

Agreement between the Federal Republic of Germany and the State of Kuwait for the Encouragement and Reciprocal Protection of Investments

The Federal Republic of Germany and the State of Kuwait (hereinafter referred to as the Contracting States),

Desiring to intensify economic co-operation between both States,

Intending to create favourable conditions for investments by investors of either State in the territory of the other 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 the prosperity in both States,

Have agreed as follows:

Article 1. Definitions

For the purposes of this Agreement

(1) (1) The term "investment" shall mean every kind of asset owned or controlled by an investor of a Contracting State and invested or channelled directly or indirectly in the territory of the other Contracting State in accordance with the legislation of that State, and shall include in particular:

- a) Movable and immovable property as well as any other rights in rem such as mortgages, liens, pledges, usufruct and similar rights;
- b) Shares, stocks and debentures of companies or other rights or interests in such companies, and securities issued by a Contracting State or any of its investors;
- c) Claims to money such as loans 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 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, win or utilize natural resources, and rights to manufacture, use and sell products;

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

(2) The term "returns" shall mean amounts yielded by an investment and in particular, though not exclusively, shall include profits, dividends, interest, capital gains, royalties or any fees and payment in kind.

(3) The term "investor" shall mean

a) In respect of the Federal Republic of Germany:

- i. Germans within the meaning of the Basic Law of the Federal Republic of Germany;
- ii. Any juridical person as well as any commercial or other company or association with or without legal personality, established in accordance with its laws, and having its seat in the German territory, irrespective of whether or not its activities are directed at profit;

b) In respect of the State of Kuwait:

- i. Natural persons holding the nationality of the State of Kuwait in accordance with the laws of the State of Kuwait;

ii. Any entity, with or without legal personality, established in accordance with the laws of the State of Kuwait, and having its seat in 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;

iii. 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 seats in Kuwait.

Article 2. Encouragement of Investments

(1) Each Contracting State shall in its territory encourage as far as possible investments by investors of the other Contracting State and admit such investments in accordance with its legislation. It shall in any case accord investors of the other Contracting State and their investments fair and equitable treatment.

(2) Neither Contracting State shall in any way impair by arbitrary or discriminatory measures the management, maintenance, use or enjoyment of investments in its territory of investors of the other Contracting State.

Article 3. National Treatment and Most Favoured Nation Treatment

(1) Each Contracting State shall accord investments made in its territory owned or controlled by investors of the other Contracting State treatment not less favourable than that which it 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 investors of the other Contracting State, as regards management, maintenance, use, enjoyment, or disposal of their investments, means of asserting rights thereto, transfers, compensation, or any other associated activity therewith in its territory treatment not less favourable than that which it accords to its own investors or to investors of any third State, whichever is the most favourable.

(3) Such treatment shall not relate to privileges, benefits or incentives which either Contracting State accords to investors of third States on account of its membership of, or association with, any existing or interim agreements leading to a customs or economic union, a common market or a free trade area, or a monetary union or similar international agreement.

(4) The treatment granted under this Article shall not relate to advantages which either Contracting State accords to investors of third States by virtue of an agreement for the avoidance of double taxation or other agreements regarding matters of taxation.

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.

(2) Investments by investors of either Contracting State shall not be expropriated, nationalized or subjected to any other measures having effects equivalent to expropriation or nationalization (hereinafter collectively referred to as "expropriation") by the other Contracting State except for the public benefit of that State and against prompt, adequate and just compensation and on condition that such measures are taken on a non-discriminatory basis and in accordance with domestic laws of general application.

(3) Such compensation shall be equivalent to the fair market-value of the investment, as determined in accordance with recognized principles of valuation such as, inter alia, the capital invested, replacement value, appreciation, current returns, goodwill and other relevant factors, immediately prior to or at the time when the decision for expropriation was announced or became publicly known, whichever is the earlier. In the event that the payment of compensation is delayed, such compensation shall be paid in an amount which would put the investor in a position not less favourable than the position in which he would have been had the compensation been paid immediately on the date of expropriation. To achieve this goal the compensation shall include interest at the prevailing commercial rate, however, in no event less than the current LIBOR-rate from the date of expropriation until the date of payment. The determination of the amount of compensation, in the absence of agreement being reached between the investor and the host State, shall at the request of the investor be referred to arbitration or local courts. The amount of compensation finally determined shall be promptly paid to the investor in freely convertible currencies and allowed to be freely transferred without delay. inter alia, the capital invested, replacement value, appreciation, current returns, goodwill and other relevant factors, immediately prior to or at the time when the decision for expropriation was announced or became publicly known, whichever is the earlier. In the event that

the payment of compensation is delayed, such compensation shall be paid in an amount which would put the investor in a position not less favourable than the position in which he would have been had the compensation been paid immediately on the date of expropriation. To achieve this goal the compensation shall include interest at the prevailing commercial rate, however, in no event less than the current LIBOR-rate from the date of expropriation until the date of payment. The determination of the amount of compensation, in the absence of agreement being reached between the investor and the host State, shall at the request of the investor be referred to arbitration or local courts. The amount of compensation finally determined shall be promptly paid to the investor in freely convertible currencies and allowed to be freely transferred without delay.

(4) 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 liquidation.

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

Article 5. Compensation for Damage or Loss

(1) When investments made by investors of either Contracting State suffer losses 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. Resulting payments shall be freely transferable without delay.

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

- a) Requisitioning of their property by its forces or authorities,
- b) Destruction of their property by its forces or authorities which was not caused in combat action or was not required by the necessity of the situation,

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

Article 6. Free Transfer

(1) Each Contracting State shall guarantee to investors of the other Contracting State the free transfer of payments in connection with an investment, in particular:

- a) Of the principal and additional amounts to maintain or increase the investment;
- b) Of the returns;
- c) In repayment of loans;
- d) Of royalties and fees for the rights referred to in Article 1 (1) d);Article 1 (1) d);
- e) Of the proceeds from the liquidation or the sale of the whole or any part of the investment;
- f) Of the earnings of nationals of the other Contracting State deriving from their work and service in connection with an investment in its territory;
- g) Of amounts spent for the management and maintenance of the investment;
- h) Of compensations referred to in Articles 4 and 5;
- i) Of payments referred to in Article 7.Article 7.

(2) These transfers shall be made without delay at the applicable rate of exchange.

(3) 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 7. Subrogation

If either Contracting State makes payment to any of its investors under a guarantee it has assumed in respect of an investment or any part thereof in the territory of the other Contracting State or has otherwise become subrogated to any of the rights of such investors with respect to such investments, the latter Contracting State shall recognize:

- a) The right of the other Contracting State arising from such subrogation, whether under law or pursuant to a legal transaction, and
- b) That the other Contracting State is entitled by virtue of subrogation to enforce such rights to the same extent as its predecessor in title.

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

(1) Any investment dispute between a Contracting State and an investor of the other Contracting State should as far as possible be settled amicably between the parties in dispute.

(2) If the dispute cannot be settled within six months of the date when it has been raised by one of the parties to the dispute, it shall, at the request of the investor of the other Contracting State, be submitted for conciliation or arbitration as the Contracting State and the investor may have previously agreed. In the absence of such a special agreement, the dispute shall be submitted at the request of the investor for conciliation or arbitration under the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States (Convention 1965).

(3) The award shall be binding and shall not be subject to any appeal or remedy other than those provided for in the Convention 1965. The award shall be enforced in accordance with domestic law.

(4) During arbitration proceedings or the enforcement of an award, the Contracting State involved in the dispute shall not raise as a defense:

- a) Its immunity,
- b) The objection that the investor of the other Contracting State has received compensation under an insurance contract in respect of all or part of the damage or loss.

(5) In case the Convention 1965 is not applicable, then the investment dispute shall at the request of the investor be submitted for settlement by an ad hoc arbitral tribunal. Such arbitral tribunal shall be established as follows:

a) The arbitral tribunal shall consist of three arbitrators. Each State shall select an arbitrator. These two arbitrators shall appoint by mutual agreement a chairman who shall be a national of a third State which has diplomatic relations with both Contracting States. The arbitrators shall be appointed within two months from the date when one of the parties to the dispute informed the other of its intention to submit the dispute to arbitration. If the appointments are not made within the period mentioned above, either party may invite the Chairman of the Arbitral Institute of the Stockholm Chamber of Commerce to make the required appointment within two months.

b) The arbitral tribunal shall reach its decision by a majority of votes. Its award shall be final and binding on both parties to the dispute, and shall be enforced in accordance with domestic laws.

c) The arbitral award shall be made in accordance with the provisions of this Agreement and the general rules of international law as well as the domestic laws of the Contracting State concerned.

d) Each party to the dispute shall bear the cost of its arbitrator and of its counsel in the arbitral proceedings. The costs 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.

(6) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its investors and the other Contracting State shall have consented to submit or shall have submitted to arbitration under the Convention 1965, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

(7) Diplomatic protection, for the purposes of paragraph (6), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

Article 9. 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 by both Contracting States through diplomatic channels.

(2) If a dispute cannot thus be settled within six months it shall, upon the request of either Contracting State, be submitted to an ad hoc arbitral tribunal in accordance with the 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 their chairman to be appointed by the governments of the two Contracting States. Such members shall be appointed within two months, and such chairman within three 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 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 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 necessary appointments. If the Vice-President is a national of either Contracting State or if he, too, is prevented from discharging the said function, the member of the Court 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 binding. Each Contracting State shall bear the cost of its member and of its representatives in the arbitral proceedings; the cost of the chairman and the remaining costs shall be borne in equal parts by the Contracting States. The arbitral tribunal may make a different ruling concerning costs. In all other respects, the arbitral tribunal shall determine its own procedure.

Article 10. 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 11. Other Rules

(1) 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 a regulation, 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 regulation shall to the extent that it is more favourable prevail over this Agreement.

(2) Each Contracting State shall observe any other obligation it may have entered into with regard to investments in its territory by investors of the other Contracting State.

Article 12. Application

This Agreement shall also apply to investments made prior to its entry into force by investors of either Contracting State in the territory of the other Contracting State and accepted in accordance with the respective legislations of either Contracting State.

Article 13. Entry Into Force

(1) This Agreement shall be ratified; the instruments of ratification shall be exchanged at Bonn.

(2) This Agreement shall enter into force one month after the date of exchange of the instruments of ratification.

Article 14. Duration and Termination

(1) This Agreement shall remain in force for a period of (15) fifteen years and shall continue in force thereafter for the same period or periods of time 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 further period of (20) twenty years from the date of termination of this Agreement.

Done at Kuwait this Wednesday 18th day of Shawwal 14144, corresponding to 30th day of March 1994, in duplicate in the German, Arabic and English languages, all texts being authentic. In case of divergent interpretation of the German and Arabic texts, the English text shall prevail.

For the Federal Republic of Germany

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For the State of Kuwait

Abdulmonsir Al-Hunaif