

A G R E E M E N T

BETWEEN THE GOVERNMENT OF THE KINGDOM OF THE
NETHERLANDS

AND

THE GOVERNMENT OF THE STATE OF KUWAIT

FOR THE ENCOURAGEMENT AND RECIPROCAL PROTECTION
OF INVESTMENTS

The Government of the Kingdom of the Netherlands and the Government of the State of Kuwait, their States hereinafter referred to as the Contracting Parties,

Desiring to strengthen their traditional ties of friendship and to extend and intensify the economic relations between them, particularly with respect to investments by investors of one Contracting Party in the territory of the other Contracting Party,

Recognizing that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development in both Contracting Parties and that fair and equitable treatment of investments is desirable,

Have agreed as follows

Article 1

Definitions

For the purposes of this Agreement:

1. The term 'investment' shall mean every kind of asset or right in the territory of one Contracting Party that is owned or controlled directly or indirectly by an investor of the other Contracting Party, and includes assets or rights consisting or taking the form of:
 - (a) movable and immovable property as well as any other rights in rem in respect of every kind of asset, such as leases, mortgages, liens and pledges;
 - (b) rights derived from shares, bonds and other kinds of interests in companies and joint ventures, and other debts, loans and securities issued by any investor;
 - (c) claims to money, to other assets or to any performance having an economic value;
 - (d) intellectual property rights, technical processes, goodwill, know-how, and trade names;
 - (e) rights granted under public law or under contract, including rights to prospect, explore, extract and exploit natural resources.

The term “investment” shall also apply to “returns” retained for the purpose of reinvestment and to proceeds from “liquidation”.

2. The term “investors” shall comprise with regard to a Contracting Party:

- (a) natural persons having the nationality of either Contracting Party;
- (b) legal persons constituted under the law of either Contracting Party ;
- (c) the Government of either Contracting Party or its institutions;
- (d) legal persons not constituted under the law of either Contracting Party but owned or controlled, directly or indirectly, by natural or legal persons referred to in (a), (b) or (c) above.

3. The term "territory" shall mean the territory of the Contracting Party concerned and any area adjacent to the territorial sea which, under the laws of the Contracting Party concerned, and in accordance with international law, is the exclusive economic zone or continental shelf of the Contracting Party concerned, in which that Contracting Party exercises jurisdiction or sovereign rights.

4. The term “returns” shall mean amounts yielded by an investment, irrespective of the form in which they are paid, and in particular, though not exclusively, include profits, interest, capital gains, dividends, royalties, and management, technical assistance or other payments or fees, and payments in kind, regardless of its type.

5. The term “freely convertible currency” shall mean a currency which is widely traded in international foreign exchange markets and widely used in international transactions.

Article 2

Admission and Encouragement of Investments

Each Contracting Party shall, within the framework of its laws and regulations, encourage investment and economic cooperation through the protection in its territory of investments by investors of the other Contracting Party. Subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments.

Article 3

Protection of Investments

1. Each Contracting Party shall in its territory ensure fair and equitable treatment of investments by investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors. Each Contracting Party shall accord to such investments full security and protection.

2. More particularly, each Contracting Party shall accord to such investments treatment which in any case shall not be less favourable than that accorded either to investments of its own investors or to investments of investors of any third state, whichever is more favourable to the investor concerned.

3. If a Contracting Party has accorded special advantages to investors of any third state by virtue of agreements establishing customs unions, economic unions, monetary unions or similar institutions, or on the basis of interim agreements leading to such unions or institutions, that Contracting Party shall not be obliged to accord such advantages to investors of the other Contracting Party.

4. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.

5. If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain a regulation, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such regulation shall, to the extent that it is more favourable, prevail over the present Agreement.

Article 4

Taxes and other fiscal matters

With respect to taxes, fees, charges and to fiscal deductions and exemptions, a Contracting Party shall accord to investors of the other Contracting Party who are engaged in any economic activity in its territory, treatment not less favourable than that accorded to its own investors or to those of any third state who are in the same circumstances, whichever is more favourable to the investors concerned. For this purpose, however, there shall not be taken into account any special fiscal advantages, including taxes, fees, charges and exemptions, accorded by the former Contracting Party under any agreement for the avoidance of double taxation, by virtue of its participation in a customs union, economic union or similar institution, or on the basis of reciprocity with a third state.

In case of difference of interpretation between this Article and the provision on non-discrimination, laid down in the Agreement between the Kingdom of the Netherlands and the State of Kuwait for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital, once in force, the latter provisions will prevail.

Article 5

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 initial capital and any additional capital for the maintenance, management and development of the investment;
- (b) returns;
- (c) payments under a contract, including amortisation of principal 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 6 and 7;
- (h) payment referred to in Article 8;
- (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. In case of delay in effecting the required transfers, the investor affected shall be entitled to receive adequate interest for the period of such delay.

3. Transfers shall be made at the spot market rate of exchange prevailing in the host Contracting Party on the date of transfer for 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 International Monetary Fund or the exchange rate for conversion of currencies into Special Drawing Rights or United States Dollars, whichever is the most favourable to the investor.

Article 6

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 effect equivalent to nationalisation, expropriation or dispossession (hereinafter collectively referred to as "expropriation") by the other Contracting Party except for a public purpose related to the internal needs of that Contracting Party and against prompt, adequate and effective compensation and on condition that such measures are taken on a non-discriminatory basis and in accordance with due process of law of general application.
- (b) Such compensation shall amount to the actual value of the expropriated investment and shall be determined and calculated in accordance with internationally recognized principles of valuation on the basis of the fair market value of the expropriated investment at the time immediately before

the expropriatory action was taken or the impending expropriation became publicly known, whichever is the earlier. Such compensation shall be calculated in a freely convertible currency to be chosen by the investor, on the basis of the prevailing market rate of exchange for that currency on the valuation date and shall include interest at a commercial rate established on a market basis, from the date of expropriation until the date of payment.

(c) Where the above-mentioned fair market value cannot be readily ascertained, the compensation shall be determined on equitable principles taking into account all relevant factors and circumstances, such as the capital invested, the nature and duration of the investment, replacement value, appreciation, current returns, discounted cash flow value, book value and goodwill. The amount of compensation finally determined shall be promptly paid to the investor.

2. For the purposes of this Agreement, the term "expropriation" shall also include interventions or regulatory measures by a Contracting Party that have a *de facto* confiscatory or expropriatory effect, in that their effect results in depriving the investor in fact from his ownership, control or substantial benefits over his investment or which may result in loss or damage to the economic value of the investment, such as the freezing or blocking of the investment, levying of arbitrary or excessive tax on the investment, compulsory sale of all or part of the investment, or other comparable acts or measures.

Article 7

Compensation for Losses

Investors of the one Contracting Party who suffer losses in respect of their investments in the territory of the other Contracting Party owing to war or other

armed conflict, revolution, a state of national emergency, revolt, insurrection or riots shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which that Contracting Party accords to its own investors or to investors of any third state, whichever is more favourable to the investors concerned.

Article 8

Subrogation

If the investments of an investor of a Contracting Party are insured against non-commercial risks or otherwise give rise to payment of indemnification under a system established by law, regulation or a government contract, any subrogation of the insurer or reinsurer or of any agency designated by such Contracting Party to the rights of such investor pursuant to the terms of such insurance or to any other indemnification system, shall be recognised by the other Contracting Party.

Article 9

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 cannot be settled within a period of six months from the date at which either party to the dispute requested amicable settlement by delivering a notice in writing to the other party, the dispute shall be submitted for resolution, at the election of the investor, party to the dispute, through one of the following means:

- (a) in accordance with national law, to a competent domestic court or administrative tribunal;
- (b) to international arbitration in accordance with the following paragraphs of this Article.

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 for the dispute to be submitted to one of the following options:

- (a) The International Centre for Settlement of Investment Disputes ("the Centre"), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 ("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 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 Centre).

4. Notwithstanding the fact that the investor may have submitted a dispute to binding arbitration under paragraph 3, it may, prior to the institution of the arbitral proceeding or during the proceeding, seek before the judicial or administrative tribunals of the Contracting Party that is a party to the dispute, interim injunctive relief for the preservation of its rights and interests, provided it does not include a request for payment of any damages.

5. Each Contracting Party hereby gives its unconditional consent to the submission of an investment dispute for settlement by binding arbitration in accordance with the choice of the investor under paragraph 3(a) and (b).

6. For the purpose of Article 25(2)(b) of the Washington Convention, an investor, other than a natural person, which has the nationality of a Contracting Party to the dispute on the date of the consent in writing referred to in paragraph (6) and which, before a dispute between it and that Contracting Party arises, is controlled by investors of the other Contracting Party, shall be treated as a “national of the other Contracting Party”.

7. The awards of arbitration, which may include an award of interest, shall be final and binding on the parties to the dispute. Each Contracting Party shall carry out promptly any such award and shall make provision for the effective enforcement in its territory of such awards.

Article 10

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 following the date on which such consultations or other diplomatic channels were requested by either Contracting Party and unless the Contracting Parties otherwise agree in writing, either Contracting Party may, by written notice to the other Contracting Party, submit the dispute to an ad hoc arbitral tribunal 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 appoint a national of a third state as Chairman of the arbitral tribunal. Such members shall be appointed

within two months, and such 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 above have not been complied with, 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 such 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 of the arbitration proceedings shall be borne in equal parts by the two Contracting Parties. However, the arbitral tribunal may, at its discretion, direct that a higher proportion or all of such costs be paid by one of the Contracting Parties. In all other respects, the arbitral tribunal shall determine its own procedure.

Article 11

Scope of the Agreement

The provisions of this Agreement shall, from the date of entry into force thereof, also apply to investments which have been made before that date and it shall apply irrespective of the existence of diplomatic or consular relations between the Contracting Parties.

Article 12

Consultations

Either Contracting Party may propose to the other Contracting Party that consultations be held on any matter concerning the interpretation or application of the Agreement. The other Contracting Party shall accord sympathetic consideration to the proposal and shall afford adequate opportunity for such consultations.

Article 13

Entry into Force, Duration and Termination

1. 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 later notification. It shall remain in force for a period of twenty (20) years and shall be extended thereafter for similar periods, until the treaty will be terminated in accordance with the provisions of paragraph 2 of this Article.

