

AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF THE REPUBLIC OF INDIA ON THE PROMOTION AND PROTECTION OF INVESTMENTS

THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF THE REPUBLIC OF INDIA (each hereinafter referred to as a Contracting Party)

RECOGNISING the importance of promoting the flow of capital for economic activity and development and aware of its role in expanding economic relations between them, particularly with respect to investment by investors of one Contracting Party in the territory of the other Contracting Party;

CONSIDERING that investment relations should be promoted and economic cooperation strengthened in accordance with the internationally accepted principles of mutual respect for sovereignty, equality, mutual benefit, non-discrimination and mutual confidence;

ACKNOWLEDGING that investments of investors of one Contracting Party in the territory of the other Contracting Party would be made within the framework of laws of that other Contracting Party; and

RECOGNISING that pursuit of these objectives would be facilitated by a clear statement of principles relating to the protection of investments, combined with rules designed to render more effective the application of these principles within the territories of the Contracting Parties.

HAVE AGREED as follows:

Article 1. Definitions

For the purposes of this Agreement:

(a) "company" means any corporation, association, partnership, trust or legally recognised entity that is duly incorporated, constituted, set up or otherwise duly organised:

(i) Under the laws of a Contracting Party; or

(ii) Under the law of a third country and is owned or controlled by an entity described in paragraph (a)(i) of this Article or by a natural person who is a citizen or permanent resident of a Contracting Party;

Regardless of whether or not the entity is organised for pecuniary gain, privately or otherwise owned, or organised with limited or unlimited liability;

(b) "freely convertible currency" means a convertible currency as classified by the International Monetary Fund or any currency that is widely traded in international foreign exchange markets;

(c) "investment" means every kind of asset, including intellectual property rights, invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and investment policies of that Contracting Party, and in particular, though not exclusively, includes:

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

(ii) shares, stocks, bonds and debentures and any other form of participation in a company;

(iii) right to money or to any performance having a financial value, contractual or otherwise;

(iv) business concessions and any other rights required to conduct economic activity and having economic value conferred by law or under a contract, including rights to search for, extract and utilise oil and other minerals;

(v) activities associated with investments, such as the organisation and operation of business facilities, the acquisition, exercise and disposition of property rights including intellectual property rights;

(d) "investor" means:

(i) In respect of India, a company or a national. A national is a person deriving status as an Indian national from the laws in force in India;

(ii) In respect of Australia, a company or a natural person who is a citizen or permanent resident of Australia. A permanent resident is a natural person whose residence in Australia is not limited as to time under its laws;

(e) "returns" means the monetary returns yielded by an investment such as profits, interest dividends, capital gains, royalties, fees and any other lawful income;

(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 Exclusive Economic Zone and continental shelf over which the Republic of India has sovereignty, sovereign rights or jurisdiction in accordance with its laws in force and international law, including the 1982 United Nations Convention on the Law of the Sea;

(ii) In respect of Australia: the territory of Australia includes the territorial sea, maritime zone, Exclusive Economic Zone or continental shelf where Australia exercises its sovereignty, sovereign rights or jurisdiction in accordance with international law;

(g) For the purposes of paragraph (c) of this Article, returns that are invested shall be treated as investments and any alteration of the form in which assets are invested or reinvested shall not affect their character as investments;

(h) For the purposes of this Agreement, a company is regarded as being controlled by a company or by a natural person, if that company or natural person has the ability to exercise decisive influence over the management and operation of the firstmentioned company, specifically demonstrated by way of:

(i) Ownership of 51% of the shares or voting rights of the firstmentioned company, or

(ii) The ability to exercise decisive control over the selection of the majority of members of the board of directors of the first mentioned company.

(i) Where doubt concerning the control of a company arises in a dispute under Article 12 the relevant investor shall be responsible for demonstrating to the Contracting Party receiving the relevant investment in its territory that such control exists.

Article 2. Scope of the Agreement

1. This Agreement shall apply to all investments made by investors of either Contracting Party in the territory of the other Contracting Party, whether made before or after the coming into force of this Agreement.

2. A company duly organised under the law of a Contracting Party shall not be treated as an investor of the other Contracting Party, but any investments in that company by investors of the other Contracting Party shall be protected by this Agreement.

3. This Agreement shall not apply to a company organised under the law of a third country within the meaning of paragraph (a)(ii) of Article 1 where the provisions of the investment protection agreement between the Contracting Party receiving the investment and the third country have already been invoked in respect of the same matter.

4. This Agreement shall not apply to a natural person who is a permanent resident but not a citizen of a Contracting Party where:

(a) The provisions of an investment protection agreement between the other Contracting Party and the country of which the person is a citizen have already been invoked in respect of the same matter; or

(b) The person is a citizen of the other Contracting Party.

Article 3. Promotion and Protection of Investments

1. Each Contracting Party shall encourage and promote favourable conditions for investors of the other Contracting Party to make investments in its territory. Each Contracting Party shall admit such investments in accordance with its laws and investment policies applicable from time to time.
2. Investments or investors of each Contracting Party shall at all times be accorded fair and equitable treatment.
3. A Contracting Party shall, subject to its laws, accord within its territory protection and security to investments and shall not impair the management, maintenance, use, enjoyment or disposal of investments.

Article 4. Treatment of Investments

1. Each Contracting Party shall, subject to its laws, regulations and investment policies, grant to investments made in its territory by investors of the other Contracting Party treatment no less favourable than that which it accords to investments of its own investors.
2. A Contracting Party shall at all times treat investments in its own territory on a basis no less favourable than that accorded to investments of investors of any third country.
3. In addition each Contracting Party shall accord to investors of the other Contracting Party treatment, with respect to the management, maintenance, use, enjoyment or disposal of investments, which shall not be less favourable than that accorded to investors of any third state.
4. This Article shall not require a Contracting Party to extend to investments any treatment, preference or privilege resulting from:
 - (a) Any customs union, economic union, free trade area or regional economic integration agreement to which the Contracting Party belongs; or
 - (b) The provisions of a double taxation agreement with a third country; or
 - (c) Any legislation relating wholly or mainly to taxation.

Article 5. Entry and Sojourn of Personnel

1. A Contracting Party shall, subject to its laws applicable from time to time relating to the entry and sojourn of non-citizens, permit natural persons who are investors of the other Contracting Party and personnel employed by companies of that other Contracting Party to enter and remain in its territory for the purpose of engaging in activities connected with investments.
2. A Contracting Party shall, subject to its laws applicable from time to time, permit investors of the other Contracting Party who have made investments in the territory of the first Contracting Party to employ within its territory key technical and managerial personnel of their choice regardless of citizenship.

Article 6. Transparency of Laws

Each Contracting Party shall, with a view to promoting the understanding of its laws that pertain to or affect investments in its territory by investors of the other Contracting Party make such laws public and readily accessible.

Article 7. Expropriation and Nationalisation

1. Neither Contracting Party shall nationalise, expropriate or subject to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") the investments of investors of the other Contracting Party except for a public purpose, on a non-discriminatory basis, in accordance with its laws and against fair and equitable compensation.
2. The compensation referred to in paragraph 1 of this Article shall be computed on the basis of the market value of the investment immediately before the expropriation or impending expropriation became public knowledge. Where that value cannot be readily ascertained, the compensation shall be determined in accordance with generally recognised principles of valuation and equitable principles taking into account the capital invested, depreciation, capital already repatriated, replacement value, and other relevant factors.
3. The compensation shall be paid without undue delay, shall include interest at a normal market rate from the date the

measures were taken to the date of payment and shall be freely transferable between the territories of the Contracting Parties. The compensation shall be payable either in the currency in which the investment was originally made or, if requested by the investor, in any other freely convertible currency.

4. An investor whose investment is expropriated may, under the law of the Contracting Party making the expropriation, seek review of the expropriation measures by a judicial or other independent authority of that Party, as appropriate. The Contracting Party making the expropriation shall make every endeavour to ensure that such review is carried out promptly.

5. Where a Contracting Party expropriates a company, investments in a company or the assets of a company, which is incorporated or constituted under the law in force in any part of its own territory, and in which investors of the other Contracting Party own shares, it shall ensure that the provisions of this Article are applied to the extent necessary to ensure compensation in respect of their investments to such investors of the other Contracting Party who are owners of those shares.

Article 8. 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 civil disturbances shall be accorded by the latter Contracting Party treatment, as regards compensation, restitution, indemnification or other forms of settlement, no less favourable than that which the latter Contracting Party accords to its own investors or investors of any third State.

Article 9. Repatriation of Investment and Returns

1. Each Contracting Party shall 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:

- (a) Capital and additional capital amounts used to maintain and increase investments;
- (b) Returns;
- (c) Repayments of any loan, including interest thereon, relating to the investment;
- (d) Payment of royalties and services fees relating to the investment;
- (e) Proceeds from sales of their shares;
- (f) Proceeds received by investors in case of sale or partial sale or liquidation;
- (g) The earnings of citizens/nationals of one Contracting Party who work in connection with investment in the territory of the other Contracting Party;
- (h) Compensation for loss payments made pursuant to Article 8. Article 8.

2. Unless otherwise agreed to between the Parties, currency transfer under paragraph 1 of this Article shall be permitted in the currency of the original investment or any other convertible currency. Such transfer shall be made at the prevailing market rate of exchange on the date of transfer. paragraph 1 of this Article shall be permitted in the currency of the original investment or any other convertible currency. Such transfer shall be made at the prevailing market rate of exchange on the date of transfer.

Article 10. Subrogation

1. If a Contracting Party or an agency of a Contracting Party makes a payment to an investor of that Contracting Party under a guarantee, a contract of insurance or any other form of indemnity it has granted in respect of an investment under this Agreement the other Contracting Party shall recognise the transfer of any right or title in respect of such investment. The subrogated right or claim shall not be greater than the original right or claim of the investor.

2. Where a Contracting Party or an agency of a Contracting Party has made a payment to its investor and has taken over rights and claims of the investor, that investor shall not, unless authorised to act on behalf of the Contracting Party or an agency of the Contracting Party making the payment, pursue those rights and claims against the other Contracting Party.

3. In a dispute relating to an investment, a Contracting Party shall not assert, as a defence, counter claim, right of set-off otherwise, that the investor concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of any alleged loss.

Article 11. Consultation between Contracting Parties

The Contracting Parties shall consult at the request of either of them on matters concerning this Agreement.

Article 12. 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 may, if both Parties agree, be submitted;
 - (a) For resolution, in accordance with the law of the Contracting Party which has admitted the investment to that Contracting Party's competent judicial or administrative bodies; or
 - (b) To international conciliation under the Conciliation Rules of the United Nations Commission on International Trade Law. 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:
 - (a) 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 Settlement of Investment Disputes such a dispute shall be referred to the Centre;
 - (b) If both Parties to the dispute so agree, under the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings; or
 - (c) 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 provisions;
 - (i) The Arbitral Tribunal shall consist of three arbitrators. Each Party shall select an arbitrator. These two arbitrators shall appoint by mutual agreement a third arbitrator, the Chairperson, who shall be a national of a third State. All arbitrators shall be appointed within two months from the date when one of the Parties to the dispute informs the other of its intention to submit the dispute to arbitration;
 - (ii) If the necessary appointments are not made within the period specified in sub-paragraph (c)(i), either Party may, in the absence of any other agreement, request the President of the International Court of Justice to make the necessary appointments;
 - (iii) The arbitral award shall be made in accordance with the provisions of this Agreement;
 - (iv) The tribunal shall reach its decision by a majority of votes;
 - (v) The decision of the arbitral tribunal shall be final and binding and the Parties shall abide by and comply with the terms of its award;
 - (vi) The arbitral tribunal shall state the basis of its decision and give reasons upon the request of either Party;
 - (vii) Each Party concerned shall bear the cost of its own arbitrator and its representation in the arbitral proceedings. The cost of the Chairperson in discharging his or her arbitral function and the remaining costs of the tribunal shall be borne equally by the Parties concerned. The tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the two Parties, and this award shall be binding on both Parties.
4. Once an action referred to in paragraphs 2 and 3 of this Article has been taken, neither Contracting Party shall pursue the dispute through diplomatic channels unless:
 - (a) The relevant judicial or administrative body, the Secretary General of the Centre, the arbitral authority or tribunal or the conciliation commission, as the case may be, has decided that it has no jurisdiction in relation to the dispute in question; or
 - (b) The other Contracting Party has failed to abide by or comply with any judgement, award, order or other determination made by the body in question.

Article 13. Disputes between the Contracting Parties

1. Disputes between the Contracting Parties concerning the interpretation or application of this Agreement should, if possible, be settled through friendly consultations and negotiations.
2. If a dispute between the Contracting Parties cannot thus be settled within six months of one Contracting Party receiving a request in writing for such negotiations or consultations, it shall upon the request of either Contracting Party be submitted to an arbitral tribunal. Arbitration proceedings shall be instituted upon notice being given through the diplomatic channel by the Contracting Party instituting such proceedings to the other Contracting Party.
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 Chairperson of the tribunal. The Chairperson shall be appointed within one month 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. In case any arbitrator appointed as provided for in this Article shall resign or become unable to act, a successor arbitrator shall be appointed in the same manner as prescribed for the appointment of the original arbitrator and the successor shall have all the powers and duties of the original arbitrator.
6. The arbitral tribunal shall reach its decision by a majority of votes. The award shall be rendered in writing and shall state its legal basis. Such award shall be binding on both Contracting Parties.
7. 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 Chairperson 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.
8. The Arbitral Tribunal shall in accordance with this Agreement decide all questions relating to its competence and shall subject to any agreement between the Contracting Parties, determine its own procedure.

Article 14. Applicable Laws

All investments shall be consistent with this Agreement and be in accordance with the laws in force in the territory of the Contracting Party in which such investments are made.

Article 15. Prohibitions and Restrictions

Nothing in this Agreement precludes the host Contracting Party from taking, in accordance with its laws applied reasonably and on a non-discriminatory basis, measures necessary for the protection of its own essential security interests or for the prevention of diseases or pests.

Article 16. Application of other Rules

If the provisions of the law of either Contracting Party or provisions of an international agreement 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 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 17. Entry Into Force, Duration and Termination

1. This Agreement shall enter into force thirty days after the date on which the Contracting Parties shall have notified each

other that their Constitutional requirements for the entry into force of this Agreement have been fulfilled. It shall remain in force for a period of ten years and thereafter shall remain in force indefinitely, unless terminated in accordance with paragraph 2 of this Article.

2. Either Contracting Party may terminate this Agreement at any time after it has been in force for ten years by giving one year's written notice to the other Contracting Party.

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

FOR THE GOVERNMENT OF FOR THE GOVERNMENT OF AUSTRALIA:

TIM FISCHER

[Signed:]

THE REPUBLIC OF INDIA:

RAMA KRISHNA HEGDE

[Signed:]