

# **Agreement between the Government of the French Republic and the Government of the Republic of Kenya concerning the encouragement and reciprocal protection of investments**

Preamble

The Government of the French Republic and the Government of the Republic of Kenya, hereinafter referred to as the "Contracting Parties",

Desiring to enhance the mutual economic cooperation between the two States and to create favourable conditions for investments,

Convinced that the promotion and protection of such investments will be conducive to the stimulation of capital and technology transfer between the two countries in the interest of their economic development,

Have agreed as follows:

## **Article 1. Definitions**

For the purposes of this Agreement,

1. The term "investment" means all assets, such as property rights and interests of any kind invested before or after the entry into force of this Agreement in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made.

Without limiting the generality of the foregoing, the term "investment" includes:

- a) Movable and immovable property as well as any other rights in rem such as mortgages, liens, usufructs, guarantees and any other similar rights;
- b) The stocks, shares and other forms of participation in companies formed in the territory of one of the contracting parties;
- c) The obligations and rights, claims to any performance having economic value;
- d) Intellectual property rights, commercial and industrial such as copyrights, patents, licences, trademarks, industrial designs or models, technical processes, trade names, know-how and goodwill;
- e) Concessions granted by law or under contract, including concessions to search for, culture, extract or exploit natural resources, including those that are in the maritime area of Contracting Parties;
- f) Reinvestments.

Any alteration of the form in which assets are invested shall not affect their classification as investment, provided that such change is not contrary to the legislation of the Contracting Party in whose territory the investment is made.

2. The term "national" means natural persons having the nationality of either Contracting Party in accordance with its legislation.

3. The term "investor" means in either of the Contracting Parties,

- a) Nationals; or
- b) Any legal person such as a company limited liability company, firm, partnership, business associations, institution or organization established or constituted in accordance with the laws and regulations of the Contracting Party whose head office, the administrative seat or principal place of business is located in the territory of that Contracting Party, whether for

profit or not and whether or not with limited liability.

4. The term "returns" means all amounts yielded by an investment and includes in particular, though not exclusively, profits, dividends, interests, capital gains, royalties, income from reinvested or any other income, as well as any payments in kind related to an investment.

5. The term "territory" means the land territory, internal waters and the territorial waters of the Contracting Party and the airspace above them, as well as the maritime areas which extend beyond the territorial sea, including the seabed and subsoil, over which the Contracting Party in question, in accordance with its domestic law and international law, sovereign rights or jurisdiction for the purpose of the exploration and exploitation of natural resources of such areas.

## **Article 2. Promotion and Admission of Investments**

1. Each Contracting Party shall promote and admit, within the framework of its laws and the provisions of this Agreement, the investments made within its territory by investors of the other Contracting Party.

2. In doing so each Contracting Party shall endeavour to encourage the use of local material and human resources for the promotion of investment in its territory.

## **Article 3. Fair and Equitable Treatment**

Each Contracting Party shall ensure fair and equitable treatment to investments of investors of the other contracting party and to refrain from interfering in its territory by unreasonable or arbitrary measures the development, operation, management, maintenance, use, enjoyment, sale or other disposition of investments of investors of the other Contracting Party.

## **Article 4. Most-favoured Nation and National Treatment**

1. Each Contracting Party shall grant to investors of the other Contracting Party and their investments a treatment no less favourable than that accorded to its own and their investors to investments with respect to the development, operation, management, maintenance, use, enjoyment, sale or other disposition of investments.

2. Each Contracting Party shall grant to investors of the other Contracting Party and their investments a treatment no less favourable than that accorded to investors of the most favoured nation and to their investments with respect to the development, operation, management, maintenance, use, enjoyment, sale or other disposition of investments.

3. Each Contracting Party shall apply to investors of the other contracting party and their investments to the treatment described in paragraphs 1 and 2 above which is the most favourable.

4. This treatment does not extend to the privileges which either Contracting Party accords to investors of a third State by virtue of its association or participation in a free trade area, customs union, common market or any other form of regional economic organization.

5. Each Contracting Party shall grant, in accordance with its laws and regulations, incentives, any treatment, preference or privilege through specific policies or measures to its own investors that for the purpose of promoting small and medium-sized enterprises and infant industries in its territory subject investments and activities of investors of the other Contracting Party would not be significantly affected.

## **Article 5. Authorisations**

1. Subject to its laws and regulations, each Contracting Party shall consider sympathetically investment applications submitted and shall exercise due diligence to grant the required authorisations in its territory in connection with investments of investors of the other contracting party.

2. Subject to its laws and regulations, each Party shall grant temporary entry and stay that are submitted to it providing the necessary documents relevant to natural persons, such as managers, specialists, leaders or technical personnel recruited abroad in connection with an investment made by an investor of the other Contracting Party and which are essential to the enterprise, as long as these persons continue to meet the conditions set out in this paragraph. immediate family members of such personnel also receive similar treatment with regard to the temporary entry and stay in the territory of the host Contracting Party.

## **Article 6. Expropriation and Compensation**

1. Investments made by investors of either Contracting Party shall enjoy, full protection and security in the territory of the other Contracting Party.
2. The Contracting Parties shall not take any measures of expropriation or nationalization or any other measures, having the effect of dispossess, directly or indirectly, an investor of the other Contracting Party of the investments owned, unless the following conditions are met:
  - i) The measures are taken for a public purpose or in the national interest and in accordance with the laws,
  - ii) The measures are not discriminatory;
  - iii) These measures shall be subject to the payment of a full and prompt compensation.
3. Such compensation shall be equivalent to the market value of the investments affected by the measure of expropriation immediately before the expropriation or before the threat of expropriation is known to the public, the date the first involved. the market value shall be determined in accordance with generally accepted principles of valuation taking into account in particular the capital invested, the replacement value, the evaluation, the current income estimates of future income, goodwill and other relevant factors.
4. Such compensation, the amount and terms of payment shall be no later than the date of dispossession. compensation shall be fully realizable, transferable, and paid without restriction or delay. it shall include interest at the market rate for the currency of payment from the date of dispossession of property until the date of actual payment.
5. Without prejudice to the provisions of article 8 of this Agreement, the investor whose investments have been affected by expropriation or similar measures have the right to a prompt review of its case and of valuation of its investments in accordance with the principles set out in this article, through the judicial or other competent authority of that Contracting Party.
6. Investors of one Contracting Party whose investments in the territory of the other contracting party have suffered losses due to a war or any other armed conflict, a national state of emergency, revolt riot, insurrection or occurring in the territory of the Contracting Party in question shall be accorded by the latter, as regards restitution, indemnification, compensation or other settlement, a treatment no less favourable than that accorded by that contracting party to its own investors or to those of the most favoured nation, the more favourable treatment, as both the investor.

## **Article 7. Free Transfer**

1. Each Contracting Party shall accord to investors of the other contracting party, the free transfer inside and outside its territory, of their investments and payments relating thereto, which shall include in particular, though not exclusively:
  - a) The principal and additional amounts to develop, maintain or increase the investment;
  - b) Income;
  - c) The proceeds of the sale of or the partial or total liquidation of the investment, including the sale of shares;
  - d) The amounts required for payment of expenses related to the operation of the investment, such as loans, repayments of royalties, fees, management licence fees or other similar expenses;
  - e) The compensation provided for in articles 6, 8 and 9;
  - f) Wages and remuneration of other personnel engaged from abroad and working in connection with the investment.
2. Each Contracting Party shall further ensure that transfers referred to in paragraph 1 of this article shall be made without any restriction in a freely convertible currency to be chosen by the investor and at the normal rate of exchange applicable to the holding of that currency on the date of transfer, and to ensure that the transfer can be effected without undue delay.
3. In the absence of a market for foreign exchange, the rate to be used shall be the most recent applied to the conversion of currencies into special drawing rights.
4. In the event of unjustified delay transfer caused by the host contracting party, the transfer shall include the product at market interest rate for the currency in question from the date on which the transfer was requested until the date of actual transfer, such interest shall be borne by the contracting party responsible for delay.

5. If, in exceptional circumstances, the movement of capital to or from third countries cause or threaten to cause a serious imbalance in the balance of payments, each Contracting Party may apply temporarily safeguard measures with regard to transfer, provided that such measures are strictly necessary, applied on an equitable, non-discriminatory basis and in good faith and that they shall not exceed a period of six months.

6. The application of this article is subject to the tax laws, regulations and conventions of each Contracting State.

7. For the purposes of this article, a Contracting Party to meet its obligations by virtue of its association or participation in a free trade area, customs union, Common Market, an Economic and Monetary Union or any other form of regional cooperation or integration.

## **Article 8. Settlement of Disputes between an Investor and a Contracting Party**

1. Any dispute arising directly from an investment between one of the Contracting Parties and an investor of the other Contracting Party shall be settled amicably between the two parties concerned.

2. If such a dispute has not been settled within three (3) months from the date on which it was raised in writing, it may, at the choice of the investor, be submitted:

a) The competent courts of the Contracting Party in whose territory the investment is made;

b) To arbitration by the International Centre for Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States done at Washington on 18 March 1965 (hereinafter referred to as the Centre), if the Centre is available;

c) An ad hoc arbitration tribunal established under the Rules of the United Nations Commission on International Trade Law (UNCITRAL);

d) Any other ad hoc tribunal previously agreed.

3. An investor who has submitted the dispute to a national court may nevertheless have recourse to one of the arbitration procedures referred to in subparagraphs (b) to (d) of paragraph 2 above if, before a national court has ruled on the merits, the investor submits a declaration that an action before national courts and reverse.

4. Any arbitration under this article shall be made at the request of either party to the dispute, in a State that is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) done at New York on 10 June 1958. Claims submitted to arbitration under this section shall be considered to arise out of a commercial relationship or transaction for purposes of article 1 of the Convention.

5. Each Contracting Party hereby gives its consent to the unconditional submission to the arbitration of a dispute between it and an investor of the other Contracting Party in accordance with this article.

## **Article 9. Guarantees and Subrogation**

1. If the legislation of either Contracting Party provides a guarantee for investments abroad, it may be granted within the framework of a case-by-case examination, to investments made by investors of that Party in the territory of the other party.

2. Investments made by investors of one Contracting Party in the territory of the other Contracting Party may request the Security referred to in the preceding paragraph only if they have previously obtained accreditation of that other party.

3. If one of the Contracting Parties, by virtue of a guarantee given in respect of an investment made in the territory of the other contracting party makes its payment to investors, it is thereby entered into the claims of rights and the investors.

4. Such payments shall not affect the rights of the holder of the security to the resort to ICSID or to continue its actions brought before the Tribunal until the completion of the procedures.

## **Article 10. Specific Commitments**

If the provisions of law of either Contracting Party or international law which are in force or subsequently submitted between the Contracting Parties in addition to the present Agreement contain a general or specific clause which accord to investments of investors of the other party to more favourable treatment than that provided for in this Agreement, these provisions shall prevail over those of this Agreement to the extent that they are more favourable to the investor.

## **Article 11. Settlement of Disputes between Contracting Parties**

1. Disputes between Contracting Parties relating to the interpretation or application of this agreement should, if possible, be settled through diplomatic channels.
2. If, within a period of six (6) months from the date when either Contracting Party requested negotiations, the dispute is not settled, it shall be submitted, at the request of either contracting party to an arbitral tribunal.
3. The Tribunal shall be constituted for each individual case in the following way: (2) within two months of receipt of the request for arbitration, each Contracting Party shall appoint one member and these two members shall appoint a national of a third State who shall be appointed Chairman of the Tribunal by both contracting parties. The Chairman shall be appointed within three (3) months from the date of appointment of the other two members.
4. If the necessary appointments have not been made within the periods specified in paragraph 3 of this article, either Contracting Party, in the absence of any other agreement, invite the President of the International Court of Justice to make the necessary appointments. If the President is a national of either Contracting Party or if he is otherwise prevented from exercising this function, the member of the International Court of Justice the oldest and who is not a national of either Contracting Party or is not for any other reason unable to perform this function, shall be invited to make the necessary appointments.
5. The arbitral tribunal shall reach its decisions by a majority of votes. Such decisions shall be final and enforceable automatically to both Contracting Parties. Each Party shall bear the cost of the member appointed by it as well as the costs for its representation in the arbitration proceedings. The two Contracting Parties shall be equally shared the cost of the Chairman and any other costs. The Tribunal may make a different decision regarding the sharing of the costs. In all other respects, the tribunal shall determine its own rules of procedure.
6. Any dispute referred to in paragraph 1 above shall be settled in accordance with the provisions of this Agreement and the generally recognized principles of international law.

## **Article 12. General Exceptions**

1. Nothing in this Agreement shall be construed as preventing a contracting party from taking any measures necessary for the protection of its essential security interests and the maintenance of public order in time of war or armed conflict, provided that such measures are not applied by a Contracting Party in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on investment.
2. The provisions of this article shall not apply to paragraph 1 (e) of article 7 of this Agreement.

## **Article 13. Miscellaneous Provisions**

1. Nothing in this Agreement shall be construed as to prevent either Contracting Party from taking measures to regulate investment of foreign companies and the conditions of their activities in the framework of policies to preserve and promote cultural and linguistic diversity.
2. For the purposes of this Agreement, it is understood that the Contracting Parties shall be responsible for the actions or omissions the entities under their authority, including but not limited to, the Federated States, regions, local authorities or any other entity over which the contracting party exercises control, representation or liability of its international affairs or its sovereignty in accordance with its domestic legislation.

## **Article 14. Entry Into Force and Duration**

1. Each Party shall notify the other of the completion of the constitutional procedures required for the entry into force of this Agreement, which shall take effect one month after the date of receipt of the last notification.
2. This agreement is concluded for an initial period of ten years. It shall remain in force after the term unless one of the Contracting Parties denounces it in writing, through the diplomatic channel with one year notice.
3. On expiry of the period of validity of the present Agreement investments over which it was in force will continue to benefit from the protection of its provisions for a further period of twenty years.

Done at Nairobi on 4 December 2007, each in two originals in English and French languages, both texts being equally authentic.

For the Government of the French Republic:

Elisabeth Barbier,

Ambassador of France

Kenya

For the Government of the Republic of Kenya:

Amos Kimunya,

Ministry of Finance