

Agreement between the Kingdom of Sweden and the State of Kuwait for the encouragement and protection of investments

The Kingdom of Sweden and The State of Kuwait, (hereinafter collectively referred to as the "Contracting States" and each referred to as a "Contracting State");

Desiring to intensify economic co-operation between both Contracting States;

Intending to create favourable conditions for investments by investors of either Contracting State in the territory of the other Contracting State;

Recognizing that the encouragement and protection of such investments will be conducive to the stimulation of business initiative and to the increase of the prosperity in both Contracting States.

Have agreed as follows:

Article I. Definitions

For the purposes of this Agreement and unless the context otherwise requires:

(1) The term "investment" shall mean every kind of assets owned or controlled directly or indirectly by an investor of a Contracting State and invested in the territory of the other Contracting State in accordance with the laws and regulations of that Contracting State, and shall include in particular, though not exclusively:

(a) Tangible and intangible, movable and immovable property as well as any other property rights such as leases, mortgages, liens, pledges, usufructs and similar rights;

(b) Shares, stocks and debentures of companies or other rights or interests in such companies, loans and securities issued by a Contracting State or any of its investors and returns retained for the purpose of reinvestment;

(c) Debts and any claims to money and claims to any other assets or performance pursuant to contract having an economic value and associated with an investment;

(d) Intellectual and industrial property rights, including, but not limited to, rights with respect to copyrights, trademarks, patents, industrial designs and technical processes, know-how, trade secrets, trade names and goodwill;

(e) Any right conferred by law, contract or by virtue of any licences and permits granted pursuant to law, including rights to prospect, explore, extract or utilize natural resources, and rights to manufacture, use and sell products, and rights to undertake other economic and commercial activities and services.

Any change in the form in which assets are invested or reinvested does not affect their character as investment.

(2) The term "investor" shall mean: (a) Any natural person holding the nationality of a Contracting State in accordance with its laws; and

(b) With respect to either Contracting State, the Government of that Contracting State and any entity legally constituted under the laws and regulations of that Contracting State, such as institutions, development funds, authorities, foundations, agencies, enterprises, cooperatives, partnerships, companies, firms, organizations and business associations or similar entities irrespective of whether their liabilities are limited or otherwise; and any entity established outside the jurisdiction of a Contracting State as a juridical person and in which such Contracting State or any of its nationals or any entity established within its jurisdiction has a predominant interest.

(3) The term "own" or "control" shall mean to include ownership or control exercised through subsidiaries or affiliates wherever located.

(4) The term "returns" shall mean amounts yielded by an investment, and in particular, though not exclusively, include profit, interest, capital gain, dividends, royalty payment and management, technical assistance or other fees or payments in kind.

(5) The term "without delay" shall mean such period as is normally required for the completion of necessary formalities for the repatriation or transfer of payments. This said period shall commence on the day on which the request for repatriation or transfer has been submitted and may on no account exceed one month.

(6) The term "territory" shall mean all the territory of a Contracting State recognized by international law including any area beyond the territorial sea which in accordance with international law has been or may be designated under the laws of a Contracting State as an area over which a Contracting State may exercise sovereign rights or jurisdiction.

(7) The term "associated activities" shall mean activities connected with an investment, which activities shall be admitted in accordance with the laws and regulations of a Contracting State and shall include without limitation, such activities as: (a) The establishment, control and maintenance of branches, agencies, offices or other facilities for the conduct of business;

(b) The organization of companies; the acquisition of companies or interests in companies or in their property; and the management, control, maintenance, use, enjoyment and expansion, and the sale, liquidation, dissolution or other disposal of companies organized or acquired;

(c) The making, performance and enforcement of contracts related to investments;

(d) The acquisition, ownership, use and disposal by any legal means of property of all kinds;

(e) The borrowing of funds at market terms and conditions from local financial institutions, as well as the purchase and issuance of shares in the local financial markets and the purchase of foreign exchange for the operation of the investments.

Article 2. Encouragement of Investments

(1) Each Contracting State shall in its territory encourage and admit in accordance with its applicable laws and regulations investments and associated activities by investors of the other Contracting State. It shall also ensure investors of the other Contracting State and their investments fair and equitable treatment.

(2) Each Contracting State shall in its territory endeavour to take the necessary measures as may be applicable for granting of appropriate facilities and other forms of encouragement for investments made by investors of the other Contracting State.

(3) Investors of either Contracting State shall be entitled to apply to the competent authorities in the other Contracting State for the appropriate facilities, incentives and other forms of encouragement and those authorities shall endeavour to grant such investors all assistance, approvals, licences and authorizations to such an extent and on such terms and conditions as may be determined by the laws and regulations of that Contracting State.

(4) With respect to its tax policies, each Contracting State should strive to accord fairness and equity in the treatment of investments of investors of the other Contracting State. The provisions of this Article do not oblige a Contracting State to extend to the investors of the other Contracting State any tax privileges, tax exemptions or tax reductions which are granted only to its own nationals or to investors resident in its territory.

(5) The Contracting States may consult between themselves concerning investment opportunities within the territory of each other in various sectors of the economy to determine where investments from one Contracting State into the other may be most beneficial in the interest of both Contracting States.

(6) Investors of either Contracting State shall be permitted to engage top managerial and technical personnel of their choice regardless of nationality to the extent permitted by the laws of the host Contracting State. Each Contracting State shall, subject to its laws and regulations relating to the entry, stay and work of a natural person, examine in good faith and give sympathetic consideration to requests by investors of the other Contracting State and key personnel who are employed by such investors including family members, to enter, leave and remain temporarily in its territory for the purpose of carrying out activities connected with the making or the management, maintenance, use, enjoyment or disposal of an investment.

(7) Whenever goods or persons connected with an investment are to be transported, each Contracting State shall to the extent permissible under its relevant laws and regulations facilitate the carrying out of such transport by enterprises of the other Contracting State.

Article 3. Protection of Investments

(1) Investments of either Contracting State or any of its investors shall enjoy 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 State shall in any way impair by arbitrary or discriminatory measures the management, maintenance, use, enjoyment or any other associated activities in connection with investments in its territory of investors of the other Contracting State.

(2) Each Contracting State shall make public all laws, regulations, administrative directives and procedures that pertain or affect investments in its territory of investors of the other Contracting State.

(3) Each Contracting State recognizes that in order to maintain a favourable environment for investments in its territory by investors of the other Contracting State, it shall provide effective means of asserting claims and enforcing rights with respect to investments. Each Contracting State shall grant to investors of the other Contracting State, the right of access to its courts of justice, administrative tribunals and agencies, and all other bodies exercising adjudicatory authority, and the right to employ persons of their choice, who qualify under applicable laws and regulations for the purpose of asserting claims, and enforcing rights, with respect to their investments.

(4) In case of reinvestment of the returns of an investment, these reinvestments and their returns shall enjoy the same protection and treatment as the initial investment. Such protection and treatment shall also be accorded to the proceeds from the liquidation of an investment.

(5) Investments of either Contracting State or any of its investors shall not be subjected to sequestration, confiscation or any similar measures save with due process of law.

Article 4. Treatment of Investments

(1) Each Contracting State shall at all times ensure investments, returns and associated activities made in its territory by investors of the other Contracting State, fair and equitable treatment. Such treatment shall not be less favourable than that which it accords in like situations to investments and associated activities of its own investors or investors of any third state, whichever is more favourable.

(2) Each Contracting State shall accord investors of the other Contracting State, as regards compensation, transfers, returns, management, maintenance, use, enjoyment, acquisition or disposal of their investments, or any other associated activity, treatment not less favourable than that which it accords to its own investors or to investors of any third state, whichever is more favourable.

(3) However, the provisions of this Article relating to the granting of treatment not less favourable than that accorded by one Contracting State to its own investors or the investors of any third state shall not be construed so as to oblige that Contracting State to extend to the investors of the other Contracting State the benefit of any treatment, preference or privilege resulting from:

(a) Any existing or future customs union, an economic union, a free trade area, a monetary union or similar international agreement to which either of the Contracting States is or may become a party; or

(b) Any international or regional agreement or other similar arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.

(4) The following shall, in particular, be deemed "treatment less favourable" within the meaning of this Article: restricting the purchase of intermediate as well as raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind, impeding the marketing of products inside or outside the country or imposing additional performance requirements once the investment has been established which may hinder their expansion or maintenance as well as any other measure which may be considered as detrimental to the viability of the investment or any other measures having similar effects, unless such measures are deemed vital for the protection of national security, public order or public health.

Article 5. Compensation for Damage or Loss

(1) When investments made by investors of either Contracting State suffer damage or loss owing to war or other armed conflict, state of national emergency, revolt, insurrection, riot or other similar events in the territory of the other Contracting State, they shall be accorded by the latter Contracting State, treatment, as regards restitution, indemnification, compensation or other settlement, which is not less favourable than that which the latter Contracting State accords to its own investors or to investors of any third state, whichever is more favourable.

(2) Without prejudice to paragraph (1), investors of one Contracting State who in any of the events referred to in that

paragraph suffer damage or loss in the territory of the other Contracting State resulting from:

(a) Requisitioning of their property or part thereof by its forces or authorities; or

(b) Destruction of their property or part thereof by its forces or authorities which was not caused in combat action or was not required by the necessity of the situation,

Shall be accorded prompt, fair and adequate compensation for the damage or loss sustained during the period of requisitioning or as a result of the destruction of their property. Resulting payments shall be transferable without delay in a freely convertible currency.

Article 6. Expropriation

(1)

(a) Investments by investors of either Contracting State shall not be nationalized, expropriated or subjected to direct or indirect measures having effect equivalent to nationalization or expropriation (hereinafter collectively referred to as "expropriation") by the other Contracting State except for the public interest related to the internal needs of that Contracting State 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, and are not contrary to any undertaking which that Contracting State may have given to the investor.

(b) Such compensation shall amount to the actual value of the investment and shall be determined and computed in accordance with internationally recognized principles of valuation on the basis of the fair market value of the investment expropriated at the time immediately before the expropriation or impending expropriation became known in such a way as to effect the value of the investment (hereinafter referred to as the "valuation date"). Such compensation shall be calculated in a freely convertible currency on the basis of the prevailing market rate of exchange for that currency on the valuation date. Such compensation shall include interest at the prevailing commercial market rate, from the date of expropriation until the date of payment.

Where the market value cannot be readily ascertained, the compensation shall be determined on equitable principles taking into account, inter alia, the capital invested, replacement value, appreciation, current returns, goodwill and other relevant factors. The amount of compensation finally determined shall be promptly paid to the investor in freely convertible currency and allowed to be transferred without delay.

(2) The investor affected shall, without prejudice to his rights under Article 9 of this Agreement, have a right to prompt review, under the law of the Contracting State making the expropriation, by a judicial or other competent and independent authority of that Contracting State, of its case, of the valuation of its investment, and of the amount of compensation, in accordance with the principles set out in paragraph (1).

(3) The provisions of paragraphs 1 and 2 of this Article shall also apply where a Contracting State expropriates the investment of a juridical person which is established or incorporated under the law in force in its territory and in which the other Contracting State or any of its investors own shares, stocks, debentures or other rights or interests.

(4) The provisions of this Article shall apply to any direct or indirect measure of expropriation, nationalization or other similar measures such as freezing, blocking of assets, levy of unreasonable taxation, the compulsory sale of all or part of the investment, any state intervention, impairment, deprivation of management or control of any kind with respect to, or a measure resulting in loss of or damage to the economic value of such an investment, if the effect of such measure or a series of such measures, would be tantamount to expropriation.

(5) A claim to compensation in accordance with the principles and provisions of this Agreement shall also exist when, as a result of an intervention by a Contracting State in any company in which investments are made by investors of the other Contracting State, the investment is substantially affected.

Article 7. Transfer of Payments Related to Investments

(1) Each Contracting State shall guarantee to investors of the other Contracting State 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 and development of the investment;

(b) Returns;

- (c) Payments under a contract, including amortisation of principal and accrued interest payment pursuant to a loan agreement;
 - (d) Royalties and fees for the rights referred to in Article 1 (1) (d);
 - (e) Proceeds from the sale or liquidation of all or any part of the investment;
 - (f) Earnings and other remuneration of personnel engaged from abroad in connection with the investment;
 - (g) Amounts spent for the management and maintenance of the investment;
 - (h) Payments of compensation pursuant to Articles 5 and 6;
 - (i) Payments referred to in Article 8; and
 - (j) Payments arising out of the settlement of a dispute.
- (2) Transfers of payments under paragraph (1) shall be effected without delay in a freely convertible currency.
- (3) Transfers shall be made at the prevailing market rate of exchange on the date of transfer with respect to spot transactions in the currency to be transferred. In the absence of a market for foreign exchange, the rate to be used will be the most recent rate applied to inward investments or the most recent exchange rate for conversion of currencies into Special Drawing Rights or United States Dollars, whichever is more favourable to the investor.

Article 8. Subrogation

- (1) If a Contracting State, its designated agency or a company or enterprise incorporated in a Contracting State (the Indemnifying Party") makes a payment under an indemnity or guarantee it has assumed in respect of an investment or returns in the territory of the other Contracting State (the "Host State"), or otherwise acquires any of the rights and claims of such an investment as a result of the complete or partial default of the investor, the Host State shall recognize:
- (a) The assignment to the Indemnifying Party by law or by legal transaction of any rights or claims resulting from such an investment; and
 - (b) That the Indemnifying Party is entitled to exercise such rights and enforce such claims by virtue of subrogation, to the same extent as its predecessor in title or the original investor.
- (2) The Indemnifying Party shall be entitled in all circumstances to:
- (a) The same treatment in respect of the rights and claims acquired by it by virtue of the assignment referred to in paragraph (1) above, and
 - (b) Any payments received in pursuance of those rights and claims, as the original investor was entitled to receive by virtue of this Agreement in respect of the investment concerned and its related returns.
- (3) Without prejudice to Article 7, any payments received in nonconvertible currency by the Indemnifying Party in pursuance of the rights and claims acquired shall be freely available to the Indemnifying Party for the purpose of meeting any expenditure incurred in the territory of the Host State.

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 relating to 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 and, in the absence of any applicable, previously agreed dispute-settlement procedures, the dispute shall, subject to paragraph (3) below be submitted to international arbitration or conciliation in accordance with paragraph (4).
- (3) An investor may choose to submit the dispute for resolution:
- (a) To the courts or administrative tribunals of the Contracting State that is a party to the dispute; or
 - (b) In accordance with paragraph (4) only if.

- (i) The investor has waived its right to initiate an action, in relation to the same subject matter, before the courts or tribunals of the Contracting State concerned or, where an action has already commenced, the investor has discontinued such action before any judgement or award is made or at any later stage permitted by the law of the Contracting State concerned; and
- (ii) The investor has consented in writing to settlement by arbitration or conciliation in accordance with the appropriate rules, thereunder.
- (4) The dispute may, at the election in writing of the investor concerned, be submitted for settlement by arbitration or conciliation to:
- (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"), provided that the Washington Convention is applicable to the dispute; or
- (b) An arbitral tribunal established under the Arbitration 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 in Article 7 of the Rules shall be the Secretary General of the Centre); or
- (c) An arbitral tribunal constituted pursuant to the arbitration rules of any arbitral institution mutually agreed between the parties to the dispute.
- (5) Each Contracting State hereby gives its unconditional consent to the submission of an investment dispute for settlement by binding arbitration in accordance with the provisions of this Article.
- (6)
- (a) The consent given in paragraph (5), together with the consent given under paragraph (3), shall satisfy the requirements for:
- (i) Written consent of the parties to a dispute for the purposes of Chapter 11 of the Washington Convention;
- (ii) An "agreement in writing" for the purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 (the "New York Convention"); and
- (iii) An agreement in writing by the parties to a contract for the purposes of Article 1 of the UNCITRAL Arbitration Rules.
- (b) Any arbitration under this Article shall, as may be mutually agreed by the parties, be held in a state that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of Article 1 of the New York Convention.
- (c) Neither Contracting State shall give diplomatic protection or bring an international claim, in respect of any dispute referred to arbitration or conciliation unless the other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.
- However, diplomatic protection for the purposes of this sub-paragraph (c) shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.
- (7) An arbitral tribunal or a conciliation commission established under this Article shall decide the issues in dispute in accordance with such rules of law as may be agreed by the parties to the dispute. In the absence of such agreement, it shall apply the law of the Contracting State, party to the dispute (including its rules on conflict of laws), and such rules of international law as may be applicable.
- (8) An investor other than a natural person which has the nationality of a Contracting State and which before a dispute between it and that Contracting State arises is controlled by investors of the other Contracting State shall for the purpose of article 25 (2) (b) of the Washington Convention be treated as an investor of that other Contracting State.
- (9) The awards of arbitration, which may include an award of interest, shall be final and binding on the parties to the dispute. Each Contracting State shall carry out without delay any such award and shall make provision for the effective enforcement in its territory of such awards.
- (10) In any proceedings, judicial, arbitral or otherwise or in an enforcement of any decision or award, concerning an investment dispute between a Contracting State and an investor of the other Contracting State, a Contracting State shall not assert, as a defense, its sovereign immunity. Any counter-claim or right of set-off may not be based on the fact that the investor concerned has received or will receive, pursuant to an insurance contract, indemnification or other compensation for all or part of its alleged damages from any third party whomsoever, whether public or private, including such other

Contracting State and its subdivisions, agencies or instrumentalities.

Article 10. Settlement of Disputes between Contracting States

(1) The Contracting States shall endeavour to settle any dispute concerning the interpretation or application of this Agreement through negotiations between the Governments of the two Contracting States.

(2) If the dispute has not been settled within six months following the date on which such negotiations were requested by either Contracting State and unless the Contracting States otherwise agree in writing, either Contracting State may, by written notice to the other Contracting State, 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 State shall appoint one member, and these two members shall agree upon a national of a third state as their Chairman to be appointed by the Governments of the two Contracting States. Such members shall be appointed within two months, and such Chairman within four months, from the date on which either Contracting State has informed the other Contracting State 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 State may, in the absence of any other arrangement, invite the President of the International Court of Justice to make the necessary appointments. If the President is a national of either Contracting State or if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting State or if he, too, is prevented from discharging the said function, the member of the Court next in seniority who is not a national of either Contracting State 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 applicable rules of international law and shall be final and binding. Each Contracting State shall bear the expenses of the member appointed by that Contracting State, as well as the expenses 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 States, unless the arbitral tribunal, at its discretion, directs that a higher proportion of such costs be borne by one of the Contracting States. In all other respects, the arbitral tribunal shall determine its own procedure.

Article 11. Relations between Contracting States

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

Article 12. Preservation of Rights

(1) If the legislation of either Contracting State or obligations under international law existing at present or established hereafter between the Contracting States in addition to this Agreement contains a regulation, whether general or specific, entitling investments or associated activities by investors of the other Contracting State to a treatment more favourable than is provided for by this Agreement, such regulation shall to the extent that it is more favourable prevail over this Agreement.

(2) Each Contracting State shall observe any other obligation it may have entered into with regard to investments in its territory by investors of the other Contracting State.

Article 13. Application

This Agreement shall apply to all investments, whether existing at or made after the date of its entry into force by investors of either Contracting State in the territory of the other Contracting State and accepted in accordance with the relevant legislations of the host Contracting State, but shall not apply to any dispute concerning an investment which arose, or any claim concerning an investment which was settled, before its entry into force.

Article 14. Entry Into Force

(1) Each of the Contracting States shall notify the other that its constitutional requirements for the entry into force of this Agreement have been fulfilled.

(2) This 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 (30) thirty 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 State notifies the other Contracting State 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 (20) twenty years from the date of termination of this Agreement.

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

Done in duplicate at Kuwait on this 29th day of Rajab 1420 H corresponding to 7th day of November 1999 in the Swedish, Arabic and English languages, all texts being equally authentic. In case of divergent interpretation, the English text shall prevail.

For the Kingdom of Sweden

Yvonne Gustafsson

For the State of Kuwait

Ahmad Hamza Al-Failakawi