

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

The Republic of Ecuador and the Federal Republic of Germany,

Desiring to intensify economic cooperation between the two States,

Seeking to create favourable conditions for capital investments by nationals and companies of one State in the territory of the other State,

Recognizing that the promotion of such capital investments and their protection by means of a treaty could stimulate private enterprise and enhance the well-being of both peoples,

Have agreed as follows:

Article 1. Definitions

For the purposes of this Treaty:

1. The term "capital investments" shall include all types of assets, in particular:

- (a) Ownership of movable and immovable property and any other rights in rem, such as mortgages, liens and pledges;
- (b) Stocks in companies and other forms of participation in companies;
- (c) Claims to money which has been used to create an economic value or to benefits having an economic value;
- (d) intellectual property rights, in particular, copyrights, patents, utility models, industrial designs and models, trade marks and trade names, industrial and commercial secrets, technical processes, know-how and goodwill;
- (e) Business concessions under public law, including concessions to prospect for, extract and exploit natural resources.

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

2. The term "income" shall mean the amounts yielded by a capital investment for a given period, such as profit sharing, dividends, interest and licence fees.

3. The term "nationals" shall mean:

(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 Ecuador:

Ecuadorians within the meaning of the Constitution of Ecuador.

4. The term "companies" shall mean:

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

Any legal entity, as well as any commercial or other company or association, with or without legal personality, having its principal place of business in the territory of the Federal Republic of Germany, whether or not its activities are for profit;

(b) In respect of the Republic of Ecuador:

Any legal entity constituted in accordance with Ecuadorian laws and regulations and domiciled in the territory of that Contracting Party, whether or not its activities are for profit.

Article 2. Promotion of Investments

1. Each Contracting Party shall promote capital investments by nationals or companies of the other Contracting Party in its territory, to the extent possible, and shall admit such investments in accordance with its legal provisions. In any case, it shall accord fair and equitable treatment to capital investments.
2. Neither Contracting Party shall impede the management, utilization, use or enjoyment of the capital investments of nationals or companies of the other Contracting Party in its territory through arbitrary or discriminatory measures.

Article 3. Treatment of Investments

1. Neither Contracting Party shall subject capital investments in its territory belonging to or under the control of nationals or companies of the other Contracting Party to treatment less favourable than that accorded to capital investments of its own nationals or companies or capital investments of nationals or companies of third States.
2. Neither Contracting Party shall subject nationals or companies of the other Contracting Party, as regards their activities in connection with capital investments in its territory, to treatment less favourable than that accorded to its own nationals or companies or to nationals or companies of third States.
3. Such treatment shall not include privileges which may be extended by either Contracting Party to nationals or companies of third States on account of its membership in a customs or economic union, common market or free trade area or its association with such groupings.
4. The treatment under this article shall not include privileges accorded by a Contracting Party to nationals or companies of third States by virtue of an agreement for the avoidance of double taxation or other tax agreements.

Article 4. Protection of Investments and Compensation In the Event of Expropriation

1. Capital investments by nationals or companies of one Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party.
2. Capital investments by nationals or companies of one Contracting Party in the territory of the other Party shall not be expropriated, nationalized or subjected to any other measure, the effects of which would be comparable to expropriation or nationalization, except for reasons of public interest and against compensation. The compensation shall be equivalent to the value of the expropriated investment immediately before the effective or impending expropriation, nationalization or comparable measure became public knowledge.

The compensation shall be paid without delay and shall carry the usual bank interest until the date of payment; it shall be readily convertible and freely transferable. At the latest, by the time of the expropriation, nationalization or comparable measure, the necessary steps shall have been taken to determine and pay the compensation. The legality of the expropriation, nationalization or comparable measure and the amount of compensation shall be subject to review in an ordinary judicial proceeding.

3. Nationals or companies of one Contracting Party whose capital 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 insurrection shall be accorded by that Contracting Party treatment no less favourable than that accorded to its own nationals or companies as regards restitution, settlement, compensation or other payments. Such payments shall be freely transferable.
4. Nationals or companies of one Contracting Party shall enjoy most-favoured-nation treatment in the territory of the other Contracting Party in respect of the matters regulated in this article.

Article 5. Free Transfer of Payments

1. Each Contracting Party shall guarantee to nationals or companies of the other Contracting Party the free transfer of payments in connection with a capital investment, in particular:
 - (a) Capital and additional amounts to maintain or increase the capital investment;
 - (b) Income;

(c) Repayment of loans;

(d) Proceeds of the liquidation or transfer of all or part of the capital investment;

(e) The compensation provided for in article 4.

2. Transfers made in accordance with article 4, paragraphs 2 and 3, article 5, paragraph 1, and article 6 shall be effected without delay at the exchange rate in force in each case.

3. Such rate shall correspond to the cross rate resulting from the exchange rates that the International Monetary Fund would apply if, on the date of payment, the currencies of the countries concerned were converted to special drawing rights.

Article 6. Subrogation

If one Contracting Party makes payments to its nationals or companies under a guarantee granted for a capital 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 9, recognize the transfer, whether under a law or pursuant to a legal transaction, of all rights of such nationals or companies to the former Contracting Party. The latter Contracting Party shall also recognize the subrogation of the former Contracting Party in respect of all such rights (transferred rights), which it shall be authorized to exercise to the same extent as its predecessor in title. For the transfer of payments by virtue of the transferred rights, article 4, paragraphs 2 and 3, and article 5 shall apply *mutatis mutandis*.

Article 7. Application of other Regulations

1. If the legislation of one Contracting Party or obligations under international law currently existing or to be established between the Contracting Parties, other than this Treaty, contain a regulation, whether general or specific, entitling capital investments by nationals or companies of the other Contracting Party to treatment more favourable than that provided for by this Treaty, such regulation shall, to the extent that it is more favourable, take precedence over this Treaty.

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

Article 8. Protection of Prior Investments

This Treaty shall also apply to capital investments made prior to its entry into force by nationals or companies of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter Party.

Article 9. Settlement of Disputes between the Contracting Parties

1. Disputes between the Contracting Parties relating to the interpretation or application of this Treaty shall, as far as possible, be settled by the Governments of the two Contracting Parties through the diplomatic channel.

2. If a dispute cannot be settled in this way within six months from the formal presentation of a diplomatic complaint, it shall, at the request of either Contracting Party, be submitted to an arbitral tribunal.

3. The arbitral tribunal shall be established on an *ad hoc* basis. Each Contracting Party shall appoint one member and the two members shall, by agreement, designate a national of a third State as Chairman, who shall be appointed by the Governments of the two Contracting Parties. The members shall be appointed within two months and the Chairman within three months after one Contracting Party has informed the other Party of its intention to submit the dispute to an arbitral tribunal.

4. If the time limits set out in paragraph 3 are not observed, and in the absence of any other agreement, either Contracting Party may request 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 prevented from discharging the said function, the appointments shall be made by the Vice-President. If the Vice-President is also a national of one of the Contracting Parties or is also prevented from discharging the said function, the appointments shall be made by the member of the Court next in seniority who is not a national of either Contracting Party.

5. The arbitral tribunal shall take its decisions by a majority of votes. Its decisions shall be binding. Each Contracting Party shall bear the costs of its own arbitrator and the costs of its representation in the arbitral proceedings. The costs of the

Chairman and the other remaining costs shall be borne equally by the two Contracting Parties. However, the arbitral tribunal may determine in its decision that a greater proportion of the costs should be borne by one of the Contracting Parties. In all other respects, the tribunal shall determine its own procedures.

6. If both Contracting Parties are also parties to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965, recourse may not be had to the arbitral tribunal provided for above, in view of the provisions of article 27, paragraph 1, of the Convention, when an agreement has been reached between the national or company of one Contracting Party and the other Contracting Party under article 25 of the Convention. The possibility of recourse to the above arbitral tribunal shall not be affected in the case of non-compliance with a decision of the arbitral tribunal established under the Convention (article 27) or in the case of a transfer under a law or pursuant to a legal transaction in accordance with article 6 of this Treaty.

Article 10. Settlement of Disputes between an Investor and the Contracting Party That Received the Investment

1. Disputes between one Contracting Party and nationals or companies of the other Contracting Party relating to the provisions of this Treaty shall, as far as possible, be settled amicably.

2. If a dispute cannot be settled within six months from the date on which one of the parties to the dispute gave notice thereof, it shall, at the request of the investor, be submitted:

(a) To a competent court of the Contracting Party in whose territory the investment was made;

(b) To an arbitral tribunal whose competence has been accepted by the Contracting Parties. Unless the parties to the dispute agree otherwise, disputes shall be submitted to arbitral proceedings under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965.

3. If the investor has submitted the dispute to a competent court of the Contracting Party in whose territory the investment was made, he may have recourse subsequently to an arbitral tribunal only in the following cases:

(a) If the competent national court has not ruled on the merits of the case within 18 months; or

(b) If the competent national court has not complied with the provisions of this Treaty in making its award.

4. The arbitral award under 2 (b) shall be binding and shall be enforced in accordance with national law. An arbitral award issued in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 shall not be subject to appeals or legal actions other than those provided for in that Convention.

5. The Contracting Party involved in the dispute shall not, during arbitral proceedings or the enforcement of an arbitral award, invoke the fact that the national or company of the other Contracting Party has received insurance compensation for all or part of the loss or injury.

Article 11. Diplomatic or Consular Relations

This Treaty shall apply regardless of whether or not diplomatic or consular relations exist between the Contracting Parties.

Article 12. Entry Into Force and Duration

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 the exchange of the instruments of ratification. It shall remain in force for a period of 10 years and shall be renewed thereafter for an indefinite period unless one of the Contracting Parties denounces it in writing 12 months before its expiry. After 10 years, the Treaty may be denounced at any time by giving 12 months' advance notice.

3. For capital investments made prior to the expiry of this Treaty, the provisions of articles 1 to 11 shall remain in force for 15 years from the date on which the validity of the Treaty expired.

4. When this Treaty enters into force, the Treaty between the Republic of Ecuador and the Federal Republic of Germany on the promotion and reciprocal protection of capital investments of 28 June 1965 shall cease to apply.

Done at Quito on 21 March 1996, in two copies, each in the Spanish and German languages, both texts being equally authentic.

For the Republic of Ecuador

DR. GALO LEORO FRANCO

For the Federal Republic of Germany

DR. WERNER PIECK

Protocol

In signing the Treaty between the Federal Republic of Germany and the Republic of Ecuador on the promotion and reciprocal protection of capital investments, the undersigned plenipotentiaries also adopted the following additional provisions, which shall be deemed an integral part of the Treaty:

1. Ad Article 1

(a) Income from a capital investment and, in the event of its reinvestment, income therefrom shall enjoy the same protection as the investment itself;

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

2. Ad Article 2

(a) Capital investments which, in accordance with the legal provisions of one of the Contracting Parties, have been made in the territory 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 in maritime areas adjacent to the outer limit of the territorial sea over which the Contracting Party concerned may, in accordance with its legislation and international law, exercise sovereignty, sovereign rights or jurisdiction.

3. Ad Article 3

(a) The following in particular, although not exclusively, shall be deemed "activities" within the meaning of article 3, paragraph 2: the management, utilization, use and enjoyment of a capital investment. The following in particular, although not exclusively, shall be deemed treatment "less favourable" within the meaning of article 3: less favourable treatment in the case of restrictions on the purchase of raw materials and other inputs, energy and fuel, as well as on all kinds of production and operation; less favourable treatment in the case of obstacles to the sale of products within and outside the country; and any measure with similar effects. Measures taken for reasons of public security and order, public health or morality shall not be deemed "less favourable" treatment within the meaning of article 3;

(b) The provisions of article 3 shall not require a Contracting Party to extend to individuals and companies resident in the territory of the other Contracting Party the tax privileges, exemptions and relief accorded under its tax laws only to individuals and companies resident in its territory;

(c) The Contracting Parties shall, within the framework of their domestic legislation, give favourable consideration to applications for entry and stay by persons of one Contracting Party who, in connection with a capital investment, wish to enter the territory of the other Contracting Party; the same rule shall apply to wage-earners of one Contracting Party who, in connection with a capital investment, wish to enter and stay in the territory of the other Contracting Party to carry on their activity as wage-earners. Applications for work permits shall also be given favourable consideration.

4. Ad Article 4

A right to compensation shall also exist when State measures are taken against the company in which the investment was made and the company's economic situation is severely impaired as a result.

5. Ad Article 5

A transfer shall be deemed to have been made "without delay" within the meaning of article 5, paragraph 2, if it is effected within the period normally required for the completion of transfer formalities. Such period shall commence with the submission of the relevant request and may in no circumstances exceed two months.

6.

In respect of the transport of goods and persons in connection with a capital investment, each Contracting Party shall neither exclude nor hinder the transport companies of the other Contracting Party and shall, where necessary, issue transport permits. Transport of the following are included:

(a) Goods intended directly for a capital investment within the meaning of the Treaty or acquired in the territory of one of the Contracting Parties or a third State by a company or by order of a company in which capital has been invested within the meaning of the Treaty;

(b) Persons traveling in connection with a capital investment.

Done at Quito on 21 March 1996, in two copies, each in the Spanish and German languages, both texts being equally authentic.

For the Republic of Ecuador:

DR. GALO LEORO FRANCO

For the Federal Republic of Germany:

DR. WERNER PIECK