

AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF KOREA AND THE GOVERNMENT OF THE STATE OF KUWAIT FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

Signed at Seoul July 15, 2004

The Government of the Republic of Korea and the Government of the State of Kuwait (hereinafter referred to as "the Contracting Parties");

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

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 Parties;

Have agreed as follows:

ARTICLE 1
Definitions

For the purposes of this Agreement:

- (1) "investments" means every kind of asset or right invested by investors of one Contracting Party in the territory of the other Contracting Party and in particular, though not exclusively, includes:
- (a) any tangible and intangible, movable and immovable property, and any related property right, such as leases, mortgages, liens and pledges;
 - (b) shares in, stocks and debentures of, and any other form of participation in a company or loans, bonds and any other form of debts or any business enterprise and rights or interest derived therefrom;
 - (c) claims to money or to performance under contract having an economic value;
 - (d) copyrights, trademarks, patents, trade names, industrial designs, technical processes, know-how, trade secrets, goodwill and any other intellectual property rights;
 - (e) business concessions having an economic value conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources;

The term "investments" shall also apply to "returns" retained for the purpose of re-investment and to proceeds from "liquidation" as these terms are defined hereinafter.

Any change in the form in which assets or rights are invested or reinvested shall not affect their character as investments.

- (2) "returns" means 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, royalties, and all kinds of fees and /or payments.

(3) "investors" means:

- (a) "natural persons" who are natural persons having the nationality of that Contracting Party in accordance with its applicable laws;
- (b) "juridical persons" which is any entity such as companies, public institutions, authorities, foundations, partnerships, firms, establishments, organizations, corporations or associations incorporated or constituted in accordance with the laws and regulations of that Contracting Party; and
- (c) "the Government of that Contracting Party" which is considered as an investor.

- (4) "liquidations" means any disposal effected for the purpose of completely or partly giving up an investment.

(5) "territory" means:

- (a) as regards the Republic of Korea, the territory of the Republic of Korea as well as those maritime areas, including the seabed and subsoil adjacent to the outer limit of the territorial sea over which the Republic of Korea exercises, in accordance with international law, sovereign rights or jurisdiction for the purpose of exploration and exploitation of the natural resources of such areas.
- (b) as regards the State of Kuwait, the territory of the State of Kuwait including any area beyond the territorial sea which in accordance with international law has been or may hereafter be designated under the laws of the State of Kuwait, as an area over which the State of Kuwait may exercise sovereign rights of jurisdiction.

- (6) "freely convertible currency" means the currency that is widely used to make payments for international transactions and widely exchanged in principal international exchange markets.

(7) "without delay" means such period as normally required for the completion of necessary formalities for the transfer of payments.

ARTICLE 2

Promotion and Protection of Investment

(1) Each Contracting Party shall in its territory and in accordance with its applicable laws and regulations admit and encourage investments by investors of the other Contracting Party.

(2) Each Contracting Party shall, in respect of investments admitted in its territory, grant such investments all necessary permits, consents, approvals, licenses and authorizations to such an extent and on such terms and conditions as may be determined by its laws and regulations.

(3) The Contracting Party may consult with each other in any manner they may deem appropriate to encourage and facilitate investment opportunities within their respective territories.

(4) Each Contracting Party 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 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 temporary and work in its territory. Immediate family members of such key personnel shall also be granted favorable treatment with regard to the entry and temporary stay in the host Contracting Party according to its laws and regulations.

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

(6) Investments by investors of either Contracting Party shall at all times enjoy fair and equitable treatment and full protection and security in the territory of the other Contracting Party in a manner consistent with recognized principles of international law and the provisions of this Agreement. Neither Contracting Party shall in anyway impair by arbitrary or discriminatory measures the use, management, operation, maintenance, enjoyment, or disposition of investments.

(7) Each Contracting Party shall, in accordance with its laws and regulations, promptly publish, or otherwise make publicly available, its laws, regulations, procedures, directives, guidelines and administrative rulings and judicial decisions of public application as well as international agreements which pertain to or may affect the operation of the provisions of this Agreement or investments in its territory of investors of the other Contracting Party.

(8) Each Contracting Party shall provide effective means of asserting claims and enforcing rights with respect to investments. Each Contracting Party shall ensure to investors of the other Contracting Party, the right of access to its courts of justice, administrative tribunals and agencies, and all other bodies exercising adjudicatory authority, and the right to mandate persons of their choice, who qualify under its laws and regulations for the purpose of the assertion of claims and the enforcement of rights with respect to their investments.

(9) Investments by investors of either Contracting Party shall not be subjected in the host Contracting Party to sequestration, confiscation or any other similar measures except under process of law and in conformity with applicable principles of international law and other relevant provisions of the Agreement.

ARTICLE 3

Treatment of Investments

(1) With respect to the use, management, conduct, operation, and sale or other disposition of investments made in its territory by investors of the other Contracting Party, each Contracting Party shall accord treatment not less favorable than that it accords, in like circumstances, to investments of its own investors or investors of any third party, whichever is more favorable to those investments.

(2) Each Contracting Party shall in its territory accord to investors of the other Contracting Party as regards management, maintenance, use, enjoyment or disposal of their investments, treatment which is fair and equitable and no less favorable than that which it accords, in like circumstances, to its own investors or to investors of any third party, whichever is more favorable to investors.

(3) However, the provisions of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the 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 Parties is or may become a party;
- (b) any international, regional or bilateral agreement or other similar arrangement or any domestic legislation relating wholly or mainly to taxation.

ARTICLE 4 Compensation for Losses

(1) When an investment made by an investor of either Contracting Party suffers a loss owing to war or other armed conflict, a state of national emergency, revolt, insurrection, riot or other similar events in the territory of the other Contracting Party, he shall be accorded by the latter Contracting Party, treatment, as regards restitution, indemnification, compensation or other settlement, not less favorable than that the latter Contracting Party accords to its own investor or investor of any third party, whichever is more favorable to the investor.

(2) Without prejudice to paragraph (1) of this Article, investors of one Contracting Party who, in any of the situations referred to in that paragraph, suffer losses in the territory of the other Contracting Party resulting from:

- (a) requisitioning of their investments or part thereof by its forces or authorities;
- (b) destruction of their investments 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 restitution or adequate compensation not less favorable than that which would be accorded under the same circumstances to an investor of the other Contracting Party or to an investor of any third party.

ARTICLE 5 Expropriation

(1) (a) Investments of investors of one Contracting Party shall not be nationalized, expropriated or otherwise subjected to any other measures having effect equivalent to nationalization or expropriation such as the freezing or blocking of the investment, compulsory sale of all or part of the investment, or other comparable measure (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for public purpose and against prompt, adequate and effective compensation. The expropriation shall be carried out on a non-discriminatory basis in accordance with legal procedures.

(b) Such compensation shall amount to the fair market value of the expropriated investments immediately before expropriation was taken or before impending expropriation became public knowledge, whichever is the earlier, shall include interest at the applicable commercial rate from the date of expropriation until the date of payment and shall be made without delay, be effectively realizable and be freely transferable. In both expropriation and compensation, treatment no less favorable than that which the Contracting Party accords to its own investors or to investors of any third party shall be accorded.

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

(2) The investor affected shall have the right to prompt review by a judicial or other competent and independent authority of the Contracting Party which made the expropriation, of its case, including the valuation of its investment and the payment of compensation therefore.

(3) Expropriation shall include situations where a Contracting Party expropriates the assets of a company that is incorporated or constituted under the laws in force in its own territory in which an investor of the other Contracting Party has an investment, including through the ownership of shares, stocks, debentures or other rights or interests.

ARTICLE 6 Transfer of Payments Related to Investments

(1) Each Contracting Party shall guarantee to investors of the other Contracting Party the free transfer of payments in connection with an investment into and out of its territory. Such transfers shall include, in particular, though not exclusively:

- (a) net profit, capital gains, dividends, interest, royalties, fees and any other current income accruing from investments;
- (b) proceeds accruing from the sale or the total or partial liquidation of investments;
- (c) funds in repayment of loans related to investments;
- (d) earnings and other remuneration of personnel engaged from abroad in connection with the investment;
- (e) initial capital or additional funds necessary for the maintenance or development of the existing investments;
- (f) amounts spent for the management of the investment in the territory of the other Contracting Party or a third party;
- (g) compensation pursuant to Articles 4 and 5;
- (h) payments referred to in Article 7;
- (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 from the entity responsible for such delay.

ARTICLE 7 Subrogation

(1) If a Contracting Party or its designated agency (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 Party (the "Host Party"), the Host Party 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 subrogated rights or claims shall not exceed the original rights or claims of the investor.

ARTICLE 8

Settlement of Investment Disputes between a Contracting Party and an Investor of the other Contracting Party

(1) For the purposes of this Article, an investment dispute is a dispute between a Contracting Party and an investor of the other Contracting Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of any right conferred by this Agreement with respect to an investment of an investor of that other Contracting Party.

(2) In the event of an investment dispute, the investment dispute shall, if possible, be settled by consultation or negotiation. If it is not so settled, the investor may submit the investment dispute for resolution under one of the following alternatives:

- (a) in accordance with any applicable, previously agreed dispute- settlement procedures; or
- (b) in accordance with the terms of paragraph (3) of this Article.

(3) If the investment dispute cannot be settled within six months from the date on which the investor requested the consultation or negotiation in writing and if the investor concerned has not submitted the investment dispute for resolution, under paragraph (2) (a) of this Article or judicial or administrative settlement investor concerned may submit the investment dispute for settlement by international arbitration to one of the following bodies:

(a) The International Center for Settlement of Investment Disputes ("the Center"), established pursuant to the Convention on the Settlement of Investment Disputes between States and nationals of the other States opened for signature at Washington, 18 March 1965 (the "Washington Convention"), if both Contracting Parties are parties to the Washington Convention and the Washington Convention is applicable to the dispute;

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

(b) 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 Center);

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

(4) Notwithstanding the fact that the investor may have submitted the dispute to the binding international arbitration under paragraph (3), the investor may seek interim injunctive relief, not involving the payment of damages, before the judicial or administrative tribunals of the Contracting Party that is a party to the dispute for the preservation of its rights and interests.

(5) Each Contracting Party hereby gives its consent to the submission of an investment dispute for settlement by binding arbitration in accordance with the choice of the investor under paragraph (3) (a) and (b) or the mutual agreement of both parties to the dispute under paragraph (3) (c).

(6) (a) The consent given in paragraph (5), together with the consent given under paragraph (3), shall satisfy the requirement for written agreement of the parties to a dispute for the purpose 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, as may be mutually agreed by the parties to the dispute, must 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.

(7) The award made by any international arbitration referred to paragraph 3 shall be final and binding on the parties to the dispute. Each Contracting Party shall ensure the recognition and enforcement of the award in accordance with its relevant laws and regulations.

ARTICLE 9

Settlement of Disputes between the Contracting Parties

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

(2) If any dispute cannot be settled within six months, it shall, at the request of either Contracting Party, 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 party 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 Parties. Such members shall be appointed within two months, and such Chairman within four months from the date on which either Contracting party has informed the other Contracting Party that it intends to submit the dispute to an arbitral tribunal.

(4) If within the periods specified in paragraph (3) of this Article the necessary appointments have not been made, a request may be made by either Contracting Party to the President of the International Court of Justice to make such appointments. If the President is a national of either Contracting Party or otherwise prevented from discharging the said function, the Vice-President shall be invited to make the appointments. If the Vice-President also is a national of either Contracting party or 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 Party shall be invited to make the 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 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 two Contracting Parties. However, the arbitral tribunal may, at its direction, 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.

ARTICLE 10 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 11 Application of Other rules

(1) Where a matter is governed simultaneously both by this Agreement and by another international agreement to which both Contracting Parties are parties, or by general principles of international law, nothing in this Agreement shall prevent either Contracting Party or any of its investors from taking advantage of whichever rules are the more favourable to his case.

(2) If the treatment to be accorded by one Contracting Party to investors of the other Contracting Party in accordance with its laws and regulations or other specific provisions of contracts is more favourable than that accorded by this Agreement, the more favourable treatment shall be accorded.

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

ARTICLE 12 Application 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 Party in the territory of the other Contracting Party, but shall not apply to any dispute concerning investments which was settled before its entry into force.

ARTICLE 13 Entry into Force

Each Contracting Party shall notify the other in writing 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 14 Duration and Termination

(1) This Agreement shall remain in force for a period of thirty years and shall remain in force thereafter indefinitely unless either Contracting Party notifies the other Contracting Party in writing one year in advance 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 WHEREOF, the undersigned, duly authorized thereto by their respective Governments, have signed this Agreement.

Done at Seoul on the 27th of Jamada I, 1425H corresponding to 15th of July 2004, in two originals in the Korean, Arabic, and English languages, all texts being equally authentic. In case of divergency, the English text shall prevail.

FOR THE GOVERNMENT FOR THE GOVERNMENT
OF THE REPUBLIC OF KOREA OF THE STATE OF KUWAIT