

AGREEMENT BETWEEN THE SWISS CONFEDERATION AND THE REPUBLIC OF INDIA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

Preamble

The Swiss Federal Council and the Government of the Republic of India;

Desiring to create conditions favourable for fostering greater investment by investors of one Contracting Party in the territory of the other Contracting Party;

Recognising that the encouragement and reciprocal protection under international agreement of such investment 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:

(1) The term "investors" means with regard to either Contracting Party:

(a) Natural persons who, according to the law of that Contracting Party, are its nationals;

(b) Companies, including corporations, partnership firms and associations, constituted in accordance with the law of that Contracting Party and engaged in substantive business operations in the territory of the same Contracting Party;

(c) Companies not established under the law of that Contracting Party in which at least 51 per cent of the equity interest is owned by persons of that Contracting Party, or in which persons of that Contracting Party control at least 51 per cent of the voting rights in respect of shares owned by them

(2) The term "investment" shall include every kind of asset and particularly:

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

(b) Shares in and stocks of a company and any similar forms of participation in a company;

(c) Rights to money, including bonds and debentures, or to any performance under contract having an economic value;

(d) Intellectual property rights (such as copyrights, patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin) as well as know-how and goodwill in accordance with the relevant laws of the respective Contracting Party;

(e) Business concessions and other rights to conduct economic activities conferred by law or under contract, including concessions to search for and extract oil and other minerals;

(3) "returns" means the monetary amounts yielded by an investment such as profit, interest, capital gains, dividends, royalties and fees;

(4) "territory" means the territory of each Contracting Party including its territorial waters and the airspace above it and other maritime zones including the Exclusive Economic Zone and continental shelf over which the respective Contracting Party has sovereign rights or exclusive jurisdiction in accordance with its laws in force and International Law.

Article 2. Scope of the Agreement

This Agreement shall apply to all investments in the territory of one Contracting Party made in accordance with its laws and regulations by investors of the other Contracting Party, whether made before or after the entry into force of this Agreement.

Article 3. Promotion and Protection of Investment

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

(2) Investments of investors of each Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party and shall at all times be accorded fair and equitable treatment.

Article 4. National Treatment and Most Favoured Nation Treatment

(1) Each Contracting Party shall in its territory accord to investments of investors of the other Contracting Party treatment not less favourable than that which it accords to investments of its own investors or to investments of investors of any third State, whichever is more favourable. Such treatment shall in particular apply to the operation, management, maintenance, use, enjoyment or disposal of such investments.

(2) If a Contracting Party accords special advantages to investors of any third State by virtue of an agreement establishing a free trade area, a customs union or a common market or by virtue of an agreement on the avoidance of double taxation, it shall not be obliged to accord such advantages to investors of the other Contracting Party.

(3) Neither Contracting Party shall be obliged to apply in matters of taxation the provisions of paragraph (1) of this Article. Reference is however made in this connection to the Agreement between the Republic of India and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, done at New Delhi on November 2, 1994.

Article 5. Expropriation

(1) Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose, in accordance with law, on a non-discriminatory basis and against compensation. Such compensation shall amount to the genuine market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at the appropriate rate until the date of payment, shall be made without undue delay, be effectively realizable and be freely transferable.

(2) The investor affected shall have a right, under the law of the Contracting Party making the expropriation, to review, by a judicial or other independent authority of that Party, of his case and of the valuation of his investment in accordance with the principles set out in this paragraph. The Contracting Party making the expropriation shall make every endeavour to ensure that such review is carried out promptly.

(3) 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, to the extent necessary, ensure that compensation according to paragraph (1) of this Article will be made available to such investors.

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 in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State. Resulting payments shall be freely transferable.

Article 7. Repatriation of Investment and Returns

(1) Each Contracting Party shall ensure that all funds of an investor of the other Contracting Party related to an investment in its territory are permitted to be freely transferred. Such funds may include:

(a) Capital and additional capital amounts used to maintain and increase investments;

(b) Net operating profits including dividends and interest in proportion to their share-holding;

- (c) Repayments of any loan, including interest thereon, relating to the investment;
 - (d) Payment of royalties and service fees relating to the investment;
 - (e) Proceeds from sales of the shares of investors;
 - (f) Proceeds received by investors in case of sale or partial sale or liquidation;
 - (g) The earnings of citizens of one Contracting Party who work in connection with an investment in the territory of the other Contracting Party.
- (2) Unless otherwise agreed to between the parties, currency transfer under paragraph (1) of this Article shall be permitted in a convertible currency. Such transfer shall be made at the prevailing market rate of exchange on the date of transfer. Any transfer formalities shall be completed without undue delay and on a non-discriminatory basis.
- (3) Nothing in this Article shall affect the transfer of any compensation under Article 6 of this Agreement.

Article 8. Subrogation

Where one Contracting Party or its designated agency has guaranteed any indemnity against non-commercial risks in respect of an investment by any of 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 agrees that the first Contracting Party or its designated agency is entitled by virtue of subrogation to exercise the rights and assert the claims of those investors. The subrogated rights or claims shall not exceed the original rights or claims of such investors.

Article 9. 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 within a period of six months may, if both parties agree, be submitted:
- (a) To the competent judicial or administrative bodies of the Contracting Party which has admitted the investment, in accordance with the law of that Contracting Party; or
 - (b) To international conciliation under the Conciliation Rules of the United Nations Commission on International Trade Law (UNCITRAL), 1976.
- (3) Should the parties fail to agree on a dispute settlement procedure provided under paragraph (2) of this article within a period of three months or where a dispute is referred to international conciliation but these proceedings are terminated other than by signing a settlement agreement, the dispute may be referred to Arbitration:
- (a) To the International Centre for the Settlement of Investment Disputes (ICSID), 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 if the investor consents in writing to do so; or
 - (b) Under the Additional Facility of ICSID 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 by either party to the dispute which, unless otherwise agreed upon by the parties, shall be in accordance with the Arbitration Rules of UNCITRAL. These Rules shall be subject to the following modifications:
 - (i) The appointing authority under Article 7 of the Rules shall be the President, the Vice-President or the next senior Judge of the International Court of Justice, who is not a national of either Contracting Party. The third arbitrator shall not be a national of either Contracting Party.
 - (ii) The parties shall appoint their respective arbitrators within two months.
 - (iii) The arbitral award shall be made in accordance with the provisions of this Agreement.
 - (iv) The arbitral tribunal shall state the basis of its decision and give reasons upon the request of either party.

Article 10. Disputes between the Contracting Parties

(1) Disputes between the Contracting Parties concerning the interpretation or application of this Agreement should, as far as possible, be settled through negotiation.

(2) If a dispute between the Contracting Parties cannot thus be settled within six months from the time the dispute arose, it shall upon the request of either Contracting Party be submitted to an arbitral tribunal.

(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 Chairman of the tribunal. The Chairman shall be appointed within two months 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 otherwise 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) The arbitral tribunal shall reach its decision by a majority of votes. 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 Chairman 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. The tribunal shall determine its own procedure. The decisions by the arbitral tribunal shall be final and binding on both Contracting Parties.

Article 11. Applicable Laws

(1) 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.

(2) Notwithstanding paragraph (1) of this Article, no provision of this Agreement shall preclude the host Contracting Party from taking action for the protection, in exceptional circumstances, of its essential security interests or in situations of extreme emergency in accordance with its laws normally and reasonably applied on a non-discriminatory basis.

Article 12. Application of other Rules

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.

Article 13. Other Commitments

Each Contracting Party shall observe any obligation it may have entered into with regard to an investment of an investor of the other Contracting Party. In relation to such obligations dispute resolution under Article 9 of this Agreement shall however only be applicable in the absence of normal local judicial remedies being available.

Article 14. Entry Into Force

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

Article 15. Duration and Termination

(1) This Agreement shall remain in force for a period of ten years and thereafter it shall be deemed to have been automatically extended unless either Contracting Party gives to the other Contracting Party a written notice of its intention to terminate the Agreement. The Agreement shall stand terminated one year from the date on receipt of such written notice.

(2) Notwithstanding termination of this Agreement pursuant to paragraph (1) 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. paragraph (1) 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.

IN WITNESS WHEREOF the undersigned, duly authorised thereto by their respective governments, have signed this Agreement.

Done at New Delhi, on this 4th day of April 1997, in two originals, each in the English, French and Hindi languages, all texts being equally authoritative. In case of divergence in interpretation the English text shall prevail.

For the Swiss Federal Council

For the Government of the Republic of India