

TREATY BETWEEN MALTA AND THE FEDERAL REPUBLIC OF GERMANY CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS

The Federal Republic of Germany and Malta

DESIRING to intensify economic co-operation between both States,

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

RECOGNISING 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.

The two Contracting Parties shall, to the extent that their legislation and resources permit, facilitate the investment of capital by nationals or companies of either Contracting Party in the territory of the other. They shall treat, in each case, these investments in a fair and equitable manner.

Article 2.

(1) The investments effected by nationals or companies of either Contracting Party in the territory of the other shall be granted conditions not less favourable than those applying to its own nationals or companies or to investments of nationals or companies of any third State.

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

(3) Paragraph 2 of this Article shall not apply to entry and sojourn.

Article 3.

(1) The investments effected by nationals or companies of either Contracting Party in the territory of the other, and the profits thereof, shall not be subject to any expropriation except in the public interest, and then only against payment of compensation equivalent to the investment at the time of expropriation. Such compensation shall be payable and transferable without delay in convertible currency, without limitation. Appropriate legislation or provision shall have been made at or prior to the time of expropriation for the determination and the giving of such compensation. The legality of any such expropriation and the amount of compensation shall be subject to review by due process of law. The term "expropriation" as referred to in this paragraph shall also pertain to acts of sovereign power the effects of which are tantamount to expropriation, as well as measures of nationalisation.

(2) Nationals or companies of either Contracting Party whose investments suffer losses in the territory of the other Contracting Party owing to war or other conflict, revolution, a state of national emergency, or revolt, shall be accorded treatment no less favourable by such other Contracting Party than that Party accords to nationals or companies of any third State, as regards restitution, indemnification, compensation or other valuable consideration. Such payments shall be freely transferable.

(3) 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 provided for in the present Article.

Article 4.

Either Contracting Party shall in respect of investments guarantee to nationals or companies of the other Contracting Party the free transfer of the capital, of the returns from it and, in the event of liquidation or sale, of the proceeds from such liquidation or sale.

Article 5.

If either Contracting Party makes payment to any of its nationals or companies under a guarantee it has assumed 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 10, recognise the assignment, whether under a law or pursuant to a legal transaction, of any right or claim from such national or company to the former Contracting Party as well as the subrogation of that Contracting Party to any such right or claim, which that Contracting Party shall be entitled to assert to the same extent as its predecessor in title. As regards the transfer of payments to be made to the Contracting Party concerned by virtue of such assignment, paragraphs 1 and 2 of Article 3 as well as Article 4 shall apply *mutatis mutandis*.

Article 6.

(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 paragraphs 1 or 2 of Article 3, under Article 4 or Article 5 shall be made without undue delay and at the rate of exchange effective for current transactions on the day the transfer is made, provided always, that in the event of the introduction of a two-tier exchange rate system the appropriate rate of exchange shall be applied. Article 5 shall be made without undue delay and at the rate of exchange effective for current transactions on the day the transfer is made, provided always, that in the event of the introduction of a two-tier exchange rate system the appropriate rate of exchange shall be applied.

(2) The rate of exchange for such transactions shall not be inconsistent with the host country's obligations to the International Monetary Fund.

(3) If at the date of transfer no rate of exchange within the meaning of paragraph 2 above exists in respect of either Contracting Party or if the exchange rate within the meaning of paragraph 2 does not correspond to actual conditions in the foreign exchange markets, the official rate fixed by such Contracting Party for its currency in relation to a freely convertible currency shall be applied. If no such rate has been fixed, the appropriate agencies of the Contracting Party in whose territory the investment is situated shall admit a rate of exchange that is fair and equitable.

Article 7.

(1) If the legislation of either Contracting Party or international obligations existing at present or established hereafter between the Contracting Parties in addition to the present 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 the present Treaty, such regulation shall to the extent that it is more favourable prevail over the present Treaty.

(2) Either Contracting Party shall observe any other obligation it may have entered into with regard to investments in its territory by nationals or companies of the other Contracting Party.

Article 8.

(1) The term "investment" shall comprise every kind of asset, and more particularly, though not exclusively,

(a) Movable and immovable property as well as any other rights in rem, such as mortgages, liens, ledges, usufructs and similar rights;

(b) Shares of companies and other kinds of interest;

(c) Claims to money or to any performance having an economic value where such claims relate to an investment;

(d) Copyrights, industrial property rights, technical processes, trade-names, and goodwill;

(e) Business concessions under public law, including concessions to search for, extract or exploit natural resources.

Any alteration of the form in which assets are invested shall not affect their classification as investment.

(2) The term "returns" shall mean the amounts yielded by an investment for a definite period as profit or interest.

(3) The term "nationals" shall mean

(a) In respect of the Federal Republic of Germany:

Germans within the meaning of the Basic Law for the Federal Republic of Germany;

(b) In respect of Malta:

Citizens of Malta.

(4) The term "companies" shall mean

(a) 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 territory of the Federal Republic of Germany and lawfully existing consistent with legal provisions, 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;

(b) In respect of Malta:

A body of persons, whether corporate or not, duly registered in Malta or having therein its main place of business.

Article 9.

(1) The present Treaty shall also apply to investments made prior to its coming into force by nationals or companies of Malta in the territory of the Federal Republic of Germany consistent with the latter's legislation.

(2) In respect of Malta the present Treaty shall apply to investments made prior to its coming into force by nationals or companies of the Federal Republic of Germany only if a document of approval has been granted following an application.

(3) This provision shall not affect the Agreement of 27 February 1953 on German External Debts.

Article 10.

(1) Any controversy arising with regard to the interpretation or the execution of the present Treaty shall be settled through the normal diplomatic channels.

(2) In case of failure to reach an understanding the controversy in question shall be referred to a Court of Arbitration for decision.

(3) Such Court of Arbitration 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 four months, from the date on which either Contracting Party has informed the other Contracting Party that it wants to submit the controversy to a Court of Arbitration.

(4) If the periods specified in paragraph 3 above have not been observed, either Contracting Party may, in the absence of any other relevant 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 a national of either Contracting Party or if he, too, is 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 should make the necessary appointments.

(5) The Court of Arbitration shall reach its decisions by a majority of votes. Such decisions shall be binding and final. Each Contracting Party shall bear the cost of its own member and of its counsel in the arbitration proceedings; the cost of the Chairman and the remaining costs shall be borne in equal parts by both Contracting Parties. The Court of Arbitration may make a different regulation concerning costs. In all other respects, the Court of Arbitration shall determine its own procedure.

Article 11.

The provisions of the present Treaty shall remain in force also 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 have been re-established.

Article 12.

With the exception of the provisions in paragraph 5 of the Protocol, referring to air transport, the present 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 Malta within three months from the coming into force of the present Treaty.

Article 13.

(1) The present Treaty shall be ratified; the instruments of ratification shall be exchanged as soon as possible in Bonn.

(2) The present Treaty shall come into force one month after the day of exchange of the instruments of ratification. It shall remain in force for a period of five years and shall continue in force thereafter for an unlimited period except if terminated by notice in writing by either Contracting Party six months before its expiration. After the expiry of the period of five years the present Treaty may be terminated at any time by either Contracting Party giving six months' notice in writing.

(3) In respect of investments made prior to the date of termination of the present Treaty, the provisions of Articles 1 to 12 shall continue to be effective for a further period of fifteen years from the date of termination of the present Treaty.

DONE at Valletta on the 17 day of September One thousand Nine hundred and Seventy-four, in duplicate in the English and German languages, both texts being equally authentic.

For the Federal Republic of Germany

Steinbach

For Malta

Abela

PROTOCOL

On signing the Treaty concerning the Encouragement and Reciprocal Protection of Investments, concluded between Malta and the Federal Republic of Germany, the undersigned plenipotentiaries have, in addition, agreed on the following provisions which should be regarded as an integral part of the said Treaty:

(1) Ad Article 1

Investments in the territory of Malta shall be subject to the present Treaty if they have been approved for the purposes of this Treaty by the Government of Malta or an agency designated by it.

(2) Ad Article 2

(a) The following shall more particularly, though not exclusively, be deemed an activity covered by the word investment within the meaning of paragraph 2 of Article 2: the management, maintenance, use, and enjoyment of an investment. Measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed "treatment less favourable" within the meaning of Article 2.

(b) In the interest of its national economy either Contracting Party may, in approving an investment by nationals or companies of the other Contracting Party, make specific stipulations deviating from the treatment provided for in Article 2. If specific stipulations of that nature have been made -the provisions of Article 2 shall, - to that extent, not be applicable. Such specific stipulations to be effective, shall be made in detail in the document of approval.

(c) In respect of Malta and in derogation of the national treatment provided for in Article 2, it is to be understood that fiscal and financial incentives extended only to its own nationals or companies shall not apply to nationals or companies of the Federal Republic of Germany.

(3) Ad Article 6

For the purpose of Article 6, paragraph 1, there shall be deemed to be no "undue delay", if approval is given within three months from the date on which the relevant request for the transfer of funds was properly submitted.

(4) Ad Article 8

(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.

(5) Whenever goods or persons connected with the making of investments are to be transported, either Contracting Party shall neither exclude nor hinder transportation enterprises of the other Contracting Party and shall issue permits as required to carry out such transports. This includes the transportation of

(a) Goods directly intended for an investment within the meaning of the present 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 the present Treaty are invested;

(b) Persons travelling in connection with the making of investments.

DONE at Valletta on the 17 day of September One thousand Nine hundred and Seventy-four, in duplicate in the English and German languages, both texts being equally authentic.

For the Federal Republic of Germany

Steinbach

For Malta

Abela

EXCHANGES OF LETTERS

Valletta 7th April, 1973

Mr R A Chalmers MBE Chairman of the Maltese Delegation

Mr Chairman

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

"I have the honour to inform you that, having noted that the competent authorities of the Federal Republic of Germany may extend measures for promoting private investment outside the Federal Republic of Germany pending the fulfillment of the Constitutional requirements for the ratification of the Treaty between Malta and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments, the Government of Malta will provisionally apply as from the date of signature of the said Treaty the provisions thereof to nationals or companies of the Federal Republic of Germany."

Accept, Mr Chairman, the assurance of my high consideration.

Mr Knut Howard Winter

Chairman of the German Delegation

Valletta 7th April, 1973

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Accept, Mr Chairman, the assurance of my high consideration.

R A Chalmers Chairman of the Maltese Delegation