

Agreement between Malta and the State of Kuwait for the Promotion and Protection of Investments

Malta and the State of Kuwait (hereinafter collectively referred to as the Contracting States and each referred to as a Contracting State)

Desiring to create favourable conditions for greater economic co-operation between them, and in particular for investments by investors of one Contracting State in the territory and maritime zones of the other Contracting State in different development activities which may be of mutual benefit to the interest of the two Contracting States.

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

Have agreed as follows:

Article 1. Definitions

For the purposes of this Agreement

1. The term 'investment' shall comprise every kind of asset invested before or after the entry into force of this Agreement by a natural or juridical person including the Government of a Contracting State in the territory or maritime zones of the other Contracting State in accordance with the Laws and Regulations of that State. Without restricting the generality of the foregoing, the term 'investment' shall include:

- (a) Movable and immovable property as well as any other property rights in rem such as mortgages, liens, pledges, usufruct and similar rights;
- (b) Shares, stocks and debentures of companies or other rights or interests in such companies and government issued securities;
- (c) Claims to money or to any performance having economic value associated with an investment;
- (d) Copyrights, trademarks, patents, industrial designs, technical processes and other industrial property rights, know-how, trade secrets, trade names and goodwill
- (e) Any right conferred by law or contract and any licenses and permits pursuant to law, including the right to search for, extraction and exploitation of natural resources.

Any alteration of the form in which assets are invested shall not affect their classification as investment.

2. The term 'investor' shall mean any natural or juridical persons including the Government of a Contracting State who invests in the territory or maritime zones of the other Contracting State.

3. The term 'natural person' shall mean with respect to either Contracting State a natural person holding the nationality of that State in accordance with its laws.

4. The term 'juridical person' shall mean with respect to either Contracting State, any entity established in accordance with, and recognised as a juridical person by the law of the State, such as public institutions, corporations, authorities, foundations, companies, partnerships, firms, establishments, organisations and associations 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 State or any of its nationals or any juridical person established within its jurisdiction has a predominant interest.

5. The terms 'returns' shall mean amounts yielded by an investment and in particular, though not exclusively, includes profits, interest, capital gains, share dividends, royalties or fees.

6. Maritime zones mean the maritime and submarine zones over which the Contracting States exercise, under international law, sovereign rights or jurisdiction.

7. 'Associated activities' include the organisation, control, operation, maintenance and disposition of juridical persons, branches, agencies, offices, factories or other facilities for the conduct of business, the acquisition, use, protection and disposition of property of all kinds, including intellectual and industrial property rights; and the borrowing of funds, the purchase and issuance of equity shares, and the purchase of foreign exchange for imports.

Article 2. Promotion and Protection of Investments

1. Each Contracting State shall encourage and create favourable conditions for investors of the other Contracting State to make investments in its territory and maritime zones and, in exercise of powers conferred by its laws and regulations, shall admit such investments.

2. Each Contracting State shall at all times ensure fair and equitable treatment to the investments of investors of the other Contracting State. Each Contracting State shall ensure that the management, exercise of rights and powers, maintenance, use, enjoyment or disposal of investments or any associated activities in its territory and maritime zones of investors of the other Contracting States shall not in any way be subjected to or impaired by unreasonable or discriminatory measures. Each Contracting State shall observe any obligation it may have entered into with regard to investments by investors of the other Contracting State.

3. The Contracting States shall periodically consult between themselves concerning investment opportunities within the territories 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, and according them appropriate facilities, exemptions, privileges, incentives, and other forms of encouragements (including inter alia, tax relief) to such an extent and on such terms and conditions as shall, from time to time, be determined by agreement between the Contracting States.

4. To attain the objectives of this Agreement, the Contracting States, when they deem feasible, shall encourage the formation and establishment of the appropriate joint legal entities, including a Kuwaiti - Maltese Holding Company, other companies or other similar business organisations to develop and execute investment projects in different economic sectors in accordance with the laws and regulations of the host State.

5. Investors of either Contracting State shall be permitted to engage top managerial personnel of their choice regardless of nationality to the extent permitted by the laws of the host State. The Contracting States shall make available all necessary facilities including the issuance of visas and permits of stay to such managerial personnel and to their families in accordance with the laws and regulations of the two Contracting States.

6. Once established, investments shall not be subject in the host State to additional performance requirements which hinder their expansion or maintenance, which require or enforce commitments to export goods produced or which specify that goods or services must be purchased locally, or which impose other similar requirements.

7. With respect to its tax policies, each Contracting State shall strive to accord fairness and equity in the treatment of investments of investors of the other Contracting State. Furthermore, the Contracting States shall endeavour to conclude an agreement for the avoidance of double taxation as soon as possible.

Article 3. Most-favoured Nation Provisions

1. Each Contracting State shall in its territory and maritime zones accord investments and returns of investors of the other Contracting State treatment not less favourable than that which it accords to investments and returns of its own investors or to investments and returns of investors of any third State, whichever is the most favourable.

2. Each Contracting State shall in its territory and maritime zones accord investors of the other Contracting State, as regards management, maintenance, use, enjoyment 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 the most favourable.

Article 4. Exceptions

Nothing in this Agreement shall be interpreted as imposing a legal obligation on either Contracting State to extend to the investors of the other Contracting State, the benefit of any treatment, preference or privilege which may be accorded to any other State or its investors by virtue of the formation of a customs union, or economic union, a free trade area, regional or

subregional arrangement or any other agreement or arrangement relating wholly or mainly to taxation or any regional or subregional arrangement relating to the movement of capital or frontier trade to which such State may be a Party.

Article 5. Compensation for Damage or Loss

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

2. Without prejudice to paragraph (1) of this Article, investors of one Contracting State who in any of the events referred to in that paragraph suffer damage or loss in the territory or maritime zone of the other Contracting State resulting from:

(a) requisitioning of their property by its forces or authorities,

(b) Destruction of their property 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 just and adequate compensation for the damage or loss sustained during the period of the requisitioning or as a result of the destruction of the property. Resulting payments shall be freely transferable without delay.

Article 6. Nationalisation or Expropriation

1. (a) Investments of either Contracting State or any of its investors shall not be subject to sequestration, confiscation or any similar measures in the territory or maritime zones of the other Contracting State save with the order of a court of competent jurisdiction in commercial and civil matters issued in accordance with laws in force.

(b) Investments of either contracting state or any of its investors shall not be nationalised, expropriated or subjected to any other measures of dispossession, direct or indirect or having effect equivalent to nationalisation or expropriation in the territory or maritime zones of the other Contracting State except for a public purpose in the national interest of that State, and then only against prompt, adequate and just compensation and on condition that such measures are taken on a non-discriminatory basis and in accordance with domestic laws of general application.

(c) Such compensation shall represent the real value of the investment concerned and shall be computed on the basis of the market value of the investment immediately prior to the point of time when the decision for expropriation, nationalisation or dispossession was announced or became publicly known and shall be determined in accordance with recognised principles of valuation such as market value. Where the market value cannot be readily ascertained, the compensation shall be determined in accordance with generally recognised principles of valuation and on equitable principles taking into account, inter alia, the capital invested, nature and site of investment, depreciation, capital already repatriated, replacement value and other relevant factors.

The compensation shall include interest at the current LIBOR rate of interest from the date of nationalisation, dispossession or expropriation until the date of payment. The determination of the compensation, in the absence of agreement being reached between the investor and the host state, shall be referred to the settlement procedures in accordance with Article 9 of this Agreement. The compensation as finally determined shall be promptly paid and repatriated without delay.

(d) Where a Contracting State nationalises or expropriates the assets of a company, firm, or other business association or business concern, which is established or licensed, under the law in force, in its territory or maritime zones and in which the other Contracting State or any of its investors owns shares, stocks, debentures or other rights or interest, it shall ensure that prompt, adequate and just compensation is received and allowed to be repatriated. Such compensation shall be determined on the basis of the recognised principles of valuation such as the market value of the shares immediately prior to the point of time when the decision for nationalisation or expropriation was announced or became publicly known. The compensation shall include interest at the current LIBOR rate of interest from the date of nationalisation or expropriation until the date of payment.

2. The provisions of paragraph 1 of this Article shall also apply to the current returns from the investment and, in the event of their reinvestment, the returns therefrom, as well as, in the event of liquidation, to the proceeds from the liquidation.

Article 7. Transfers

1. Each Contracting State shall guarantee without delay the transfer out of its territory in any freely convertible currency of:

- (a) the net profits, dividends, royalties, technical assistance and technical service fees, interest and other current income accruing from any investment by an investor of the other Contracting State;
- (b) The proceeds accruing from the sale of the total or partial liquidation of any investment made by an investor of the other Contracting State;
- (c) Funds in repayment of borrowings;
- (d) The earnings of nationals of the other Contracting State who are allowed to work in connection with an investment in its territory;
- (e) Amounts spent for the management of the investment in the territory of the other Contracting State or a third State;
- (f) additional funds necessary for the maintenance of the investment; and
- (g) Compensation pursuant to Article 5 and 6 and other similar payments.

2. Without restricting the generality of Article 3 of this Agreement, the Contracting State undertake to accord to transfers referred to in paragraph (1) of this Article a treatment as favourable as that accorded to transfers originating from investments made by investors of any third State.

3. For the purpose of this Agreement, exchange rates shall be the rates effective for current transactions or those which are determined in accordance with the official rates agreed with the International Monetary Fund, or where such rates do not exist, the official exchange rates for Special Drawing Rights or United States dollars or any other convertible currency agreed between the Contracting States;

Provided always, that in the event of the introduction of a two-tier exchange rate system the appropriate rate of exchange shall be applied.

4. Such transfers as above shall, however, be subject to such reasonable regulatory procedures as shall, from time to time, be in force in the host State and shall likewise be subject to the right of its government to impose reasonable restrictions for temporary periods not exceeding three months to meet situations of fundamental economic disequilibrium, provided that at least 50% of such transfers are allowed to be repatriated during such periods.

Article 8. Subrogation

1. If a Contracting State (or its designated Agency) makes payment to any of its investors under an indemnity or a guarantee it has granted in respect of an investment or any part thereof in the territory or maritime zones of the host State, or has otherwise become subrogated to any of the rights of such investors, with respect to such investments, the host State shall recognise:

(a) the right of the other Contracting State (or its designated Agency) arising from the assignment, indemnity or other subrogation whether under law or pursuant to a legal title, and

(b) that the other Contracting State (or its designated Agency) is entitled by virtue of subrogation to enforce such right.

2. If such other Contracting State pay any amounts in such manner as above, it shall be accorded in respect thereof treatment no less favourable than that accorded to the funds of investors of the host State or any other third State whichever is the most favourable deriving from investment activities similar to those in which the party indemnified was engaged.

Article 9. Settlement of Investment Disputes

1. Any dispute arising out of an investment, between either Contracting State and an investor of the other Contracting State, shall, as far as possible, be settled by consultations and negotiations between the parties to the dispute.

2. If the dispute cannot be resolved through consultations and negotiations, then the dispute shall be submitted for settlement in accordance with the applicable dispute settlement procedures upon which a Contracting State have previously agreed. With respect to expropriation by either Contracting State, any dispute settlement procedures specified in an investment agreement between such Contracting State and such investor shall remain binding and shall be enforceable in accordance with the terms of the investment agreement and treaties and other international agreements regarding enforcement or arbitral awards to which such Contracting State has subscribed.

3. (a) In the event that the dispute has not been resolved under the procedures specified above, the investor concerned may

choose to submit the dispute in writing to the International Centre for the Settlement of Investment Disputes ("Centre") for settlement by conciliation or binding arbitration at any time, if, within three (3) months of the date upon which it arose (i) the dispute has not been settled through consultations and negotiations, or (ii) the dispute has not for any reason in good faith, been submitted for resolution in accordance with any applicable dispute-settlement procedures previously agreed to by the parties to the dispute.

(b) Each Contracting State hereby irrevocably consents in advance to the submission of an investment dispute to the Centre for settlement by conciliation or binding arbitration. This consents implies renunciation of the requirement that the internal administrative or judicial remedies should be exhausted.

(c) Conciliation or binding arbitration of such disputes shall be done in accordance with the provisions of the Convention on the settlement of Investment Disputes Between States and Nationals of Other States ("Convention") and the Regulations and Rules of the Centre.

4. In any proceeding judicial, arbitral or otherwise, concerning an investment dispute between it and an investor of the other contracting state, a Contracting State shall not assert, as a defence, its 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 whatsoever, whether public or private, including such other Contracting State and its subdivisions, agencies and instrumentalities. Notwithstanding the foregoing, an investor of the other Contracting State shall not be entitled to compensation for more than the value of its affected assets, taking into account all sources of compensation within the territory of the State liable for compensation.

5. For the purpose of any proceedings initiated before the Centre in accordance with this Article, any company that, immediately prior to the occurrence of the event or events giving rise to the dispute was a company of the other Contracting State, shall be treated as a national or company of such other Contracting State.

6. Neither Contracting State shall pursue through diplomatic channels any matter referred to arbitration until the proceedings have terminated and a Contracting State has failed to abide by or to comply with the award rendered by the Arbitral Tribunal.

7. In case the Convention is not applicable, then the dispute shall be settled by an ad hoc arbitration.

Article 10. Settlement of Disputes between the Contracting States

1. Should any dispute arise concerning the interpretation or application of this Agreement the Governments of the Contracting States shall try to settle the same by negotiations.

2. If the dispute cannot be so settled within three months it shall, upon the request of either Contracting State, be submitted to an Arbitral Tribunal in accordance with the provisions of this article.

3. The Arbitral Tribunal shall be constituted in the following way. Within two months of the receipt of the request for arbitration, each Contracting State shall appoint one member of the Tribunal. The two members shall then select a national of a third state which has diplomatic relations with the two Contracting States to act as Chairman (hereinafter referred to as the Chairman). The Chairman shall be appointed within three months from the date of the other two members.

4. If within the periods specified in paragraph 3 of this Article either party shall not have appointed its arbitrator or the two arbitrators shall not have agreed on the Chairman a request may be made to the President of the International Court of Justice to make the appointment. If he happens to be 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 appointment. If the Vice-President also happens to be a national of either Contracting State or 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 State shall be invited to make the appointment.

5. The Arbitral Tribunal shall reach its decision by a majority of votes. Such decision shall be binding. Each Contracting State shall bear the costs of its own arbitrator and its counsel in the arbitral proceedings; the cost of the Chairman and the remaining costs shall be borne in equal parts by both Contracting States. The Arbitral Tribunal shall determine its own procedure.

Article 11. Relations between Governments

The provisions of the present Agreement shall apply irrespective of the existence of diplomatic or consular relations

between the Contracting States.

Article 12. Application of other Rules and Special Commitments

1. Where a matter is governed simultaneously both by this Agreement and by another international agreement to which both Contracting States are parties, or by general principles of international law nothing in this Agreement shall prevent either Contracting State or any of its investors who own investments in the territory or maritime zones of the other Contracting State from taking advantage of whichever rules are the more favourable to his case.
2. If the treatment to be accorded by one Contracting State to investor of the other Contracting State in accordance with its laws and regulations or other specific provisions or contracts is more favourable than that accorded by this Agreement, the more favourable treatment shall be accorded.
3. Either Contracting State shall observe any other obligation it may have entered into with regard to investments in its territory or maritime zones by investors of the other Contracting State.

Article 13. Entry Into Force

This Agreement shall enter into force on the latter date on which either Contracting State notifies the other that its constitutional requirements for entry into force of this Agreement have been fulfilled.

Article 14. Duration and Termination

1. This Agreement shall remain in force for a period of thirty (30) years and shall continue in force thereafter for a similar period unless, one year before the expiry of therein or any subsequent periods, either Contracting State notifies the other in writing of its intention to terminate the Agreement. The notice of termination shall become effective one year after it has been received by the other Contracting State.
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 the present Agreement.

In witness whereof the undersigned duly authorised thereto have signed this Agreement.

Done in duplicate at Kuwait on this 19th day of April 1995, corresponding to 19th day of Thulqida 1415H., in the English and Arabic languages both texts being equally authentic.

For Malta

For the State of Kuwait

PROTOCOL

On signing the Agreement between Malta and the State of Kuwait concerning the Promotion and Protection of Investments, the undersigned Plenipotentiaries have, in addition, agreed on the following provisions which should be regarded as an integral part of the said Agreement.

1. With Respect to Article 2:

- (a) The Kuwaiti companies and companies to be established jointly by Kuwaiti investors and Maltese investors shall have the right to exercise the powers granted under the Maltese Laws for the attainment of their purposes and objects. They shall have the right to issue and execute any decision which they deem necessary to achieve their objectives and to safeguard their interests. In order to realise their objectives, they shall have the right to establish subsidiary companies and/or participate in other companies in the industrial, manufacturing, financial, touristic and technical projects and other development activities, which may be of mutual benefit to the interests of the two Contracting States.
- (b) Each Contracting State shall endeavour to take the necessary measures and legislation for granting if appropriate

facilities incentives and other forms of encouragement for investments made by investors of the other Contracting State.

(c) Investors of either Contracting State shall be entitled to apply to the competent authorities in the host State for the appropriate facilities, incentives and other forms of encouragement (including inter alia, tax relief, privileges and other exemptions) and the host State shall respond favourably to the applications of the investors therefore and grant them all assistance, consents, approvals, licences and authorisations to such an extent and on such terms and conditions as shall, from time to time, be determined by the laws and regulations of the host State or by agreement between the Contracting State thereto as the case may be.

(d) All activities involving the purchase, sale and transport of raw and secondary materials, energy, fuels and means of production and operations of all types shall be accorded treatment no less favourable than that accorded to the investment related activities carried out by the nationals of the host State or third State investors whichever is the most favourable. There shall be no impediment to the normal exercise of such activities, provided they are carried out in accordance with the laws and regulations of the host State and in observance of the provisions of this Agreement. Restricting any of these activities shall be deemed "treatment less favourable" if directed in a discriminatory way against investors of the other Contracting State. measures that have to be taken for reasons of public security and order public, healths or morality shall not be deemed "treatment less favourable" within the meaning of this Article.

(e) Nationals authorised to work in the territory and maritime zones of one of the Contracting States shall be accorded the appropriate support for the exercise of their professional activities.

(f) The Contracting States shall facilitate in the light of their domestic laws the issuance of entry visas and authorisations pertaining to sojourn, work and travel of the nationals of one Contracting State pursuant to an investment in the territory or the maritime zones of the other Contracting State.

(g) Whenever goods or persons connected with the making of investments are to be transported, either Contracting State shall neither exclude nor hinder transportation enterprises of the other Contracting State and shall issue permits as required to carry out such transports. This includes the transportation of:

(i) Goods directly intended for an investment within the meaning of the present Agreement or acquired in the territory of either Contracting State or of any third State by or on behalf of an enterprise in which assets within the meaning of the present Agreement are invested;

(ii) Persons travelling in connection with the making of investments.

2. With Respect to Article 6:

(a) The provisions of this Article shall apply measure of expropriation, nationalisation, dispossession or other similar measures such as freezing or blocking of assets or funds concerning investments made by investors of the other Contracting State wherever they may be, and irrespective of the place where they may be deposited.

(b) The provisions of this Article shall also apply to the transfer of an investment to public ownership, to the subjection of an investment to public control or to any other measure the effects of which would be tantamount to expropriation or nationalisation. "Expropriation" shall mean the taking away or restricting of any property rights which in itself or in conjunction with other rights constitute an investment.

3. With Respect to Articles 5, 6 and 7:

(a) The term "without delay" within the meaning of Articles 5, 6 and 7 is deemed to be fulfilled if a repatriation is made within such period as normally required according to international financial custom and not later, in any case, than three months.

(b) Invested returns shall enjoy the same facilities and protection as the original investment.

4. With Respect to Article 7:

The transfers referred to in Article 7 of this Agreement shall mean the transfers which shall be made from the foreign exchange deposit account in Malta of investors of the State of Kuwait in accordance with the foreign exchange control regulations of Malta.

When an investor in the State of Kuwait does not have sufficient foreign exchange for the transfer, the Maltese government shall provide foreign exchange for the transfer of:

- (a) The payment and fees for copyrights, trademarks, patents and other industrial property rights, know-how, trade names and technical assistance and technical service related to investments undertaken by investors of the State of Kuwait;
- (b) The proceeds accruing from the sale of total or partial liquidation of any investment made by investors of the State of Kuwait even if such proceeds exceed the initial investment;
- (c) Compensation referred to in paragraph (2) of Article 5 and Article 6 of this Agreement;
- (d) The funds mentioned in paragraph (1) (c) of Article 7 of this Agreement;
- (e) Returns accruing from investments of investors of the State of Kuwait where the competent State authority of Malta had given specific approval to the investor concerned to sell its products in the domestic market of Malta;
- (f) The earnings of all employees who are allowed to work in connection with an investment made by a Kuwaiti investor in the territory of maritime zones of Malta;
- (g) Amount spent for the management of the investment in the territory of the maritime zones of Malta or a third State; and
- (h) Additional funds necessary for the maintenance of the investment.

5. With Respect to Article 9:

Regarding the arbitration referred to in paragraph (7) of Article 9, the Arbitral Tribunal shall be established as follows:

(a) The Arbitral Tribunal shall consist of three arbitrators. Each party shall select an arbitrator. These two arbitrators shall appoint by mutual agreement a Chairman who shall be a national of a third State which has diplomatic relations with both Contracting States. The arbitrators shall be appointed within two months from the date when one of the parties to the dispute informed the other of its intention to submit the dispute to arbitration.

If the appointments are not made within the period mentioned above, either party may invite the Chairman of the Arbitration Institute of the Stockholm Chamber of Commerce to make the required appointment within two months.

(b) The Arbitral Tribunal shall reach its decision by a majority of votes. Its award shall be final and binding on both parties to the dispute, and shall be entered in any court of jurisdiction.

(c) The Arbitral Award shall be made in accordance with the domestic laws, including the rules of conflicts of laws of the Contracting State which accepts the investment and in accordance with the provisions of this Agreement as well as the principles of international law generally recognised and adopted by both Contracting States.

(d) Each party to the dispute shall bear the cost of its own arbitrator and of its counsel in the arbitration proceedings. The cost of the Chairman and the remaining costs of the Arbitral Tribunal shall be borne in equal parts by both parties to the dispute.

5. With Respect to Article 12:

Kuwaiti investors shall immediately enjoy all rights, exemptions and privileges which are existing today and granted to similar investors in Malta. In addition the Kuwaiti investors shall, subject to Article 4 of this Agreement, automatically enjoy, in relation to their investments, all privileges deriving from more favourable future Maltese laws and regulations and / or from any accord, agreement, contract or convention concluded or to be concluded by Malta with Maltese nationals investors or foreign investors.

In witness whereof the undersigned duly authorised thereto have signed this Agreement.

Done in duplicate at Kuwait on this 19th day of April 1995, corresponding to 19th day of Thulqida 1415H., in the English and Arabic languages both texts being equally authentic.

For Malta

For the State of Kuwait