

AGREEMENT
between the Republic of Austria
and
the State of Kuwait
for the Encouragement and reciprocal Protection of Investments

THE REPUBLIC OF AUSTRIA AND THE STATE OF KUWAIT, (hereinafter referred to as the 'Contracting States');

DESIRING to create favourable conditions for the development of the economic co-operation 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 I

Definitions

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

1. The term "investment" shall mean 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 and regulations of that 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) a company or business enterprise, or shares, stocks, and other forms of equity participation, and bonds, debentures, and other forms of debt interests in a company or business enterprise, and loans and securities issued by any investor of a Contracting State, and returns retained for the purpose of reinvestment;
 - (c) claims to money and claims to any other assets or performance pursuant to contract having an economic value and associated with an investment;
 - (d) intellectual and industrial property rights, as defined in the Agreement of the World Intellectual Property Organization, including, but not limited to, copyright, trademarks, patents, industrial designs and technical processes, know-how, trade secrets, trade names and goodwill;
 - (e) any rights conferred by law or contract subject to authorization as provided for under existing national legislation, including rights to prospect, explore, extract, or utilise natural resources;Any change of the form in which assets are invested including legal extension, alteration or transformation thereof does not affect their character as investment, provided that such change is made in accordance with applicable legislation of the host Contracting State.
2. The term "investor" shall mean:
 - (a) with respect to the Republic of Austria
 - (1) a natural person holding the citizenship of the Republic of Austria; and
 - (2) any juridical person or commercial partnership constituted in accordance with the legislation of the Republic of Austria and having its seat in the territory of the Republic of Austria; and any juridical person established and having its seat outside the jurisdiction of the Republic of Austria and in which any investor of the Republic of Austria has a predominant influence;
 - (b) with respect to the State of Kuwait
 - (1) a natural person holding the nationality of the State of Kuwait in accordance with its applicable law; and
 - (2) the Government of the State of Kuwait and any juridical person or other entity legally constituted under the laws and regulations of the State of Kuwait, such as institutions, development funds, authorities, foundations, establishments, agencies, enterprises, co-operatives, partnerships, corporations, companies, firms, 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 and in which the Government of the State of Kuwait or any of its nationals or any entity established within its jurisdiction has a predominant interest;
- (c) with respect to a “third state”, a natural person, a legal entity or other organization which fulfils, *mutatis mutandis*, the conditions specified in sub-paragraph (a) or (b), as the case may be, for a Contracting State.
3. The term “own” or “control” includes also ownership or control exercised through subsidiaries or affiliates wherever located.
 4. The term “returns” shall mean amounts yielded by an investment, irrespective of the form in which they are paid, and in particular, though not exclusively, include profits, interest, capital gains, dividends, royalty payments, management, technical assistance or other fees, and payments in kind, such as in the form of goods or services.
 5. 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.
 6. The term “territory” shall mean all 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 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 “associated activities” shall mean activities connected with an investment and undertaken in accordance with the applicable laws and regulations of the host Contracting State and shall include, in particular, such activities as:
 - (a) the establishment, control and maintenance of branches, agencies, offices or other facilities for the conduct of business;
 - (b) the organization of companies, the acquisition of companies or interests in companies or in their property, the management, control, maintenance, use, enjoyment and expansion, and the sale, liquidation, dissolution or other disposal of companies organized or acquired;
 - (c) the making, performance and enforcement of contracts related to investments;
 - (d) the acquisition, ownership, use and disposal by any legal means of property of all kinds, including intellectual property, as well as the protection thereof;
 - (e) the borrowing of funds from local financial institutions, as well as the purchase, sale and issue of shares and other securities in the local financial markets, and the purchase of foreign exchange for the operation of the investments;
 - (f) the manufacture, use and sale of products, and other economic and commercial activities and services.

Article 2

Encouragement of Investments

1. Each Contracting State shall in its territory and in accordance with its applicable laws and regulations encourage and admit investments and associated activities by investors of the other Contracting State.

2. To attain the objectives of this Agreement, the Contracting States shall endeavour to 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 and associated activities made by investors of the other Contracting State, and such investors shall, in this regard, be granted by the host Contracting State all necessary consents, approvals, licences and authorizations 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. 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 obligations under relevant multilateral treaties to which both Contracting States are members such as the General Agreement on Trade and Services, and 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 requests by investors of the other Contracting State and key personnel who are employed by such investors 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, and each Contracting State shall, subject to its laws and regulations relating to entry and stay of a natural person, examine in good faith and give sympathetic consideration to the requests of accompanying family members of such investors or key personnel, to enter, leave and remain temporarily in its territory.

6. Whenever goods or persons connected with an investment are to be transported, each Contracting State shall to the extent permissible under its relevant laws and regulations permit the operation of such transport by enterprises of the other Contracting State.

Article 3

Protection of Investments

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

2. Each Contracting State shall make public all laws, regulations, administrative directives 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.

4. Once established, investments shall not be subjected in the host Contracting State to additional performance requirements which may hinder or restrict their expansion or maintenance in a manner as to adversely affect or be detrimental to their viability, unless such requirements are deemed vital for reasons of public order, public health, the environment or other considerations of public interest and are enforced by due process of law of general application.

5. Each Contracting State recognizes that in order to maintain favourable environment for investments in its territory by investors of the other Contracting State, it shall provide effective means of asserting claims and enforcing rights with respects to investments. Each Contracting State shall 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, 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.

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.

7. Investments by investors of either Contracting State shall not be subjected to requisition, sequestration, confiscation or any other similar measures except under an applicable law and in conformity with applicable principles of international law and other relevant provisions of this Agreement.

Article 4

Treatment of Investments

1. Each Contracting State shall at all times ensure investments, returns 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 it accords in like situations to investments and associated activities 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 compensation, transfers, returns, management, maintenance, use, enjoyment or disposal of their investments, and other associated activities, 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. 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 present or future benefit 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 or 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 other similar arrangement and any domestic legislation relating wholly or mainly to taxation; or
- (c) any regulation to facilitate frontier traffic.

4. Either Contracting State shall not impose on investments by investors of the other Contracting State discriminatory mandatory measures, which require or restrict the purchase of materials, energy, fuel or of means of transport or production of any kind or restrict the marketing of products inside or outside the territory of the host Contracting State.

Article 5

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 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 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. Resulting payments shall be made in a freely convertible currency and be freely transferable without delay.

Article 6

Expropriation

1. (a) Investments made by investors of one Contracting State in the territory of the other Contracting State shall not be nationalised, expropriated, dispossessed or subjected to direct or indirect measures having effect equivalent to nationalisation, 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.

(b) 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 to be chosen by the investor, on the basis of the prevailing market rate of exchange for that currency on the valuation date and shall include interest at the prevailing commercial market rate, however, in no event less than the prevailing 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, in particular 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 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 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.

3. For the avoidance of doubt, expropriation shall include situations where a Contracting State expropriates the assets of a company or enterprise that is incorporated or established under the laws in force in its own territory in which an investor of the other Contracting State has an investment, including through the ownership of shares, stocks, debentures or other rights or interests.

4. The provisions of this Article shall also apply to interventions or regulatory measures by a Contracting State such as the freezing or blocking of the investment, levying of 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 the investment.

5. A claim to compensation in accordance with the principles and provisions of this Article shall also exist when, as a result of an action by a Contracting State in any company in which investment is made by investors of the other Contracting State, the investment is impaired in substance.

Article 7

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);
- (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 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 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 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 8

Subrogation

1. If a Contracting State, its designated agency or a company or other enterprise constituted or incorporated in a Contracting State (the "Indemnifying Party") other than an investor 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"), 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 recognize:

- (a) the assignment to the Indemnifying Party by law or by legal transaction of 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.

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 and its related returns.

Article 9

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 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 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"), provided that the Washington Convention is applicable to the dispute; or
- (b) an arbitral tribunal established under the Arbitration 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 in Article 7 of the Rules shall be the Secretary General of the Centre); or
- (c) 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.

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 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, 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, 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 (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 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 party to the dispute, including its rules on conflict of laws, and such rules of international law as may be applicable.

8. An investor other than a natural person which has the nationality of a Contracting State to the dispute on the date of 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 an investor of that other 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 any proceedings, judicial, arbitral or otherwise 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 defence, its sovereign immunity. Any counterclaim, right of set-off or objection, 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 instrumentalities.

Article 10

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 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 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 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. The arbitral tribunal may, however, 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 11

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 12

Preservation of Rights

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, contains a regulation, whether general or specific, entitling investments or associated activities 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. The two Contracting States agree to consult with one another in case either the European Union or the Gulf Co-operation Council introduces certain mandatory measures or regulations which may be incompatible with provisions of this Agreement, with a view to resolve the matter and / or amend this Agreement, as may be deemed necessary.

Article 13

Application

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 14

Entry into Force

This Agreement is subject to ratification and shall enter into force on the sixtieth day after the date on which the instruments of ratification have been exchanged.

Article 15

Duration and Termination

1. This Agreement shall remain in force for a period of thirty (30) 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 twenty (20) years from the date of termination of this Agreement.

IN WITNESS thereof, the respective plenipotentiaries of both Contracting States have signed this Agreement.

DONE in two originals at Kuwait on this 5th day of Rajab 1417 H corresponding to 16th day of November 1996 in the German, Arabic and English languages, all texts being equally authentic. In case of divergence, the English text shall prevail.

For the Republic of Austria:

Dr. B. Ferrero-Waldner

For the State of Kuwait:

Abdul-Mohsen Al-Hunaif

Die vom Bundespräsidenten unterzeichnete und vom Bundeskanzler gegengezeichnete Ratifikationsurkunde wurde am 24. Juli 1998 ausgetauscht; das Abkommen tritt gemäß seinem Art. 14 mit 22. September 1998 in Kraft.

Klima