Treaty between the Federal Republic of Germany and Kenya concerning the Encouragement and Reciprocal Protection of Investments

THE FEDERAL REPUBLIC OF GERMANY and KENYA

DESIRING to intensify economic cooperalion between both States,

INTENDING to create favourable conditions for in investments by nationals and companies of either State in the territory of the other State, and

RECOGNIZING that encouragement and contractual protection of such investments are apt to stimulate private business initiative and to increase the prosperity of both nations,

HAVE AGREED AS FOLLOWS:

Article 1.

Each Contracting Party shall in its territory promote as far as possible the investment of capital by nationals or companies of the other Contracting Party and admit such investmenst in accordance with its legislation. It shall in any case accord such investments fair and equitable treatment.

Article 2.

(1) Investments owned by, or under control of, nationals or companies of cither Contracting Party in the territory of the other Contracting Party shall not be accorded by that Party treatment less favourable than it accords to any other similar investment in its territory.

(2) Neither Contracting Party shall subject activities of nationals or companies of the other Contracting Party in connection with their investments, as well as the management, use or enjoyment of such investments, to conditions less favourable than it imposes on activities in connection with any other similar investment in its territory,

Article 3.

(1) Investments by nationals or companies of either Contracting Party shall enjoy full protection as well as security in the territory of the other Contracting Party.

(2) Investments by nationals or Companies of either Contracting Party shall not be expropriated in the territory of the other Contracting Party except for the public benefit and against compensation. Such compensation shall represent the equivalent of the investment expropriated; it shall be actually realizable, transferable and shall be made without delay. Provision shall have been made in an appropriate manner at or prior to the time of expropriation for the determination and the giving of such compensation. The legality of any such expropriation and the amount of compensation and the time during which it should be paid shall be subject to review by due process of law.

(3) Nationals or companies of either Contracting Party whose investments suffer losses in the territory of the other Contracting Party owing to war or other armed conflict, revolution, a state of national emergency, or revolt, shall be accorded treatment no less favourable by such other Contracting Party than that Party accords to its own nationals or companies, as regards restitution, indemnification, compensation or other valuable consideration. Such payments shall be transferable.

(4) Nationals or companies of either Contracting Party shall enjoy most-favoured-nation treatment in the territory of the other Contracting Party in respect of the matters provided for in the present Article.

Article 4.

Either Contracting Party shall in respect of investments guarantee to nationals or companies of the other Contracting Party the transfer of the capital, of the returns from it and, in the event of liquidation, of the proceeds from such liquidation.

Article 5. S

If either Contracting Party makes payment to any ot its nationals or companies under a guarantee it has assumed in respect of an investment in the territory of the other Contracting Party, the latter Contracting Party shall, without prejudice to the rights of the former Contracting Party under Article 11, recognize the assignment, whether under a law or pursuant to a legal transaction, of any right or claim from such national or company to the former Contracting Party as well as the subrogation of that Contracting Party to any such right or claim, which that Contracting Party shall be entitled to assert to the same extent as its predecessor in title. As regards the transfer of payments to be made to the Contracting Party concerned by virtue of such assignment paragraphs 2 and 3 of Article 3 as well as Article 4 shall apply mutatis mutandis.

Article 6.

(1) To the extent that those concerned have not made another arrangement admitted by the appropriate agencies of the Contracting Party in whose territory the investment is situate, transfers under paragraph 2 or 3 of Article 3, under Article 4 or Article 5 shall be made without unreasonable delay and at the rate of exchange effective for current transactions on the day the transfer is made.

(2) The rate of exchange effective for current transactions shall be based on the par value agreed with the International Monetary Fund and shall lie within the margins above ot below parily admitted under section 3 of Article IV of the Articles of Agreement on the International Monetary Fund.

(3) If at the date of transfer no rate of exchange within the meaning of paragraph 2 above exists in respect of eilher Contracting Party, the official rate fixed by such Contracting Party for its currency in relation to the US Dollar or to another freely convertible currency or to gold shall be applied. It no such rate has been fixed, the appropriaic agencies of the Contracting Party in whose lerritory the investment is situate shall admit a rate of exchange that is fair and equitable

Article 7.

(1) If the legislation of either Contracting Party or international obligations existing at presenf or established hereafter between the Contracting Parties in addition to the present Treaty, contain a regulation, whether general or specific, entitling investments by nationals or companies of the other Contracting Party to a treatment more favourable than is provided tor by the present Treaty, such regulation shall to the extent that it is more favourable prevail over the present Treaty.

(2) Either Contracting Party shall observe any other obligation it may have entered into with regard to invest- ments in its territory by nationals or companies of the other Contracting Party.

Article 8.

(1) The term "investment" shall comprise every kind of asset, and more particularly, though not exclusively,

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

(b) shares of companies and other kinds of interest;

(c) claims to money or te any performance having an economic value;

(d) copyrights, industrial property rights, techaical pro- cesses, trade-names, and good will;

(e) business concessions under public law, including concessions to search for, extract or exploit natural resources,

Any alteration of the form in which assets are invested shall not affect their classification as investment.

(2) The term "returns" shall mean the amounts yielded by an investment for a definite period as profit or interest.

(3) The term "nationals" shall mean

(a) in respect of the Federal Republic of Germany:

Germans within the meaning of the Basic Law for the Federal Republic of Germany;

(b) in respect of Kenya: citizens as defined under the Constitution of Kenya (Chapter I).

(4) The term "companies" shall mean

(a) in respect of the Federal Republic of Germany: any juristic person as well as any commercial or other company or association with or without legal personalily, having its seat in the territory of the Federal Republic of Germany and lawfully existing consistent with legal provisions, irrespective of whether the liability of its partners, associates or members is limited or unlimited and whether or not its activilies are directed at profit;

(b) in respect of Kenya: a company formed and registered under the Companies Act (Cap. 486) Laws of Kenya.

Article 9.

The present Treaty shall also apply to investments made prior to its entry into force by nationals or companies of either Contracting Party in the territory of the other Contracting Party consistent with the latter's legislation. This provision shall not affect the Agreement of 27 February 1953 on German External Debts.

Article 10.

Either Contracting Party shall grant national trealment within the framework of the present Treaty in consideration of the fact that national treatment in like matters is also granted by the other Contracting Party.

Article 11.

(1) Disputes concerning the interpretation or application of the present Treaty should, if possible, be settled by the Governments of the two Contracting Parties.

(2) If a dispute cannot thus be settled, it shall upon the request of either Contracting Party be submitted to an arbitral tribunal.

(3) Such arbitral tribunal shall be constituted for each individual case as follows: Each Contracting Partly shall appoint one member, and these two members shall agree upon a national of a third State as their chairman to be appointed by the Governments of the two Contracting Parties. Such members shall be appointed within two months, and such chairman within three months, from the date on which either Contracting Party has informed the other Contracting Party that it wants to submit the dispute to an arbitral tribunal

(4) If the periods specified in paragraph 3 above have not been observed, either Contracting Party may, in the absence of any other relevant agreement, invite the President of the Inlernational 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 discharging the said function, the Vice-President should 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 should make the necessary appointments.

(5) The arbitral tribunal shall reach its decisions by a majority of votes. Such decisions shall be binding. Each Contracting Party shall bear the cost of its own member and of its counsel in the arbitral proceedings; the cost of the Chairman and the remaining costs shall be borne in equal parts by both Contracting Parties. The arbitral tribunal may make a different regulation concerning the cost of the Chairman and the remaining costs. In all other respects, the arbitral tribunal shall determine its own procedure

Article 12.

The provisions of the present Treaty shall remain in force also in the event of a conflict arising between the Contracting Parties, without prejudice to the right of taking such temporary measures as are permitted under the general rules of international law, Measures of this kind shall be repealed not later than on the date of the actual termination of the conflict, irrespective of whether or not diplomatic relations have been re-established

Article 13.

With the exception of the provisions in paragraph 7 of the Protocol, referring to air transport, the present Treaty shall also apply to Land Berlin, provided that the Government of the Federal Republic of Germany has not made a contrary declaration to the Government of Kenya within three months from the entry into force of the present Treaty.

Article 14.

(1) The present Treaty shall be ratified; the instruments of ratification shall be exchanged as soon as possible in Bonn.

(2) The present Treaty shall enter into force one month after the day of exchange of the instruments of ratification. It shall remain in force for a period of five years and shall continue in force thereafter for an unlimited period except if denounced in writing by either Contracting Party one year before its expiration. After the expiry of the period of five years the present Treaty may be denounced at any time by either Contracting Party giving one year's notice.

(3) In respect of investments made prior to the date of termination of the present Treaty, the provisions of Articles 1 to 13 shall continue to be effective for a further period of twenty years from the date of termination of the present Treaty.

DONE at Nairobi on 4th December 1964 in four originals, two each in the German and English languages, all four texts being equally authentic.

For the Federal Republic of Germany:

Oskar Schlitter

Soltmann

For Kenya:

J.S. Gichuru

Protocol

On signing the Trealy concerning the Encouragement and Reciprocal Protection of Investments, concluded between the Federal Republic of Germany and Kenya the undersigned plenipotentiaries have, in addition, agreed on the following provisions which should be regarded as an integral part of the said Treaty:

(1) Ad Article 1

(a) Investments made in accordance with the laws and tegulations of either Contracting Party within the area of application of that Party's legal system by nationals or companies of the other Contracting Party, shall enjoy the full protection of the present Treaty.

(b) In respect of investments in the territory of Kenya this Treaty shall only apply to investments which are classified as "approved enterprise" or enjoy "approved status" as defined under Kenya legislation for the Protection of Foreign Investments.

(2) Ad Article 2

(a) The following shall more particularly, though not exclusively, be deemed "activity" within the meaning of paragraph 2 of Article 2: the management, maintenance, use, and enjoyment of an investment. The following shall, in particular, be deemed "treatment less favourable" within the meaning of paragraph 2 of Article 2: restricting the purchase of raw or auxiliary materials, of power or fuel or of means of production or operation of any kind, impeding the marketing of products inside or oulside the country, as well as any other measures having similar effects. Measures that have to be taken for reasons of public security and order, public health or morality shail not be deemed âtreatment less favourableâ within the meaning of Article 2.

(b) The term "any other similar investment" as referred to in Article 2 shall be deemed to comprise any investment of a like nature in the territory of the Contracting Party concerned regardless of whether such investments have been made by nationals or companies of any third State or by any other individual or company.

(c) Paragraph 2 of Article 2 shall not apply to entry, sojourn, and activity as an employee.

(d) The most-favoured-nation treatment as understood in this Treaty shall not apply to privileges, which either Contracting

Party grants to nationals or companies of other States because of an existing custom's union, free trade zone or because of the membership of a common market.

(e) Either Contracting Party reserves the right to restrict the acquisition of land to its own nationals or companies in accordance with its laws.

(3) Ad Article 3

(a) The provision of paragraph 2 of Article 3 shall also apply to the transfer of an investment to public ownership, to the subjection of an investment to public control, or to similar interventions by public authorities, Expropriation shall mean the compulsory taking away or restricting of any property right which in itself or in conjunction with other rights constitutes an investment.

(b) Either Contracting Party reserves the right to decide, on grounds of national reconstitution or other valid reason, that payments made under the provisions of paragraph 3 of Article 3 shall not be transferable but shall be re-invested

(4) Ad Article4

"Liquidation" within the meaning of Article 4 shall be deemed to include any disposal effected for the purpose of completely or partly giving up the investment concerned.

(5) Ad Article 6

A transfer shall be deemed to have been made "without unreasonable delay" within the meaning of paragraph 1 of Article 6 if made within such period as is normally required for the completion of transfer formalities. The said period shall commence on the day on which the relevant request has been submitted and may on no account exceed six months.

(6) Ad Article 8

(a) Returns from an investment, as well as returns from re-invested returns, shall enjoy the same protection as the original investment.

(b) Without prejudice to any other method of determining nationality, any person in possession of a valid national passport issued by the appropriate authori- ties of either Contracting Party shall he deemed to be a national of that Party.

(7) Either Contracting Party shall refrain from any measures which, contrary to the principles of free competition, may prevent or hinder sea-going vessels or aircraft of the other Contracting Party trom participating in the transport of goods intended for, or of persons travelling in connection with, an investment within the meaning of the present Treaty. This also applies to goods acquired in the territory of either Contracting Party or of any third State with funds of an enterprise in which capital within the meaning of the present Treaty is invested; it applies furthermore to persons travelling on behalf of such an enterprise.

DONE at Nairobi on 4th December 1964 in four originals, two each in the German and English languages, all four texts heing equally authentic.

For the Federal Republic of Germany:

Oskar Schlitter

Soltmann

For Kenya:

J.S. Gichuru

Exchange of Letters

Nairobi, 4th December 1964

Mr. Chairman,

I refer to Article 2 of the Treaty signed today between the Federal Republic of Germany and Kenya concerning the Encouragement and Reciprocal Protection of Investments.

It was stated by the Government of Kenya that the development of the economy of Kenya may necessitate certain subsequent exceptions to the provisions of this Article and it is agreed between the Contracting Parties that on the request

of the Government of Kenya consideration may be given to the amendment of this Article by mutual agreement.

Accept, Mr. Chairman, the assurance of my high consideration.

J.S. Gichuru Minister for Finance and Economic Planning

Government of Kenya

To:

The Chairman of the German Delegation.

Ambassador Oskar Schlitter

Chairman of the German Delegation

Nairobi, 4th December 1964

Excellency,

I have the honour to confirm receipt of your letler received today which reads as follows:

"I refer to Article 2 of the Treaty signed today between the Federal Republic of Germany and Kenya concerning the Encouragement and Reciprocal Protection of Investments.

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Accept, Excellency, the assurance of my high consideration.

Oskar Schlitter

Ambassador

To: The Hon. J.S. Gichuru, MP

Minister for Finance and Economic Planning.

Government of Kenya

Nairobi, 4th December 1964

Mr. Chairman,

Intending to faciiitate and promote the making and developing of investments by German nationals or companies in Kenya, the Government of Kenya will grant, in accordance with the Laws and Regulations of Kenya, the necessary permits to German nationals who in connection with investments by German nationals or companies desire to enter and stay in Kenya and lo carry on an activity there as an employee, except as reasons of public order and security, of public health or morality may warrant otherwise.

Accept, Mr. Chairman, the assurance of my high consideration.

J.S. Gichuru

Minister for Finance and Economic Planning

Government of Kenya

To:

The Chairman of the German Delegation,

Ambassador Oskar Schlitter

Chairman of the German Delegation

Nairobi, 4th December L964

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Accept, Excellency, the assurance of my high consideration,

Oskar Schlitter

Ambassador

To:

The Hon. J.S. Gichuru, MP,,

Minister for Finance and Economic Planning,

Government of Kenya