

AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF TURKEY AND THE GOVERNMENT OF THE STATE OF KUWAIT CONCERNING THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS

The Government of the Republic of Turkey and The Government of the State of Kuwait, hereinafter referred to as the Contracting Parties.

Desiring to promote greater economic cooperation between them, particularly with respect to investment by investors of one Contracting Party in the territory of the other Contracting Party;

Recognizing that this agreement upon the treatment to be accorded to such investment will stimulate the flow of capital and technology and the economic development of the Contracting Parties;

Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investments and maximum effective utilization of economic resources; and

Having resolved to conclude an Agreement Concerning the Promotion and Reciprocal Protection of Investments,

Have agreed as follows:

Article 1. Definitions

For the purpose of this Agreement;

1. The term "investment" means every kind of asset, that is owned or controlled directly by an investor of the other Contracting Party connected with business activities, acquired for the purpose of establishing lasting economic relations in the territory of a Contracting Party in conformity with its laws and regulations, and shall include in particular, but not exclusively;

(a) movable and immovable property, as well as any other rights as mortgages, liens, pledges and any other similar rights as defined in conformity with the laws and regulations of the Contracting Party in whose territory the property is situated;

(b) reinvested returns, claims to money or any other rights having financial value related to an investment;

(c) shares, stocks or any other form of participation in companies;

(d) industrial and intellectual property rights such as patents, industrial designs, technical processes, as well as trademarks, goodwill, know-how and other similar rights;

(e) business concessions conferred by law or by contract, including concessions to prospect, explore, extract or utilize natural resources;

Provided that such investments are not in the nature of acquisition of shares or voting power less than 10 percent of a company through stock exchanges (portfolio investments) which shall not be covered by this Agreement.

2. The term "investor" means:

(a) natural persons deriving their status as nationals of a Contracting Party according to its laws,

(b) any legal entity such as corporations, firms or business associations incorporated or constituted under the law in force of either of the Contracting Parties, including those wholly or partially owned by the Government of either Contracting Party, and having their headquarters in the territory of that Contracting Party;

Who have made an investment in the territory of the other Contracting Party.

3. The term "returns" means the amounts yielded by an investment, irrespective of the form in which they are paid, and includes in particular, though not exclusively, profit, interest, capital gains, royalties, fees and dividends.

4. The term "territory" means:

(a) With respect to the Republic of Turkey;

The territory means; territory, territorial sea, as well as the maritime areas over which it has jurisdiction or sovereign rights for the purposes of exploration, exploitation and conservation of natural resources, pursuant to international law.

(b) With respect to the State of Kuwait;

The term Kuwait means the state of Kuwait and includes any area beyond the territorial sea which in accordance with international law has been or may be designated under the laws of Kuwait as an area in which Kuwait may exercise sovereign right or jurisdiction.

5. The term "freely convertible currency" means currency that is widely used to make payments for international transactions and for which there are ready buyers in the principal international exchange markets.

6. The term "without delay" shall mean such period as is normally required for the completion of necessary formalities for the transfer of payments.

Article 2. Promotion and Protection of Investments

1. Subject to its laws and regulations, each Contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting Party.

2. Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, or disposal of such investments.

3. Once established, investments of investors of either Contracting Party shall not be subject to additional performance requirements which may be detrimental to their viability or adversely affect their use, management, conduct, operation, expansion, sale or other disposition.

Article 3. Treatment of Investments

1. Each Contracting Party shall admit in its territory investments on a basis no less favourable than that accorded in like circumstances to investments of investors of any third State, within the framework of its laws and regulations.

2. Each Contracting Party shall accord to these investments, once established, treatment no less favourable than that accorded in like circumstances to investments of its investors or to investments of investors of any third State, whichever is the most favourable.

3. The Contracting Parties shall within the framework of their national legislation give sympathetic consideration to applications for the entry and sojourn of persons of either Contracting Party who wish to enter the territory of the other Contracting Party in connection with the making and carrying through of an investment; the same shall apply to nationals of either Contracting Party who in connection with an investment wish to enter the territory of the other Contracting Party and sojourn there to take up employment. Application for work permits shall also be given sympathetic consideration.

4. (a) The Provisions of this Article shall not be construed so as to oblige one Contracting

(b) The non-discrimination, national treatment and most-favored nation treatment provisions of this Agreement shall not apply to all actual or future advantages accorded by either Contracting Party by virtue of its membership of, or association with a customs, economic or monetary union, a common market or a free trade area, to nationals or companies of its own, of Member States of such union, common market or free trade area, or of any other third State.

(c) Paragraphs 1 and 2 of this Article do not apply in respect of procedural rights laid down simultaneously by this Agreement and by another similar international agreement to which one of the Contracting Parties is signatory.

(d) The provisions of Article 2 and 3 of this Agreement shall not be construed as to prevent either Contracting Party from

adopting, maintaining, or enforcing any non-discriminatory measures with regard to acquisition of land and real estate, and real rights upon them by the investors of the other Contracting Party, in accordance with laws and regulations of the Contracting Party where the investment is made.

Article 4. Expropriation

1. Investments shall not be expropriated, nationalized or subject, directly or indirectly, to measures of similar effects (hereinafter referred as expropriation) that may result in depriving the investor from his ownership or control over his investment such as freezing or blocking of the investment, except for a public purpose, in a non-discriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with due process of law and the general principles of treatment provided for in Article 3 of this Agreement.
2. Non-discriminatory legal measures designed and applied to protect legitimate public welfare objectives, such as health, safety and environment, do not constitute indirect expropriation.
3. Compensation shall be equivalent to the market value of the expropriated investment before the expropriation was taken or became public knowledge. Compensation shall be paid without delay and be freely transferable as described in paragraph 2 Article 6.
4. In the event that payment of compensation is delayed, it shall carry an interest at a rate to be agreed upon by both parties unless such rate is prescribed by law from the date of expropriation until the date of payment.

Article 5. Compensation for Losses

Investors of either Contracting Party whose investments suffer losses in the territory of the other Contracting Party owing to war, insurrection, civil disturbance or other similar events shall be accorded by such other Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that accorded to its own investors or to investors of any third State, whichever is the most favourable treatment, as regards any measures it adopts in relation to such losses.

Article 6. Repatriation and Transfer

1. Upon fulfillment of all tax obligations, each Contracting Party shall permit in good faith all transfers related to an investment to be made freely and without delay into and out of its territory. Such transfers include:

- (a) returns;
- (b) proceeds from the sale or liquidation of all or any part of an investment;
- (c) compensation pursuant to Article 4;
- (d) reimbursements and interest payments deriving from loans in connection with investments;
- (e) salaries, wages and other remunerations received by the nationals of one Contracting Party who have obtained in the territory of the other Contracting Party the corresponding work permits related to an investment;
- (f) payments arising from an investment dispute.

2. Transfers shall be made in the convertible currency in which the investment has been made or in any freely convertible currency at the rate of exchange in force at the date of transfer, unless otherwise agreed by the investor and the hosting Contracting Party.

Article 7. Subrogation

1. If the investment of an investor of one Contracting Party is insured against noncommercial risks under a system established by law, any subrogation of the Indemnifying Party, which stems from the terms of the indemnity or guarantee agreement between the investor and the Indemnifying Party, shall be recognized by the other Contracting Party.
2. The Indemnifying Party is entitled by virtue of subrogation to exercise the rights and enforce the claims of that investor and shall assume the obligations related to the investment. The subrogated rights or claims shall not exceed the original rights or claims of the investor.

3. Disputes between a Contracting Party and an Indemnifying Party shall be settled in accordance with the provisions of Article 8 of this Agreement.

Article 8. Settlement of Disputes between One Contracting Party and Investors of the other Contracting Party

1. Disputes between one of the Contracting Parties and an investor of the other Contracting Party, in connection with his investment, shall be notified in writing, including detailed information, by the investor to the recipient Contracting Party of the investment. As far as possible, the investor and the concerned Contracting Party shall endeavor to settle these disputes by consultations and negotiations in good faith.

2. If these disputes, cannot be settled in this way within six (6) months following the date of the written notification mentioned in paragraph 1, the dispute can be submitted, as the investor may choose, to:

(a) the competent court of the Contracting Party in whose territory the investment has been made;

(b) the International Center for Settlement of Investment Disputes (ICSID) set up by the "Convention on Settlement of Investment Disputes Between States and Nationals of other States", in case both Contracting Parties become signatories of this Convention;

(c) an ad hoc court of arbitration laid down under the Arbitration Rules of Procedure of the United Nations Commission for International Trade Law (UNCITRAL).

3. Once the investor has submitted the dispute to the one of the dispute settlement procedures mentioned in paragraph 2 of this Article, the choice of one of these procedures is final.

4. Notwithstanding the provisions of paragraph 2 of this Article;

(a) only the disputes arising directly out of investment activities which have obtained necessary permission, if any, in conformity with the relevant legislation of the Republic of Turkey on foreign capital, and that effectively started shall be subject to the jurisdiction of the International Center for Settlement of Investment Disputes (ICSID) or any other international dispute settlement mechanism as agreed upon by the Contracting Parties;

(b) the disputes, related to the property and real rights upon the real estate are totally under the jurisdiction of the Contracting Party where the investment is made and therefore, shall not be submitted to jurisdiction of the International Center for Settlement of Investment Disputes (ICSID) or any other international dispute settlement mechanism.

5. The arbitration awards shall be final and binding for all parties in dispute. Each Contracting Party commits itself to execute the award according to its national law.

6. In any proceedings, judicial, arbitral or otherwise or in an enforcement of any decision or award, concerning an investment dispute between a Contracting Party and an investor of the other Contracting Party, a Contracting Party shall not assert, as a defense, its sovereign immunity. At any stage of the arbitration proceedings or of the execution of an arbitral award, none of the Contracting Parties involved in a dispute shall be entitled to raise as an objection the fact that the investor who is the opposing party in the dispute has received compensation totally or partly covering his losses pursuant to an indemnity or guarantee provided in Article 7 of this Agreement. A dispute shall, however, not be submitted to international arbitration by the Indemnifying Party under the provisions of this Article, if the same dispute has been brought before international arbitration by the investor.

Article 9. Settlement of Disputes between the Contracting Parties

1. The Contracting Parties shall seek in good faith and a spirit of cooperation a rapid and equitable solution to any dispute between them concerning the interpretation or application of this Agreement. In this regard, the Contracting Parties agree to engage in direct and meaningful negotiations to arrive at such solutions. If the Contracting Parties cannot reach an agreement within six (6) months after the beginning of disputes between themselves through the foregoing procedure, the disputes may be submitted, upon the request of either Contracting Party, to an arbitral tribunal of three members.

2. Within two (2) months of receipt of a request, each Contracting Party shall appoint an arbitrator. The two arbitrators shall select a third arbitrator as Chairman, who is a national of a third State. In the event that either Contracting Party fails to appoint an arbitrator within the specified time, the other Contracting Party may request the President of the International Court of Justice to make the appointment.

3. If both arbitrators cannot reach an agreement about the choice of the Chairman within two (2) months after their

appointment, the Chairman shall be appointed upon the request of either Contracting Party by the President of the International Court of Justice,

4. If, in the cases specified under paragraphs (2) and (3) of this Article, the President of the International Court of Justice is prevented from carrying out the said function or if he is a national of either Contracting Party, the appointment shall be made by the Vice-President, and if the Vice-President is prevented from carrying out the said function or if he is a national of either Contracting Party, the appointment shall be made by the most senior member of the Court who is not a national of either Contracting Party.

5. The tribunal shall have three (3) months from the date of the selection of the Chairman to agree upon rules of procedure consistent with the other provisions of this Agreement. In the absence of such agreement, the tribunal shall request the President of the International Court of Justice to designate rules of procedure, taking into account generally recognized rules of international arbitral procedure.

6. The arbitral tribunal shall take its decision by a majority of votes. Such decision shall be made in accordance with this Agreement and such recognized rules of international law as may be applicable and shall be final and binding on both Contracting Parties. Each Contracting Party shall bear the costs of the member of the arbitral tribunal appointed by that Contracting Party, 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 Parties. 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 parties. In all other respects, the arbitral tribunal shall determine its own procedure.

7. A dispute shall not be submitted to an international arbitration court under the provisions of this Article, if the same dispute has been brought before another international arbitration court under the provisions of Article 8 and is still before the court.

Article 10. Scope of Application

This Agreement shall apply to investments in the territory of one Contracting Party, made in accordance with its national laws and regulations, by investors of the other Contracting Party, whether prior to, or after the entry into force of the present Agreement.

Article 11. Relations between Contracting Parties

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

Article 12. Entry Into Force

1. This Agreement shall enter into force on the date of last notification by the Contracting Parties, in writing and through diplomatic channels, of the completion of the respective internal legal procedures necessary to that effect. It shall remain in force for a period of fifteen (15) years and shall continue in force unless terminated in accordance with paragraph 2 of this Article.

2. Either Contracting Party may, by giving one-year written notice to the other Contracting Party, terminate this Agreement at the end of the initial fifteen-year period or at any time thereafter.

3. This Agreement may be amended by mutual written consent of the Contracting Parties at any time. The amendments shall enter into force in accordance with the same legal procedure prescribed under the first paragraph of this Article.

4. With respect to investments made or acquired prior to the date of termination of this Agreement and to which this Agreement otherwise applies, the provisions of all of the other Articles of this Agreement shall thereafter continue to be effective for a further period of ten (10) years from such date of termination.

5. This Agreement substitutes and replaces the Agreement between the Republic of Turkey and the State of Kuwait on the Reciprocal Promotion and Protection of Investments, signed on 27 th of October, 1988 in Ankara and entered into force on 25 th of April 1992 (hereinafter referred to as Previous Agreement), which will be terminated on the date of entry into force of this Agreement. For any dispute which arose before the date of the entry into force of this Agreement, provisions of the Previous Agreement shall apply. Any dispute which arises after the date of the entry into force of this Agreement shall be settled in accordance with the provisions of this Agreement.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this Agreement.

Done at Kuwait on this 13 th day of Jamada A1 Akhra 1431 H corresponding to the 27 lh day of May 2010 in two originals in the Turkish, Arabic, and English languages, all texts being equally authentic.

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

FOR THE GOVERNMENT OF THE REPUBLIC OF TURKEY

FOR THE GOVERNMENT OF THE STATE OF KUWAIT

Mehmet Şimşek

Minister of Finance

Ahmad Rashed Al-Haroun

Minister of Commerce and Trade