

Treaty between the Federal Republic of Germany and the Kingdom of Nepal concerning the Encouragement and Reciprocal Protection of Investments

The Federal Republic of Germany and the Kingdom of Nepal,

Desiring to intensify economic cooperation between both States,

Being conscious of the need to create favourable conditions for investments by nationals and companies for either State in the territory of the other State,

Recognizing that encouragement and contractual protection of such investments are essential to stimulate private sector's initiative and to increase the prosperity of both nations,

Have agreed as follows:

Article 1.

For the purpose of this Treaty

1. 1. the term "investments" shall comprise 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;

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

(d) Copyrights, industrial property rights, technical processes, trade-marks, trade-names, 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" shall mean the amounts yielded by an investment for a definite period as profit, dividends, interest, licence or other fees;

3. The term "nationals" shall mean

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

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

(b) In respect of the Kingdom of Nepal:

Nepalese citizens within the meaning of the law of Nepal for the Kingdom of Nepal;

4. The term "companies" shall mean

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

Any juridical person as well as any commercial or other company, partnership or firm having its seat in the German area of application of this Treaty and lawfully existing consistent with legal provisions, irrespective of whether the liability of its partners, associates or members is limited or unlimited and whether or not its activities are directed at profit;

(b) In respect of the Kingdom of Nepal:

Any juridical person, or any company, firm or association incorporated or registered under relevant laws of Nepal.

Article 2.

Each Contracting Party shall in its territory promote as far as possible investments by nationals or companies of the other Contracting Party and admit such investments in accordance with its respective laws. Further, they shall accord such investments fair and equitable treatment in their respective countries.

Article 3.

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

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

(3) Such treatment shall not extend to privileges which either Contracting Party accords to nationals or companies of third countries on account of its membership in, 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 refer to privileges granted by either Contracting Party to nationals or companies of third States by virtue of a double taxation agreement or other agreements regarding matters of taxation.

Article 4.

(1) Investments by nationals or companies of either Contracting Party shall enjoy full protection as well as security in the territory of the other Contracting Party.

(2) Investments by nationals or companies of either Contracting Party shall not 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 Party except for the public benefit and against compensation. Such compensation shall be equivalent to the value of the investment expropriated immediately before the date the expropriation or nationalization or the imminent expropriation or nationalization has become publicly known. The compensation shall be paid without delay, it shall be effectively realizable and freely transferable. 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) Nationals or companies of either Contracting Party whose investments suffer losses in the territory of the other Contracting Party 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 Party than that Party accords to its own nationals or companies, as regards restitution, indemnification, compensation or other valuable consideration. Such payments shall be freely transferable.

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

Article 5.

Each Contracting Party shall guarantee to nationals or companies of the other Contracting Party the free transfer of payments in connexion with an investment, in particular

(a) Of the capital and additional amounts to maintain or increase the investment;

(b) Of the returns;

(c) In repayment of loans;

(d) Of licence and other fees for the rights defined in sub-paragraph (d) of paragraph 1 of Article 1;

(e) Of the proceeds from the liquidation or from the sale of the whole or any part of the investment.

Article 6.

If either Contracting Party makes payments to any of its nationals or companies under a guarantee it has assumed in respect of an investment in the territory of the other Contracting Party, the latter Contracting Party shall, without prejudice to the rights of the former Contracting Party under Article 11, recognize the assignment, whether under a law or pursuant to a legal transaction of any right or claim from such national or company to the former Contracting Party. The latter Contracting Party shall also recognize the subrogation of the former Contracting Party to any such right or claim (assigned claims) which that Contracting Party shall be entitled to assert to the same extent as its predecessor in title. As regards the transfer of payments to be made to the Contracting Party concerned by virtue of such assignment, paragraphs 2 and 3 of Article 4 as well as Article 5 shall apply *mutatis mutandis*.

Article 7.

(1) To the extent that those concerned have not made another arrangement admitted by the appropriate agencies of the Contracting Party in whose territory the investment is situated, transfers under paragraph 2 or 3 of Article 4, under Article 5 or Article 6 shall be made without delay at the rate of exchange effective for the agreed currency. Article 6 shall be made without delay at the rate of exchange effective for the agreed currency.

(2) This 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.

Article 8.

(1) 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 Treaty contain a regulation, whether general or specific, entitling investments by nationals or companies of the other Contracting Party 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 Party shall observe any other obligation it may have entered into with regard to investments in its territory by agreement with nationals or companies of the other Contracting Party.

Article 9.

This Treaty shall also apply to investments made prior to its entry into force by nationals or companies of either Contracting Party in the territory of the other Contracting Party in accordance with its relevant legislation.

Article 10.

(1) Any dispute arising directly out of an investment, between either Contracting Party and a national or company of the other Contracting Party shall, as far as possible, be settled amicably between the parties to the dispute.

(2) If any such dispute cannot be so settled within three months of a written notification of a sufficiently detailed claim the dispute shall upon the request of the national or company of either of the Contracting Parties be submitted for arbitration to the International Centre for Settlement of Investment Disputes, established by the Convention on the Settlement of Investment Disputes between States and nationals of other States of 18 March 1965. For this purpose, each Contracting Party by this Treaty irrevocably consents in advance to submit any such dispute to this Centre.

(3) A Contracting Party which is a Party to a dispute shall not, at any stage of arbitration proceeding or enforcement of an award, raise as an objection the fact that the national or company, which is the other party to the dispute, has received in pursuance of an insurance policy an indemnity in respect of some or all of its losses.

Article 11.

(1) Disputes between the Contracting Parties concerning the interpretation or application of this Treaty should, if possible, be settled by the Governments of the two Contracting Parties.

(2) If a dispute cannot thus be settled, it shall upon the request of either Contracting Party be submitted to an arbitral

tribunal.

(3) Such arbitral tribunal shall be constituted for each individual case as follows: each Contracting Party 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 Parties. Such members shall be appointed within two months, and such chairman within three months, from the date on which either Contracting Party has informed the other Contracting Party that it wants to submit the dispute to an arbitral tribunal.

(4) If the periods specified in paragraph 3 above have not been observed, either Contracting Party may, in the absence of any other relevant agreement, invite the President of the International Court of Justice to make the 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 should 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 should make the necessary appointments.

(5) The arbitral tribunal shall reach its decisions by a majority of votes. Such decisions shall be binding. Each Contracting Party shall bear the cost of its own member and of its counsel in the arbitral proceedings; the cost of the chairman and the remaining costs shall be borne in equal parts by the Contracting Parties. The arbitral tribunal may make a different regulation concerning costs. In all other respects, the arbitral tribunal shall determine its own procedure.

(6) If both Contracting Parties are members of the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and nationals of other States the arbitral tribunal provided for above may in consideration of the provisions of paragraph 1 of Article 27 of the said Convention not be appealed to insofar as agreement has been reached between the national or company of one Contracting Party and the other Contracting Party under Article 25 of the Convention. This shall not affect the possibility of appealing to such arbitral tribunal in the event that a decision of the Arbitral Tribunal established under the said Convention is not complied with (Article 27) or in the case of an assignment under a law or pursuant to a legal transaction as provided for in Article 6 of the present Treaty.

Article 12.

This Treaty shall remain in force also in the event of a conflict arising between the Contracting Parties, without prejudice to the right to take such temporary measures as are permitted under the general rules of international law. Such measures shall be repealed not later than on the date of the actual termination of the conflict, irrespective of whether or not diplomatic relations exist.

Article 13.

With the exception of the provisions in paragraph 7 of the Protocol, insofar as they refer to air transport, this Treaty shall also apply to Land Berlin, provided that the Government of the Federal Republic of Germany does not make a contrary declaration to His Majesty's Government of Nepal within three months of the date of entry into force of this Treaty.

Article 14.

(1) This Treaty shall be ratified or approved as required by the respective rules and regulations and the concerned instruments shall be exchanged between the Contracting Parties as soon as possible.

(2) This Treaty shall enter into force one month from the date of the exchange of the instruments of ratification or approval. It shall remain in force for a period of ten years and shall be extended thereafter for an unlimited period except if denounced in writing by either Contracting Party 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 Party giving one year's notice.

(3) In respect of investments made prior to the date of termination of this Treaty the provisions of Articles 1 to 13 shall continue to be effective for a further period of twenty years from the date of termination of this Treaty.

Done at Bonn on October 20th, 1985 in duplicate in German, Nepali and English languages, all texts being authentic. In case of a divergent interpretation of the German and Nepali texts the English text shall prevail.

For the Federal of Germany

Hans-Dietrich Genschler

For the Kingdom of Nepal

Shailendra Kumar Upadhyaya

On signing the Treaty concerning the Encouragement and Reciprocal Protection of Investments, concluded between the Federal Republic of Germany and the Kingdom of Nepal the undersigned authorised representatives have, in addition, agreed on the following provisions which shall be regarded as an integral part of the said Treaty:

(1) Ad Article 1

(a) Returns from the investment, and, in the event of their reinvestment, 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 party concerned shall be deemed to be a national of that Party

(2) Ad Article 2

Investments made, in accordance with the laws and regulations of either Contracting Party, within the area of application of the law of that Party by nationals or companies of the other Contracting Party concerned shall be deemed to be a national of that Party shall enjoy the full protection of this Treaty

(3) Ad Article 3

(a) The following shall more particularly, though not exclusively be deemed "activity" within the meaning of paragraph 2 of Article 3: the management, maintenance, use, and enjoyment of an investment. The following shall, in particular, be deemed "treatment less favourable" within the meaning of Article 3: restricting the purchases of raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind, 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 Party to extend to natural persons or companies resident in the territory of the other Contracting Party tax privileges, tax exemptions and tax reductions which according to its tax laws are granted only to natural persons and companies resident in its territory.

(c) The Contracting Parties shall within the framework of their national legislation give sympathetic consideration to applications for the entry and sojourn of persons of either Contracting Party who wish to enter the territory of the other Contracting Party in connexion with the making and carrying through of an investment: the same apply to nationals of either Contracting Party who in connexion with an investment wish to enter the territory of the other Contracting Party and work there temporarily. Applications for work permits shall also be given sympathetic consideration.

(4) Ad Article 4

(a) "Expropriation" shall mean any taking away or restricting tantamount to the taking away of any property right when in itself or in conjunction with other rights constitutes an investment.

(b) A claim to compensation shall also exist if, as a result of State intervention in the company in which the investment is made, its economic substance is severely impaired.

(5) Ad Article 5

In the event of exceptional balance of payments difficulties the transfer of the proceeds from the liquidation or from the sale of the investment may be restricted to annual instalments of at least 20 per cent so that the transfer will be completed within a maximum period of five years.

(6) Ad Article 7

A transfer shall be deemed to have been made "without delay" within the meaning of paragraph 1 of Article 7 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.

(7) Whenever goods or persons connected with the making of investments are to be transported, each Contracting Party shall neither exclude nor hinder transport enterprises of the other Contracting Party and shall issue permits as required to carry out such transport. This shall include the transport by land, air and sea of:

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

(b) Persons travelling in connexion with the making and carrying through of investments.

Done at Bonn on October 20th, 1985 in duplicate in German, Nepali and English languages, all texts being authentic. In case of a divergent interpretation of the German and Nepali texts the English text shall prevail.

For the Federal of Germany

Hans-Dietrich Genscher

For the Kingdom of Nepal

Shailendra Kumar Upadhyaya