

Agreement between the Federal Republic of Germany and the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments

The Federal Republic of Germany and the Republic of the Philippines –

Hereinafter referred to as the Contracting States,

Desiring to intensify economic co-operation between both States;

Intending to create favorable conditions for investments by nationals and companies of either Contracting State in the territory of the other Contracting State, and to increase prosperity in their respective territories;

Recognizing that encouragement and protection of such investments will benefit the economic prosperity of both States —

Have agreed as follows:

Article 1. Definition of Terms

For the purpose of this Agreement:

1. The term "investment" shall mean any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State, and more particularly, though not exclusively:

- (a) Movable and immovable property as well as other rights in rem, such as mortgages, liens, pledges, usufructs and similar rights;
- (b) Shares of stocks and debentures of companies or interest in the property of such companies;
- (c) Claims to money utilized for the purpose of creating an economic value or to any performance having an economic value;
- (d) Intellectual property rights, in particular copyrights, patents, utility-model patents, registered designs, trademarks, trade-names, trade and business secrets, technical processes, know-how, and good will;
- (e) Business concessions conferred by law or under contract, 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 an investment;

2. The term "nationals" shall mean

(a) With respect to the Republic of the Philippines:

Citizens of the Philippines within the meaning of its Constitution,

(b) With respect to the Federal Republic of Germany:

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

3. The term "companies" shall mean

(a) With respect to the Republic of the Philippines:

Corporations, partnerships or other associations, incorporated or constituted and actually doing business under the laws in force in any part of the territory of that Contracting State wherein a place of effective management is situated,

(b) With respect to 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;

4. The term "investor" shall mean nationals and companies as defined in numbers 2 and 3;

5. The term "returns" shall mean the amounts yielded by an investment for a definite period of time as profits, interest, capital gains, dividends, royalties, fees and other legitimate returns.

Article 2. Promotion and Acceptance

(1) Each Contracting State shall promote as far as possible investments in its territory by investors of the other Contracting State and admit such investments in accordance with its Constitution, laws and regulations as referred to in Article 1 paragraph 1. Such investments shall be accorded fair and equitable treatment. Article 1 paragraph 1. Such investments shall be accorded fair and equitable treatment.

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

Article 3. Treatment

(1) Each Contracting State shall in its territory accord investments of investors of the other Contracting State treatment not less favorable than that which it accords to investments or return of investments of investors of any third State.

(2) Each Contracting State shall in its territory accord the investors of the other Contracting State, as regards management, maintenance, use, enjoyment or disposal of their investments, treatment not less favorable than that which it accords to investors of any third State.

(3) Each Contracting State shall apply in its territory to investments and to investors of the other Contracting State, with respect to their investments which are made in accordance with the legislation of that Contracting State and activities related to such investments, a treatment not less favorable than that granted to its own investments and investors, or the treatment granted to the investments and investors of the most favored nation, if the latter is more favorable.

(4) The provisions of the preceding paragraphs shall not be construed as to oblige one Contracting State to extend to the investors of the other the benefit of any treatment, preference or privilege resulting from:

(a) Any customs union, common market, free trade area, or regional economic organization of which either Contracting State is a member, or

(b) Any international agreement relating wholly or mainly to taxation.

(5) If the legislation of either Contracting State or obligations under international law existing at present or established hereafter between the Contracting States in addition to this Agreement contain a regulation, whether general or specific, entitling investments by investors of the other Contracting State to a treatment more favorable than is provided for by this Agreement, such regulation shall to the extent that it is more favorable prevail over this Agreement. Each Contracting State shall observe any other obligation it has assumed with regard to investments in its territory by investors of the other Contracting State.

Article 4. Expropriation and Compensation

(1) Investments by investors of either Contracting State shall enjoy full protection and security in the territory of the other Contracting State.

(2) Investments by investors of either Contracting State shall not be expropriated, nationalized or subjected to any other direct or indirect measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting State 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. It shall be effectively 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. The legality of any such expropriation, nationalization or comparable measure and the amount of compensation shall be subject to review by due process of law.

(3) For the avoidance of doubt, where a Contracting State 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 investors of the other Contracting State own shares, it shall apply the provisions of paragraphs 1 and 2 of this Article so as to ensure the compensation provided for in that paragraphs to such investors to the extent of their interest in the assets expropriated.

(4) If a Contracting State makes restitution, indemnification, compensation or other settlement for losses suffered owing to war, revolution, state of national emergency, revolt, insurrection, riot or other armed conflicts in the territory of such Contracting State, it shall accord to the investors of the other Contracting State whose investments in the territory of the former have suffered such losses, treatment no less favorable than that which the Contracting State shall accord to its own investors. Resulting payments shall be freely transferable.

(5) Investors of either Contracting State shall enjoy most-favored-nation treatment in the territory of the other Contracting State in respect of the matters provided for in this Article.

Article 5. Transfers

(1) Each Contracting State shall guarantee the free transfer of payments in connection with investments made in its territory by investors of the other Contracting State which have been duly registered by its appropriate government agencies if so required, and in particular, though not exclusively:

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

(b) Of the returns;

(c) Of repayments of loans;

(d) Of the proceeds from a partial or total liquidation or disposal of the investment, including capital gains on the capital invested;

(e) Of the compensation for dispossession or loss pursuant to Article 4 of this Agreement; Article 4 of this Agreement;

(f) Of the earnings of individuals, not being its nationals who are allowed to work in connection with an investment in its territory and other amounts appropriated for the coverage of expenses connected with the management of the investment.

(2) Transfers of payment shall be made without delay in a freely convertible currency at the market rate of exchange with respect to spot transactions on the date of transfer in the territory of the Contracting State where the investment is made.

(3) In the absence of a market rate for foreign exchange the appropriate agencies of the Contracting State in whose territory the investment is situated shall admit a rate of exchange that is fair and equitable whereby the most recent rate to inward investments should provide an orientation.

Article 6. Subrogation

If either Contracting State makes a payment to any of its investors under a guarantee it has assumed in respect of an investment in the territory of the other Contracting State, the latter Contracting State shall, without prejudice to the rights of the former Contracting State under Article 10, recognize the assignment, whether under a law or pursuant to a legal transaction, of any right or claim of such investors to the former Contracting State. The latter Contracting State shall also recognize the subrogation of the former Contracting State to any such right or claim (assigned claims) which that Contracting State 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, Article 4 (2) to (4) as well as Article 5 shall apply mutatis mutandis.

Article 7. Consultation

The Contracting States agree to consult each other at the request of either State on any matter relating to investment between the two countries, or otherwise affecting the implementation of this Agreement.

Article 8. Prior Investments

This Agreement shall also apply to investments made prior to its entry into force by investors of either Contracting State in the territory of the other Contracting State consistent with the latter's legislation.

Article 9. Settlement of Disputes between a Contracting State and an Investor of

Another Contracting State

(1) All kinds of divergencies between a Contracting State and an investor of the other Contracting State concerning an investment shall be settled amicably through negotiations.

(2) If such divergencies cannot be settled according to the provisions of paragraph (1) of this Article within six months from the date of request for settlement, the investor concerned may submit the dispute to:

(a) The competent court of the Contracting State for decision;

(b) The International Centre for the Settlement of Investment Disputes through conciliation or arbitration, established under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, of March 18, 1965 done in Washington D.C.

(3) Neither Contracting State shall pursue through diplomatic channels any matter referred to arbitration until the proceedings have terminated and a Contracting State has failed to abide by or to comply with the award rendered by the International Centre for Settlement of Investment Disputes.

(4) 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.

Article 10. Settlement of Disputes between Contracting States

(1) Disputes between the Contracting States concerning the interpretation and application of this Agreement shall be settled, as far as possible, through friendly consultations by both parties through diplomatic channels.

(2) If such disputes cannot be settled within six months from the date on which either Contracting State informs in writing the other Contracting State, they shall, at the request of either Contracting State, be submitted for settlement to an ad hoc international Arbitral Tribunal.

(3) The ad hoc international Arbitral Tribunal mentioned above shall be established as follows: The Arbitral Tribunal is composed of three arbitrators. Each Contracting State shall appoint one arbitrator; the two arbitrators shall propose by mutual agreement the third arbitrator who is a national of a third State which has diplomatic relations with both Contracting States, and the third arbitrator shall be appointed as Chairman of the tribunal by both Contracting States.

(4) If the appointments of the members of the Arbitral Tribunal are not made within a period of six months from the date of request for arbitration, either Contracting State may, in the absence of any other arrangement, invite the President of the International Court of Justice to make the necessary appointments within three months. Should the President be a national of one Contracting State or should he not be able to perform this designation because of other reasons, this task shall be entrusted to the Vice-President of the Court, or to the next senior Judge of the Court who is not a national of either Contracting State.

(5) The Arbitral Tribunal shall determine its own procedure. The Arbitral Tribunal shall decide its award by majority of votes. Such award is final and binding upon the Contracting States.

(6) Each Contracting State shall bear the cost of its own member of the panel and of its representative in the arbitral proceedings. The costs of the Chairman and the remaining costs shall be borne in equal parts by the Contracting States. The Arbitral Tribunal may make a different apportionment concerning costs.

Article 11. Entry Into Force, Duration and Termination

(1) The present Agreement is subject to ratification in the Federal Republic of Germany and in the Republic of the Philippines subject to approval by its President.

(2) This Agreement shall enter into force on the first day of the second month following the date of the exchange of the German instruments of ratification and the Philippine notification of approval.

(3) It shall remain in force for a period of ten (10) years and shall continue in force thereafter unless denounced in writing by either Contracting State one year (12 months) before its expiration.

(4) In respect to investments made prior to the date of termination of this Agreement, its provisions shall continue to be effective for a further period of twenty (20) years from the date of termination of this Agreement.

(5) The attached Protocol forms an integral part of this Agreement.

Done at Bonn on April 18th. 1997 in duplicate in the German, Filipino and English languages, all three texts being authentic. In case of divergent interpretations of the German and the Filipino texts, the English text shall prevail.

For the Federal Republic of Germany

Hartmann

For the Republic of the Philippines

Bautista

On Signing the Agreement between the Federal Republic of Germany and the Republic of the Philippines concerning the Promotion and Reciprocal Protection of Investments, the plenipotentiaries being duly authorised have, in addition, agreed on the following provisions:

(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 State concerned shall be deemed to be a national of that State.

(2) Ad Article 2

(a) As provided for in the Constitution of the Republic of the Philippines, foreign investors are not allowed to own land in the territory of the Republic of the Philippines. However, investors are allowed to own up to 40 % of the equity of a company which can then acquire ownership of land.

(b) Whenever goods or persons connected with an investment are to be transported into and out of, the territory of either Contracting State, each Contracting State shall neither exclude nor hinder transport enterprises chosen by the investor of the other Contracting State and shall issue permits as required to carry out such transport.

(3) Ad Article 3

(a) The following shall, in particular, be deemed "treatment less favorable" within the meaning of Article 3: unequal treatment in the case of restrictions on the purchase of raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind; unequal treatment in the case of, 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 favorable" within the meaning of Article 3.

(b) The provisions of Article 3 do not oblige a Contracting State to extend to natural persons or companies resident in the territory of the other Contracting State 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 States shall within the framework of their national legislation give sympathetic consideration to applications for the entry and sojourn of persons of either Contracting States who wish to enter the territory of the other Contracting State in connection with an investment the same shall apply to employed persons of either Contracting State who in connection with an investment wish to enter the territory of the other Contracting State and sojourn there to take up employment. Applications for work permits shall also be given sympathetic consideration.

(4) Ad Article 4

The compensation for dispossession described in Article 4 shall include interest at the prevailing commercial rate in the country from the date of dispossession until the date of payment.

(5) Ad Article 5

(a) With respect to the Republic of the Philippines it is understood that duly registered investments are assets of any kind as defined in Article 1, admitted in accordance with Article 2 (1) and reported to competent governmental agencies at the time the investment was made. It is further understood, that the transfer guarantee is not limited to the capital values of the investments that have been duly registered. The Republic of the Philippines will relax as soon as possible existing reporting requirements.

(b) A transfer shall be deemed to have been made "without delay" within the meaning of Article 5 of effected within such period as is normally required for 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.