AGREEMENT BETWEEN THE GOVERNMENT OF THE ITALIAN REPUBLIC AND THE GOVERNMENT OF THE REPUBLIC OF KENYA ON THE PROMOTION AND PROTECTION OF INVESTMENTS

The Government of the Italian Republic and the Government of the Republic of Kenya (hereafter referred to as the Contracting Parties),

Desiring to establish favourable conditions for improved economic cooperation between the two Countries, and especially in relation to capital investments by investors of one Contracting Party in the territory of the other Contracting Party;

And

Acknowledging that offering encouragement and mutual protection to such investments, based on an international Agreement, will contribute to stimulate business ventures, which foster the prosperity of both Contracting Parties,

Hereby agree as follows:

Article 1. Definitions

For the purposes of this Agreement:

1. The term "investment" 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 person of a Contracting Party, in conformity with the laws and regulations of that Party, irrespective of the legal form chosen, as well as of the legal framework.

Without limiting the generality of the foregoing, the term "investment" comprises in particular, but not exclusively:

a) Movable and immovable property and any ownership right in rem, including real guarantee rights on property of a Third Party, to the extent that it can be invested;in rem, including real guarantee rights on property of a Third Party, to the extent that it can be invested;

b) Shares, debentures, equity holdings or any other instruments of credit, as well as Government and public securities in general;

c) Credits for sums of money or any service right having an economic value connected with an investment, as well as re-invested income and capital gains;

d) Copyright, commercial trade marks, patents, industrial designs and other intellectual and industrial property rights, Know-how, trade secrets, trade names and goodwill;

e) Any economic right accruing by law or by contract and any licence and franchise granted in accordance with the provisions in force on economic activities, including the right to prospect for, extract and exploit natural resources;

f) Any increase in value of the original investment.

Any modification in the form of the investment does not imply a change in the nature thereof.

2. The term "investor" shall be construed to mean any natural or legal person of a Contracting Party investing in the territory of the other Contracting Party as well as the foreign subsidiaries, affiliates and branches controlled in anyway by the above natural and legal persons.

3. The term "natural person", in reference to either Contracting Party, shall be construed to mean any natural person holding the nationality of that State in accordance with its laws.

4. The term "legal person", in reference to either Contracting Party, shall be construed to mean any entity having its head

office in the territory of one of the Contracting Parties and recognised by it, such as public institutions, corporations, partnerships, foundations and associations, regardless of whether their liability is limited or otherwise.

5. The term "income" shall be construed to mean the money accruing to an investment, including in particular profits or interests, interest income, capital gains, dividends, royalties and any other form of payment either in money or in kind.

6. The term "territory" shall be construed to mean, in addition to the zones contained within the land boundaries, the "maritime zones". The latter also comprise the marine and submarine zones over which the Contracting Parties exercise sovereignty, and sovereign or jurisdictional rights, under international law.

7. "Investment agreement" means an agreement between a Party (or its agencies or instrumentalities) and an investor of the other Party concerning an investment.

8. "Nondiscriminatory treatment" means treatment that is at least as favourable as the national treatment or most-favoured-nation treatment.

Article 2. Promotion and Protection of Investments

1. Both Contracting Parties shall encourage investors of the other Contracting Party to invest in their territory.

2. Investors of one of the Contracting Parties shall have the right of access to the investment activities, in the territory of the other Contracting Party, not less favourable than the one granted as per Article 3.1.Article 3.1.

3. Both Contracting Parties shall at all times ensure just and fair treatment of the investments of investors of the other Contracting Party. Both Contracting Parties shall ensure that the management, maintenance, use, transformation, enjoyment or assignment of the investments effected in their territory by investors of the other Contracting Party, as well as companies and enterprises in which these investments have been effected, shall in no way be subject to unjustified or discriminatory measures.

4. Each Contracting Party shall create and maintain, in its territory a legal framework apt to assure to investors the continuity of legal treatment, including the compliance, in good faith, of all undertakings assumed with regard to each specific investor.

Article 3. National Treatment and the Most Favoured Nation Clause

1. Both Contracting Parties, within the boundaries of their own territory, shall offer investments effected by, and the income accruing to, investors of the other Contracting Party no less favourable treatment than that accorded to investments effected by, and income accruing to, its own nationals or investors of Third States.

2. If provisions in the legislation of a Contracting Party, or in international agreements in force or which may come into force in the future for that Contracting Party, should accord to investors of the other Contracting Party more favourable treatment than foreseen in this Agreement, such provisions shall, to the extent that they are more favourable to the investor concerned, prevail over this Agreement. This principle shall also apply to existing investments.

3. The provisions under point 1 and 2 of this Article do not refer to the advantages and privileges which one Contracting Party may grant to investors of Third States by virtue of their membership of a Customs or Economic Union, of a Common Market, of a Free Trade Area, of a multilateral economic Agreement or under agreements signed in order to prevent double taxation or to facilitate cross border trade.

Article 4. Compensation for Damages or Losses

When investments by investors of either Contracting Party suffer damages or losses owing to war, armed conflict, a state of national emergency, revolt, insurrection, riot or other similar events in the territory of the other Contracting Party, they shall be accorded by the latter Contracting Party a treatment, as regards compensation or other settlement, not less favourable than that accorded to its own investors or to investors of any Third State.

Article 5. Nationalization or Expropriation

1. The investments to which this Agreement relates shall not be subject to any measure which might limit the right of ownership, possession, control or enjoyment of the investments, permanently or temporarily, save where specifically provided by current, national or local, legislation or regulations and orders handed down by Courts or Tribunals having jurisdiction.

2. Investments of investors of one of the Contracting Parties shall not be, "de jure" or "de facto", directly or indirectly nationalized, expropriated, requisitioned or subjected to any measures having an equivalent effect in the territory of the other Contracting Party, except for public purposes or national interest and in exchange for immediate, full and effective compensation, and on condition that these measures are taken on a non-discriminatory basis and in conformity with all legal provisions and procedures.

3. The just compensation shall be established on the basis of real market value immediately prior to the moment in which the decision to nationalize or expropriate is announced or made public. In the absence of an understanding between the host Contracting Party and the investor during the nationalization or expropriation procedure, compensation shall be based on the same reference parameters and exchange rates taken into account in the documents for the constitution of the investment.

The exchange rate applicable to any such compensation shall be that prevailing on the date immediately prior to the moment in which the nationalization or expropriation has been annonced or made public.

4. Without restricting the scope of the above paragraph, should the object of nationalization, expropriation, or similar event be a company any part of whose share capital shall have been subscribed by an investor in a foreign currency or denominated in a foreign currency, the evaluation of the share of such investor will be in the currency of the investment, increased by capital increases, revaluation of capital, undistributed profits and reserves and diminished by the value of capital reductions and losses.

5. Compensation will be considered as actual if it will have been paid in the same currency in which the investment has been made by the foreign investor, in as much as such currency is — or remains — convertible, or, otherwise, in any other currency accepted by the investor.

6. Compensation will be considered as timely if it takes place without undue delay and, in any case, within six months.

7. Compensation shall include interests calculated on LIBOR basis from the date of nationalization or expropriation to the date of payment.

8. A national or company of either Party that asserts that all or part of its investment has been expropriated shall have a right to prompt review by the appropriate judicial or administrative authorities of the other Party to determine whether any such expropriation, and any compensation thereof, conforms to principles of international law, and to decide all other matters relating thereto.

9. If, after the dispossession, the assets concerned have not been utilized, wholly or partially, for that purpose, the owner or his assignees are entitled to the repurchasing of the assets at the market price.

Article 6. Repatriation of Capital, Profits and Income

1. Each of the Contracting Parties shall guarantee that the investors of the other may transfer the following abroad, without undue delay, in any convertible currency:

a) Capital and additional capital, including reinvested income, used to maintain and increase investment;

b) Any income derived from an investment;

c) Income deriving from the total or partial sale or the total or partial liquidation of an investment;

d) Funds to repay loans connected to an investment and the payment of the related interests;

e) Remuneration and allowances paid to nationals of the other Contracting Party for work and services performed in relation to an investment effected in the territory of the other Contracting Party in the amount and manner prescribed by the national legislation and regulations in force.

2. Without restricting the scope of Article 3 of this Agreement, the Contracting Parties undertake to apply to the transfers mentioned in paragraph 1. of this Article the same favourable treatment that is accorded to investments effected by investors of Third States, in case it is more favourable.

Article 7. Subrogation

In the event that one Contracting Party or an Institution thereof has provided a guarantee in respect of non-commercial risks for investment effected by one of its investors in the territory of the other Contracting Party, and has effected payment

to said investor on the basis of that guarantee, the other Contracting Party shall recognise the assignment of the rights of the investor to the first-named Contracting Party. In relation to the transfer of payments to the Contracting Party or its Institution by virtue of this assignment, the provisions of Article 4, 5 and 6 of this Agreement shall apply.

Article 8. Transfer Procedures

1. The transfers referred to in Article 4, 5, 6 and 7 shall be effected without undue delay and, at all events, within six months after all fiscal obligations have been met and shall be made in a convertible currency. All the transfers shall be made at the prevailing exchange rate applicable on the date on which the investor applies for the related transfer, with the exception of the provisions under point 3 of Article 5 concerning the exchange rate applicable in case of nationalization or expropriation.

2. The fiscal obligations under the previous paragraph are deemed to be complied with when the investor has fulfilled the proceedings provided for by the law of the Contracting Party on the territory of which the investment has been carried out.

Article 9. Settlement of Disputes between Investors and Contracting Parties

1. Any dispute which may arise between one of the Contracting Parties and the investors of the other Contracting Party on investments, including disputes relating to the amount of compensation, shall be settled amicably, as far as possible.

2. In case the Investor and one entity of one of the Parties have stipulated an investment agreement, the procedures foreseen in such investment agreement shall apply.

3. In the event that such dispute cannot be settled amicably within six months of the date of the written application for settlement, the investor in question may submit at his choice the dispute for settlement to:

a) The Contracting Party's Court having territorial jurisdiction;

b) An "ad hoc" Arbitration Tribunal, in compliance with the arbitration regulation of the UN Commission on the International Trade Law (UNCITRAL); the host Contracting Party undertakes hereby to accept the reference to said arbitration;

c) The International Centre for Settlement of Investment Disputes, for the implementation of the arbitration procedures under the Washington Convention of 18 March 1965, on the settlement of investment disputes between States and nationals of other States, if or as soon as both the Contracting Parties have acceded to it.

4. Both Contracting Parties shall refrain from negotiating through diplomatic channels any matter relating to an arbitration or judicial procedures underway until these procedures have been concluded and one of the Contracting Parties has failed to comply with the ruling of the Arbitration Tribunal or the Court of law within the period envisaged by the ruling, or else within the period which can be determined on the basis of the international or domestic law provisions which can be applied to the case.

Article 10. Settlement of Disputes between the Contracting Parties

1. Any dispute which may arise between the Contracting Parties relating to the interpretation and application of this Agreement shall, as far as possible, be settled amicably through diplomatic channels.

2. In the event that the dispute cannot be settled within six months of the date on which one of the Contracting Parties notifies, in writing, the other Contracting Party, the dispute shall, at the request of one of the Contracting Parties, be laid before an "ad hoc" Arbitration Tribunal as provided in this Article.

3. The Arbitration Tribunal shall be constituted in the following manner: within two months from the moment on which the request for arbitration is received, each of the two Contracting Parties shall appoint a member of the Tribunal. The two members shall then choose a national of a Third State to serve as a President. The President shall be appointed within three months of the date on which the other two members are appointed.

4. If, within the period specified in paragraph 3. of this Article, the appointments have not been made, each of the two Contracting Parties can, in default of other arrangement, ask the President of the International Court of Justice to make the appointment. In the event that the President of the Court is a national of one of the Contracting Parties or it is, for any reason, impossible for him to make the appointment, the application shall be made to the Vice President of the Court. If the Vice President of the Court is a national of one of the Contracting Parties or is unable to make the appointment for any reason, the most senior member of the International Court of Justice, who is not a national of one of the Contracting Parties, shall be invited to make the appointment.

5. The Arbitration Tribunal shall rule with a majority vote and its decisions shall be binding. Both Contracting Parties shall pay the costs of their own arbitration and of their representative at the hearings. The President's costs and any other cost shall be divided equally between the Contracting Parties.

The Arbitration Tribunal shall lay down its own procedures.

Article 11. Relations between Governments

The provisions of this Agreement shall be applied irrespective of whether or not the Contracting Parties have diplomatic or consular relations.

Article 12. Application of other Provisions

1. If a matter is governed both by this Agreement and another international agreement to which both Contracting Parties are signatories, or by general international law provisions, the most favourable provisions shall be applied to the Contracting Parties and to the their investors.

2. Whenever the treatment accorded by one Contracting Party to the investors of the other Contracting Party, according to its laws and regulations or other provisions or specific contract or investment authorisations or agreement, is more favourable than that provided under this Agreement, the more favourable treatment shall apply.

3. Whenever, after the date when the investment has been made, a modification should take place in laws, regulations, acts or measures of economic policies governing the investment directly or indirectly, the said modification shall not be applied retrospectively and the investment made under this Agreement shall be protected.

Article 13. Entry Into Force

This Agreement shall become effective as from the date in which the two Contracting Parties notify each other that their respective constitutional procedures have been completed.

Article 14. Duration and Expiry

1. This Agreement shall remain effective for a period of ten (10) years from the date of the notification under Article 13 and shall remain in force for a further period of five (5) years thereafter, save if one of the two Contracting Parties withdraws in writing by not later than one year before its expiry date.

2. In the case of investments effected prior to the expiry dates, as provided under paragraph 1 of this Article, the provisions of Articles 1 to 12 shall remain effective for a further five (5) years after the aforementioned dates.

Article 15. Amendments

This Agreement may be amended in writing by mutual consent.

Article 16. Review

This Agreement may be reviewed five (5) years after its entry into force and thereafter at consecutive periods of five (5) years or at such other time as the Contracting Parties may agree.

DONE AT Rome this 16 day of September one thousand nine hundred and 96, in two originals, in the Italian and English languages, both texts being equally authentic.

In case of any divergence, the English text shall prevail.

FOR THE GOVERNMENT OF THE ITALIAN REPUBLIC

FOR THE GOVERNMENT OF THE REPUBLIC OF KENYA