

AGREEMENT ON THE PROMOTION AND THE RECIPROCAL PROTECTION OF INVESTMENTS BETWEEN THE THE REPUBLIC OF INDIA AND THE KINGDOM OF SPAIN

The Republic of India and the Kingdom of Spain hereinafter referred to as "the Contracting Parties",

Desiring to intensify their economic cooperation for the mutual benefit of both countries,

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

Recognising that the promotion and protection of investments under this Agreement will stimulate initiatives in this field,

Have agreed as follows:

Article 1. Definitions

For the purpose of the present Agreement,

1. The term "investor" means with regard to either Contracting Party:

(a) A physical person who, according to the law of that Contracting Party, is considered to be its national.

(b) Any legal entity, including any company, association, partnership, corporation and any other organization incorporated or instituted or, otherwise, duly established under the law of that Contracting Party.

2. The term "investment" means every kind of asset invested in accordance with the national laws of the Contracting Party in whose territory the investment is made and includes in particular, though not exclusively, the following:

(a) Shares in and stocks and debentures of a company and any other form of participation in a company;

(b) Rights to money or to any performance under contract having economic or financial value, including loans granted for the purpose of creating economic value;

(c) Movable and immovable property and any other property rights such as mortgages, liens, pledges and similar rights;

(d) Intellectual property rights, such as patents, tradenames, technical processes, trademarks, goodwill and know-how in accordance with the relevant laws of the respective Contracting Party;

(e) Rights to undertake economic and commercial activities conferred by law or by virtue of a contract, including concessions to search for, extract or exploit natural resources. Any change of the form in which assets are invested or reinvested shall not affect their character as an investment, provided that such a change is made in accordance with the laws and regulations of the host Contracting Party of the investment.

3. The terms "returns" means the monetary amounts yielded by an Investment and includes, in particular although not exclusively, profit, dividends, interest, capital gains, royalties and fees.

4. The term "territory" designates the land territory and territorial waters and the airspace above it of each of the Contracting Parties, as well as the exclusive economic zone, the continental shelf and other maritime zones over which they have or may have jurisdiction and/or sovereign rights pursuant to international law, including the 1982 United Nations Convention on the Law of the Sea.

Article 2. Scope of the Agreement

This Agreement shall apply to any investments made by investors of either Contracting Party in the territory of the other Contracting Party, in accordance with its laws and regulations, including an indirect investment made through another company, whenever located, which is fully owned by such investors, whether made before or after the coming into force of this Agreement.

Article 3. Promotion and Admission

1. Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its territory, and shall admit such investments in accordance with its laws and regulations.
2. In order to encourage mutual investment flows, each Contracting Party shall endeavour to inform the other Contracting Party, at the request of the latter Contracting Party, on the investment opportunities in its territory.
3. When a Contracting Party has admitted an investment in its territory, it shall, in accordance with its laws and regulations, facilitate the permits necessary in connection with such an investment and activities related to it.
4. Each Contracting Party shall endeavour to facilitate, according to its laws and regulations, the entry, stay and work in its territory of natural persons of the other Contracting Party and of personnel employed by investors of the other Contracting Party for the purpose of engaging in activities connected with investments.

Article 4. Protection

1. Investments made by investors of one Contracting Party in the territory of the other Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security.
2. Neither Contracting Party shall in any way impair by arbitrary or discriminatory measures the operation, management, maintenance, use, enjoyment, sale, and if it is the case, the liquidation of such investments.
3. Each Contracting Party shall observe any obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party, with disputes arising from such obligations being only redressed under the terms of the contracts underlying the obligations.

Article 5. National Treatment and Most-favoured-nation Treatment

1. Each Contracting Party shall in its territory accord to investments or returns of investors of the other Contracting Party, treatment no less favourable than that which it accords to the investments or returns of its own investors or to investments or returns of investors of any third State, whichever is more favourable to the investor concerned.
2. In addition, each Contracting Party shall accord to investors of the other Contracting Party treatment which shall not be less favourable than that accorded to investors of any third State.
3. The Provisions of this Agreement relative to the grant of treatment not less favourable than that accorded to the investors of either Contracting Party or of any third State 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:
 - (a) Any existing or future customs union or similar international agreement to which either of the Contracting Parties is or may become a party, or
 - (b) Any arrangement or international agreement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.

Article 6. Expropriation

1. Investments of investors of either Contracting Party in the territory of the other Contracting Party shall not be nationalised, expropriated or subjected to measures having equivalent effect to nationalisation or expropriation (hereinafter referred to as "expropriation") except for public interest, pursuant to the law, on a non-discriminatory basis and against the payment of fair and equitable compensation.
2. Such compensation shall amount to the fair market value of the expropriated investment immediately before the expropriatory measure was taken or before the impending expropriation became public knowledge, whichever is the earlier. Compensation shall include interest at a normal market rate from the date of expropriation until the date of payment, shall be paid without undue delay, shall be effectively realizable and be freely convertible and transferable.

3. The investor affected shall have the right, under the law of the Contracting Party making the expropriation, to review by a judicial authority or other competent and independent authority of that Contracting Party, of its case to determine whether such expropriation, the valuation of its Investment and the payment of compensation conform to the principles set out in this Article. The Contracting Party making the expropriation shall make every endeavour to ensure that such review is carried out promptly.

4. Where a Contracting Party expropriates 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 so as to guarantee fair and equitable compensation in respect of their Investment to such investors of the other Contracting Party who are owners of those shares.

Article 7. Compensation for Losses

1. Investors of one Contracting Party whose investments or returns in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, state of national emergency, revolution, insurrection, civil disturbances or any other similar event, shall be accorded by the latter Contracting Party as regards restitution, indemnification, compensation or other settlement, treatment, no less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State whichever is more favourable to the investor concerned. Resulting payments shall be freely transferable.

2. Notwithstanding paragraph 1, an investor of a Contracting Party which, in any of the situations referred to in that paragraph, suffers a loss in the territory of the other Contracting party resulting from:

- (a) Requisitioning of its investment or part thereof by the latter's forces or authorities; or
- (b) Destruction of its investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation;

Shall be accorded by the latter Contracting Party restitution or adequate compensation. Resulting payments shall be freely convertible and transferable.

Article 8. Transfers

(1) Each Contracting Party shall guarantee to investors of the other Contracting party the free transfer of all payments relating to their investments. Such transfers shall include, in particular, though not exclusively:

- (a) The initial capital and additional amounts needed for the maintenance or increase of an investment;
- (b) Investment returns, as defined in Article 1;
- (c) Funds in repayment of loans related to an investment;
- (d) Compensations provided for under Articles 6 and 7;
- (e) Proceeds from the total or partial sale or liquidation of an investment;
- (f) Earnings and other remuneration of personnel engaged from abroad in connection with an investment;
- (g) Payments arising out of the settlement of a dispute.

2. Transfers under the present Agreement shall be made without undue delay in a freely convertible currency at the market rate of exchange prevailing on the date of transfer.

3. A transfer shall be deemed to have been made without undue delay if effected within such period as is normally required for the completion of transfer formalities. The period shall commence on the day on which the relevant request has been made, with full documentation, and may on no account exceed one month.

4. The Contracting Parties shall grant to transfers referred to in this present Article treatment no less favourable than that accorded to the transfer of payments originating from investments made by investors of any third State.

Article 9. More Favourable Terms

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 this Agreement contain regulations, whether general or specific,

entitling investments by Investors of the other Contracting Party to a treatment more favourable than that provided for by this Agreement, such regulations shall to the extent that it is more favourable prevail over this Agreement.

Article 10. Subrogation

1. If one Contracting Party or its designated Agency makes a payment under an indemnity, guarantee or contract of insurance against noncommercial risks given in respect. of an investment made by any of its investors in the territory of the other Contracting Party, the latter Contracting Party shall recognize the assignment of any right or claim of such investor to the former Contracting Party or its designated Agency and the right of the former Contracting Party or its designated Agency to exercise, by virtue of subrogation, any such right and claim to the same extent as its predecessor in title. This subrogation will make it possible for the former Contracting Party or its designated Agency to be the direct beneficiary of any payment for indemnification or other compensation to which the investor could be entitled.

Article 11. Settlement of Disputes between the Contracting Parties

1. Any dispute between the Contracting Parties relative to the interpretation or application of this Agreement shall as far as possible be settled through diplomatic channels.

2. If the dispute is not settled in this way within six months from the start of the negotiations, it shall be submitted, at the request of either of the two Contracting Parties, to an arbitral tribunal.

3. The tribunal shall be set up as follows: each Contracting Party shall appoint an arbitrator and these two arbitrators shall elect a national of a third country as president. The arbitrators shall be appointed within three months and the president within five months from the date on which either Of the two Contracting Parties Informed the other Contracting Party of its intention to submit the dispute to a court of arbitration.

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 Curt of Justice next in seniority who is not a national of either Contracting Party shall be invited to make the necessary appointments.

5. The tribunal shall issue its decision on the basis of respect for the law, of the rules contained in this Agreement or in other agreements in force between the Contracting Parties, and as well as of the universally accepted principles of international law.

6. Unless the Contracting Parties decide otherwise, the tribunal shall lay down its own procedure.

7. The tribunal shall reach its decision by a majority of votes and that decision shall be final and binding on both Contracting Parties.

8. Each Contracting Party shall bear the expenses of the arbitrator appointed by it and those connected with representing it in the arbitration proceedings. The other expenses, including those of the president, shall be borne in equal parts by the two Contracting Parties.

Article 12. Disputes between One Party and Investors of the other Contracting Party

1. Disputes that may arise between one of the Contracting Parties and an investor of the other Contracting Party with regard to an investment under the present Agreement, shall be notified in writing, including a detailed information, by the investor to the host Contracting Party of the investment. As far as possible, the parties concerned shall endeavour to settle these differences amicably, through negotiations.

2. If these disputes cannot be settled amicably within six months from the date of the written notification mentioned in paragraph 1, the dispute may be submitted, at the choice of the investor, to

- The competent judicial, administrative or arbitral bodies of the Contracting Party in whose territory the investment was made; or,
- To international arbitration.

3. In the case of international arbitration, the dispute may be submitted as follows:

(a) To the International Centre for the Settlement of Investment Disputes, 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, opened for signature at Washington DC on 18th March, 1965 (ICSID convention); or

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

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

(i) The arbitral tribunal shall consist of three arbitrators, one each to be appointed by the respective parties within two months; and the third arbitrator to be elected by the above two arbitrators who shall act as the Chairman of the tribunal. The third arbitrator shall not be a national either of the parties to the dispute.

(ii) Should the two arbitrators fail to elect the third arbitrator, the parties to the dispute shall invite the President of the International Court of Justice, if he is not a national of either of the Contracting Parties to the dispute, to appoint the third arbitrator. In case the President is a national of either of the two Contracting Parties, or is otherwise prevented or unable to discharge his functions, the parties to dispute shall invite the Vice-President of the International Court of Justice for making the necessary appointment. If the Vice President is also a national of either of the Contracting Parties or is prevented or unable to discharge his duties, the parties shall approach the next senior most judge of this International Court of Justice, who is not a national of either Contracting Parties, for making the necessary appointment.

4. The arbitration shall be based on:

- The provisions of this Agreement and of the other agreements in force between the Contracting Parties;
- The rules and the universally accepted principles of international law;
- The national law of the Contracting Party in whose territory the investment was made, including the rules relative to conflict of laws.

5. A Contracting Party shall not assert as a defence that indemnification or other compensation for all or part of the alleged damages has been received or will be received by the investor pursuant to a guarantee or insurance contract.

6. The arbitration decisions shall be final and binding on the parties to the dispute. Each Contracting Party undertakes to execute the decisions in accordance with its national law.

Article 13. Applicable Laws

1. Subject to the provisions of 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. Nothing in this Agreement precludes the host Contracting Party from taking necessary measures in accordance with its laws normally and reasonably applied on a non-discriminatory basis, in circumstances of extreme emergency posing a threat to the life or health of human beings, animals or plants.

Article 14. Entry Into Force, Extension and Termination

1. This Agreement shall enter into force on the date on which the Contracting Parties shall have notified each other that their respective constitutional formalities required for the entry into force of international agreements have been completed. It shall remain in force for an initial period of ten years and shall be automatically renewed unless either Contracting Party terminates this Agreement by prior six months notice in writing.

2. With respect to investments made prior to the date of termination of this Agreement, the provisions of all the other Articles of this Agreement shall thereafter continue to be effective for a further period of fifteen years from such date of termination.

IN WITNESS WHEREOF, the respective plenipotentiaries, being duly authorised by their Governments, have signed this Agreement.

DONE at New Delhi on this the 30th day of September, 1997, in two originals each in Hindi, Spanish and English, all texts being equally authentic. In case of divergence, the English text shall prevail.

For the Republic of India

For the Kingdom of Spain