

No. 22421

**FEDERAL REPUBLIC OF GERMANY
and
PORTUGAL**

Treaty concerning the encouragement and reciprocal protection of investments (with protocol and exchange of letters). Signed at Bonn on 16 September 1980

Authentic texts: German and Portuguese.

Registered by the Federal Republic of Germany on 31 October 1983.

**RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE
et
PORTUGAL**

Accord pour l'encouragement et la protection réciproque des investissements (avec protocole et échange de lettres). Signé à Bonn le 16 septembre 1980

Textes authentiques : allemand et portugais.

Enregistré par la République fédérale d'Allemagne le 31 octobre 1983.

[TRANSLATION—TRADUCTION]

TREATY¹ BETWEEN THE FEDERAL REPUBLIC OF GERMANY AND THE PORTUGUESE REPUBLIC CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS

The Federal Republic of Germany and the Portuguese Republic,
Desiring to intensify economic co-operation between the two States,

Intending to create favourable conditions for investments by nationals and companies of either State in the territory of the other State, and

Recognizing that encouragement and contractual protection of such investments are apt to stimulate private business initiative and to increase the prosperity of both nations,

Have agreed as follows:

Article 1. For purposes of this Treaty:

1. The term “investment” shall comprise the following kinds of assets and rights:

- (a) Shares of companies and other kinds of interests;
- (b) Ownership of movable and immovable property as well as any other rights *in rem*;
- (c) Claims to money or to any other performance having an economic value;
- (d) Copyrights, industrial property rights, technical processes, patents, trade marks, trade names and know-how;
- (e) Business concessions under public law, including concessions to search for, extract or exploit natural resources;
- (f) Any other assets or rights equivalent to those mentioned above.

2. The term “returns” shall mean the amounts yielded by an investment for a definite period as profit, dividends, interest, and royalties or other fees.

3. The term “nationals” shall mean:

- (a) In respect of the Portuguese Republic: Portuguese as defined in the Constitution of the Portuguese Republic and the Portuguese laws governing nationality;
- (b) In respect of the Federal Republic of Germany: Germans within the meaning of the Basic Law for the Federal Republic of Germany.

¹ Came into force on 23 April 1982, i.e., one month after the exchange of the instruments of ratification, which took place at Lisbon on 23 March 1982, in accordance with article 13 (2).

4. The term “companies” shall mean:

- (a) In respect of the Portuguese Republic: any individual or corporate entity, including commercial or other companies and associations, with or without legal personality having its seat in Portugal, lawfully existing and operating, irrespective of the extent to which its partners, associates or members are liable and whether or not its activities are directed at profit;
- (b) In respect of the Federal Republic of Germany: any juridical person as well as any commercial or other company or association with or without legal personality, having its seat in the German area to which this Treaty applies and lawfully existing, irrespective of whether the liability of its partners, associates or members is limited or unlimited and whether or not its activities are directed at profit.

Article 2. Each Contracting Party shall promote investments in its territory by nationals or companies of the other Contracting Party in so far as possible and permit such investments in accordance with its legal provisions. It shall in any case accord the investments fair and equitable treatment.

Article 3. 1. Neither Contracting Party shall in its territory subject investments by nationals or companies of the other Contracting Party to treatment less favourable than it accords to investments of its own nationals or companies or to investments of nationals and companies of any third State.

2. Neither Contracting Party shall subject nationals or companies of the other Contracting Party, as regards their activity in connection with investments in its territory, to treatment less favourable than it accords to its own nationals or companies or to nationals and companies of any third State.

Article 4. 1. Investments by nationals or companies of either Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party.

2. Investments by nationals or companies of either Contracting Party shall not be expropriated or nationalized in the territory of the other Contracting Party except for the public benefit and against compensation. Such compensation shall represent the equivalent of the expropriated or nationalized investment immediately prior to the time when the expropriation or nationalization was publicly announced, taking into account the amount of time elapsed between the expropriation or nationalization and the determination of compensation. Compensation shall be paid without delay; it shall be actually realizable and transferable. Appropriate provision shall have been made for the determination and payment of compensation not later than the time of expropriation or nationalization. The legality of the expropriation or nationalization and the amount of compensation shall be subject to review in accordance with the normal legal procedure (civil and administrative courts) of the Contracting Party in whose territory the investment has been made.

3. Nationals or companies of either Contracting Party whose investments suffer losses in the territory of the other Contracting Party owing to war or other armed conflict, revolution, a state of national emergency, or revolt, shall

be accorded treatments no less favourable by such other Contracting Party than that Party accords to its own nationals or companies, as regards restitution, compensation, indemnification or other payment.

4. Nationals or companies of either Contracting Party shall enjoy most-favoured-nation treatment in the territory of the other Contracting Party in respect of the matters governed by this article.

Article 5. Each Contracting Party shall guarantee to nationals or companies of the other Contracting Party the transfer of the sums related to the investments, as follows:

- (a) The principal amount and additional sums serving to maintain or increase the investment;
- (b) The returns defined in article 1, paragraph 2, less tax;
- (c) For the repayment of loans;
- (d) The proceeds of liquidation in the event of total or partial disposal of the investment, less tax.

Article 6. If either Contracting Party makes payment to its nationals or companies under a guarantee it has given in respect of an investment in the territory of the other Contracting Party, the latter Contracting Party shall, without prejudice to the rights of the former Contracting Party under article 11, recognize the assignment of any right or claim from such national or company to the former Contracting Party, whether under a law or pursuant to a legal transaction. The other Contracting Party shall further recognize the subrogation of the former Contracting Party in respect of any such right or claim which that Contracting Party may assert to the same extent as its predecessor in title. Article 4, paragraphs 2 and 3, and article 5 shall apply *mutatis mutandis* to the transfer of the amounts payable to the Contracting Party concerned by virtue of the subrogation of rights or claims.

Article 7. 1. To the extent that those concerned have not made another arrangement admitted by the appropriate agencies of the Contracting Party in whose territory the investment is situated, transfers under articles 4, 5 or 6 shall be made without delay in the currency agreed upon and at the rate of exchange effective for current transactions.

2. The rate of exchange must conform to the relevant provisions of the International Monetary Fund.

Article 8. 1. If the legislation of either Contracting Party or international obligations existing at present or established hereafter between the Contracting Parties in addition to this Treaty contain a regulation, whether general or specific, entitling investments by nationals or companies of the other Contracting Party to a treatment more favourable than is provided for by this Treaty, any portion of such regulation which is more favourable shall prevail over this Treaty.

2. Each Contracting Party shall fulfil any other obligation it may have entered into with regard to investments in its territory made through agreements with nationals or companies of the other Contracting Party.

Article 9. This Treaty shall also apply to investments made prior to its entry into force by nationals or companies of either Contracting Party in the territory of the other Contracting Party, consistent with the latter's legislation.

Article 10. 1. Any disputes which may arise between the Contracting Parties concerning the interpretation or application of this Treaty should, if possible, be settled by the Governments of the two Contracting Parties.

2. If a dispute cannot thus be settled, it shall upon the request of either Contracting Party be submitted to an arbitral tribunal.

3. Such arbitral tribunal shall be constituted for each individual case, as follows: each Contracting Party shall appoint one member, and these two members shall agree upon a national of a third State as their Chairman to be appointed by the Governments of the two Contracting Parties. Such members shall be appointed within two months, and such Chairman within three months, from the date on which either Contracting Party has informed the other Contracting Party that it wants to submit the dispute to an arbitral tribunal.

4. If the periods specified in paragraph 3 above have not been observed, 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 if he is otherwise prevented from discharging the said function, the Vice-President should make the necessary appointments. If the Vice-President is also a national of either Contracting Party or if he, too, 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 shall make the necessary appointments.

5. The arbitral tribunal shall reach its decisions by a majority of votes. Such decisions shall be binding. Each Contracting Party shall bear the cost of its own member and of its counsel in the arbitral proceedings: the cost of the Chairman and the remaining costs shall be divided equally between the two Contracting Parties. The arbitral tribunal may make a different regulation concerning costs. In all other respects, the arbitral tribunal shall determine its own procedure.

6. If the two Contracting Parties are parties to the Convention of 18 March 1965 on the settlement of investment disputes between States and nationals of other States,¹ they shall not have recourse, under the terms of article 27, paragraph 1, of that Convention, to the arbitral tribunal provided for above, if the agreement referred to in article 25 of the Convention exists between the national or company of either Contracting Party and the other Contracting Party. The option of recourse to the arbitral tribunal referred to above shall not be affected in the event of non-compliance with a judicial decision of the arbitral tribunal established under the Convention (article 27), or in the event of an assignment, of any right or claim, whether under a law or pursuant to a legal transaction, in accordance with article 6 of this Treaty.

¹ United Nations, *Treaty Series*, vol. 575, p. 159.

Article 11. This Treaty shall remain in force even in the event of a conflict arising between the Contracting Parties, without prejudice to the right of taking such temporary measures as are permitted under the general rules of international law. Measures of this kind shall be repealed not later than on the date of the actual termination of the conflict, irrespective of whether or not diplomatic relations are maintained.

Article 12. With the exception of the provisions of paragraph 8 of the Protocol referring to air transport, this Treaty shall also apply to *Land Berlin*, provided that the Government of the Federal Republic of Germany has not made a contrary declaration to the Government of the Portuguese Republic within three months of the entry into force of this Treaty.

Article 13. 1. This Treaty shall be ratified; the instruments of ratification shall be exchanged as soon as possible in Lisbon.

2. This Treaty shall enter into force one month after the exchange of the instruments of ratification. It shall remain in force for 10 years, at the expiry of which it shall be deemed to be extended indefinitely, unless it is denounced in writing by either Contracting Party 12 months in advance. After the expiry of the period of 10 years, the Treaty may be denounced at any time. It shall, however, remain in force for one year from the date on which it was denounced.

3. In respect of investments made up until the date of termination of this Treaty, the provisions of articles 1 to 12 shall continue to be effective for 20 years from the date of termination of the Treaty.

DONE at Bonn on 16 September 1980 in duplicate, in the German and Portuguese languages, both texts being equally authentic.

For the Federal Republic of Germany:
HANS-DIETRICH GENSCHER

For the Portuguese Republic:
DIOGO F. DO AMARAL

PROTOCOL

On signing the Treaty concerning the encouragement and reciprocal protection of investments, concluded between the Federal Republic of Germany and the Portuguese Republic, the undersigned plenipotentiaries have agreed on the following provisions which constitute an integral part of the said Treaty:

1. *Ad article 1*

(a) Returns from an investment, as well as returns from re-invested returns, shall enjoy the same protection as the original investment.

(b) Without prejudice to any other method of determining nationality, any person in possession of a national passport issued by the appropriate authorities of either Contracting Party shall be deemed to be a national of that Party.

2. *Ad article 2*

Investments made in accordance with the laws of either Contracting Party within its territory by nationals or companies of the other Contracting Party shall enjoy the full protection of this Treaty.

3. *Ad article 3*

(a) The management, maintenance, use and enjoyment of an investment shall more particularly, though not exclusively, be deemed "activity" within the meaning of article 3, paragraph 2. Restricting the purchase of raw and auxiliary materials, of power and fuel, and of means of production and operation of any kind, impeding the marketing of products inside or outside the country, and any other measures having similar effects shall, in particular, be deemed "treatment less favourable" within the meaning of article 3, paragraph 2. Measures that have to be taken for reasons of security and law and order, public health or morality shall not be deemed "treatment less favourable" within the meaning of article 3.

(b) Within the scope of their national legislation, the Contracting Parties shall show sympathetic consideration with respect to entry and residence applications filed by persons from either Contracting Party who wish to enter the territory of the other Contracting Party in connection with preparations for and execution of an investment; the same sympathetic consideration shall be shown towards employees of either Contracting Party who wish to enter and reside in the territory of the other Contracting Party in connection with an investment in order to engage in paid employment. Sympathetic consideration shall also be shown with respect to applications for work permits.

(c) The Contracting Parties shall not deem limitations on the access to medium- and long-term credit facilities to be incompatible with the provisions of article 3.

4. *Ad article 4*

(a) Any confiscation or any restriction resulting from acts of sovereignty against any property or rights whatsoever which constitute all or part of an investment, as well as other acts of sovereignty which have the effect of irreversible expropriation, shall be deemed to be "expropriation";

(b) Compensation may also be claimed in cases where the State intervenes in the enterprise which the investment was made and the enterprise's financial situation is seriously compromised solely because of such intervention.

(c) The provisions of article 4, paragraph 2, on transfers shall apply only if the expropriated or nationalized investment originated from imported assets; reinvestments and appreciation in value shall also be regarded as imported assets.

(d) If the prejudice caused by an event referred to in article 4, paragraph 3, results in total loss of the investment, any payments made as indemnification, compensation or other valuable consideration shall be treated in the same manner as compensation paid under article 4, paragraph 2.

5. *Ad article 5*

If the Portuguese Government, owing to extreme balance-of-payment difficulties, is unable to transfer the returns and proceeds of the liquidation of investments within six months of the date on which they are due, it may, by decision of the Council of Ministers, suspend such transfers for a limited period and only in so far as dictated by the difficulties mentioned above. However, it undertakes to ensure that the amount to be transferred every year shall in no case be less than 20 per cent of the total to be transferred.

In such case, and if the investor so desires, the untransferred sums shall be credited to a special account in a currency to be selected by him. The interest payable shall be

fixed on the basis of the interest rates applied to equivalent funds obtained in the money market of the country whose currency has been selected.

6. *Ad article 6*

It is understood that the investment guarantee referred to in article 6 applies solely to political risks, including risks related to transfers.

7. *Ad article 7*

A transfer shall be deemed to have been made "without delay" within the meaning of article 7, paragraph 1, if made within such period as is normally required for the completion of transfer formalities. The said period shall commence on the day on which a complete application, accompanied by the necessary documents, has been submitted and may on no account exceed three months.

The application shall also be deemed complete if the competent authority of either Contracting Party is solely responsible for the inability to produce missing documents.

The withholding of tax on the amounts to be transferred (article 5 (*b*) and (*d*)) may not constitute a reason for delaying the transfer.

8. Whenever goods or persons connected with the making of investments are to be transported, the Contracting Parties shall neither exclude nor hinder the use of transport agencies of the other Contracting Party and shall issue permits as required to carry out such transport.

The above provisions include the transportation of:

- (*a*) Goods directly intended for an investment within the meaning of this Treaty or acquired in the territory of either Contracting Party or of any third State by or on behalf of an enterprise in which assets within the meaning of this Treaty have been invested;
- (*b*) Persons travelling in connection with the making of investments.

DONE at Bonn on 16 September 1980 in duplicate, in the German and Portuguese languages, both texts being equally authentic.

For the Federal Republic of Germany:

HANS-DIETRICH GENSCHER

For the Portuguese Republic:

DIOGO F. DO AMARAL

EXCHANGE OF LETTERS

I

FEDERAL MINISTER FOR FOREIGN AFFAIRS

Bonn, 16 September 1980

Sir,

I wish to confirm that we have agreed as follows:

The Contracting Parties shall deem the option of restricting transfers, provided for in paragraph 5 of the Protocol, *ad* article 5 of the Treaty, to be

an inoperative provision, since, as a result of negotiations between Portugal and the European Communities on a Treaty of accession, an arrangement concerning such transfers that is more favourable to the investors concerned will enter into force.

Accept, Sir, etc.

GENSCHER

His Excellency
Professor Diogo Freitas do Amaral
Minister for Foreign Affairs
of the Portuguese Republic

II

MINISTER FOR FOREIGN AFFAIRS OF THE PORTUGUESE REPUBLIC

Bonn, 16 September 1980

I have the honour to acknowledge receipt of your letter of today, which reads as follows:

[*See letter I*]

I have the honour to inform you that my Government agrees to the foregoing.

Accept, Sir, etc.

DIOGO F. DO AMARAL

His Excellency Mr. Hans-Dietrich Genscher
Minister for Foreign Affairs
of the Federal Republic of Germany
