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THE DECLARATION OF SPECIAL ARRANGEMENTS FOR THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENT

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Foreign Investments Protection Act

Declaration of Special Arrangements for the Reciprocal Promotion and Protection of Investment

Legal Notice 151 of 2009

Legislation as at 31 December 2022

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Declaration of Special Arrangements for the Reciprocal Promotion and Protection of Investment (Legal Notice 151 of 2009)

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FOREIGN INVESTMENTS PROTECTION ACT

DECLARATION OF SPECIAL ARRANGEMENTS FOR THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENT

LEGAL NOTICE 151 OF 2009

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IN EXERCISE of the powers conferred by section 8B of the Foreign Investment Protection Act (Cap. 518), the Deputy Prime Minister and Cabinet Secretary for Finance declares that the arrangements specified in the Schedule hereto, between the Government of the Republic of Kenya and the Government of the Republic of Burundi for the Reciprocal Promotion and Protection in relation to foreign investments, entered into on the 1st April, 2009, shall, notwithstanding anything to the contrary in the Foreign Investment Protection Act (Cap. 518) or in any other written law, have effect in relation to investments promotion and protection.

SCHEDULE

The Government of the Republic of Kenya and the Government of the Republic of Burundi, hereinafter jointly referred to as the "Contracting Parties" and separately as the "Contracting Party";

Desiring to create conditions favourable for fostering greater investment by investors of one Contracting Party in the territory of the other Contracting Party;

Recognizing that the promotion and protection of these investments will stimulate the flow of capital and technology between the two Contracting Parties in the interest of economic development.

HAVE AGREED AS FOLLOWS:

ARTICLE 1 - DEFINITIONS

For the purposes of this Agreement and unless stated otherwise, the following words and terms shall have the corresponding meanings—

(1) "Investment" means every kind of asset established or acquired, including changes in the form of such investment, in accordance with the national laws of the Contracting Party in whose territory the investment is made and in particular, though not exclusively, includes—

(i) movable and immovable property as well as other rights such as mortgages, liens or pledges;

(ii) shares, stock and debentures of a company and any other similar forms of participation in a company;

(iii) rights to money or to any performance under contract having a financial value;

(iv) intellectual property rights in accordance with the relevant laws of the respective Contracting Parties;

(v) business concessions conferred by law under contract, including concession to search for and extract oil and other natural resources.

(2) "Investor" means—

(i) Natural persons deriving their status as nationals of the Republic of Kenya or the Republic of Burundi according to their applicable laws;

(ii) Any legal entity such as a company, corporation, firm, partnership, business associations, institution, organization, incorporated or constituted in accordance with the laws and regulations of the Contracting Party and having its registered office or central administration or principal place of business within the jurisdiction of that Contracting Party, whether or not for profit and whether its liabilities are limited or not.

(3) "Returns" means the amounts yielded by investments, and shall in particular, though not exclusively include profits, dividends, interest, royalties, capital gains, reinvestment returns or other income including payments in kind related to investment. Returns reinvested shall have the same protection as enjoyed by an investment.

(4) "Territory" means—

(i) In respect of the Republic of Kenya, the land territory, internal waters and territorial sea and the airspace above them, as well as the maritime zones beyond the territorial sea, including the seabed and subsoil, over which Kenya exercises sovereign rights or jurisdiction in accordance with its national laws in force and international law, for the purpose of exploitation and exploration of the natural resources of such areas.

(ii) In respect of the Republic of Burundi, the lands of the State of Burundi, the territorial waters, including respectively their subsoil and seabed, the airspace over them, over which the State of Burundi exercises its sovereignty and its sovereign rights in accordance with the provisions of international law and internal laws and regulations of the State of Burundi.

ARTICLE 2 - SCOPE OF THE AGREEMENT

This Agreement shall apply to all investments made by investors of either Contracting Party in the territory of the other Contracting Party, accepted as such in accordance with its laws and regulations, whether made before or after the coming into force of this Agreement, but shall not apply to any dispute concerning an investment that arose or any claim that was settled before entry into force.

ARTICLE 3 - PROMOTION AND PROTECTION OF INVESTMENT

1. Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its territory, and admit such investments in accordance with its laws and regulations in force.
2. Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party.
3. Investments by investors of each Contracting Party shall be accorded whole and sufficient protection and security in the territory of the other Contracting Party.
4. Without prejudice to its laws and regulations, none of the Contracting Parties shall take any unjustified or discriminatory measures against management, maintenance, usage, enjoyment, sale or other disposal of investments by investors of the other Contracting Party.
5. Subject to its laws and regulations, each Contracting Party shall provide assistance and means necessary for granting work permits to nationals of the Contracting Party engaged in activities related to investments made in the territory of this Contracting Party.
6. Each Contracting Party shall endeavour to encourage the use of both local human and material resources for the promotion of investment in its territory.

ARTICLE 4 - NATIONAL TREATMENT AND MOST FAVOURED NATIONAL TREATMENT

1. Each Contracting Party shall accord to investments of investors of the other Contracting Party, treatment which shall not be less favourable than that accorded either to investments of its own or investments of investors of any third State.

2. The provisions stipulated in the above paragraph shall not be construed to allow the investors of the Contracting Parties to enjoy the privileges granted by either Contracting Party to the investors of a third State by virtue of its participation in any of the following—

   (i) Agreements relating to any existing or future customs unions, free trade zones, regional economic organizations or similar international agreements;

   (ii) International agreements relating wholly or mainly to taxation.

ARTICLE 5 - EXPROPRIATION AND COMPENSATION

1. The investment shall not be subject, either directly or indirectly, to any act of expropriation or nationalization or to any other procedure of similar effect unless it is intended for public interest and without discrimination against prompt and full compensation paid in accordance with the legal procedures and general principles of the type of treatment stipulated in paragraph 2 of this Article subject to provisions of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) on compulsory licensing.

2. The said compensation shall be equivalent to the real market value for the expropriated investment at the time of its expropriation or its declaration and shall be estimated in accordance with a normal economic situation prevailing prior to any threat of expropriation.The compensation due shall be paid without unreasonable delay and shall enjoy free transfer, and it shall include interest at a fair and equitable rate, however, it shall not be less than the prevailing six month Liborrate of interest or equivalent, from the date of expropriation until the date of payment.

3. Without prejudice to the rights of the investor under Article 8 of this Agreement, the investor shall have a right, under the law of the Contracting Party making the expropriation, to review, by a judicial or other independent authority of that contracting Party, of the valuation of the compensation in accordance with the principles set out in this Article. The Contracting Party making the expropriation shall make every endeavour to ensure that such review is carried out promptly.

4. Where a Contracting Party expropriates the assets of a Company which is incorporated or constituted under the law in force in any part of its own territory, and in which investor of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to ensure prompt and full compensation in respect to their investment to such investors to the other Contracting Party who are owners of those shares.

5. Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, a state of national emergency or civil disturbances 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 no less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State.

6. The application of this Article is subject to compliance with the tax laws, regulations and conventions of each Contracting State.

ARTICLE 6 - REPATRIATION OF INVESTMENT AND RETURNS

1. Each Contracting Party shall permit all funds of an investor of the other Contracting Party related to an investment in its territory to be freely transferred, without unreasonable delay and on a non-discrimination basis. Such funds would include—

   (i) capital and additional capital amounts used to maintain and increase investment;

   (ii) returns;

   (iii) repayments of any loan, including interest thereon, relating to the investment;

(iv) proceeds from sales of their shares;

(v) proceeds received by investors in case of sale or partial sale or liquidation;

(vi) the earnings of citizens/nationals of one Contracting Party who work in connection with an investment in the territory of other Contracting Party;

(vii) payments arising from an investment dispute;

(viii) compensation pursuant to Article 5 of this Agreement.

2. Unless otherwise agreed to between the parties, currency transfer under paragraph 1 of this Article shall be permitted in the currency of the original investment or any other convertible currency. Such transfer shall be made at the prevailing market rate of exchange on the date of transfer.

3. The application of this Article is subject to compliance with the tax laws, regulations and conventions of each Contracting State.

ARTICLE 7 - SUBROGATION

Where one Contracting party or its designated agency has guaranteed any indemnity against non-commercial risks in respect of an investment by any of its investors in the territory of the other Contracting Party and has made payment to such investors in respect of their claims under this Agreement, the other Contracting Party agrees that the first Contracting Party or its designated agency is entitled by virtue of subrogation to exercise the claims of those investors. The subrogated rights or claims shall not exceed the original rights or claims of such investors.

ARTICLE 8 - SETTLEMENT OF DISPUTES BETWEEN A CONTRACTING PARTY AND AN INVESTOR OF THE OTHER CONTRACTING PARTY

1. All legal disputes under the provisions on this Agreement; arising directly from an investment between either Contracting Party and an investor of the other Contracting Party shall be settled amicably among themselves through mutual negotiations.

2. If such disputes cannot be settled according to the provisions of paragraph (1) of this Article within three months from the date of request in writing for settlement, either party to the dispute may submit the dispute to—

(i) the competent court of the host Contracting Party for decision, if the investor so agrees; or

(ii) the International Centre for the Settlement of Investment Disputes established under the Convention on the Settlement of Investment Disputes between States and Nationals of other States of March 18, 1965 done in Washington, D.C., if this Convention is applicable to the Contracting Parties, or

(iii) an *Ad Hoc* Arbitral Tribunal.

Either party to the investment dispute, who chooses one of the above mentioned ways of the settlement of dispute, cannot choose the two other ways.

3. The *Ad Hoc* Arbitral Tribunal specified under paragraph (iii) shall be established as follows—

(i) Each party to the dispute shall appoint one arbitrator, and the two arbitrators, thus appointed, shall select by mutual agreement a third arbitrator, who must be a citizen of a third country, and who shall be appointed as Chairperson of the Tribunal by the two parties. All the arbitrators must be appointed within two months from the date of notification by one party to the other party of its intention to submit the dispute to arbitration.

(ii) If the periods specified in paragraph 3(i) herein have not been respected, either party, in the absence of any other agreement, shall invite the President of the International Court of Justice, who is not a national of either Contracting Party, to make the necessary appointments. If the President is a national of either Contracting Party or prevented from discharging the said functions, the

member of the International Court of Justice next is seniority and who is not a national of either Contracting Party shall be invited to make the necessary appointments.

(iii) The *Ad Hoc* Arbitral Tribunal shall reach its decisions by a majority of votes.These decisions shall be final and legally binding upon the parties and shall be enforced in accordance with the domestic law of the Contracting Party to the dispute. The decisions shall be taken in conformity with the provisions of this Agreement and the laws of the Contracting Party to the dispute.

(iv) The Tribunal shall interpret its awards and give reasons and basis of its decision at the request of either party. Unless otherwise agreed by the parties, the venue of Arbitration will be at the Hague, Netherlands.

(v) The languages of the proceedings of the *Ad Hoc* Arbitral Tribunal shall be English and French.

Subject to the above, the Tribunal shall follow the Arbitration Rules of the United Nations Commission for International Trade Law (UNCTRAL), 1976.

ARTICLE 9 - SETTLEMENT OF DISPUTE BETWEEN THE CONTRACTING PARTIES

1. The two Contracting Parties shall strive in good faith and mutual co-operation to reach a fair and quick settlement of any dispute arising between them concerning interpretation or execution of this Agreement. In this connection, the two Contracting Parties hereby agree to enter into mutual negotiations to reach such amicable settlement of all the disputes. If, after such mutual negotiations, the dispute has not been settled within a period of six months from the date on which the matter was raised by either Contracting Party, it may be submitted at the request of either Contracting Party to an Arbitral Tribunal composed of three members.

2. Within a period of two months from the date of receiving the said request, each Contracting Party shall appoint one arbitrator, and the two arbitrators so appointed shall appoint, within a period of two months and with the approval of both Contracting Parties, a national of a third country as Chairperson of the Tribunal.

3. If within the periods specified in paragraph 2 of this Article the necessary appointments have not been made, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice at the Hague, Netherlands, to make any necessary appointments. If otherwise prevented from discharging the said function, the Vice-President of the International Court of Justice, at he Hague, Netherlands, shall be invited to make the necessary appointments. If the Vice-President of the International Court of Justice, at The Hague, Netherlands, is a national of either Contracting Party or if he/she too is prevented from discharging the said function, the Member of the International Court of Justice next in seniority who is not a national of either Contracting Party shall be invited to make the necessary appointments.

4. The Arbitral Tribunal shall reach its decisions by a majority of votes. Such decisions shall be binding on both Contracting Parties. Each Contracting Party shall bear the cost of its own member of the Arbitral Tribunal and of its representation in the arbitral proceeding.

   The cost of the tribunal and of its remaining cost shall be borne in equal parts by Contracting Parties. The Tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the two Contracting Parties and this award be binding on both Contracting Parties.

5. Unless agreed otherwise by the Contracting Parties, the venue of Arbitration shall be The Hague, Netherlands.

6. All claims shall be submitted and all hearing sessions shall be completed within a period of eight months from the date the third member of the Arbitral tribunal is appointed, unless otherwise agreed. The Tribunal shall issue its decision within two months from the date of submitting the final claims or the date of closing the general sessions, whichever is later.

7. It shall not be permitted to submit a dispute to an Arbitration Tribunal pursuant to the rules of this Article if the same dispute was submitted to another Arbitration Tribunal pursuant to the rules of Articles (8) above and which is still under hearing by that Tribunal.

This, however, shall not affect entering into direct and constructive negotiations between the Contracting Parties.

8. The languages of the proceedings of the Arbitral Tribunal shall be English and French.

ARTICLE 10 - ENTRY AND SOJOURN OF PERSONNEL

A Contracting Party shall, subject to its laws applicable to the entry and sojourn of non- citizens, permit natural persons of the other Contracting Party and other persons appointed or employed by investors of the other Contracting Party to enter and remain in its territory for the purpose of engaging in activities connected with investments.

ARTICLE 11 - APPLICABLE LAWS

1. Except as otherwise provided in this Agreement, all investments shall be governed by the laws in force in the territory of the Contracting Party in which such investments are made.

2. Notwithstanding paragraph 1 of this Article, nothing in this Agreement precludes the host Contracting Party from taking action for the protection of its essential national security interests or public order or morality affecting public order or in circumstances of extreme emergency in accordance with its laws normally and reasonably applied on a non- discriminatory basis.

ARTICLE 12 - APPLICATION OF OTHER RULES

If the law of either Contracting Party or obligations under international law, existing at present or established hereafter between the Contracting Parties in addition to this Agreement, contains a provision, whether general or specific, entitling investments made by investors of other Contracting Party to a treatment more favourable than is provided by this Agreement, such provisions shall, to the extent that they are more favourable to the investor, prevail over this Agreement.

ARTICLE 13 - AMENDMENT

This Agreement may be amended by written agreement between the two Contracting Parties. Any approved amendments shall be an integral part of this Agreement and shall enter into force upon signature of the authorized Representatives of the Contracting Parties.

ARTICLE 14 - ENTRY INTO FORCE

This Agreement shall enter into force upon signature by the duly authorized Representative of the two Contracting Parties.

ARTICLE 15 - DURATION AND TERMINATION

1. This Agreement shall remain in force for a period of ten years and thereafter it shall be deemed to have been automatically extended unless either Contracting Party gives to the other Contracting Party a written notice of its intention to terminate the Agreement. The Agreement shall stand terminated one year from the date on receipt of such written notice.

2. Notwithstanding termination of this Agreement pursuant to paragraph (1) of this Article, the Agreement shall continue to be effective for a further period of ten years from the date of its termination in respect of investments made or acquired before the date of termination of this Agreement.