

# **AGREEMENT ON ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS BETWEEN THE REPUBLIC OF KENYA AND \***

The Republic of Kenya and the

Hereinafter referred to as the Contracting Parties

Desiring to strengthen their traditional ties of friendship and to extend and intensify the economic relations between them particularly with respect to investments by the nationals of one Contracting Party in the territory of the other Contracting Party

Recognizing that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and economic development of the Contracting Parties and that fair and equitable treatment of investment is desirable,

Have agreed as follows;

## **Article 1. Definitions**

For the Purpose of this Agreement:

(a) the term "investments" shall be construed to mean any kind of property invested before or after the entry into force of this Agreement by a natural or legal persons being national of one Contracting Party in the territory of the other, in conformity with the laws and regulations of the latter.

Without limiting the generality of the foregoing, the term "investment" comprises;

- (i) movable and immovable property as well as any other rights in rem in respect of every kind of assets;
- (ii) rights derived from shares, bonds and other kinds of interests in companies and joint ventures;
- (iii) claims to money, to other assets or to any performance having an economic value;
- (iv) rights in the field of intellectual property, technical processes, goodwill and know-how;
- (v) rights granted under public law or under contract, including rights to prospect, explore, extract and win natural resources
- (vi) the minimum volume of investment set at million US dollars or the equivalent.

(b) "investor" means the following subjects which have made an investment in the territory of the other Contracting Party in accordance with the present Agreement:

- (i) natural persons who, according to the law of that Contracting Party, are considered to be its nationals;
- (ii) a legal entity, including companies, corporations, business associations and other legally recognized entities, which are constituted or otherwise duly organized under the law of that Contracting Party and have their seat together with effective economic activities in the territory of that same Contracting Party.

c) "returns" means all amounts yielded by an investment and in particular, though not exclusively, include profits, interest, capital gains, dividends, royalties, fees or other incomes.

d) "territory" means in respect of each of the Contracting Party the land territory and territorial waters of each of the Contracting Party, over which it has jurisdiction and sovereign rights pursuant to international law.

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

1. Either Contracting Party shall, within the framework of its laws and regulations, promote economic cooperation through the protection in its territory of investments of investors of the other Contracting Party, subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments.

2. Each contracting party shall endeavour to encourage the use of local resources both human and material for the promotion of investment in the country of both contracting parties

### **Article 3. Most Favoured Nation Treatment**

a) Each Contracting Party shall ensure fair and equitable treatment of investment of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof.

b) More particularly, each Contracting Party shall accord to such admitted investments and returns on investments treatment that in any case shall not be less favourable than that accorded to admitted investments or returns of investments of investors of any third State.

c) If a Contracting Party has accorded special advantages to investors of any third State by virtue of agreements establishing customs unions, economic unions, monetary unions or similar institutions, or on the basis of interim agreements leading to such unions or institutions, that Contracting Party shall not be obliged to accord such advantages to investors of the other Contracting Party.

### **Article 4. National Treatment**

a) Each Contracting Party shall accord in its territory to the investments or returns of investors of the other Contracting Party treatment that is not less favourable than that it accords to the investments or returns of its own investors.

b) Each of the Contracting Parties shall extend to the investors of the other Contracting Party, treatment that is not less favourable than that it accords to its own investors in regard to management, control, use enjoyment and disposal in relation to investments which have been received in its territory.

### **Article 5. Expropriation and Compensation**

a) Neither Contracting Party shall take any measures depriving, directly or indirectly, an investor of the other Contracting Party of an investment unless the following conditions are complied with:

(i) The measures are taken in the public or national interest and in accordance with the law;

(ii) The measures are not discriminatory;

(iii) Provisions for the payment of prompt, adequate and effective compensation accompany the measures.

b) The compensation shall be based on the market value of the investments affected immediately before the measure became public knowledge. Where that value cannot be readily ascertained, the compensation may be determined in accordance with generally recognised equitable principles of valuation taking into account the capital invested, depreciation, capital already repatriated, replacement value and other relevant factors. This compensation shall carry an interest at the appropriate market rate of interest from the date of expropriation or loss until the date of payment.

c) The investor affected shall have a right to access, under the law of the Contracting Party making the expropriation, to the judicial authority of that Part, in order to review the amount of compensation and the legality of any such expropriation or comparable measure.

### **Article 6. Transfer of Payments**

(a) Each Contracting Party shall allow without delay the investors of the other Contracting Party the unrestricted transfer of payments in connection with the investment in a freely convertible currency, subject to the right of the former Contracting Party to impose equitably and in good faith such measures as may be necessary to safeguard the integrity and

independence of its currency, its external financial position and balance of payments consistent with its rights and obligations as a member of the International Monetary Fund. Such transfers include in particular:

i, interests, dividends, profits and other returns;

- ii. repayments of loans related to investment;
- iii. the proceeds of partial or total sale of the investment;
- iv. compensation for dispossession or loss described in Article 5 of this Agreement
- v. the earnings of foreign employees working in relation to an investment once the legal requirements have been fulfilled.

(b) A transfer shall be deemed to have been made without delay if carried out within such period as is normally required for the completion of transfer formalities. The said period shall start on the day on which the relevant request has been submitted in due form and may in no case exceed six months. Transfers shall be made at the prevailing rate of exchange on the date of transfer.

(c) Equity capital can only be transferred one year after it has entered the territory of the Contracting Party unless its legislation provides for a more favourable treatment.

## **Article 7. Performance Requirements**

Within the context of its national economic policies and goals, each Party shall endeavour to avoid imposing on the investments of investors of the other Party conditions, which require the export of goods produced, or purchase of goods or services locally. This provision shall not preclude the right of either Contracting Party to impose restrictions on the importation of goods and services into their respective territories.

## **Article 8. Entry and Sojourn of Foreign Nationals**

The Contracting Parties shall within the framework of their national legislation give sympathetic consideration to applications for the entry and sojourn of persons of either Contracting Party who wish to enter the territory of the other Contracting Party in connection with the making and carrying through of an investment; the same shall apply to nationals of either Contracting Party who in connection with an investment wish to enter the territory of the other Contracting Party and sojourn there to take up employment. Application for work permits shall also be given sympathetic consideration.

## **Article 9. Transparency**

Each Contracting Party shall make public all laws, regulations, administrative practices and procedures that pertain to or affect investments

## **Article 10. Investor-to-State Dispute Resolution**

(a) In the event of a dispute between a Contracting Party and a national of the other Contracting Party relating to an investment, the parties to the dispute shall initially seek to resolve the dispute by consultations and negotiations.

(b) If the dispute in question cannot be resolved through consultations and negotiations, either party to the dispute may:

i. In accordance with the law of the Contracting Party which has admitted the investment, initiate proceedings before that Contracting Party's competent judicial or administrative bodies;

ii. If both Contracting Parties are at the time party to the 1965 Convention on the Settlement of Investment of Investment Disputes between States and Nationals of other States (âthe Conventionâ), refer the dispute to the International Centre for the Settlement of Investment Disputes (âthe Centreâ) for conciliation or arbitration pursuant to Article 28 or 36 of the Convention;

iii. If both Contracting Parties are not at the time party to the Convention, refer the dispute to an Arbitral Tribunal constituted in accordance with..... or by agreement, to any other arbitral authority.

(c) Where a dispute is referred to the Centre pursuant to sub-paragraph (b)(ii) of this Article:

i. Where the action is taken by a national of one Contracting Party, the other Contracting

ii. Party shall consent in writing to the submission of the dispute to the Centre within thirty days of receiving such a request from the national.

iii. If the parties to the dispute cannot agree whether conciliation or arbitration is the more appropriate procedure, the national affected shall have the right to choose;

iv. A company which is constituted or incorporated under the law in force in the territory of one Contracting Party and in which before the dispute arises the majority of the shares are owned by nationals of the other Contracting Party shall, in accordance with Article 25(2)(b) of the Convention, be treated for the purpose of the Convention as a company of the other Contracting Party.

(d) Once an action referred to in paragraph (b) of this Article has been taken, neither Contracting Party shall pursue the dispute through diplomatic channels unless:

i. The relevant judicial or administrative body, the Secretary General of the Centre, the arbitral authority or tribunal or the conciliation commission, as the case may be, has decided that it has no jurisdiction in relation to the dispute in question; or

ii. The other Contracting Party has failed to abide by or comply with any judgement, award, order or other determination made by the body in question.

(e) In any proceeding involving a dispute relating to an investment, a Contracting Party shall not assert, as a defence, counter-claim right of set-off or otherwise, that the national concerned has received or will receive pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of any alleged loss

## **Article 11. Dispute between the Contracting Parties**

(a) Disputes between the Contracting Parties concerning the interpretation or application of this Agreement should, as far as possible, be settled through negotiation.

(b) If a dispute between the Contracting Parties cannot thus be settled within six months from the time the dispute arose, it shall upon the request of either Contracting Party be submitted to an arbitral tribunal

(c) Such an arbitral tribunal shall be constituted for each individual case in the following way: Within two months of the receipt of the request for arbitration, each Contracting Party shall appoint one member of the tribunal. Those two members shall then select a national of a third State who on approval by the two Contracting Parties shall be appointed Chairman of the tribunal. The Chairman shall be appointed within two months from the date of appointment of the other two members.

(d) If within the periods specified in paragraph (3) of this Article the necessary appointments have not been made, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointments. If the President is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice President shall be invited to make the necessary appointments. If the Vice President is a national of either Contracting Party or if he too is prevented from discharging the said function, the Member of the International Court of Justice next in seniority who is not a national of either Contracting Party shall be invited to make the necessary appointments.

(e) The arbitral tribunal shall reach its decision by a majority of votes. Such decisions shall be binding on both Contracting Parties. Each Contracting Party shall bear the cost of its own member of the tribunal and of its representation in the arbitral proceedings; the cost of the Chairman and the remaining costs shall be borne in equal parts by the Contracting Parties. The tribunal may, however, in its decision direct that a higher proportion of cost shall be borne by one of the two Contracting Parties, and this award shall be binding on both Contracting Parties. The tribunal shall determine its own procedures

## **Article 12. Applicable Laws**

Except as otherwise provided in this Agreement, all investments shall be governed by the laws in force in the territory of the Contracting Party in which such investments are made including such laws enacted for the protection of its essential security interests or in circumstances of extreme emergency provided however that such laws are reasonably applied on a non-discriminatory basis.

## **Article 13. Application of other Rules**

If the provision of law of either Contracting Party or obligations under international law existing at the present or established hereafter between the Contracting Parties in addition to the present Agreement contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement.

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

This Agreement shall be subject to ratification and shall enter into force on the date of exchange of Instruments of Ratification.

## **Article 15. Duration and Termination**

(a) This agreement shall remain in force for a period of ten years and thereafter it shall be deemed to have been automatically extended unless either Contracting Party gives to the other Contracting Party a written notice of its intention to terminate the Agreement. The Agreement shall stand terminated one year from receipt of such written notice

(b) Notwithstanding termination of this Agreement pursuant to paragraph (1) of this Article, the Agreement shall continue to be effective for a further period of fifteen years from the date of its termination in respect of investment made or acquired before the date of termination of this Agreement.

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

se eeeeseeeeees and English languages, both texts being authoritative.

Done at on this day of , 2003 in two originals each in the

In case of any divergence, the English text shall prevail

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