

AGREEMENT BETWEEN THE STATE OF KUWAIT AND THE REPUBLIC OF INDIA FOR THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT

The State of Kuwait and the Republic of India. (hereinafter referred to as the 'Contracting States');

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

Recognising 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 States;

Have agreed as follows:

Article 1. Definitions

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

1. "companies" means

(a) In respect of India corporations, firms and associations incorporated or constituted or established under the law in force in any part of India;

(b) In respect of Kuwait : any juridical person or other entity legally constituted under the laws and regulations of Kuwait, such as institutions, development funds, authorities, foundations, establishments, agencies, enterprises, cooperatives, partnerships, corporations, companies, firms, organisations and business associations or similar entities irrespective of whether their liabilities are limited or otherwise;

This Agreement shall not apply to any indirect investments in a Contracting State made through a company incorporated in a third state unless such company is owned to an extent of at least 51% or is controlled by investors of the other Contracting State. An investor of a Contracting State shall be regarded as controlling a company incorporated in a third state if such investor has real ownership interest in, and exercises effective control over the company. The provisions of Article 10 shall apply to any dispute regarding whether an investor controls a company incorporated in a third state.

2. 'investment' means every kind of asset, owned or controlled directly or indirectly by an investor of one Contracting State and invested in the territory of the other Contracting State in accordance with the laws of the Contracting State. This term shall include in particular, though not exclusively:

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

(b) Shares, stocks, bonds, debentures and any other similar forms of participation in a company and other debts and loans and securities issued by any investor of a Contracting State, and returns retained for the purpose of reinvestment and associated activities as these terms are defined hereinafter;

(c) Rights or claims to money or to any performance under contract having a financial or economic value;

(d) Intellectual property rights, goodwill, technical processes, know-how, copyrights, trade marks, trade names and patents in accordance with the relevant laws of the respective host Contracting State;

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

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

3. Investors" means any national. company or Government of a Contracting State:

4. Nationals" means natural persons holding the nationality of a Contracting State in accordance with its applicable law.

5. "returns" means the monetary amounts yielded by an investment such as profit. interest, capital gains, dividends, royalties. management and technical assistance fees:

6. "territory" means

(a) In respect of India : the territory of the Republic of India including its territorial waters and the airspace above it and other maritime zones including the Exclusive Economic Zone and continental shelf over which the Republic of India has sovereignty. sovereign rights or exclusive jurisdiction in accordance with its laws in force. the 1952 United Nations Convention on the Law of the Sea and International Law.

(b) In respect of Kuwait: the territory' of Kuwait recognised by international law including any area beyond the territorial seas which in accordance with international law has been or may hereafter be designated under the laws of Kuwait as an area over which Kuwait may exercise sovereign rights or jurisdiction.

7. The term 'own' or 'control' shall mean to include ownership; or control exercised through subsidiaries or affiliates wherever locate.

8. The term associated activities' shall mean activities connected with an investment and shall include without limitation, such activities as

(a) The establishment, control and maintenance of branches, agencies. offices or other facilities for the conduct of business:

(b) The organisation of companies. the acquisition of companies or interests in companies or the management. control. maintenance, use. enjoyment and expansion. and the sale. liquidation, dissolution or other disposal of companies organised or acquired: .

(c) The acquisition. ownership. use and disposal by any legal means of property of all kinds. including intellectual property. as well as the protection thereof:

(d) The borrowing of funds from local financial institutions, the purchase. sale and issue of shares and other securities in the local financial markets, the purchase of foreign exchange for the operation of the investments and investment contracts, in accordance with applicable laws and regulations of the Contracting State in which the investment is made.

9. 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 on month.

Article 2. Scope of the Agreement

This Agreement shall apply to all investments made by investors of either Contracting State in the territory of the other Contracting State, whether made before or after the coming .into force of this Agreement.

Article 3. Encouragement 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 admit such investments in accordance with its laws and policy.

2. The Contracting States shall encourage and facilitate the formation and establishment of appropriate legal entities by investors in order to establish. develop and execute investment projects in different economic sectors as may be permitted by the laws and regulations of the host Contracting State.

3. Each Contracting State shall in its territory endeavour to take and enforce the necessary measures as may be applicable for granting of appropriate facilities, incentives, and other forms of encouragement for investments made by investors of the other Contracting State, and such investor may, in this regard, be granted by the host Contracting State all necessary consents, approvals, licences and authorisations to such an extent and on such terms and conditions as may be determined by its laws and regulations.

4. The Contracting States may consult with each other in any manner they may deem appropriate to encourage and

facilitate investment opportunities within their respective territories,

5. Neither Contracting State shall place any constraints on the movement of goods or persons directly connected with an investment being transported subject to bilateral or international agreements governing such transport. which are in force between the Contracting States.

Article 4. Protection of Investments

1. Investments by investors of either Contracting State shall enjoy full protection and security in the territory of the other Contracting State in a manner consistent with the provisions of this Agreement and applicable rules of international law. Neither Contracting State shall in any way impair by arbitrary or discriminatory measures, the management, maintenance, use, enjoyment, or disposal of investments.

2. Each Contracting State shall make public all laws, regulations, policies, and procedures that pertain to or directly affect investments in its territory of investors of the other Contracting State.

3. Each Contracting State shall observe any obligation or undertaking it may have entered into with regard to investments in its territory by investors of the other Contracting State with disputes arising from such obligations being only redressed under the terms of the contracts underlying the obligations.

4. Once established, investment shall not be subjected in the host Contracting State to additional performance requirements which may hinder or restrict their expansion or maintenance or adversely affect or be considered as detrimental to their viability, unless such requirements are deemed vital for reasons of public order, public health or environmental concerns and are enforced by law of general application.

5. Each Contracting State shall maintain a favourable environment for investments in its territory by investors of the other Contracting State. Each Contracting State shall in accordance with its applicable laws and regulations provide effective means of asserting claims and enforcing rights with respect to investments and ensure to investors of the other Contracting State. the right of access to its courts of justice. administrative tribunals and agencies. and all other bodies exercising adjudicatory authority, and the right to employ persons of their choice, for the purpose of the assertion of claims and the enforcement of rights with respect to their investments.

6. In case of liquidation of an investment, the proceeds from liquidation shall be accorded the same forms of protection and treatment as the initial investment, including those accorded by virtue of Article 6 hereunder.

Article 5. Treatment of Investments

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

2. Each Contracting State shall accord to investors of the other Contracting State as regards compensation, transfers, management, use, enjoyment, acquisition or disposal of their investments treatment no less favourable than that which it accords to investments by its own investors or by investors of any third state, whichever is the most favourable.

3. However, the provisions of this Article shall not be construed so as to oblige one Contracting State to extend to the investors of the other Contracting State the benefits 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 for other similar international agreement, to which either of the Contracting States, is or may become a party, or

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

4. A Contracting State shall not discriminate against investments by investors of the other Contracting State in favour of investments by its own investors or investors of a third state in respect of the purchase of materials, energy, fuel or of means of production, transport or operation of any kind or restrict the marketing of products inside or outside its territory.

Article 6. Compensation for Damage or Loss

1. When investments made by investors of either Contracting State suffer damage or loss owing to war or other armed conflict, a state of national emergency, revolt, civil disturbances, 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 the latter Contracting State accords to its own investors or 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 damage or loss in the territory of the other Contracting State resulting from

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

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

Shall be accorded expeditious, 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. Resulting payments shall be made in a freely convertible currency and be freely transferable without delay.

Article 7. Expropriation

1.(a) Investments made by investors of one Contracting State in the territory of the other Contracting State shall not be nationalized, expropriated, dispossessed or subjected to direct or indirect measures having effect equivalent to nationalisation. expropriation or dispossession (hereinafter collectively referred to as expropriation') b the other Contracting State except for a public purpose related to the internal needs of that Contracting State and against expeditious adequate and effective compensation and on condition that such measures are taken on a non-discriminatory basis and in accordance with the procedure established under law.

(b) Such compensation shall amount to the actual value of the expropriated investment and shall be determined and computed 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 "valuation date"). Such compensation shall include interest at the prevailing commercial market rate, however, in no event less than the prevailing six month 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 expeditiously paid to the investor in a freely convertible currency and allowed to be freely transferred without delay.

2. Without prejudice to his rights under Article 9 of this Agreement the investor affected shall have a right . under the law of the Contracting State making the expropriation, to review, by a judicial or other independent authority of that State, of his or its case and of the valuation of his or its investment in accordance with the principles set out in paragraph 1. The Contracting State making the expropriation shall make every endeavour to ensure that such review is carried out promptly.

3. Where a Contracting State expropriates the assets of a company which is incorporated or constituted under its applicable law in force in any part of its own territory, and in which investors of the other Contracting State own shares, stocks, debentures or other rights of interest it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to ensure fair and equitable compensation in respect of their investment to such investors of the other Contracting State who are owners of such rights or interest.

4. The term "expropriation" shall also apply to interventions or regulatory measures by a Contracting State such as the freezing or blocking of the investment. levying or arbitrary or excessive tax on the investment, compulsory sale of all or part of the investment, or other comparable measures, that have a de facto confiscatory or expropriatory effect in that 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 his investment.

Article 8. Transfer of Payments Related to Investments

1. Each Contracting State shall permit investors of the other Contracting State the 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 amortisation of principle and accrued interest payments made pursuant to a loan agreement:

(d) Royalties and fees referred to in Article I, paragraph 1(d):

(e) Proceeds from sale or liquidation of the whole or any part of the investment, including shares:

(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 effected 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 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 9. Subrogation

1. If a Contracting State, its designated agency or a company or other enterprise constituted or incorporated in that Contracting State other than an investor (the Indemnifying Party") makes a payment under an indemnity or guarantee against noncommercial risk it has assumed in respect of an investment in the territory of the other Contracting State the ("Host State"), or otherwise acquires part or all of the rights and claims of such an investment as a result of the complete or partial default of the investor, the Host State shall recognise.

(a) The assignment to the Indemnifying Party by law or by legal transaction or part or all of the rights and claims resulting from such an investment; and

(b) That the Indemnifying Party is entitled to exercise such rights and enforce such claims and shall assume all obligations related to the investment by virtue of subrogation, to the same extent as its predecessor in title or the original investor; and

(c) The subrogated rights or claims shall not exceed the original rights or claims of such investor.

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.

3. Without prejudice to Article 7, any payments received in local currency by the Indemnifying Party in pursuance of the rights and claims acquired shall be freely available to the Indemnifying Party for the purpose of meeting any expenditure incurred in the territory of the Host State.

Article 10. Settlement of Disputes between an Investor and a Contracting State

1. Disputes arising between a Contracting State and an investor of the other Contracting State in respect of an investment, under this Agreement, 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, the dispute shall be submitted for resolution, at the choice of the investor party to the dispute, either

- (a) In accordance with any applicable, previously agreed dispute settlement procedures; or
- (b) To the competent judicial or administrative bodies of the host Contracting State; or
- (c) To international arbitration in accordance with the following paragraphs of this Article.

3. In the event that an investor chooses 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) The International Centre for Settlement of Investment Disputes ("the Centre"), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (the "Washington Convention"), if both Contracting States are parties to the Washington Convention; or

(b) An arbitral tribunal established under the Arbitration Rules of the United Nations Commission on international Trade Law (UNCITRAL), subject to the following modifications:

(1) The Appointing Authority under Article 7 of the Rules shall be the President, the Vice-President or the next senior Judge of the International Court of Justice, who is not a national of either Contracting State. The third arbitrator shall not be a national of either Contracting State.

(2) The parties to the dispute shall appoint their respective arbitrators within two months.

(3) The arbitral tribunal shall state the basis of its decision and give reasons upon the request of either party.

(c) An arbitral tribunal constituted pursuant to the arbitration rules of any other arbitral institution mutually agreed upon between the parties to the dispute.

4. An investor, notwithstanding that it may have submitted a dispute to binding international arbitration under paragraphs 2 and 3 above, may in accordance with applicable laws and regulations and prior to the commencement of the actual arbitral proceedings and without prejudice to such proceedings, seek interim injunctive relief, not involving the payment of damages, before the judicial or administrative tribunals of the Contracting State that is a party to the dispute, for the preservation of its rights and interests.

5. Each Contracting State hereby gives its unconditional consent to the submission of an investment dispute for settlement by binding arbitration in accordance with the 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 II of the Washington Convention, Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1953 (the "New York Convention"), and Article 1 of the UNCITRAL Arbitration Rules.

(b) Any arbitration under this Article shall, as may be mutually agreed by the parties to the dispute, be held in a state that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of Article I of the New York Convention.

(c) Neither Contracting State shall give diplomatic protection or bring an international claim, in respect of any dispute referred to arbitration unless the other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

However, diplomatic protection for the purposes of this sub-paragraph (c) shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute. 7. An arbitral tribunal established under this Article shall decide the issues in dispute in accordance with this Agreement and such rules of law as may be agreed by the parties to the dispute. In the absence of such agreement, it shall apply the law of the Contracting State which is party to the dispute, including its rules on conflict of laws, and applicable rules of international law.

8. An investor other than a natural person which has the nationality of a Contracting State 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 State arises, is controlled by investors of the other Contracting State, shall for the purpose of Article 25(2)(b) of the Washington Convention be treated as a "national of another Contracting State".

9. The awards of arbitration, which may include an award of interest, shall be final and binding on the parties to the dispute. Each Contracting State shall carry out without delay any such award and shall make provision for the effective enforcement in its territory of such awards.

10. In a dispute relating to an investment, a Contracting State shall not assert, as a defence, 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 or guarantee contract, indemnification, or other compensation for all or part of any alleged loss.

Article 11. Settlement of Disputes between Contracting States

1. The Contracting States 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 State and unless the Contracting States otherwise agree in writing, either Contracting State may, by written notice to the other Contracting State, submit the dispute to an ad hoc arbitral tribunal in accordance with the following provisions of this Article.

3. The arbitral tribunal shall be constituted as follows each Contracting State shall appoint one member, and these two members shall agree upon a national of a third state as Chairman of the arbitral tribunal to be appointed by the two Contracting States. Such members shall be appointed within two months, and such Chairman within four months, from the date on which either Contracting State has informed the other Contracting State that it intends to submit the dispute to an arbitral tribunal.

4. If the periods specified in paragraph 3 above have not been complied with, either Contracting State may, in the absence of any other arrangement, invite the President of the International Court of Justice to make the necessary appointments. If the President of the International Court of Justice is a national of either Contracting State 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 necessary appointments. If the Vice-President of the International Court of Justice is a national of either Contracting State 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 State shall be invited to make the necessary appointments.

5. The arbitral tribunal shall take its decision by a majority of votes. Such decision shall be made in accordance with the provisions of this Agreement and applicable rules of international law and shall be final and binding on both Contracting States. Each Contracting State shall bear the costs of the member of the arbitral tribunal appointed by the Contracting State, as well as the costs of 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 States. 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 States. In all other respects, the arbitral tribunal shall determine its own procedure.

Article 12. Entry and Sojourn of Personnel

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

Article 13. Application of other Rules

If the provisions of law of either Contracting State or obligations under, international law existing at present or established hereafter between the Contracting States in addition to the present Agreement contain rules, whether general or specific, entitling investments and associated activities by investors of the other Contracting State to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement.

Article 14. Applicable Laws

1. Except as otherwise provided in this Agreement, all investment shall be governed by the laws in force in the territory of the Contracting State in which such investments are made.

2. Nothing in this Agreement precludes the host Contracting State from taking necessary reasonable measures in

accordance with its laws applied generally on a nondiscriminatory basis. in circumstances of extreme emergency for the specific purposes of prevention of diseases or pests.

Article 15. Entry Into Force

Each Contracting State shall notify the other that its constitutional requirements 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 16. Duration and Termination

1. This Agreement shall remain in force for a period of fifteen (15) years and shall continue in force thereafter for similar period or periods unless. one year before the expiry of the initial or any subsequent period, either Contracting State notifies the other Contracting State in writing of its intention to terminate this Agreement.
2. In respect of investments made prior to the date when the notice of termination of this Agreement becomes effective, the provisions of this Agreement shall continue to be effective for a period of fifteen(15) years from the date of termination of this Agreement.
3. The provisions of this Agreement shall apply irrespective of the existence of diplomatic or consular relations between the Contracting States.

In witness whereof the undersigned. duly authorised thereto by their respective States. have signed this Agreement.

Done at Kuwait on this the 12 day of Rarnadan 1422 1-1 corresponding to27 day of November 2001 in two originals each in the Arabic. Hindi and English all texts being equally authoritative. In case of detergency the English text shall prevail.

For the State of Kuwait

Abdulmohsen Y. Al-Hunaif

Undersecretary of Ministry of Finance

Prabha Dayal

For the Republic of India

Ambassador of the Republic of India In Kuwait