

AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF INDIA AND THE GOVERNMENT OF THE REPUBLIC OF SENEGAL FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

The Government of the Republic of India and the Government of the Republic of Senegal (hereinafter referred to as the "Contracting Parties");

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 the territory of both Contracting Parties;

Have agreed as follows:

Article 1. Definitions

For the purposes of this Agreement:

(a) "investment" means every kind of asset established or acquired, including changes in the form of such investment, in accordance with the national laws of the Contracting Party in whose territory the investment is made and in particular, though not exclusively, includes:

(i) Movable and immovable property as well as other rights such as mortgages, leases, liens or pledges of real property, usufructs and charges;

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

(iii) Rights to money or to any obligation under contract having a financial value;

(iv) Intellectual and industrial property rights, such as patents, copyrights, industrial designs, trade marks, 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 to search for and extract oil and other minerals;

(b) The term "investors" refers with regard to either Contracting Party to:

(i) Natural persons having the nationality of the Contracting Party under the law in force of that Contracting Party;

(ii) Legal entities, including companies, corporations, firms and business associations incorporated or constituted or established under the law of a Contracting Party.

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

(d) "territory" means:

(i) In respect 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 exclusive jurisdiction in accordance with its laws in force, the 1982 United Nations Convention on the Law of the Sea and International Law.

(ii) In respect of Senegal: the territory of the Republic of Senegal 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 Senegal has sovereignty, sovereign rights or exclusive jurisdiction in accordance with its laws in force, the 1982 United Nations Convention on the Law of the Sea and International Law.

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, accepted as such in accordance with its laws and regulations, whether made before or after the coming into force of this Agreement. The provisions of this Agreement shall not apply to disputes or claims arising out of events which occurred prior to entry into force of this Agreement.

Article 3. Promotion and Protection of Investment

(1) Each Contracting Party shall encourage and create favourable conditions for investments by investors of the other Contracting Party on its territory and shall admit these investments in accordance with its laws and regulations.

(2) The investments of investors of each Contracting Party shall always be treated fairly and equitably and shall enjoy full protection and security in the territory of the other Contracting Party, in accordance with its laws and regulations. No Contracting Party shall impede, in any way, the management, preservation, use, increase or disposal of such investments through discriminatory measures.

Article 4. National Treatment and Most-favoured-nation Treatment

(1) Each Contracting Party shall accord to investments of investors of the other Contracting Party, treatment which shall not be less favourable than that accorded either to investments of its own or investments of investors of any third State.

(2) Each Contracting Party shall accord to investors of the other Contracting Party as regards management, use, enjoyment or disposal of their investments, treatment which shall not be less favourable than that which it accords to its own investors or to investors of any third State as regards their investments, whichever is more favourable.

(3) The provisions of paragraphs (1) and (2) above 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 resulting from:

(a) Any existing or future customs unions or free trade agreement or common market or similar international agreements to which it is or may become a party, or

(b) Any matter pertaining wholly or mainly to taxation including any agreement on the avoidance of double taxation.

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 its laws on a non-discriminatory basis and against fair and equitable compensation. Such compensation shall amount to the 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 a normal commercial rate until the date of payment, shall be made without unreasonable delay, be effectively realizable and be freely transferable on the basis of the exchange rate applicable on the date of transfer in accordance with exchange rules in force. For greater certainty, this paragraph shall be interpreted in accordance with Annexure A, which shall form an integral part of this Agreement.

(2) The investor affected shall have 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 or its case and of the valuation of his or its investment in accordance with 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.

(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 ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to ensure fair and equitable compensation in respect of their investment to such investors of the other Contracting Party who are owners of those shares.

Article 6. Compensation for Losses

(1) 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, revolt, insurrection, riots 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 at the exchange rate applicable on the date of transfer, in accordance with exchange rules in force.

(2) Without prejudice to paragraph (1) of this Article, the investors of a Contracting Party who, in one of the situations referred to in the said paragraph, suffer losses in the territory of the other Contracting Party because of:

(a) The requisition of their assets by its forces or authorities,

(b) Destruction of their property by its forces or authorities, which was not caused in combat action or was not required by the necessity of the situation,

Shall have the requisitioned assets or property restituted or adequately compensated.

Article 7. Free Transfer

(1) Each Contracting Party shall permit all funds of an investor of the other Contracting Party related to an investment in its territory to be freely transferred, without unreasonable delay and on a non-discriminatory basis. 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-holdings;

(c) Repayments of any loan including interest thereon, relating to the investment;

(d) Payment of royalties and services fees relating to the investment;

(e) Proceeds from sales of their shares;

(f) Proceeds received by investors in case of sale or partial sale or liquidation;

(g) The earnings of nationals of one Contracting Party who work in connection with investment in the territory of the other Contracting Party.

(2) Nothing in paragraph (1) of this Article shall affect the transfer of any compensation under Articles 5 and 6 of this Agreement.

(3) Unless otherwise agreed to between the parties, currency transfer under paragraph (1) of this Article shall be permitted in the currency of the original investment or any other convertible currency. Such transfer shall be made at the prevailing market rate of exchange on the date of transfer, in accordance with the regulations in force in the territory of the Contracting Parties.

Article 8. Subrogation

(1) If, by virtue of a legal or contractual guarantee covering the noncommercial risks of investments, an investor of a Contracting Party receives compensation, the other Contracting Party shall recognize the subrogation of the entity designated to represent the rights of the indemnified investor.

(2) The subrogated rights or claims shall not exceed the original rights or claim of such investors.

(3) The transfer of funds on account of subrogated rights or claims shall be governed by the provisions of Article 7.

(4) Any difference between a Contracting Party and the designated entity subrogated shall be settled in accordance with the provisions of Article 9 of this Agreement.

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) For resolution, in accordance with the law of the Contracting Party which has admitted the investment to that Contracting Party's competent judicial, arbitral or administrative bodies; or

(b) To international conciliation under the Conciliation Rules of the United Nations Commission on International Trade Law.

(3) Should the Parties fail to agree on a dispute settlement procedure provided under paragraph (2) of this Article or where a dispute is referred to conciliation but conciliation proceedings are terminated other than by signing of a settlement agreement, the dispute may be referred to arbitration. The arbitration procedure shall be as follows:

(a) 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 the investor consents in writing to submit the dispute to the International Centre for the Settlement of Investment Disputes (the Center) such a dispute shall be referred to the Centre; or

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

(c) To an ad hoc arbitral tribunal by either party to the dispute in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, 1976.

(4) In respect of arbitration proceedings under paragraph 3 (c) of this Article the following shall apply:

(i) The Arbitral Tribunal shall consist of three arbitrators. Each party shall appoint an arbitrator within two months from the date when one of the parties to the dispute informs in writing the other of its intention to submit the dispute to arbitration. The two arbitrators, so appointed, shall within two months from the date of their appointment, by mutual agreement appoint a third arbitrator, the Chairman, who shall be a national of a third State.

(ii) If the necessary appointments are not made within the period specified in paragraph (4) (i), either party may request the President, Vice-President or the next senior Judge of the International Court of Justice, who is not a national of either Contracting Party to make the necessary appointment of arbitrators.

(iii) The arbitral award shall be made in accordance with the provisions of this Agreement and shall be binding on the parties to the dispute.

(iv) The arbitral tribunal shall state the basis of its decision and give reasons.

(v) Each party shall bear the cost of its arbitrator and its representation in the arbitral proceedings. The cost of the Chairman and the remaining costs of the arbitration proceedings shall be borne equally by the parties concerned, unless otherwise decided by the Tribunal.

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 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. Such decisions 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; 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, and this award shall be binding on both Contracting Parties. The tribunal shall determine its own procedures.

Article 11. Entry and Sojourn of Personnel

A Contracting Party shall, subject to its laws relating to the entry and sojourn of non-citizens, permit natural persons of the other Contracting Party and personnel employed by companies of the other Contracting Party to enter and remain in its territory for the purpose of engaging in activities connected with investments.

Article 12. Applicable Laws

Except as otherwise provided in 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.

Article 13. General and Security Exceptions

No provisions of this Agreement shall be interpreted as preventing the host Contracting Party from taking any measure necessary for the protection of its essential interests as regards security or for public health reasons or to prevent diseases affecting animals and plants or in circumstances of extreme emergency in accordance with its laws normally and reasonably applied on a non-discriminatory basis.

Article 14. Application of other Rules

If the provisions of the laws of a Contracting Party or of international law grants the investments of investors of the other Contracting Party a more favourable treatment than the one provided for in this Agreement, they shall prevail over the latter to the extent that they are more favourable.

Article 15. Entry Into Force

The present Agreement shall enter into force 30 days after the later date on which the Contracting Parties have notified each other that their constitutional requirements for the entry into force of this Agreement have been fulfilled.

Article 16. Duration and Termination

(1) This agreement shall remain in force for a period of fifteen 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 twelve months from the date on receipt of such written notice.

(2) 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 or for a longer period agreed between the investor and the Contracting Party on whose territory investment is made.

(3) This Agreement shall be amended by mutual consent of the Contracting Parties.

In witness whereof the undersigned, duly authorised thereto by their respective Governments, have signed this Agreement.

Done at Dakar on this July 3rd, 2008 in three originals each in English, French and Hindi languages, all three texts being equally authoritative.

For the Government of the Republic of India For the Government of the Republic of Senegal

Sd/- Sd/-

Mrs. Parbati Sen Vyas Ambassador of India Senegal

1. A measure of expropriation includes, apart from direct expropriation or nationalization through formal transfer of title or outright seizure, a measure or series of measures taken intentionally by a Party to create a situation whereby the investment of an investor may be rendered substantially unproductive and incapable of yielding a return without a formal transfer of title or outright seizure.
2. The determination of whether a measure or a series of measures of a Party in a specific situation, constitutes measures as outlined in paragraph 1 above requires a case by case, fact based inquiry that considers, among other factors:
 - (i) The economic impact of the measure or a series of measures, although the fact that a measure or series of measures by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that expropriation or nationalization, has occurred;
 - (ii) The extent to which the measures are discriminatory either in scope or in application with respect to a Party or an investor or an enterprise;
 - (iii) The extent to which the measures or series of measures interfere with distinct, reasonable, investment-backed expectations;
 - (iv) The character and intent of the measures or series of measures, whether they are for bona fide public interest purposes or not and whether there is a reasonable nexus between them and the intention to expropriate.
3. Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives including health, safety and the environment concerns do not constitute expropriation or nationalization.
4. Actions and awards by judicial bodies of a Party that are designed, applied or issued in public interest including those designed to address health, safety and environmental concerns do not constitute expropriation or nationalization.
5. This Annexure shall form an integral part of this Agreement.