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LEGISLATIVE COUNCIL BRIEF

Inland Revenue Ordinance
(Chapter 112)

INLAND REVENUE (DOUBLE TAXATION RELIEF AND PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME) (STATE OF KUWAIT) ORDER

INTRODUCTION

At the meeting of the Executive Council on 17 April 2012, the Council ADVISED and the Acting Chief Executive ORDERED that the Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (State of Kuwiat) Order (the Order), at
A Annex A, should be made under section 49(1A) of the Inland Revenue Ordinance, Cap. 112 (the Ordinance). The Order implements the Agreement between the Hong Kong Special Administrative Region (HKSAR) and the State of Kuwait (Kuwait) for the Avoidance of Double Taxation with respect to Taxes on Income and the Prevention of Fiscal Evasion signed on 13 May 2010 (the Kuwaiti Agreement).

JUSTIFICATIONS

Benefits of Comprehensive Agreements for Avoidance of Double Taxation

2. Double taxation refers to the imposition of comparable taxes in more than one tax jurisdiction in respect of the same source of income. The international community generally recognises that double taxation hinders the exchange of goods and services, movements of capital, technology and human resources, and poses an obstacle to the development of economic

relations between economies. As a business facilitation initiative, it is our policy to enter into Comprehensive Agreements for Avoidance of Double Taxation (CDTAs) with our trading and investment partners so as to minimise double taxation.

3. Hong Kong adopts the territorial concept of taxation whereby only income sourced from Hong Kong is subject to tax. A local resident's income derived from sources outside Hong Kong would not be taxed in Hong Kong and hence would not be subject to double taxation. Double taxation may occur where a foreign jurisdiction taxes its own residents' income derived from Hong Kong. Although many jurisdictions do provide their residents with unilateral tax relief for the Hong Kong tax they paid on income derived therefrom, the existence of a CDTA will provide enhanced certainty and stability in respect of the elimination of double taxation. Besides, the tax relief provided under a CDTA may exceed the level provided unilaterally by a tax jurisdiction.

Benefits of the Kuwaiti Agreement

4. In the absence of the Kuwaiti Agreement, profits of Hong Kong companies doing business through a permanent establishment, such as a sales outlet, in Kuwait may be taxed in both places if the income is Hong Kong sourced. Under the Kuwaiti Agreement, double taxation is avoided in that any Kuwaiti tax paid by the companies shall be allowed as a credit against the tax payable in Hong Kong.

5. In the absence of a CDTA, Hong Kong residents receiving dividends from Kuwait not attributable to a permanent establishment there are subject to Kuwaiti withholding tax currently at 15%. Under the Kuwaiti Agreement, such withholding tax will be capped at 5%. If the beneficial owner is the HKSAR Government, the withholding tax rate will be further reduced to 0%. Also, currently, Hong Kong residents receiving royalties from Kuwait are subject to withholding tax at 15% in Kuwait. Under the Kuwaiti Agreement, the withholding tax on royalties will be capped at 5%.

6. Upon its entry into force, the Kuwaiti Agreement will supersede the existing provisions in the air services agreement with Kuwait on limited double taxation avoidance for airline income, i.e. Hong Kong airlines operating flights to Kuwait will be taxed in Hong Kong at Hong Kong's corporation tax rate. Profits from international shipping transport earned by Hong Kong residents that arise in Kuwait, which are currently subject to tax there, will enjoy tax exemption in Kuwait under the Kuwaiti Agreement.

7. Overall speaking, the Kuwaiti Agreement sets out clearly the allocation of taxing rights between the two jurisdictions and the relief on tax rates on different types of income. It will help investors of the two economies to better assess their potential tax liabilities from cross-border economic activities, foster closer economic and trade links between the two places, and provide added incentives for enterprises of Kuwait to do business with or invest in Hong Kong, and vice versa.

Exchange of Information Article under the Kuwaiti Agreement

8. The Inland Revenue (Amendment) Ordinance 2010 which enables Hong Kong to adopt the Organisation for Economic Co-operation and Development (OECD) 2004 version of the Exchange of Information (EoI) Article in our CDTAs came into operation in March 2010. During the scrutiny of the relevant bill, the Government presented a sample EoI Article (Annex B) to the Bills Committee and undertook to highlight any deviation from the text in any CDTA that we have signed when we submit the CDTA for vetting.

B

9. The Kuwaiti Agreement, which contains an EoI Article (the Article) based on the OECD 2004 version, has adopted all the safeguards in the sample EoI Article, in particular -

(a) the Article only obliges the Contracting Parties to exchange information upon receipt of specific request. It does not require the Contracting Parties to exchange information on an automatic or spontaneous basis;

(b) the scope of information exchange is confined to taxes covered by the Kuwaiti Agreement;

(c) the information sought should be foreseeably relevant, i.e. there will be no fishing expedition;

(d) confidentiality requirements and restrictions on the usage of the information exchanged are as set out in the sample EoI Article;

(e) information will only be disclosed to the tax authorities and not for release to their oversight body;

(f) the information requested shall not be disclosed to a third jurisdiction; and

(g) there is no obligation to supply information under certain circumstances as set out in the sample EoI Article.

Legal Basis

10. Under section 49(1A) of the Ordinance, the Chief Executive in Council may, by order, declare that arrangements have been made with the government of any territory outside Hong Kong with a view to affording relief from double taxation in relation to income tax and any tax of a similar character imposed by the laws of that territory. Following the signing of the Kuwaiti Agreement, it is necessary for the Chief Executive in Council to declare by order that arrangements with Kuwait on double taxation relief have been made so as to put the Kuwaiti Agreement into effect.

OTHER OPTIONS

11. An Order made by the Chief Executive in Council under section 49(1A) of the Ordinance is the only way to give effect to the Kuwaiti Agreement. There is no other option.

THE ORDER

12. **Section 2** of the Order declares that the arrangements specified in section 3 for double taxation relief in relation to income tax and any tax of a similar character imposed by the laws of Kuwait have been made and that those arrangements should take effect. **Section 3** states that the arrangements are those in Articles 1 to 28 of the Kuwaiti Agreement as well as Paragraphs 1 to 7 of the Protocol to the Kuwaiti Agreement, the text of which Articles and Paragraphs is set out in the **Schedule** to the Order.

LEGISLATIVE TIMETABLE

13. The legislative timetable is as follows –

Publication in the Gazette	18 May 2012
Tabling at Legislative Council	23 May 2012
Commencement of the Order	13 July 2012

IMPLICATIONS OF THE PROPOSAL

14. The proposal has financial, economic and civil service implications as set out in Annex C. The proposal is in conformity with the Basic Law, including the provisions concerning human rights. The proposal will not affect the binding effect of the existing provisions of the Ordinance and its subsidiary legislation. It has no productivity, environmental or sustainability implications.

C

PUBLIC CONSULTATION

15. The business and professional sectors have all along supported our policy to conclude more CDTAs with our trading and investment partners.

PUBLICITY

16. Publicity was arranged for the signing of the Kuwaiti Agreement on 13 May 2010. A spokesman will be available to answer media and public enquiries.

BACKGROUND

17. The Kuwaiti Agreement is the tenth CDTA concluded by Hong Kong with another jurisdiction. A summary of the main provisions of the Agreement is at Annex D.

D

18. We entered into a CDTA with Belgium in December 2003, with Thailand in September 2005, with the Mainland of China in August 2006, with Luxembourg in November 2007, with Vietnam in December 2008, with Brunei, the Netherlands and Indonesia in March 2010, with Hungary, Kuwait and Austria in May 2010, with the United Kingdom and Ireland in June 2010, with Liechtenstein in August 2010, with France in October 2010, with Japan in November 2010, with New Zealand in December 2010, with Switzerland on the original CDTA in December 2010 and on the new CDTA in October 2011, with Portugal in March 2011, with Spain in April 2011, with the Czech Republic in June 2011, with Malta in November 2011, with Jersey in February 2012 and with Malaysia in April 2012.

ENQUIRY

19. In case of enquiries about this Brief, please contact Ms Shirley Kwan, Principal Assistant Secretary for Financial Services and the Treasury (Treasury), at 2810 2370.

Financial Services and the Treasury Bureau
16 May 2012

LEGISLATIVE COUNCIL BRIEF

Inland Revenue Ordinance
(Chapter 112)

INLAND REVENUE (DOUBLE TAXATION RELIEF AND PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME) (STATE OF KUWAIT) ORDER

ANNEXES

Annex A	Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (State of Kuwait) Order
Annex B	Sample Exchange of Information Article
Annex C	Financial, Economic and Civil Service Implications of the Proposal
Annex D	Summary of the main provisions of the Comprehensive Double Taxation Agreement between Hong Kong and Kuwait

Inland Revenue (Double Taxation Relief and Prevention of Fiscal Evasion with respect to Taxes on Income) (State of Kuwait) Order

(Made by the Chief Executive in Council under section 49(1A) of the Inland Revenue Ordinance (Cap. 112))

1. Commencement

This Order comes into operation on 13 July 2012.

2. Declaration under section 49(1A)

For the purposes of section 49(1A) of the Ordinance, it is declared—

(a) that the arrangements specified in section 3(1) have been made with the Government of the State of Kuwait with a view to affording relief from double taxation in relation to income tax and any tax of a similar character imposed by the laws of the State; and

(b) that it is expedient that those arrangements should have effect.

3. Arrangements specified

(1) The arrangements specified for the purposes of section 2(a) are the arrangements in—

(a) Articles 1 to 28 of the agreement titled "Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the State of Kuwait for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income", done in duplicate at Hong Kong on 13 May 2010 in the Chinese, Arabic and English languages; and

(b) Paragraphs 1 to 7 of the protocol to the agreement, done in duplicate at Hong Kong on 13 May 2010 in the Chinese, Arabic and English languages.

(2) The English text of the Articles referred to in subsection (1)(a) is reproduced in Part 1 of the Schedule.

(3) The English text of the Paragraphs referred to in subsection (1)(b) is reproduced in Part 2 of the Schedule.

Schedule [s. 3]

Part 1

Articles 1 to 28 of the Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the State of Kuwait for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income

Article 1

Persons Covered

This Agreement shall apply to persons who are residents of one or both of the Contracting Parties.

Article 2

Taxes Covered

1. This Agreement shall apply to taxes on income imposed on behalf of a Contracting Party, irrespective of the manner in which they are levied.

2. There shall be regarded as taxes on income all taxes imposed on total income, or on elements of income, including taxes on gains from the alienation of movable or immovable property, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.

3. The existing taxes to which this Agreement shall apply are:

(a) in the case of the Hong Kong Special Administrative Region -

(1) profits tax;

(2) salaries tax;

(3) property tax;

whether or not charged under personal assessment;

(b) in the case of Kuwait -

(1) the corporate income tax;

(2) the contribution from the net profits of Kuwaiti shareholding companies payable to the Kuwait Foundation for Advancement of Science (KFAS);

(3) the contribution from the net profits of Kuwaiti shareholding companies payable to the supporting of the National Budget;

(4) the Zakat;

(5) the tax imposed to support national employees.

4. This Agreement shall apply also to any identical or substantially similar taxes that are imposed under the laws of a Contracting Party after the date of signature of this Agreement in addition to, or in place of, the existing taxes, as well as any other taxes falling within paragraphs 1 and 2 of this Article which a Contracting Party may

impose in future. The competent authorities of the Contracting Parties shall notify each other of any significant changes that have been made in their respective taxation laws.

5. The existing taxes, together with the taxes imposed after the signature of this Agreement, are hereinafter referred to as "Hong Kong Special Administrative Region tax" or "Kuwaiti tax", as the context requires.

Article 3

General Definitions

1. For the purposes of this Agreement, unless the context otherwise requires:

(a) (1) the term "Hong Kong Special Administrative Region" means any territory where the tax laws of the Hong Kong Special Administrative Region apply;

(2) the term "Kuwait" means 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 Kuwait, as an area over which Kuwait may exercise sovereign rights or jurisdiction;

(b) the term "business" includes the performance of professional services and of other activities of an independent character;

(c) the term "company" means any body corporate or any entity that is treated as a body corporate for tax purposes;

(d) the term "competent authority" means:

(1) in the case of the Hong Kong Special Administrative Region, the Commissioner of Inland Revenue or an authorized representative of the Commissioner of Inland Revenue;

(2) in the case of Kuwait, the Minister of Finance or an authorized representative of the Minister of Finance;

(e) the terms "a Contracting Party" and "the other Contracting Party" mean the Hong Kong Special Administrative Region or Kuwait, as the context requires;

(f) the term "enterprise" applies to the carrying on of any business;

(g) the terms "enterprise of a Contracting Party" and "enterprise of the other Contracting Party" mean respectively an enterprise carried on by a resident of a Contracting Party and an enterprise carried on by a resident of the other Contracting Party;

(h) the term "international traffic" means any transport by a ship or aircraft operated by an enterprise of a Contracting Party, except when the ship or aircraft is operated solely between places in the other Contracting Party;

(i) the term "national" in relation to Kuwait means any individual possessing the nationality of Kuwait, and any legal person, partnership or association deriving its status as such from the laws in force in Kuwait;

(j) the term "person" includes an individual, a company, a trust, a partnership and any other body of persons;

(k) the term "tax" means the Hong Kong Special Administrative Region tax or Kuwaiti tax, as the context requires.

2. In this Agreement, the terms "Hong Kong Special Administrative Region tax" and "Kuwaiti tax" do not include any penalty or interest (including, in the case of the Hong Kong Special Administrative Region, any sum added to the Hong Kong Special Administrative Region tax by reason of default and recovered therewith and "additional tax" under Section 82A of the Inland Revenue Ordinance) imposed under the laws of either Contracting Party relating to the taxes to which this Agreement applies by virtue of Article 2.

3. As regards the application of this Agreement at any time by a Contracting Party, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the laws of that Party for the purposes of the taxes to which this Agreement applies, any meaning under the applicable tax laws of that Party prevailing over a meaning given to the term under other laws of that Party.

Article 4

Resident

1. For the purposes of this Agreement, the term "resident of a Contracting Party" means:

(a) in the case of the Hong Kong Special Administrative Region -

(1) any individual who ordinarily resides in the Hong Kong Special Administrative Region;

(2) any individual who stays in the Hong Kong Special Administrative Region for more than 180 days during a year of assessment or for more than 300 days in two consecutive years of assessment one of which is the relevant year of assessment;

(3) a company incorporated in the Hong Kong Special Administrative Region or, if incorporated outside the Hong Kong Special Administrative Region, being normally managed or controlled in the Hong Kong Special Administrative Region;

(4) any other person constituted under the laws of the Hong Kong Special Administrative Region or, if constituted outside the Hong Kong Special Administrative Region, being normally managed or controlled in the Hong Kong Special Administrative Region;

(b) in the case of Kuwait -

(1) an individual who has his domicile in Kuwait and is a Kuwaiti national;

(2) a company which is incorporated in Kuwait;

(3) any governmental institution created in Kuwait under public law such as a corporation, Central Bank, fund, authority, foundation, agency or other similar entity;

(4) any entity established in Kuwait all the capital of which has been provided by Kuwait or any governmental institution as defined in item (3), together with other states;

(c) in the case of either Contracting Party, the Government of that Party.

2. Where by reason of the provisions of paragraph 1, an individual is a resident of both Contracting Parties, then his status shall be determined as follows:

(a) he shall be deemed to be a resident only of the Party in which he has a permanent home available to him; if he has a permanent home available to him in both Parties, he shall be deemed to be a resident only of the Party with which his personal and economic relations are closer ("centre of vital interests");

(b) if the Party in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either Party, he shall be deemed to be a resident only of the Party in which he has an habitual abode;

(c) if he has an habitual abode in both Parties or in neither of them, he shall be deemed to be a resident only of the Party in which he has the right of abode (in the case of the Hong Kong Special Administrative Region) or of which he is a national (in the case of Kuwait);

(d) if his status cannot be determined under the provisions of subparagraphs (a) to (c), the competent authorities of the Contracting Parties shall settle the question by mutual agreement.

3. Where by reason of the provisions of paragraph 1, a person other than an individual is a resident of both Contracting Parties, then it shall be deemed to be a resident only of the Party in which its place of effective management is situated.

Article 5

Permanent Establishment

1. For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially:

(a) a place of management;

(b) a branch;

(c) an office;

(d) a factory;

(e) a workshop; and

(f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

3. The term "permanent establishment" also encompasses:

(a) a building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only if such site, project or activities last more than six months;

(b) the furnishing of services, including consultancy services, by an enterprise directly or through employees or other personnel engaged by the enterprise for such purpose, but only if activities of that nature continue (for the same or a connected project) within a Contracting Party for a period or periods

aggregating more than 180 days within any twelve-month period.

4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:

(a) the use of facilities solely for the purpose of storage or display of goods or merchandise belonging to the enterprise;

(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display;

(c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;

(e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;

(f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs (a) to (e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

5. Notwithstanding the provisions of paragraphs 1 and 2, where a person - other than an agent of an independent status to whom paragraph 6 applies - is acting in a Contracting Party on behalf of an enterprise of the other Contracting Party, that enterprise shall be

deemed to have a permanent establishment in the first-mentioned Contracting Party in respect of any activities which that person undertakes for the enterprise, if such a person:

(a) has, and habitually exercises, in the first-mentioned Contracting Party an authority to conclude contracts in the name of the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph, or

(b) has no such authority, but habitually maintains in the first-mentioned Party a stock of goods or merchandise belonging to such enterprise from which he regularly delivers goods or merchandise on behalf of the enterprise.

6. An enterprise shall not be deemed to have a permanent establishment in a Contracting Party merely because it carries on business in that Party through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise, and conditions are made or imposed between that enterprise and the agent in their commercial and financial relations which differ from those which would have been made between independent enterprises, he will not be considered an agent of an independent status within the meaning of this paragraph.

7. The fact that a company which is a resident of a Contracting Party controls or is controlled by a company which is a resident of the other Contracting Party, or which carries on business in that other Party (whether through a permanent establishment or otherwise),

shall not of itself constitute either company a permanent establishment of the other.

Article 6

Income from Immovable Property

1. Income derived by a resident of a Contracting Party from immovable property (including income from agriculture or forestry) situated in the other Contracting Party may be taxed in that other Party.

2. The term "immovable property" shall have the meaning which it has under the laws of the Contracting Party in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, quarries, sources and other natural resources; ships, boats and aircraft shall not be regarded as immovable property.

3. Any property or right referred to in paragraph 2 shall be regarded as situated where the land, standing timber, mineral deposits, quarries, sources or natural resources, as the case may be, are situated or where the working may take place.

4. The provisions of paragraph 1 shall apply to income derived from the direct use, letting, or use in any other form of immovable property.

5. The provisions of paragraphs 1 and 4 shall also apply to the income from immovable property of an enterprise.

Article 7

Business Profits

1. The profits of an enterprise of a Contracting Party shall be taxable only in that Party unless the enterprise carries on business in the other Contracting Party through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other Party, but only so much of them as is attributable to that permanent establishment.

2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting Party carries on business in the other Contracting Party through a permanent establishment situated therein, there shall in each Contracting Party be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

3. In determining the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred, whether in the Party in which the permanent establishment is situated or elsewhere, taking into consideration any applicable law or regulations. However, no such deduction shall be allowed in respect of amounts, if any, paid (otherwise than towards reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission, for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on

moneys lent to the permanent establishment. Likewise, no account shall be taken, in the determination of the profits of a permanent establishment, of amounts charged (otherwise than towards reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the head office of the enterprise or any of its other offices.

4. Insofar as it has been customary in a Contracting Party to determine the profits to be attributed to a permanent establishment on the basis of an apportionment of the total profits of the enterprise to its various parts, or on the basis of such other method as may be prescribed by the laws or regulations of that Party, nothing in paragraph 2 shall preclude that Contracting Party from determining the profits to be taxed by such method; the method adopted shall, however, be such that the result shall be in accordance with the principles contained in this Article.

5. No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

6. For the purposes of the preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

7. Where profits include items of income which are dealt with separately in other Articles of this Agreement, then the provisions of those Articles shall not be affected by the provisions of this Article.

Article 8

Shipping and Air Transport

1. Profits of an enterprise of a Contracting Party from the operation of ships or aircraft in international traffic shall be taxable only in that Party.

2. The provisions of paragraph 1 shall also apply to profits derived from the participation in a pool, a joint business or an international operating agency.

3. For the purposes of this Article, profits from the operation of ships in international traffic shall include:

   (a) income derived from the lease of ships on a bareboat charter basis where such lease is incidental to the operation of ships in international traffic; and

   (b) profits from the lease, use or maintenance of containers by the enterprise, when such lease, use or maintenance is incidental to the operation of ships in international traffic.

Article 9

Associated Enterprises

1. Where:

   (a) an enterprise of a Contracting Party participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting Party, or

(b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting Party and an enterprise of the other Contracting Party,

and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

2. Where a Contracting Party includes in the profits of an enterprise of that Party - and taxes accordingly - profits on which an enterprise of the other Contracting Party has been charged to tax in that other Party and the profits so included are profits which would have accrued to the enterprise of the first-mentioned Party if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other Party shall make an appropriate adjustment to the amount of the tax charged therein on those profits. In determining such adjustment, due regard shall be had to the other provisions of this Agreement and the competent authorities of the Contracting Parties shall, if necessary, consult each other.

Article 10

Dividends

1. Dividends paid by a company which is a resident of a Contracting Party to a resident of the other Contracting Party may be taxed in that other Party.

2. However, such dividends may also be taxed in the Contracting Party of which the company paying the dividends is a resident and according to the laws of that Party, but if the beneficial owner of the dividends is a resident of the other Contracting Party, the tax so charged shall not exceed:

(a) zero per cent of the gross amount of the dividends if the beneficial owner is the Government of that other Contracting Party or any of its institutions or other entity wholly-owned directly by the Government of that other Contracting Party;

(b) five per cent of the gross amount of the dividends in all other cases.

This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

3. The term "dividends" as used in this Article means income from shares, "jouissance" shares or "jouissance" rights, mining shares, founders' shares or other rights, not being debt-claims, participating in profits, as well as income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the Party of which the company making the distribution is a resident.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting Party, carries on business in the other Contracting Party of which the company paying the dividends is a resident through a permanent establishment situated therein and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.

5. Where a company which is a resident of a Contracting Party derives profits or income from the other Contracting Party, that other Party

may not impose any tax on the dividends paid by the company, except insofar as such dividends are paid to a resident of that other Party or insofar as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment situated in that other Party, nor subject the company's undistributed profits to a tax on the company's undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other Party.

Article 11

Interest

1. Interest arising in a Contracting Party and paid to a resident of the other Contracting Party may be taxed in that other Party.

2. However, such interest may also be taxed in the Contracting Party in which it arises and according to the laws of that Party, but if the beneficial owner of the interest is a resident of the other Contracting Party, the tax so charged shall not exceed five per cent of the gross amount of the interest.

3. Notwithstanding the provisions of paragraph 2 of this Article, interest arising in a Contracting Party is exempt from tax in that Party, if it is paid:

(a) in the case of the Hong Kong Special Administrative Region -

(1) to the Government of the Hong Kong Special Administrative Region;

(2) to the Hong Kong Monetary Authority;

(3) to any institution set up by the Government of the Hong Kong Special Administrative Region under statutory law such as a corporation, fund, authority, foundation, agency or other similar entity;

(4) to any entity established in the Hong Kong Special Administrative Region all the capital of which has been provided by the Government of the Hong Kong Special Administrative Region or any institution as defined in subparagraph (a)(3) of paragraph 3 of this Article;

(b) in the case of Kuwait -

(1) to the Government of Kuwait;

(2) to any governmental institution created in Kuwait under public law such as a corporation, Central Bank, fund, authority, foundation, agency or other similar entity;

(3) to any entity established in Kuwait all the capital of which has been provided by the Kuwaiti Government or any governmental institution as defined in subparagraph (b)(2) of paragraph 3 of this Article.

4. The term "interest" as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carries a right to participate in the debtor's profits, and in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures. Penalty charges for late payment shall not be regarded as interest for the purpose of this Article.

5. The provisions of paragraphs 1, 2 and 3 shall not apply if the beneficial owner of the interest, being a resident of a Contracting

Party, carries on business in the other Contracting Party in which the interest arises through a permanent establishment situated therein and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.

6. Interest shall be deemed to arise in a Contracting Party when the payer is a resident of that Party. Where, however, the person paying the interest, whether he is a resident of a Contracting Party or not, has in a Contracting Party a permanent establishment in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establishment, then such interest shall be deemed to arise in the Party in which the permanent establishment is situated.

7. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest exceeds, for whatever reason, the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting Party, due regard being had to the other provisions of this Agreement.

Article 12

Royalties

1. Royalties arising in a Contracting Party and paid to a resident of the other Contracting Party may be taxed in that other Party.

2. However, such royalties may also be taxed in the Contracting Party in which they arise and according to the laws of that Party, but if

the beneficial owner of the royalties is a resident of the other Contracting Party, the tax so charged shall not exceed five per cent of the gross amount of the royalties.

3. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment or for information (know-how) concerning industrial, commercial or scientific experience.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting Party, carries on business in the other Contracting Party in which the royalties arise through a permanent establishment situated therein and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.

5. Royalties shall be deemed to arise in a Contracting Party when the payer is a resident of that Party. Where, however, the person paying the royalties, whether he is a resident of a Contracting Party or not, has in a Contracting Party a permanent establishment in connection with which the liability to pay the royalties was incurred, and such royalties are borne by such permanent establishment, then such royalties shall be deemed to arise in the Party in which the permanent establishment is situated.

6. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties exceeds, for whatever reason, the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the

provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting Party, due regard being had to the other provisions of this Agreement.

Article 13

Capital Gains

1. Gains derived by a resident of a Contracting Party from the alienation of immovable property referred to in Article 6 and situated in the other Contracting Party may be taxed in that other Party.

2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting Party has in the other Contracting Party, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise), may be taxed in that other Party.

3. Gains derived by an enterprise of a Contracting Party from the alienation of ships or aircraft operated in international traffic or movable property pertaining to the operation of such ships or aircraft shall be taxable only in that Party.

4. Gains derived by a resident of a Contracting Party from the alienation of shares of a company deriving more than 50 per cent of its asset value directly or indirectly from immovable property situated in the other Contracting Party may be taxed in that other Party. However, this paragraph does not apply to gains derived from the alienation of shares:

(a) quoted on such stock exchange as may be agreed between the Parties; or

(b) alienated or exchanged in the framework of a reorganisation of a company, a merger, a scission or a similar operation; or

(c) in a company deriving more than 50 per cent of its asset value from immovable property in which it carries on its business.

5. Gains from the alienation of any property, other than that referred to in paragraphs 1, 2, 3 and 4, shall be taxable only in the Contracting Party of which the alienator is a resident.

Article 14

Income from Employment

1. Subject to the provisions of Articles 15, 17 and 18, salaries, wages and other similar remuneration derived by a resident of a Contracting Party in respect of an employment shall be taxable only in that Party unless the employment is exercised in the other Contracting Party. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other Party.

2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting Party in respect of an employment exercised in the other Contracting Party shall be taxable only in the first-mentioned Party if:

(a) the recipient is present in the other Party for a period or periods not exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned, and

(b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other Party, and

(c) the remuneration is not borne by a permanent establishment which the employer has in the other Party.

3. Notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic by an enterprise of a Contracting Party shall be taxable only in that Party.

Article 15

Directors' Fees

Directors' fees and other similar payments derived by a resident of a Contracting Party in his capacity as a member of the board of directors of a company which is a resident of the other Contracting Party may be taxed in that other Party.

Article 16

Artistes and Sportsmen

1. Notwithstanding the provisions of Articles 7 and 14, income derived by a resident of a Contracting Party as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as a sportsman, from his personal activities as such exercised in the other Contracting Party, may be taxed in that other Party.

2. Where income in respect of personal activities exercised by an entertainer or a sportsman in his capacity as such accrues not to the entertainer or sportsman himself but to another person, that income may, notwithstanding the provisions of Articles 7 and 14, be taxed in the Contracting Party in which the activities of the entertainer or sportsman are exercised.

Article 17

Pensions, Alimony and Maintenance Payment

1. Subject to the provisions of paragraph 2 of Article 18, pensions and other similar remuneration (including a lump sum payment) paid to a resident of a Contracting Party in consideration of past employment or self-employment shall be taxable only in that Party.

2. Notwithstanding the provisions of paragraph 1, pensions and other similar remuneration (including a lump sum payment) made under a pension or retirement scheme which is:

(a) a public scheme which is part of the social security system of a Contracting Party; or

(b) a scheme in which individuals may participate to secure retirement benefits and which is recognised for tax purposes in a Contracting Party,

shall be taxable only in that Contracting Party.

3. Alimony or other maintenance payment paid by a resident of a Contracting Party to a resident of the other Contracting Party shall, to the extent it is not allowable as a deduction to the payer in the first-mentioned Party, be taxable only in that Party.

Article 18

Government Service

1. (a) Salaries, wages and other similar remuneration, other than a pension, paid by the Government of a Contracting Party to an individual in respect of services rendered to that Party shall be taxable only in that Party.

(b) However, such salaries, wages and other similar remuneration shall be taxable only in the other Contracting Party if the services are rendered in that Party and the individual is a resident of that Party who:

(1) in the case of the Hong Kong Special Administrative Region, has the right of abode therein and in the case of Kuwait, is a national thereof; or

(2) did not become a resident of that Party solely for the purpose of rendering the services.

2. (a) Any pension (including a lump sum payment) paid by, or paid out of funds created or contributed by, the Government of a Contracting Party to an individual in respect of services rendered to that Party shall be taxable only in that Party.

(b) However, if the individual who rendered the services is a resident of the other Contracting Party and the case falls within subparagraph (b) of paragraph 1 of this Article, any corresponding pension (including a lump sum payment) shall be taxable only in that Party.

3. The provisions of Articles 14, 15, 16 and 17 shall apply to salaries, wages, pensions (including a lump sum payment) and other similar

remuneration in respect of services rendered in connection with a business carried on by the Government of a Contracting Party.

Article 19

Students

Payments which a student who is or was immediately before visiting a Contracting Party a resident of the other Contracting Party and who is present in the first-mentioned Party solely for the purpose of his education receives for the purpose of his maintenance or education shall not be taxed in that Party, provided that such payments arise from sources outside that Party.

Article 20

Other Income

1. Items of income of a resident of a Contracting Party, wherever arising, not dealt with in the foregoing Articles of this Agreement shall be taxable only in that Party.

2. The provisions of paragraph 1 shall not apply to income, other than income from immovable property as defined in paragraph 2 of Article 6, if the recipient of such income, being a resident of a Contracting Party, carries on business in the other Contracting Party through a permanent establishment situated therein and the right or property in respect of which the income is paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.

Article 21

Elimination of Double Taxation

1. The laws in force in either of the Contracting Parties shall continue to govern the taxation in the respective Party except where provisions to the contrary are made in this Agreement.

2. It is agreed that double taxation shall be avoided in accordance with the following paragraphs of this Article:

(a) in the case of the Hong Kong Special Administrative Region -

Subject to the provisions of the laws of the Hong Kong Special Administrative Region relating to the allowance of a credit against Hong Kong Special Administrative Region tax (which shall not affect the general principle of this Article), Kuwaiti tax paid under the laws of Kuwait and in accordance with this Agreement, whether directly or by deduction, in respect of income derived by a person who is a resident of the Hong Kong Special Administrative Region from sources in Kuwait, shall be allowed as a credit against Hong Kong Special Administrative Region tax payable in respect of that income, provided that the credit so allowed does not exceed the amount of Hong Kong Special Administrative Region tax computed in respect of that income in accordance with the tax laws of the Hong Kong Special Administrative Region;

(b) in the case of Kuwait -

Where a resident of Kuwait derives income which, in accordance with the provisions of this Agreement, may be taxed in both Kuwait and the Hong Kong Special Administrative Region, Kuwait shall allow as a deduction from the tax on the income of that resident, an amount equal to the income tax paid in the Hong Kong Special Administrative Region.

Such deduction shall not, however, exceed that part of the tax on income, as computed before the deduction is given, which is attributable, as the case may be, to the income which may be taxed in the Hong Kong Special Administrative Region.

Article 22

Non-Discrimination

1. Persons who, in the case of the Hong Kong Special Administrative Region, have the right of abode or are incorporated or otherwise constituted therein, and, in the case of Kuwait, are individuals possessing the Kuwaiti nationality shall not be subjected in the other Contracting Party to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which persons who have the right of abode or are incorporated or otherwise constituted in that other Party (where that other Party is the Hong Kong Special Administrative Region) or individuals possessing the Kuwaiti nationality (where that other Party is Kuwait) in the same circumstances, in particular with respect to residence, are or may be subjected.

2. The taxation on a permanent establishment which an enterprise of a Contracting Party has in the other Contracting Party shall not be less favourably levied in that other Party than the taxation levied on enterprises of that other Party carrying on the same activities. This provision shall not be construed as obliging a Contracting Party to grant to residents of the other Contracting Party any personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents.

3. Except where the provisions of paragraph 1 of Article 9, paragraph 7 of Article 11, or paragraph 6 of Article 12, apply, interest, royalties and other disbursements paid by an enterprise of a Contracting Party to a resident of the other Contracting Party shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned Party.

4. Enterprises of a Contracting Party, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting Party, shall not be subjected in the first-mentioned Party to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned Party are or may be subjected.

5. Nothing in this Article shall be construed as imposing a legal obligation on a Contracting Party to extend to the residents of the other Contracting Party, the benefit of any treatment, preference or privilege which may be accorded to any other state or its residents by virtue of the formation of a customs union, economic union, special agreements, a free trade area or by virtue of any regional or sub-regional arrangement relating wholly or mainly to movement of capital and/or taxation to which the first-mentioned Contracting Party may be a party.

6. In this Article, the term "taxation" means taxes, which are the subject of this Agreement.

Article 23

Mutual Agreement Procedure

1. Where a person considers that the actions of one or both of the Contracting Parties result or will result for him in taxation not in accordance with the provisions of this Agreement, he may, irrespective of the remedies provided by the domestic laws of those Parties, present his case to the competent authority of the Contracting Party of which he is a resident or, if his case comes under paragraph 1 of Article 22, to that of the Contracting Party in which he has the right of abode or is incorporated or otherwise constituted (in the case of the Hong Kong Special Administrative Region) or of which he is a national (in the case of Kuwait). The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of this Agreement.

2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting Party, with a view to the avoidance of taxation which is not in accordance with this Agreement. Any agreement reached shall be implemented notwithstanding any time limits in the domestic laws of the Contracting Parties.

3. The competent authorities of the Contracting Parties shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of this Agreement. They may also consult together for the elimination of double taxation in cases not provided for in this Agreement.

4. The competent authorities of the Contracting Parties may communicate with each other directly, including through a joint commission consisting of themselves or their representatives, for the purpose of reaching an agreement in the sense of the preceding paragraphs.

Article 24

Exchange of Information

1. The competent authorities of the Contracting Parties shall exchange such information as is foreseeably relevant for carrying out the provisions of this Agreement or to the administration or enforcement of the domestic laws of the Contracting Parties concerning taxes covered by this Agreement, insofar as the taxation thereunder is not contrary to the Agreement. The exchange of information is not restricted by Article 1.

2. Any information received under paragraph 1 by a Contracting Party shall be treated as secret in the same manner as information obtained under the domestic laws of that Party and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes referred to in paragraph 1. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions, including, in the case of the Hong Kong Special Administrative Region, the decisions of the Board of Review. Information shall not be disclosed to any third jurisdiction for any purpose.

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting Party the obligation:

   (a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting Party;

   (b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting Party;

   (c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (*ordre public*).

4. If information is requested by a Contracting Party in accordance with this Article, the other Contracting Party shall use its information gathering measures to obtain the requested information, even though that other Party may not need such information for its own tax purposes. The obligation contained in this paragraph is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting Party to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting Party to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

Article 25

Members of Government Missions

Nothing in this Agreement shall affect the fiscal privileges of members of government missions, including consular posts, under the general rules of international law or under the provisions of special agreements.

Article 26

Miscellaneous Rules

1. Nothing in this Agreement shall prejudice the right of each Contracting Party to apply its domestic laws and measures concerning tax avoidance, whether or not described as such.

2. The provisions of this Agreement shall not be construed to restrict in any manner any exclusion, exemption, deduction, credit or other allowance now or hereafter accorded either:

   (a) by the laws of a Contracting Party in the determination of the tax imposed by that Contracting Party;

   (b) by any other special arrangement on taxation in connection with the economic or technical cooperation between the Contracting Parties.

Article 27

Entry into Force

1. Each of the Contracting Parties shall notify the other in writing of the completion of the procedures required by its law for the bringing into force of this Agreement. This Agreement shall enter into force on the date of the later of these notifications.

2. The provisions of this Agreement shall thereupon have effect:

   (a) in the Hong Kong Special Administrative Region -

   in respect of Hong Kong Special Administrative Region tax, for any year of assessment beginning on or after 1 April in the

   calendar year following that in which this Agreement enters into force;

   (b) in Kuwait -

   in respect of Kuwaiti tax, for any taxable period beginning on or after 1 April in the calendar year following that in which this Agreement enters into force.

Article 28

Duration and Termination

This Agreement shall remain in force until terminated by one of the Contracting Parties. Either Contracting Party may terminate this Agreement by giving notice of termination at least six months before the expiry of the period of five years beginning with the date of entry into force of this Agreement or before the expiry of any subsequent period of five years beginning with the end of a previous period. In such event, this Agreement shall cease to have effect:

(a) in the Hong Kong Special Administrative Region -

in respect of Hong Kong Special Administrative Region tax, for any year of assessment beginning on or after 1 April in the calendar year next following the expiry of the period of five years in which the notice is given;

(b) in Kuwait -

in respect of Kuwaiti tax, for any taxable period beginning on or after 1 April in the calendar year next following the expiry of the period of five years in which the notice is given.

Part 2

Paragraphs 1 to 7 of the Protocol to the Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the State of Kuwait for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income

1. For the purposes of Article 2 paragraph 3(b)(4), the Zakat means the divine obligation payable on net surplus by Muslim individuals and public institutions, organizations, associations, companies and other Kuwaiti entities.

2. In relation to Article 3 paragraph 1(a)(1), the tax laws of the Hong Kong Special Administrative Region also applies, as from 1 July 2007, to the Shenzhen Bay Port Hong Kong Port Area set up at the Shenzhen Bay Port in accordance with the decision of the Standing Committee of the Tenth National People's Congress of the People's Republic of China at its 24th Meeting on 31 October 2006 and implemented in the Hong Kong Special Administrative Region by way of the enactment of the Shenzhen Bay Port Hong Kong Port Area Ordinance, Chapter 591 of the Laws of Hong Kong.

3. For the purposes of Article 7 paragraph 3, the term "banking enterprise", in the case of the Hong Kong Special Administrative Region, means a financial institution as defined in its tax laws.

4. For the purposes of Article 8 -

   (a) income or profits derived from the operation of aircraft in international traffic by an enterprise of a Contracting Party, including participation in a pool service, a joint air transport

   operation or an international operating agency, which are subject to tax in the area of that Contracting Party shall be exempt from income tax, profits tax and all other taxes on income or profits imposed in the area of the other Contracting Party;

   (b) capital and assets of an enterprise of a Contracting Party relating to the operation of aircraft in international traffic shall be exempt from taxes of every kind and description on capital and assets imposed in the area of the other Contracting Party;

   (c) the term "income or profits" referred to in subparagraph (a) hereof includes revenues and gross receipts from the operation of aircraft for the carriage of persons, livestock, goods, mail or merchandise in international traffic including:

      (1) the charter or rental of aircraft;

      (2) the sale of tickets or similar documents, and the provision of services connected with such carriage, either for the airline itself or for any other airline; and

      (3) interest on funds directly connected with the operation of aircraft in international traffic.

5. For the purposes of Articles 10, 11 and 12, the competent authorities of the Contracting Parties shall by mutual agreement settle the mode of application of any limitation contained therein.

6. For the purposes of Article 24, it is understood that the Article only obliges the Contracting Parties to exchange information upon request.

7. For the purposes of Article 25, the term "government missions", in the case of Kuwait, includes diplomatic missions.

Clerk to the Executive Council

COUNCIL CHAMBER

2012

Explanatory Note

The Hong Kong Special Administrative Region Government and the Government of Kuwait signed an agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income (***Agreement***) together with a protocol to the Agreement (***Protocol***) on 13 May 2010. This Order specifies the arrangements in Articles 1 to 28 of the Agreement and Paragraphs 1 to 7 of the Protocol as double taxation relief arrangements under section 49(1A) of the Inland Revenue Ordinance (Cap. 112) and declares that it is expedient that those arrangements should have effect. The Agreement and Protocol were signed in the Chinese, Arabic and English languages.

2. The effects of the declaration are—

(a) that the arrangements have effect in relation to tax under the Inland Revenue Ordinance (Cap. 112) despite anything in any enactment; and

(b) that the arrangements, for the purposes of any provision of those arrangements that requires disclosure of information concerning tax of Kuwait, have effect in relation to any tax of Kuwait that is the subject of that provision.

Annex B

Extracts of Hong Kong's Sample CDTA Text

ARTICLE 25

EXCHANGE OF INFORMATION

1. The competent authorities of the Contracting Parties shall exchange such information as is foreseeably relevant for carrying out the provisions of this Agreement or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting Parties, or of their political subdivisions or local or territorial authorities, insofar as the taxation thereunder is not contrary to the Agreement. The exchange of information is not restricted by Article 1[1].

2. Any information received under paragraph 1 by a Contracting Party shall be treated as secret in the same manner as information obtained under the domestic laws of that Party and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting Party the obligation:

   (a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting Party;

   (b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting Party;

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[1] Article 1: "PERSONS COVERED: This Agreement shall apply to persons who are residents of one or both of the Contracting Parties."

(c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (ordre public).

4. If information is requested by a Contracting Party in accordance with this Article, the other Contracting Party shall use its information gathering measures to obtain the requested information, even though that other Party may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contacting Party to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting Party to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

* * * *

PROTOCOL

At the time of signing of the Agreement between the Government of Country A and the Government of the Hong Kong Special Administrative Region of the People's Republic of China for the Avoidance of Double Taxation with respect to Taxes on Income and the Prevention of Fiscal Evasion, the two Governments have agreed on the following provisions which shall form an integral part of the Agreement.

1-9. …..

10. It is understood that Article 25 does not create obligations as regards automatic or spontaneous exchanges of information between the Contracting Parties. In respect of the same Article, it is also understood that information requested shall not be disclosed to a third jurisdiction. In the case of the Hong Kong Special Administrative Region, the judicial decisions in which information may be disclosed include the decisions of the Board of Review.

* * * *

Annex C

Financial, Economic and Civil Service Implications of the Proposal

Financial Implications

The Government would have to forgo some revenue which is currently being collected in respect of profits of Kuwaiti resident companies not attributable to a permanent establishment in Hong Kong, as well as shipping profits of Kuwaiti operators. However, the overall financial implications would be insignificant.

Economic Implications

2. The Kuwaiti Agreement will facilitate business development between Hong Kong and Kuwait and contribute positively to the economic development of Hong Kong. It will enhance the economic interaction between Hong Kong and Kuwait by providing enhanced certainty and stability to the tax liabilities of investors.

Civil Service Implications

3. There will be additional work for the Inland Revenue Department in handling requests for exchange of information from Kuwait under the Kuwaiti Agreement. Additional manpower resources would be sought in accordance with the established resource allocation mechanism.

Annex D

Comprehensive Double Taxation Agreement (CDTA) Between Hong Kong and Kuwait

Summary of Main Provisions

1. The CDTA with Kuwait ("the Kuwaiti Agreement") covers the following types of taxes:

(a) in respect of Hong Kong –
- (i) salaries tax;
- (ii) profits tax; and
- (iii) property tax;

(b) in respect of Kuwait –
- (i) the corporate income tax;
- (ii) the contribution from the net profits of Kuwaiti shareholding companies payable to the Kuwait Foundation for Advancement of Science;
- (iii) the contribution from the net profits of Kuwaiti shareholding companies payable to the supporting of the National Budget;
- (iv) the Zakat[1]; and
- (v) the tax imposed to support national employees.

2. The Kuwaiti Agreement deals with the taxing of income of the resident of one Contracting Party ("resident jurisdiction") derived from another Contracting Party ("source jurisdiction").

Exclusive taxing rights

3. Where the right to tax income is allocated exclusively to one

[1] Zakat is a religious obligation with which every Muslim has to comply. Both companies as well as individuals have to pay Zakat. It is in the nature of a tax on both income and capital.

Contracting Party under the Kuwaiti Agreement (the resident jurisdiction or the source jurisdiction), there is no double taxation. It is provided in the Kuwaiti Agreement that the following types of income shall only be taxed in the resident jurisdiction:

(a) profits of an enterprise, unless the enterprise carries on business in the source jurisdiction through a permanent establishment therein (i.e. a fixed place of business through which the business of an enterprise is wholly or partly carried on);

(b) profits from operation of ships or aircraft in international traffic and gains from alienation of ships or aircraft operated in international traffic;

(c) income from employment, unless the employment is exercised in the source jurisdiction;

(d) non-government pensions, unless the pensions are made under a public scheme which is part of the social security system of the source jurisdiction or under a retirement scheme which is recognized for tax purpose in the source jurisdiction;

(e) capital gains not expressly dealt with in the Agreement; and

(f) other income not expressly dealt with in the Agreement except where the income (excluding capital gains) is derived through a permanent establishment in the source jurisdiction.

4. Non-government pensions made under a public scheme which is part of the social security system of the source jurisdiction or under a retirement scheme which is recognized for tax purpose in the source jurisdiction are taxable only in the source jurisdiction. Besides, employment income and pensions paid by the government of a Contracting Party are, in general, taxable only in that Party (source jurisdiction).

Shared taxing rights

5. Where both tax jurisdictions are given the right to tax the same item of income, the resident jurisdiction is required under the Kuwaiti Agreement to give double taxation relief to its resident for any income doubly assessed (i.e. the source jurisdiction has the primary right to tax and the resident jurisdiction is left with a secondary right). It is provided in the Kuwaiti Agreement that the following types of income may be taxed in both jurisdictions:

(a) income generated from immovable property and gains from the alienation of such property situated in the source jurisdiction;

(b) profits of an enterprise which carries on business in the source jurisdiction through a permanent establishment, to the extent that such profits are attributable to the permanent establishment, and gains from the alienation of the business property of such permanent establishment;

(c) passive income of dividends, interest and royalties received from residents of a source jurisdiction. The source jurisdiction's right to tax is subject to a specified limit in tax rates:

- for dividends, 0% if the beneficial owner is the Government of the other Contracting Party and 5% in all other cases;

- for interest, 0% if the beneficial owner is the Government of the other Contracting Party and 5% in all other cases;

- for royalties, 5%;

(d) gains from alienation of immovable property or shares of a company deriving more than 50 per cent of its asset value directly or indirectly from immovable property situated in

the source jurisdiction;

(e) remuneration from non-government employment exercised in the source jurisdiction;

(f) directors' fees from a company resident in the source jurisdiction;

(g) income of entertainers and sportspersons who conduct their professional activities in the source jurisdiction; and

(h) other income (excluding capital gains) not expressly dealt with in the Agreement if it is derived through a permanent establishment in the source jurisdiction.

6. In general, in case of shared taxing rights, double taxation relief may be given to a taxpayer either through the exemption method, where income taxable in the source jurisdiction is exempted from taxation in the resident jurisdiction; or through the credit method, where income taxable in the source jurisdiction is subject to tax in the resident jurisdiction but the tax levied in the source jurisdiction is credited against the tax levied in the resident jurisdiction on such income. Both Hong Kong and Kuwait will provide double taxation relief for its residents by the credit method.