AGREEMENT BETWEEN THE GOVERNMENT OF INDIA AND THE GOVERNMENT OF NEPAL FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

The Government of India and the Government of Nepal (hereinafter referred to as the Contracting Parties);

Desiring to create conditions favourable for fostering greater investments by investors of one State in the territory of the other State;

Recognising that the encouragement and reciprocal promotion and protection of such investments are essential to stimulate private sector initiative and will increase prosperity in both States;

Have agreed as follows:

Article 1. Definitions

For the purposes of this Agreement:

(a) companies mean:

(i) in respect of India: corporations, firms and associations incorporated or constituted or established under the law in force in any part of India.

(ii) in respect of Nepal: corporations, firms and associations incorporated or constituted or established under the law in force in Nepal;

(b) investment means every kind of asset established or acquired, including changes in the form of such investment, by investor of one Contracting Party in accordance with the laws of the other Contracting Party in the territory of the latter and in particular, though not exclusively, includes:

(i) movable and immovable property as well as other rights related thereto such as mortgages, liens or pledges;

(ii) shares in and stock and debentures of a company and any other similar forms of participation in a company;

(iii) claims to money or to any performance under contract having a financial value;

(iv) intellectual property rights, in accordance with the relevant laws of the respective Contracting Party;

(v) business concessions conferred by law or under contract, including concessions to search for and extract oil and other minerals;

(c) investors mean any national or company of a Contracting Party that has made an investment in the territory of the other Contracting Party;

(d) nationals mean:

(i) In respect of India: natural persons deriving their status as Indian nationals from the law in force in India;

(ii) In respect of Nepal: natural persons deriving their status as Nepalese nationals from the law in force in Nepal.

(e) returns mean the monetary amounts yielded by an investment such as profit, interest, capital gains, dividends, royalties and fees;

(f) territory means:

(i) in respect of India: the territory of the Republic of India including its territorial waters and the airspace above it and other

maritime zones including the Exclusive Economic Zone and Continental Shelf over which the Republic of India has sovereignty, sovereign rights or exclusive jurisdiction in accordance with its laws in force, the 1982 United Nations Convention on the Law of the Sea and International Law.

(ii) in respect of Nepal: territory falling within the sovereignty and jurisdiction of Nepal under its constitution and international law.

Article 2. Scope of the Agreement

This Agreement shall apply to any investment by investors of either Contracting Party in the territory of the other Contracting Party admitted in accordance with its laws and regulations, whether made before or after coming into force of this Agreement, but shall not apply to any dispute concerning an investment which arose, or any claim which was settled, before its entry into force.

Article 3. Promotion and Protection of Investments

(1) Each Contracting Party shall encourage and create favourable condition for investors of the other Contracting Party to make investments in its territory, and admit such investments in accordance with its policies, laws and regulations.

(2) Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party.

Article 4. National Treatment and Most-favoured-nation Treatment

(1) Each Contracting Party shall accord to investments of investors of the other Contracting Party, treatment which shall not be less favourable than that accorded either to investments of its own investors or investments of investors of any third State.

(2) In addition, each Contracting Party shall accord to investors of the other Contracting Party, including in respect of returns on their investments, treatment which shall not be less favourable than that accorded to investors of any third State.

(3) The provisions of paragraphs (1) and (2) above shall not be construed so as to oblige one Contracting Party to extend to the investors of the other the benefit of any treatment, preference or privilege resulting from:

(i) any existing or future customs unions or similar international agreement to which it is or may become a party; or

(ii) any matter pertaining wholly or mainly to taxation.

Article 5. Expropriation

(1) Investments of investors of either Contracting Party in the territory of the other Contracting Party shall not be subjected to nationalisation, expropriation or any other measure having similar effects (hereinafter expropriation) except for reasons of public purpose in accordance with the law, on a non-discriminatory basis and against fair and equitable compensation.

(2) It is understood that:

(a) Indirect expropriation results from a measure or series of measures of a Contracting Party having an equivalent effect to direct expropriation without formal transfer of title or outright seizure;

(b) The determination of whether a measure or series of measures of a Contracting Party constitute indirect expropriation requires a case-by-case, fact-based inquiry considering among other factors:

(i) the economic impact of the measure or series of measures, however, the sole fact of a measure or series of measures having adverse effects on the economic value of an investment does not imply that an indirect expropriation has occurred;

(ii) the extent to which the measures are discriminatory either in scope or in application with respect to an investor or a company of a Party;

(iii) the extent to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations concerning the investment;

(iv) the character and intent of the measure or series of measures, whether they are for bona fide public interest purposes or not and whether there is a reasonable nexus between them, and the intention to expropriate.

(c) Non-discriminatory regulatory measures by a Contracting Party that are designed and applied to protect legitimate public welfare objectives including the protection of health, safety and environment do not constitute expropriation or nationalization; except in rare circumstances, where those measures are so severe that they cannot be reasonably viewed as having been adopted and applied in good faith for achieving their objectives.

(d) Actions and awards by judicial bodies of a Contracting Party that are designed, applied or issued in public interest including those designed to address health, safety and environmental concerns, do not constitute expropriation or nationalization.

(3) The compensation shall be equivalent to the fair market value of the investment expropriated, immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a commercially reasonable rate until the date of payment, shall be made without unreasonable delay, be effectively realizable and be freely transferable.

(4) The affected investor shall have the right to, in conformity with the laws of the Contracting Party that makes the expropriation, the prompt review, by a judicial or other independent authority of that Contracting Party, of its case, in order to decide if the expropriation and assessment of its investment have been adopted pursuant to the principles established in this Article.

(5) Where a Contracting Party expropriates the assets of a company that is constituted in its territory according to its laws in force and in which investors of the other Contracting Party participate, it shall ensure that the provisions of this Article are applied in such a way that it guarantees such investors a fair and equitable compensation.

Article 6. Compensation for Losses

Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, a state of national emergency or insurrection or riots in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party, treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that it accords to its own investors or to investors of any third State. Resulting payments shall be freely transferable.

Article 7. Repatriation of Investment and Returns

(1) Each Contracting Party shall, in accordance with its laws, permit all funds of an investor of the other Contracting Party related to an investment in its territory to be freely transferred, without unreasonable delay and on a non-discriminatory basis. Such funds may include:

(i) Capital and additional capital amounts used to maintain and increase investments;

(ii) Net profits including dividends and interest in proportion to their share-holdings;

(iii) Repayments of any loan pursuant to a loan agreement including interest thereon, relating to the investment;

(iv) Payment of royalties and services fees relating to the investment;

(v) Proceeds from sales of their shares;

(vi) Proceeds received by investors in case of sale or partial sale or liquidation;

(vii) The earnings of nationals of one Contracting Party who work in connection with investments in the territory of the other Contracting Party.

(2) Nothing in paragraph (1) of this Article shall affect the transfer of any compensation under Article 6 of this Agreement.

(3) Unless otherwise agreed to by the Contracting Parties, currency transfer under paragraph (1) of this Article shall be permitted in the currency of the original investment, or any other convertible currency mutually agreed upon between the Contracting Party and the investor. Such transfer shall be made at the prevailing market rate of exchange on the date of transfer.

Article 8. Subrogation

Where one Contracting Party or its designated agency has guaranteed any indemnity against non-commercial risks in respect of an investment by any of its investors in the territory of the other Contracting Party and has made payment to

such investors in respect of their claims under this Agreement, the other Contracting Party agrees that the first Contracting Party or its designated agency is entitled by virtue of subrogation to exercise the rights and assert the claims of those investors. The subrogated rights or claims shall not exceed the original rights or claims of such investors.

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

(1) Any dispute between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former under this Agreement shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.

(2) Any such dispute which has not been amicably settled within a period of six months may, if both parties agree, be submitted:

(i) for resolution, in accordance with the law of the Contracting Party which has admitted the investment to that Contracting Partys competent judicial, arbitral or administrative bodies; or

(ii) to international conciliation under the Conciliation Rules of the United Nations Commission on International Trade Law.

(3) Should the parties fail to agree on a dispute settlement procedure provided under paragraph (2) of this Article or where a dispute is referred to conciliation but conciliation proceedings are terminated other than by signing of a settlement agreement, the dispute may be referred to Arbitration. The Arbitration procedure shall be as follows:

(i) If the Contracting Party of the Investor and the other Contracting Party are both parties to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1965 and both parties to the dispute consent in writing to submit the dispute to the International Centre for the Settlement of Investment Disputes such a dispute shall be referred to the Centre; or

(ii) If both parties to the dispute so agree, under the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding proceedings; or

(iii) to an ad hoc arbitral tribunal by either party to the dispute in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, 1976, subject to the following modifications:

(a) The appointing authority under Article 7 of the Rules shall be the President, the Vice-President or the next senior Judge of the International Court of Justice, who is not a national of either Contracting Party. The third arbitrator shall not be a national of either Contracting Party;

(b) The parties shall appoint their respective arbitrators within two months;

(c) The arbitral award shall be made in accordance with the provisions of this Agreement and shall be binding on the parties to the dispute; and

(d) The arbitral tribunal shall state the basis of its decision and give reasons upon the request of either party.

Article 10. Disputes between the Contracting Parties

(1) Disputes between the Contracting Parties concerning the interpretation or application of this Agreement shall, as far as possible, be settled through negotiations.

(2) If a dispute between the Contracting Parties cannot thus be settled within six months from the time the dispute arose, it shall upon the request of either Contracting party be submitted to an arbitral tribunal.

(3) Such an arbitral tribunal shall be constituted for each individual case in the following way. Within two months of the receipt of the request for arbitration, each Contracting Party shall appoint one member of the tribunal. Those two members shall then select a national of a third State who on approval by the two Contracting parties shall be appointed as Chairman of the tribunal. The Chairman shall be appointed within two months from the date of appointment of the other two members.

(4) If within the periods specified in paragraph (3) of this Article the necessary appointments have not been made, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any 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 shall be invited to 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 International Court of Justice next in seniority who is not a national of either Contracting party shall be invited to make the necessary appointments.

(5) The arbitral tribunal shall reach its decision by a majority of votes. Such decisions shall be binding on both Contracting Parties. Each Contracting party shall bear the cost of its own member of the tribunal and of its representation in the arbitral proceedings; the cost of the Chairman and the remaining costs shall be borne in equal parts by the Contracting Parties. The tribunal may, however, in its decision direct 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. The tribunal shall determine its own procedures.

Article 11. Entry and Sojourn of Personnel

A Contracting Party shall, subject to its laws in force, relating to the entry and sojourn of non-citizens, permit natural persons of the other Contracting Party and personnel employed by companies of the other Contracting Party to enter and remain in its territory for the purpose of engaging in activities connected with investments.

Article 12. Applicable Laws

(1) Except as otherwise provided in this Agreement, all investments shall be governed by the laws in force in the territory of the Contracting Party in which such investments are made.

(2) Notwithstanding paragraph (1) of this Article nothing in this Agreement precludes the host Contracting Party from taking action for the protection of its essential security interests or in circumstances of extreme emergency in accordance with its laws normally and reasonably applied on a non discriminatory basis.

Article 13. Application of other Rules

If the provisions of laws and regulations of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement.

Article 14. Denial of Benefits

(1) A Contracting Party may deny the benefits of this Agreement to an investor of the other Contracting Party and to investments of that investor, if persons of a non-Party own or control such investor and the denying Contracting Party

(i) does not maintain diplomatic relations with such non-Party; or

(ii) adopts or maintains measures with respect to such nonParty that prohibit transactions with the investor or that would be violated or circumvent if the benefits of this Agreement were accorded to the investor or to its investments;

(2) A Contracting Party may deny the benefits of this Agreement to an investor of the other Contracting Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities (*) in the territory of the other Contracting Party and persons of a non-Party, or of the denying Contracting Party, own or control the enterprise.

(*) To determine substantial business activities of a company, among other factors, investment of money, management, ownership, title, production of financial statements, employment information and a catalogue of materials produced at a given time may be considered.

Article 15. Entry Into Force

This Agreement shall come into force on the date of exchange of diplomatic notes confirming that the legal requirements of the Contracting Parties have been fulfilled for the entry into force of this Agreement.

Article 16. Duration, Termination and Amendment

(1) This Agreement shall remain in force for a period of ten years and thereafter it shall be deemed to have been automatically extended unless either Contracting Party gives to the other Contracting Party a written notice of its intention

to terminate the Agreement. The Agreement shall stand terminated one year from the date of receipt of such written notice.

(2) Notwithstanding termination of this Agreement pursuant to paragraph (1) of this Article, the Agreement shall continue to be effective for a further period of ten years from the date of its termination in respect of investments made or acquired before the date of termination of this Agreement.

(3) This Agreement may be amended by the mutual consent of the parties through the exchange of diplomatic notes.

In witness whereof the undersigned, duly authorised thereto by their respective Governments, have signed this Agreement.

Done at New Delhi on this 21 st day of October, 2011 in two originals each in the Hindi, Nepalese and English languages, all texts being equally authentic. In case of any divergence, the English text shall prevail.

For the Government of India

Sd/-

(Pranab Mukherjee)

Minister of Finance

For the Government of Nepal

Sd/-

(Anil Kumar Jha)

Minister of Industry