

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

The Government of the Republic of Kenya and The Government of the Republic of Turkey hereinafter referred to as "the Contracting Parties".

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

RECOGNIZING that the Agreement on the Reciprocal Promotion and Protection of Investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties;

AGREEING that fair and equitable treatment of investments is desirable in order to maintain a stable framework for investment and will contribute to maximizing effective utilization of economic resources and improve living standards; and

CONVINCED that these objectives can be achieved without relaxing health, safety and environmental measures of general application as well as internationally recognized labour rights,

HAVING resolved to conclude an agreement on the reciprocal promotion and protection of investments,

HAVE AGREED AS FOLLOWS:

Article 1. Definitions

For the purpose of this Agreement;

1. The term "investment" means every kind of asset invested by an investor of a Contracting Party, for the purpose of establishing lasting economic relations, in the territory of the other Contracting Party in accordance with its laws and regulations, and shall include in particular, but not exclusively:

(a) movable and immovable property, as well as any other rights such as mortgages, liens, pledges and any other similar rights,

(b) reinvested returns,

(c) claims to money or any other rights to performance having an economic value related to an investment,

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

(e) industrial and intellectual property rights, in particular patents, copyrights, business names, industrial designs, technical processes, as well as trademarks, goodwill and know-how;

(f) business concessions conferred under the laws and regulations of a Contracting Party or under a contract including concessions to explore, develop, extract or exploit natural resources;

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

2. The term "investor" means:

(a) any natural person who is a national of either Contracting Party in accordance with its laws,

(b) any legal entity such as a company, corporation, firm or partnership incorporated or constituted in accordance with the laws and regulations of the Contracting Party excluding non-profit making organizations and having its registered office or principal place of business together with substantial business activities in the territory of that Contracting Party who have made an investment in the territory of the other Contracting Party.

3. The term "returns" means the amounts yielded by an investment and includes in particular, though not exclusively, profit, interest, capital gains, royalties, fees, dividends or any payments in kind related to an investment.

4. The term "territory" means:

(a) in respect of the Republic of Turkey; territory, territorial sea, as well as the maritime areas over which the Republic of Turkey has jurisdiction or sovereign rights for the purposes of exploration, exploitation and conservation of natural resources, pursuant to international law;

(b) in respect of the Republic of Kenya; the land territory, internal waters and territorial sea of the Republic of Kenya and the airspace above them, as well as the maritime ones beyond the territorial sea including the seabed and subsoil, over which the Republic of Kenya exercises sovereign rights or jurisdiction in accordance with its national laws in force and international law for the purpose of exploration and exploitation of the natural resources of such areas.

Article 2. Promotion and Protection of Investments

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

2. Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and full protection and security in the territory of the other Contracting Party.

3. Neither Contracting Party shall in any way impair the management, maintenance, use, enjoyment, extension, or disposal of such investments by unreasonable or discriminatory measures.

Article 3. Treatment of Investments

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

2. Each Contracting Party shall accord to these investments, once established, treatment no less favourable than that accorded in like circumstances to investments of its investors or to investments of investors of any third State, whichever is the more favourable, as regards the operation, management, maintenance, use, enjoyment, expansion, or disposal of the investment.

3. (a) The Provisions of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege which may be extended by the former Contracting Party by virtue of any existing or future multilateral agreement or arrangement relating wholly or mainly to taxation or investments.

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

(c) The provisions of Articles 2 and 3 of this Agreement shall not oblige either Contracting Party to accord investments of investors of the other Contracting Party the same treatment that it accords to investments of its own investors with regard to acquisition of land and real estates, and real rights upon them.

(c) Each Contracting Party may, in accordance with its laws and regulations, grant incentives, treatment, preferences or privileges through special policies or measures to its own investors only for the purpose of promoting small and medium sized enterprises and infant industries in its territory, subject to the condition that these shall not significantly affect the investments and activities of the investors of the other Contracting Party.

Article 4. General Exceptions

1. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any non-discriminatory legal measures:

(a) designed and applied for the protection of human, animal or plant life or health, or the environment;

(b) related to the conservation of exhaustible natural resources.

2. Nothing in this Agreement shall be construed:

(a) to require any Contracting Party to furnish or allow access to any information the disclosure of which it considers to be contrary to its essential security interests;

(b) to prevent any Contracting Party from taking any actions that it considers necessary for the protection of its essential security interests,

(i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment,

(ii) taken in time of war, armed conflict or other emergency in international relations,

(iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices;

(iv) relating to maintenance of public order where a genuine and sufficiently serious threat is posed to the public.

(c) to prevent any Contracting Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

3. The provisions of this Article shall not apply to Article 7 paragraph 1(d) of this Agreement.

Article 5. Expropriation

1. Investments by investors of a Contracting Party in the territory of the other Contracting Party shall not be expropriated, nationalized or subjected to any measures direct or indirect having similar effects (hereinafter referred to as expropriation) except for a public purpose, in a non-discriminatory manner, upon payment of prompt, adequate, effective and full compensation, and in accordance with due process of law and the general principles of treatment provided for in Article 3 of this Agreement.

2. Non-discriminatory legal measures designed and applied to protect legitimate public welfare objectives, such as health, safety and environment, do not constitute indirect expropriation.

3. Such compensation shall be equivalent to the market value of the expropriated investment at the time immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier. The market value shall be determined in accordance with the laws and regulations of the host Contracting Party taking into account, inter alia, the capital invested, replacement value, appreciation, current returns, goodwill and other relevant factors.

4. Compensation shall be paid without delay and be freely transferable as described in paragraph 2 Article 7. Compensation shall be payable in a freely convertible currency and in the event that payment of compensation is delayed, it shall include an interest rate;

(a) with respect to investments made within the Republic of Turkey, equivalent to the highest interest rate paid on public claims,

(b) in respect of the Republic of Kenya, equivalent to a commercial rate established on a market basis,

from the date of dispossession of the expropriated property until the date of actual payment.

Article 6. Compensation for Losses

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

Article 7. Repatriation and Transfer

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

- (a) principal and additional amounts to maintain, develop or increase the investment,
- (b) returns except payments in kind,
- (c) proceeds from the sale or liquidation of all or any part of an investment,
- (d) compensation pursuant to Articles 5, 6, 8 and 9,
- (e) amounts required for the payment of expenses which arise from the operation of the investment, such as loans repayments, payment of royalties, management fees, license fees or other similar expenses,
- (f) salaries, wages and other remunerations received by the nationals of one Contracting Party who have obtained in the territory of the other Contracting Party the corresponding work permits related to an investment,
- (g) payments of expenses arising from an investment dispute.

2. Transfers shall be made without any restriction in a freely convertible currency at the prevailing market rate of exchange applicable on the date of transfer to the currency to be transferred and shall be promptly transferable.

3. Where, in exceptional circumstances, payments and capital movements cause or threaten to cause serious balance of payments difficulties, each Contracting Party may temporarily restrict transfers, provided that such restrictions are not discriminatory.

Article 8. Subrogation

If a Contracting Party or any of its related agency makes a payment to an investor under a system established by law against non-commercial risks in respect of an investment made by their investor in the territory of the other Contracting Party, the latter Contracting Party shall recognise the transfer of any rights as claim from the investor to the former Contracting Party or any of its related agency to exercise by virtue of subrogation any such right and claim to the same extent as its predecessor in title.

Article 9. Settlement of Disputes between an Investors and a Contracting Party

1. Any dispute between one of the Contracting Parties and an investor of the other Contracting Party, in connection with the investment of that investor, shall be notified in writing, including detailed information, by the investor to the host Contracting Party. As far as possible, the investor and the concerned Contracting Party shall endeavour to settle the dispute through consultations and negotiations in good faith.

2. If the dispute, cannot be settled in the manner specified in Paragraph 1 within six (6) months, the dispute may at the choice of the investor, be submitted to:

- (a) the competent court of the Contracting Party in whose territory the investment has been made; or
- (b) the International Centre for Settlement of Investment Disputes (ICSID) set up by the Convention on Settlement of Investment Disputes Between States and Nationals of other States; or
- (c) an ad hoc arbitration tribunal established under the Arbitration Rules of Procedure of the United Nations Commission for International Trade Law (UNCITRAL).

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

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

both Contracting Parties agrees that the Notifications, submitted by the Republic of Turkey on March 3, 1989 to the International Centre for the Settlement of Investment Disputes (ICSID) concerning classes of disputes considered suitable or unsuitable for submission to ICSID, will constitute an integral part of this Agreement and the classes of disputes considered unsuitable for submission to ICSID in the aforementioned Notifications shall not be submitted to ICSID or any international dispute settlement mechanism, unless otherwise agreed by the Republic of Turkey.

5. Disputes arising out of investments which are in the nature of acquisition of shares or voting power amounting to, or representing of less than ten (10) percent of a company through stock exchanges shall not be submitted to international arbitration.

6. The arbitration tribunal shall take its decisions in accordance with the provisions of this Agreement, the laws and regulations of the Contracting Party involved in the dispute on which territory the investment is made (including its rules on the conflict of law) and the relevant principles of international law as accepted by both Contracting Parties.
7. The award shall be final and binding for all parties in dispute. Each Contracting Party commits itself to execute the award according to its national law.
8. Paragraph (2) of Article 3 shall not apply in respect of dispute settlement provisions between an investor and the hosting Contracting Party laid down simultaneously by this Agreement and by another similar international agreement to which one of the Contracting Parties is signatory.

Article 10. Settlement of Disputes between the Contracting Parties

1. The Contracting Parties shall seek in good faith and a spirit of cooperation a rapid and equitable solution to any dispute between them concerning the interpretation or application of this Agreement. In this regard, the Contracting Parties agree to engage in direct and meaningful negotiations to arrive at such solutions. If the Contracting Parties cannot reach an agreement within six (6) months after the beginning of disputes between themselves through the foregoing procedure, the disputes may be submitted, upon the request of either Contracting Party, to an arbitral tribunal.
2. Within two (2) months of receipt of a request, each Contracting Party shall appoint an arbitrator. The two arbitrators shall select a third arbitrator as Chairman, who is a national of a third State. In the event either Contracting Party fails to appoint an arbitrator within the specified time, the other Contracting Party may request the President of the International Court of Justice to make the appointment.
3. If both arbitrators cannot reach an agreement about the choice of the Chairman within two (2) months after their appointment, the Chairman shall be appointed upon the request of either Contracting Party by the President of the International Court of Justice.
4. If, in the cases specified under paragraphs (2) and (3) of this Article, the President of the International Court of Justice is prevented from carrying out the said function or if he is a national of either Contracting Party, the appointment shall be made by the Vice-President, and if the Vice-President is prevented from carrying out the said function or if he is a national of either Contracting Party, the appointment shall be made by the most senior member of the Court who is not a national of either Contracting Party.
5. The tribunal shall have three (3) months from the date of the selection of the Chairman to agree upon rules of procedure consistent with the other provisions of this Agreement. In the absence of such agreement, the tribunal shall request the President of the International Court of Justice to designate rules of procedure, taking into account generally recognized rules of international arbitral procedure.
6. Unless otherwise agreed, all submissions shall be made and all hearings shall be completed within eight (8) months of the date of selection of the Chairman, and the tribunal shall render its decision within two (2) months after the date of the final submissions or the date of the closing of the hearings, whichever is later. The arbitral tribunal shall reach its decisions, which shall be final and binding, by a majority of votes.
7. Each Contracting Party shall bear the costs of the arbitrator appointed by that Contracting Party and of its representation in the arbitral proceedings. Both Contracting Parties shall assume an equal share of the costs of the Chairman, as well as any other costs. The tribunal may make a different decision regarding the sharing of costs.

Article 11. Consultations

The Contracting Parties shall, at the request of either Contracting Party, hold consultations for the purpose of reviewing the implementation of this Agreement and studying any issue that may arise from this Agreement. Such consultations shall be held between the competent authorities of the Contracting Parties in a place and at a time agreed on through appropriate channels.

Article 12. Scope of Application

This Agreement shall apply to investments in the territory of one Contracting Party, made in accordance with its national laws and regulations, by investors of the other Contracting Party, whether prior to, or after the entry into force of the present Agreement. However, this Agreement shall not apply to any disputes that have arisen before its entry into force.

Article 13. Entry Into Force

1. The Contracting Parties shall notify each other through diplomatic channels, when their constitutional requirements for the entry into force of this Agreement have been fulfilled. The Agreement shall enter into force on the thirtieth day following the date of receipt of the last notification.
2. This Agreement shall remain in force for a period of ten (10) years and shall continue in force unless terminated in accordance with paragraph 3 of this Article.
3. Either Contracting Party may, by giving one year's written notice to the other Contracting Party, terminate this Agreement at the end of the initial ten-year period or at any time thereafter.
4. This Agreement may be amended by mutual written consent of the Contracting Parties at any time. The amendments shall enter into force in accordance with the same legal procedure as agreed in the first paragraph of the present Article.
5. With respect to investments made or acquired prior to the date of termination of this Agreement and to which this Agreement otherwise applies, the provisions of all of the other Articles of this Agreement shall thereafter continue to be effective for a further period of ten (10) years from such date of termination.

IN WITNESS WHEREOF, the undersigned being duly authorized by their respective governments have signed this Agreement in two original copies (duplicate) in English and Turkish languages, both texts being equally authentic. In the event there is a divergence in interpretation of text, the English text shall prevail.

Done in Ankara a on this 8th day of April 2014.

FOR THE GOVERNMENT OF THE REPUBLIC OF KENYA

(signature)

AMB. AMINA C. MOHAMED, CBS, CAV

CABINET SECRETARY FOR FOREIGN MINISTER OF ECONOMY AFFAIRS AND INTERNATIONAL TRADE

FOR THE GOVERNMENT OF THE REPUBLIC OF TURKEY

(signature)

NIHAT ZEYBEKCI

MINISTER OF ECONOMY