

# **Agreement between the Government of the Republic of Tunisia and the Government of the State of Kuwait for the Reciprocal Promotion and Protection of Investments**

The Government of the Republic of Tunisia and the Government of the State of Kuwait (hereinafter referred to as the 'Contracting Parties'),

Desiring to create favorable conditions for greater economic corporation between them and particularly for investments by investors of one Contracting Party in the territory of the other Contracting Party,

Recognizing that the reciprocal promotion and protection of such investments will be conducive to the stimulation of business initiatives and will increase prosperity in both Contracting Parties,

Have agreed as follows:

## **Article 1. Definitions**

For the purpose of this agreement:

1. The term "Investment" shall comprise every kind of asset established in the territory of a Contracting Party, in accordance with its laws and regulations, owned by an investor of the other Contracting Party or has controlling interest in it directly or indirectly. This term shall include particularly, but not exclusively:

- a. Movable and immovable property as well as any other property rights in rem such as mortgages, liens, possessory mortgages, usufruct and similar rights,
- b. A company, institution, shares, or stocks and other forms of participation in ownership, bonds, debt securities and other forms of debt rights in a company or institution, and other debt, loans and any other securities issued by an investor of a Contracting Party,
- c. Claims to money and to any other asset or performance in accordance with a contract having economic value,
- d. Intellectual property rights, including not exclusively, copyrights, trademarks, patents, industrial designs and models, technical operations, know-how, trade secrets, trade names and goodwill,
- e. Any rights conferred by law, contract, licenses or permits granted pursuant to the law including the right to explore, extract or exploit natural resources and the right to manufacture, use and sell the products.

Any alteration to the form in which assets were invested or reinvested shall not affect their nature as investments, provided that such alteration is in compliance with the applicable laws and regulations in the host Contracting Party of the investment.

The term "investment" also applies to "returns" that are reinvested, or those resulting from "liquidation" as defined by these two terms later.

2. The term "Investor" for a Contracting Party shall mean:

- a. A natural person holding the nationality of that Contracting Party according to its applicable laws,
- b. The government, authorities and institutions of that Contracting Party,
- c. Any legal person or any other entity that was legally established in accordance with the laws and regulations of that Contracting Party, like institutes, development funds, authorities, charitable and scientific institutions, establishments, agencies, institutions, cooperative societies, companies of all forms and types, commercial unions or similar entities, and

any entity established outside the authority of a Contracting Party as a legal person that is owned by controlling interest, directly or indirectly, by that Contracting Party or by any of its nationals or any entity established through branch institutions or affiliates wherever their location.

3. The term "Returns" shall mean amounts yielded by an investment, regardless of the way they are paid.

4. The term "Liquidation" shall mean any measure taken for the purpose of fully or partially terminating the investment.

5. The term "Territory" shall mean

a. For the Republic of Tunisia: the territory of the Republic of Tunisia, marine areas, and the deep-sea areas that extend beyond the regional waters and upon which the Republic of Tunisia practices its right of sovereignty and jurisdiction according to international law.

b. For the State of Kuwait: the territory of the State of Kuwait, including any area outside the regional waters of the State of Kuwait and which, according to international law, has been determined or can be determined in accordance with the law of the State of Kuwait as an area over which the State of Kuwait can practice its right of sovereignty or jurisdiction.

6. The term "Related Activities" shall mean the activities related to the investment and which are performed and exercised in accordance with the laws and regulations of the host Contracting Party to the investment.

7. The term "Freely Convertible Currency" shall mean any currency designated by the IMF, from time to time, as a freely usable currency in accordance with the IMF agreement and any amendments thereon.

8. The term "Without Delay" shall mean the period of time that is usually required to complete the necessary formalities to transfer payments.

## **Article 2. Admission and Promotion of Investments**

1. Each Contracting Party shall, in accordance with its applicable laws and regulations, accept and promote investments in its territory made by investors of the other Contracting Party.

2. Each Contracting Party shall, with regards to the accepted investments in its territory, grant such investments and its related activities the authorizations, approvals, permits, licenses, and the necessary clearances, to the extent permitted by the terms and conditions in its laws and regulations.

3. Each Contracting Party shall, subject to its laws and regulations related to the entry, residence, and work of natural persons, work in good faith on examining the requests of investors of the other Contracting Party and executive management personnel of technicians and administrators who are employed for the investment, to enter and temporarily stay in its territory. Direct family members shall be granted the same treatment in terms of the entry and temporary stay in the territory of the other Contracting Party.

Each Contracting Party shall permit, in accordance with its laws and regulations, investors of the other Contracting Party who have investments in its territory, to employ any key person of the investor's choice, regardless of nationality or citizenship, within the period this key person has been permitted to enter, stay and work in the territory of the former Contracting Party.

4. Whenever goods or persons connected with an investment are to be transported, each Contracting Party shall to extent permissible under its laws and regulations permit this transport process to be conducted by enterprises of the other Contracting Party.

## **Article 3. Protection of Investments**

1. Investments by investors of either Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party in a manner consistent with the recognized principles of international law and the provisions of this Agreement. Neither Contracting Party shall take measures that are in any way unjustifiable or discriminatory, that would lead to the impairment of such investments or related activities, marketing their products, restricting the purchase of the necessary materials to operate these investments, or any matter relating to its performance.

2. Each Contracting Party shall make public all laws, regulations and conditions that pertain to or directly affect investments or related activities in its territory of investors of the other Contracting Party.

3. Each Contracting Party shall observe any obligation or undertaking it may have entered into with regard to investments

and related activities in its territory by investors of the other Contracting Party.

## **Article 4. Treatment of Investments**

1. Each Contracting Party shall at all times guarantee fair and equitable treatment to investments made in its territory by investors of the other Contracting Party. Such treatment shall not be less favorable than that which it accords, in like circumstances, to investments of its own investors or investors of any other country, whichever is the most favorable.

2. Each Contracting Party shall accord investors of the other Contracting Party with regards to connected and related activities to their investments treatment that is no less favorable than that which it accords to its own investors or to investors of any other country, whichever is more favorable.

3. However, the provisions of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from:

- a. Any customs union, economic union, free trade area, monetary union, or any other form of regional economic cooperation or any other similar international agreement, to which either Contracting Party is or may become a party,
- b. Any international, regional or bilateral agreement or any other similar arrangement relating wholly or mainly to taxation.

## **Article 5. Compensation for Damage or Loss**

Investments of investors of either Contracting Party that suffer damage or loss owing to war or any other armed conflict, a national state of emergency, revolt, unrest, insurrection, or other similar events in the territory of the other Contracting Party shall be accorded by the latter Contracting Party treatment, with regards to restitution, indemnification, compensation or any other settlement, that is not less favorable than the latter Contracting Party accords to its own investors or to investors of any other country, whichever is more favorable.

## **Article 6. Receivership**

Investments of the Contracting Parties, natural persons or legal persons shall not subject to receivership or any similar measures except through an order from a specialized court issued in accordance with the applicable laws. The investor shall have the right to appeal against these proceedings in accordance with the applicable laws.

## **Article 7. Expropriation**

1. (a) Investments made by investors of one Contracting Party in the territory of the other Contracting Party shall not be nationalized, expropriated, dispossessed or subjected to direct or indirect measures having an effect equivalent to nationalization, expropriation or dispossession, such as freezing the investment or imposing an unjustified or exaggerated tax or any other measures having the same effect as expropriation (hereinafter collectively referred to as "expropriation") by the other Contracting Party except for a public purpose related to the national benefit of that Contracting Party, and against prompt, adequate and effective compensation and on the condition that such measures are taken on a non-discriminatory basis and in accordance with generally applicable legal procedures.

(b) Such compensation shall amount to the actual value of the expropriated investment and shall be determined and computed in accordance with the internationally recognized principles of valuation on the basis of the fair market value of the expropriated investment, immediately before the expropriatory measure was taken or the impending expropriation became publicly known, whichever is earlier (hereinafter referred to as the "valuation date"). Such compensation shall be calculated in a freely convertible currency chosen by the investor, on the basis of the fair market value of the prevailing exchange rate of that currency on the valuation date and shall include an appropriate amount to compensate for any loss that may occur due to a delay in payment, from the date of expropriation until the actual payment date, provided that the investor is not responsible for such delay.

(c) Where the above-mentioned fair market value cannot be readily ascertained, the compensation shall be determined on the basis of equitable principles taking into account all relevant factors and circumstances related to the investment. The amount of compensation finally determined shall be promptly paid to the investor in a freely convertible currency and without delay.

2. In light of the principles set out in Paragraph 1 and without prejudice to the rights of the investor under Article 10 of this Agreement, the affected investor shall have the right to prompt review of his case, by a judicial or other specialized and independent authority of that Contracting Party which made the expropriation, including evaluating his investment and the

payment of compensation thereon.

3. Expropriation shall also include situations where a Contracting Party expropriates the assets of a company or enterprise that is incorporated or established under the laws in force in its territory in which an investor of the other Contracting Party has an investment, including through the ownership of shares, stocks, debentures or other rights or interests.

## **Article 8. Transfer of Payments Related to Investments**

1. Each Contracting Party shall guarantee to investors of the other Contracting Party the free transfer of payments in connection with an investment into and out of its territory, including the transfer of:

- a. The original capital and any additional capital for the maintenance, management and development of the investment,
- b. Returns,
- c. Payments under a contract, including payment of the original debt and accrued interest payments made pursuant to a loan agreement,
- d. Royalties and fees for the rights referred to in Article 1 Paragraph 1 (d),
- e. Proceeds from the sale or liquidation of the whole or any part of the investment,
- f. Earnings and other remuneration of personnel engaged from abroad in connection with the investment,
- g. Payments of compensation pursuant to Articles 5 and 7,
- h. Payments referred to in Article 9,
- i. Payments arising out of the settlement of disputes.

2. Transfers of payments under Paragraph 1 shall be effected without delay or restrictions and, except in the case of payments in kind, in a freely convertible currency.

3. Transfers shall be made, without discrimination, at the spot market rate of exchange prevailing in the host Contracting Party on the date of transfer with regards to the immediate transactions of the currency to be transferred. In the absence of a market for foreign exchange, the rate to be applied will be the most recent rate applied to inward investments or the exchange rate determined in accordance with the regulations of the IMF or the exchange rate for conversion of currencies into special drawing rights or to the United States Dollar, whichever is more favorable to the investor.

## **Article 9. Subrogation**

1. If a Contracting Party, its designated agency or any other entity it appoints (the "Indemnifying Party") constituted or incorporated in the territory of that Contracting Party, makes a payment under an indemnity or guarantee against non-commercial risks it has assumed in respect of an investment in the territory of the other Contracting Party (the "Host Party"), the Host Party shall recognize:

- a. The assignment to the Indemnifying Party, by law or by legal agreement, of all the rights and claims resulting from such an investment,
- b. The right of the Indemnifying Party to exercise such rights, enforce such claims and assume obligations related to the investment by virtue of subrogation.

2. The Indemnifying Party shall be entitled in all circumstances to:

- a. The same treatment in respect of the rights and claims acquired and the obligations assumed by it by virtue of the assignment referred to in Paragraph 1 above,
- b. Any payments received in pursuance of those rights and claims.

3. Without prejudice to Article 8, any payments received in local currency by the Indemnifying Party, in pursuance of the rights and claims acquired, shall be freely available and usable by the Indemnifying Party for the purpose of meeting any expenditure incurred in the territory of the Host Party.

## **Article 10. Settlement of Disputes between a Contracting Party and an Investor**

1. Disputes arising between a Contracting Party and an investor of the other Contracting Party in respect of an investment of the latter in the territory of the former shall, as far as possible, be settled amicably.

2. If such disputes could not be settled within a period of six months from the date at which either party to the dispute requested amicable settlement by delivering a written notice to the other party, the dispute shall be submitted for resolution, at the choice of the investor party to the dispute, in one of the following ways:

- a. In accordance with any appropriate, previously agreed upon dispute-settlement procedures,
- b. The concerned judicial authority of the Contracting Party in whose territory the investment was established,
- c. In accordance with the provisions of the disputes settlement chapter of the Unified Agreement for the Investment of Arab Capital in the Arab States of 1980,
- d. International arbitration in accordance with the following paragraphs of this Article.

If an investor elects to submit the dispute for resolution to one of the entities mentioned in Paragraph 2 above, this choice shall be final.

In the case of an investor's recourse to the judicial authority in accordance with the provisions of Subparagraph (b) of this Article, the Contracting Party shall work on providing the effective means of asserting claims and enforcing rights with respect to investments. In accordance with its laws and regulations, it shall also provide the investors of the other Contracting Party the right to assign qualified persons of their choice for the purpose of asserting claims and implementing rights regarding their investments and related activities.

3. In the event that an investor elects to submit the dispute for resolution to international arbitration, the investor shall further provide its consent in writing to submit the dispute to one of the following bodies:

- a. The International Center for Settlement of Investment Disputes ("the Center") established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature in Washington on 18 March 1965 (the "Washington Convention"), if both Contracting Parties are parties to the Washington Convention and the Washington Convention is applicable to the dispute,
- b. An arbitral tribunal established under the Arbitration Rules (the "Rules") of the United Nations Commission on International Trade Law (UNCITRAL), as those Rules may be modified by the parties to the dispute (the appointing authority referred to under Article 7 of the Rules shall be the Secretary General of the Center),
- c. An arbitral tribunal constituted pursuant to the arbitration rules of any arbitral authority mutually agreed upon between the parties to the dispute.

4. Notwithstanding the fact that the investor may have submitted a dispute to binding arbitration under Paragraph 3 above, it may, prior to the commencement of the arbitral proceedings or during these proceedings, seek a temporary injunction from the judicial authorities of the Contracting Party that is a party to the dispute for the preservation of its rights and interests, provided that it does not include a request for compensation for any damages.

5. (a) The consent mentioned in Paragraph 3 shall satisfy the requirement for a written approval of the parties to a dispute for the purposes of each of, Chapter II of the Washington Convention, the Additional Facility Rules, Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on 10 June 1958 (the "New York Convention"), and Article 1 of the UNCITRAL Arbitration Rules.

(b) Any arbitration under this Article, and as mutually agreed between the parties, must be held in a state party to the New York Convention. Claims submitted for arbitration under the provisions of this agreement shall be considered to have arisen out of a commercial relationship or transaction for the purpose of Article 1 of the New York Convention.

(c) Neither Contracting Party shall give diplomatic protection or bring an international claim, in respect of any dispute referred to arbitration unless the other Contracting Party fails to abide by and comply with the award rendered on such a dispute. Informal diplomatic notes may be exchanged for the sole purpose of facilitating the settlement of the dispute.

6. An arbitral tribunal established under this Article shall decide the subjects of the dispute in accordance with such rules of law as may be agreed between the parties to the dispute. In the absence of such agreement, the law of the Contracting Party party to the dispute shall apply, including its rules on the conflict of laws, and the recognized rules of international law as may be applicable, also taking into consideration the relevant provisions of this Agreement.

7. An investor, other than a natural person, holding the nationality of a Contracting Party to the dispute on the date of the written consent referred to in Paragraph 5 and who has controlling interest in it, before a dispute with that Contracting Party

arises, shall be treated as an investor of the other Contracting Party, and for the purpose of Article 25 (2) (b) of the Washington Convention as a "national of the other Contracting Party" and shall for the purpose of Article 1 (6) of the Additional Facility Rules be treated as a "national of other Contracting Party".

8. All arbitral awards shall be final and binding on the parties to the dispute. Each Contracting Party shall immediately implement the award and shall take the necessary measures for the effective enforcement of such awards in its territory.

9. No Contracting Party shall hinder any proceedings concerning an investment dispute between a Contracting Party and an investor of the other Contracting Party. In addition, no claim against or right of set-off shall be made against the fact that the investor concerned has received or will receive compensation, based on an insurance contract, for damages or any other compensation for all or part of the damages allegedly suffered by a third party, whether public or private, including the other Contracting Party, its subdivisions, agencies or organs.

## **Article 11. Settlement of Disputes between the Contracting Parties**

1. The Contracting Parties shall, as far as possible, settle any dispute concerning the interpretation or application of this Agreement through consultations or other diplomatic channels.

2. If the dispute has not been settled within six months from the date on which such consultations or other diplomatic channels were requested by either Contracting Party, and unless the Contracting Parties agree otherwise in writing, either Contracting Party may, by written notice to the other Contracting Party, submit the dispute to an ad hoc arbitral tribunal established for this purpose in accordance with the following provisions of this Article.

3. The arbitral tribunal shall be constituted as follows: each Contracting Party shall appoint one member, and these two members shall agree upon a national of a third state as Chairman of the arbitral tribunal to be appointed by the Contracting Parties. These members shall be appointed within two months, and the Chairman within four months from the date on which either Contracting Party has informed the other Contracting Party that it intends to submit the dispute to an arbitral tribunal.

4. If the periods specified in Paragraph 3 are not observed, either Contracting 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 either Contracting Party or if he is otherwise prevented from discharging 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 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 take its decision by a majority of votes. Such decision shall be made in accordance with this Agreement and the recognized rules of international law as may be applicable, and shall be final and binding on both Contracting Parties. Each Contracting Party shall bear the costs of the member of the arbitral tribunal appointed by that Contracting Party, as well as the costs for its representation in the arbitration proceedings. The expenses of the Chairman as well as any other costs shall be borne in equal parts by the two Contracting Parties. The arbitral tribunal may, at its discretion, decide to assign a bigger percentage or all of such costs to one of the Contracting Parties. In all other respects, the arbitral tribunal shall determine its own procedures.

## **Article 12. Application of other Provisions**

If the legislation of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties, in addition to this Agreement, contain a provision, whether general or specific, entitling investments or related activities by investors of the other Contracting Party to treatment more favorable than is provided for by this Agreement, such rules shall to the extent that they are more favorable prevail over this Agreement.

## **Article 13. Scope of Agreement**

This agreement shall apply to investments that were established or will be established by investors of either Contracting Party in the territory of the other Contracting Party, starting from the beginning of January 1957 in accordance with its laws and regulations, but shall not apply to disputes that may have arisen before its entry into force.

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

## **Article 14. Entry Into Force of the Agreement**

Each Contracting Party shall notify the other when its constitutional requirements for the entry into force of this Agreement have been fulfilled, and the Agreement shall enter into force on the thirtieth day after the date of receipt of the last notification.

## **Article 15. Duration and Termination**

1. This Agreement shall remain in force for a period of twenty (20) years and shall continue in force thereafter for similar period or periods unless, one year before the expiry of the initial or any subsequent period, either Contracting Parties notifies the other Contracting Party in writing of its intention to terminate this Agreement.
2. In respect of investments made prior to the date when the notice of termination of this Agreement becomes effective, the provisions of this Agreement shall continue to be effective for a period of twenty (20) years from the date of termination of this Agreement.

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

Done in Kuwait on the 9 Safar 1425 H, corresponding to 30 March 2004, in two originals in the Arabic language, both texts being equally authentic.

For the Government of the Republic of Tunisia

Hamouda Hamdy

Secretary of State to the Minister of Development and International Cooperation in charge of International Cooperation and Foreign Investment

For the Government of the State of Kuwait

Abdul Mohsen Al-Hunaif

Undersecretary of the Ministry of Finance