

AGREEMENT BETWEEN THE KINGDOM OF DENMARK AND THE STATE OF KUWAIT FOR THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS

The Kingdom of Denmark 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 of the other Contracting State;

Referring to the Agreement on Economic, Industrial, Scientific and Technical co-operation between the two States and its objectives;

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

Have agreed as follows:

Article 1. Definitions

For the purpose of this Agreement,

1) The term »investment« shall mean every kind of asset 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 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; 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, loans, guarantees and securities issued by a Contracting State or any of its investors and returns retained for the purpose of re-investment;
- c) Debt, service and claims to money or to any performance having economic value associated with an investment;
- d) Intellectual and industrial property rights, including, but not limited to, rights with respect to copyrights, trademarks, patents, industrial designs, know-how, trade secrets, trade names and goodwill and other industrial property rights;
- e) Any right conferred by law or contract and any licences and permits issued pursuant to law, including rights to prospect, explore, extract, win or utilise natural resources, and rights to manufacture, use and sell products.

2) Any alteration of the form in which assets are invested or reinvested shall not affect their character as investment.

3) The term »investor« shall mean:

- a) Physical persons;
- b) Juridical persons; or
- c) The government of a Contracting State,
Who invest in the other Contracting State.

4) The term »physical person« shall mean a person holding the nationality of a Contracting State according to its laws.

5) The term »juridical person« shall mean:

a) Authorities, funds, companies, corporations, firms, associations or any other juridical person established or constituted under the law in force in either of the Contracting States;

b) Legal entities established under the law of any State which are, directly or indirectly, owned or controlled by investors of the Contracting State having their seat with real economic activities in the territory of that Contracting State.

An investor according to this subparagraph may be required to submit proof of such ownership or control in order to be recognised by the Contracting State in the territory of which the investment has been or is to be made as an investor of the other Contracting State.

6) The term »control« over the assets in an entity established as a juridical person outside the jurisdiction of a Contracting State relate to the exertion by an investor of a Contracting State of a controlling influence over the activities of that other juridical person, if the influence results from the equity participation of the investor or from powers conferred upon him in the founding documents of such a juridical person.

Contractual arrangements alone, such as for example loans, existing between the investor of a Contracting State and a third-state juridical person, do not constitute »control« in the absence of other means of control under company law.

7) The term »returns« shall mean amounts yielded by an investment and in particular, though not exclusively, includes profits, interests, capital gains, dividends, royalties, fees and payment in kind.

8) The term »territory« means all the territory of a Contracting State recognised 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 right or jurisdiction.

The present Agreement shall not apply to the Faroe Islands and Greenland.

9) »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 purchases of foreign exchange for imports, in accordance with national regulations and practices.

10) The term »expropriation« shall also comprise the nationalisation, freezing or blocking of assets, dispossession, compulsory sale of all or part of the investment, impairment or deprivation of management, disposition or control of such an investment or any other measure (not being a commercial risk) by a Contracting State, if the effect of the above-mentioned measures would be tantamount to expropriation.

11) The term »without delay« shall be deemed to be fulfilled if a transfer is made within such period as is normally required by international financial custom and not later, in any case, than three months.

Article 2. Promotion of Investments

1) Each Contracting State shall admit the investments made by investors of the other Contracting State in accordance with its laws, regulations and administrative practices, and promote such investments as far as possible.

2) 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 and the host State shall give them 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.

3) 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.

4) Within the framework of their internal legislation, the Contracting States shall favourably examine requests for entry and authorisation to reside, work and travel made by the nationals of one Contracting State in relation to an investment in the territory of the other Contracting State.

5) Each Contracting State shall endeavour to maintain conditions of free competition for investments of investors of the other Contracting State.

6) Neither Contracting State shall impose performance requirements as a condition of establishment, expansion or maintenance of investments, which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements.

Article 3. Protection of Investments and Standard of Treatment

- 1) Once established, investments shall at all times enjoy full protection and security, in a manner consistent with International Law.
- 2) Each Contracting State shall observe any obligation it may have entered into with regard to any particular investment of an investor of the other Contracting State.
- 3) Each Contracting State recognises 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 investment agreements, investment authorisations and properties. Each Contracting State shall grant to investors of the other Contracting State, on terms and conditions not less favourable than those which it grants in like situations to its own investors or to investors of any third State, whichever is the most favourable treatment, 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 otherwise qualify under applicable laws and regulations of the forum for the purpose of asserting claims, and enforcing rights, with respect to their investments.
- 4) Each contracting State shall make public all laws, regulations, administrative practices and procedures that pertain to or affect investments in its territory of investors of the other Contracting State.
- 5) Each Contracting State shall accord investments and associated activities in connection with these investments, made in its territory by investors of the other Contracting State, fair and equitable treatment. This 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 the most favourable.
- 6) Neither Contracting State shall in any way impair by unreasonable or discriminatory measures the management, expansion, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting State.
- 7) Neither Contracting State shall in its territory subject the investors of the other Contracting State, as regards the management, maintenance, use, enjoyment, or disposal of their investments, compensation, transfers or returns, to treatment less favourable than that which it accords to its own investors or to investors of any third State (whichever of these standards is more favourable from the point of view of the investor).

Article 4. Exception

- 1) Nothing in this Agreement shall be construed as to oblige one Contracting State to extend to the investors of the other Contracting State and their investments the present or future benefit of any treatment, preference or privilege resulting from:
 - a) Any existing or future customs union, regional or sub-regional economic organisation or similar international agreement to which either of the Contracting State is or may become a party; or
 - b) Any international, regional or sub-regional agreement or other arrangement relating wholly or mainly to taxation, or movement of capital or any domestic legislation relating wholly or mainly to taxation; or
 - c) Any regulation to facilitate the frontier trade.
- 2) It is understood that the expression »movement of capital« mentioned in subparagraph b) of paragraph 1 shall refer to the following organisations:
 - i) The Organization of the Islamic Conference (OIC);
 - ii) The Arab League; and
 - iii) The Gulf Cooperation Council (GCC).

Article 5. Compensation for Damage or Loss

- 1) When investments made 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 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), investors of one Contracting State who in any of the events referred to in that paragraph suffer loss in the territory 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 loss sustained as a result of the requisitioning or of the destruction of the property.

3) Payments resulting from any provision in this Article shall be freely transferable, without delay and shall include interest at LIBOR rate until the day of payment and be effectively realisable.

Article 6. Sequestration and Confiscation

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

Article 7. Expropriation and Compensation

1)

a) Investments of either Contracting State or any of its investors shall not be expropriated or subjected to measures having effect equivalent to expropriation by the other Contracting State except for a public purpose related to the internal needs of that State, for prompt, adequate, just and effective compensation and on condition that such measures are taken on a non-discriminatory basis and in accordance with domestic laws of general application and are not contrary to any undertaking which that State may have given to the investor concerned.

b) Such compensation shall be computed and determined in accordance with recognised principles of valuation such as the fair market value of the investment immediately prior to or at the time when the decision for expropriation was announced or became publicly known, whichever is the most favourable. When determining the market value, the following factors shall be taken into account: the capital invested, depreciation, capital already repatriated, replacement value, appreciation, current returns, goodwill and other relevant factors.

The compensation shall be made without delay and shall include interest at LIBOR rate until the date of payment, be effectively realisable and be freely transferable.

There shall be legal provisions giving the investor concerned a right to prompt review of the legality of the expropriation and of the valuation of compensation in accordance with the principles set out in this paragraph by due process of law in the territory of the Contracting State making the expropriation.

c) Where a Contracting State expropriates the investment of a juridical person which is established or licensed under the law in force in its territory 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, just and effective compensation is received and allowed to be repatriated. Such compensation shall be determined and paid in accordance with the provisions of paragraph 1) b).

2) The provisions of this Article shall also apply to the current returns from an investment as well as, in the event of liquidation, to the proceeds from the liquidation.

Article 8. Transfers

1) Each Contracting State shall, subject to its right to exercise equitably, in good faith and on a non-discriminatory basis the powers conferred by its laws, guarantee without delay the transfer in any freely convertible currency of:

a) The returns;

b) The proceeds accruing from the sale, total or partial liquidation of any investment made by an investor of the other Contracting State;

c) Payments made for repayment of borrowings;

d) The earnings of nationals of the other Contracting State deriving from their work and service in connection with an investment in its territory;

e) Amounts spent for the management and maintenance of the investment in the territory of the Contracting State or a third State; and

f) Compensation referred to in Articles 5 and 7.

2) In case transfer in freely convertible currencies cannot take place, the rate of exchange shall correspond to the cross rate obtained from those rates which would be applied by the International Monetary Fund on the date of payment for conversions of the currencies concerned into Special Drawing Rights.

Article 9. 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 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 transaction, and

b) That the other Contracting State (or its designated Agency) is entitled by virtue of subrogation to enforce such right and shall assume the obligations related to the investment.

2) If such other Contracting State acquires any amounts in such manner as above, it shall be accorded in respect thereof treatment not less favourable than that accorded to the funds of investors of the host State or of any third State deriving from investment activities similar to those in which the party indemnified was engaged, whichever is the most favourable.

Article 10. Settlement of Investment Disputes

1) Any dispute which may arise between a Contracting State and an investor of the other Contracting State with respect to an investment of such investor in the territory of that other Contracting State, shall initially be resolved by consultations or negotiations between the parties to the dispute.

2)

a) In the event that the dispute has not been resolved by consultations or negotiations within (6) six months of the date upon which it arose, either party to the dispute shall be entitled to submit the dispute to the International Centre for the Settlement of Investment Disputes («Centre») for settlement by conciliation or binding arbitration.

b) Each Contracting State hereby consents to the submission of an investment dispute to the Centre for settlement by conciliation or binding arbitration.

c) Conciliation or binding arbitration of such disputes shall be done in accordance with the provisions of the Washington convention on the Settlement of Investment Disputes Between States and Nationals of other States opened for signature in Washington on 18th March 1965 («Convention») and the Regulations and Rules of the Centre. Settlement of Investment Disputes Between States and Nationals of other States opened for signature in Washington on 18th March 1965 («Convention») and the Regulations and Rules of the Centre.

3) In any proceedings, 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 defense, its immunity. Any counter-claim, 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.

4) 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.

5) 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.

6) In case the Washington Convention is not applicable, then the dispute shall be settled by an international ad hoc arbitration.

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.

b) 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.

c) The Tribunal which shall normally sit and render its award in Sweden may also hear evidence and hold meetings in such other places as it may deem appropriate. Proceedings shall be conducted in the English language provided that, where it deems necessary or conducive to reaching a just decision, the Tribunal may hear any evidence or admit any document in another language. Provided further that in such case the Tribunal shall cause to be made available a reliable translation in the English language.

d) 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 enforced by both parties to the dispute.

e) The Arbitral Award shall be made in accordance with the domestic laws, including the rules of conflict, of the Contracting State which accepts the investments and in accordance with the provisions of this Agreement as well as the principles of International Law generally recognized.

f) 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 proceedings shall be borne in equal parts by both parties to the dispute unless the Tribunal decides otherwise.

Article 11. Settlement of Disputes between Contracting States

1) Any dispute between the Contracting States concerning the interpretation or application of this Agreement shall be settled as far as possible through friendly consultations and negotiations between the Contracting States.

2) If the dispute cannot be so settled within (6) six 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 for each individual case in the following way: Within three 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 who on approval by the Contracting States shall act as Chairman (hereinafter referred to as the Chairman). The Chairman shall be appointed within three months from the date of appointment of the other two members.

4) If within any of the periods specified in Paragraph 3) the necessary appointments have not been made, either Contracting State, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointment. 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 appointment. If the Vice-President is also 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 necessary appointments.

5) The Arbitral Tribunal shall apply the provisions of this Agreement, other Agreements concluded between the Contracting States, and the procedural standards called for by International Law. It shall reach its decision by a majority of votes. Such decision shall be final and binding on both Contracting States.

6) Each Contracting State shall bear the cost of its own member of the Tribunal and of its representation in the arbitral proceedings. The cost of the Chairman and the remaining costs shall be borne in equal parts by the Contracting States.

7) The Arbitral Tribunal shall determine its own procedure.

Article 12. 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 13. National or International Law

Nothing in this Agreement shall prejudice any rights or benefits under national or International Law accruing to an investor of one Contracting State in the territory of the other Contracting State.

Article 14. Application

This Agreement shall also apply to investments made by investors of either Contracting State in the territory of the other Contracting State prior to the entering into force of this Agreement.

Article 15. Entry Into Force

This Agreement shall enter into force when the Contracting States have notified each other that the constitutional requirements for the entry into force of this Agreement have been complied with.

Article 16. Duration and Termination

1) This Agreement shall remain in force for a period of twenty years and shall continue in force thereafter for a 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 the 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 fifteen years from the date of termination of the present Agreement.

Done in duplicate at Copenhagen this 1. day of June 2001 corresponding to this 9. day of Rabi I 1422 H in the Danish, Arabic, and English languages, all texts being equally authentic.

In case of divergence of interpretation, the English text shall prevail.

For the Government of the Kingdom of Denmark Herluf Hansen

For the Government of the State of Kuwait Abdul Mohsen Y. Al-Hunaif