

# **AGREEMENT BETWEEN THE GOVERNMENT OF THE ITALIAN REPUBLIC AND THE GOVERNMENT OF THE REPUBLIC OF MALAWI ON THE PROMOTION AND PROTECTION OF INVESTMENTS**

The Government of the Italian Republic and the Government of the Republic of Malawi, hereinafter referred to as the Contracting Parties,

DESIRING to establish favorable conditions for strengthening economic cooperation between the two countries, and in particular with regard to capital investment by investors of one Contracting Party;

CONSCIOUS of the need to protect investments of both Contracting Parties and the need for political and legal stability to promote planning and long-term investments;

RECOGNIZING that the encouragement and reciprocal protection of such investment based on international law, will help to stimulate economic relationships that will foster the prosperity of both Contracting Parties;

HAVE AGREED as follows:

## **Article 1. Definitions**

For the purposes of this Agreement:

The term "Company" means for each Contracting Party a legal person, firm, association, institution or other body having legal personality, established or registered in its territory in accordance with the laws of that Contracting Party;

The term "income" means the amounts yielded by an investment, including in particular profits or interests, interest income, capital gains, dividends, royalties, fees for technical services, assistance or otherwise, as well as any in-kind payment as for example, but not limited to, raw materials, agricultural products, or livestock products.

The term "investments" means any kind of asset permitted by each Contracting Party in accordance with its laws and includes in particular, but not limited to:

- a) movable and immovable property and any other right of ownership and warranty as mortgages, usufruct, liens and claims;
- b) stocks, bonds, shares and any other document of title and Government and public securities in general;
- c) claims to money or depreciable bonds or other debt securities with the companies;
- d) copyrights, intellectual property rights (such as patents for inventions, trademarks, industrial design), know-how, trade secrets, technical processes, trade names and goodwill;
- e) commercial concessions granted by law or by contract, including the prospecting rights, cultivation, extraction or exploitation of natural resources;
- f) activities relating to an investment that include the organization, control, operation, maintenance and disposal of companies, branches, agencies, offices, factories and other facilities for the conduct of commercial activities; the writing, the operation and performance of contracts; the acquisition, use, protection and disposal of all kinds of property, including intellectual property; borrowings; the purchase, issuance and sale of shares and other securities and the purchase of foreign exchange for imports.

The "activities connected with an investment" shall also include, without Limitations:

- i) the grant of relief or rights granted;

- ii) the receipt of registrations, licenses, permits and other authorizations necessary for conducting business activities which in any case will be released promptly in accordance with the legislation of the Contracting Parties;
- iii) access to financial institutions in any currency, as well as to credit and currency markets;
- iv) access to loans held by financial institutions;
- v) the import and installation of equipment necessary for the normal course of business, including, but not limited to, office equipment and cars, as well as the export of the material and of cars imported to this end;
- vi) the dissemination of commercial information;
- vii) implementation of market surveys;
- viii) the appointment of commercial representatives, including agents, consultants and distributors (such as intermediaries in the distribution of products not manufactured by themselves) and the tasks performed by these, and their participation in trade fairs and other promotional events;
- ix) the marketing of goods and services, even though trade and domestic distribution networks as well as advertising and direct contact with citizens and societies;
- x) the payment in local currency for goods and services; is
- xi) the leasing of services performed in or in respect of the territory of the Contracting Parties.

The expression "investment agreement" means an agreement between a Contracting Party (or its agency or Holding) and an investor of the other Contracting Party related to an investment.

The term "investor" means any natural or legal person of a Contracting Party to make investments in the territory of the other Contracting Party.

The term "legal person", in reference to either Contracting Party means any entity having its head office in the territory of one of the Contracting Parties and recognized by the latter as public institutions, companies, firms, regardless of whether they are or less limited liability.

The term "natural person" and "national", in reference to either Contracting Party means a person who is a national of that State, in accordance with its laws.

The term "non-discriminatory treatment" refers to treatment that is no less favorable than that accorded to nationals of each Contracting Party, subject to the exceptions provided for by the law of the State.

The term "access rights" means the right to be allowed to invest in the territory of the other Contracting Party.

The term "territory" means:

a) for Malawi, the Republic of Malawi and includes all the territory of the Republic of Malawi in accordance with the Constitution of the Republic of Malawi;

b) for Italy, the Italian Republic and includes in addition to the zones contained within the land boundaries, the marine areas. These also comprise the marine and submarine zones over which the Italian Republic has sovereignty or exercises sovereign rights and jurisdiction in accordance with international law.

## **Article 2. Scope**

1. This Agreement applies only to investments of a Contracting Party in the territory of the other Contracting Party and to all investments made by nationals and companies of one of the Contracting Parties specifically approved by the competent authority designated by the other Contracting Party and subject to the conditions if any, that Party deems necessary.

2. The provisions of the preceding paragraph shall apply to all investments made by nationals and companies of either Contracting Party in the territory of the other Contracting Party, irrespective of whether they were made before or after the entry into force of this Agreement.

## **Article 3. Promotion and Protection of Investments**

1. Both Contracting Parties shall encourage and create favorable conditions for citizens and companies of the other

Contracting Party to make investments in accordance with regulations on investment.

2. All investments made under this Agreement shall be guaranteed fair and equitable treatment and protection in accordance with this Agreement.

3. Investors of one Contracting Party shall have a right of access to the territory of the other Contracting Party and will be allowed to stay in the territory with their family for a reasonable period of time to the investment activities.

4. The companies that are owned or controlled by investors of the other Contracting Party shall be authorized to take in their choice of high-level management personnel, regardless of nationality, in accordance with the Laws on Immigration in force and the regulations of the Contracting Parties.

## **Article 4. Most-favoured-nation Treatment Clause**

Under Articles 5, 7 and 8 of this Agreement, the Contracting Parties will not offer in its territory to investments made under this Agreement or to income derived by individuals and other companies Contracting Party, a treatment less treatment that accorded to the investments and returns made by nationals or companies of a third State.

## **Article 5. Exceptions to the Most-favoured-nation Treatment**

The provisions of this Agreement relative to the granting of treatment no less favorable than that accorded to nationals and companies of a third State do not bind a Contracting Party to extend to citizens and companies of the other Contracting Party the benefits of any treatment, preference or privilege arising from:

- a) any regional arrangement for customs, monetary, tariff or trade (including a free trade area) or any agreement designed to lead to an agreement of this kind in the future; or
- b) any agreement with one or more third countries from the same geographical region designed to promote regional cooperation in the economic, social, labor, industrial or monetary within specific projects; or
- c) any agreement or arrangement between the Contracting Parties relating in whole or in part to the imposition, including agreements on double taxation and the promotion of cross-border trade.

## **Article 6. Compensation for Damage or Loss**

1. Should investors of either Contracting Party may suffer loss or damage to their investments in the territory of the other Contracting Party due to war, other forms of armed conflict, state of emergency, civil strife or other similar events, the Contracting Party in whose territory the investment was made will provide adequate compensation for such loss or damage. Payments by way of compensation shall be freely transferable without undue delay.

2. The interested investors will be entitled to equal treatment with nationals of the other Contracting Party and, in any case, a treatment no less favorable than that of investors of Third States.

## **Article 7. Nationalization or Expropriation**

1. The investments covered by this Agreement shall not be subject to any measures to limit temporarily or permanently, the right to ownership, possession, control or enjoyment of the investments, unless it is specifically provided for in national legislation in force; local and by the provisions issued by the competent judicial authorities.

2. Investments of investors of either Contracting Party shall not be, de jure or de facto, directly or indirectly, nationalized, expropriated, requisitioned or subjected to measures having an equivalent effect in the territory of the other Contracting Party except for a public purpose or for the national interest and the payment of prompt payment, full and effective compensation, and provided that such measures are taken on a non-discriminatory basis and in accordance with all legal provisions and procedures.

3. The equitable compensation will be based on the prevailing market value immediately before the time when the decision to nationalize or expropriate is announced or made public.

In the absence of agreement between the Contracting Party and the investor during the process of nationalization or expropriation, the compensation will be calculated based on the same reference parameters and exchange rates, adopted in the documents prepared for the purpose of evaluating the investment.

The exchange rate applicable to the allowance shall be that prevailing on the date immediately preceding the time when the decision to nationalize or expropriate is announced or made public.

4. Without limiting the scope of the paragraph above, if the object of nationalization, expropriation or similar measures, is a company with foreign capital, the assessment of the investor's share of the investment will be made in the currency and will not be less than start value, increased by capital increases and revaluation of capital from undistributed profits and reserve funds, and reduced by the value of capital reductions and losses.

5. The allowance will be regarded as valid if paid in the same currency used by the foreign investor to make the investment, to the extent that such currency is - or remains - convertible, or, otherwise, in any other currency accepted by the investor.

6. Payment of the fee will be considered timely if made without undue delay and, in any case, within five months.

7. The compensation will include interest calculated on the basis of six months EURIBOR parameters from the date of nationalization or expropriation until the date of payment.

8. A citizen or a company of one of the Contracting Parties declares that its investments or part thereof have been expropriated shall have the right to request a prompt review by the competent judicial or administrative authorities of the other Contracting Party, in order to determine whether such expropriation, and the resulting benefits, reflects the principles of international law, and in order to decide on all matters relating.

9. In the absence of agreement between the investor and the competent authorities, the amount of compensation will be calculated according to the procedures for the settlement of disputes of Article 11 of this Agreement. The allowance will be freely transferable.

10. The provisions of paragraph 2 of this Article shall also apply to profits derived by an investment and, in the event of liquidation, the proceeds of liquidation.

11. If after the expropriation the property concerned is not used in whole or in part for the purpose intended, the owner or its successors shall be entitled to repurchase the asset at the market price.

## **Article 8. Repatriation of Capital, Profits and Income**

1. In accordance with applicable national laws and regulations, each Contracting Party shall guarantee that the investors of the other Party may transfer the following, without undue delay and in a convertible currency:

- a) capital and additional capital, including reinvested profit used for maintaining and increasing investment;
- b) net income, dividends, royalties, payments for assistance and technical services, interests and other profits;
- c) the income from the total or partial sale or the total or partial liquidation of an investment;
- d) funds in repayment of loans related to an investment and the payment of accrued interest;
- e) the remuneration and allowances paid to nationals of the other Contracting Party for work and fomites services in relation to an investment effected in the territory of the other Contracting Party to the extent and in the manner prescribed by the laws and national regulations.

2. Without limiting the scope of Article 4 of this Agreement, the Contracting Parties undertake to apply to the transfers referred to in paragraph 1 of this Article the same favorable treatment accorded to investments made by investors of third States, where this is more favorable.

## **Article 9. Subrogation**

If a Contracting Party (or one of its institutions) has granted a guarantee for non-commercial risks of an investment by one of its investors in the territory of the other Contracting Party and has made payment to such investor on the basis of the foregoing warranty, the other Contracting Party shall recognize the assignment of the investor's right to the first Contracting Party. As for the transfer of payment to the Contracting Party or its Institution by virtue of this assignment, the provisions of Articles 6,7 and 8 of this Agreement.

## **Article 10. Transfer Procedures**

1. The transfers referred to in articles 6, 7, 8 and 9 will be made without undue delay and in any event within six months

from the date of fulfillment of all tax obligations, and in a convertible currency. All transfers will be made at the prevailing exchange rate applicable on the date on which V investor has requested the transfer in question, except for the provisions of paragraph 3 of Article 7, concerning the 'exchange rate applicable in case of nationalization or expropriation.

2. The tax obligations referred to in the previous paragraph must have been made at a time when the investor has complied with the procedures provided for by the law of the Contracting Party in whose territory the investment was made.

## **Article 11. Settlement of Disputes between Investors and Contracting Parties**

1. Any issue arising between a Contracting Party and the investors of the other Contracting Party in respect of an investment, including a dispute on the amount of compensation, shall be settled, as far as possible, amicably.

2. In case the investor and the institution of a Contracting Party have entered into an investment agreement, the procedure provided for by that investment agreement will be applied.

3. If the dispute can not be settled amicably within six months from the written request of the date of settlement, the investor concerned may submit the dispute at his choice:

a) the court of the Contracting Party which has territorial jurisdiction;

b) to an ad hoc Arbitral Tribunal in accordance with the Regulations of the Arbitration Commission of the United Nations on International Trade Law (UNCITRAL), established by General Assembly Resolution no. 31/98 of 15 December 1976 and according to the following provisions:

i) The Arbitral Tribunal shall consist of three arbitrators; if they are not nationals of one of the Contracting Parties shall be nationals of States which have diplomatic relations with both Contracting Parties. The appointment of the arbitrators, when necessary according to UNCITRAL rules, will be made by the President of the Institute of Arbitration of the Chamber of Stockholm, as the authority responsible for the appointment. The arbitration will take place in Stockholm, except in cases where the two parties to the dispute have agreed otherwise.

ii) In rendering its decision, the Arbitral Tribunal shall apply in every case the provisions of this Agreement, and the principles of international law recognized by both Contracting Parties. The arbitration award shall be recognized and enforced in the territory of the Contracting Parties in accordance with their national legislation and international conventions on the subject of which they are part.

c) the International Centre for Settlement of Investment Disputes relating to the implementation of the arbitration procedure under the Washington Convention on the settlement of disputes regarding its investments between States and Nationals of other States of March 18, 1965 if or as soon as the two Contracting Parties have acceded to it.

## **Article 12. Settlement of Disputes between the Contracting Parties**

1. Any dispute arising between the Contracting Parties concerning the interpretation and application of this Agreement shall be settled, as far as possible, be settled amicably through diplomatic channels.

2. If a dispute can not be settled within six months from the date on which either Contracting Party has submitted written notice to the other Contracting Party, the dispute, at the request of either Contracting Party, be referred before an ad hoc Arbitral Tribunal, as required under this Article.

3. The Arbitral Tribunal shall be composed as follows: within two months from the date of receipt of the request for arbitration, either Contracting Party shall appoint a member of the Tribunal. The two members will choose a national of a third State who shall act as President. The Chairman shall be appointed within three months from the date on which the other two members were appointed.

4. If, during the period specified in paragraph 3 of this Article, will be no appointment has been made, either Contracting Party, in the absence of other arrangement, request the President of the International Court of Justice to make the appointment. If the President of the Court is a national of either Contracting Party or, for whatever reason, is unable to make the appointment, be apprised of the request, the Vice President of the Court. If the Vice President of the Court is a national of either Contracting Party or, for whatever reason, is unable to make the appointment, the member of the International Court of Justice following in seniority will invited to make the appointments, provided it is not a national of either Contracting Party.

5. The Arbitral Tribunal shall decide by majority vote, and its decision will be binding. Both Contracting Parties shall pay the costs of the arbitration and to its own representative to the hearings. The costs related to the Chairman and all other

expenses will be shared equally by the Contracting Parties. The Arbitral Tribunal shall determine its own procedures.

### **Article 13. Relations between the Governments**

The provisions of this Agreement will apply regardless of whether or not diplomatic or consular relations between the Contracting Parties.

### **Article 14. Application of other Provisions**

1. Where a matter is governed both by this Agreement as from another International Agreement to which they bind both Contracting Parties or by rules of general international law, the Contracting Parties and their investors will apply more favorable provisions.
2. Whenever the treatment accorded by a Contracting Party to the investors of the other Contracting Party according to its laws and its regulations or other provisions, or according to a specific contract or investment authorization, or other agreements, is more favorable than that provided in this Agreement, it will apply the most favorable treatment.
3. In the event that a Contracting Party has not applied such treatment in accordance with the preceding paragraph, and the investor has consequently suffered damage, investors will be entitled to compensation under Article 6.

### **Article 15. Entry Into Force**

This Agreement shall enter into force as from the thirtieth (30th) day from the date of receipt of the last notification by which the Contracting Parties notify the completion of their respective internal procedures.

### **Article 16. Duration and Expiry**

- (1) This Agreement shall remain in force for a period of ten (10) years from the date of notification referred to in Article 15 and will remain in force for a further five years unless one of the Contracting Parties decides to denounce it no later than one year before the expiration date.
2. In the case of investments made prior to the expiration date, as provided under paragraph 1 of this Article, the provisions of Articles 1 to 14 shall remain in force for a further period of five (5) years with effect from dates mentioned above.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, they have signed this Agreement.

Made in Blantyre the 28 of August Two Thousand and Three in duplicate in Italian and English languages, both texts being equally authentic.

FOR THE GOVERNMENT OF THE ITALIAN REPUBLIC

FOR THE GOVERNMENT OF THE REPUBLIC OF MALAWI