

Treaty between the Federal Republic of Germany and the Republic of Ghana concerning the Encouragement and Reciprocal Protection of Investments

The Federal Republic of Germany and the Republic of Ghana

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,

RECOGNIZING that the 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 the purposes of this Treaty

(1) The term "investments" comprises every kind of asset, in particular:

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

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

(c) Claims to money which has been used to create an economic value or claims to any performance having an economic value;

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

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

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

(2) The term "returns" means the amounts yielded by an investment for a definite period, such as profit, dividends, interest, royalties or fees;

(3) The term "nationals" means:

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

Germans within the meaning of the Basic Law of the Federal Republic of Germany,

(b) In respect of the Republic of Ghana:

Physical persons deriving their status as Ghanaian nationals from the law in force in the Republic of Ghana;

(4) The term "companies" means:

(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, irrespective of whether or not its activities are directed at profit;

(b) In respect of the Republic of Ghana:

Any corporations, firms and associations incorporated or constituted under the law in force in the Republic of Ghana.

Article 2.

(1) Each Contracting Party shall in its territory promote as far as possible investments by nationals or companies of the other Contracting Party and admit such investments in accordance with its legislation. It shall in any case accord such investments fair and equitable treatment.

(2) Neither Contracting Party shall in any way impair by arbitrary or discriminatory measures the management, maintenance, use or enjoyment of investments in its territory of nationals or companies of the other Contracting Party.

Article 3.

(1) Neither Contracting Party shall subject investments in its territory owned or controlled 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 or 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 or companies of any third State.

(3) Such treatment shall not relate to privileges which either Contracting Party accords to nationals or companies of third States on account of its membership of, or association with, a customs or economic union, a common market or a free trade area.

(4) The treatment granted under this Article shall not relate to advantages which either Contracting Party accords to nationals or companies of third States by virtue of a double taxation agreement or other agreements regarding matters of taxation.

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 of nationals or companies of either Contracting Party shall not be expropriated, nationalized or subjected to measures having effect equivalent to expropriation or nationalization (hereinafter referred to as "expropriation") in the territory of the other Contracting Party, except where expropriation is made for the public interest related to the Contracting Party's internal needs and against compensation. The expropriating Contracting Party shall comply with the following conditions:

1. The measures shall be accompanied by provision for the payment of compensation amounting to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier.

2. The compensation shall be paid without undue delay and shall include interest at the normal commercial rate until the date of payment.

3. The compensation shall be effectively realizable and freely transferable.

4. Prompt review, by a judicial or other independent authority of the expropriating Contracting Party, shall be guaranteed to the national or company affected with regard to his or its case and of the valuation of his or its investments.

(3) A claim to compensation shall also exist where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its territory, and in which nationals or companies of the other Contracting Party have an investment.

(4) Nationals or companies of either Contracting Party shall enjoy most-favoured-nation treatment in the territory of the other Contracting Party.

Article 5.

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 treatment no less favourable by the other Contracting Party than the treatment which the latter Contracting Party accords to its own nationals or companies or to nationals or companies of any third State as regards restitution, indemnification, compensation or other valuable consideration. Such payments shall be freely transferable.

Article 6.

Each Contracting Party shall guarantee to nationals or companies of the other Contracting Party the free transfer of payments in connection with an investment, in particular:

- (a) The principal and additional amounts to maintain or increase the investment;
- (b) Returns generated by the investment;
- (c) Repayment of loans;
- (d) Royalties and fees for the rights referred to in Article 1 (1) (d);
- (e) The proceeds from the liquidation or the sale of the whole or any part of the investment.

Article 7.

If either Contracting Party makes a 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 11, recognize the assignment, whether under a law or pursuant to a legal transaction, of any right or claim of such national or company to the former Contracting Party. The latter Contracting Party shall also recognize the subrogation of the former Contracting Party to any such right or claim (assigned claims) which that Contracting Party shall be entitled to assert to the same extent as its predecessor in title. As regards the transfer of payments made by virtue of such assigned claims, Articles 4, 5 and 6 shall apply *mutatis mutandis*.

Article 8.

- (1) Transfers under Articles 4, 5, 6 and 7 shall be made without undue delay at the applicable rate of exchange.
- (2) This rate of exchange shall correspond to the cross rate obtained from those rates which would be applied by the International Monetary Fund on the date of payment for conversions of the currencies concerned into Special Drawing Rights.

Article 9.

(1) If the legislation of either Contracting Party or obligations under international law 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, such regulation shall to the extent that it is more favourable prevail over this Treaty.

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

Article 10.

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 11.

(1) Disputes between the Contracting Parties concerning the interpretation or application of this Treaty should as far as 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 arbitration tribunal.

(3) Such arbitration tribunal shall be constituted ad hoc 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 intends to submit the dispute to an arbitration tribunal.

(4) If the periods specified in paragraph 3 above have not been observed, either Contracting Party may, in the absence of any other arrangement, 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 be invited to 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 Court next in seniority who is not a national of either Contracting Party should be invited to make the necessary appointments.

(5) The arbitration 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 representatives in the arbitration proceedings; the cost of the chairman and the remaining costs shall be borne in equal parts by the Contracting Parties. The arbitration tribunal may make a different regulation concerning costs. In all other respects, the arbitration tribunal shall determine its own procedure.

(6) In the event that a dispute under Article 12 hereof is submitted to arbitration in accordance with the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States the arbitration tribunal provided for above may in consideration of the provisions of Article 27 (1) of the said Convention not be appealed to insofar as agreement has been reached between the national or company of one Contracting Party and the other Contracting Party under Article 25 of the Convention. This shall not affect the possibility of appealing to such arbitration tribunal in the event that a decision of the arbitration tribunal established under the said Convention is not complied with (Article 27) or in the case of an assignment under a law or pursuant to a legal transaction as provided for in Article 7 of this Treaty. Article 12 hereof is submitted to arbitration in accordance with the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States the arbitration tribunal provided for above may in consideration of the provisions of Article 27 (1) of the said Convention not be appealed to insofar as agreement has been reached between the national or company of one Contracting Party and the other Contracting Party under Article 25 of the Convention. This shall not affect the possibility of appealing to such arbitration tribunal in the event that a decision of the arbitration tribunal established under the said Convention is not complied with (Article 27) or in the case of an assignment under a law or pursuant to a legal transaction as provided for in Article 7 of this Treaty.

Article 12.

(1) Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Treaty in relation to an investment of the former shall as far as possible be settled amicably between the parties to the dispute.

(2) If the dispute cannot be settled within six months of the date of written notification by one of the parties to the dispute, it shall be submitted for arbitration if either party to the dispute so requests.

(3) Unless the parties agree otherwise, the aggrieved party shall have the right to refer the dispute to:

(a) The International Centre for the Settlement of Investment Disputes for arbitration under the provisions of the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States; or

(b) An international arbitration tribunal established in accordance with the rules and procedure for arbitration of the UN Commission on International Trade Law; or

(c) An international arbitration tribunal established in accordance with the procedures outlined in paragraphs 3, 4 and 5 of Article 11, which should apply mutatis mutandis, and with the exception that for purposes of Article 11 (4), the President of the Court of International Arbitration of the International Chamber of Commerce in Paris shall be invited to make the necessary appointments. Article 11 (4), the President of the Court of International Arbitration of the International Chamber of Commerce in Paris shall be invited to make the necessary appointments.

(4) If both a national or company and a Contracting Party are aggrieved, the choice of the national or company as to the dispute settlement procedure shall prevail.

(5) The award shall be binding and be enforced in accordance with domestic law.

(6) During arbitration proceedings or the enforcement of an award, the Contracting Party involved in the dispute shall not

raise the objection that the national or company of the other Contracting Party has received compensation under an insurance contract in respect of all or part of the damage.

Article 13.

This Treaty shall remain in force also in the event of a conflict arising between the Contracting Parties, without prejudice to the right to take such temporary measures as are permitted under the general rules of international law. Such measures shall be repealed at the latest on the date of the actual termination of the conflict, irrespective of whether or not diplomatic relations exist.

Article 14.

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

(2) This Treaty shall enter into force one month after the date of exchange of the instruments of ratification and shall remain in force for a period of ten years. It shall be extended thereafter for an unlimited period unless denounced in writing by either Contracting Party twelve months before its expiration. After the expiry of the initial period of ten years this Treaty may be denounced at any time by either Contracting Party giving twelve months notice.

(3) In respect of investments made prior to the date of termination of this Treaty, the provisions of Articles 1 to 13 shall continue to be effective for a further period of fifteen years from the date of termination of this Treaty.

Done at Accra on twenty-fourth February 1995 in duplicate in the English and German languages, both texts being equally authentic.

For the Federal Republic of Germany

Heldt

For the Republic of Ghana

Dr. Kwesi Botchwey

Protocol

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

1. Ad Article 1

(a) Returns from the investment and, in the event of their re-investment, the returns therefrom shall enjoy the same protection as the investment.

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

2. Ad Article 2

(a) Investments made, in accordance with the legislation of either Contracting Party, within the area of application of the law of that Contracting Party by nationals or companies of the other Contracting Party shall enjoy the full protection of the Treaty.

(b) The Treaty shall also apply to the areas of the exclusive economic zone and the continental shelf insofar as international law permits the Contracting Party concerned to exercise sovereign rights or jurisdiction in these areas.

3. Ad Article 3

(a) The following shall more particularly, though not exclusively, be deemed "activity" within the meaning of Article 3 (2): the management, maintenance, use and enjoyment of an investment. The following shall, in particular, be deemed "treatment less favourable" within the meaning of Article 3: restricting the purchase of raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind, impeding the marketing of products inside or outside the country, as well as any other measures having similar effects. 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 3.

(b) The provisions of Article 3 do not oblige a Contracting Party to extend to natural persons or companies resident in the territory of the other Contracting Party tax privileges, tax exemptions and tax reductions which according to its tax laws are granted only to natural persons and companies resident in its territory.

(c) The Contracting Parties shall within the framework of their national legislation give sympathetic consideration to applications for the entry and sojourn of persons of either Contracting Party who wish to enter the territory of the other Contracting Party in connection with an investment; the same shall apply to employed persons of either Contracting Party who in connection with an investment wish to enter the territory of the other Contracting Party and sojourn there to take up employment. Applications for work permits shall also be given sympathetic consideration.

4. Ad Article 8

A transfer shall be deemed to have been made "without undue delay" within the meaning of Article 8 (1) if effected within such period as is normally required for completion of transfer formalities. The said period shall commence on the day on which the relevant request has been submitted and shall not exceed two months. In cases of exceptional balance of payments difficulties the period within which transfers have to be completed may be extended to a maximum of three months. The Contracting Party taking such measure shall ensure that it is carried out in a non-discriminatory manner and is no broader in scope or duration than absolutely necessary.

Whenever goods or persons connected with an investment are to be transported, subject to any bilateral or multilateral agreement on transport matters, to which the Contracting States are parties, each Contracting Party shall neither exclude nor hinder transport enterprises of the other Contracting Party and shall issue permits as required to carry out such transport. This shall include the transport of:

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

(b) Persons travelling in connection with an investment.

Done at Accra, on twenty-fourth February 1995 in duplicate in the German and English languages, both texts being equally authentic.

For the Federal Republic of Germany

Heldt

For the Republic of Ghana

Dr. Kwesi Botchwey