(25/2175)

A G R E E M E N T

BETWEEN THE GOVERNMENT OF THE STATE OF KUWAIT

AND

THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA

FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

The Government of the State of Kuwait and the Government of the People's Republic of China (hereinafter collectively referred to as the Contracting States and each referred to as a Contracting State);

Desiring to create favourable conditions for greater economic co-operation between them and in particular for investments by investors of one Contracting State in the territory and maritime zones of the other Contracting State;

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

Have agreed as follows:

ARTICLE 1

Definitions

For the purposes of this Agreement

(1) The term 'investment' shall comprise every kind of assets invested before or after the entry into force of this Agreement by natural or juridical persons of one Contracting State in the territory and maritime zones of the other Contracting State in accordance with the laws and regulations of that State. Without restricting the generality of the foregoing, the term 'investment' shall include:

(a) movable and immovable property as well as any other property 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; loans and bonds issued by a Contracting State or any of its natural or juridical person and returns retained for the purpose of re-investment;

(c) claims to money or to any performance having economic value associated with an investment;

(d) copyrights, trademarks, patents, and other industrial property rights, know-how, trade names and goodwill;

(e) any right conferred by law or contract and any licences and permits pursuant to law.

Any alteration of the form in which assets are invested shall not affect their classification as investments, provided that such alteration is not contrary to the admission, if any, granted in respect of the assets orginally invested.

(2) The term 'investor' shall mean any natural or juridical person of a Contracting State who invests in the territory and maritime zones of the other Contracting State.

(3) The term 'natural person' shall mean with respect to either Contracting State a natural person holding the nationality of that State in accordance with its laws.

(4) The term 'juridical person' shall mean with respect to either Contracting State, any entity established in its territory and in accordance with, and recognized as a juridical person by the law of the State, such as public institutions, authorities, corporations, foundations, agencies, development funds, enterprises, cooporatives, societies, associations, and similar entities and private companies, firms, partnerships, establishments and organizations irrespective of whether their liabilities are limited or otherwise.

If natural or juridical persons of a Contracting

State have an interest in a juridical person which was established within the territory of a third State, and this juridical person invests in the other Contracting State, it shall be recognized as a juridical person of the former Contracting State. This Paragraph of this Article can be applied only when the said third State has no right or abandons its right to protect the said juridical person.

(5) The term 'returns' shall mean amounts yielded by an investment and in particular, though not exclusively, includes profits, interest, capital gains, share dividends, royalties or fees.

(6) The term 'host government' shall mean the government of the Contracting State in whose territory and maritime zones the relevant investment is made or is to be made.

(7) Maritime zones mean the marine and submarine zones over which the Contracting States exercise, under international law, sovereignty, sovereign rights or jurisdiction.

ARTICLE 2

Promotion and Protection of Investments

(1) Each Contracting State shall encourage and create favourable conditions for investors of the other Contracting

State to make investments in its territory and maritime zones and, in exercise of powers conferred by its laws, shall admit such investments.

(2) Each Contracting State shall at all times ensure fair and equitable treatment to the investments and returns of investors of the other Contracting State. Each Contracting State shall ensure, subject to its laws and regulations, that the management, maintenance, use, enjoyment or disposal of investments in its territory and maritime zones of investors of the other Contracting State shall not in any way be subjected to or impaired by any unreasonable or discriminatory measures. Each Contracting State shall observe any obligation it may have entered into in the documents of approval of investments or the approved investment contracts by investors of the other Contracting State.

(3) The Contracting States shall periodically consult between themselves concerning investment opportunities within the territory and maritime zones of each other in various sectors of the economy to determine where investments from one Contracting State into the other may be most beneficial in the interest of both Contracting States, and accord them appropriate facilities, incentives and other forms of encouragement to such an extent and on such terms and conditions as shall, from time to time, be determined by agreement between the Contracting States hereto.

ARTICLE 3

Most-favoured-nation Provisions

(1) Each Contracting State shall in its territory and maritime zones accord investments and returns of investors of the other Contracting State treatment not less favourable than that which it accords to investments and returns of investors of any third State.

(2) Each Contracting State shall in its territory and maritime zones accord investors of the other Contracting State, as regards management, maintenance, use, enjoyment or disposal of their investments, treatment not less favourable than that which it accords to investors of any third State.

PROVIDED that nothing in this Article or in the immediately preceding Article shall be interpreted as imposing a legal obligation on either Contracting State to extend to the investors of the other, the benefit of any treatment, preference or privilege which may be accorded to any investor of other states by virtue of the formation of a customs union, a free trade area or any other agreement or arrangement relating wholly or mainly to taxation or any regional or sub-regional arrangement relating to movement of capital to which such State may be a party.

ARTICLE 4

Compensation for Damage or Loss

(1) Investors of one Contracting State whose investments in the territory and maritime zones of the other Contracting State suffer losses owing to war or other armed conflict, a state of national emergency, revolt, insurrection or riot in the territory and maritime zones of the latter Contracting State shall be accorded by the latter Contracting State treatment, as regards relevant compensatory measures adopted, not less favourable than that which the latter Contracting State accords to investors of any third State.

(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 and maritime zones 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 fair, reasonable and non-discriminatory

compensation for the damage or loss sustained during the period of requisitioning or as a result of the destruction of the property. Resulting payments shall be in convertible currency and freely transferable.

ARTICLE 5

Nationalization, Expropriation or Similar Measures

(1) (i) Investments of any natural or juridical person of either Contracting State shall not be subject to sequestration or confiscation or any similar measures save with the order of a competent court issued in accordance with laws in force.

(ii) Investments of any natural or juridical person of either Contracting State can be nationalized or expropriated or subjected to measures having effect equivalent to nationalization or expropriation in the territory and maritime zones of the other Contracting State only for a public purpose in the national interest of that Contracting State and by giving fair and reasonable compensation and on condition that such measures are taken on a non-discriminatory basis and in accordance with domestic laws of general application.

(iii) Such compensation shall be computed on the basis of the market value of the investment immediately

prior to the point of time when the decision for expropriation was announced or became publicly known. Where the market value cannot be readily ascertained, the compensation shall be determined in accordance with generally recognized principles of valuation and on equitable principles taking into account, inter alia, the capital invested, depreciation, capital already repatriated, replacement value and other relevant factors. The compensation shall include interest at the current rate of interest applicable to the currency in which the investment was originally undertaken 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 be referred to arbitration. The amount of compensation finally determined shall be paid to investors in freely convertible currencies and allowed to be repatriated without undue delay.

(iv) Where a Contracting State nationalizes or expropriates the assets of a company, firm or other business association or business concern, which is established or licenced under the law in force in its territory and in which any natural or juridical person of the other

Contracting State owns shares, stocks, debentures or other rights or interest, it shall ensure that fair and reasonable compensation is received in freely convertible currencies and allowed to be repatriated. Such compensation shall be determined on the basis of the recognized principles of valuation such as the market value of the assets immediately prior to the point of time when the decision for nationalization or expropriation was announced or became publicly known. The compensation shall include interest at the current rate of interest applicable to the currency in which the investment was originally undertaken from the date of nationalization or expropriation until the date of payment.

(2) The provisions of Paragraph (1) 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 the liquidation.

ARTICLE 6

Repatriation of Investment and Returns

(1) Each Contracting State shall, in accordance with its laws and regulations, allow without undue delay the transfer in any convertible currency of:

(a) the net profits, dividends, royalties, technical assistance and technical service fees, interest and other returns, accruing from any investment by an investor of the other Contracting State;

(b) the proceeds accruing from the total or partial liquidation of any investment made by an investor of the other Contracting State;

(c) funds in repayment of borrowings which both Contracting States have recognized as investment; and

(d) the earnings of nationals of the other Contracting State and their employees who are allowed to work in connection with an investment in its territory and maritime zones.

(2) Without restricting the generality of Article 5 of this Agreement, the Contracting States undertake to accord to transfers referred to in Paragraph (1) of this Article a treatment as favourable as that accorded to transfers originating from investments made by investors of any third State.

(3) For the purpose of this Agreement, exchange rates shall be determined in accordance with the official rates agreed with the International Monetary Fund or, where such rates do not exist, the official exchange

rates for Special Drawing Rights or United States Dollars or any other convertible currency agreed between the Contracting States.

(4) Such transfers as above shall, however, be subject to the right of the host government to impose reasonable restrictions beyond its existing regulations relating to foreign exchange controls for temporary periods not exceeding six months to meet situations of fundamental economic disequilibrium provided that fifty percent (50%) of such transfers are allowed to be repatriated during such periods.

ARTICLE 7
Subrogation

(1) If a Contracting State (or its designated Agency) makes payment to any of its investors under an indemnity or a guarantee it has granted in respect of an investment or any part thereof in the territory and maritime zones of the host State, or has otherwise become subrogated to any of the rights of such investors with respect to such investments, the host State shall recognize:

(a) the right of the other Contracting State (or its designated Agency) arising from the assignment, indemnity or other subrogation, whether under

law or pursuant to a legal transaction, and

(b) that the other Contracting State (or its designated Agency) is entitled by virtue of subrogation to enforce such right and to undertake any obligations in relation to such right.

Such other Contracting State (or its designated Agency) shall accordingly, if it so desires, be entitled to assert any such right to the same extent as its predecessor in title before a competent Court or Tribunal in the host State or submit the dispute to arbitration according to the procedures of Article 9 of this Agreement.

(2) If such other Contracting State acquires any amount in such manner as above, it shall be accorded in respect thereof treatment not less favourable than that accorded to the funds of any third State deriving from investment activities similar to those in which the party indemnified was engaged.

ARTICLE 8

Settlement of Investment Disputes

(1) Disputes or differences between one Contracting State and an investor of the other Contracting State concerning an investment of that investor in the territory and

maritime zones of the former Contracting State shall, if possible, be settled amicably.

(2) If such disputes or differences cannot be settled according to the provisions of Paragraph (1) of this Article within a period of six months from the date either party requested amicable settlement and the parties have not agreed to any other dispute settlement procedures, the investor concerned may choose one or both of the following means of resolutions:

(a) file complaint with and seek relief from the competent administrative authority or agency of the Contracting State in whose territory or maritime zones the investment was made;

(b) file suit with the competent court of law of the Contracting State in whose territory or maritime zones the investment was made.

(3) The dispute relating to the amount of compensation and any other dispute agreed upon by both parties may be submitted to an international Arbitral Tribunal.

The international Arbitral Tribunal mentioned above shall be especially constituted in the following way: each party to the dispute shall appoint an arbitrator. The two arbitrators shall appoint an arbitrator as Chairman who

shall be a national of a third State which shall have diplomatic relations with both Contracting States. The arbitrators shall be appointed within two months and the Chairman within four months from the date when the concerned party notified the other party of its submission of the dispute to arbitration.

If the necessary appointments are not made within the period specified in the previous Paragraph, either party may, in the absence of any other agreement, request the Chairman of the International Arbitration Institute of the Stockholm Chamber of Commerce to make the necessary appointments.

The Arbitral Tribunal shall determine its own arbitral procedures by referring either to the Convention on the Settlement of Investment Disputes between States and Nationals of other States done at Washington on March 18, 1965 or the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

The Arbitral Tribunal shall reach its award based upon the provisions of this Agreement, the relevant domestic laws, the agreements both Contracting States have concluded and the generally recognized principles of international law.

The Arbitral Tribunal shall meet in a third State

selected by common accord by the parties concerned or, if the choice has not been made within forty five (45) days of the appointment of the final member of the Tribunal, in Stockholm. The Tribunal shall reach its decision by a majority of votes. The award shall be final and binding on both parties.

When the Tribunal renders an award, it shall state its legal basis and, upon request of either party, shall interpret it.

Each party shall bear the costs of the arbitrator it has appointed and of its own expenses during the arbitration proceedings. The expenses of the Chairman of the Tribunal and other costs shall be borne equally by both parties.

(4) In addition to the foregoing provisions of this Article, disputes between investors of a Contracting State and the investors of the other Contracting State in whose territory or maritime zones the investment was made may be settled by international arbitration in accordance with the arbitration clause between the parties.

(5) Neither Contracting State shall pursue through diplomatic channels any matter referred to arbitration until the proceedings have terminated and a Contracting State has failed to abide by or to comply with the award rendered by the Arbitral Tribunal.

ARTICLE 9

Settlement of Disputes between Contracting States

(1) Should any dispute arise concerning the interpretation or application of this Agreement the Governments of the Contracting States shall try to settle the same by negotiation or conciliation.

(2) If the dispute cannot be so settled it shall, upon the request of either Contracting State, be submitted to an Arbitral Tribunal in accordance with the provisions of this Article.

(3) The Arbitral Tribunal shall be constituted in the following way: within two months of the receipt of the request for arbitration, each Contracting State shall appoint one arbitrator. The two arbitrators shall then select a national of a third State who shall act as the Chairman of the Tribunal (hereinafter referred to as the Chairman). The Chairman shall be appointed within two months from the date of appointment of the other two arbitrators.

(4) If within the periods specified in Paragraph (3) of this Article either party shall not have appointed its arbitrator or the two arbitrators shall not have agreed on the Chairman, a request may be made to the President of the International Court of Justice to make the appointment. If he happens to be 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 appointment. If the Vice-President also happens to be a national of either Contracting State or is also otherwise 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 appointment.

(5) The Arbitral Tribunal shall reach its decision by a majority of votes. Such decision shall be binding. Each Contracting State shall bear the cost of its own arbitrator and its counsel in the arbitral proceedings; the cost of the Chairman and the remaining costs shall be borne in equal parts by both Contracting States. The Arbitral Tribunal shall determine its own procedure.

ARTICLE 10

Relations between Contracting States

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

ARTICLE 11

Application of Other Rules and Special Commitments

(1) Where a matter is governed simultaneously by this

Agreement and by other agreements in which the Contracting States are parties or principles of law commonly recognized by both Contracting States or the domestic laws of the host State, nothing in this Agreement shall prevent investors of either Contracting State who own investments in the territory and maritime zones of the other Contracting State from taking advantage of whichever rules are the more favourable to their cases.

(2) Investments subject to special commitments undertaken by one Contracting State with respect to the investors of the other Contracting State shall be governed, without prejudice to the provisions of this Agreement, by the terms of those commitments insofar as their provisions are more favourable than those provided by this Agreement.

ARTICLE 12

Entry into Force

This Agreement shall enter into force on the date on which the two Contracting States have notified each other that the internal requirements necessary for the entry into force of this Agreement have been fulfilled.

ARTICLE 13

Duration and Termination

(1) This Agreement shall remain in force for a period of twenty years and shall continue in force thereafter unless, after the expiry of the initial period of nineteen years, either of the Contracting States notifies the other Contracting State of its intention to terminate the Agreement. The notice of termination shall become effective one year after it has been received by the other Contracting State.

(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, mutatis mutandis, remain in force for a further period of twenty years from that date.

In witness whereof the undersigned duly authorized thereto by their respective Governments, have signed this Agreement.

Signed in two originals in Kuwait this .....11th.....day of .....Rabi.....1406H corresponding to ...23rd...day of November 1985 in the

Arabic, Chinese and English languages, all texts being equally authentic.

In case of divergency, the English text shall prevail.

For the Government of the People's Republic of China

By.....

For the Government of the State of Kuwait

By.....

P R O T O C O L

At the time of signing the Agreement concerning the Promotion and Protection of Investments concluded between the Government of the State of Kuwait and the Government of the People's Republic of China (hereinafter referred to as the 'Agreement'), the undersigned have, in addition, agreed upon the following provisions which shall form an integral part of the Agreement:

1. With respect to Article 2:

Investors of either Contracting State shall be entitled to apply to the competent authorities in the host State for the appropriate facilities, incentives and other forms of encouragement (including inter alia, tax relief) to such an extent and on such terms and conditions as shall, from time to time, be determined by the laws and regulations of the host State or by agreement between the Contracting States thereto as the case may be.

2. With respect to Article 3:

(a) All activities involving the purchase, sale, and transport of raw and secondary materials, energy, fuels and means of production and operation of all types shall be accorded treatment not less favourable than that accorded to the investment-related activities carried out by investors of any third State. There shall be no impediment to the normal exercise of such activities, provided they are

carried out in accordance with the laws and regulations of the host State and in observance of the provisions of this Agreement.

(b) Nationals authorized to work in the territory and maritime zones of one of the Contracting States shall be accorded the appropriate material support for the exercise of their professional activities by the host State.

(c) The Contracting States shall examine sympathetically, in the light of their domestic laws, the applications for entry and for authorization pertaining to sojourn, work, and travel submitted by the nationals of one Contracting State and their employees pursuant to an investment in the territory and maritime zones of the other Contracting State.

3. With respect to Article 4:

The principle of non-discrimination applicable to compensation for loss owing to the events stated in Paragraph 2 of Article 4 of this Agreement shall be applied to all investors regardless of their nationalities.

4. With respect to Article 5:

If the original investment was undertaken in United States Dollars, then the compensation shall include interest at the current LIBOR rate of interest from the date of expropriation, nationalization or similar measures until the

date of payment.

5. With respect to Article 6:

The transfers referred to in Article 6 of this Agreement shall mean the transfers which shall be made from the foreign exchange deposit account in the People's Republic of China of investors of the State of Kuwait in accordance with the foreign exchange control regulations of the People's Republic of China.

When an investor of the State of Kuwait does not have sufficient foreign exchange for the transfer, the Government of the People's Republic of China shall provide foreign exchange for the transfer of:

(1) the payment for copyrights, trademarks, patents and other industrial property rights, know-how, trade names and technical assistance and technical service related to investments undertaken by investors of the State of Kuwait.

(2) the proceeds accruing from the total or partial liquidation of any investment made by investors of the State of Kuwait and compensation referred to in Paragraph (2) of Article 4 and Article 5 of this Agreement.

(3) the funds mentioned in Paragraph (1) (c) of

Article 6 of this Agreement if such funds are guaranteed by the Bank of China.

(4) returns accruing from investments by investors of the State of Kuwait where the competent State Authority of China had given specific approval to the investor concerned to sell its products in the domestic market of the People's Republic of China.

(5) The earnings of all employees who are allowed to work in connection with an investment made by a Kuwaiti investor in the territory or maritime zones of the People's Republic of China.

6. With respect to Article 8;

(1) The disputes which may be referred to international arbitration under Paragraph (3) of Article 8 of this Agreement shall be the following:

(a) disputes relating to the amount of compensation referred to in Article 5 and in Paragraph (2) of Article 4 of this Agreement;

(b) any other investment dispute which may be agreed upon by both Contracting States to be submitted to arbitration;

2) Investment disputes between the corporations

(including State-owned enterprises) of the People's Republic of China and the investors of the State of Kuwait shall be settled by international arbitration in accordance with the arbitration clause between the parties to the dispute. The arbitral award rendered by the international Arbitral Tribunal shall be recognized and enforced in the territory of the People's Republic of China in accordance with its laws and regulations.

(3) Article 8 of this Agreement shall be applied and interpreted by the two Contracting States in good faith and on mutual understanding to provide effective procedures for settlement of investment disputes of investors of the Contracting States.

7. With respect to Exchanged Notes:

All Exchanged Notes between the Contracting States shall be integral parts of this Agreement.

Signed in two originals in Kuwait, this 11th day of Rabi 1406H corresponding to 23rd day of November 1985 in the Arabic, Chinese and English languages, all texts being equally authentic.

In case of divergency, the English text shall prevail.

For the Government of the People's Republic of China

By _____

For the Government of the State of Kuwait

By _____