

Treaty between the Independent State of Papua New Guinea and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments

The Independent State of Papua New Guinea and the Federal Republic of Germany,

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, and

Recognizing that 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 purpose of the present Treaty

1. The term "investments" shall comprise 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;

(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 or exploit natural resources;

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

2. The term "returns" shall mean the amounts yielded by an investment for a definite period as profit, dividends, interest, licence or other fees;

3. The term "nationals" shall mean

(a) In respect of the Federal Republic of Germany: Germans within the meaning of the Basic Law for the Federal Republic of Germany;

(b) In respect of the Independent State of Papua New Guinea: citizens within the meaning of the Constitution of the Independent State of Papua New Guinea;

4. The term "companies" shall mean

(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 the present Treaty and lawfully existing consistent with legal provisions, irrespective of whether the liability of its partners, associates or members is limited or unlimited and whether or not its activities are directed at profit;

(b) In respect of the Independent State of Papua New Guinea: any juridical person as well as any commercial or other body or association whether incorporated or unincorporated which validly exists under the laws of Papua New Guinea

irrespective of whether the liability of its partners, associates or members is limited or unlimited and whether or not its activities are directed at profit.

Article 2.

Each Contracting Party shall in its territory promote as far as possible the investment of capital 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.

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.

Article 4.

(1) Investments by nationals or companies of either Contracting Party shall enjoy full protection as well as 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 investment expropriated immediately before the date the expropriation or nationalization was publicly announced. The compensation shall be paid without delay and shall carry the usual bank interest until the time of payment; it shall be actually 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) 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 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 the present 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 capital and additional amounts to maintain or increase the investment;

(b) Of the returns;

(c) Of instalments in repayment of loans;

(d) Of licence and other fees for the rights defined in subparagraph (d) of paragraph 1 of Article 1; subparagraph (d) of paragraph 1 of Article 1;

(e) Of the proceeds from the sale of the whole or any part of the investment or reduction of paid-in capital.

Article 6.

If either Contracting Party makes 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 from 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 to be made to the Contracting Party concerned by virtue of such assignment, paragraphs 2 and 3 of Article 4 as well as Article 5 shall apply *mutatis mutandis*.

Article 7.

(1) To the extent that those concerned have not made another arrangement admitted by the appropriate agencies of the Contracting Party in whose territory the investment is situated, transfers under paragraph 2 or 3 of Article 4, under Article 5 or Article 6 shall be made without delay at the rate of exchange effective for the agreed currency. Article 5 or Article 6 shall be made without delay at the rate of exchange effective for the agreed currency.

(2) This rate of exchange shall, in accordance with normal commercial banking practices, closely 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 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 the present 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 the present Treaty, such regulation shall to the extent that it is more favourable prevail over the present Treaty.

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

Article 9.

The present 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) Divergencies between the Contracting Parties concerning the interpretation or application of the present Treaty should as far as possible be settled by the Governments of the two Contracting Parties.

(2) If a divergency 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 relevant 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 arbitral 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) Both Contracting Parties being members 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 paragraph 1 of Article 27 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 (Article 27) is not complied with or in the case of an assignment under a law or pursuant to a legal transaction as provided for in Article 6 of the present Treaty. Article 6 of the present Treaty.

Article 11.

The present 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 on the date of the actual termination of the conflict, irrespective of whether or not diplomatic relations exist.

Article 12.

With the exception of the provisions in paragraph 9 of the Protocol, which refer to air transport, the present 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 Independent State of Papua New Guinea within three months of the date of entry into force of the present Treaty.

Article 13.

(1) The present Treaty requires ratification; the instruments of ratification shall be exchanged as soon as possible in Bonn.

(2) The present Treaty shall enter into force one month from the date of the 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 except if denounced in writing by either Contracting Party twelve months before its expiration. After the expiry of the period of ten years the present Treaty may be denounced at any time by either Contracting Party giving six months' notice.

(3) In respect of investments made prior to the date of termination of the present Treaty, the provisions of Articles 1 to 12 shall continue to be effective for a further period of fifteen years from the date of termination of the present Treaty.

Done at Port Moresby on Twelfth November 1980 in duplicate in the English and German languages, both texts being equally authentic.

For the Federal Republic of Germany

Bernd Oetter

For the Independent State of Papua New Guinea

W. Noel Levi

On signing the Treaty concerning the Encouragement and Reciprocal Protection of Investments, concluded between the Independent State of Papua New Guinea and the Federal Republic of Germany, 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 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 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 laws and regulations of either Contracting Party, within the area of application of the law of that Party by nationals or companies of the other Contracting Party shall enjoy the full protection of the present Treaty.

(b) Additional investments shall enjoy the full protection of this Treaty only if made in accordance with the laws and regulations of either Contracting Party.

(3) Ad Article 3

(a) The following shall more particularly, though not exclusively, be deemed "activity" within the meaning of paragraph 2 of Article 3: 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 machinery and equipment of any kind related to the investment, 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 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 the making and carrying through of an investment: the same shall apply to nationals 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.

(c) Special incentives granted by Papua New Guinea only to its nationals in order to stimulate the creation of local industries are considered compatible with Article 3 provided they do not substantially impair the investment and activities of nationals and companies of the Federal Republic of Germany in connection with an investment.

(4) Ad Article 4

(a) "Expropriation" shall mean any taking away or restricting tantamount to the taking away of any property right which in itself or in conjunction with other rights constitutes an investment.

(b) With regard to payments to be made under paragraph 3 of Article 4 the provisions of paragraph (5 c) of the Protocol will apply correspondingly.

(5) Ad Article 5

(a) This provision shall not be construed so as to oblige either Contracting Party to exempt nationals or companies of the other Contracting Party from the application of domestic legislation relating wholly or mainly to taxation.

(b) With respect to the free transfer of returns, licence and other fees in connection with an investment, in the event that, for reasons of extreme balance of payments difficulties, a Contracting Party acts in accordance with Article VIII 2 (a) of the Articles of Agreement of the International Monetary Fund, that Contracting Party shall have the right to restrict such transfers up to fifty per cent in any one year of the amount due and payable in that year in normal circumstances. The remainder will be eligible for transfer the following year.

(c) If, in the event of extreme balance of payments difficulties a Contracting Party foresees that it will not be able within any six-month period to permit the transfer of the proceeds from the liquidation of the whole or any part of the investment or amounts realized in consequence of the reduction of paid-in capital, such payments may be restricted for a limited time but only to the extent necessary to meet the difficulties. However, the amount to be transferred will not be less than ten per cent per annum of the said liquidation proceeds or amounts, all of which shall be transferred within five years from the due date.

(d) Furthermore each Contracting Party may, in exceptional circumstances, request consultations relating to transfer issues and their resolution.

(6) Ad Article 6

The Federal Republic of Germany is entitled to entrust the exercise of rights acquired under Article 6 to a person of its own choice acting as a trustee on her behalf, in particular when the laws of Papua New Guinea partially or wholly obviate the exercise of certain investment rights by a foreign State. In any case the Federal Republic of Germany is entitled to pursue directly claims for compensation or indemnification acquired under Article 6 if she so chooses.

(7) Ad Article 7

A transfer shall be deemed to have been made "without delay" within the meaning of paragraph 1 of Article 7 if 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 properly documented request has been submitted and shall not exceed two months.

(8) If legislation mentioned in paragraph 1 of Article 8 refers only to a specific investment project, the provision of Article 8 applies only to that particular project.

(9) Whenever goods or persons connected with the making of investments are to be transported, 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. Both cabotage and, in the absence of an air transport agreement between the Contracting Parties, transport by air would have to be approved on an individual basis.

Done at Port Moresby on Twelfth November 1980 in duplicate in the English and German languages, both texts being equally authentic.

For the Federal Republic of Germany

Bernd Oetter

For the Independent State of Papua New Guinea

W. Noel Levi