Agreement between the Government of the State of Kuwait and the Government of the Democratic Socialist Republic of Sri Lanka for the Mutual Promotion and Protection of Investments

The Government of the State of Kuwait and the Government of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as the "Contracting States"),

Desiring to promote economic cooperation for the mutual benefit of both Contracting States and

To create and maintain conditions conducive to investments made by investors of one Contracting State in the territory of the other Contracting State, and

Recognizing that the mutual promotion and protection of such investments will serve as an incentive to stimulate trade, capital flows, and economic development in both Contracting States,

Have agreed as follows:

Article 1. Definitions

For the purposes of this Agreement:

1. The term "investment" means all types of assets in the territory of a Contracting State that are owned or controlled by an investor of the other Contracting State, directly or indirectly, and which have been introduced into the territory in accordance with the laws and regulations of the host State, and includes assets or rights consisting of or taking the form of:

a) Tangible and intangible movable and immovable property, and any property rights related thereto, such as leases, mortgages, debt securities, and liens;

b) equity interests, debentures, and other securities such as company shares, partnership interests, debentures, and other forms of equity interests in a company, as well as other debts, loans, and securities issued by any investor of a Contracting State;

c) Monetary claims and claims to any other assets or performance under a contract of economic value related to an investment;

d) Intellectual property rights, including, without limitation, copyrights, trademarks, patents, industrial designs and models, technical processes, know-how, trade secrets, trade names, and goodwill related to the investment or licenses granted, contract, or pursuant to any concession;

e) Any right granted by law to prospect, explore, extract, or exploit resources, including natural resource rights and rights to engage in other economic or commercial activities or to provide services.

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

The term "investment" also applies to "returns" retained for the purpose of reinvestment, and to "liquidation" as defined below.

2. The term "investor" means, with respect to a Contracting State:

a) the government of either Contracting State;

b) a natural person who is a national or resident of that Contracting State in accordance with its applicable laws;

c) Any legal entity established for that purpose or incorporated under the laws and regulations of that Contracting State, having its registered office within the territory of that Contracting State, which invests in the other Contracting State, such as

institutions, development funds, agencies, charitable organizations, and other legal entities and bodies, as well as companies.

3. The term “income” means the amounts derived from an investment, regardless of the form in which they are paid, and includes, in particular but not limited to, profits, interest, capital gains, dividends, royalties, management fees, technical assistance fees, or other legal payments or fees.

4. The term “territory” means:

a) With respect to the State of Kuwait: the territorial lands, including any area outside the territorial sea which, in accordance with international law, has been or may hereafter be designated by the State of Kuwait as an area in which it may not exercise sovereign rights or jurisdiction.

b) With respect to the Democratic Socialist Republic of Sri Lanka: the territorial land, internal waters, and territorial sea of the Democratic Socialist Republic of Sri Lanka, including, the maritime zones beyond the territorial sea, including the seabed and subsoil, which, in accordance with its applicable domestic laws and international law, have been or may subsequently be designated as an area in which the Democratic Socialist Republic of Sri Lanka exercises sovereign rights and jurisdiction for the purpose of exploring and exploiting the natural resources of those areas.

5. The term “company” means any legal entity, whether or not established for the purpose of making a profit, and whether owned or controlled by the private or public sector, duly organized in accordance with the laws of the Contracting State, and includes public institutions, trusts, joint-stock companies, sole proprietorships, branches, joint ventures, and other similar associations or organizations.

6. The term “liquidation” means any action taken for the purpose of the total or partial termination of an investment.

7. The term “freely convertible currency” means any currency designated by the International Monetary Fund from time to time as a currency that is freely usable in accordance with the Articles of Agreement of the International Monetary Fund and any subsequent amendments thereto.

8. The term “without delay” means the period of time normally required to complete the formalities necessary for the transfer of funds.

Article 2. Promotion and Protection of Investments

1. Each Contracting State shall encourage and create more favorable conditions for investments by investors of the other Contracting State in its territory and, in accordance with its laws and regulations, shall admit such investments.

2. Investments made by investors of one Contracting State in the territory of the other Contracting State shall be accorded fair and equitable treatment and shall enjoy full protection and security, in a manner consistent with the principles of recognized international law and the provisions of this Agreement. Neither Contracting State shall, in any manner whatsoever, take arbitrary or discriminatory measures that would impair the management, ownership, use, enjoyment, or disposal of investments in the territory of the other Contracting State. Each Contracting State shall observe any obligation or commitment to which it may be a party relating to the investments of investors of the other Contracting State.

3. Investments in the host Contracting State shall not, upon establishment, be subject to additional performance requirements that may hinder or restrict their expansion or operation, or adversely affect or be deemed detrimental to their continued existence, unless such requirements are required by generally applicable law.

Article 3. National Treatment

1. Each Contracting State shall accord to investments and returns made by investors of the other Contracting State treatment no less favorable than that which it accords to its own investments or returns, or to the investments and returns of investors of any third State, whichever is more favorable.

2. Notwithstanding the foregoing, the provisions of this Article shall not be construed as obligating a Contracting State to accord to investors of another Contracting State any treatment, advantage, or privilege resulting from: (a) any customs union, economic union, free trade area, monetary union, or any other form of regional economic arrangement, or any other international agreement to which either Contracting State is or may become a party; (b) any international or regional agreement, treaty, or other arrangement that is in force and relates wholly or principally to investment.

Article 4. Compensation for Damage or Loss

1. Where investments made by investors of either Contracting State suffer losses due to war, other armed conflict, a state of national emergency, revolution, civil disobedience, insurrection, strikes, or other similar events in the territory of the other Contracting State, the Contracting State shall accord to such investors treatment regarding the restoration of the status quo, indemnification for losses, or other compensation no less favorable than that accorded by the other Contracting State to its own investors or to investors of any third State.

2. Without prejudice to paragraph 1 of this Article, investors of either Contracting State who suffer a loss as a result of any of the events referred to in that paragraph in the territory of the other Contracting State and arising from:

a) the expropriation of their property by the forces or authorities of the latter Contracting State;

b) or the destruction of their property by the forces or authorities of the latter Contracting State, without such action being caused by combat operations or necessitated by the exigencies of the situation,

shall be restored to their former status, or shall be granted prompt, adequate, and effective compensation for the losses incurred during the period of expropriation or as a result of the destruction of their property. Payments arising therefrom may be remitted in any freely convertible currency without delay.

Article 5. Expropriation

1. (a) Investments made by investors of either Contracting State in the territory of the other Contracting State shall not be nationalized, expropriated, deprived of their ownership, or subjected, directly or indirectly, to measures having an effect equivalent to nationalization, expropriation, or deprivation of ownership (collectively referred to as “expropriation”) by a Contracting State except for a public purpose related to the internal needs of that Contracting State and in return for prompt and adequate compensation, provided that such measures are taken on a non-discriminatory basis and in accordance with applicable legal procedures.

(b) The amount of such compensation shall be the fair market value of the expropriated investment, and shall be determined and calculated in accordance with internationally recognized valuation principles based on the fair market value of the expropriated investment immediately prior to the expropriation or at the time when the impending expropriation became publicly known, whichever is earlier (hereinafter referred to as the “valuation date”). Such compensation shall be calculated in a freely convertible currency selected by the investor based on the market value of the prevailing exchange rate for that currency on the valuation date, including interest at a market rate determined on a market basis, provided that it shall in no event be less than the prevailing interest rate among London (LIBOR) or its equivalent, from the date of expropriation until the date of payment.

2. For further clarification, expropriation includes cases where a Contracting State nationalizes assets, a company, or a project established or incorporated under the laws in force in its territory in which an investor of the other Contracting State holds an investment through shares, equity interests, debt securities, rights, or other interests.

3. The aggrieved investor shall have the right to immediate review of the matter by a judicial authority or other independent authority in the Contracting State where the investment is situated, including the determination of its validity and compliance with the principles set forth in this Article.

4. For the purposes of this Agreement, the term “expropriation” includes any regulatory measures such as freezing or seizure of the investment.

Article 6. Transfer of Payments Related to Investments

1. Each Contracting State shall guarantee to investors of the other Contracting State the free transfer into and out of its territory of payments relating to the investment.

2. Transfers of payments under paragraph 1 of this Article shall be effected without delay or restriction and in a freely convertible currency; except in the case of payments in kind, the aggrieved investor shall be entitled to receive interest for the period of such delay in effecting the required transfers.

3. Notwithstanding paragraphs 1 and 2 of this Article, the Contracting State concerned may take measures to restrict the transfer of payments relating to investments in the event of a balance of payments crisis or difficulty. Such restrictions shall be applied on an equitable and non-discriminatory basis and in good faith, with a view to minimizing the adverse effects on the free transfer of payments protected by this Convention. The duration of the restrictions on the transfer of payments provided for in paragraph 1 of this Article shall apply only for as long as is necessary to correct a balance of payments difficulty.

Article 7. Subrogation

1. If the Contracting State or its designated agency (the guaranteeing party) makes a payment under an indemnity or guarantee it has undertaken in connection with an investment in the territory of the other Contracting State (the host State), the host State shall recognize:

a) the subrogation of the guarantor, by law or legal transaction, to all rights and claims arising from such an investment;

b) the right of the guarantor to exercise such rights and enforce such claims and to assume all obligations relating to the investment in accordance with the principle of subrogation.

2. In all circumstances, the guarantor shall be entitled, by the same operation and subject to the same conditions:

a) to the rights, benefits, and obligations acquired pursuant to the assignment referred to in paragraph 1 above;

b) to any payments received based on such rights and benefits;

just as the original investor was entitled to receive under this agreement with respect to paragraph 3.

3. The rights and benefits acquired by the subrogated party shall not exceed the original rights and benefits of the contracting party.

Article 8. Settlement of Disputes between a Contracting Party and an Investor

1. Disputes arising between a contracting party and an investor affiliated with the other contracting party regarding an investment belonging to the latter in the State of the first party shall, as far as possible, be settled by amicable means.

2. If such disputes cannot be settled within six months from the date on which either party to the dispute requests amicable settlement by delivering a written notice to the other party, the dispute shall be submitted for resolution, at the investor's choice, by one of the following means:

a) The competent court or administrative tribunal of the Contracting State that is a party to the dispute;

b) In accordance with procedures for dispute resolution agreed upon in advance;

c) International arbitration in accordance with the provisions of this Article.

3. If the investor chooses to submit the dispute to international arbitration, the State must also give its written consent to the submission of the dispute for settlement by one of the following bodies:

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 in Washington on March 18, 1965 (the Washington Convention), provided that both States are Contracting Parties to the Washington Convention and have entered into the Washington Convention at that time;

b) the Center, pursuant to the rules governing additional facilities for the administration of proceedings by the Secretary-General of the Center ("Rules on Additional Facilities"), if the Contracting State of the investor or the Contracting State party to the dispute, but not both, is a party to the Washington Convention;

c) An arbitral tribunal established under the Rules of Arbitration ("the Rules") of the United Nations Commission on International Trade Law (UNCITRAL), as such 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 Center);

d) An arbitral tribunal constituted in accordance with the arbitration rules of any arbitration institution mutually agreed upon by the parties to the dispute.

4. Although the investor has submitted the dispute to binding arbitration pursuant to paragraph 3, he may, before the commencement of arbitration proceedings or during such proceedings, apply to the judicial or administrative courts of the State Party to the dispute to issue a provisional order to preserve his rights and interests, provided that such application shall not include a claim for compensation for any damages.

5. A Contracting State shall not, in its diplomatic capacity, pay any costs in any judicial or arbitral proceedings or in the enforcement of any decision or award relating to an investment dispute between a Contracting State and an investor of another Contracting State. Nor may a counterclaim or set-off be raised on the grounds that the investor concerned has

received or will receive, under an insurance contract, compensation for loss or any other indemnity for all or part of the loss claimed.

Article 9. Settlement of Disputes between the Contracting Parties

1. The Contracting States shall, to the extent possible, settle any dispute concerning the interpretation or application of this Agreement through consultations via diplomatic channels.

2. If the dispute is not settled within six (6) months from the date of the request for such consultations by either Contracting State, and unless the Contracting States agree otherwise, either Contracting State may, by written notification to the other Contracting State, refer the dispute to an 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; the members shall select a national of a third State to serve as President of the arbitral tribunal, who shall be appointed by mutual agreement of the Contracting States; and these two members shall be appointed within (2) months, and the chairperson within (4) four months from the date on which either Contracting State notifies the other Contracting State of its intention to submit the dispute to an arbitral tribunal.

4. If the time limits specified in paragraph (3) above are not observed, 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 of the International Court of Justice is a national of one of the Contracting States or is unable to perform the said task, the Vice-President of the International Court of Justice shall be requested to make the necessary appointments; and if the Vice President of the International Court of Justice is a national of one of the Contracting States or is unable to perform the said task, the member of the International Court of Justice next in rank who is not a national of either Contracting State shall make the necessary appointments.

5. The Arbitral Tribunal shall render its decisions by a majority vote. Such decisions shall be in accordance with this Convention and the rules of international law, as applicable, and shall be final and binding upon both Contracting States. Each Contracting State shall bear the expenses of the member of the Arbitral Tribunal appointed by that Contracting State, as well as the expenses of its representation in the arbitration proceedings. The expenses of the President, as well as any other costs of the arbitration, shall be borne equally by both Contracting States. However, the arbitral tribunal may, at its discretion, rule that one of the Contracting States shall bear a greater share of the costs or all of them. The arbitral tribunal shall determine its own procedures with respect to all other matters.

Article 10. Application of other Rules

If the laws of either Contracting State or obligations under international law, whether currently in force or which may arise at a later date between the Contracting States, in addition to this Agreement, contain provisions, whether general or specific, granting investments by investors of the other Contracting State more favorable treatment than that provided for in this Agreement, such provisions shall prevail over this Agreement to the extent that they provide more favorable treatment.

Article 11. Scope of the Agreement

This Agreement applies to all investments, whether existing or made after the date of entry into force of this Agreement, by investors of either Contracting State in the territory of the other Contracting State. However, the provisions of this Agreement shall not apply to any claims arising after its entry into force or to any claims settled prior to its entry into force.

Article 12. Consultations

A Contracting State may, at the request of either Contracting State, hold consultations for the purpose of reviewing the application of this Agreement. Such consultations shall be held between the competent authorities of the two Contracting States at a time and place agreed upon by the competent authorities of the two Contracting States through diplomatic channels.

Article 13. Termination

Either Contracting State shall notify the other in writing of its intention to terminate this Agreement, and the Agreement shall terminate on the thirtieth day following the date of receipt of the last notification.

Article 14. Duration and Termination

1. This Agreement shall remain in force for a period of twenty (20) years and shall continue in force thereafter for an equal period or periods, unless either Contracting State notifies the other Contracting State in writing at least one year prior to the expiration of the initial period or any subsequent period of its intention to terminate the Agreement.

2. With respect to contracts concluded after the effective date of the notice of termination of this Agreement, the provisions of this Agreement shall remain in force for a period of fifteen (15) years from the date of termination of this Agreement.

In witness whereof, the authorized representatives of both contracting parties have signed this agreement.

Done at Al-Kut on this day, the 17th of Dhu al-Qi'dah 1430 AH, corresponding to November 5, 2009, in three original copies in the Arabic, Arabic (final), and English languages, each copy having equal legal force; in the event of any discrepancy, the English text shall prevail.

For the Government of the Democratic Socialist Republic of Sri Lanka:

Kankatamge Sarath Chandra,

Ambassador Extraordinary and Plenipotentiary of the Democratic Socialist Republic of Sri Lanka to the State of Kuwait;

For the Government of the State of Kuwait:

Khalifa Musa Hamada,

Undersecretary of the Ministry of Finance