FROM DOUBLE TAXATION

(1) Tax shall be determined in the case of a resident of the Federal Republic of Germany as follows:

- (a) Unless foreign tax credit is to be allowed under sub-paragraph b), there shall be exempted from German tax any item of income arising in the Republic of Namibia and any item of capital situated within the Republic of Namibia, which, according to this Agreement, may be taxed in the Republic of Namibia. The Federal Republic of Germany, however, retains the right to take into account in the determination of its rate of tax the items of income and capital so exempted.

In the case of dividends exemption shall apply only to such dividends as are paid to a company (not including partnerships) being a resident of the Federal Republic of Germany by a company being a resident of the Republic of Namibia at least 10 per cent of the capital of which is owned directly by the German company.

There shall be exempted from taxes on capital any shareholding the dividends of which are exempted or, if paid, would be exempted, according to the immediately foregoing sentence.

- (b) Subject to the provisions of German tax law regarding credit for foreign tax, there shall be allowed as a credit against German income, corporation and capital tax payable in respect of the following items of income arising in the Republic of Namibia and the items of capital situated there the Namibian tax paid under the laws of the Republic of Namibia and in accordance with this Agreement on:
- (aa) dividends not dealt with in sub-paragraph a);
 - (bb) interest;
 - (cc) royalties;
 - (dd) directors' fees;
 - (ee) income of artistes and athletes;
 - (ff) immovable property and income therefrom.

This shall not apply if the immovable property is effectively connected with a permanent establishment referred to in Article 7 and situated in the Republic of Namibia or with a fixed base referred to in Article 14 and situated in the Republic of Namibia, unless the provisions of sub-paragraph c) preclude the application of the provisions of sub-paragraph a) to the profits of the permanent establishment.

- (c) Notwithstanding the provisions of sub-paragraph a) items of income dealt with in Articles 7 and 10 gains derived from the alienation of the business property of a permanent establishment as well as the items of capital underlying such income shall be exempted from German tax only if the resident of the Federal Republic of Germany can prove that the receipts of the permanent establishment or company are derived exclusively or almost exclusively from active operations.

In the case of items of income dealt with in Article 10 and the items of capital underlying such income the exemption shall apply even when the dividends are derived from holdings in other companies being residents of the Republic of Namibia which carry on active operations and in which the company which last made a distribution has a holding of more than 25 per cent.

Active operations are the following: producing or selling goods or merchandise, giving technical advice or rendering engineering services, or doing banking or insurance business, within the Republic of Namibia.

If this is not proved, only the credit procedure as per sub-paragraph b) shall apply.

(2) Tax shall be determined in the case of a resident of the Republic of Namibia as follows:

Where profits or income derived by a resident of the Republic of Namibia are taxable in the Federal Republic of Germany according to the previous Articles, the Republic of Namibia shall either impose no tax on such profits or income, or shall, subject to such provisions (which shall not affect the general principle hereof) as may be enacted in the Republic of Namibia, allow as a credit against any Namibian tax payable in respect of such profits or income so much of the German tax as does not exceed the Namibian tax.

Article 24 NON-DISCRIMINATION

(1) Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances are or may be subjected. This provision shall, notwithstanding the provisions of Article 1, also apply to persons who are not residents of one or both of the Contracting States.

(2) The taxation on a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favourably levied in that other State than the taxation levied on enterprises of that other State carrying on the same activities. This provision shall not be construed as obliging a Contracting State to grant to residents of the other Contracting State any personal allowances, reliefs and reductions for taxation purposes which it grants only to its own residents.

(3) Except where the provisions of Article 9, paragraph 5 of Article 11, or paragraph 5 of Article 12, apply, interest, royalties and other disbursements paid by an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned State. Similarly, any debts of an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable capital of such enterprise, be deductible under the same conditions as if they had been contracted to a resident of the first-mentioned State.

(4) Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned State are or may be subjected.

(5) The provisions of this Article shall, notwithstanding the provisions of Article 2, apply to taxes of every kind and description.

Article 25 **MUTUAL AGREEMENT PROCEDURE**

(1) Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Agreement, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or, if his case comes under paragraph 1 of Article 24, to that of the Contracting State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of this Agreement.

(2) The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Agreement. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

(3) The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Agreement. They may also consult together for the elimination of double taxation in cases not provided for in the Agreement.

(4) The competent authorities of the Contracting States shall establish by mutual agreement the mode of application of the limitations of taxation provided for in this Agreement.

(5) The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs.

Article 26 **EXCHANGE OF INFORMATION**

(1) The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Agreement. Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by the Agreement. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

(2) In no case shall the provisions of paragraph 1 be construed so as to impose on a Contracting State the obligation:

- (a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
- (b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
- (c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (ordre public).

Article 27

DIPLOMATIC AND CONSULAR PRIVILEGES

(1) Nothing in this Agreement shall affect the fiscal privileges of members of a diplomatic mission, a consular post or an international organisation under the general rules of international law or under the provisions of special agreements.

(2) Notwithstanding the provisions of Article 4, an individual who is a member of a diplomatic mission or a consular post of a Contracting State which is situated in the other Contracting State or in a third State shall be deemed for the purposes of the Agreement to be a resident of the sending State if:

- (a) in accordance with international law he is not liable to tax in the receiving State in respect of income from sources outside that State, and
- (b) he is liable in the sending State to the same obligations in relation to tax on his world income as are residents of that State.

Article 28

ENTRY INTO FORCE

(1) This Agreement shall be ratified and the instruments of ratification shall be exchanged at Bonn as soon as possible.

(2) This Agreement shall enter into force thirty days after the date of exchange of the instruments of ratification and shall have effect:

- (a) in the Federal Republic of Germany on taxes withheld at source in respect of amounts paid after 31 December 1992.
- (b) in the Republic of Namibia on taxes withheld at source in respect of amounts paid on or after 1 March 1993, and
- (c) in both Contracting States on taxes levied for periods commencing on or after 1 January 1993.

Article 29
TERMINATION

This Agreement shall continue in effect indefinitely but either of the Contracting States may, on or before 30 June in any calendar year beginning after the expiration of a period of five years from the date of its entry into force, give the other Contracting State, through diplomatic channels, written notice of termination and, in such event, this Agreement shall cease to have effect:

- (a) in the Federal Republic of Germany on taxes withheld at source in respect of amounts paid after 31 December of the calendar year in which notice of termination is given,
- (b) in the Republic of Namibia on taxes withheld at source in respect of amounts paid on or after 1 March of the calendar year next following that in which notice of termination is given, and
- (c) in both Contracting States on taxes levied for periods commencing on or after 1 January of the calendar year next following that in which notice of termination is given.

Done at WINDHOEK on 2 December 1993 in duplicate in the English and German languages, both texts being equally authentic.

G.J. HANEKOM
For the Republic of Namibia

H.H. SCHUMACHER
For the Federal Republic of Germany

PROTOCOL

The Republic of Namibia
and
the Federal Republic of Germany

have agreed at the signing at Windhoek on 2 December 1993 of the Agreement between the two States for the avoidance of double taxation with respect to taxes on income and capital upon the following provisions which shall form an integral part of the said Agreement:

1. With reference to Articles 6 to 21:

If according to the provisions of Articles 6 to 21 the right of the Federal Republic of Germany to tax income is limited and according to the tax laws of the Republic of Namibia the income is regarded as income from foreign sources and therefore exempted from Namibian tax the Federal Republic of Germany may tax such income as if this Agreement did not exist.

2. With reference to Article 7:

- (a) In the Contracting State in which the permanent establishment is situated, no profits shall be attributed to a building site or construction or installation project except those which are the result of such activities themselves. Profits derived from the supply of goods connected with, or independent of, such activities and effected by the principal permanent establishment or any other permanent establishment of the enterprise or by a third party shall not be attributed to the building site or construction or installation project.
- (b) Income derived from design, planning, engineering or research or from technical services which a resident of a Contracting State performs in that Contracting State shall not be attributed to that permanent establishment.
- (c) It is understood that payments made in consideration for any services of a managerial, technical or consulting nature shall be regarded as business profits in the meaning of Article 7.
- (d) In respect of paragraph 3 of Article 7 no such deduction shall be allowed in respect of amounts paid or charged (otherwise than towards reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise or any of its other offices, by way of:
 - (i) royalties, fees or other similar payments in return for the use of patents or other rights;
 - (ii) commission, for specific services performed or for management; and
 - (iii) interest on moneys lent to the permanent establishment, except in

the case of a banking institution.

3. With reference to Articles 10 and 11:

Notwithstanding the provisions of these Articles, dividends and interest may be taxed in the Contracting State in which they arise, and according to the law of that State, if they

- (a) are derived from rights or debt-claims carrying a right to participate in profits (including income derived by a sleeping partner from his participation as such, from a "partiarisches Darlehen" and from "Gewinnobligationen" within the meaning of the tax law of the Federal Republic of Germany) and
- (b) under the condition that they are deductible in the determination of profits of the debtor of such income.

4. With reference to Article 23:

- (a) Where a company being a resident of the Federal Republic of Germany distributes income derived from sources within the Republic of Namibia paragraph 1 shall not preclude the compensatory imposition of corporation tax on such distributions in accordance with the provisions of German tax law.
- (b) The Federal Republic of Germany shall avoid double taxation by a tax credit as provided for in paragraph 2 b) of Article 23, and not by a tax exemption under paragraph 2a) of Article 23,
 - (aa) if in the Contracting States income or capital is placed under differing provisions of the Agreement or attributed to different persons [other than under Article 9 (Associated Enterprises)] and this conflict cannot be settled by a procedure pursuant to Article 25 and
 - (i) if as a result of such placement or attribution the relevant income or capital would be subject to double taxation; or
 - (ii) if as a result of such placement or attribution the relevant income or capital would remain untaxed or be subject only to inappropriately reduced taxation in the Republic of Namibia and would (but for the application of this paragraph) remain exempt from tax in the Federal Republic of Germany; or
 - (bb) if the Federal Republic of Germany has, after due consultation and subject to the limitations of its internal law, notified the Republic of Namibia through diplomatic channels of other items of income to which it intends to apply this paragraph in order to prevent the exemption of income from taxation in both Contracting States or other arrangements for the improper use of the Agreement.

In the case of a notification under sub-paragraph (bb) the Republic of Namibia may, subject to notification through diplomatic channels, characterize such income under the Agreement consistently with the characterization of that income by the Federal Republic of Germany. A notification made under this paragraph shall have effect only from the first day of the calendar year following the year in which it was transmitted and any legal prerequisites under the domestic law of the notifying State for giving it effect have been fulfilled.

5. With reference to Article 26:

If personal data is exchanged under this Article, the following additional provisions shall apply subject to the domestic laws of each Contracting State:

- (a) The data supplying Contracting States shall be responsible for the accuracy of the data they supply. If it emerges that inaccurate data or data which should not have been supplied have been communicated, the receiving State shall be notified of this without delay. That State shall be obliged to correct or destroy said data.
 - (b) The Contracting States shall be obliged to keep official records of the transmission and receipt of personal data.
 - (c) The Contracting States shall be obliged to take effective measures to protect the personal data communicated against unauthorised access, unauthorised alteration and unauthorised disclosure.
 - (d) Upon application the person concerned shall be informed of the information stored about him and of the use planned to be made of it. There shall be no obligation to give this information if on balance it appears that the public interest in withholding it outweighs the interest of the person concerned in receiving it.
 - (e) The right of the person concerned to be informed of the data stored about him shall be a matter of the domestic law of the Contracting State in whose sovereign territory the application for the information is made.
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