

# Agreement between the Swiss Confederation and the State of Kuwait for the Encouragement and Reciprocal Protection of Investments

## Preamble

The Swiss Confederation and the State of Kuwait (hereinafter referred to as the "Contracting States");

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

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

Have agreed as follows:

## Article 1. Definitions

For the purposes of this Agreement:

(1) The term "investment" shall mean every kind of tangible or intangible asset in the territory of one Contracting State that is owned or controlled directly or indirectly by an investor of the other Contracting State, and in particular, though not exclusively, includes:

(a) Movable and immovable property as well as any other rights in rem such as mortgages, liens, pledges, usufructs and similar rights;

(b) Shares, stocks, debentures of companies or other rights or interests in such companies, and securities issued by a Contracting State or any of its investors;

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

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

(e) Any right conferred by law or public contract and any licences and permits issued pursuant to law, including rights to prospect, explore, extract, or utilize natural resources, and rights to undertake other economic or commercial activities or to render services;

Any change in the form in which assets are invested or reinvested shall not affect their character as investment. "Returns" retained for re-investment and proceeds from "liquidation" as these terms are defined hereinafter shall be considered as investments.

(2) The term "investor" refers with regard to the State of Kuwait to:

(a) Natural persons holding the nationality of the State of Kuwait in accordance with the laws of the State of Kuwait;

(b) Any entity, with or without legal personality, established in accordance with the laws of the State of Kuwait, and having its seat in the State of Kuwait, such as enterprises, cooperatives, partnerships, corporations, foundations, companies, firms, establishments, funds, organizations and business associations or similar entities, irrespective of whether their liabilities are limited or otherwise; and any entity established outside the jurisdiction of the State of Kuwait as a juridical person, which the Government of the State of Kuwait or any of its nationals or any entity established within its jurisdiction owns or controls;

(c) The Government of the State of Kuwait acting either directly or indirectly through the Kuwait Investment Authority (KIA) or its offices abroad, as well as development funds, agencies or other similar government institutions having their seat in

Kuwait.

(3) The term "investor" refers with regard to Switzerland to:

(a) Natural persons who, according to Swiss law are considered to be its nationals;

(b) Legal entities, including companies, corporations, business associations and other organizations, which are constituted or otherwise duly organized under Swiss law and have their seat, together with real economic activities, in the territory of Switzerland;

(c) Legal entities not established under Swiss law but effectively controlled by natural persons as defined in (a) above or by legal entities as defined in (b) above.

(4) The terms "own" or "control" shall mean to include ownership or control exercised through subsidiaries or affiliates, wherever located.

(5) The term "returns" shall mean amounts yielded by an investment and in particular, though not exclusively, include profits, interest, capital gains, dividends, royalties, management and technical assistance fees and any other current income; whether paid in cash, in kind or in other forms.

(6) The term "territory" shall mean the territory of a Contracting State recognized by international law including any area beyond the territorial sea which in accordance with international law has been or may hereafter be designated under the laws of a Contracting State as an area over which a Contracting State may exercise sovereign rights or jurisdiction.

(7) The term "freely convertible currency" shall mean any currency that the International Monetary Fund determines, from time to time, as freely usable currency in accordance with the Articles of Agreement of the International Monetary Fund and any amendment thereto.

(8) The term "without delay" shall mean such period as is normally required for the completion of necessary formalities for the transfer of payments. The said period shall commence on the day on which the request for transfer has been submitted and may on no account exceed one month.

(9) The term "liquidation" shall mean to include any disposal effected for the purpose of completely or partly giving up an investment.

## **Article 2. Encouragement and Admission**

(1) Each Contracting State shall in its territory encourage investments by investors of the other Contracting State and admit such investments in accordance with its laws and regulations. To that end it shall allow the creation of appropriate legal entities by investors of the other Contracting State in order for them to establish, develop and execute investment projects in different economic sectors as may be permitted by the relevant laws and regulations.

(2) When a Contracting State shall have admitted an investment on its territory, it shall grant in accordance with its laws and regulations the necessary permits in connection with such an investment and associated activities and with the carrying out of licensing agreements and contracts for technical, commercial or administrative assistance.

(3) Each Contracting State shall, subject to its laws and regulations relating to the entry, stay and work of natural persons, examine in good faith and give due consideration, regardless of nationality or citizenship to requests of key personnel including top managerial and technical persons who are employed for the purposes of investments in its territory, to enter, remain temporarily and work in its territory. Immediate family members of such key personnel shall also be granted similar treatment with regard to the entry and temporary stay in the host Contracting State.

(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.

## **Article 3. 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 accordance with generally recognized principles of international law.

(2) Each Contracting State shall make public all laws, regulations, judicial decisions and administrative rulings that pertain to or directly affect investments in its territory of investors of the other Contracting State.

(3) Each Contracting State shall ensure to investors of the other Contracting State, the right to 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 qualify under applicable laws and regulations for the purpose of the assertion of claims and the enforcement of rights with respect to their investments.

(4) Investments by investors of either Contracting State shall not be subjected in the host Contracting State to sequestration, confiscation or any other similar measures except under due process of law.

(5) 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.

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

(1) Each Contracting State shall at all times accord investments and associated activities made in its territory by investors of the other Contracting State, fair and equitable treatment. Neither Contracting State shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, or disposal of such investments and associated activities.

(2) Each Contracting State shall in its territory accord investments and associated activities of investors of the other Contracting State treatment not less favourable than that which it accords to investments and associated activities of its own investors or to investments of investors of any third state, whichever is the most favourable.

(3) Each Contracting State shall in its territory accord investors of the other Contracting State, as regards the management, maintenance, use, enjoyment or disposal of their investments, or any other activity associated with the investment, treatment not less favourable than that which it accords to its own investors or investors of any third state, whichever is the most favourable.

(4) If a Contracting State accords special advantages to investors of any third state by virtue of an agreement establishing a free trade area, a customs union, a common market or a similar regional or international agreement or by virtue of an agreement on the avoidance of double taxation, it shall not be obliged to accord such advantages to investors of the other Contracting State.

## **Article 5. Performance Requirements**

Neither Contracting State may impose in connection with investments of investors of the other Contracting State any requirements having a discriminatory effect against such investments in terms of Article 4. The following shall in particular constitute such requirements: to purchase goods or services from a specific origin, to achieve in the production of goods or services a certain level of domestic content, to sell or not sell goods or services to certain markets. Furthermore, investments shall not be subjected to other requirements or restrictions which adversely affect their use, enjoyment, management, maintenance, expansion or other activities associated with them, unless such measures are based on laws of general application.

## **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 that which 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: 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;

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

Shall be accorded prompt, adequate and effective compensation for the damage or loss sustained during the period of requisitioning or as a result of the destruction of their property.

## **Article 7. Expropriation**

(1) 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 nationalization or expropriation or dispossession (hereinafter collectively referred to as "expropriation") by the other Contracting State except for a public purpose related to the internal needs of that Contracting State and against prompt, adequate and effective compensation and on condition that such measures are taken on a non-discriminatory basis and in accordance with due process of law of general application.

(2) Such compensation shall amount to the actual value of the expropriated investment and shall be determined and computed in accordance with internationally recognized principles of valuation on the basis of the fair market value of the expropriated investment at the time immediately before the expropriatory action was taken or the impending expropriation became publicly known, whichever is the earlier (hereinafter referred to as the "valuation date"). Such compensation shall be calculated in a freely convertible currency on the basis of the prevailing market rate of exchange for that currency on the valuation date and shall include interest at a commercial rate established on a market basis from the date of expropriation until the date of payment.

(3) Where the above-mentioned fair market value cannot be readily ascertained, the compensation shall be determined on equitable principles taking into account all relevant factors and circumstances, such as the capital invested, the nature and duration of the investment, replacement value, appreciation, current returns, discounted cash flow value, book value and goodwill. The amount of compensation finally determined shall be promptly paid to the investor.

(4) Without prejudice to the rights of the investor under Article 10 of this Agreement, the investor affected shall have a right to prompt review, under the law of the Contracting State making the expropriation, by a judicial or other competent and independent authority of that Contracting State, of its case, including the valuation of its investment and the payment of compensation therefore, in light of the principles set out in paragraph 1. Article 10 of this Agreement, the investor affected shall have a right to prompt review, under the law of the Contracting State making the expropriation, by a judicial or other competent and independent authority of that Contracting State, of its case, including the valuation of its investment and the payment of compensation therefore, in light of the principles set out in paragraph 1.

(5) Where a Contracting State expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which investors of the other Contracting State own shares, it shall, to the extent necessary, ensure that compensation according to this Article will be made available to such investors.

## **Article 8. Transfer of Payments Related to Investments**

(1) Each Contracting State shall guarantee to investors of the other Contracting State the free transfer of payments in connection with an investment into and out of its territory, including the transfer of:

- (a) The initial capital and any additional capital for the maintenance, management and development of the investment;
- (b) Returns;
- (c) Payments under a contract, including amortisation of principal and accrued interest payments made pursuant to a loan agreement;
- (d) Royalties and fees for the rights referred to in Article 1 paragraph 1 (d);(d);
- (e) Proceeds from the sale or liquidation of the whole or any part of the investment;
- (f) Earnings and other remuneration of personnel engaged from abroad in connection with the investment;
- (g) Payments of compensation pursuant to Articles 6 and 7;Articles 6 and 7;
- (h) Payments referred to in Article 9;Article 9;
- (i) Payments arising out of the settlement of disputes.

(2) Transfers of payments under paragraph 1 shall be effected without delay or restrictions and, except in the case of payments in kind, in a freely convertible currency. In case of such delay in effecting the required transfers, the investor affected shall be entitled to receive interest for the period of such delay. paragraph 1 shall be effected without delay or restrictions and, except in the case of payments in kind, in a freely convertible currency. In case of such delay in effecting the required transfers, the investor affected shall be entitled to receive interest for the period of such delay.

(3) Transfers shall be made at the spot market rate of exchange prevailing in the host Contracting State 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 (the "Indemnifying Party"), makes a payment under an indemnity or guarantee it has assumed in respect of an investment in the territory of the other Contracting State (the "Host State"), the Host State shall recognize:

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

(b) The right of the Indemnifying Party to exercise all such rights and enforce such claims and to assume all obligations related to the investment by virtue of subrogation.

(2) The Indemnifying Party shall be entitled in all circumstances to:

(a) The same treatment in respect of the rights and claims acquired and the obligations assumed by it by virtue of the assignment referred to in paragraph 1 above; paragraph 1 above;

(b) Any payments received in pursuance of those rights and claims.

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

(1) Disputes arising between a Contracting State and an investor of the other Contracting State in respect of an investment of the latter under this Agreement shall, as far as possible, be settled amicably.

(2) If such disputes cannot be settled within a period of six months from the date at which either party to the dispute requested amicable settlement by delivering a notice in writing to the other party, the dispute shall be submitted for resolution, at the election of the investor party to the dispute, through one of the following means:

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

(b) To international arbitration in accordance with the following paragraphs of this Article.

(3) In the event that an investor elects to submit the dispute for resolution to international arbitration, the investor shall further provide its consent in writing for the dispute to be submitted to 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 at Washington, 18 March 1965 (the "Washington Convention"), as long as both Contracting States are parties to the Washington Convention and the Washington Convention is applicable to the dispute;

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

(c) An arbitral tribunal established under the Arbitration Rules (the "Rules") of the United Nations Commission on International Trade Law (UNCITRAL), as those Rules may be modified by the parties to the dispute (the Appointing Authority referred to under Article 7 of the Rules shall be the Secretary General of the Centre); Article 7 of the Rules shall be the Secretary General of the Centre;

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

(4) An investor, notwithstanding that it may have submitted a dispute to binding arbitration under paragraph 3, may 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, prior to the institution of the arbitral proceeding or during the proceeding, for the preservation of its rights and interests. paragraph 3, may 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, prior to the

institution of the arbitral proceeding or during the proceeding, 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), (b) and (c) or the mutual agreement of both parties to the dispute under paragraph 3(d). (a), (b) and (c) or the mutual agreement of both parties to the dispute under paragraph 3(d).

(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, the Additional Facility Rules, Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 (the "New York Convention"), and Article 1 of the UNCITRAL Arbitration Rules. 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, the Additional Facility Rules, Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 (the "New York Convention"), and Article 1 of the UNCITRAL Arbitration Rules.

(b) Any arbitration under this Article 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 1 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 shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

(7) An arbitral tribunal established under this Article shall decide the issues in dispute in accordance with such rules of law as may be agreed by the parties to the dispute. In the absence of such agreement, it shall apply the provisions of this Agreement and the generally recognized rules of international law as well as the domestic laws of the Contracting State concerned.

(8) An investor other than a natural person which has the nationality of a Contracting State parry 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" and shall for the purpose of Article 1 (6) of the Additional Facility Rules be treated as a "national of another State". 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" and shall for the purpose of Article 1 (6) of the Additional Facility Rules be treated as a "national of another 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 promptly any such award and shall make provision for the effective enforcement in its territory of such awards.

(10) In any proceedings, judicial, arbitral or other or in an enforcement of any decision or award, concerning an investment dispute between a Contracting State and an investor of the other Contracting State, a Contracting State shall not assert, as a defense, its sovereign immunity. Any counterclaim or right of set-off may not be based on the fact that the investor concerned has received or will receive, pursuant to an insurance contract, indemnification or other compensation for all or part of its alleged damages from any third party whomsoever, whether public or private, including such other Contracting State and its subdivisions, agencies or institutions.

## **Article 11. Settlement of Disputes between the Contracting States**

(1) The Contracting States shall, as far as possible, settle any dispute concerning the interpretation or application of this Agreement through diplomatic channels.

(2) If the dispute has not been settled through diplomatic channels within six months following the date on which such settlement was 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 the 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 this Agreement and such generally recognized rules of international law as may be applicable 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 that Contracting State, as well as the costs for its representation in the arbitration proceedings. The expenses of the Chairman as well as any other costs of the arbitration proceedings shall be borne in equal parts by the two Contracting 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. Relations between Contracting States**

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

## **Article 13. Application of other Rules**

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

## **Article 14. Scope of the Agreement**

This Agreement shall apply to all investments, whether existing at or made after the date of its entry into force by investors of either Contracting State in the territory of the other Contracting State.

## **Article 15. Entry Into Force**

Each Contracting State shall notify the other when 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 the present Agreement.

Done in two originals at Kuwait, on this 11th day of Rajab 1419 H corresponding to 31 October 1998 in the Arabic, German and English languages, all texts being equally authentic. In case of divergency in interpretation, the English text shall prevail.

For the Swiss Confederation

For the State of Kuwait