

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

The Federal Republic of Germany and the Kingdom of Swaziland,

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 Kingdom of Swaziland:

A citizen within the meaning of the laws of Swaziland;

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 German area of application of this Treaty, irrespective of whether or not its activities are directed at profit,

(b) In respect of the Kingdom of Swaziland:

Corporations, firms or associations incorporated or constituted under the laws in force in the Kingdom of Swaziland.

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. This provision is without prejudice to any policy of preferential employment of own nationals of either 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) Any 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 by nationals or companies of either Contracting Party shall not be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party except for the public benefit and against compensation. Such compensation shall be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation, nationalization or comparable measure has become publicly known. The compensation shall be paid without delay and shall carry the prevailing bank interest until the time of payment; it shall be realizable and freely transferable. Provision shall have been made in an appropriate manner at or prior to the time of expropriation, nationalization or comparable measure for the determination and payment of such compensation. Nationals or companies of the other Contracting Party shall have the right to make the legality of any such expropriation, nationalization or comparable measure and the amount of compensation subject to review by due process of law.

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

(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 provided for in this Article.

Article 5.

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) Of the principal and additional amounts to maintain or increase the investment;

- (b) Of the returns;
- (c) In repayment of loans;
- (d) Of royalties and fees for the rights referred to in Article 1 (1) (d);
- (e) Of the proceeds from the liquidation or the sale of the whole or any part of the investment.

Article 6.

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 10, 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 envisaged by virtue of such assigned claims, Article 4 (2) and (3) as well as Article 5 shall apply *mutatis mutandis*.

Article 7.

(1) Transfers under Article 4 (2) or (3), under Article 5 or Article 6 shall be made without delay at the applicable rate of exchange.

(2) This rate of exchange shall correspond to the cross rate obtainable 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 8.

(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 under any agreement with regard to investments in its territory by 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) Disputes between the Contracting Parties arising from the interpretation or application of this Treaty should as far as possible be settled by the governments of the two Contracting Parties in a spirit of conciliation.

(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 *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 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 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 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 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 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 arbitral tribunal may make a different regulation concerning costs. In all other respects, the arbitral tribunal shall determine its own procedure.

(6) If both Contracting Parties are Contracting States of the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States the arbitral 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 arbitral tribunal in the event that a decision of the arbitral 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 6 of this Treaty.

Article 11.

(1) Disputes concerning investments between a Contracting Party and a national or company of the other Contracting Party should as far as possible be settled amicably between the parties in dispute.

(2) If the dispute cannot be settled within six months of the date when it has been raised by one of the parties in dispute, it shall, at the request of the national or company of the other Contracting Party, be submitted for arbitration. Unless the parties in dispute agree otherwise, the dispute shall be submitted for arbitration under the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States.

(3) The award shall be binding and shall not be subject to any appeal or remedy other than those provided for in the said Convention. The award shall be enforced in accordance with domestic law.

(4) 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 12.

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 not later than the date of the actual termination of the conflict, irrespective of whether or not diplomatic relations exist.

Article 13.

With the exception of the provisions in paragraph 6 of the Protocol, insofar as they refer to air transport, this Treaty shall also apply to Land Berlin, provided that the Government of the Federal Republic of Germany does not make a contrary declaration to the Government of the Kingdom of Swaziland within three months of the date of entry into force of this Treaty.

Article 14.

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

(2) This Treaty shall enter into force one month after the date of exchange of the instruments of ratification. It shall remain in force for a period of ten years and 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 period of ten years this Treaty may be denounced at any time by either Contracting Party upon 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 twenty years from the date of termination of this Treaty.

Done at Mbabane on 5 April 1990 in duplicate in the German and English languages, both texts being equally authentic.

For the Federal Republic of Germany

Reinhart Frans

For the Kingdom of Swaziland

Mamba

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

(1) Ad Article 1

(a) Returns from the investment and, in the event of their reinvestment, 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 envisaged by this Treaty. 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 envisaged by this Treaty; 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 4

A claim to compensation shall also exist when, as a result of State intervention in the company in which the investment is made, its economic substance is severely impaired.

(5) Ad Article 7

(a) A transfer shall be deemed to have been made "without delay" within the meaning of Article 7 (1) if effected within such period as is normally required of the completion of transfer formalities. The said period shall commence on the day on which the relevant request has been submitted and may on no account exceed two months.

(b) If and insofar as necessitated by extreme balance of payments difficulties, either Contracting Party may, on the decision of the competent organ, restrict for a limited period the transfer of the proceeds of liquidation in the event of the sate of the whole or any part of the investment. In any case an annual minimum transfer of twenty per cent (20%) of the proceeds of liquidation shall be guaranteed. The transfer shall be carried out at a rate of exchange no less favourable than the rate of exchange on the date on which application for transfer is made.

(6) Whenever goods or persons connected with an investment are to be transported, each Contracting Party shall neither exclude nor hinder enterprises of the other Contracting Party and shall issue permits as required to carry, out such transport. This shall 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.