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Accord de promotion et de protection réciproques des investissements (APPI) avec la République Populaire de Pologne

Vu la proposition du DFEP du 25 octobre 1989

Vu les résultats de la procédure de co-rapport, il est

décidé:

- 1 Le texte de l'accord paraphé le 20 septembre 1989 entre la Suisse et la Pologne relatif à la promotion et à la protection réciproques des investissements entre la Confédération suisse et la République Populaire de Pologne est approuvé.
- 2 Le Secrétaire d'Etat Franz Blankart ou, en cas d'empêchement, l'Ambassadeur Silvio Arioli, Délégué aux accords commerciaux, est chargé de signer l'accord.
- 3 La Chancellerie fédérale est chargée d'établir les pouvoirs pour la signature de l'accord.
- 4 Le DFAE est chargé de procéder à la notification prévue à l'article 12, alinéa (1), de l'accord.
- 5 La Chancellerie fédérale est chargée de publier l'accord dans le recueil des lois.

Pour extrait conforme

Le secrétaire:

Protokollauszug an:				
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EIDGENÖSSISCHES VOLKSWIRTSCHAFTSDEPARTEMENT
 DÉPARTEMENT FÉDÉRAL DE L'ÉCONOMIE PUBLIQUE
 DIPARTIMENTO FEDERALE DELL'ECONOMIA PUBBLICA

2310.1

Berne, le 25 octobre 1989

Au Conseil fédéral

Accord de promotion et de protection réciproques des investissements (APPI) avec la République Populaire de Pologne

1 Contexte général

Engagés dans les mutations qui caractérisent l'environnement politique général, les pays à économie planifiée d'Europe centrale et de l'Est s'ouvrent, depuis quelques années déjà, progressivement mais résolument aux investissements étrangers. Ainsi, nombre d'entre eux se sont-ils dotés de législations plus libérales en matière d'investissements étrangers, qui prévoient, par exemple, une participation plus ou moins large au capital des entreprises nationales. Désormais conscients du rôle irremplaçable de la sécurité juridique et du climat d'investissement pour attirer les investisseurs étrangers dont ils ont un besoin urgent en raison de leurs difficultés économiques, ces pays se montrent plus perméables aux principes défendus par les pays industrialisés à économie de marché en matière d'investissement. Les perspectives de conclure des APPI avec les pays du CAEM se sont, en conséquence, nettement améliorées.

Les milieux économiques de la zone OCDE portent un intérêt croissant - maintes fois exprimé en Suisse - au renforcement des liens économiques avec les pays du CAEM, comme en témoigne aussi la multiplication de leurs projets et réalisations dans ces pays.

Convaincue de la volonté de la plupart des membres du CAEM d'améliorer en profondeur le cadre normatif proposé aux investissements étrangers, la Suisse a récemment relancé ses efforts pour une protection suffisante de ses investisseurs dans ces pays. Ainsi, l'accord signé en 1988 avec la Hongrie (entré en vigueur cette année) est-il maintenant suivi de celui paraphé le 20 septembre dernier avec la Pologne, alors que les négociations APPI avec la Bulgarie et l'Union soviétique sont à un stade avancé.

Au total, la Suisse a jusqu'à présent conclu avec 40 Etats des APPI ou accords comportant une clause relative à la protection des investissements. En outre, des négociations sont en cours avec d'autres pays - en développement - désireux de conclure un tel traité avec notre pays.

2 Contenu de l'APPI paraphé avec la Pologne

Les APPI conclus jusqu'ici et envisagés par la Suisse concordent dans une large mesure quant à leur contenu. Le texte conventionnel négocié avec la Pologne - texte qui s'inscrit dans la ligne de la politique suisse de soutien actif aux réformes en cours dans les pays d'Europe centrale et de l'Est - retient les principes fondamentaux défendus par la Suisse dans ce domaine. Ainsi, les principes fixés dans la délégation de compétence à conclure des APPI avec des pays en développement ou avec d'autres Etats, du Parlement au Conseil fédéral (AF du 27 septembre 1963, RS 975 et message du Conseil fédéral du 24 mai 1963) sont-ils respectés.

Les dispositions les plus importantes du présent accord règlent les points suivants:

Article 1^{er}, alinéa (1)

Définition de l'investisseur

Pour une société, la qualité d'investisseur est fonction de deux critères: soit son incorporation liée à son siège, soit son contrôle.

Article 2

Champ d'application

Tombent sous le champ d'application de l'accord les investissements effectués après le 26 mai 1976, date de la première loi polonaise sur les activités des entreprises étrangères en Pologne (alinéa (1)). Cependant, l'accord n'affectera pas les droits ni les obligations des Parties Contractantes liés à des investissements qui ne tomberaient pas sous son champ d'application (alinéa (2)).

Article 3

Encouragement et admission

Une fois un investissement étranger admis sur le territoire d'une Partie Contractante, celle-ci délivre toute autorisation réclamée par l'investissement.

Article 4, alinéa (1)

Protection

Dès l'admission d'un investissement étranger sur son territoire, chaque Partie Contractante en assure la protection sur une base non discriminatoire.

Article 4, alinéa (2)

Traitement

Chaque Partie Contractante assure sur son territoire un traitement juste et équitable aux investissements des investisseurs de

l'autre Partie Contractante. Ce traitement ne doit pas être moins favorable que celui accordé aux investissements effectués sur son territoire par ses propres investisseurs. En outre si le traitement accordé aux investisseurs de la nation la plus favorisée devait être plus favorable encore, c'est ce traitement qui serait accordé.

Les entreprises conjointes (joint ventures) d'investisseurs des deux Parties Contractantes devront en outre bénéficier d'un tel traitement et ce, en tant qu'entités.

Article 5

Transfert

La garantie du libre transfert est assortie des modalités suivantes:

- pour ses transferts en devises, l'investisseur suisse en Pologne doit faire appel à son propre compte en devises. Si ce compte est insuffisant, les autorités polonaises sont tenues d'autoriser la conversion des zlotys en monnaie convertible;
- en ce qui concerne les emprunts, notamment, ainsi que les revenus de l'investissement, le transfert pourra faire l'objet d'arrangements spécifiques - entre investisseur suisse et autorités polonaises compétentes - passés de préférence lors de l'admission de l'investissement.

Dès cinq ans après l'entrée en vigueur de l'accord, la Suisse pourra rouvrir la discussion sur cette concession en vue de son abandon. En tout état de cause, les investisseurs suisses devront être mis au bénéfice de la clause de la nation la plus favorisée.

Article 6

Expropriation et compensation

Toute mesure d'expropriation ou de nationalisation doit être conforme aux prescriptions légales et non discriminatoire. Elle ne saurait se fonder sur des raisons autres que l'intérêt public et entraînera le paiement d'une indemnité effective et adéquate, dont le montant sera réglé sans retard et sera librement transférable.

Article 9

Arbitrage entre une Partie Contractante et un investisseur de l'autre Partie Contractante

L'investisseur peut porter devant un tribunal arbitral une contestation relative aux articles 5 et 6 de l'accord (transfert et indemnisation en cas d'expropriation, par ex.); dans les autres cas, les parties au différend décident conjointement de s'en remettre à un tribunal arbitral (alinéa (2)). En outre, cette disposition tient compte du fait que la Pologne n'est pas encore membre du Centre international pour le règlement des différends relatifs aux investissements (CIRDI), institué par la Convention

de Washington du 18 mars 1965 pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats (alinéa (8)).

Article 10

Arbitrage entre Parties Contractantes

Une procédure d'arbitrage est prévue en cas de différend sur l'interprétation ou l'application de l'accord.

3 Constitutionnalité de l'accord

L'article 8 de la constitution fédérale donne à la Confédération la compétence de conclure des traités internationaux.

En vertu de l'article premier de l'arrêté fédéral du 27 septembre 1963 (RS 975), le Conseil fédéral est autorisé à conclure de sa propre compétence des accords de protection et d'encouragement des investissements de capitaux.

4 Conséquences financières et effets sur l'état du personnel

La conclusion du présent accord avec la Pologne n'impose aucune charge à la Confédération et n'entraîne pas d'augmentation du personnel.

5 Prise de position des offices intéressés

La Chancellerie fédérale, l'Office fédéral de la justice, la Direction du droit international public et l'Administration fédérale des contributions

sont d'accord avec la présente proposition.

6 Proposition

Nous fondant sur ces considérations, nous vous soumettons la proposition ci-jointe.

DEPARTEMENT FEDERAL DE L'ECONOMIE PUBLIQUE



Annexes

- Projet de décision du Conseil fédéral
- Accord de promotion et de protection réciproques des investissements avec la République Populaire de Pologne (en anglais, langue dans laquelle l'accord a été négocié, puis paraphé; les versions française et polonaise de l'accord sont en préparation, de concert avec les autorités polonaises).

Pour co-rapport à:

- CHF
- DFJP
- DFAE proposition du DFEP du 23 octobre 1989
- DFF

Extrait du procès-verbal à:

- DFEP en 15 ex. (7 ex. SG, 8 ex. OFAEE)
- DFJP en 10 ex.
- DFAE en 10 ex.
- DFF en 10 ex.

- 1 Le texte de l'accord paraphé le 20 septembre 1989 entre la Suisse et la Pologne relatif à la promotion et à la protection réciproques des investissements entre la Confédération suisse et la République Populaire de Pologne est approuvé.
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Le secrétaire

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Pour extrait conforme

Le secrétaire:

AnnexPreamble

The Swiss Confederation and the Polish People's Republic
 desiring to intensify economic cooperation to the mutual benefit
 of both States, hereinafter referred to as the Contracting Par-
 ties,

Agreement

intending to create and maintain favourable conditions for invest-
 ments by investors of one Contracting Party in the territory of
 the other Contracting Party,

between**the Swiss Confederation**

Recognizing the need to promote and protect foreign investments
 with the aim to foster the economic and prosperity of both Contracting
 Parties,

and**the Polish People's Republic**

Have agreed as follows:

on the Reciprocal Promotion and Protection**of Investments**

Preamble

The Swiss Confederation and the Polish People's Republic

Desiring to intensify economic cooperation to the mutual benefit of both States, hereinafter referred to as the Contracting Parties,

Intending to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party,

Recognizing the need to promote and protect foreign investments with the aim to foster the economic prosperity of both Contracting Parties,

Have agreed as follows:

- 1) legal entities established under the law of any country which are, directly or indirectly, controlled by nationals of that Contracting Party; or by legal entities having their seat, together with real economic activities, in the territory of that Contracting Party; it being understood that control requires substantial part in the ownership;
- 2) The term "investments" means any kind of assets and in particular, though not exclusively, includes:
 - a) movable and immovable property as well as any other rights in rem, such as servitudes, mortgages, liens, pledges;
 - b) shares, parts or any other kinds of participation in companies;
 - c) claims to money or to any performance having an economic value;

d) copyrights, industrial property rights, such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin, know-how and goodwill;

Article 1

Definitions

For the purpose of this Agreement:

- (1) The term "investor" refers with regard to either Contracting Party to
 - a) natural persons having the nationality of that Contracting Party;
 - b) legal entities, including companies, corporations, business associations and other organisations, which are constituted or otherwise duly organised under the law of that Contracting Party and have their seat, together with real economic activities, in the territory of that same Contracting Party;

Scope of application

- (1) The term "investment" means
 - c) legal entities established under the law of any country which are, directly or indirectly, controlled by nationals of that Contracting Party or by legal entities having their seat, together with real economic activities, in the territory of that Contracting Party; it being understood that control requires substantial part in the ownership.
- (2) The term "investments" means any kind of assets and in particular, though not exclusively, includes:
 - a) movable and immovable property as well as any other rights in rem, such as servitudes, mortgages, liens, pledges;
 - b) shares, parts or any other kinds of participation in companies;

Article 2

- (1) c) claims to money or to any performance having an economic value;

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- d) copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin), know-how and goodwill;
- e) rights granted by a public authority to carry out an economic activity, including concessions, for example, to search for, extract or exploit natural resources.
- (3) The term "territory" means the territory of a Contracting Party including any area beyond the territorial sea which in accordance with international law has been or may be designated under the laws of a Contracting Party as area over which a Contracting Party may exercise sovereign rights or jurisdiction.

Article 2

Scope of application

- (1) The present Agreement shall apply to investments in the territory of one Contracting Party by investors of the other Contracting Party, if the investments have been made later than 26 May 1976 in accordance with the laws and regulations of the former Contracting Party.
- (2) The present Agreement shall not affect the rights and obligations of the Contracting Parties with respect to investments that are not within the scope of the Agreement.

Article 3

Promotion and admission of investments

- (1) Each Contracting Party shall promote in its territory investments by investors of the other Contracting Party and admit such investments in accordance with its laws and regulations.

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- (2) When a Contracting Party shall have admitted an investment in its territory, it shall grant in accordance with its laws and regulations the necessary permits in connection with such an investment and with the carrying out of licensing agreements and contracts for technical, commercial or administrative assistance. Each Contracting Party shall, whenever needed, endeavour to issue the necessary authorizations concerning the activities of consultants and other qualified persons of foreign nationality.

Article 4

Protection and treatment of investments

- (1) Each Contracting Party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale and, should it so happen, liquidation of such investments.
- (2) Each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other Contracting Party. This treatment shall not be less favourable than that granted by each Contracting Party to investments made in its territory by its own investors, or than that granted by each Contracting Party to the investments made in its territory by investors of the most favoured nation, if this latter treatment is more favourable. As for joint ventures they shall enjoy the aforementioned treatment as entity.
- (3) The treatment of the most favoured nation shall not apply to privileges which either Contracting Party accords to investors of a third State because of its membership in, or association with a free trade area, customs union, common market or organisation for mutual economic assistance.

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Article 5**Transfer**

- (1) Each Contracting Party in whose territory investments have been made by investors of the other Contracting Party shall grant those investors the free transfer of the payments relating to these investments, particularly of:
- a) the proceeds from the sale or from the partial or total liquidation of the investment, including possible capital appreciation;
 - b) royalties deriving from rights enumerated in Article 1, paragraph (2), letter d) of this Agreement;
 - c) amounts relating to loans incurred, or other contractual obligations undertaken, for the investment;
 - d) interests, dividends, profits and other current returns;
- (2) The free transfer relating to Swiss investments in the territory of the Polish People's Republic shall be subject to the following modalities:
- a) transfers of foreign currency by Swiss investors shall be made from the foreign exchange account of the investor transferring the currency; where that foreign exchange account does not have sufficient foreign exchange for the transfer, the Polish People's Republic shall, without prejudice to the provision of letter b) of this paragraph, permit the conversion of Polish currency into convertible currency;
 - b) as for cases mentioned under letters c) and d) of paragraph (1) of this Article, the conversion of Polish currency into convertible currency may, in accordance with Polish legislation, depend on specific arrangements between the investor and the competent authorities of the Polish

- People's Republic; such arrangements should preferably be made at the time of the approval of the investment;
- c) the modalities of this paragraph shall, after a period of five years following the date of the entry into force of this Agreement and upon request of either Contracting Party, be discussed with a view to their possible deletion;
- d) in no case shall Swiss investors be treated less favourable than investors of any third State.
- (3) Unless otherwise agreed by the investor transfers shall be made at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force of the Contracting Party in whose territory the investment was made.

Article 6

Expropriation and compensation

- (1) Neither of the Contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other measure having the same nature or an equivalent effect against investments belonging to investors of the other Contracting Party, unless the measures are taken in the public interest, on a non discriminatory basis, and under due process of law, and provided that provisions be made for effective and adequate compensation. The amount of compensation shall be settled in the currency of the country of origin of the investment and paid without undue delay to the person entitled thereto without regard to its residence or domicile. A transfer shall be deemed to be made "without undue delay" 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 request has been submitted and may not exceed three months.

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- (2) The investors of one Contracting Party whose investments have suffered losses due to a war or any other armed conflict, revolts, riots, state of emergency or similar events, which took place in the territory of the other Contracting Party shall benefit, on the part of this latter, from a treatment in accordance with Article 4, paragraph (2) of this Agreement as regards restitution, indemnification, compensation or other valuable consideration.
- (3) Investors referred to in Article 1, paragraph (1), letter c) may not raise a claim based on paragraph (1) or (2) of this Article if compensation has been paid pursuant to a similar provision in another Investment Protection Agreement concluded by the Contracting Party in the territory of which the investment has been made.

Article 7

More favourable provisions

If provisions contained in the legislation of either Contracting Party entitle the investor to a treatment more favourable than is provided by the present Agreement, those provisions shall prevail over the terms set forth by this Agreement.

Article 8

Subrogation

Where one Contracting Party has granted any financial guarantee against non-commercial risks in regard to an investment by an investor in the territory of the other Contracting Party, the latter shall recognize the rights of the first Contracting Party by virtue of the principle of subrogation to the rights of the investor when payment has been made under this guarantee by the first Contracting Party. The other Contracting Party shall be entitled to set off taxes and other public charges due and payable by the investor.

national of a Contracting Party the provisions in paragraph (3) of article 10 of this Agreement shall be applied mutatis mutandis.

Article 9

- (3) UN Disputes between a Contracting Party and an investor of the other Contracting Party whose decisions are final and binding. Each Contracting Party shall ensure the
- (1) For the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party and without prejudice to Article 10 of this Agreement consultations will take place between the parties concerned.
 - (2) If these consultations do not result in a solution within six months from the written request to enter into consultations, the parties to the dispute may proceed as follows:
 - a) A dispute concerning an obligation under Article 5 and Article 6 of this Agreement shall upon request of the investor be submitted to an arbitral tribunal.
 - b) In the event of a dispute not referred to in paragraph (2) letter a) of this Article the dispute shall be submitted upon agreement on such submission by both parties to an arbitral tribunal.
 - (3) The arbitral tribunal shall be constituted for each individual case. Unless the parties to the dispute have agreed otherwise each of them shall appoint one arbitrator and these two arbitrators shall nominate a chairman who shall be national of a third State. The arbitrators are to be appointed within two months of the receipt of the request for arbitration and the chairman is to be nominated within further two months.
 - (4) If the periods specified in paragraph (3) of this Article have not been observed, either party to the dispute may, in the absence of any other arrangements, invite the President of the Court of Arbitration of the International Chamber of Commerce in Paris to make the necessary appointments. If the President is prevented from carrying out the said function or if he is a

national of a Contracting Party the provisions in paragraph (5) of Article 10 of this Agreement shall be applied mutatis mutandis.

- (5) Unless the parties to the dispute have agreed otherwise, the tribunal shall determine its procedure. Its decisions are final and binding. Each Contracting Party shall ensure the recognition and execution of the arbitral judgement.
- (6) Each party to the dispute shall bear the costs of its own member of the tribunal and of its representation in the arbitral proceedings; the costs of the chairman and the remaining cost shall be borne in equal parts by both parties to the dispute. The tribunal may, however, in its award decide on a different proportion of costs to be borne by one of the parties and this award shall be binding on both parties.
- (7) The Contracting Party which is party to the dispute can, at no time whatever during the settlement procedure or the execution of the sentence, alledge the fact that the investor has received, by virtue of an insurance contract, a compensation covering the whole or part of the incurred damage.
- (8) In the event of both Contracting Parties having become members of the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of other States, disputes shall be submitted to the International Center for Settlement of Investment Disputes as follows: disputes referred to in paragraph (2), letter a) of this Article upon request of the investor, and disputes referred to in paragraph (2), letter b) of this Article upon agreement of both parties.

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Article 10

Disputes between Contracting Parties

- (1) Disputes between Contracting Parties regarding the interpretation and application of the provisions of this Agreement shall be settled through diplomatic channels.
- (2) If both Contracting Parties cannot reach an agreement within twelve months after the beginning of the dispute between themselves, the latter shall, upon request of either Contracting Party, be submitted to an arbitral tribunal of three members. Each Contracting Party shall appoint one arbitrator, and these two arbitrators shall nominate a chairman who shall be a national of a third State, which maintains diplomatic relations with both Contracting Parties.
- (3) If one of the Contracting Parties has not appointed its arbitrator and has not followed the invitation of the other Contracting Party to make that appointment within two months, the arbitrator shall be appointed upon the request of that Contracting Party by the President of the International Court of Justice.
- (4) If both arbitrators cannot reach an agreement about the choice of the chairman within two months after their appointment, the latter shall be appointed upon the request of either Contracting Party by the President of the International Court of Justice.
- (5) If, in the cases specified under paragraphs (3) and (4) of this Article, the President of the International Court of Justice is prevented from carrying out the said function or if he is a national of either Contracting Party, the appointment shall be made by the Vice-President, and if the latter is prevented or if he is a national of either Contracting Party, the appointment shall be made by the most senior Judge of the Court who is not a national of either Contracting Party.

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- (6) Subject to other provisions made by the Contracting Parties, the tribunal shall determine its procedure. The tribunal shall reach its decisions by a majority of votes.
- (7) The decisions of the tribunal are final and binding for each Contracting Party.
- (8) Each Contracting Party shall bear the costs of its own member of the tribunal and of its representation in the arbitral proceedings; the costs of the chairman and the remaining costs shall be borne in equal parts by the Contracting Parties. The tribunal may, however, decide that a higher proportion of costs shall be borne by one of the two Contracting Parties, and this award shall be binding on both Contracting Parties.

Article 11

For the Swiss
Confederation

For the Polish People's

Observance of commitments

Each Contracting Party shall observe any commitment it may have entered into with regard to investments of investors of the other Contracting Party.

Article 12

Final Provisions

- (1) This Agreement shall enter into force on the day when both Contracting Parties have notified each other that they have complied with the legal requirements for the conclusion and entry into force of international agreements, and shall remain binding for a period of ten years. Unless written notice of termination is given six months before the expiration of this period, the Agreement shall be considered as renewed on the same terms for a period of five years, and so forth.

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SCHWEIZERISCHER BUNDESRAT

(2) In case of official notice as to the termination of the present Agreement, the provisions of Articles 1 to 11 shall continue to be effective for a further period of ten years for investments made before official notice was given.

Verordnung über landwirtschaftliche Begriffe

Aufgrund des Antrages des EVD vom 13. Oktober 1989

Aufgrund der Ergebnisse des Mitberichtsverfahrens wird

Done, in duplicate at , on , in French, Polish and English, each text being equally authentic. In case of divergency, the English text shall prevail.

1. Die Verordnung über landwirtschaftliche Begriffe wird gutgeheissen und am 15. November 1989 in Kraft gesetzt.

For the Swiss Confederation

For the Polish People's Republic

3. Der Erlass dieser Verordnung soll die Form, in der die angestrebte Begriffsvereinheitlichung realisiert wird, nicht präjudizieren.

4. Das EVD (BLM) wird beauftragt, in Zusammenarbeit mit dem BJ und der BK die landwirtschaftlichen Begriffe zu vereinheitlichen mit dem Ziel, eine Vereinfachung und bessere Verständlichkeit der landwirtschaftlichen Erlasse herbeizuführen.

Für getrennten Auszug, der Protokollführer:

Veröffentlichung: Amtliche Sammlung

Protokollierung von				
Datum / □ mit Anlage				
V	ZH	Dsp.	Ans.	Akten
		EDA		
		EDI		
X		EPO	6	-
		EMO		
		EHO		
		EVD	16	-
		EVED		
		BE	5	-
		EPK		
		Fin.DK		

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