

AGREEMENT

BETWEEN

THE GOVERNMENT OF THE REPUBLIC OF SINGAPORE

AND

THE GOVERNMENT OF THE REPUBLIC OF KENYA

ON

THE PROMOTION AND PROTECTION OF INVESTMENTS

PREAMBLE

The Government of the Republic of Singapore and the Government of the Republic of Kenya (hereinafter referred to individually as a "Contracting Party", and collectively as the "Contracting Parties"),

DESIRING to create favourable conditions for greater economic co-operation between them and in particular for investments by investors of one Contracting Party in the territory of the other Contracting Party based on the principles of equality and mutual benefit;

RECOGNISING the important contribution investments can make to sustainable development, and seeking to promote, protect and facilitate such investments within the territories of the Contracting Parties;

REAFFIRMING the right of the Contracting Parties to regulate and to introduce new measures such as health, safety and environmental measures relating to investments in their territories in order to meet national policy objectives; and

RECOGNISING that the encouragement and reciprocal protection of such investments will be conducive to stimulating business initiative and increasing prosperity in both States,

HAVE AGREED AS FOLLOWS:

CHAPTER I: GENERAL PROVISIONS

ARTICLE 1
DEFINITIONS

For the purposes of this Agreement:

enterprise means any entity constituted or organised under applicable law and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organisation; and a branch of an enterprise;

freely usable currency means "freely usable currency" as determined by the International Monetary Fund under its *Articles of Agreement* and any amendments thereto;

investment means every kind of asset, owned or controlled, directly or indirectly, by an investor, that has the characteristics of an investment, including such characteristics as the commitment of capital, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include but are not limited to:

(a) shares, stock, and other forms of equity participation in an enterprise, including rights derived therefrom;

(b) bonds, debentures, and loans and other debt instruments, including rights derived therefrom;

(c) futures, options, and other derivatives;

(d) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;

(e) claims to money or to any contractual performance related to a business and having an economic value;

(f) intellectual property rights and goodwill;

(g) licences and similar rights conferred pursuant to applicable domestic law, including any concession to search for, cultivate, extract or exploit natural resources;

(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges; and

(i) returns that are reinvested;

"Loans and other debt instruments" described in subparagraph (b) and "claims to money or to any contractual performance" described in subparagraph (e) of this definition refer to assets which relate to a business activity and do not refer to assets which are of a personal nature, unrelated to any business activity;

Any alteration of the form in which assets are invested or reinvested shall not affect their character as investments.

For greater certainty, "investment" does not include:

(a) debt securities issued by a government or loans to a government;

(b) an order or judgment entered in a judicial or administrative action; and

(c) claims to money that arise solely from commercial contracts for the sale of goods or services, or the extension of credit in connection with a commercial transaction;

investor means:

(a) an enterprise of a Contracting Party; or

(b) a natural person who resides in the territory of a Contracting Party or elsewhere and who under the law of that Contracting Party is a citizen of that Contracting Party;

that has made an investment;

measure means any measure by a Contracting Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form, and includes measures taken by central, regional or local governments and authorities or statutory bodies;

return means an amount yielded by or derived from an investment, including profits, dividends, interest, capital gains, royalty payments, payments in connection with intellectual property rights, and all other lawful income; and

territory means:

(a) in respect of the Republic of Singapore: its land territory, internal waters and territorial sea, as well as any maritime area situated beyond the territorial sea which has been or might in the future be designated under its national law, in accordance with international law, as an area within which Singapore may exercise sovereign rights or jurisdiction with regards to the sea, the sea-bed, the subsoil and the natural resources; and

(b) in respect of Republic of Kenya: all territory of Kenya in state boundaries, including internal territory and territorial waters and also the exclusive economic zone, maritime zones, and all installations erected thereon, as defined in its national law, in accordance with international law, over which Kenya exercises its sovereign rights with respect to exploration, exploitation, conservation and management of natural resources of the seabed, its subsoil and the superjacent waters.

ARTICLE 2
APPLICABILITY OF AGREEMENT

1. Each Contracting Party shall admit the entry of investments made by investors of the other Contracting Party pursuant to its applicable laws and regulations.

2. The provisions in this Agreement shall apply to all investments made by investors of one 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 claims arising out of events which occurred, or claims which had been raised, prior to the entry into force of this Agreement.

3. This Agreement shall not apply to subsidies or grants provided by a Contracting Party, including government-supported loans, guarantees, and insurance, or to any conditions attached to the receipt or continued receipt of such subsidies or grants, whether or not such subsidies or grants are offered exclusively to investors of the Contracting Party or investments of investors of the Contracting Party.

CHAPTER II: PROTECTION

ARTICLE 3
TREATMENT OF INVESTMENT

1. Each Contracting Party shall accord to investors and investments of the other Contracting Party fair and equitable treatment and full protection and security.

2. For greater certainty:

(a) fair and equitable treatment requires each Contracting Party not to deny access to justice in any legal or administrative proceedings;

(b) full protection and security requires each Contracting Party to take such measures as may be reasonably necessary to ensure the protection and security of the investment; and

(c) the concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required under the customary international law minimum standard of treatment of aliens, and do not create additional substantive rights.

3. For greater certainty, 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 for the purpose of promoting small and medium sized enterprises and infant industries in its territory.

4. A determination that there has been a breach of another provision of this Chapter, or of a separate international agreement, does not establish that there has been a breach of this Article.

ARTICLE 4
MOST-FAVOURED-NATION TREATMENT

1. Each Contracting Party shall accord to investors of the other Contracting Party treatment no less favourable than that it accords, in like circumstances, to investors of any non-Contracting Party with respect to the management, conduct, operation, and sale or other disposition of investments.

2. Each Contracting Party shall accord to investments of investors of the other Contracting Party treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any non-Contracting Party with respect to the management, conduct, operation, and sale or other disposition of investments.

3. For greater certainty, a determination of whether treatment is accorded "in like circumstances" under Article 4 (Most-Favoured-Nation Treatment) depends on the totality of the circumstances, including the sector the investor is in, the aim of the measure, and whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.

4. The provisions of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party and investments of investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from:

(a) any existing or future customs union, free trade area, free trade arrangement, common market, monetary union or similar international agreement or other forms of regional cooperation to which either of the Contracting Parties is or may become a party; or the adoption of an agreement designed to lead to the formation or extension of such a union, area or arrangement;

(b) any existing bilateral investment agreements (also commonly referred to as "investment guarantee agreements", "investment promotion and protection agreements", or "international investment agreements");

(c) any existing or future international investment agreements between or among Member States of the Association of South-East Asian Nations (ASEAN), including investment agreements between or among Member States of ASEAN and any one or more third States;

(d) any existing or future international investment agreements between or among African Union (AU), Common Market of Eastern and Southern Africa (COMESA) or East Africa Community (EAC) Member States, including investment agreements between or among Member States of AU, COMESA or EAC and any one or more third States; or

(e) any arrangement with a non-Contracting Party or parties in the same geographical region designed to promote regional cooperation in the economic, social, labour, industrial or monetary fields within the framework of specific projects.

5. For greater certainty, paragraphs 1 and 2 shall not be construed as granting to investors options or procedures for the settlement of disputes other than those set out in Section One (Settlement of Disputes between a Contracting Party and an Investor of the other Contracting Party) of Chapter III (Dispute Settlement) of this Agreement.

ARTICLE 5
EXPROPRIATION

1. Neither Contracting Party shall nationalise, expropriate or subject to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") the investments of investors of the other Contracting Party unless such a measure is taken on a non-discriminatory basis, for a public purpose, in accordance with due process of law, and upon payment of compensation in accordance with this Article.

2. The expropriation shall be accompanied by the payment of prompt, adequate and effective compensation. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation or before the impending expropriation became public knowledge, whichever is earlier. Such compensation shall be

effectively realisable, freely usable, and freely transferable in accordance with Article 7 (Transfers) and made without undue delay. The compensation shall include interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

3. Notwithstanding paragraphs 1 and 2, any measure of expropriation relating to land, which is defined in the domestic legislation of the respective Contracting Party on the date of entry into force of this Agreement, shall be for a purpose and upon payment of compensation in accordance with the aforesaid legislation.

4. Any measure of expropriation or valuation may, at the request of the investors affected, be reviewed by a judicial or other independent authority of the Contracting Party taking the measure in the manner prescribed by its laws.

5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the *Agreement on Trade-Related Aspects of Intellectual Property Rights* in Annex 1C to the *Marrakesh Agreement Establishing the World Trade Organization* done at Marrakesh on 15 April 1994.

6. The provisions of this Article are to be interpreted in accordance with Annex 1 (Expropriation).

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, civil disturbances, a state of national emergency, revolt, insurrection, riot or other similar situations in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, if any, no less favourable than that which the latter Contracting Party accords to investors of any non-Contracting Party or to its own investors, whichever is more favourable. Any resulting compensation shall be made in freely usable currency and be freely transferable in accordance with Article 7 (Transfers).

2. Notwithstanding paragraph 1, if an investor of a Contracting Party, in the situations referred to in paragraph 1, suffers a loss in the territory of the other Contracting Party resulting from:

(a) requisitioning of its investment or part thereof by the latter's forces or authorities; or

(b) destruction of its investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation,

the latter Contracting Party shall provide the investor restitution, compensation, or both, as appropriate, for such loss.

ARTICLE 7
TRANSFERS

1. Each Contracting Party shall permit all transfers relating to investments in its territory of an investor of the other Contracting Party to be made freely and without delay into and out of its territory. Such transfers include:

(a) contributions to capital, including the initial contribution;

(b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;

(c) interest, royalty payments, management fees, and technical assistance and other fees;

(d) payments made under a contract entered into by the investor, or its investment, including payments made pursuant to a loan agreement;

(e) payments made pursuant to Article 5 (Expropriation) and Article 6 (Compensation for Losses); and

(f) payments arising under Chapter III (Dispute Settlement).

2. Each Contracting Party shall permit such transfers to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer.

3. Notwithstanding paragraphs 1 and 2, a Contracting Party may prevent a transfer through the equitable, non-discriminatory, and good faith application of its laws relating to:

(a) bankruptcy, insolvency, or the protection of the rights of creditors;

(b) issuing, trading, or dealing in securities, futures, options, or derivatives;

(c) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;

(d) criminal or penal offences;

(e) ensuring compliance with orders or judgments in judicial or administrative proceedings;

(f) social security, public retirement or compulsory savings schemes; or

(g) taxation.

4. Nothing in this Agreement shall affect the rights and obligations of the members of the International Monetary Fund under the *Articles of Agreement* of the Fund, including the use of exchange actions which are in conformity with the *Articles of Agreement*, provided that a Contracting Party shall not impose restrictions on any capital transactions inconsistently with

its obligations under this Agreement regarding such transactions, except under Article 8 (Restrictions to Safeguard the Balance of Payments) or at the request of the Fund.

ARTICLE 8
RESTRICTIONS TO SAFEGUARD THE BALANCE OF PAYMENTS

1. In the event of serious balance of payments and external financial difficulties, or threat thereof, a Contracting Party may adopt or maintain restrictions on payments or transfers related to investments. It is recognised that particular pressures on the balance of payments of a Contracting Party in the process of economic development may necessitate the use of restrictions to ensure, *inter alia*, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development.

2. The restrictions referred to in paragraph 1 shall:

(a) be consistent with the *Articles of Agreement* of the International Monetary Fund;

(b) avoid unnecessary damage to the commercial, economic and financial interests of the other Contracting Party;

(c) not exceed those necessary to deal with the circumstances described in paragraph 1;

(d) be temporary and be phased out progressively as the situation specified in paragraph 1 improves; and

(e) be applied on a non-discriminatory basis such that the other Contracting Party is treated no less favourably than any non-Contracting Party.

3. Any restrictions adopted or maintained under paragraph 1, or any changes therein, shall be promptly notified to the other Contracting Party.

4. The Contracting Party adopting any restrictions under paragraph 1 shall commence consultations with the other Contracting Party in order to review the restrictions adopted by it.

ARTICLE 9
SUBROGATION

1. In the event that either Contracting Party (or any agency, institution, statutory body or corporation designated by it), as a result of an indemnity it has given in respect of an investment or any part thereof, makes payment to its own investors in respect of any of their claims under this Agreement, the other Contracting Party acknowledges that the former Contracting Party (or any agency, institution, statutory body or corporation designated by it) is entitled by virtue of subrogation to exercise the rights and assert the claims of its own investors. The subrogated rights or claims shall not be greater than the original rights or claims of the said investor.

2. Where a Contracting Party (or any agency, institution, statutory body or corporation designated by it) has made a payment to an investor of that Contracting Party and has taken

over the rights and claims of the investor, that investor shall not be entitled to pursue those rights and claims against the other Contracting Party, unless authorised to act on behalf of the Contracting Party (or any agency, institution, statutory body or corporation designated by it) making the payment.

CHAPTER III: DISPUTE SETTLEMENT

SECTION ONE: SETTLEMENT OF DISPUTES BETWEEN A CONTRACTING PARTY AND AN INVESTOR OF THE OTHER CONTRACTING PARTY

ARTICLE 10
SCOPE

1. This Section shall apply to disputes between a Contracting Party and an investor of the other Contracting Party concerning an alleged breach of an obligation of the former Contracting Party under this Agreement which causes loss or damage to the investor or its investment.

2. This Section shall not apply to any dispute concerning any measure adopted or maintained or any treatment accorded to investors or investments by a Contracting Party in respect of tobacco or tobacco-related products[1] that is aimed at protecting or promoting human health.

ARTICLE 11
INSTITUTION OF ARBITRAL PROCEEDINGS

1. The disputing parties shall initially seek to resolve the dispute by consultations and negotiations.

2. The disputing investor may also submit the dispute to a competent court or an administrative tribunal of the Contracting Party in whose territory the investment is made.

3. Where the dispute cannot be resolved as provided for under paragraph 1 within twelve (12) months from the date of a written request for consultations and negotiations, then, unless the disputing parties agree otherwise, the disputing investor may submit the dispute to:

(a) arbitration under the *Convention on the Settlement of Investment Disputes between States and Nationals of other States*, done at Washington on March 18, 1965 ("ICSID Convention"), and the *Rules of Procedure for Arbitration Proceedings (Arbitration Rules)*, as amended and in effect on April 10, 2006, provided that both the respondent Contracting Party and the Contracting Party of the disputing investor are parties to the ICSID Convention;

(b) arbitration under the *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes*, as amended and in effect on April 10, 2006 ("ICSID Additional Facility Rules"), provided that either the respondent Contracting Party or the Contracting Party of the disputing investor is a party to the ICSID Convention;

[1] For the purpose of this Agreement, "tobacco products" means products under Harmonised System Chapter 24 (Tobacco and Manufactured Tobacco Substitutes) and tobacco-related products falling outside Harmonised System Chapter 24 (Tobacco and Manufactured Tobacco Substitutes).

(c) arbitration under the *Arbitration Rules of the United Nations Commission on International Trade Law*, as adopted by the United Nations General Assembly on 15 December 1976 ("UNCITRAL Arbitration Rules"); or

(d) any other arbitral institutions or under any other arbitration rules, if the disputing parties so agree.

For the avoidance of doubt, the disputing investor may submit a claim on its own behalf in respect of loss or damage that has been incurred by the disputing investor, or on behalf of an enterprise of the respondent Contracting Party that the disputing investor owns or controls, either directly or indirectly, in respect of loss or damage that has been incurred by the enterprise.

4. Each Contracting Party hereby consents to the submission of a dispute to arbitration under paragraph 3 in accordance with the provisions of this Section, conditional upon:

(a) the submission of the dispute to such arbitration taking place within three (3) years of the time at which the disputing investor became aware, or should reasonably have become aware, of a breach of an obligation under this Agreement causing loss or damage to the disputing investor or its investment;

(b) the disputing investor providing written consent to arbitration in accordance with the provisions set out in this Section; and

(c) the disputing investor providing written notice, which shall be submitted at least ninety (90) days before the claim is submitted, to the respondent Contracting Party of its intent to submit the dispute to such arbitration and which:

(i) states the name and address of the disputing investor and, where a dispute is submitted on behalf of an enterprise, the name, address, and place of constitution of the enterprise;

(ii) nominates one of the *fora* referred to in paragraph 3 as the forum for dispute settlement;

(iii) waives its right to initiate or continue any proceedings before any court or administrative tribunal under the disputing Contracting Party's law, or any proceedings (excluding proceedings for interim measures of protection referred to in paragraph 1 of Article 15 (Interim Measures of Protection and Diplomatic Protection)) before any of the other dispute settlement *fora* referred to in paragraph 3 in relation to the matter under dispute; and

(iv) briefly summarises the alleged breach of the respondent Contracting Party under this Agreement (including the provisions alleged to have been breached), the legal and factual basis for the dispute, and the loss or damage allegedly caused to the disputing investor or its investment by reason of that breach.

For greater certainty, failure to meet any of these pre-conditions nullifies a Contracting Party's consent under this paragraph.

5. The consent under paragraph 4 and the submission of a claim to arbitration under this Section shall satisfy the requirements of:

(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute; and

(b) Article II of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, adopted at the United Nations in New York on June 10, 1958 ("New York Convention") for an "agreement in writing".

6. A claim that is submitted for arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention.

ARTICLE 12
CONSTITUTION OF THE ARBITRAL TRIBUNAL

1. Unless the disputing parties otherwise agree, the arbitral tribunal (the "tribunal") shall be composed of three arbitrators, who shall not be nationals or permanent residents of either Contracting Party. Each disputing party shall appoint one arbitrator and the disputing parties shall agree upon a third arbitrator, who shall be the chairman of the arbitral tribunal. If an arbitral tribunal has not been established within ninety (90) days from the date on which the claim was submitted to arbitration, either because a disputing party failed to appoint an arbitrator or because the disputing parties failed to agree upon the chairman, the Secretary-General of the International Centre for Settlement of Investment Disputes ("ICSID"), upon request of either disputing party, shall appoint, at his own discretion, the arbitrator or arbitrators not yet appointed. If the Secretary-General is a national or permanent resident of either Contracting Party, or he or she is otherwise unable to act, the Deputy Secretary-General, who is not a national or permanent resident of either Contracting Party, may be invited to make the necessary appointments.

2. The arbitrators shall:

(a) have experience or expertise in public international law or international investment law;

(b) be independent from the Contracting Parties and the disputing investor, and not be affiliated to or receive instructions from any of them; and

(c) be free of conflict of interest and shall disclose any issues that may give rise to conflict of interest.

3. The non-disputing Contracting Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement.

ARTICLE 13
PLACE OF ARBITRATION

Unless the disputing parties otherwise agree, the tribunal shall determine the place of arbitration in accordance with the applicable arbitration rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.

ARTICLE 14
THE ARBITRAL PROCEEDINGS

1. A tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and the applicable rules and principles of international law.

2. Without prejudice to a tribunal's authority to address other objections as a preliminary question, such as an objection that a dispute is not within the competence of the tribunal, a tribunal shall address and decide as a preliminary question any objection by the respondent Contracting Party that, as a matter of law, a claim submitted is not a claim for which an award in favour of the disputing investor may be made under Article 16 (Award).

(a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent Contracting Party to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent Contracting Party to submit its response to the amendment).

(b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.

(c) In deciding an objection under this paragraph, the tribunal shall assume to be true the disputing investor's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in the relevant article of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.

(d) The respondent Contracting Party does not waive any objection as to competence or any argument on the merits merely because the respondent Contracting Party did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 3.

3. In the event that the respondent Contracting Party so requests within forty-five (45) days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 2 and any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds thereof, no later than one hundred and fifty (150) days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take

an additional thirty (30) days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed thirty (30) days.

4. When deciding the respondent Contracting Party's objection under paragraph 2 or 3, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claim of the disputing investor or the respondent Contracting Party's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

ARTICLE 15
INTERIM MEASURES OF PROTECTION AND DIPLOMATIC PROTECTION

1. Neither Contracting Party shall prevent the disputing investor from seeking interim measures of protection, not involving the payment of damages or resolution of the substance of the matter in dispute before the courts or administrative tribunals of the respondent Contracting Party, prior to the institution of proceedings before any of the dispute settlement *fora* referred to in paragraph 3 of Article 11 (Institution of Arbitral Proceedings), for the preservation of its rights and interests.

2. Neither Contracting Party shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its investors and the other Contracting Party shall have consented to submit or have submitted to arbitration under this Section, unless such other Contracting Party has failed to abide by and comply with the award rendered in such dispute. Diplomatic protection, for the purposes of this paragraph, shall not include exchanges or correspondence for the sole purpose of facilitating a settlement of the dispute.

ARTICLE 16
AWARD

1. Where a tribunal makes a final award against a respondent Contracting Party, the tribunal may award, separately or in combination, only:

(a) monetary damages and any applicable interest; and

(b) restitution of property, in which case the award shall provide that the respondent Contracting Party may pay monetary damages and any applicable interest in lieu of restitution.

A tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules.

2. Any arbitral award shall be final and binding upon the disputing parties. Each Contracting Party shall ensure the recognition and enforcement of the award in accordance with its relevant laws and regulations.

3. Where a claim is submitted on behalf of an enterprise of the respondent Contracting Party, the arbitral award shall be made to the enterprise.

4. In any arbitration conducted under this Section, at the request of a disputing party, a tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or award to the disputing parties. Within sixty (60) days after the tribunal transmits its proposed decision or award, the disputing parties may submit written comments to the tribunal concerning any aspect of the proposed decision or award. The tribunal shall consider any such comments and issue its decision or award not later than forty-five (45) days after the expiration of the sixty (60) day comment period.

ARTICLE 17
CONSOLIDATION

1. Where two or more claims have been submitted separately to arbitration under this Section, and the claims raised have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order, in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of this Article.

2. A disputing party that seeks a consolidation order under this Article shall deliver, in writing, a request to the Secretary-General of ICSID and to all the disputing parties sought to be covered by the order, specifying the name and address of all the disputing parties sought to be covered by the order; the nature of the order sought; and the grounds on which the order is sought.

3. Unless the Secretary-General of ICSID finds within thirty (30) days after receiving a request in conformity with paragraph 2 that the request is manifestly unfounded, a tribunal shall be established under this Article.

4. Unless all the disputing parties sought to be covered by the consolidation order otherwise agree, the tribunal established under this Article shall comprise three arbitrators, who shall not be nationals or permanent residents of either Contracting Party, and who shall be appointed as follows:

(a) one arbitrator appointed by agreement of the disputing investors;

(b) one arbitrator appointed by the respondent Contracting Party; and

(c) the chairman of the arbitral tribunal appointed by the Secretary-General of ICSID.

5. If, within the sixty (60) days after the Secretary-General of ICSID receives a request made under paragraph 2, the respondent Contracting Party fails or the disputing investors fail to appoint an arbitrator in accordance with paragraph 4, the Secretary-General of ICSID, on request of any disputing party sought to be covered by the order, shall appoint the arbitrator or arbitrators not yet appointed.

6. Where a tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration in accordance with Article 11 (Institution of Arbitral Proceedings), have a question of law or fact in common, and arise out of the same events or circumstances, the tribunal may, in the interest of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

(a) assume jurisdiction over, and hear and determine together, all or part of the claims;

(b) assume jurisdiction over, and hear and determine one or more claims, whose determination it considers would assist in the resolution of the other claims; or

(c) instruct a tribunal previously established under Article 12 (Constitution of the Arbitral Tribunal) to assume jurisdiction over and to hear and determine together, all or part of the claims, provided that:

(i) that tribunal, at the request of any disputing investor, not previously a disputing party before that tribunal, shall be reconstituted with its original members, except that the arbitrator for the disputing investors shall be appointed pursuant to paragraphs 4(a) and 5; and

(ii) that tribunal shall decide whether any previous hearing must be repeated.

7. Where a tribunal has been established under this Article, a disputing investor that has submitted a claim to arbitration pursuant to Article 11 (Institution of Arbitral Proceedings) and that has not been named in a request made under paragraph 2, may make a written request to the tribunal that it be included in any order issued under paragraph 6, specifying:

(a) the name and address of the disputing investor;

(b) the nature of the order sought; and

(c) the grounds on which the order is sought.

The claimant shall provide the Secretary-General of ICSID with a copy of his request.

8. A tribunal established pursuant to this Article shall conduct the proceedings in accordance with the UNCITRAL Arbitration Rules, except as modified by this Section.

9. A tribunal established under Article 12 (Constitution of the Arbitral Tribunal) shall not have jurisdiction to decide a claim or a part of a claim over which a tribunal established or instructed under this Article has assumed jurisdiction.

10. On application of a disputing party, a tribunal established pursuant to this Article may, pending its decision under paragraph 6, order that the proceedings of a tribunal established under Article 12 (Constitution of the Arbitral Tribunal) be stayed, unless the latter tribunal has already adjourned its proceedings.

SECTION TWO: SETTLEMENT OF DISPUTES BETWEEN THE CONTRACTING PARTIES

ARTICLE 18
SCOPE

1. This Section applies to the settlement of disputes between the Contracting Parties arising from the interpretation or application of the provisions of this Agreement.

2. This Section shall not apply to any dispute concerning any measure adopted or maintained or any treatment accorded to investors or investments by a Contracting Party in respect of tobacco or tobacco-related products[2] that is aimed at protecting or promoting human health.

ARTICLE 19
CONSULTATIONS AND NEGOTIATIONS

1. Either Contracting Party may request in writing, consultations on the interpretation or application of this Agreement. If a dispute arises between the Contracting Parties on the interpretation or application of this Agreement, it shall, to the extent possible, be settled amicably through consultations and negotiation.

2. In the event the dispute is not settled through the means mentioned above within twelve (12) months from the date such negotiations or consultations were requested in writing, then, unless the Contracting Parties agree otherwise, either Contracting Party may submit such dispute to an arbitral tribunal established in accordance with this Section or, by agreement of the Contracting Parties, to any other international tribunal.

ARTICLE 20
CONSTITUTION OF THE ARBITRAL TRIBUNAL

1. Arbitration proceedings shall initiate upon written notice delivered by one Contracting Party (hereinafter referred to as "requesting Party") to the other Contracting Party (hereinafter referred to as "respondent Party") through diplomatic channels. Such notice shall contain a statement setting forth the provisions of Chapter II alleged to have been breached, the legal and factual grounds of the claim, a summary of the development and results of the consultations and negotiations pursuant to Article 19 (Consultations and Negotiations), the requesting Party's intention to initiate proceedings under this Section and the name of the arbitrator appointed by such requesting Party.

2. Within thirty (30) days after delivery of such notice, the respondent Party shall notify the requesting Party the name of its appointed arbitrator.

---

[2] For the purpose of this Agreement, "tobacco products" means products under Harmonised System Chapter 24 (Tobacco and Manufactured Tobacco Substitutes) and tobacco-related products falling outside Harmonised System Chapter 24 (Tobacco and Manufactured Tobacco Substitutes).

3. Within thirty (30) days following the date on which the second arbitrator was appointed, the Contracting Parties shall appoint, by mutual agreement, a third arbitrator, who shall be the chairman of the arbitral tribunal. In the event that the Contracting Parties fail to mutually agree on the appointment of the third arbitrator, the arbitrators appointed by the Contracting Parties shall, within thirty (30) days, appoint the third arbitrator, who shall be the chairman of the arbitral tribunal.

4. The arbitrators shall:

(a) have experience or expertise in public international law or international investment law;

(b) be independent from the Contracting Parties, and not be affiliated to or receive instructions from either of them; and

(c) be free of conflict of interest and shall disclose any issues that may give rise to conflict of interest.

5. With regard to the selection of arbitrators under paragraphs 1, 2 and 3, both Contracting Parties and, where relevant, the arbitrators appointed by them, shall not select arbitrators that are nationals or permanent residents of either Contracting Party.

6. If within the time limits set forth in paragraphs 2 and 3 above, the required appointments have not been made, either Contracting Party may invite the President of the International Court of Justice to appoint the arbitrator or arbitrators not yet appointed. If the President is a national or a permanent resident of either Contracting Party, or he or she is otherwise unable to act, the Vice-President shall be invited to make the said appointments. If the Vice-President is a national or a permanent resident of either Contracting Party, or he or she is otherwise unable to act, the Member of the International Court of Justice next in seniority who is not a national nor a permanent resident of either Contracting Party shall be invited to make the necessary appointments.

7. In case an arbitrator appointed under this Article resigns or becomes unable to act, a successor shall be appointed in the same manner as prescribed for the appointment of the original arbitrator, and he or she shall have the same powers and duties that the original arbitrator had.

8. Each Contracting Party shall bear the costs of its appointed arbitrator and of any legal representation in the proceedings. The costs of the chairman of the arbitral tribunal and of other expenses associated with the conduct of the arbitration shall be borne equally by the Contracting Parties, unless the arbitral tribunal decides that a higher proportion of costs be borne by one of the Contracting Parties.

ARTICLE 21
PLACE OF ARBITRATION

Unless the Contracting Parties agree otherwise, the place of arbitration shall be determined by the arbitral tribunal.

ARTICLE 22
THE ARBITRAL PROCEEDINGS

1. An arbitral tribunal established under this Section shall decide all questions relating to its competence and, subject to any agreement between the Contracting Parties, determine its own procedure. At any stage of the proceedings, the arbitral tribunal may propose to the Contracting Parties that the dispute be settled amicably. At all times, the arbitral tribunal shall afford a fair hearing to the Contracting Parties.

2. The arbitral tribunal shall decide the issues in dispute in accordance with this Agreement and the applicable rules and principles of international law.

3. The arbitral tribunal shall reach its decision by majority vote. The award shall be issued in writing and shall contain the applicable factual and legal findings. A signed award shall be delivered to each Contracting Party. The award shall be final and binding on the Contracting Parties.

CHAPTER IV: FINAL PROVISIONS

ARTICLE 23
DENIAL OF BENEFITS

Subject to prior notification and consultation, a Contracting Party (the "denying Party") may deny the benefits of this Agreement to an investor of the other Contracting Party that is an enterprise of that other Contracting Party and to investments of such an investor where the denying Party establishes that the enterprise is owned or controlled by persons of a non-Contracting Party, or of the denying Party, and has no substantive business operations in the territory of the other Contracting Party.

ARTICLE 24
TRANSPARENCY

1. Each Contracting Party shall ensure that its laws, regulations and administrative rulings of general application pertaining to or affecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons or the other Contracting Party to become acquainted with them.

2. To the extent possible, each Contracting Party shall make the measures and international agreements of the kind referred to in paragraph 1 easily accessible, including by making such information available on the internet. Each Contracting Party shall, upon request by the other Contracting Party, promptly respond to specific questions from and provide information to the other Contracting Party with respect to matters referred to in paragraph 1.

ARTICLE 25
INFORMATION REQUIREMENTS AND DISCLOSURE OF INFORMATION

1. Notwithstanding Article 4 (Most-Favoured-Nation Treatment), a Contracting Party may require an investor of the other Contracting Party, or its investment, to provide information concerning that investment solely for informational or statistical purposes. The Contracting Party shall protect such business information that is confidential from any disclosure that would prejudice the competitive position of the investor or its investment. Nothing in this paragraph shall be construed to prevent a Contracting Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.

2. Nothing in this Agreement shall require either Contracting Party to provide confidential information the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice the legitimate commercial interests of particular enterprises, public or private.

ARTICLE 26
EXCEPTIONS

1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Contracting Party or its investors where like conditions prevail, or a disguised restriction on investments of investors of the other Contracting Party in the territory of a Contracting Party, nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Contracting Party of measures[3]:

(a) necessary to protect public morals or to maintain public order[4];

(b) necessary to protect human, animal or plant life or health;

(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:

(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on a contract;

(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; or

(iii) safety;

(d) imposed for the protection of national treasures of artistic, historic or archaeological value; or

(e) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

2. Nothing in this Agreement shall be construed to:

(a) require a Contracting Party to furnish any information, the disclosure of which it considers contrary to its essential security interests; or

(b) preclude a Contracting Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

---

[3] For greater certainty, the application of these exceptions to this Agreement shall not be interpreted so as to diminish the ability of governments to take measures where investors are not in like circumstances due to the existence of legitimate regulatory objectives.

[4] The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

ARTICLE 27
TAXATION

1. Nothing in this Agreement shall apply to taxation matters which shall, except as provided for in this Article, be governed by the domestic laws of each Contracting Party and/or any tax treaty between both Contracting Parties.

2. Article 5 (Expropriation) and Chapter III Section One (Settlement of Disputes between a Contracting Party and an Investor of the other Contracting Party) shall apply to taxation measures to the extent that such taxation measures constitute expropriation as provided for therein[5]. An investor that seeks to invoke Article 5 (Expropriation) with respect to a taxation measure must first refer to the competent taxation authorities as described in paragraph 2, at the time that it gives notice under Chapter III Section One (Settlement of Disputes between a Contracting Party and an Investor of the other Contracting Party), the issue of whether that taxation measure involves an expropriation. If, within a period of six (6) months of such referral, both authorities reach an agreement that the taxation measure in question is not an expropriation, the investor shall not submit its claim to arbitration under Chapter III Section One (Settlement of Disputes between a Contracting Party and an Investor of the other Contracting Party).

3. For the purposes of this Article, "competent taxation authorities" means:

(a) in the case of Kenya, the Cabinet Secretary responsible for finance or his authorised representative; and

(b) in the case of Singapore, the Ministry of Finance,

or their successors.

---

[5] With reference to Article 5 (Expropriation), in assessing whether a taxation measure constitutes expropriation, the following considerations are relevant:

(i) the imposition of taxes does not generally constitute expropriation. The mere introduction of new taxation measures or the imposition of taxes in more than one jurisdiction in respect of an investment, does not in and of itself constitute expropriation;

(ii) taxation measures which are consistent with internationally recognised tax policies, principles and practices do not constitute expropriation. In particular, taxation measures aimed at preventing the avoidance or evasion of taxes should not, generally, be considered to be expropriatory; and

(iii) taxation measures which are applied on a non-discriminatory basis, as opposed to being targeted at investors of a particular nationality or specific individual taxpayers, are less likely to constitute expropriation. A taxation measure should not constitute expropriation if, when the investment is made, it was already in force, and information about the measure was made public or otherwise made publicly available.

ARTICLE 28
ENTRY INTO FORCE, DURATION AND TERMINATION

1. The Contracting Parties shall notify each other of the fulfillment of their respective internal legal procedures required for the bringing into force of this Agreement. This Agreement shall enter into force on the thirtieth day from the later of the notifications. It shall remain in force for a period of ten (10) years after its entry into force and shall continue in force unless terminated as provided for in paragraph 2.

2. A Contracting Party may, by giving one (1) year's advance notice in writing to the other Contracting Party, terminate this Agreement at the end of the initial ten (10) year period or at any time thereafter. The notice of termination shall become effective one (1) year after it has been received by the other Contracting Party.

3. The Agreement may be amended by mutual consent of the Contracting Parties in writing. The amendments shall enter into force in accordance with the same legal procedure prescribed under paragraph 1.

4. In respect of investments made prior to the date when the notice of termination of this Agreement becomes effective, the provisions of this Agreement shall remain in force for a further period of ten (10) years from that date.

DONE in Nairobi, on 12 June, 2018.

FOR THE GOVERNMENT OF THE REPUBLIC OF SINGAPORE

KOH POH KOON
SENIOR MINISTER OF STATE
FOR TRADE AND INDUSTRY

FOR THE GOVERNMENT OF THE REPUBLIC OF KENYA

HENRY K. ROTICH, EGH
CABINET SECRETARY FOR
THE NATIONAL TREASURY AND
PLANNING

ANNEX 1

EXPROPRIATION

The Contracting Parties confirm their shared understanding that:

1. An action or a series of actions by a Contracting Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.

2. Paragraph 1 of Article 5 (Expropriation) addresses two situations. The first is direct expropriation, where an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure.

3. The second situation addressed by paragraph 1 of Article 5 (Expropriation) is indirect expropriation, where an action or series of actions by a Contracting Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(a) The determination of whether an action or series of actions by a Contracting Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the government action, although the fact that an action or series of actions by a Contracting Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

(iii) the character of the government action.

(b) Except in rare circumstances, non-discriminatory regulatory actions by a Contracting Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations.