

Agreement between the Swiss Confederation and the Republic of Kenya on the Promotion and Reciprocal Protection of Investments

The Swiss Federal Council and the Government of the Republic of Kenya,

On behalf of the Swiss Confederation and of the Republic of Kenya respectively (hereinafter referred to as the "Contracting Parties"),

Desiring to strengthen the economic cooperation for the mutual benefit of both States,

Intending to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party,

Recognizing the need to promote and protect foreign investments with the aim to foster the economic prosperity of both States,

Have agreed as follows:

Article 1. Definitions

For the purposes of this Agreement:

(1) The term "investor" means with respect to either Contracting Party:

- (a) natural persons who, according to the law of that Contracting Party, are considered to be its nationals;
- (b) legal entities, including companies, corporations, business associations and other organisations, which are constituted or otherwise duly organised under the law of that Contracting Party and have their seat, together with real economic activities, in the territory of the same Contracting Party;
- (c) legal entities not established under the law of that Contracting Party but effectively controlled by natural persons as defined in (a) above or by legal entities as defined in (b) above,

(2) The term "investment" includes every kind of asset and in particular:

- (a) movable and immovable property as well as any other rights in rem, such as mortgages, liens and pledges;
- (b) shares, stocks, parts or any other kind of participation in companies; bonds, debentures, other debt instruments, and loans; claims to money or to any performance having an economic value;
- (c) copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin), know-how and goodwill;
- (d) concessions under public law, including concessions to search for, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of the authority in accordance with the law.
- (e) Any change in the form in which assets are invested shall not affect their character as investments.

(3) The term "returns" means the amounts yielded by an investment, in particular, though not exclusively, profits, interest, capital gains, dividends, royalties, fees and payments in kind.

(4) The term "territory" means, with respect to each Contracting Party, the land territory, the internal waters, the air space and, where applicable, the territorial sea and the maritime zones beyond the territorial sea, including the seabed and the subsoil and their natural resources, over which the Contracting Party concerned exercises sovereign rights or jurisdiction in accordance with national and international law.

Article 2. Scope of Application

The present Agreement shall apply to investments in the territory of one Contracting Party made in accordance with its laws and regulations by investors of the other Contracting Party, whether prior to or after the entry into force of the Agreement. It shall however not apply to claims or disputes arising out of events which occurred prior to its entry into force.

Article 3. Promotion and Admission

(1) Each Contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting Party and admit such investments in accordance with its laws and regulations.

(2) When a Contracting Party shall have admitted an investment in its territory, it shall grant, in accordance with its laws and regulations, the necessary permits in connection with such an investment including permits for the carrying out of licensing agreements and contracts for technical, commercial or administrative assistance.

(3) Each Contracting Party shall, subject to its laws and regulations relating to the entry, stay and work of natural persons, examine and give due consideration to requests of key personnel including managerial and technical persons who are employed from abroad in connection with an investment by an investor of the other Contracting Party, to enter, remain temporarily and work in its territory. Immediate family members of such key personnel shall also, in accordance with the laws and regulations of the host Contracting Party, be granted such treatment with regard to the entry and temporary stay in the territory of that Contracting Party.

Article 4. Protection and Treatment

(1) Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension or disposal of such investments.

(2) Each Contracting Party shall in its territory accord investments or returns of investors of the other Contracting Party treatment not less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State, whichever is more favourable to the investor concerned.

(3) Each Contracting Party shall in its territory accord investors of the other Contracting Party, as regards the management, maintenance, use, enjoyment or disposal of their investments, treatment not less favourable than that which it accords to its own investors or investors of any third State, whichever is more favourable to the investor concerned.

(4) The provisions of paragraphs (2) and (3) of this Article shall not prevent a Contracting Party from granting special incentives to its own nationals and companies in accordance with its laws and regulations, in order to stimulate and promote the creation of local industries, in particular small and medium sized enterprises, provided that such incentives do not significantly affect investments of investors of the other Contracting Party.

(5) If a Contracting Party accords special advantages to investors of any third State by virtue of an agreement establishing a free trade area, a customs union or a common market or by virtue of an agreement on the avoidance of double taxation, it shall not be obliged to accord such advantages to investors of the other Contracting Party.

Article 5. Free Transfer

(1) Each Contracting Party in whose territory investments have been made by investors of the other Contracting Party shall grant those investors the transfer without restriction or delay in a freely convertible currency of the amounts relating to such investments, and in particular:

- (a) returns;
- (b) payments relating to loans incurred, or other contractual obligations undertaken, for the investment;
- (c) amounts assigned to cover expenses relating to the management of the investment;
- (d) royalties and other payments deriving from rights enumerated in Article 1, paragraph (2) (4), (c) and (f) of this Agreement;
- (e) earnings and other remuneration of personnel engaged from abroad in connection with the investment;

(f) the initial capital and additional amounts to maintain or increase the investment;

(g) the proceeds of the partial or total sale or liquidation of the investment, including possible increment values;

(h) payments arising under Articles 6, 7, 8, 9 and 10 of this Agreement.

(2) Unless otherwise agreed with the investor, transfers shall be made at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force of the Contracting Party in whose territory the investment was made.

(3) For clarity, it is confirmed that the application of this Article does not affect the obligation of an investor to comply with the tax laws and regulations of each Contracting Party.

Article 6. Expropriation and Compensation

(1) Neither of the Contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other measures having the same nature or the same effect against investments of investors of the other Contracting Party, unless the measures are taken in the public interest, on a non-discriminatory basis and under due process of law, and provided that provisions are made for compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriatory action was taken or became public knowledge, whichever is earlier. The amount of compensation shall include interest at a normal commercial rate from the date of dispossession until the date of payment, be settled in a freely convertible currency, be paid without delay and be freely transferable. The investor affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Contracting Party, of his case and of the valuation of his investment in accordance with this paragraph.

(2) 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 own territory, and in which investors of the other Contracting Party own shares, it shall, to the extent necessary and subject to its laws, ensure that compensation according to paragraph (1) of this Article will be made available to such investors.

Article 7. Compensation for Losses

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 that accorded by the latter Contracting Party to its own investors or investors of the most favoured nation, whichever, according to the investor, is the more favourable.

Article 8. Principle of Subrogation

Where one Contracting Party or its designated agency has granted any financial guarantee against non-commercial risks in regard to an investment by one of its investors in the territory of the other Contracting Party, the latter shall recognize the rights of the first Contracting Party, or its designated agency, by virtue of the principle of subrogation to the rights of the investor when payment has been made under this guarantee by the first Contracting Party or its designated agency.

Article 9. Disputes between a Contracting Party and an Investor of the other Contracting Party

(1) For the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party and without prejudice to Article 10 of this Agreement (Disputes between the Contracting Parties), consultations will take place between the parties concerned.

(2) If these consultations do not result in a solution within three months from the date of the written request for consultations, the investor may submit the dispute either to the courts or tribunals of the Contracting Party in whose territory the investment has been made or to international arbitration. In the latter event, the investor has the choice between either of the following:

(a) the International Centre for Settlement of Investment Disputes (ICSID) provided for by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington, on March 18, 1965 (hereinafter referred to as the "Convention of Washington"); and

(b) an ad hoc arbitral tribunal which, unless otherwise agreed upon by the parties to the dispute, shall be established under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).

(3) Each Contracting Party hereby consents to the submission of an investment dispute to international arbitration.

(4) A company which has been incorporated or constituted according to the laws in force in the territory of one Contracting Party and which before a dispute arises was under the control of investors of the other Contracting Party shall, in accordance with Article 25 (2) (b) of the Convention of Washington, be treated as a company of the other Contracting Party.

(5) The Contracting Party which is party to the dispute shall at no time whatsoever during the process assert as a defence its sovereign immunity.

(6) Neither Contracting Party shall pursue through diplomatic channels a dispute submitted to international arbitration unless the other Contracting Party does not abide by and comply with the arbitral award.

(7) The arbitral award shall be final and binding for the parties to the dispute and shall be executed without delay according to the law of the Contracting Party concerned.

Article 10. Disputes between the Contracting Parties

(1) Disputes between the Contracting Parties regarding the interpretation or application of the provisions of this Agreement shall if possible be settled through diplomatic channels.

(2) If both Contracting Parties cannot reach an agreement within six months after the beginning of the dispute between themselves, the latter shall, upon request of either Contracting Party, be submitted to an arbitral tribunal of three members. Each Contracting Party shall appoint one arbitrator, and these two arbitrators shall nominate a chairman who shall be a national of a third State.

(3) If one of the Contracting Parties has not appointed its arbitrator and has not followed the invitation of the other Contracting Party to make that appointment within two months, the arbitrator shall be appointed upon the request of that Contracting Party by the President of the International Court of Justice.

(4) If both arbitrators cannot reach an agreement about the choice of the chairman within two months after their appointment, the latter shall be appointed upon the request of either Contracting Party by the President of the International Court of Justice.

(5) If, in the cases specified under paragraphs (3) and (4) of this Article, the President of the International Court of Justice is prevented from carrying out the said function or is a national of either Contracting Party, the appointment shall be made by the Vice-President, and if the latter is prevented or is a national of either Contracting Party, the appointment shall be made by the most senior Judge of the Court who is not a national of either Contracting Party.

(6) Subject to other provisions made by the Contracting Parties, the tribunal shall determine its own procedure. 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, unless the arbitral tribunal decides otherwise.

(7) The decisions of the tribunal are final and binding for each Contracting Party.

Article 11. Other Commitments

(1) If provisions in the legislation of either Contracting Party or obligations under international law entitle investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Agreement, such provisions or obligations shall to the extent that they are more favourable prevail over this Agreement.

(2) Each Contracting Party shall observe any obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party.

Article 12. Final Provisions

(1) This Agreement shall enter into force on the day when both Governments have notified each other that they have complied with the legal requirements for the entry into force of the Agreement.

(2) The Agreement shall be in force for an initial period of ten years and shall remain in force thereafter for an indefinite

period of time, unless terminated in accordance with paragraph 3 of this Article.

(3) Either Contracting Party may terminate the Agreement at the end of the initial ten year period or at any time thereafter, by giving twelve months written notice to the other.

(4) In case of termination of the present Agreement, the provisions of Articles 1 to 11 shall continue fo be effective for a further period of ten years for investments made before the termination.

IN WITNESS WHEREOF, the undersigned, duly authorised thereto by their respective Governments, have signed this Agreement.

Done in duplicate, at Nairobi, on 14 November 2006, in the French and English languages, both texts being equally authentic. In case of any divergence, the English text shall prevail.

For the Swiss Federal Council

H.E. Georges Martin

Ambassador of Switzerland in Kenya

For the Government of the Republic of Kenya

Hon. Amos Kimunya

Minister of Finance