

# **Agreement between the Government of the Republic of Senegal and the Government of the State of Kuwait on encouragement and reciprocal protection of investments**

The Government of the Republic of Senegal and the Government of the State of Kuwait, (hereinafter referred to as the "State Parties");

Desiring to create favorable conditions for the creation of the development of economic cooperation between the two countries and in particular for investments by investors of one Party in the territory of the other Party;

Grateful that the promotion and reciprocal protection of such investments can help to stimulate initiatives by the private sector and increase prosperity in the territories of both States Parties;

Have agreed as follows:

## **Article 1. Definitions**

For the purposes of this Agreement:

1. The term "investment" means all types of assets owned or controlled directly or indirectly by an investor of one State Party in the territory of the other State Party in accordance with the laws and regulations of the latter.

The term "investment" means, in particular and not exclusively :

(a) shares, stocks, and bonds of a company and any other form of participation in a company, and other forms of debit interest in a company, and other claims, borrowings and securities issued by any investor of a State Party;

(b) financial claims or claims against any liability and any benefit under a contract with an economic value;

(c) intellectual property rights, including copyrights, patents, design patents and models, registered designs, technical processes, know-how, trade secrets, trade names and goodwill;

(d) rights granted by statute or contract, or under rights or licences granted by law, including rights relating to the exploration for, extraction or exploitation of natural resources, and rights to engage in other economic or commercial activities or provide services ;

(e) tangible, intangible, movable and immovable property and any related property rights, such as leases, mortgages, liens or securities.

The term "investment" shall also apply to "returns" retained for the purpose of reinvestment and products of "liquidations" in the sense covered by the terms of this agreement.

Any change in the form in which assets or rights are invested, where reinvested does not affect their status as investments.

2. The term "investor" means, in the case of either State Party :

(a) any individual possessing the nationality or citizenship of that state in accordance with its laws in this area;

(b) the Government of that State;

(c) a corporation incorporated or organized under the laws and regulations of that State, such as institutions, development funds, associations, foundations and other institutions, and governmental institutions and companies.

3. The term "company" means any legal person, whether for profit or otherwise, privately or publicly owned or controlled, formed in accordance with the applicable law of a State Party, including a corporation, trust, partnership, sole

proprietorship, subsidiary, joint venture, association or other similar organization.

4. The term "income" means income derived from an investment, irrespective of the form of payment, and includes profits, interest, capital gains, dividends, royalties, other remuneration relating to management, administration, technical assistance or other payments or dues, and payments in kind, irrespective of type.

5. The term "liquidation" means any disposition made for the purpose of relinquishing all or part of an investment.

6. The term "territory" means the territory of a State Party, including any area beyond the territorial sea which, in accordance with international law, has been or may be regarded under the laws of a State Party as an area over which that State may exercise jurisdiction or sovereign rights.

7. The term "freely convertible currency" means any currency which the International Monetary Fund determines, from time to time, to be a freely usable currency in accordance with the Articles of Agreement of the International Monetary Fund and any amendments thereto.

8. The term "without delay" means a period of time as normally required for the completion of formalities necessary for the transfer of payments. The said period shall begin on the day on which the request for transfer was submitted and shall in no case exceed one month.

## **Article 2. Encouragement and Protection of Investments**

1. Each Party undertakes to promote itself in accordance with its general policy on foreign investment, investments in its territory by investors of the other Party, and under the right to exercise powers conferred by its laws for such investments.

2. Each Party shall at all times accord fair and equitable treatment to investments of investors of the other Party, which shall enjoy full protection and security in its territory, in accordance with recognized principles of international law and the provisions of this Agreement. No State Party may in any way hinder by abusive or discriminatory measures, the management, maintenance, the use, enjoyment or disposal of investments in its territory, the activities of investors of the other State Party. Each Party shall respect any commitments it may have entered into with respect to the investments of investors of the other Party.

3. Once established, the investments of investors of either Party shall not be subject to additional performance requirements that could impair their viability or jeopardize their use, management, conduct, operation, expansion, sale or other disposition.

## **Article 3. National Treatment and the Most-favoured-nation Clause**

1. With respect to the use, management, conduct, operation, expansion, sale and other disposition of investments made in the territory of one State Party by investors of the other State Party, each Party shall accord treatment no less favourable than that which it accords, in like situations, to its own investors or to investors of any third State, whichever treatment is more favourable to such investments.

2. The provisions of this Article shall not be interpreted as a State Party to extend to the investors of the other Party the benefits of any treatment, preference or privilege resulting from:

(a) a customs union, an economic union, a free trade area or a monetary union or other forms of regional economic cooperation or other similar international agreements to which either State Party is or may become a party;

(b) any international, regional, bilateral or other similar agreements or arrangements, or any domestic legislation relating exclusively or mainly to taxation.

## **Article 4. Compensation for Damage or Loss**

1. Except where Article 6 applies, an investor of one State Party whose investments in the territory of the other State Party have suffered losses as a result of war or other armed conflict, national emergency, revolt, disturbance of public order or insurrection, of a riot or other similar event in the territory of the other State Party, shall be accorded by the latter State Party, with regard to restitution, compensation, indemnification or any other settlement, treatment no less favourable than that accorded by that State to its own investors or to those of a third State, whichever is the more favourable.

Payments by way of compensation may be freely transferred without undue delay.

2. Subject to the provisions of paragraph 1 of this Article, an investor of one State Party who, in any of the events referred to

in that paragraph, has suffered losses in the territory of the other State Party as a result of :

(a) the requisition of all or part of his property by its forces or authorities ;

b) the destruction of all or part of his property by the forces or authorities of the latter, for a cause other than armed confrontation or which was not required by the situation, shall be compensated or indemnified promptly, fairly and adequately, with the most advantageous treatment prevailing.

## **Article 5. Nationalization or Expropriation**

1. (a) Investments made by investors of one State Party in the territory of the other State Party shall not be subject to nationalization, expropriation, dispossession or direct or indirect measures having an effect equivalent to nationalization, expropriation and dispossession (hereinafter collectively referred to as "expropriation") by the other State Party, except for reasons of public utility relating to the internal needs of that State. and upon payment of compensation prompt, adequate and effective and provided that such measures are taken on a non-discriminatory basis and in accordance with the application due process of law.

(b) Such compensation shall be equal to the real value of the expropriated investment and shall be determined and calculated in accordance with internationally accepted principles of valuation on the basis of the fair market value of the nationalized or expropriated investment immediately before the nationalization or expropriation measure was taken or the imminent nationalization or expropriation is publicly known, whichever occurs first (hereinafter referred to as the "valuation date"). Such compensation shall be calculated in a freely convertible currency to be chosen by the investor, based on the market exchange rate prevailing for such currency on the Valuation Date, and shall include interest at a commercial rate fixed on the basis of the market rate, but in no case at a rate less than or equivalent to the prevailing LIBOR interest rate, from the date of expropriation until the date of payment.

2. For greater certainty, nationalization or expropriation includes situations where a State Party expropriates the assets of a company or enterprise incorporated or established under the laws in force in its own territory in which an investor of the other State Party has an investment, including through ownership of shares, securities, bonds or other rights or interests.

3. For the purposes of this Agreement, the term "nationalization or expropriation" also refers to interventions or regulatory measures adopted by a State Party which have the effect of de facto nationalization or expropriation, in that their effect is to deprive the investor of ownership, of its control or substantial benefits from its investment or which may result in the loss or damage to the economic value of the investment, such as freezing or blocking the investment, levying arbitrary or excessive taxes on the investment, forced sale, etc. of all or part of the investment, or other comparable measures.

## **Article 6. Transfer of Payments Related to Investment**

1. Each State Party shall guarantee to investors of the other State Party the free transfer of investments and payments concerning them within and outside its territory.

2. Transfers of payments under paragraph 1 shall be made without delay and without restrictions and, except in the case of payment in kind, in a freely convertible currency. In the event of delay in respect of transfers under this Article, the affected investor shall also receive interest at the statutory rate in force.

## **Article 7. Subrogation**

1. When one of the States Parties or an institution designated by it makes a payment by way of compensation or guarantee for an investment that an investor has made in the territory of the other State Party ("the host State"), the host State recognizes :

(a) the assignment to the Indemnifying Party, either by law or pursuant to a legal transaction, of any right or claim arising from such investments;

(b) the right of the Indemnifying Party is entitled to exercise such rights and enforce such claims and assume all obligations related to the investment under the subrogation.

2. The Indemnifying Party may at any time entitled to the same treatment with regard to:

(a) acquired the rights and entitlements and obligations it under the contract referred to in paragraph 1 above;

(b) the payments in accordance with these rights and claims, and that the original investor was entitled to receive under this

Agreement with respect to the investment in question.

## **Article 8. Settlement of Disputes between a State Party and an Investor**

1. Disputes between a State Party and an investor of the other Party relating to an investment in the territory of the latter will, to the extent possible, be settled amicably.
2. If the dispute can not be settled within six months from the date on which either party to the requested amicable settlement by written notice to the other party dispute, the dispute shall be submitted to a settlement on the investor party choice at the dispute as follows:
  - (a) in accordance with the applicable, previously agreed dispute settlement procedures ;
  - (b) to international arbitration in accordance with the following paragraphs of this article.
3. If an investor chooses to submit the dispute to international arbitration must give written consent to submit the dispute to the following organs:
  - (a) (1) To 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, opened for signature in Washington DC on 18 March 1965, if both Parties have acceded to the Convention;
  - (2) in the event that this condition is not met, each State Party agrees that the dispute may be settled under the rules of the Additional Facility for the Administration of Proceedings by the ICSID Secretariat;
  - (b) an arbitral tribunal established under the Arbitration Rules (the "Rules") of the United Nations Commission on International Trade Law (UNCITRAL), as this procedure may be amended by the parties to the dispute (the appointing authority referred to in Article 7 of the Regulations shall be the Secretary-General of the Centre);
  - (C) an arbitration tribunal constituted in accordance with the Arbitration Rules of any arbitration institution mutually agreed upon by the Parties to the dispute.
4. Notwithstanding that the investor may have submitted a dispute to binding arbitration under paragraph 3, the investor may, before the commencement of the arbitral proceedings or in the course of the proceedings, seek an order from the judicial or administrative tribunals of the State Party that is a party to the dispute for the preservation of its rights and interests, provided that such order does not include the payment of damages.
5. In no judicial, arbitral or other proceedings, or in no application of any decision or judgment in an investment dispute between a State Party and an investor of the other State Party, that State Party may assert, as a defence, its sovereign immunity. No counterclaim or right of set-off may be based on the fact that the investor concerned has received or will receive, pursuant to a contract of insurance, compensation or other set-off for any part of its alleged damages from any third party, public or private, including another State Party and its branches, agencies or other public structures.
6. Once an investor has submitted the dispute either to the domestic courts of the Party concerned or to international arbitration, the choice of either of these procedures remains final.

The resulting international arbitral awards shall be final and binding on the Parties to the dispute.

## **Article 9. Settlement of Disputes between States Parties**

1. States Parties shall, to the extent possible, any dispute concerning the interpretation 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 by one of the States Parties requested and, unless States Parties n 'decision in writing, each State Party may, by written notice to the other Party, submit the dispute to an ad hoc arbitral tribunal in accordance with the following provisions of this Article.
3. The arbitral tribunal composed as follows: Each State Party shall appoint one member and these two members shall agree on a national of a third State as chairman of the tribunal by the parties to designate the two states.

These two members shall be appointed within two months and the Chairman within four months from the date of one of the States Parties, the other State party informed of its intention to the dispute to court arbitration.

4. If the time limits specified in paragraph 3 above have not been observed, each State Party 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 States Parties or is unable to perform the said function, 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 States Parties or is also unable to perform that function, the most senior member of the International Court of Justice who is not a national of one of the States Parties shall be invited to make the necessary appointments. of one of the States Parties will be invited to make the necessary appointments.

5. The Arbitration Tribunal shall take its decision by a majority of votes, in accordance with this Agreement and the recognized rules of international law as applicable. The Decision shall be final and binding on both States Parties. Each State Party shall bear the expenses of the member of the Arbitration Tribunal appointed by it and the costs of his or her representation in the arbitration proceedings. The expenses of the Chairman as well as all other costs of the arbitration proceedings shall be borne equally by both States Parties. However, the Arbitration Tribunal may, in its sole discretion, decide that a higher proportion of all costs shall be borne by one of the States Parties. In all other respects, the arbitration tribunal will determine its own procedure.

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

The provisions of this Agreement shall apply irrespective of the existence of diplomatic or consular relations between the States Parties.

## **Article 11. Application of other Rules**

If the laws of a State Party or obligations at the end of the existing international legislation made now or later among the States Parties, in addition to the current agreement rules, general or specific, entitling investments include investors of the other party, to benefit from more favorable treatment than that provided under this agreement, these rules, because it is more favorable to the investor, prevail over this Agreement.

## **Article 12. Scope of the Agreement**

This agreement applies to all investments before or after the entry into force by investors of one of the States Parties in the territory of the other Party.

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

Each State Party in writing of the date on which the constitutional requirements for the entry into force of this Agreement have been fulfilled, and this Agreement shall enter into force on the thirtieth day after the date of receipt of the last notification.

## **Article 14. Duration and Termination**

1. This Agreement shall remain in force for a period of thirty (30) years from the date of notification of completion of the legislative formalities and shall continue in force thereafter for a similar period or periods unless either State Party notifies the other State Party, in writing, at least one year prior to the expiry of the initial period or any subsequent period, of its intention to denounce it.

2. With respect to investments made prior to the date of notification of the denunciation of this Agreement, the provisions of this Agreement shall remain in force for a period of twenty (20) years from the date of denunciation of this Agreement.

In witness whereof, the plenipotentiaries duly authorized by their respective Governments have signed the present Agreement.

Done at Dakar on 25 July 2009, in two original copies, in the Arabic, English and French languages, both texts being equally authentic. In case of divergence in interpretation, the English version shall prevail.

For the Government of the Republic of Senegal

The Minister of State, Foreign Minister,

Dr. Sheikh Tidiane GADIO

For the Government of the State of Kuwait

The Minister of Finance,

Mustafa Jassim AL Shamali