

# Agreement between Mongolia and Kuwait to encourage and mutual protection of investments

Mongolia and the State of Kuwait, (hereinafter referred to as "the Contracting Parties");

In order to create conditions conducive to the development of economic cooperation between them and in particular for investments by investors of a Contracting Party in the territory of the other Contracting Party;

Recognizing that mutual encouragement and protection of such investments will be an incentive for revitalization of trade initiatives and to increase prosperity in both Contracting Parties;

Have agreed as follows:

## Article 1. Definitions

For the purposes of this Agreement:

1. "Investment" means all types of assets or rights in the territory of a Contracting Party and owned or controlled, directly or indirectly, by an investor of the another Contracting Party, and that include the assets and rights, consisting of, or taking the form of:

(A) a company or shares, stocks, and other forms of ownership, bonds, debentures, and other forms of debt securities in the company, and other debts, loans and bonds issued by a Contracting State;

(B) Claims to money and claims to any other assets or perform according to the contract with an economic value;

(C) Intellectual property rights, including but not limited to, copyright, trademarks, and patents invention, industrial designs, technical processes, trade secrets, trade names and goodwill;

(D) any right granted by law or contract or under any licenses and permits granted according to the law, including the rights of prospecting, exploration and production or exploitation of natural resources, and the exercise of the rights of other economic and commercial activities and the provision of services;

(E) tangible and intangible, movable and immovable property, and any property rights such as leases, mortgages, debt concessions and proprietary mortgages;

The term "investment" is also applied to "proceeds" held for the purpose of reinvestment. The proceeds from the "liquidation" are defined as these terms thereafter.

Any change in the form in which the assets or rights were invested or reinvested will not affect their nature.

2. "Investor" means for a Contracting State:

(A) A natural person holding the nationality of that State in accordance with the applicable law;

(B) The Government of that Contracting State;

(C) any legal person or foundations established under the laws and regulations of that State, such as institutions, development funds, agencies, scientific and charitable institutions, enterprises, organizations and companies.

3. The term "Company" means any legal entity, whether or not it is for financial profit, and whether it is owned or controlled from the private sector or government, which was established under the laws of the Contracting State or is owned or controlled it entirely by investors of the Contracting State, including a company, a trust company, a partnership, and individual proprietorship, or a branch, joint venture, consortium or other similar organizations.

4. The term "Proceeds" means the amounts realized by the investment, regardless of the form in which it is made, and that

includes, in particular, but not limited to, profits, benefits and capital gains, dividends, royalties, management and technical assistance or other payments and payments in kind, regardless of their types.

5. The term "Liquidation" means any action 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 have been identified or may be identified in accordance with international law, as a territory which a Contracting State may exercise jurisdiction or rights of sovereignty under its laws.

7. The term "currency" means any freely convertible currency that the International Monetary Fund lists from time to time as a currency negotiable according to the provisions of the Convention of the International Monetary Fund and any amendments to it.

8. The term "without delay" means the period which usually is required to complete the necessary formalities for the transfer of payments. This period begins on the day on which the application for conversion starts, and shall not exceed in any case one month.

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

1. Each Contracting State shall accept and encourage investments in its territory by the investors of the other Contracting State according to its applicable laws and regulations.

2. For the investment accepted in their territory, each Contracting State shall all approvals, permits, licenses and permits necessary to the extent permitted by and in accordance with the principles and conditions specified in their laws and regulations.

3. The Contracting States may consult with each other by any means they deem appropriate to encourage and facilitate investment opportunities within their respective territories.

4. Each Contracting State, in accordance with their laws and regulations relating to the entry and residence and work of natural persons, and in good faith, without regard to nationality or citizenship, shall study applications of senior management, staff, professionals and administrators appointed for investment purposes, requesting the entry and temporary residence in its territory. The immediate family members of these employees also receive the same treatment.

5. When goods or persons connected to an investment project are transferred, each of the Contracting States shall, to the extent permitted by their laws and regulations, allow such transfer process from a subsidiary in the other Contracting State.

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

1. Investments made by investors from either Contracting State shall be granted fair and equitable treatment and full protection and security in the territory of the other Contracting State in a manner consistent with international law and the provisions of this Agreement. Neither Contracting States will take arbitrary or discriminatory measures that results in damages to the management, use or operation or expansion, sale or disposition of investments.

2. Each Contracting State shall immediately publish all laws and regulations, regulations, procedures, guidelines and administrative procedures and judicial resolutions of general application, as well as international agreements that relate to or affect the provisions of this Agreement or affect the operation of these provisions, or investments in its territory to investors of the other Contracting State.

3. Each Contracting State agrees to provide effective means to assert claims and enforce the rights with respect to investments. Each Contracting State shall guarantee ensure that the investors of the other Contracting State has the right to resort to courts of law and courts and administrative bodies and all other service which will exercise judicial authority, for the purpose of asserting claims and implementing rights, as well as the right to employ people of their choice for their investments, qualified in accordance with applicable laws and regulations.

4. No Contracting State shall impose as a condition for acquisition, expansion, use, management, disposition, or operation of investments, other mandatory procedures to investor of the other Contracting State, which may require or restrict the purchase of materials, or energy, or fuel, or the means of production or transportation or operation of any kind, or restrict the marketing of products inside or outside the territory of the host Contracting State, or any discriminatory action against investments by investors of the other Contracting State in favor of investments carried out by its investors, or by state investors.

In addition, investments are not subject to the host Contracting State for the additional performance requirements may

hinder or restrict their use, manage or dispose of them or run or expansion or for sale or other disposal.

5. Investments made by investors of any Contracting State will not be subject to the seizure or confiscation or any similar measures in the host State except in accordance with due process of law and in accordance with the applicable principles of international law, and other provisions relating to this Agreement.

6. Each Contracting State shall take into account any obligation or pledge to which a party is a party, in respect of investments in its territory belonging to investors of the other Contracting State.

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

1. Regarding the use, management and disposition, operation, expansion and sale or other disposition of investments carried out in its territory by investors of the other Contracting State, each Contracting State shall grant treatment no less favorable than those granted in similar situations to its private investors or investments of any third country, whichever is the most favorable for those investments.

2. However, the provisions of this article shall not be construed as obliging a Contracting State to offer to investors of the other Contracting State the advantages of any transaction, preference or concession resulting from:

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

(B) any international agreement or regional or bilateral or any other interim arrangement and any domestic legislation wholly or mainly related to taxation.

#### **Article 5. Compensation for Losses**

1. Except when applying Article 6, investments by investors of a Contracting State affected for losses due to war or other armed conflict, state of national emergency, revolution, civil unrest or riots or other similar events in the territory of the other Contracting State, the Contracting State shall grant with respect to the reinstatement of the situation, or to refund compensation, insurance or other settlement, treatment no less favorable than for those granted by the latter Contracting State to its investors or investors of any third state, whichever is more favorable for the investor.

2. Without prejudice to paragraph 1, the affected investors of a Contracting State who suffer a loss as a result of any of the events referred to in that paragraph in the territory of the other Contracting State resulting from:

(A) the temporary seizure of their investments or part by its forces or authorities;

(B) (b) the destruction of their investment or part thereof by their forces or authorities without being due to combat operations or not required by the necessity of the situation, shall be granted compensation or reinstatement, and in both cases, it shall be prompt, adequate and effective.

#### **Article 6. Expropriation**

1.

(A) Investments made by investors of a Contracting State in the territory of the other Contracting State, shall not be nationalized or expropriated, acquired or subjugated, in a direct or indirect manner, to procedures having effect equivalent to nationalization or expropriation or dispossession (referred to collectively as after "expropriation") by the other Contracting State, except for a general purpose, and in the national interest of that Contracting State, and in return for a prompt, adequate and effective compensation, provided that those actions have been taken on the basis of non-discrimination and in accordance with legal procedures applicable in general.

(B) The amount of this compensation shall be the actual value of the expropriated investment, and is determined and calculated in accordance with the internationally recognized valuation principle on the basis of the fair market value of the expropriated investment at a time that precedes an expropriation or where the investment expropriation became publicly known, whichever is known before (hereinafter referred to as the "date of assessment"). This compensation is calculated in a freely convertible currency chosen by the investor on the basis of the market value of the exchange rate prevailing for that currency on the valuation date and includes interest at market price.

The commercial interest, however, should not be less in any way on the prevailing interest rate at the banks of London (LIBOR) or equivalent from the date of expropriation until the date of payment.

(C) If the fair market value mentioned above cannot be easily ascertained, the compensation will be determined based on the principles of fairness, taking into account all the factors and circumstances related to it, such as the capital invested, and the nature and duration of investment, replacement value, the increase in investment and ongoing revenue value, the calculated value of the cash flow, book value and reputation. The exact amount of compensation is finally paid immediately to Mscher.

2. In the light of the principles set forth in paragraph 1, and without prejudice to the rights of the investor mentioned in Article 9 of this Convention, the affected investor has the right to an immediate review of his case by the judicial or other competent independent authority of the Contracting State in which the expropriation takes place, including the assessment of the investment and compensation payments for the investment.

3. For further clarity, expropriation includes cases in which a Contracting State assumes ownership of the assets of a company or a project created or established under the laws in force in its territory, who has an investor of the other Contracting State has an investment in it, through the ownership of stocks and shares and debt securities, rights or other benefits.

4. For the purposes of this Agreement, the term "Expropriation" also include interventions or regulatory measures taken by the State and that have the same expropriation effect, which deprives the investor of his effective ownership or dominion over, the core of his investment or which may result in loss or damage to the economic value of the investment, such as freezing of applicable interests, the imposition of arbitrary or excessive tax on investment, or compulsory sale of all or part of the investment, or other similar procedures.

5. Claims for compensation in accordance with the principles and provisions of this article, shall be made when the investment is threatened as a result of actual state intervention in any company in which the investment is made by an investor of the other Contracting State, and the damage is at the substance of the investment.

## **Article 7. Transfer of Payments In Respect of Investment**

1. The Contracting States shall ensure to investors of the other Contracting State the free transfer of payments related to an investment inside and outside its territory, including the conversion 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 the repayment of principal and accrued interest payments performed according to a Loan Agreement;
- (D) royalties and fees for the rights referred to in Article 1, paragraph (1) (d);
- (E) The proceeds from the sale or liquidation of all or any part of the investment;
- (F) Acquired funds and other remuneration for employees hired from abroad who are linked to the investment;
- (G) the compensation payments in accordance with articles is 6;
- (H) Payments referred to in Article 8;
- (I) The settlement of disputes arising from the payments.

2. The transfer of payments under paragraph 1 shall be effected without delay or restriction, except in the case of payments in kind, in a freely convertible currency. In the case of delays in making the needed conversions, the investor is entitled to receive interest for the period of delay.

3. Transfers are made at the prevailing market exchange rate in the host State at the date of the conversion of the currency to be converted. In the absence of the foreign exchange market, the applicable price is the most recent price applied to the underlying investments or the fixed exchange rate according to the regulations of the International Monetary Fund or the exchange rate to convert currencies into SDR or US dollars, whichever is more favorable to the investor.

## **Article 8. Subrogation**

1. If the Contracting State or its concerned agency (the "Guarantor Party") makes payments under the Compensation or guarantee it has undertaken in respect of an investment in the territory of the other Contracting State ("the host State"), the host State must recognize:

(A) a waiver to the guarantor party under the law or legal agreement of all rights and claims resulting from such an investment;

(B) the right of the guarantor party in the exercise of such rights and the implementation of those claims and undertakes all obligations relating the investment based on the principle of subrogating the creditor.

2. In all the circumstances, the guarantor party shall be entitled to:

(A) the same treatment relating to the rights and claims acquired and obligations undertaken under the waiver referred to in paragraph 1 above;

(B) Any payments received based on those rights and claims, as the original investor was recipient under this Convention with regard to investment in question.

## **Article 9. Settlement of Disputes between a Contracting State and an Investor**

1. Disputes between a Contracting State and an investor of the other Contracting State in respect of an investment made in the territory of the first mentioned State, shall be settled as much as possible in an amicable way.

2. If such disputes cannot be settled within six months from the date of the request of any party to the dispute of an amicable settlement by delivery of written notice to the other party, the dispute shall be submitted to the resolution, by choice of the investor party to the dispute, to the following means:

(A) In accordance with any applicable procedures for settling the dispute agreed upon in advance;

(B) To international arbitration in accordance with the following paragraphs of this article.

3. In the case of an investor choose to submit the dispute for the settlement of international arbitration, it shall also provide his written consent to submit the dispute to one of the following entities:

(A) 1 - International Centre for Settlement of Investment Disputes (ICSID Center), which was established by the Convention on the settlement of Investment between States and nationals of other States opened for signature in Washington on March 1, 1965 (Washington Convention), if both Contracting States are party to the Washington Convention and are applying the Washington Convention to the dispute;

2 - The center, under the rules of the provisions and additional facilities for administrative work before the secretary of the center (ICSID Additional Facility Rules), if the Contracting State of the investor or a Contracting State is a party to the dispute, but not both are party to the Washington Convention;

(B) An arbitral tribunal established under the Rules of Arbitration of the United Nations Commission on Law (UNCITRAL), where the parties to the dispute may amend these rules for appointment referred to in Article 7 of the these rules shall be the Secretary-General of the center);

(C) An arbitral tribunal court is shall be appointed on the basis of the arbitration rules of any arbitral institution, or may be agreed between the parties to the conflict.

4. Even though the investor may submit the dispute to binding arbitration under paragraph 3, it may seek a temporary injunction before the courts or administrative of the Contracting State of which it is a party to the conflict, and even before the establishment of an arbitration or during the procedure, to retain their rights and interests and provided that the payment request does not include any damages.

5. Each of the Contracting States shall give its unconditional consent to the presentation of a dispute for the purpose of settlement by binding arbitration in accordance with the choice of the investor under paragraph 3 (a) and (b) or the mutual agreement of the parties to the dispute in accordance with paragraph 3 (c).

6. (A) the approval in paragraph 5, with the approval in paragraph 3 satisfy the request for written consent of the parties to the conflict for the purposes of both the second chapter of the Washington Conventoon, the Additional Facility Rules, and the second article of the United Nations Convention to recognize the enforcement of foreign arbitral awards, done in New York, June 1, 1958 ("New York Convention") and Article 1 of the UNCITRAL Arbitration Rules.

(B) Any arbitration under this Article, as are mutually agreed between the parties to the conflict, shall be held in a state that is a party to the New York Convention. Claims before arbitration are considered in accordance with the provisions of this Agreement, have arisen outside the scope of business or transaction for the purposes of Article 1 of the New York Convention.

(C) Neither Contracting State will grant diplomatic protection or make an international claim related to any dispute which has been forwarded to the arbitration, except in the case of failure of the other Contracting State in compliance or acquiescence of the ruling on that dispute. However, diplomatic protection does not include for the purposes of this subparagraph, the exchange of informal diplomatic notes, only for the purpose of facilitating a settlement of the conflict.

7. The arbitral tribunal established under this Article shall decide matters relating to the dispute in accordance with those rules of law as agreed by the parties to the dispute. In the absence of such an agreement, the law of the Contracting State party applies to the conflict, including their own rules on conflict of laws, rules and those of the customary international law, as may be applicable. The rules shall also take into account the provisions relating to this Convention.

8. For the purpose of Article 25 (2) (b) of the Washington Convention, the investor, other than a natural person who holds the nationality of the Contracting State party to the dispute on the date of such written approval when the dispute between him and the Contracting State arose, investors of the other Contracting State shall be treated as "nationals of the other Contracting State". For the purpose of Article 6 of the Additional Facility Rules, he shall be treated as a national of the other Contracting State.

9. Arbitral decisions, which may include a provision for interest, shall be final and binding on both parties to the dispute, and each of the Contracting States shall enforce execute any judgment like this immediately, and are to take necessary measures for effective implementation of those provisions in its territory.

10. A Contracting State shall not give diplomatic protection in any judicial proceedings or arbitration proceedings or otherwise or in the implementation of any decision or provision concerning a dispute that investment between the State and an investor of the other Contracting State, nor shall the establishment of any claim or right of set-off on the fact that the investor in question has received or will receive, based on the insurance contract, compensation for damage or any other compensation for all or part of the damages alleged by any third party whatsoever, whether public or private, including those of the other Contracting State and its subdivisions, agencies or organs.

## **Article 10. Settlement of Disputes between the Contracting States**

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

2. If the dispute is not settled within six months from the date of the request of such consultations or other diplomatic channels by either Contracting State, and unless the Contracting States agree in writing to the contrary, it may be made by any of the Contracting States, by written notification to the other Contracting State, to submit the dispute to an 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 State, shall appoint one member and these two members shall agree in a citizen of a third country to be president of the Court of Arbitration, and shall be appointed by the Contracting States. These two members are to be appointed within two months, and the president within four months from the date of notification of a Contracting State the other Contracting State of its intention to submit the dispute to an arbitral tribunal.

4. If the periods specified in paragraph 3 are not observed, any Contracting State in the absence of any other arrangement may be, may 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 a Contracting State or if there is an impediment to performance thos task, the Vice President of the International Court of Justice shall be asked to make the he necessary appointments. If the Vice President of the International Court of Justice is a national of a Contracting State or if any obstacle preventing the performance of the task, the member of the Court next in seniority and who is not a national of a Contracting State shall be asked to make the necessary appointments.

5. The arbitral tribunal shall take its decision by a majority vote. This decision is made in accordance with the provisions of this Agreement and the rules of customary international law and applicable and shall be final and binding on each of the Contracting States.

Each of the Contracting States shall bear the fees of the member of the designated arbitral tribunal by that Contracting State as well as the remuneration of its representative in the arbitral proceedings. The President's fees as well as any other costs to be borne equally by both Contracting States. However the arbitral tribunal may, at its discretion, decide that the assignment of the Contracting States shall be waived in whole or in part the costs. The arbitral tribunal shall determine its own procedures in respect of all other matters.

## **Article 11. Relations between the Contracting States**

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

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

Whether the legislation of either Contracting State or the obligations under currently existing international law or subsequently arising between the Contracting States in addition to this Agreement, including laws, whether public or private, grant investments by state investors, the Contracting Parties shall be treated more favorably than those provided for in this Agreement. The wisdom prevails over this agreement to the extent that it provides more favorable treatment.

## **Article 13. Application of this Convention**

This Convention shall apply to all investments, whether existing ones in the date of entry into force of this Agreement or made after that date by the investors of any Contracting State in the territory of the other Contracting State.

## **Article 14. Entry Into Force**

Each Contracting State shall notify the other in writing updated it with constitutional requirements for entry into force of this Agreement. This Agreement shall enter into force on the thirtieth day after the last date of receipt of notice.

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

(A) This Convention shall remain in force for a period of thirty (30) years, and then continue in force for a period or similar periods, unless notified to a Contracting State of the other Contracting State, in writing prior to one year from the end of the first period or any further period, of its intention to terminate this agreement.

(B) With respect to investments held prior to the date notice of termination of this Agreement shall enter into force, the provisions of this Agreement shall remain in force for two (2) years from the date of termination of this Agreement.

In witness thereof the commissioners of both Contracting States have signed this Agreement.

Done in Kuwait in such a Member of the fifth day of March 1998, corresponding to the sixteenth day of November 1418 d, in two copies, in Mongolian, Arabic and English, all texts being equally authentic. In case of disagreement, the English text shall prevail.