

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

The Government of the Republic of Mauritius and the Government of the Republic of Kenya (hereinafter referred to as the "Contracting Parties");

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;

RECOGNISING that agreement on the treatment to be accorded to 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;

DESIRING to create favourable conditions for greater flow of investments made by investors of either Contracting Party in the territory of the other Contracting Party;

RECOGNISING that the promotion and reciprocal protection of such investments will lend greater stimulation to the development of business initiatives and will increase prosperity in the territories of both Contracting Parties; and

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

HAVE AGREED as follows:

Article 1. Definitions

(1) In this Agreement,

(a) "investment" means every kind of asset invested in accordance with the relevant laws and regulations of the Contracting Party in whose territory the respective business undertaking is made, and in particular, though not exclusively, includes:

(i) Movable and immovable property as well as other similar rights/n rem such as mortgages, liens or pledges;

(ii) Shares, debentures and any other form of participation in a company or business enterprise;

(iii) Claims to money, or to any performance under contract having an economic value;

(iv) Industrial and intellectual property rights, in particular copyrights, patents, utility-model patents, designs, trademarks, trade-names, technical processes, know-how and goodwill;

(iv) Concession rights or permits having an economic value conferred in accordance with the law or under contract, including concessions to search for, cultivate, extract or exploit natural resources;

(v) Invested or re-invested returns;

(b) "return" means the amount yielded by an investment and in particular, though not exclusively, profit, interest, capital gains, dividends, royalties, fees and payments-in-kind related to the investments;

(c) "investor" means in respect to either Contracting Party:

(i) A "national", that is a natural person deriving his or her status as a national of that Contracting Party from the relevant law of that Contracting Party; and

(ii) A "company", that is a legal person, such as a corporation, firm or association, incorporated or constituted in accordance with the law of that Contracting Party;

(d) "territory" means-

(i) In the case of the Republic of Mauritius—

(a) All the territories and islands which, in accordance with the laws of Mauritius constitute the State of Mauritius;

(b) The territorial sea of Mauritius; and

(c) Any area outside the territorial sea of Mauritius which in accordance with international law has been or may hereafter be designated, under the laws of Mauritius, as an area, including the Continental Shelf, within which the rights of Mauritius with respect to the sea, the seabed and sub-soil and their natural resources may be exercised;

(ii) In the case of the Republic of Kenya, all territory of Kenya in state boundaries, including internal and territorial waters and also special economic zone and continental shelf, and all installations erected thereon as defined in the Continental Shelf Act, over which Kenya exercises its sovereign rights for the purpose of exploiting natural resources of the seabed, its subsoil and the superjacent waters, in accordance with international law;

(2) Any change in the form in which assets are or have been invested does not affect their character as investments as defined in this Agreement.

Article 2. Scope of the Agreement

This Agreement shall only apply to investments made by investors of either Contracting Party in the territory of the other Contracting Party in conformity with the host Contracting Party's laws.

Article 3. Promotion and Protection of Investments

(1) Each Contracting Party shall promote and encourage the making of investments in its territory by investors of the other Contracting Party, and, subject to compliance with the provisions of its laws and regulations, shall admit such investments.

(2) Each Contracting Party shall use its best endeavours to grant, in accordance with its laws, the necessary permits, clearances and licences required for the carrying out of such investments and, whenever necessary, provide the required facilitation.

(3) Each Contracting Party shall endeavour to encourage the use of local human and material resources for the promotion of investments in its territory.

Article 4. Treatment of Investments

(1) Investments and returns of investors of either Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable nor discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory by investors of the other Contracting Party.

(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 its own investors and their investments with respect to the acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposal of investments.

(3) Each Contracting Party shall in its territory accord to investors and to investments and returns of investors of the other Contracting Party treatment no less favourable than that which it accords to investments and returns of investors of any third State.

(4) The provisions of paragraphs (2) and (3) shall not be construed so as to oblige either Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from:

(a) Any customs union, free trade area, common market or any similar international agreement or interim arrangement leading up to such customs union, free trade area, or common market of which either of the Contracting Parties is a

member;

(b) Any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation;

(c) Special advantages to foreign development finance institutions operating in the territory of either Contracting Party for the exclusive purpose of development assistance through mainly nonprofit activities;

(5) Each Contracting Party may, in accordance with its laws and regulations, grant incentives, treatment, preferences or privileges through special policies or measures to its own investors only for the purpose of promoting small and medium sized enterprises and infant industries in its territory, subject to the condition that these shall not significantly affect the investments and activities of the investors of the other Contracting Party.

Article 5. 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 Articles, 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 investment or a part thereof by the forces or authorities of the latter Contracting Party, acting under and within the scope of the legal provisions relating to their competences, duties and command structures; or

(b) Destruction of their investment or a part thereof by the forces or authorities of the latter Contracting Party, which was not caused in combat action or was not required by the necessity of the situation or observance of any legal requirement;

Shall be accorded restitution or prompt and full compensation, no less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State.

Article 6. Expropriation

(1) Investments of investors of either Contracting Party in the territory of the other Contracting Party shall not be nationalised, expropriated or subjected to measures having effects equivalent to nationalisation or expropriation except for public purposes, under due process of law, on a non-discriminatory basis and against prompt and full compensation.

(2) Such compensation shall amount to the market value of the expropriated investment at the time immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier. The 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 realisable, effective and shall be paid without any restriction or delay. It shall include interest at a commercial rate established on a market basis for the currency of payment from the date of dispossession of the expropriated investments until the date of actual payment.

(4) The investor affected by the expropriation shall have a right, under the law of the expropriating Contracting Party to prompt review of the expropriation case, by a court of law or other independent competent authority of that Contracting Party.

(5) Where a Contracting Party expropriates, nationalises or takes measures having effect equivalent to nationalisation or expropriation against the assets of a company which is incorporated or constituted under the laws in force in any part of its own territory, and in which investors of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this article are applied to the extent necessary to guarantee compensation as specified therein to such investors of the other Contracting Party who are owners of those shares.

Article 7. Transfer of Investments and Returns

(1) Each Contracting Party shall, in accordance with its relevant laws, allow investors of the other Contracting Party the free

transfer of funds relating to their investments and returns, including compensation paid pursuant to the provisions of Articles 5, 6, 8 and 10 of this Agreement.

(2) All transfers shall be effected without delay in any convertible currency at the market rate of exchange applicable on the date of transfer. In the absence of such a market exchange rate, the rate to be used will be the most recent exchange rate applied to inward investments or the most recent exchange rate for conversion of currencies into Special Drawing Rights, whichever is the more favourable to the investor.

(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 the request for transfer is made, and provided that the application of such laws and regulations shall not unnecessarily impair the free transfer ensured by this Agreement.

Article 8. Settlement of 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 six 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 '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);

(d) Or any other previously agreed ad hoc arbitration tribunal;

(3) 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 on 10 June 1958. Claims submitted to arbitration under this Article shall be considered to arise out of a commercial relationship or transaction for the purposes of Article 1 of the New York Convention.

(4) 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.

(5) Neither of the Contracting Parties, which is a 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 the other party to the dispute, has received an indemnification covering a part or the whole of its losses by virtue of an insurance.

(6) Each party concerned shall bear the cost of its own arbitrator and its representation in the arbitral proceedings. The cost of the Chairman in discharging his arbitral function and the remaining costs of the tribunal shall be borne equally by the parties concerned. The tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the two parties, and this award shall be binding on both parties.

(7) The award shall be final and binding on the parties to the dispute and shall be executed in accordance with national 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 9. Settlement of Disputes between the Contracting Parties

(1) Any dispute between the Contracting Parties concerning the interpretation or application of this Agreement should, if possible, be settled through negotiations between the Governments of the two Contracting Parties.

(2) If the dispute cannot be settled within a period of six months following the date on which such negotiations were requested by either Contracting Party, it may upon the request of either Contracting Party, be submitted to an arbitral tribunal.

(3) 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 arbitrator for the tribunal. Those two arbitrators shall then select a national of a third State who, upon 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 arbitrators.

(4) 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 and is not otherwise prevented from discharging such functions shall be invited to make the necessary appointments.

(5) The arbitral tribunal shall determine its own procedure and reach its decision by a majority of votes. Such decision shall be binding on both Contracting Parties. Each Contracting Party shall bear the cost of its own arbitrator to the tribunal and of its representation in the arbitral proceedings. The cost of the Chairman and the remaining costs shall be borne equally by the Contracting Parties. The tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the two Contracting Parties, and this award shall be binding on, and executed by, both Contracting Parties.

Article 10. Subrogation

(1) If a Contracting Party or its designated agency makes a payment to its own investor under a guarantee it has given in respect of an investment made in the territory of the other Contracting Party, the latter Contracting Party shall recognise the assignment to the former Contracting Party of all the rights and claims of the indemnified investor, and shall also recognise that the former Contracting Party or its designated Agency is entitled to exercise such rights and enforce such claims by virtue of subrogation, to the same extent as the original investor.

(2) Any payment made by one Contracting Party or its designated Agency to its own investor as provided in paragraph (1) shall not affect the right of such investor to make his claims against the other Contracting Party in accordance with Article 8 provided that the exercise of such a right does not overlap and that such claims shall be limited only to any amount outstanding by virtue of subrogation under that paragraph.

Article 11. Application of other Rules

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

(2) Each Contracting Party shall, however, honour any obligation it may have entered into with regard to investments of investors of the other Contracting Party.

Article 12. Prohibitions and Restrictions

(1) The provisions of this Agreement shall not be construed as preventing a Contracting Party from taking any action necessary for the protection of its essential security interests in time of war or armed conflict, or other emergency in international relations or for the protection of public health or the prevention of diseases and pests in animals or plants.

(2) 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.

Article 13. 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 investments 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 14. Other Provisions

(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 coming 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. For the avoidance of any doubt, it is declared that all investments shall, subject to this Agreement, be governed by the laws in force in the territory of the Contracting Party in which such

Investments are made.

(2) 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 15. Entry Into Force, Duration and Termination

(1) The Contracting Parties shall notify each other promptly of the fulfillment of their legal procedures required for entry into force of this Agreement. The Agreement shall enter into force on the day following the date of receipt of the last notification.

(2) This Agreement shall remain in force for a period of ten years. Thereafter it shall continue in force until the expiration of twelve months from the date on which either Contracting Party shall have given written notice of termination of this Agreement to the other Contracting Party.

(3) In respect of investments admitted and/or made prior to the date the notice of

Termination of this Agreement becomes effective, the provisions of the preceding articles shall remain in force with respect to such investments for a further period of ten years from that date or for any longer period as provided for or agreed upon in the relevant contract or approval granted to the investor.