

AGREEMENT BETWEEN THE FEDERAL REPUBLIC OF GERMANY AND THE REPUBLIC OF INDIA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

The Federal Republic of Germany and the Republic of India (hereinafter referred to as the Contracting Parties)

Desirous of creating conditions favourable for fostering greater investment by nationals and companies of either State in the territory of the other State,

Recognising that reciprocal protection of such investments under an agreement will subserve the aforesaid objective and will be conducive to the stimulation of individual business initiative and will increase prosperity in both States,

Have agreed as follows:

Article 1. Definitions

For the purpose of this Agreement:

(a) "Companies" means:

(i) In respect of the Republic of India:

Corporations, firms and associations incorporated or constituted under the law in force in any part of India;

(ii) In respect of the Federal Republic of Germany:

Juridical persons as well as commercial or other companies or associations with or without legal personality having their seat in the territory of the Federal Republic of Germany, irrespective of whether or not their activities are directed at profit;

(b) "Investment" means every kind of asset invested in accordance with the national laws of the Contracting Party where the investment is made and, in particular, though not exclusively, includes:

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

(ii) Shares in, and stock and debentures of, a company, and any other forms of such interests in a company;

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

(iv) Intellectual property rights, including patents, copyrights, registered designs, trade marks, trade names, technical processes, know-how and goodwill in accordance with the relevant laws of the respective Contracting Party;

(v) Business concessions conferred by law or under contract, including concessions for mining and oil exploration;

(c) "Investors" means nationals or companies of a Contracting Party who have effected or are effecting investment in the territory of the other Contracting Party;

(d) "Nationals" means:

(i) In respect of the Republic of India:

Persons deriving their status as Indian nationals from the law in force in India;

(ii) In respect of the Federal Republic of Germany:

Germans within the meaning of the Basic Law of the Federal Republic of Germany;

(e) "Returns" means the monetary returns yielded by an investment, such as profits, interest, dividends, royalties and fees;

(f) "Territory" means:

(i) In respect of the Republic 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 jurisdiction in accordance with its laws in force, the 1982 United Nations Convention on the Law of the Sea or Public International Law;

(ii) In respect of the Federal Republic of Germany:

The territory of application of the law of the Federal Republic of Germany and the territory where international law permits the Federal Republic of Germany to exercise sovereign rights or jurisdiction.

Article 2. Scope of the Agreement

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.

Article 3. Promotion and Protection of Investment

(1) Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party and also admit investments in its territory in accordance with its law and policy.

(2) Each Contracting Party shall accord to investments as well as to investors in respect of such investments at all times fair and equitable treatment and full protection and security in its territory.

(3) Neither Contracting Party shall place any constraints on the international movement of goods or persons directly connected with an investment being transported subject to bilateral or international agreements governing such transports, which are in force between the Contracting Parties.

Article 4. National Treatment and Most Favoured Nation Treatment

(1) Each Contracting Party shall accord to investments of investors of the other Contracting Party, including their operation, management, maintenance, use, enjoyment or disposal by such investors, treatment which shall not be less favourable than that accorded either to investments of its own investors or to investments of investors of any third State.

(2) The provisions of paragraph 1 shall not relate to privileges which either Contracting Party accords to investors of third States on account of its membership of, or association with, a customs or economic union, a common market or a free trade area.

(3) The provisions of paragraph 1 shall also not relate to advantages which either Contracting Party accords to its own investors or to investors of third States by virtue of an agreement, legislation, or arrangements consequent to such legislation regarding matters of taxation, including an agreement on the avoidance of double taxation.

Article 5. Expropriation or Nationalisation

(1) Investments of investors of either Contracting Party shall not be expropriated, nationalised or subjected to measures having effect equivalent to nationalisation or expropriation in the territory of the other Contracting Party except in public interest, authorised by the laws of that Party, on a non-discriminatory basis and against compensation which shall be equivalent to the value of the expropriated or nationalised investment immediately before the date on which such expropriation or nationalisation became publicly known. Such compensation shall be effectively realisable without undue delay and shall be freely convertible and transferable. Interest shall be paid in a fair and equitable manner for the period between the date of expropriation or nationalisation and the date of actual payment of compensation.

(2) An investor whose investment is expropriated or nationalised may, under the laws of the Contracting Party making the expropriation or nationalisation, seek review of expropriation or nationalisation measures by a judicial or other independent authority of that Contracting Party.

(3) Where a Contracting Party expropriates the assets of a company in its own territory, in which investors of the other

Contracting Party own shares, it shall ensure that the provisions of paragraphs 1 and 2 of this Article are applied in the same manner to provide compensation in respect of the investment of such investors of the other Contracting Party who are owners of those shares.

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 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. Any payments made under this Article shall be freely transferable.

Article 7. Repatriation of Investment and Returns

(1) Each Contracting Party shall ensure and permit investors of the other Contracting Party, without undue delay and on a non-discriminatory basis, the transfer of:

- (a) Capital and additional capital amounts used to maintain and increase investments;
- (b) Net operation profits including dividends and interest in proportion to their shareholding;
- (c) Repayments of any loan, including interest thereon, relating to the investment;
- (d) Payment of royalties and service fees as far as it is related to the investment;
- (e) Proceeds from sales of their shares;
- (f) Proceeds received by investors in case of liquidation;
- (g) Earnings of nationals of one Contracting Party who work in connection with investment in the territory of the other Contracting Party;
- (h) Any other returns.

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

(3) Transfers under paragraph 1 of this Article, as well as under Article 5 and Article 6, shall be permitted in a convertible currency. Such transfer shall be made at the prevailing market rate of exchange on the date of transfer. If a market rate is unavailable the applicable rate of exchange shall correspond to the cross rate obtained from those rates which would be applied by the International Monetary Fund on the date of payment for conversions of the currencies concerned into Special Drawing Rights.

(4) 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 information, and may on no account exceed two months.

(5) Either Contracting Party may maintain laws and regulations requiring reports of currency transfers.

Article 8. Subrogation

In case one Contracting Party or its designated agency has guaranteed any indemnity against non-commercial risks in respect of investments by 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 recognises that the former Contracting Party or its designated agency is entitled by virtue of subrogation to exercise the rights and assert the claims of its own investors. The subrogated rights or claims shall not exceed the original rights or claims of such investors.

Article 9. Investment Disputes

(1) Any dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute. The party intending to resolve such dispute through negotiations shall give notice to the

other of its intentions.

(2) If the dispute cannot be thus resolved as provided in paragraph 1 of this Article within six months from the date of notice given thereunder, then the dispute may be referred to conciliation in accordance with the United Nations Commission on International Trade Law Rules on Conciliation, 1980, if both parties agree. If either party does not agree to conciliation or if conciliation fails, either party may refer such dispute to arbitration in accordance with the United Nations Commission on International Trade Law Rules on Arbitration, 1976, subject to the following provisions:

(a) In respect of conciliation proceedings, there shall be two conciliators, one each appointed by the respective parties;

(b) In respect of arbitration proceedings, the following shall apply:

(i) The arbitral tribunal shall consist of three arbitrators. Each party shall select an arbitrator. These two arbitrators shall appoint by mutual agreement a Chairman who shall be a national of a third State which has diplomatic relations with the Governments of the parties to the dispute. The arbitrators shall be appointed within two months from the date on which one of the parties to the dispute informs the other of its intention to submit the dispute to arbitration;

(ii) The arbitral award shall be made in accordance with the provisions of this Agreement, the relevant national laws including the rules on the conflict of laws of the Contracting Party where the investment dispute arises as well as the generally recognised principles of international law;

(iii) If the necessary appointments are not made within the period specified in paragraph (2) (b) (i), either party may, in the absence of any other agreement, request the Secretary General of the International Centre for the Settlement of Investment Disputes to make the necessary appointments;

(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. The award shall be enforced in accordance with national laws of the Contracting Party where the investment has been made;

(vi) The arbitral tribunal shall state the basis of its decision and state 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 Chairman in discharging his 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;

(viii) During conciliation or arbitration proceedings or the enforcement of an award, the Contracting Party involved in the dispute shall not raise the objection that the investor of the other Contracting Party has received compensation under an insurance contract in respect of all or part of the damage. In this case the other Contracting Party will respect the award made in the arbitration or conciliation proceedings and shall not initiate fresh proceedings for the same matter as covered in the award.

Article 10. 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 negotiations.

(2) If a dispute between the Contracting Parties cannot be settled after six months, it shall upon the request of either Contracting Party be submitted to arbitration.

(3) The arbitral tribunal shall consist of three arbitrators. Within two months of receipt of the request for arbitration, each Contracting Party shall appoint one arbitrator and within two months from then the Contracting Parties shall appoint a third arbitrator who shall be the Chairman of the tribunal.

(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 such appointments. If the President is a national of either Contracting Party or if he is otherwise not able to discharge the 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 unable to discharge the 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 decision 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 and half of the costs of the Chairman and the remaining costs. The tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the two Contracting Parties. The tribunal shall determine its own procedure.

Article 11. Applicable Laws

All investments shall, subject to this Agreement, be governed by the laws in force in the territory of the Contracting Party in which such investments are made.

Article 12. Prohibitions and Restrictions

Nothing in this Agreement shall prevent either Contracting Party from applying prohibitions or restrictions to the extent necessary for the protection of its essential security interests, or for the prevention of diseases and pests in animals or plants.

Article 13. Application of other Rules

(1) If the provisions of law 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.

(2) Each Contracting Party shall observe any other 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 14. Entry Into Force

This Agreement shall be subject to ratification and enter into force on the date of exchange of Instruments of Ratification.

Article 15. Duration and Termination

This Agreement shall remain in force for a period of ten years. Thereafter, it shall continue to be in force until the expiry of twelve months from the date on which either Contracting Party shall have given written notice of termination to the other; provided that in respect of investments made while the Agreement is in force, its provisions shall continue to be in effect with respect to such investments for a period of fifteen years after the date of termination and without prejudice to the application thereafter of the rules of general international law. This Agreement shall be in force irrespective of whether or not diplomatic relations continue between the Contracting Parties.

In witness thereof the undersigned have signed this Agreement.

Done at Bonn on this 10th July 1995 in duplicate in the German, Hindi and english languages, each text being authentic. In case of divergence of interpretation, the English text shall prevail.

For the Federal Republic of Germany

Kinkel

For the Republic of India

Mukherjee