

AGREEMENT BETWEEN THE GOVERNMENT OF THE SLOVAK REPUBLIC AND THE GOVERNMENT OF THE REPUBLIC OF KENYA FOR THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS

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

RECOGNIZING that this Agreement is concluded between the Government of the Slovak Republic and the Government of the Republic of Kenya, which act on behalf of the Slovak Republic and the Republic of Kenya respectively;

RECOGNIZING the need to protect investments of the investors of one Contracting Party in the territory of the other Contracting Party on a non-discriminatory basis;

DESIRING to promote greater economic co-operation between them, with respect to investments by nationals and companies of one Contracting Party in the territory of the other Contracting Party;

RECOGNIZING that agreement on the promotion and protection to be accorded such investments will stimulate the flow of private capital and the economic development of the Contracting Parties;

AGREEING that a stable framework for investments will contribute to maximizing the effective utilization of economic resources and improve living standards;

RECOGNIZING that the development of economic and business ties can promote respect for internationally recognized labour rights;

AGREEING that these objectives can be achieved without relaxing health, safety and environmental measures of general application; and

Having resolved to conclude an Agreement concerning the promotion and protection of investments;

HAVE AGREED AS FOLLOWS:

Article 1. Definitions

For the purposes of this Agreement:

1. The term "investment" means every kind of assets established or acquired by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter Contracting Party, including in particular, though not exclusively:

a) movable and immovable property and any other property rights such as mortgages, liens, pledges, leases, usufruct and other similar rights;

b) invested and reinvested returns;

c) shares in, stocks and debentures of, and any other forms of participation in a company or any business enterprise and rights or interest derived there from;

d) claims to money or to any performance under contract having an economic value;

e) intellectual property rights such as patents, copyrights, trademarks, industrial designs, business names, franchises, geographical indications as well as technical processes, know-how, trade secrets and goodwill associated with an investment; and

f) concessions, rights and permits having an economic value conferred by law, administrative decisions or under contract,

including concessions to search for, develop, extract or exploit natural resources.

Investments made in the territory of one Contracting Party by any legal entity of that Contracting Party, but actually owned or controlled, directly or indirectly, by investors of the other Contracting Party, shall likewise be considered as investments of investors of the latter Contracting Party, if they have been made in accordance with the laws and regulations of the former Contracting Party.

Any change of the form in which assets are invested or reinvested shall not affect their character as an investment.

2. The term "returns" means amounts yielded by investments and shall, in particular, though not exclusively, include profits, dividends, interest, royalties, capital gains or any payments in kind related to the investments.

3. The term "investor" means for either Contracting Party, any of the following subjects who invest in the territory of the other Contracting Party in accordance with the laws and regulations of the latter Contracting Party and the provisions of this Agreement:

a) any natural person, who is a national of either Contracting Party in accordance with its laws and regulations; or

b) any legal entity such as company, corporation, firm, partnership, business association, institution or organization incorporated or constituted in accordance with the laws and regulations of the Contracting Party and having its registered office or central administration or principal place of business within the jurisdiction of that Contracting Party, whether or not for profit and whether its liabilities are limited or not.

4. The term "territory" means:

a) as regards the Slovak Republic, the land territory, internal waters and the air space above them, over which it exercises its sovereignty, sovereign rights and jurisdiction in accordance with international law;

b) as regards the Republic of Kenya, the land territory, internal waters, territorial sea and the airspace above them, as well as the maritime zones 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.

5. The term freely convertible currency means the currency that is widely used to make payments for international transactions and widely exchanged in principal international exchange markets.

Article 2. Promotion and Protection of Investments

1. Each Contracting Party shall promote in its territory investments by investors of the other Contracting Party and shall, in accordance with its laws and regulations, admit such investments.

2. Each Contracting Party shall in its territory accord to investments and returns of investments of investors of the other Contracting Party fair and equitable treatment and full and constant protection and security.

3. Neither Contracting Party shall in its territory impair by unreasonable or arbitrary measures the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposal of investments of investors of the other Contracting Party.

Article 3. Treatment of Investments

1. Each Contracting Party shall accord to investors of the other Contracting Party and to their investments a treatment no less favourable than the treatment it accords to its own investors and their investments with respect to the acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposal of investments.

2. Each Contracting Party shall accord to investors of the other Contracting Party and to their investments, a treatment no less favourable than the treatment it accords to investors of the most favoured nation and to their investments with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposal of investments.

3. Neither Contracting Party shall mandate or enforce in its territory measures on investments by investors of the other Contracting Party, concerning purchase of materials, means of production, operation, transport, marketing of its products or similar orders having discriminatory effects. Such requirements do not include conditions for the receipt or continued receipt of an advantage.

4. Paragraph 1 of this Article is supplemented by a Protocol which shall be an integral part of this Agreement.

Article 4. Exemptions

The provisions of this Agreement shall not be construed so as to oblige one Contracting Party to extend to the investors and investments by investors of the other Contracting Party the benefit of any treatment, preference or privilege by virtue of any existing or future:

- a) free trade area, customs union, common market, economic and monetary union or other similar regional economic integration agreement, including regional labour market agreements, to which one of the Contracting Parties is or may become a party; or
- b) agreement for the avoidance of double taxation or other international agreement relating wholly or mainly to taxation; or
- c) multilateral agreement relating wholly or mainly to investments.

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 other measures, directly or indirectly, having an effect equivalent to expropriation or nationalization (hereinafter referred to as expropriation), except for a purpose which is in public interest, on a non-discriminatory basis, in accordance with due process of law and against prompt and full compensation.

2. Such compensation shall amount to the fair market value of the expropriated investments at the time immediately before expropriation was taken or before the impending expropriation became public knowledge, whichever is the earlier. The fair market value shall be determined in accordance with generally accepted principles of valuation, taking into account, inter alia, the capital invested, replacement value, appreciation, current returns, the projected flow of future returns, goodwill and other relevant factors.

3. Compensation shall be fully realizable, effective and shall be paid without any restriction or delay. It shall include interest at the applicable commercial rate established on the market basis for the currency of payment from the date of dispossession of the expropriated property until the date of actual payment. Compensation shall be made in a freely convertible currency.

4. Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its territory, and in which investors of the other Contracting Party own shares, debentures or other forms of participation, it shall ensure that the provisions of the paragraphs 1 to 3 of this Article are applied to the extent necessary to guarantee compensation in respect of their investments to such investor of the other Contracting Party who are owners of those shares, debentures or other forms of participation.

5. Without prejudice to the provisions of Article 9 of this Agreement, the investor of one of the Contracting Parties whose investments are expropriated shall have the right to prompt review of its case and of the valuation of its investments in accordance with the principles set out in this Article, by a judicial or other competent and independent authority of that Contracting Party.

Article 6. Compensation for Losses

1. Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or other settlement, a treatment no less favourable than the one accorded by the latter Contracting Party to its own investors or investors of the most favoured nation, whichever, according to the investor, is more favourable.

2. Without prejudice to paragraph 1 of this Article, investors of one Contracting Party who, in any of the situations referred to in that paragraph, suffer losses in the territory of the other Contracting Party resulting from:

- a) requisitioning of their investments or a part thereof by latter's authorities; or
- b) destruction of their investments or a part thereof by latter's authorities which was not required by the necessity of the situation,

Shall be accorded by latter Contracting Party restitution or compensation which in either case shall be prompt and full with

respect to compensation, shall be in accordance with Article 5 paragraphs 2 - 3 from the date of requisitioning or destruction until the date of actual payment.

Article 7. Free Transfers

1. Each Contracting Party shall ensure to investors of the other Contracting Party the free transfer, into and out of its territory, of their investments and transfer of payments related to investments. Such payments shall include in particular, though not exclusively:

- a) principal and additional amounts to maintain, develop or increase the investment;
- b) returns and any other income accruing from investments;
- c) proceeds obtained from the total or partial sale or disposal of an investment, including the sale of shares;
- d) proceeds from total or partial liquidation of investments;
- e) amounts required for the payment of expenses, which arise from the operation of the investment, such as loan repayments, payments of royalties, payments related to import letters of credit, management fees, license fees, advance payments and other similar expenses;
- f) compensation payable pursuant to Articles 5, 6, 8 and 9;
- g) earnings and other remuneration of personnel engaged from abroad and working in connection with an investment.

2. Each Contracting Party shall further ensure that the transfers referred to in paragraph 1 of this Article shall be made without any restriction in a freely convertible currency of the choice of the investor and 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. Notwithstanding paragraphs 1 and 2 of this Article, a Contracting Party may delay a transfer through the application of measures ensuring investors' compliance with the host Contracting Party's laws and regulations on the payment of taxes and dues in force at the time request for transfer was made, and provided that the application of such laws and regulations shall not unnecessarily impair the free transfer ensured by this Agreement.

4. In the absence of a market for foreign exchange, the rate to be used shall be the most recent exchange rate for the conversions of currencies into Special Drawing Rights.

5. In case of an unjustified delay in transfer caused by the host Contracting Party, the transfer shall also include interest at a commercial rate established on a market basis for the currency in question from the date on which the transfer was requested until the date of actual transfer and shall be borne by that Contracting Party.

6. Notwithstanding paragraphs (1) and (2) above, a Contracting Party may adopt or maintain measures relating to cross-border capital and payment transactions adopted by each contracting party and particularly but not limited by the following cases:

- a) in the event of serious balance of payments and external financial difficulties or threat thereof; or
- b) in cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies; or
- c) in the exceptional cases of economic sanctions.

7. Measures referred to in paragraph (6) of this Article:

- a) shall not exceed those necessary to deal with the circumstances set out in paragraph (6) of this Article;
- b) shall be temporary and shall be eliminated as soon as conditions permit; and
- c) shall be promptly notified to the other Contracting Party.

Article 8. Subrogation

1. If a Contracting Party or its designated agency makes a payment under an indemnity, guarantee or contract of insurance given in respect of an investment of an investor in the territory of the other Contracting Party, the latter Contracting Party shall recognize the assignment of any right or claim of such an investor to the former Contracting Party or its designated

agency and the right of the former Contracting Party or its designated agency to exercise by virtue of subrogation any such right and claim to the same extent as its predecessor in title.

2. The subrogated rights or claims shall not exceed the original rights or claims of the investor.

Article 9. Disputes between an Investor and a Contracting Party

1. Any dispute arising directly from an investment between one Contracting Party and an investor of the other Contracting Party should be settled amicably between the parties to the dispute.

2. If the dispute has not been settled within four (4) months from the date on which it was raised in writing, the dispute may, at choice of the investor, be submitted to:

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

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

c) an ad hoc arbitration tribunal to be established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or

d) any other previously agreed ad hoc arbitration tribunal.

3. An investor who has submitted the dispute to a national court may nevertheless have recourse to one of the arbitral proceedings mentioned in paragraphs 2 (b) to 2 (d) of this Article if, before a judgment has been delivered on the subject matter by a national court, the investor declares not to pursue the case any longer through national proceedings and withdraws the case.

4. Any arbitration under this Article shall, at the request of either party to the dispute, be held in a state that is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), opened for signature at New York 10 June 1958. Claims submitted to arbitration under this Article shall be considered to arise out of a commercial relationship or transaction for the purpose of the Article 1 of the New York Convention.

5. Each Contracting Party hereby gives its unconditional consent to the submission of a dispute between it and an investor of the other Contracting Party to arbitration in accordance with this Article. Once the investor has submitted the dispute under any of the procedures stipulated above, that choice is final.

6. Neither of the Contracting Parties, which is the party to a dispute, can raise an objection, at any phase of the arbitration procedure or of the execution of an arbitral award, on account of the fact that the investor, which is other party to the dispute, has received an indemnification covering a part or the whole of its losses by virtue of insurance or guarantee contract.

7. The award granted pursuant to this article shall be final and binding on the parties to the dispute and shall be executed in accordance with law of the Contracting Party in whose territory the award is relied upon, by the competent authorities of the Contracting Party by the date indicated in the award.

Article 10. Disputes between the Contracting Parties

1. The Contracting Parties agree to consult promptly on the request of either contracting party to resolve any disputes in connection with this Agreement.

2. Disputes between the Contracting Parties concerning the interpretation and application of this Agreement shall, as far as possible, be settled through diplomatic channels.

3. If the dispute cannot thus be settled within nine (9) months following the date on which either Contracting Party requested such negotiations, it shall at the request of either Contracting Party be submitted to an Arbitral Tribunal.

4. Such an Arbitral Tribunal shall be constituted for each individual case in the following way. Within two (2) months of the receipt of the request for arbitration, each Contracting Party shall appoint one member of Arbitral Tribunal. The Chairman shall be appointed within four (4) months from the date of appointment of the other two members.

5. If the necessary appointments have not been made within the periods specified in paragraph 4 of this Article, either Contracting Party may, 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 is otherwise 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 or is not otherwise prevented from discharging the said function, shall be invited to make the necessary appointments.

6. The Arbitral Tribunal shall reach its decision by a majority of votes. The decisions of the Arbitral Tribunal shall be final and binding on both 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 Arbitral Tribunal may make a different decision regarding the sharing of costs. In all other respects, the Arbitral Tribunal shall determine its own rules of procedure.

7. Issues subject to dispute referred to in paragraph 2 of this Article shall be decided in accordance with the provisions of this Agreement and the generally recognized principles of international law.

Article 11. Permits

1. Each Contracting Party shall, subject to its laws and regulations, treat favorably the applications relating to investments by investors of the other Contracting Party.

2. Each Contracting Party shall, subject to its laws and regulations, grant temporary entry and stay and provide any necessary confirming documentation to natural persons who are employed from aboard as executives, managers, specialists or technical personnel in connection with an investment by an investor of the other Contracting Party, and who are essential for the enterprise, as long as these person continue to meet the requirements of this paragraph. Immediate family members of such personnel shall also be granted a similar treatment with regard to entry and temporary stay in the territory of the host Contracting Party.

Article 12. Application of other Rules

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

2. Each Contracting Party shall observe any other obligation it may have with regard to a specific investment of an investor of the other Contracting Party.

Article 13. Application of the Agreement

1. This Agreement shall apply to all investments made by investors of either Contracting Party in the territory of the other Contracting Party, whether made before or after the entry into force of this Agreement, but shall not apply to any dispute concerning an investment that arose or any claim that was settled before its entry into force.

2. Notwithstanding the Most Favoured Nation treatment provisions set out in this Agreement, disputes between an investor and the other Contracting Party shall be governed by dispute settlement procedures set out in this Agreement.

3. This Agreement shall not apply to an investor whose operation does not possess real and continuous link with the economy of the other Contracting Party.

Article 14. General Derogations

1. Nothing in this Agreement shall be construed as preventing a Contracting Party from taking any action that it considers necessary for the protection of its essential security interests in time of war or armed conflict, financial, economic, social crisis or other emergency in international relations, provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination by a Contracting Party, or a disguised investment restriction, nothing in this agreement shall be construed as preventing the contracting parties from taking any measure necessary for the maintenance of public order.

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

Article 15. Transparency

1. Each Contracting Party shall promptly publish, or otherwise make available to the investor, its laws, regulations, judicial decisions of general application and other relevant information as well as international agreements, which may affect the investment of investors of the other Contracting Party in the territory of the former Contracting Party.
2. Nothing in this Agreement shall require a Contracting Party to furnish or allow access to any confidential or proprietary information, including information concerning particular investors or investments, the disclosure of which would impede law enforcement or be contrary to its laws protecting confidentiality or prejudice legitimate commercial interests of particular investors.

Article 16. 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 17. Entry Into Force, Duration and Termination

1. The Contracting Parties shall notify each other when their constitutional requirements for the entry into force of this Agreement have been fulfilled. The Agreement shall enter into force on the ninetieth (90th) day following the date of receipt of the last notification.
2. This Agreement shall remain in force for a period of twenty (20) years and shall thereafter remain in force on the same terms until either Contracting Party notifies the other in writing of its intention to terminate the Agreement in twelve (12) months.
3. In respect of investments made prior to the date of termination of this Agreement, the provisions of Articles 1 to 16 shall remain in force for a further period of twenty (20) years from the date of termination of this Agreement.
4. This Agreement may be amended in writing by mutual consent of both Contracting Parties at any time after it is in force. Any alteration or modification of this Agreement shall be done without prejudice to the rights and obligations arising from this Agreement.

IN WITNESS WHEREOF, the undersigned duly authorized thereto, have signed this Agreement.

DONE in duplicate at _ on the 14th day of December in the Slovak and English languages, both texts being equally authentic

For the Government of the Slovak Republic

For the Government of the Republic of Kenya

Protocol to the Agreement on the Promotion and Protection of Investments between the Government of the Slovak Republic and the Government of the Republic of Kenya

Upon signing the Agreement between the Government of the Slovak Republic and the Government of the Republic of Kenya on the Promotion and Reciprocal Protection of Investments, the undersigned representatives of both Contracting Parties have agreed with respect to Kenya on the following provisions, which constitute an integral part of the Agreement.

Ad Article 3 Paragraph 1

The provision "...a treatment no less favourable than the treatment it accords to its own investors and their investments..." does not apply to non-conforming measures maintained within the territory of Kenya at the time of this signing of the Agreement or to any future non confirming measures as relates to granting incentives to its own investors in order to protect small and medium-sized businesses and stimulate the creation of local industries, provided that such incentives do not significantly affect the investments and activities of investors of Slovak Republic.

The principle of most favoured nation treatment shall be observed in case of foreign participation in such businesses.

Kenya will take appropriate actions to endeavour to remove such non-conforming measures.

IN WITNESS WHEREOF, the undersigned duly authorized thereto, have signed this Protocol.

DONE in duplicate at _ on the 14th day of December in the Slovak and English languages, both texts being equally authentic

For the Government of the Slovak Republic

For the Government of the Republic of Kenya