

# **Agreement between the Government of the State of Kuwait and the Government of the Republic of Benin for the mutual encouragement and protection of investments**

The Government of the State of Kuwait and the Government of the Republic of Benin (hereinafter referred to as "the Contracting States");

Desiring to create favorable conditions for the development of economic cooperation between them and in particular for the investments made by investors belonging to a Contracting State in the territory of the other Contracting State;

Recognizing that the encouragement and reciprocal protection of such investments will be an incentive to revitalize commercial initiative and to increase prosperity in both Contracting States;

Have agreed as follows:

## **Article 1. Definitions**

For the purposes of this Agreement:

1. The term "investment" means all kinds of assets situated in the territory of a Contracting State which are owned or controlled, directly or indirectly, by an investor of the other Contracting State and includes assets or rights consisting of or taking the form of:

(a) company shares, stocks and other forms of equity interest, debentures, debentures and other forms of debt rights in a company, and other debts, loans and securities issued by any investor of a Contracting State;

(b) claims for money and claims for any other assets or performance under a contract of economic value;

(c) intellectual property rights, including, but not limited to, copyrights, trademarks, patents, industrial designs and models, technical processes, know-how, trade secrets, trade names and goodwill;

(d) any right established by law, contract or under any licenses or permits granted in accordance with the law, including rights to prospect, explore, extract or exploit natural resources and rights to engage in other economic and commercial activities or to provide services;

(e) tangible and intangible, movable and immovable property and any related property rights such as rents, mortgages, debt liens and encumbrances.

The term "investment" also applies to "returns" retained for the purpose of reinvestment, and the results from "liquidation", as both terms are defined hereafter. Any change in the place in which the assets are invested or reinvested will not affect its nature as an investment.

2. The term "investor" for a Contracting State means:

(a) a natural person who has the nationality of that Contracting State in accordance with its applicable laws;

(b) the government of that Contracting State;

(c) any legal person or other entity legally incorporated under the laws and regulations of that Contracting State, such as institutes, development funds, agencies, charitable and scientific institutions, legal and governmental institutions and corporations.

3. The term "company" means any legal entity, whether or not established for the purpose of making a financial profit, and whether it is owned or received privately or governmentally, organized in accordance with the applicable law of a

Contracting State or is actually owned or managed by investors of a Contracting State, and includes public institutions, trust solidarity companies, one-person companies, branch, joint venture, and other similar organizations.

4. The term 'returns' means the amounts generated by an investment, regardless of the form in which it is paid and includes, in particular, but not limited to, profits, interest, capital gains, dividends, royalties, management fees, technical assistance or other payments or fees and payments in kind, of any kind.

5. The term "liquidation" means any activity carried out for the purpose of total or partial termination of the investment.

6. The term "territory" means the territory of a Contracting State, including any area outside the territorial sea which, in accordance with international law, has been determined, or may hereafter be determined in accordance with the law of a Contracting State, as an area in which a Contracting State may exercise the rights of sovereignty or jurisdiction.

7. The term "freely convertible currency" means any currency specified by the International Monetary Fund from one period to another as a currency to be used freely in accordance with the provisions of the International Monetary Fund Agreement and any amendments thereto.

8. The term "without delay" means such a period of time normally required to complete the formalities necessary to transfer payments. The aforementioned period starts from the day on which the transfer request is submitted, provided that it does not, in any case, exceed one month.

## **Article 2. Investment Protection**

1. Each of the Contracting States shall encourage and create more favorable conditions for the investments made by the investors of the other Contracting State in its territory, and in accordance with its rights granted to it by the force of its laws and legislation, it shall accept such investments.

2. Investments made by investors of a Contracting State in the territory of the other Contracting State shall be accorded fair and equitable treatment and enjoy full protection and security, in conformity with the recognized principles of international law and the provisions of this Agreement. Neither Contracting State shall, in any way, take arbitrary or discriminatory measures resulting in prejudice to the maintenance, maintenance, use, enjoyment, or disposal of investments in the territory of investors of the other Contracting State. Each Contracting State shall observe any obligation or will to which it may be a party in respect of investments by investors of the other Contracting State.

3. The investments of investors of either Contracting Party shall not be subject to additional performance requirements, which may hinder or restrict their use, management, disposal, operation, expansion, sale, or any other conduct.

## **Article 3. Treatment of Investments**

1. With respect to the use, management, disposal, operation, expansion, sale, or other forms of disposal of investments made in its territory by investors of the other Contracting State, no Contracting State shall accord treatment no less favorable than that which it would prevent in similar cases for investments of its own investors or of any third State, whichever is more favorable to those investments.

2. Notwithstanding this, the provisions of this Article shall not be construed as obligating a Contracting State to accord to investors of the other Contracting State the advantage of any treatment, preference, or privilege from:

(a) any customs union, economic union, free trade area, monetary union or any other form of regional economic arrangement or any other similar international agreement to which either Contracting State is or may become a party;

(b) any international or regional agreement, bilateral agreement, or another similar arrangement, and any domestic legislation relating wholly or principally to taxation.

## **Article 4. Compensation for Losses**

1. Investors of one Contracting State whose territory has been damaged or lost due to war or any other armed conflict, national emergency, revolution, disturbance, riot, or other events shall be granted by the other Contracting State with respect to restoring the situation to its previous stage, or restitution of losses, compensation or any other settlement, no less favorable than that which the last Contracting State accords to its own investors or to the investors of any third State, whichever is more favorable.

2. Without prejudice to paragraph 1, investors of one of the Contracting States incur a loss as a result of any of the events

referred to in that paragraph being in the territory of the other Contracting State and resulting from:

(a) the temporary seizure of their property or part of it by its forces or authorities;

(b) the destruction of their property, or part thereof, by its forces or authorities, which was not caused or required by hostilities, or the necessity of the situation,

they shall be granted prompt, adequate and effective compensation for the damage or loss suffered by them.

## **Article 5. Expropriation**

1. (a) Investments made by investors of either Contracting State in the territory of the other Contracting State shall not be nationalized, expropriated, dispossessed or subject, directly or indirectly, to measures of an effect equivalent to nationalization, expropriation or dispossession (together referred to as (hereinafter due to expropriation) by the other Contracting State except for a general purpose related to the national interest of that Contracting State and in return for prompt, adequate and effective compensation, provided that such measures were taken on a non-discriminatory basis and in accordance with the legal procedures in force in the Contracting States.

(b) the amount of such compensation shall be the actual value of the expropriated investment, determined and computed in accordance with internationally recognized valuation principles on the basis of the fair market value of the expropriated investment at the time immediately before the expropriation proceeded or the imminent expropriation became publicly known; Whichever is earlier (hereinafter referred to as the date of evaluation). Such compensation shall be calculated in a currency that each Contracting State guarantees to investors of the other Contracting State, the free transfer of investments and the proceeds relating thereto within and outside its territory.

2. The transfer of payments under Paragraph (1) is accomplished without delay or restrictions, except in the case of payments in kind, and in a freely convertible currency. In the event of a delay in making the required transfers, the affected investor is entitled to receive interest for the delay period.

3. Freely convertible at the option of the holder, on the basis of the market value of the exchange rate prevailing for that currency on the valuation date. In the event of late payment of compensation, it will include interest calculated according to the market rate from the date of interest accrual until the date of payment, and it will be paid to the investor in a freely convertible and usable currency.

## **Article 6. Indirect Expropriation**

1. For further clarification, expropriation includes cases in which a Contracting State expropriates the assets of a company or enterprise created or incorporated under the laws in force in its territory in which an investor of the other Contracting State has an investment through ownership of shares, shares, debentures, rights or other interests.

2. For the purposes of this Agreement, the term "expropriation" also includes any legal intervention or action by a Contracting State that has the same effect as the expropriation and which results in the investor being in fact deprived of ownership, control or substantial interest in his investment, or which may result in loss or damage to value Economic investment of the investment, such as freezing or withholding of the investment, the imposition of an arbitrary tax on the investment, the compulsory sale of all or part of the investment, or other similar measures.

## **Article 7. Subrogation**

1. If a Contracting State or its relevant agency (the guarantor party) makes a payment or compensation under a guarantee relating to an investment in the territory of the other Contracting State (the "hosting State), the host State shall recognize:

(a) to waive to the guarantor by law or legal agreement all rights and claims arising from such investment;

(b) The right of the guarantor party to exercise such rights and implement those claims and obligations related to the investment based on the principle of substitution of the creditor.

2. In all circumstances, the guarantor has the right:

(a) the same treatment of rights and claims acquired and obligations assumed under the assignment referred to in paragraph 1 above;

(b) any payments received pursuant to those rights and claims.

The original investor was also entitled to receive under this Agreement in respect of the relevant investment.

## **Article 8. Disputes between a Contracting State and an Investor**

1. Disputes which arise between a Contracting State and an investor of the other Contracting State in connection with an investment belonging to the latter in the territory of the first-mentioned State, shall be settled, as far as possible, by amicable means.

2. If it is not possible to settle those disputes within six months from the date of the request of any of the parties to the dispute for amicable settlement by delivering a written notification to the other party, the dispute will not be submitted for resolution by choosing the investor, the party to the dispute only, by one of the following means:

- (a) the competent judicial authority of the Contracting State which is a party to the dispute;
- (b) in accordance with any appropriate procedures for the settlement of the dispute previously agreed upon,
- (c) International arbitration in accordance with the following paragraphs of this Article.

3. In the event that the investor chooses to submit the dispute to international arbitration, the investor shall also submit his written consent to submit the dispute for settlement through one of the following bodies:

- (a) (1) The International Center for the Settlement of Investment Disputes (the Centre), established pursuant to the Agreement on the Settlement of Investment Disputes between States and Nationals of Other Countries opened for signature in Washington on March 18, 1965 (the "Washington Convention") being parties to the Washington Convention ;
- (2) The Centre, under the rules governing additional facilities for the conduct of proceedings by the Secretary of the Center (the Additional Facilities Rules), if the Contracting State of the recipient or the Contracting State party to the dispute, but not both, is a party to the Washington Convention;
- (b) an arbitral tribunal established under the Arbitration Rules (the "Rules") of the United Nations Commission on International Trade Law (UNCITRAL), as these Rules are modified by the parties to the dispute (the appointing body referred to in Article 7 of the Rules is the Secretary-General of the Centre) ;
- (c) An arbitral tribunal to be appointed based on the arbitration rules of any arbitral tribunal to be mutually agreed upon between the parties to the dispute.

4. Notwithstanding that the investor has submitted the dispute to binding arbitration under paragraph 4 above of this Article, he may, before or during the commencement of the arbitration proceedings, petition the judicial or administrative courts of the Contracting State which is a party to the dispute to issue an interim injunction to maintain his rights and interests, provided that this does not include a request for compensation for any damages.

5. A Contracting State shall not assert its immunity in any judicial, arbitral or otherwise proceeding or in the enforcement of any decision or judgment relating to an investment dispute between a Contracting State and an investor of the other Contracting State. Nor may any counterclaim or right of set-off be established on the fact that the concerned investor has received, or will receive, based on an insurance contract, compensation for damage or any other compensation for all or part of the damages claimed by any third party, whether general or particular, including that of that other Contracting State and its subdivisions, agencies or organs.

6. The arbitral tribunal established under this Article shall decide issues relating to the dispute in accordance with those rules of law to be agreed upon by the parties to the dispute. In the absence of such an agreement, the law of the Contracting State party to the dispute, including the rules of conflict of laws, and the rules of customary international law as they are applied, shall apply, considering the provisions of this Agreement.

## **Article 9. Disputes between the Contracting States**

1. The Contracting States shall, as far as possible, settle any dispute relating to the operation or application of this Agreement through consultations or other diplomatic channels.

2. If the dispute is not settled within six months from the date on which such consultations or other diplomatic channels were requested by either Contracting State, and unless the Contracting States otherwise agree in writing, either Contracting State may, by written notification to the other Contracting State, submit the dispute an arbitral tribunal shall convene for this purpose in accordance with the following provisions of this Article.

3. The arbitral tribunal shall be constituted as follows: Each of the two contracting states appoints one member, and these two members agree on a citizen of a third country to be their president, who is appointed by the two Contracting States. These two members shall be appointed within two months, and the president within four months from the date on which either of the two contracting states notifies the other contracting state of its intention to submit the dispute to an arbitral tribunal.

4. If the periods specified in period 3 above are not 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 of the International Court of Justice is a national of one of the two Contracting States, or if he finds an impediment preventing him from performing the aforementioned task, he shall ask the Vice-President of the International Court of Justice to make the necessary appointments. If the Vice-President of the International Court of Justice is a national of one of the Contracting States or finds an impediment to performing the said task, the member of the International Court of Justice next in seniority and who is not a national of one of the Contracting States shall be required to make the necessary appointments.

5. The arbitral tribunal takes its decisions by a majority vote. This decision shall be taken in accordance with the provisions of this treaty and the recognized rules of international law, as applicable, and shall be final and binding on each of the two Contracting States. Each Contracting State shall pay the fees of the member of the arbitral tribunal appointed by that Contracting State, as well as the fees of its representative in the arbitral proceedings. As for the fees of the President, as well as any other costs, they shall be borne equally by both Contracting States. The arbitral tribunal may, at its discretion, decide to assign one of the two Contracting States a proportion greater than or all of the aforementioned costs. The arbitral tribunal shall determine its own procedure in respect of all other matters.

## **Article 10. Relations between Contracting Parties**

The provisions of this Agreement shall apply regardless of the existence of diplomatic or consular relations between the two Contracting States. The two Contracting States shall hold, when necessary, consultative meetings in order to review the implementation of this Convention. These meetings shall be held upon the proposal of one of the two contracting states at a place and time to be agreed upon through diplomatic channels.

## **Article 11. Most Favorable Treatment**

If the laws of either Contracting State or obligations under international law now existing or which may subsequently arise between the two Contracting States in addition to this Agreement contain provisions, whether general or specific, which accord investments or made by investors of the other Contracting State a more favorable treatment than those set forth in this Agreement, this provision shall prevail over this Agreement to the extent that it provides a more favorable treatment.

## **Article 12. Scope of Application**

This Agreement shall apply to all investments, whether existing at the date of entry into this Agreement made after that date by investors of either of the two Contracting States in force or in which the Agreement came into force in the territory of the other Contracting State. It does not apply to investment disputes arising before its entry into force.

## **Article 13. Entry Into Force**

For the implementation, each of the Contracting States shall notify the other in writing of their fulfillment of the constitutional requirements necessary for the entry into force of this Agreement, and the Agreement shall enter into force on the thirtieth day after the date of receipt of the last notification.

## **Article 14. Modifications**

Any Contracting State may, in writing, request modification of all or part of this Agreement. The amended and agreed portion shall enter into force under the terms set forth in Article 13 of this Agreement.

## **Article 15. Duration**

1. This Agreement shall remain in force for a period of twenty (20) years, after which it shall continue in force for a similar period or periods, unless either Contracting State notifies the other Contracting State in writing one year before the expiry of the first term or any subsequent period of its intention to terminate the Agreement.

2. With respect to investments made prior to the effective date of the notice of termination of this Agreement, the provisions of this Agreement shall remain in effect for a period of fifteen (15) years from the date of termination of this Agreement.

In witness whereof, the respective plenipotentiaries of both Contracting States have signed this Agreement.

Done in Kuwait on this fourth day of the month of Jumada Al-Akher 1429 AH corresponding to the day of June 2008, in two original copies in the Arabic, French and English languages.

For the Republic of Benin

Baskal, Irina Oba'i,

Chief minister in the Council of Ministers in charge of Economic Assessment and Planification

For the State of Kuwait,

Mustafa Gessem Al-Shamali

Minister of Finance