

AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF MALI AND THE GOVERNMENT OF THE REPUBLIC OF SENEGAL CONCERNING THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS

PREAMBLE

The Government of the Republic of Mali and the Government of the Republic of Senegal,

(hereinafter referred to as the "Contracting Parties");

Desiring to create favourable conditions for increased investment and to intensify economic cooperation between the two States on the basis of equality and mutual benefit;

With the intention of creating and maintaining favourable conditions for investment by investors of one of the Contracting Parties in the territory of the other Contracting Party;

Recognizing the need to encourage and protect foreign investment with a view to promoting the economic welfare of both States ;

Have agreed as follows:

Article 1. Definitions

(1) For the purposes of this Agreement :

(A) The term "investment" means any asset and in particular, but not exclusively:

(i) movable and immovable property and all other rights in rem, such as mortgages, privileges, securities, charges on land, pledges of movable and immovable property, usufruct and similar rights ;

(ii) shares and other forms of participation, even indirect or minority shares, in companies incorporated in the territory of one of the Contracting Parties;

(iii) Monetary claims and rights to any other benefits under a contract of economic value;

(iv) industrial and intellectual property rights, such as copyrights, patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source, technical processes, know-how and clientele;

(v) Concessions granted by law or by contract, including concessions for the prospection, cultivation, extraction or exploitation of natural resources, as well as any other right conferred by law by contract or by a decision of the authority pursuant to law ;

(vi) Property which, in accordance with the law and the lease agreements, is made available to a lessor within the territory of a Party.

No change in the legal form in which the assets have been invested or reinvested shall affect their investment status within the meaning of this Agreement.

(B) The term "income" means amounts, net of tax, derived from an investment and includes, but is not limited to, profits, interest, capital gains, dividends, royalties and remuneration or other lawful income.

(C) The term "investors" means, with respect to each Contracting Party :

(i) natural persons who, under the law of that Contracting Party, are regarded as its nationals ;

(ii) legal entities, including commercial companies, registered companies, partnerships or other organisations which have their headquarters in the territory of one of the Contracting Parties and which are constituted and operate in accordance

with the legislation of that Contracting Party.

(D) The term "territory" means :

(i) With regards to the Republic of Senegal :

(a) all territories and islands which, in accordance with the legislation of Senegal, constitute the State of Senegal;

(b) the territorial waters of Senegal; and

(c) any area beyond the territorial waters of Senegal which, in accordance with international law, is or will be defined by the legislation of Senegal as an area, including the continental shelf, over which the rights of Senegal with respect to the sea, the seabed and subsoil and their natural resources may be exercised.

(ii) With regard to the Republic of Mali: The State territory of Mali and all areas over which it exercises sovereignty, sovereign rights or jurisdiction in accordance with international law.

Article 2. Scope of application

This Agreement shall also cover, as from its entry into force, investments made before its entry into force by investors of one of the Contracting Parties in the territory of the other Contracting Party in accordance with its laws and regulations.

However, it does not cover disputes which may arise before its entry into force.

Article 3. Encouragement and Admission

(1) Each Contracting Party shall encourage and facilitate investments by investors of the other Contracting Party in its territory and shall admit or approve such investments in accordance with its laws and regulations.

(2) Each Contracting Party shall endeavour to issue, in accordance with its laws and regulations, the necessary authorizations in connection with such investments, including for the purpose of carrying out, licensing, technical, commercial or administrative assistance contracts, as well as authorizations required for the activities of consultants and experts.

Article 4. Treatment and Protection of Investments

(1) The investments and income of investors of each Contracting Party shall at all times be accorded fair and equitable treatment 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 hinder in any way, by unjustified or discriminatory measures, the management, maintenance, use, enjoyment, expansion or disposal of such investments.

Income from investment and possible reinvestment shall enjoy the same protection as the investment.

(2) Each Contracting Party shall accord to investments made in its territory, and to the income of investors of the other Contracting Party, treatment no less favourable than that which it accords to investments and income of its own investors or to investments and income of investors of any third State, whichever is more favourable.

(3) Each Contracting Party shall accord to investors of the other Contracting Party, with respect to the management, maintenance, use, enjoyment or disposal of their investments made in its territory, treatment no less favourable than that which it accords to its own investors or to investors of any third State, whichever is more favourable.

(4) If a Contracting Party grants special advantages to investors of any third State under an Agreement establishing a free trade area, customs union or common market or any other form of regional economic organization or similar international agreement to which it is or will become a party, or under an Agreement on the Non-Double Taxation of Taxes, it shall not be required to grant such advantages to investors of the other Contracting Party.

(5) For the avoidance of doubt, it is confirmed that the principles referred to in paragraphs (2) and (3) of this Article shall not apply with respect to special advantages granted to development finance institutions.

Article 5. Compensation for Losses

(1) Investors of a Contracting Party whose investments made in the territory of the other Contracting Party have suffered losses as a result of war or any other armed conflict, revolution, state of national emergency, revolt, insurrection or riot

occurring in the territory of the latter Contracting Party, shall enjoy, on the part of the latter Contracting Party, as regards restitution, compensation, indemnification or any other settlement, treatment no less favourable than that which it accords to its own investors or to investors of any third State. Payments resulting therefrom shall be freely transferable at the rate of exchange applicable on the date of transfer in accordance with the exchange rules in force.

(2) Without prejudice to paragraph (1) of this Article, investors of a Contracting Party which, in one of the situations referred to in paragraph (1) of this Article, have suffered losses in the territory of the other Contracting Party as a result of :

(a) the requisition of their assets by its forces or authorities; or

(b) the destruction of their assets by its forces or authorities which was not the result of fighting or was not required by the situation shall be accorded adequate restitution or compensation. Payments resulting therefrom shall be freely transferable at the rate of exchange applicable on the date of transfer in accordance with the exchange rules in force.

Article 6. Expropriation and Compensation

(1) Investments of investors of a Contracting Party shall not be nationalized, expropriated or subjected to measures having effects equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party, except on grounds of public interest and provided that such measures comply with legal requirements, are non-discriminatory and result in prompt, effective and adequate compensation. The compensation shall correspond to the market value of the investment concerned on the day before the measures are taken or made public, whichever is the earlier. It shall also include, where appropriate, interest calculated at a normal commercial rate up to the date of payment, shall be fully realizable and freely transferable on the basis of the exchange rate applicable on the date of transfer in accordance with the exchange rules in force.

(2) The investor affected by expropriation shall have the right to have a prompt review, in accordance with the law of the expropriating Contracting Party, by a judicial or independent authority of that Contracting Party, of its case and of the valuation of its investment in accordance with the principles set forth in this Article.

(3) If a Contracting Party expropriates the assets of a company registered or incorporated under the laws in force in its territory in which investors of the other Contracting Party hold shares, it shall, in accordance with its laws, ensure that such investors are compensated in accordance with paragraph (1) of this Article.

Article 7. Free Transfer

(1) Each Contracting Party in whose territory investments have been made by investors of the other Contracting Party shall guarantee to the investors of the other Contracting Party the transfer without delay in a convertible currency of the amounts relating to the investments, in particular, but not exclusively:

(a) the capital and additional amounts necessary for the maintenance or development of the investments;

(b) net income as defined in Article 1, B of this Agreement;

(c) amounts required for servicing, repayment and amortization of loans recognized by both Contracting Parties as investments;

(d) the proceeds resulting from the alienation or liquidation of all or part of the investments;

(e) compensation due under Articles 5 and 6;

(f) the wages of foreign workers authorised to work,

in connection with an investment in the territory of the other Contracting Party.

(2) Transfers shall be made at the rate of exchange prevailing on the market on the date of transfer, in accordance with the regulations in force in the Contracting Parties. In the absence of an exchange market, the rate to be used shall be the most recent rate applied to domestic investments or the most recent rate for the conversion of the currency concerned into Special Drawing Rights, whichever is more favourable to the investor.

Article 8. Settlement of Investment Disputes

(1) Subject to the provisions of paragraph (3) below, any dispute between a Contracting Party and an investor of the other Contracting Party relating to an investment shall, to the extent possible, be settled amicably through consultations and

negotiations between the parties to the dispute.

(2) Failing an amicable settlement between the parties to the dispute within six (6) months from the date of written notification by either of the parties to the dispute, the dispute shall be submitted to the choice of the investor:

(a) either to the competent court of the Contracting Party in whose territory the investment was made ;

(b) or to arbitration by the Common Court of Justice and Arbitration established by the Treaty of the Organization for the Harmonization of Business Law in Africa (O.H.A.D.A. Treaty), where the parties to the dispute are nationals of a State signatory to the O.H.A.D.A. Treaty of 17 October 1993;

(c) or for arbitration by the International Centre for Settlement of Investment Disputes (ICSID), established by "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States", signed in Washington on 18 March 1965;

To this end, each of the Contracting Parties gives its irrevocable consent that any dispute relating to the amount of compensation inherent in the expropriation shall be submitted to this arbitration procedure. Other disputes shall be submitted to this procedure with the consent of both parties.

(d) or to an ad hoc arbitral tribunal which, in the absence of any other arrangement between the parties to the dispute, shall be constituted in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).

Recourse to one of the above-mentioned forms of arbitration shall be exclusive of any parallel or subsequent referral to any other of these bodies under the provisions of this article, without prejudice to the parties to the dispute continuing amicable negotiations until an arbitral award has the force of *res judicata*.

(3) The international arbitration tribunal referred to above shall be constituted as follows: each of the parties to the dispute shall appoint one arbitrator. The two (2) arbitrators so appointed shall proceed to appoint a third arbitrator as President of the Tribunal. The arbitrators shall be appointed within two (2) months, and the Chairman of the Tribunal within four (4) months, from the date on which either party has notified the other party of its intention to submit the dispute to arbitration.

(4) Except as hereinafter provided, the arbitral tribunal shall determine its own procedure by reference to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington on March 18, 1965.

(5) No Contracting Party, party to a dispute, may raise an objection at any stage of the arbitration proceedings or the enforcement of an arbitral award on the ground that the investor, the adverse party to the dispute, has received compensation covering all or part of its losses under the guarantee provided for in Article 10 of this Agreement.

(6) The arbitral tribunal shall decide on the basis of the national law of the Contracting Party, party to the dispute, in whose territory the investment is situated, as well as on the basis of the rules relating to the conflict of laws of the provisions of this Agreement, the terms of any special agreements which may be concluded by the Contracting Parties concerning the investment, and the principles of international law.

(7) The decision of the arbitral tribunal shall be taken by a majority vote and shall be final and binding on the parties to comply with the provisions of the award.

(8) The Arbitral Tribunal shall state the basis of its decision and shall give reasons for it upon the request of either party.

(9) Each party shall bear the expenses of the arbitrator appointed by it and of his advisers in the arbitral proceedings. The expenses of the chairman of the Tribunal for his function, as well as the other expenses of the Arbitral Tribunal, shall be borne equally by each party. The Tribunal may, however, decide in its award that a greater proportion of the costs shall be borne by one of the parties, and the award shall be binding on both parties.

(10) The provisions of this Article shall not affect the right of the Contracting Parties to have recourse to the procedures provided for in Article 9 if the dispute concerns the interpretation or implementation of this Agreement.

Article 9. Settlement of Disputes between the Contracting Parties

(1) Any dispute between contracting parties concerning the interpretation or application of this Agreement shall, to the extent possible, be settled through diplomatic channels.

(2) If the dispute cannot be settled through diplomatic channels within six (6) months from the commencement of

negotiations, it shall be submitted to arbitration at the request of either Contracting Party.

(3) The Arbitration Tribunal hereinafter referred to as "the Tribunal" shall be constituted as follows:

Each Contracting Party shall appoint one arbitrator and the two arbitrators shall together appoint a third arbitrator, who shall be the president of the tribunal, who shall be a national of a third State having diplomatic relations with both Contracting Parties. Within three (3) months after receipt of the request for arbitration, each Contracting Party shall appoint one arbitrator and, within three (3) months after the appointment of the (02) arbitrators, the latter shall together appoint the third arbitrator.

(4) If the time-limits fixed in paragraph (3) above have not been observed, either Contracting Party shall invite the President of the International Court of Justice to make the necessary designations. If the President of the International Court of Justice is a national of either Contracting Party or if he is prevented from exercising his office, the Vice-President of the International Court of Justice shall be invited to make the necessary appointments. If the Vice-President of the International Court of Justice is a national of one of the Contracting Parties or if he is prevented from exercising his functions, the senior judge of the International Court of Justice who is not a national of any of the Contracting Parties shall be invited to make the said appointments.

(5) The Tribunal shall take its decision by a majority of votes. The decision of the Arbitral Tribunal shall be final and binding on the parties, who shall undertake to comply with the provisions of the award. Each Contracting Party shall bear the expenses of the arbitrator appointed by it and of his advisers in the arbitral proceedings, as well as half of the expenses of the chairman of the Tribunal and of the other expenses. The Tribunal may, however, decide in its award that a greater proportion of the costs shall be borne by one of the parties, and the award shall be binding on both parties.

(6) Except for the foregoing, the Tribunal shall establish its own rules of procedure.

Article 10. Principle of Subrogation

(1) If under a legal or contractual guarantee covering the non-commercial risks of investments, compensation is paid to an investor of one of the Contracting Parties, the other Contracting Party shall recognize the subrogation of the designated institution in the rights of the compensated investor.

(2) In accordance with the guarantee given for the investment concerned, the designated institution shall be entitled to assert all the rights which the investor would have been able to exercise if the said institution had not been subrogated to it.

(3) The transfer of sums resulting from the above subrogation shall be governed by the provisions of Article 7.

(4) Any dispute between a Contracting Party and the institution subrogated to the other Contracting Party shall be settled in accordance with the provisions of Article 8 of this Agreement.

Article 11. Applicable Rules

(1) If provisions of the legislation of a Contracting Party or of rules of international law accord to investments of investors of the other Contracting Party more favourable treatment than that provided for in this Agreement, such provisions shall prevail over this Agreement to the extent that they are more favourable.

(2) Each Contracting Party shall comply with any special obligation undertaken in respect of an investment made in its territory by an investor of the other Contracting Party.

Article 12. Prohibitions and restrictions

Nothing in this Agreement may be interpreted as preventing a Contracting Party from taking any measure necessary for the protection of its essential interests with regard to safety, the environment, public health or the prevention of diseases affecting animals and plants.

Article 13. Entry Into Force and Duration

(1) This Agreement shall enter into force thirty (30) days from the date of receipt of the last of the two notifications relating to the internal completion by the two Contracting Parties of the legislative procedures required in their respective countries.

(2) The Agreement, concluded for a period of ten (10) years, shall remain in force after this term unless one of the Parties denounces it by written notification at least six (6) months before the date of expiry of the current period of validity.

(3) The said Agreement may be amended by agreement between the Parties by the exchange of letters under the same conditions and within the same time limits as provided for in paragraph 2 above.

(4) With respect to investments made prior to the expiration of this Agreement, the provisions of this Agreement shall continue to apply for an additional period of ten (10) years from the date of expiration or such longer period as may be agreed between the investor and the contracting party in whose territory the investment has been made.

In witness whereof, the undersigned representatives, being duly authorized by their respective Governments, have signed this Agreement.

Done at Bamako, on 12 April 2005, in two originals in the French language.

For the Government of the Republic of Mali

(signature)

Ousmane Issoufi MAIGA

Prime Minister

For the Government of the Republic of Senegal

(signature)

Macky SALL

Prime Minister