Treaty between the Federal Republic of Germany and the Islamic Republic of Afghanistan concerning the Encouragement and Reciprocal Protection of Investments

The Federal Republic of Germany and the Islamic Republic of Afghanistan,

Desiring to intensify economic co-operation between both States,

Intending to create favourable conditions for investments by investors of either State in the territory of the other State,

Recognizing that the encouragement and contractual protection of such investments are apt to stimulate private business initiative and to increase the prosperity of both nations,

Have agreed as follows:

Article 1.

For the purposes of this Treaty

1. The term "investments" comprises every kind of asset, in particular:

(a) Movable and immovable property as well as any other rights in rem, such as mortgages, liens and pledges;

(b) Shares of companies and other kinds of interest in companies;

(c) Claims to money which has been used to create an economic value or claims to any performance having an economic value;

(d) Intellectual property rights, in particular copyrights, patents, utility-model patents, industrial designs, trademarks, trade-names, trade and business secrets, technical processes, know-how, and good will;

(e) Business concessions under public law, including concessions to search for, extract and exploit natural resources;

Any alteration of the form in which assets are invested shall not affect their classification as investment;

2. The term "returns" means the amounts yielded by an investment for a definite period, such as profit, dividends, interest, royalties or fees;

3. The term "investor" means

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

- Germans within the meaning of the Basic Law of the Federal Republic of Germany,

- Any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the territory of the Federal Republic of Germany, irrespective of whether or not its activities are directed at profit,

(b) In respect of the Islamic Republic of Afghanistan:

- Afghans within the meaning of the Constitution of the Islamic Republic of Afghanistan,

- Any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the territory of the Islamic Republic of Afghanistan, irrespective of whether or not its activities are directed at profit.

Article 2.

(1) Each Contracting State shall in its territory promote as far as possible investments by investors of the other Contracting State and admit such investments in accordance with its legislation.

(2) Each Contracting State shall in its territory in any case accord investments by investors of the other Contracting State fair and equitable treatment as well as full protection under the Treaty.

(3) Neither Contracting State shall in any way impair by arbitrary or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting State.

Article 3.

(1) Neither Contracting State shall subject investments in its territory owned or controlled by investors of the other Contracting State to treatment less favourable than it accords to investments of its own investors or to investments of investors of any third State.

(2) Neither Contracting State shall subject investors of the other Contracting State, as regards their activity in connection with investments in its territory, to treatment less favourable than it accords to its own investors or to investors of any third State.

(3) Such treatment shall not relate to privileges which either Contracting State 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.

(4) The treatment granted under this Article shall not relate to advantages which either Contracting State accords to investors of third States by virtue of a double taxation agreement or other agreements regarding matters of taxation.

Article 4.

(1) Investments by investors of either Contracting State shall enjoy full protection and security in the territory of the other Contracting State.

(2) Investments by investors of either Contracting State shall not directly or indirectly be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting State except for the public benefit and against compensation. Such compensation shall be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation, nationalization or comparable measure has become publicly known. The compensation shall be paid without delay and shall carry the usual bank interest until the time of payment; it shall be effectively realizable and freely transferable. Provision shall have been made in an appropriate manner at or prior to the time of expropriation, nationalization or comparable measure for the determination and payment of such compensation. The legality of any such expropriation, nationalization or comparable measure and the amount of compensation shall be subject to review by due process of law.

(3) Investors of either Contracting State whose investments suffer losses in the territory of the other Contracting State owing to war or other armed conflict, revolution, a state of national emergency, or revolt, shall be accorded treatment no less favourable by such other Contracting State than that which the latter Contracting State accords to its own investors as regards restitution, indemnification, compensation or other valuable consideration. Such payments shall be freely transferable.

(4) Investors of either Contracting State shall enjoy most-favoured-nation treatment in the territory of the other Contracting State in respect of the matters provided for in this Article.

Article 5.

Each Contracting State shall guarantee to investors of the other Contracting State the free transfer of payments in connection with an investment, in particular

(a) The principal and additional amounts to maintain or increase the investment;

(b) The returns;

(c) The repayment of loans;

(d) The proceeds from the liquidation or the sale of the whole or any part of the investment;

(e) The compensation provided for in Article 4.

Article 6.

If either Contracting State makes a payment to any of its investors under a guarantee it has assumed in respect of an investment in the territory of the other Contracting State, the latter Contracting State shall, without prejudice to the rights of the former Contracting State under Article 10, recognize the assignment, whether under a law or pursuant to a legal transaction, of any right or claim of such investor to the former Contracting State. The latter Contracting State shall also recognize the subrogation of the former Contracting State to any such right or claim (assigned claims) which that Contracting State shall be entitled to assert to the same extent as its predecessor in title. As regards the transfer of payments made by virtue of such assigned claims, Article 4 (2) and (3) as well as Article 5 shall apply mutatis mutandis.

Article 7.

(1) Transfers under Article 4 (2) or (3), under Article 5 or Article 6 shall be made without delay at the market rate of exchange applicable on the day of the transfer.Article 4 (2) or (3), under Article 5 or Article 6 shall be made without delay at the market rate of exchange applicable on the day of the transfer.

(2) Should there be no foreign exchange market 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 shall apply.

Article 8.

(1) If the legislation of either Contracting State or obligations under international law existing at present or established hereafter between the Contracting States in addition to this Treaty contain a regulation, whether general or specific, entitling investments by investors of the other Contracting State to a treatment more favourable than is provided for by this Treaty, such regulation shall to the extent that it is more favourable prevail over this Treaty.

(2) Each Contracting State shall observe any other obligation it has assumed with regard to investments in its territory by investors of the other Contracting State.

Article 9.

This Treaty shall also apply to investments made prior to its entry into force by investors of either Contracting State in the territory of the other Contracting State consistent with the latter's legislation.

Article 10.

(1) Divergencies between the Contracting States concerning the interpretation or application of this Treaty should as far as possible be settled by the governments of the two Contracting States.

(2) If a divergency cannot thus be settled, it shall upon the request of either Contracting State be submitted to an arbitration tribunal.

(3) Such arbitration tribunal shall be constituted ad hoc as follows: each Contracting State shall appoint one member, and these two members shall agree upon a national of a third State as their chairman to be appointed by the governments of the two Contracting States. Such members shall be appointed within two months, and such chairman within three months from the date on which either Contracting State has informed the other Contracting State that it intends to submit the dispute to an arbitration tribunal.

(4) If the periods specified in paragraph 3 above have not been observed, either Contracting State may, in the absence of any other arrangement, invite the President of the International Court of Justice to make the necessary appointments. If the President is a national of either Contracting State or if he is otherwise prevented from discharging the said function, the Vice-President should make the necessary appointments. If the Vice-President is a national of either Contracting State or if he, too, is prevented from discharging the said function, the member of the Court next in seniority who is not a national of either Contracting State should make the necessary appointments.

(5) The arbitration tribunal shall reach its decisions by a majority of votes. Such decisions shall be binding. Each Contracting State shall bear the cost of its own member and of its representatives in the arbitration proceedings; the cost of the

chairman and the remaining costs shall be borne in equal parts by the Contracting States. The arbitration tribunal may make a different regulation concerning costs. In all other respects, the arbitration tribunal shall determine its own procedure.

Article 11.

(1) Divergencies concerning investments between a Contracting State and an investor of the other Contracting State should as far as possible be settled amicably between the parties in dispute.

(2) If the divergency cannot be settled within six months of the date when it has been raised by one of the parties in dispute, it shall, at the request of the investor of the other Contracting State, be submitted for arbitration. Unless the parties in dispute agree otherwise, the divergency shall be submitted for arbitration under the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States.

(3) The award shall be binding and shall not be subject to any appeal or remedy other than those provided for in the said Convention. The award shall be enforced in accordance with domestic law.

(4) During arbitration proceedings or the enforcement of an award, the Contracting State involved in the dispute shall not raise the objection that the investor of the other Contracting State has received compensation under an insurance contract in respect of all or part of the damage.

Article 12.

This Treaty shall be in force irrespective of whether or not diplomatic or consular relations exist between the Contracting States.

Article 13.

The attached Protocol shall form an integral part of this Treaty.

Article 14.

(1) This Treaty shall enter into force one month from the date on which the Contracting States have notified each other that the national requirements for such entry into force have been fulfilled. The relevant date shall be the day on which the last notification is received.

(2) This Treaty shall remain in force for a period of ten years and shall be extended thereafter for an unlimited period unless denounced in writing through diplomatic channels by either Contracting State twelve months before its expiration. After the expiry of the period of ten years this Treaty may be denounced at any time by either Contracting State giving twelve months' notice.

(3) In respect of investments made prior to the date of termination of this Treaty, the provisions of the preceding Articles shall continue to be effective for a further period of twenty years from the date of termination of this Treaty.

Done at Berlin on April 19 and 20, 2005 in duplicate In the German, Dari and English languages, all three texts being authentic. In case of divergent interpretations of the German and Dari texts, the English text shall prevail.

For the Federal Republic of Germany

Wolfgang Clement

For the Islamic Republic of Afghanistan

H. Amin Arsala

Protocol to the treaty between the federal republic of germany and the islamic republic of afghanistan concerning the encouragement and reciprocal protection of investments

The Federal Republic of Germany and the Islamic Republic of Afghanistan have agreed on the following provisions to the Treaty of 19 and 20 April 2005 concerning the Encouragement and Reciprocal Protection of Investments:

1. Ad Article 1

(a) Returns from the investment and, in the event of their re-investment, the returns therefrom shall enjoy, the same protection as the investment.

(b) Without prejudice to any other method of determining nationality, in particular any person in possession of a national passport issued by the competent authorities of the Contracting State concerned shall be deemed to be a national of that Contracting State.

2. Ad Article 2

The Treaty shall also apply to the areas of the exclusive economic zone and the continental shelf insofar as international law permits the Contracting State concerned to exercise sovereign rights or jurisdiction in these areas.

3. Ad Article 3

(a) The following shall more particularly, though not exclusively, be deemed "activity" within the meaning of Article 3(2): the management, maintenance, use, enjoyment and disposal of an Investment. The following shall, in particular, be deemed ''treatment less favourable" within themeaning of Article,3: unequal treatment in the case of restrictions on the purchase of raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind, unequal treatment in the case of impeding the marketing of products Inside or outside the country, as well as any other measures having similar effects. Measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed "treatment less favourable" within the meaning of Article 3.

(b) The provisions of Article 3 do not oblige a Contracting State to extend to investors resident in the territory of the other Contracting State tax privileges, tax exemptions and tax reductions which according to its tax laws are granted only to investors resident in Its territory.

(c) The Contracting States shall within the framework of their national legislation give sympathetic consideration to applications for the entry and sojourn of persons of either Contracting State who wish to enter the territory of the other Contracting State iil connection with an Investment; the same shall apply to employed persons of either Contracting State who in connection with an investment wish to enter the territory of the other Contracting State and sojourn there to take up employment. Applications for work permits shall also be given sympathetic consideration.

4. Ad Article 7

A transfer shall be deemed to have been made "without delay" within the meaning of Article 7 (1) 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 on no account exceed two months.

5. Whenever goods or persons connected with an investment are to be transported, each Contracting State shall neither exclude nor hinder transport enterprises of the other Contracting State and shall issue permits as required to carry out such transport. This shall include the transport of

(a) Goods directly intended for an investment within the meaning of the Treaty or acquired in the territory of either Contracting State or of any third State by or on behalf of an enterprise in which assets within the meaning of the Treaty are invested;

(b) Persons travelling In connection with an Investment.