

# Treaty between the Federal Republic of Germany and the Republic of Guatemala on the Promotion and Reciprocal Protection of Capital Investments

The Federal Republic of Germany and the Republic of Guatemala

(Hereinafter referred to as "Contracting Parties"),

In the desire to deepen economic cooperation between the two Contracting Parties,

In the endeavor to create favorable conditions for the investments of investors of one Contracting Party in the territory of the other Contracting Parties,

Recognizing the fact that the promotion and the contractual protection of these investments are capable of stimulating private economic initiatives and increasing the prosperity of the two peoples,

Have agreed as follows:

## Article 1. Definitions

For the purposes of this Treaty

1. the term "investments" includes assets of any kind, in particular but not exclusively

a) Ownership of movable and immovable property as well as other rights in rem such as mortgages and liens;

b) Shares and other shareholdings in companies as well as any other type of shareholdings in companies;

c) Claims on money used to create an economic value or claims on an economic value;

d) Intellectual property rights, such as copyrights, patents, utility models, industrial designs, trademarks, trade names, business and commercial secrets, technical procedures, know-how and goodwill;

e) Public-law concessions, including concessions, exploitation and profit concessions for natural resources;

A change in the form in which assets are invested does not affect their property as an investment;

2. The term "income" means the amounts incurred in connection with an investment for a specific period, such as profit shares, dividends, interest, royalties or other charges;

3. The term "investor"

a) In relation to the Federal Republic of Germany:

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

b) In respect of the Republic of Guatemala:

Guatemalan in the sense of the political constitution of the Republic of Guatemala,

c) In respect of both Contracting Parties:

Any legal person, any commercial or other company or association, with or without legal personality, formed in accordance with its respective laws and having its seat in the territory of the respective Contracting Party, whether its activity is directed to profit or not.

Without prejudice to other procedures for the determination of nationality, in particular as a national of a Contracting Party, any person possessing a national passport issued by the competent authorities of the Contracting Party concerned shall be deemed to be a person.

## **Article 2. Promotion and Protection of Investments**

(1) Each Contracting Party shall, as far as possible, promote investments in its territory by investors of the other Contracting Parties and allow them to do so in accordance with its laws.

(2) Each Party shall, in its territory, treat investments made by investors of the other Party in all cases fairly and equitably and afford them the full protection of this Treaty. Income from the capital investment and, in the case of its reinvestment, the income therefrom, shall enjoy the same protection as the capital investment.

(3) A Contracting Party shall in no way interfere with the management, maintenance, use, use or disposal of the investments of investors of the other Contracting Parties in its territory by means of arbitrary or discriminatory measures.

(4) The investors of the Contracting Parties may freely choose international means of transport for the transport of persons and / or goods directly connected with an investment within the meaning of this Treaty.

(5) The Treaty shall also apply in the territories of the exclusive economic zone and the mainland base, provided that the international law of the respective Contracting Parties permits the exercise of sovereign rights or sovereign powers in these territories.

## **Article 3. National Treatment and Most-favored-nation Treatment**

(1) Each Contracting Party treats investments in its territory, which are owned or under the influence of investors of the other Contracting Parties, no less favorable than the investments of its own investors or investors of third States.

(2) Each Contracting Party shall accord to investors of the other Contracting Party in its territory, so far as their activities relating to investments of capital are concerned, treatment no less favorable than to its own investors or to investors of third States. Activities" shall include, in particular, but not exclusively, the management, maintenance, use, enjoyment, and disposal of an equity investment. Unequal treatment in the case of limitations on the acquisition of raw and auxiliary materials, energy, and fuels, as well as means of production and exploitation of all kinds, unequal treatment in the case of the hindrance of the sale of products within the country and abroad, and any measure having similar effects, shall be considered as "less favorable treatment". Measures taken for reasons of public safety and order, public health, or morality shall not be considered as "less favorable treatment".

(3) The provisions of paragraphs 1 and 2 shall not apply to privileges granted by a Contracting Party to investors of third countries because of their membership in a customs or economic union, a common market or a free trade zone or because of their association with them; Nor do they refer to the advantages granted by a Contracting Party to third-country investors on the basis of a double tax treaty or other agreements on tax questions.

(4) The provisions of this article do not require a Contracting Party to extend tax advantages, exemptions and reductions granted under the tax laws only to investors resident in its territory to investors resident in the territory of the other Contracting Party.

(5) Within the framework of their national legislation, the Contracting Parties shall examine with a view to the entry and residence of persons of one Contracting Party who wish to enter the territory of the other Contracting Party in connection with an investment; The same shall apply to employees of the one Contracting Party who enter the territory of the other Contracting Party in the context of an investment and wish to reside there in order to pursue an activity as an employee. Applications for the approval of work are also examined with due diligence.

## **Article 4. Expropriation and Compensation**

(1) Investments made by investors of a Contracting Party in the territory of the other Contracting Parties shall be fully protected and fully secured.

(2) Capital investments of investors of one Contracting Party may not, in the territory of the other Contracting Party, be expropriated, directly or indirectly, nationalized or subjected to other measures which in their effect amount to expropriation or nationalization, except in the public interest, and shall in such case be compensated. The compensation shall correspond to the value of the expropriated investment immediately prior to the date of disclosure of the actual or imminent expropriation, nationalization or equivalent measure. The compensation shall be payable without delay and shall

bear interest until the date of payment at a market rate of credit interest, shall be effectively realizable and freely transferable. At the latest at the time of the expropriation, nationalization or equivalent measure, adequate provisions shall have been made to fix and pay the compensation. The legality of the expropriation, nationalization or equivalent measure and the amount of compensation shall be subject to review in ordinary legal proceedings.

(3) Investors in a Contracting Party who suffer losses in investments through war or other armed conflicts, revolution, or state insurrection or turmoil in the territory of the other Contracting Party shall not be treated less favorably by the Contracting Party with regard to reimbursements, settlements, compensation or other benefits than their own investors.

(4) In respect of the matters governed by this Article, the investors of a Contracting Party shall enjoy most-favored-nation treatment in the territory of the other Contracting Party.

## **Article 5. Free Transfer**

(1) Each Contracting Party shall guarantee to investors of the other Contracting Party the free transfer of payments in connection with a capital investment, including in particular but not exclusively:

(a) initial capital and additional sums for the maintenance or expansion of the capital investment;

b) rents;

c) the amortization of loans;

d) the proceeds of the capital investment in the event of total or partial liquidation or disposal;

e) the indemnities provided for in Article 4.

(2) The transfers referred to in this Article, as well as in Article 6, shall be made without delay, at the market rate of exchange prevailing on the date of transfer. A transfer shall be deemed to have been effected "without delay" when it has been effected within the period of time normally required for the completion of the transfer formalities. The time limit, which in no case may exceed two months, shall begin to run at the time when the request has been submitted in due form.

(3) In the absence of an exchange market, the cross rate resulting from the exchange rates that the International Monetary Fund would apply on the date of payment for the conversion of the currencies of the countries concerned into special drawing rights shall apply.

## **Article 6. Subrogation**

If a Contracting Party makes payments to its investors under a guarantee, granted for a capital investment in the territory of the other Contracting Party, the latter, without prejudice to the rights of the former Contracting Party under Article 9, shall recognize the subrogation of all rights or claims of such investors to the former Contracting Party, whether by operation of law or by legal act. Furthermore, the other Contracting Party shall recognize the cause and extent of the subrogation of the first Contracting Party in all such rights or claims, which the latter shall be entitled to exercise to the same extent as the former holder. With respect to the transfer of payments under the transferred claims, Article 4, paragraphs 2 and 3, and Article 5 shall apply *mutatis mutandis*.

## **Article 7. Other Provisions**

(1) If legal provisions of one of the Contracting Parties, or obligations arising under international law outside this Treaty, present or future, between the Contracting Parties, result in a general or special regulation under which capital investments of investors of the other Contracting Party are to be accorded more favorable treatment than that provided for in this Treaty, such regulation shall prevail over this Treaty, to the extent that it is more favorable.

(2) Each Contracting Party shall comply with any other commitments it may have entered into with respect to investments of capital of investors of the other Contracting Party in its territory.

## **Article 8. Scope of Application**

This Agreement shall also apply to investments made by investors of one Contracting Party in accordance with the laws of the other Contracting Parties in their territory before the entry into force of this Treaty. However, it shall not apply to divergences or disputes that have arisen prior to its entry into force.

## **Article 9. Settlement of Disputes between the Contracting Parties**

- (1) Disputes arising between the Contracting Parties concerning the interpretation or application of this Treaty shall, as far as possible, be settled by consultation or negotiation between the governments of the two Contracting Parties.
- (2) If a dispute cannot be settled in this way, after at least six months from the notification of the initiation of consultations or negotiations, it shall, at the request of one of the Contracting Parties, be submitted to an arbitral tribunal.
- (3) The arbitral tribunal shall be constituted ad hoc as follows: each Contracting Party shall appoint one member, and the two members shall agree upon a national of a third State to be appointed by the Governments of both Contracting Parties as chairman. The members shall be appointed within two months and the chairman within three months of the date on which one Contracting Party informs the other Contracting Party that it wishes to submit the dispute to an arbitral tribunal.
- (4) If the time limits provided for in paragraph (3) are not observed, and in the absence of other arrangements, either Contracting Party may invite the President of the International Court of Justice to make the necessary appointments. If the President is a national of one of the Contracting Parties or is otherwise unable to act, the Vice-President shall be responsible for making the appointments. If the Vice-Chairman is also a national of one of the Contracting Parties or if he is also prevented from doing so, the member of the Court next in line in the hierarchy who is not a national of one of the Contracting Parties shall make the appointments.
- (5) The arbitral tribunal shall take its decisions by majority vote. Its decisions shall be binding. Each Contracting Party shall bear the expenses occasioned by the activity of its arbitrator and his representation in the arbitral proceedings; the expenses of the presiding arbitrator and other expenses shall be borne equally by the two Contracting Parties. The arbitral tribunal may adopt a different measure as regards expenses. Otherwise, the arbitral tribunal shall determine its own procedure.

## **Article 10. Settlement of Disputes between One of the Contracting Parties and an Investor of the other Contracting Party**

- (1) Disputes arising between a Contracting Party and an investor of the other Contracting Party concerning capital investments shall, as far as possible, be settled amicably between the parties to the dispute.
- (2) If a dispute cannot be settled within six months from the date on which one of the disputing parties has asserted it, it shall, at the request of the investor of the other Contracting Party, be submitted to arbitration. To the extent that the parties to the dispute do not otherwise agree, the provisions of paragraphs 3 to 5 of Article 9 shall apply mutatis mutandis, provided that the parties to the dispute shall appoint the members of the arbitral tribunal in accordance with the provisions of paragraph 3 of Article 9 and that, if the time limits provided for in Article 9, paragraph 3, are not observed, either party to the dispute may, failing other arrangement, invite the Chairman of the Arbitration Court of the International Chamber of Commerce of Paris to make the necessary appointments. The arbitral award shall be enforced in accordance with domestic law.
- (3) The Contracting Party involved in the dispute shall not invoke during arbitral proceedings or the enforcement of an arbitral award the fact that the investor of the other Contracting Party has received compensation for part or all of the damage under an insurance contract.
- (4) If both Contracting Parties have also become Contracting States to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of March 18, 1965, disputes between the parties to the dispute referred to in this Article shall be submitted to arbitration in accordance with the said Convention, provided that the parties to the dispute do not otherwise agree; the Contracting Parties agree to such a procedure.

## **Article 11. Entry Into Force, Duration and Termination**

- (1) This Treaty shall be ratified and the instruments of ratification shall be exchanged as soon as possible.
- (2) This Treaty shall enter into force one month after the date on which the instruments of ratification have been exchanged. It shall remain in force for ten years and shall continue thereafter for an indefinite period, unless it is denounced in writing through diplomatic channels by one of the Contracting Parties twelve months prior to its expiration. After ten years, the Treaty may be denounced in writing at any time through diplomatic channels with twelve months' notice.
- (3) For capital investments made up to the time of expiry of this Treaty, the provisions of the preceding Articles shall continue to apply for twenty years after the date on which this Treaty has expired.

(4) This Treaty shall govern whether or not diplomatic or consular relations exist between the Contracting Parties.

Done at Guatemala City, on October 17, 2003, in two copies, in the German and Spanish languages, both texts being equally authentic.

For the Federal Republic of Germany

W. Eickhoff

For the Republic of Guatemala

E. Gutierrez