

# **AGREEMENT BETWEEN THE GOVERNMENT OF UKRAINE AND THE GOVERNMENT OF THE STATE OF KUWAIT FOR THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS**

The Government of Ukraine and the Government of the State of Kuwait. (hereinafter referred to as the "Contracting Parties");

Desiring to create favourable conditions for the development of economic cooperation between them and in particular for investments by investors of one Contracting Party in the territory of the other Contracting Party;

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

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 in accordance with the laws and regulations, and includes asset or right consisting or taking the form of:

(a) movable and immovable property and any related property rights such as leases, mortgages, liens and pledges;

(b) a company, or shares, stocks, and other forms of equity participation and bonds, debentures, and other forms of debt interests in a company, and other debts and loans and securities issued by any investor of a Contracting Party.

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

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

(e) any rights conferred by law, contract or by virtue of any licenses or permits granted pursuant to law, including rights to prospect, explore, extract, or utilize natural resources, and rights to undertake other economic or commercial activities or to render services.

The term "investment" shall also apply to "returns" retained for the purpose of reinvestment and to proceeds from "liquidation" as these terms are defined hereinafter.

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

2. The term "investor" with respect to a Contracting Party shall mean:

(a) any natural person holding the nationality of the Contracting Party investing in the territory of the other Contracting Party in accordance with its applicable law;

(b) any legal person constituted or incorporated under the laws and regulations of that Contracting Party such as institutions, development funds, agencies, foundations and other statutory establishments and authorities, and companies;

(c) the Government of that Contracting Party.

3. 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, management, technical assistance and other payments or fees, and payments in kind, regardless of its type.

4. The term "liquidation" shall mean any disposal effected for the purpose of completely or partly giving up an investment.
5. The term "territory" shall mean the territory of a Contracting Party including any area beyond the territorial sea which in accordance with international law has been or may hereafter be designated under the laws of a Contracting Party. as an area over which a Contracting Party may exercise sovereign rights or jurisdiction.
6. The term "freely convertible currency" shall mean any currency that the International Monetary Fund determines. from time to time, as freely usable currency in accordance with the Articles of the Agreement of the International Monetary Fund and any amendment thereto.
7. The term "without delay" shall mean such period as is normally required for the completion of necessary formalities for the transfer of payments. The said period shall commence on the day on which the request for transfer has been submitted and may on no account exceed one month.

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

1. Each Contracting Party shall in its territory and in accordance with its applicable laws and regulations admit and encourage investments by investors of the other Contracting Party.
2. Each Contracting Party shall. in respect of investments admitted in its territory. grant such investments all necessary permits. consents. approvals. licenses and authorizations to such an extent and on such terms and conditions as may be determined by its laws and regulations.
3. The Contracting Parties may consult with each other in any manner they may deem appropriate to encourage and facilitate investment opportunities within their respective territories.
4. Each Contracting Party shall. subject to its laws and regulations relating to the entry. stay and work of natural persons. examine in good faith and give due consideration. regardless of nationality or citizenship to requests of key personnel including top managerial and technical persons who are employed for the purposes of investments in its territory. to enter. remain temporary and work in its territory. Immediate family members of such key personnel shall also be granted similar treatment with regard to entry and temporary stay in host Contracting Party.
5. Whenever goods or persons connected with an investment are to be transported. each Contracting Party shall to the extent permissible under its relevant laws and regulations permit the operation of such transport by enterprises of the other Contracting Party.

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

1. Investments by investors of either Contracting Party shall at all times enjoy fair and equitable treatment and full protection and security in the territory of the other Contracting Party in a manner consistent with recognized principles of international law and the provisions of this Agreement. Neither Contracting Party shall in any way impair by arbitrary or discriminatory measure is the use, management, conduct, operation, expansion or sale or other disposition of investments.
2. Each Contracting Party shall make public all laws, regulations, administrative practices and procedures and adjudicatory decisions that pertain to or affect investments.
3. Each Contracting Party shall provide effective means of asserting claims and enforcing rights with respect to investments. Each Contracting Party shall ensure to investors of the other Contracting Party the right of access to its courts of justice, administrative tribunals and agencies, and all other bodies exercising adjudicator authority, and the right to mandate persons of their choice, who qualify under applicable laws and regulations for the purpose of the assertion of claims and the enforcement of rights with respect to their investment.
4. Neither Contracting Party may impose as a condition for the establishment. acquisition. expansion. use. management. conduct or of operation of investments by investors of the other Contracting Party mandatory measures. which may require of restrict the purchase of materials. energy. fuel or of means of production. transport of operation of any kind or restrict the marketing of products inside or outside its territory. or any other measures having the effect of discrimination against investments by investors of the other Contracting Party in favor of investments by its own investors or by investors of third party.

Furthermore. investments shall not be subjected in the host Contracting Party to performance requirements which may be detrimental to their viability or adversely affect their use. management. conduct. operation. expansion. sale or other disposition.

5. Investments by investors of either Contracting Party shall not be subjected in the host Contracting Party to sequestration, confiscation or any other similar measures except under due process of law and in conformity with applicable principles of international law and other relevant provisions of this Agreement.

6. Each Contracting Party shall observe any obligation or undertaking it may have entered into with regard to investments in its territory by investors of the other Contracting Party.

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

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

2. 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 other form of regional economic arrangement or other similar international agreement, to which either of the Contracting Parties is or may become a party; or

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

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

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

2. Without prejudice to paragraph 1, investors of one Contracting Party who in any of the events referred to in that paragraph suffer damage or loss in the territory of the other Contracting Party 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, adequate and effective compensation for the damage or loss sustained during the period of requisitioning or as a result of the destruction of their property.

#### **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 nationalization, 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 computed 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 (hereinafter referred to as the "violation date"). 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, however, in no event less than the prevailing LIBOR-rate of interest or equivalent, 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. In light of the principles set out in paragraph 1 and without prejudice to the rights of the investor under Article 9 of this Agreement, the investor affected shall have the right to prompt review by a judicial or other competent and independent authority of the Contracting Party which made the expropriation, of its case, including the valuation of its investment and the payment of compensation therefore.

3. For further certainty, expropriation shall 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 own 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.

4. 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 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 particular investment, compulsory sale of all or part of the investment, or other comparable acts or measures.

5. A claim to compensation in accordance with the principles and provisions of this Article shall also exist when, as a result of an action by a Contracting Party in any company in which investment is made by investors of the other Contracting Party, the investment is impaired in substance.

## **Article 7. Transfer of Payments Related to Investments**

1. Each Contracting Party 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 amortization 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 5 and 6;
- (h) payments referred to in Article 8: and
- (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 such delay in effecting the required transfers, the investor affected shall be entitled to receive 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 8. Subrogation**

1. If a Contracting Party, its designated agency or any other party appointed by it constituted or incorporated in that Contracting Party (the "Indemnifying Party"), makes a payment under an indemnity or guarantee 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 transaction of all the rights and claims resulting from such an investment; and
- (b) the right of the Indemnifying Party to exercise all such rights and enforce such claims and to assume all 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; 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.

## **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, either:

(a) in accordance with any applicable, previously agreed dispute-settlement procedures; or

(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:

(a) (1) The International Centre for Settlement of Investment Disputes ("the Centre"), established pursuant to the Convention on the Settlement of Investment Disputes between Parties and Nationals of other Parties opened for signature at Washington, 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; or

(2) The Centre, under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (the "Additional Facility Rules"), if the Contracting Party of the investor or the Contracting Party to the dispute, but not both, is a party to 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); or

(c) an arbitral tribunal constituted pursuant to the arbitration rules of any arbitral institution 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, 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 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) or the mutual agreement of both parties to the dispute under paragraph 3(c).

6. (a) The consent given in paragraph 5, together with the consent given under paragraph 3, shall satisfy the requirement for written agreement of the parties to a dispute for the purposes of each of Chapter 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 at New York, June 10, 1958 (the "New York Convention"), and Article 1 of the UNCITRAL Arbitration Rules.

(b) Any arbitration under this Article, as may be mutually agreed by the parties to the dispute, must be held in a Party 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 Party shall give diplomatic protection or bring an international claim, in respect of any dispute referred to arbitration unless the other Contracting Party 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 shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

7. An arbitral tribunal 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 Party party to the dispute, including its rules on conflict of laws, and such recognized rules of international law as may be applicable, taking into consideration also the relevant provisions of this Agreement.

8. 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 another Contracting Party" and for the purpose of Article 1(6) of the Additional Facility Rules shall be treated as a "national of another Party".

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 Party shall carry out promptly 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 Party and an investor of the other Contracting Party, a Contracting Party shall not assert, as a defense, its sovereign immunity. Any counterclaim 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 Party and its subdivisions, agencies or instrumentalities.

## **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 agree upon a national of a third party as Chairman of the arbitral tribunal to be appointed by the two Contracting Parties, 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. Relations between Contracting Parties**

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

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

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 rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Agreement, such rules shall to the extent that they are more favourable to the investor prevail over this Agreement.

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

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 Party in the territory of the other Contracting Party.

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

Each Contracting Party shall notify the other when its required internal procedures 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.

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

1. This Agreement shall remain in force for a period of thirty (30) 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 Party 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 at Kuwait on this 12 day of January 2002, corresponding to ..... day of ..... in two originals in the Ukrainian, Arabic and English languages, all texts being equally authentic. In case of divergency, the English text shall prevail.

For the Government of Ukraine

For the Government of the State of Kuwait