

CHAPTER 518

THE FOREIGN INVESTMENTS PROTECTION ACT

SUBSIDIARY LEGISLATION

List of Subsidiary Legislation

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

[Legal Notice 138 of 2009]

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 French Republic for the Reciprocal Promotion and Protection in relation to foreign investments, entered into on the 4th December, 2007, 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 French Republic and the Government of the Republic of Kenya hereinafter referred to as the Contracting Parties;

Recognising the need to protect investments of the investors of one Contracting Party in the territory of the other Contracting Party on a non-discriminatory basis;

Desiring to strengthen the economic reciprocal co-operation between both States and to create favourable conditions for investments;

Recognizing that the promotion and protection of these investments would succeed in stimulating transfers of capital and technology between the two countries in the interest of their economic development.

HAVE AGREED AS FOLLOWS:

ARTICLE 1 - DEFINITIONS

For the purpose of this Agreement:

1. The term "investments" shall be construed to mean any kind of assets, such as goods, rights and interests of whatever nature invested before or after the entry into force of this Agreement and in conformity with the laws and regulations of the Contracting party in whose territory the investment is made.

Without limiting the generality of the foregoing, the term "investment" comprises—

- (a) movable and immovable property as well as any other right *in rem* such as mortgages, liens, usufructs, pledges and similar rights;
- (b) shares, premium on share and other kinds of interest in companies constituted in the territory of one Contracting Party;
- (c) title to money or debentures, or title to any legitimate performance having an economic value;
- (d) intellectual, commercial and industrial property rights such as copyrights, patents, licenses, trademarks, industrial models and industrial mock-ups, technical processes, know-how, trade names and goodwill;
- (e) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources, including those which are located in the maritime area of the Contracting Parties; and
- (f) re-investment.

Any alteration of the form in which assets are invested shall not affect their qualification as investments provided that such alteration is not in conflict with

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the legislation of the Contracting Party on whose territory the investment is made.

2. The term "nationals" means natural persons possessing the nationality of either Contracting Party in accordance with its laws.
3. The term "investor" means, for either Contracting Party—
 - (a) nationals; or
 - (b) any legal entity such as company, corporation, firm, partnership, business association, institution or organisation, 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.
4. The term "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 an investment.
5. The term "territory" means the land territory, internal waters and territorial sea of the Contracting Party and the airspace above them, as well as the maritime zones beyond the territorial sea, including the seabed and subsoil, over which that Contracting Party exercises sovereign rights or jurisdiction in accordance with its national laws in force and international law, for the purpose of exploration and exploitation of the natural resources of such areas.

ARTICLE 2 - PROMOTION AND ADMISSION OF INVESTMENTS

1. Each Contracting Party shall promote and admit in its territory, in accordance with its legislation and with the provisions of this Agreement, investments made by investors of the other Contracting Party.
2. 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 3 - FAIR AND EQUITABLE TREATMENT

Each Contracting Party shall ensure fair and equitable treatment of investments by investors of the other Contracting Party and shall not, in its territory impair by unreasonable or arbitrary measures the expansion, operation, management, maintenance, use, enjoyment, sale or other disposal of investments of investors of the other Contracting Party.

ARTICLE 4 - NATIONAL TREATMENT AND MOST FAVOURED NATION TREATMENT

1. Each Contracting Party shall accord to investors of the other Contracting Party and to their investments, a treatment no less favourable than the treatment it accords to its own investors and their investments with respect to the expansion, operation, management, maintenance, use, enjoyment, sale or other disposal of investments.
2. Each Contracting Party shall accord to investors of the other Contracting Party and to their investments, a treatment no less favourable than the treatment it accords to investors of the most favoured nation and to their investments with respect to the expansion, operation, management, maintenance, use, enjoyment, sale or other disposal of investments.
3. Each Contracting Party shall accord to investors of the other Contracting Party and their investments the better of the treatments required by paragraph 1 and paragraph 2 of this Article, whichever is the more favourable to the investors or investments.
4. This treatment shall not include the privileges granted by one Contracting Party to investors of a third party State by virtue of its participation or association in a free trade zone, customs union, common market or any other form of regional economic organization.
5. Each Contracting Party may, in accordance with its laws and regulations, grant incentives, treatment, preferences or privileges through special policies or measures to its own investors only for the purpose of promoting small and medium sized enterprises and infant industries

in its territory, subject to the condition that these shall not significantly affect the investments and activities of the investors of the other Contracting Party.

ARTICLE 5 - PERMITS

1. Each Contracting Party shall, subject to its laws and regulations, treat favourably the applications relating to investments and grant expeditiously the necessary permits required in its territory, in connection with investments by investors of the other Contracting Party.

2. Each Contracting Party shall, subject to its laws and regulations, grant temporary entry and stay and provide any necessary confirming documentation to natural persons who are employed from abroad as executives, managers, specialists or technical personnel in connection with an investment by an investor of the other Contracting Party, and who are essential for the enterprise, as long as these persons continue to meet the requirements of this paragraph. Immediate family members of such personnel shall also be granted a similar treatment with regard to entry and temporary stay in the territory of the host Contracting Party.

ARTICLE 6 - DEPRIVATION AND COMPENSATION

1. The investments made by investors of one Contracting Party shall enjoy full and complete protection and safety in the territory of the other Contracting Party.

2. Neither Contracting Party shall take any measures of expropriation or nationalization or any other measures depriving, directly or indirectly, an investor of the other Contracting Party of an investment unless the following conditions are complied with—

- (i) the measures are taken in the public or national interest and in accordance with the law;
- (ii) the measures are not discriminatory;
- (iii) provisions for the payment of prompt and full compensation to accompany the measures.

3. Such compensation shall amount to the market value of the expropriated investment at the time immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier. The market value shall be determined in accordance with generally accepted principles of valuation, taking into account, inter alia, the capital invested, replacement value, appreciation, current returns, the projected flow of future returns, goodwill and other relevant factors.

4. The said compensation, the amounts and conditions of payment, shall be set not later than the date of dispossession. Compensation shall be fully realisable, transferable and shall be paid without any restriction or delay. It shall include interest at a commercial rate established on a market basis for the currency of payment from the date of dispossession of the expropriated property until the date of actual payment.

5. Without prejudice to the provisions of Article 8 of this Agreement, the investor whose investments are expropriated or who suffers comparable measures shall have the right to prompt review of its case and of valuation of its investments in accordance with the principles set out in this Article, by access to judicial or other competent authority of that Contracting Party.

6. Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or other settlement, a treatment no less favourable than the one accorded by the latter Contracting Party to its own investors or investors of the most favoured nation, whichever, according to the investor, is the more favourable.

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ARTICLE 7 - FREE TRANSFER

1. Each Contracting Party shall ensure to investors of the other Contracting Party the free transfer, into and out of its territory, of their investments and transfer payments related to investments. Such payments shall include in particular, though not exclusively—

- (a) principal and additional amounts to maintain, develop or increase the investment;
- (b) returns;
- (c) proceeds obtained from the total or partial sale or disposal of an investment, including the sale of shares;
- (d) amounts required for the payment of expenses which arise from the operation of the investment, such as loans repayments, payment of royalties, management fees, licence fees or other similar expenses;
- (e) compensation payable pursuant to Articles 6, 8 and 9;
- (f) earnings and other remuneration of personnel engaged from abroad and working in connection with an investment.

2. Each Contracting Party shall further ensure that the transfers referred to in paragraph 1 of this Article shall be made without any restriction in a freely convertible currency of the choice of the investor and at the prevailing market rate of exchange applicable on the date of transfer to the currency to be transferred and shall be promptly transferable.

3. In the absence of a market for foreign exchange, the rate to be used shall be the most recent exchange rate for the conversions of currencies into Special Drawing Rights.

4. In case of an unjustified delay in transfer caused by the host Contracting Party, the transfer shall also include interest at a commercial rate established on a market basis for the currency in question from the date on which the transfer was requested until the date of actual transfer and shall be borne by that Contracting Party.

5. When, in exceptional circumstances, capital movements from or to third countries cause or threaten to cause a serious disequilibrium to its balance of payments, each Contracting Party may temporarily apply safeguard measures to the transfers, provided that these measures shall be strictly necessary, would be imposed in an equitable, non discriminatory and in good faith basis and shall not exceed in any case a six months period.

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

7. The Contracting Party shall, with respect to this Article, honour its obligations arising from participation in or association with a free trade area, customs union, common market, economic and monetary union or any other of regional co-operation or integration.

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

1. Any dispute arising directly from an investment between one Contracting Party and an investor of the other Contracting Party should be settled amicably between the two parties to the dispute.

2. If the dispute has not been settled within three (3) months from the date on which it was raised in writing, the dispute may, at the choice of the investor, be submitted to—

- (a) the competent courts of the Contracting Party in whose territory the investment is made; or
- (b) arbitration by the International Centre for Settlement of Investment Disputes (ICSID), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965 (hereinafter referred to as the "Centre"), if the Centre is available; or

- (c) an *ad hoc* arbitration tribunal to be established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or
- (d) any other previously accepted *ad hoc* arbitration tribunal.

3. An investor who has submitted the dispute to a national court may nevertheless have recourse to one of the arbitral proceedings mentioned in paragraphs 2(b) to 2(d) of this Article if, before a judgement has been delivered on the subject matter by a national court, the investor declares not to pursue the case any longer through national proceedings and withdraws the case.

4. Any arbitration under this Article shall, at the request of either party to the dispute, be held in a state that is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), opened for signature at New York on 10 June, 1958. Claims submitted to arbitration under this Article shall be considered to arise out of a commercial relationship or transaction for the purposes of Article 1 of the New York Convention.

5. Each Contracting Party hereby gives its unconditional consent to the submission of a dispute between it and an investor of the other Contracting Party to arbitration in accordance with this Article.

ARTICLE 9 - GUARANTEE AND SUBROGATION

1. In the event that the regulations of one Contracting Party contain a guarantee for investments made abroad, this guarantee may be accorded, after examining case by case, to investments made by investors of this Party on the territory of the other Party.

2. Investments made by investors of one Contracting Party on the territory of the other Contracting Party, may obtain the guarantee referred to in the foregoing paragraph only if they have been previously agreed to by the other Party.

3. If one Contracting Party, as a result of a guarantee given for an investment made on the territory of the other Contracting Party, makes payments to its own investors, the first mentioned Party has in this case full rights of subrogation with regard to the rights and actions of the investors.

4. The payments shall not affect the rights of the beneficiary of the guarantee to have recourse to the ICSID or to continue proceedings submitted to it until completion.

ARTICLE 10 - SPECIAL COMMITMENT

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, contain a provision, whether general or specific, entitling investments made by investors of the 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 11 - SETTLEMENT OF DISPUTES BETWEEN CONTRACTING PARTIES

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

2. If the dispute cannot thus be settled within six (6) months following the date on which either Contracting Party requested such negotiations; it shall at the request of either Contracting Party be submitted to an Arbitral Tribunal.

3. Such an Arbitral Tribunal shall be constituted for each individual case in the following way—

Within two (2) months of the receipt of the request for arbitration, each Contracting Party shall appoint one member of the Tribunal. Those two members shall then select a national of a third State who, on approval by the two Contracting Parties, shall be appointed Chairman

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of the Tribunal. The Chairman shall be appointed within three (3) months from the date of appointment of the other two members.

4. If the necessary appointments have not been made within the periods specified in paragraph 3 of this Article, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make the necessary appointments. If the President is a national of either Contracting Party or is otherwise 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 or is not otherwise prevented from discharging the said function, shall be invited to make the necessary appointments.

5. The Arbitral Tribunal shall reach its decision by a majority of votes. The decisions of the Tribunal shall be final and binding on both Contracting Parties. Each Contracting Party shall bear the costs of the member appointed by that Contracting Party and of its representation in the arbitral proceedings. Both Contracting Parties shall assume an equal share of the costs of the Chairman, as well as any other costs. The Tribunal may make a different decision regarding the sharing of the costs. In all other respects, the Arbitral Tribunal shall determine its own rules of procedure.

6. Issues subject to dispute referred to in paragraph 1 of this Article shall be decided in accordance with the provisions of this Agreement and the generally recognised principles of international law.

ARTICLE 12 - GENERAL DEROGATIONS

1. Nothing in this Agreement shall be construed as preventing a Contracting Party from taking any action necessary for the protection of its essential security interests and maintenance of public order in time of war or armed conflict; provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination by a Contracting Party, or a disguised investment restriction.

2. The provisions of this Article shall not apply to Article 7 paragraph 1(e) of this Agreement.

ARTICLE 13 - OTHER PROVISIONS

1. Nothing in this Agreement shall be construed to prevent any Contracting Party from taking any measure to regulate investment of foreign companies and the conditions of activities of these companies in the framework of policies designed to preserve and promote cultural and linguistic diversity.

2. For the purpose of this Agreement, it is understood that the Contracting Parties are responsible for the actions or omission of their sub-sovereign entities, including though not exclusively their federal states, regions, local governments or any other entity over which the Contracting Party exercises the control, the representation or the responsibility of its international affairs, or its sovereignty consistent with its internal legislation.

ARTICLE 14 - ENTRY INTO FORCE AND TERMINATION

1. Each Party shall notify the other of the completion of the constitutional procedures required concerning the entry into force of this Agreement, which shall enter into force one month after the date of receipt of the final notification.

2. The Agreement shall be in force for an initial period of ten years. It shall remain in force thereafter, unless one of the Contracting Parties gives one year's written notice of termination through diplomatic channels.

3. In case of termination of the period of validity of this Agreement, investments made while it was in force shall continue to enjoy the protection of its provisions for an additional period of twenty years.

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

[Legal Notice 148 of 2009]

IN EXERCISE of the powers conferred by section 8B of the Foreign Investment Protection Act (Cap. 518), the Deputy Prime Minister and Minister 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 Finland for the Reciprocal Promotion and Protection in relation to foreign investments, entered into on the 1st September, 2008, 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 Finland and the Government of the Republic of Kenya, hereinafter referred to as the "Contracting Parties",

Recognising the need to protect investments of the investors of one Contracting Party in the territory of the other Contracting Party on a non-discriminatory basis;

Desiring to promote greater economic co-operation between them, with respect to investments by nationals and companies of one Contracting Party in the territory of the other Contracting Party;

Recognising that agreement on the treatment to be accorded such investments will stimulate the flow of private capital and the economic development of the Contracting Parties;

Agreeing that a stable framework for investment will contribute to maximising the effective utilisation of economic resources and improve living standards;

Recognising that the development of economic and business ties can promote respect for internationally recognised labour rights;

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

Having resolved to conclude an Agreement concerning the promotion and protection of investments.

HAVE AGREED AS FOLLOWS:

ARTICLE 1 - DEFINITIONS

For the purpose of this Agreement:

1. The term "investment" means every kind of asset established or acquired by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter Contracting Party, including in particular, though not exclusively—

- (a) movable and immovable property or any property rights such as mortgages, liens, pledges, leases, usufruct and similar rights;
- (b) reinvested returns;
- (c) shares in and stocks and debentures of a company or any other forms of participation in a company;
- (d) claims to money or rights to a performance having an economic value;

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- (e) intellectual property rights such as patents, copyrights, trade marks, industrial designs, business names, geographical indications as well as technical processes, know-how and good-will; and
- (f) concessions conferred by law, by an administrative act or under a contract by a competent authority, including concessions to search for, develop, extract or exploit natural resources.

Investments made in the territory of one Contracting Party by any legal entity of that same Contracting Party, but actually owned or controlled, directly or indirectly, by investors of the other Contracting Party, shall likewise be considered as investments of investors of the latter Contracting Party if they have been made in accordance with the laws and regulations of the former Contracting Party.

Any change in the form in which assets are invested or reinvested does not affect their character as investments.

2. The term "returns" means the amounts yielded by investments and shall in particular, though not exclusively, include profits, dividends, interest, royalties, capital gains or any payments in kind related to an investment.

3. The term "investor" means, for either Contracting Party, the following subjects who invest in the territory of the other Contracting Party in accordance with the laws of the latter Contracting Party and the provisions of this Agreement—

- (a) any natural person who is a national of either Contracting Party in accordance with its laws; or
- (b) any legal entity such as company, corporation, firm, partnership, business association, institution or organisation, 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.

4. The term "territory" means the land territory, internal waters and territorial sea of the Contracting Party and the airspace above them, as well as the maritime zones beyond the territorial sea, including the seabed and subsoil, over which that Contracting Party exercises sovereign rights or jurisdiction in accordance with its national laws in force and international law, for the purpose of exploration and exploitation of the natural resources of such areas.

ARTICLE 2 - PROMOTION AND PROTECTION OF INVESTMENTS

1. Each Contracting Party shall promote in its territory investments by investors of the other Contracting Party and shall, in accordance with its laws and regulations admit such investments.

2. Each Contracting Party shall in its territory accord to investments and returns of investments of investors of the other Contracting Party fair and equitable treatment and full and constant protection and security.

3. Neither Contracting Party shall in its territory impair by unreasonable or arbitrary measures the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposal of investments of investors of the other Contracting Party.

ARTICLE 3 - TREATMENT OF INVESTMENTS

1. Each Contracting Party shall accord to investors of the other Contracting Party and to their investments, a treatment no less favourable than the treatment it accords to its own investors and their investments with respect to the acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposal of investments.

2. Each Contracting Party shall accord to investors of the other Contracting Party and to their investments, a treatment no less favourable than the treatment it accords to investors

of the most favoured nation and to their investments with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment, and sale or other disposal of investments.

3. Each Contracting Party shall accord to investors of the other Contracting Party and to their investments the better of the treatments required by paragraph 1 and paragraph 2 of this Article, whichever is the more favourable to the investors or investments.

4. Neither Contracting Party shall mandate or enforce in its territory measures on investments by investors of the other Contracting Party, concerning purchase of materials, means of production, operation, transport, marketing of its products or similar orders having discriminatory effects. Such requirements do not include conditions for the receipt or continued receipt of an advantage.

5. Paragraph 1 of this Article is supplemented by a Protocol, which shall be an integral part of this Agreement.

ARTICLE 4 - EXEMPTIONS

The provisions of this Agreement shall not be construed so as to oblige one Contracting Party to extend to the investors and investments by investors of the other Contracting Party the benefit of any treatment, preference or privilege by virtue of any existing or future—

(a) free trade area, customs union, common market, economic and monetary union or other similar regional economic integration agreement, including regional labour market agreements, to which one of the Contracting Parties is or may become a party; or

(b) agreement for the avoidance of double taxation or other international agreement relating wholly or mainly to taxation; or

(c) multilateral agreement relating wholly or mainly to investments.

ARTICLE 5 - EXPROPRIATION

1. Investments by investors of a Contracting Party in the territory of the other Contracting Party shall not be expropriated, nationalised or subjected to any other measures, direct or indirect, having an effect equivalent to expropriation or nationalisation (hereinafter referred to as "expropriation"), except for a purpose which is in the public interest, on a non-discriminatory basis, in accordance with due process of law, and against prompt and full compensation.

2. Such compensation shall amount to the market value of the expropriated investment at the time immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier. The market value shall be determined in accordance with generally accepted principles of valuation, taking into account, inter alia, the capital invested, replacement value, appreciation, current returns, the projected flow of future returns, goodwill and other relevant factors.

3. Compensation shall be fully realisable, effective and shall be paid without any restriction or delay. It shall include interest at a commercial rate established on a market basis for the currency of payment from the date of dispossession of the expropriated property until the date of actual payment.

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 investors of the other Contracting Party own shares, it shall ensure that the provisions of paragraphs 1 to 3 of this Article are applied to the extent necessary to guarantee compensation in respect of their investment to such investors of the contracting party who are owners of those shares.

5. Without prejudice to the provisions of Article 9 of this Agreement, the investor whose investments are expropriated shall have the right to prompt review of its case and of valuation of its investments in accordance with the principles set out in this Article, by a judicial or other competent authority of that Contracting Party.

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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, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or other settlement, a treatment no less favourable than the one accorded by the latter Contracting Party to its own investors or investors of the most favoured nation, whichever, according to the investor, is the more favourable.

2. Without prejudice to paragraph 1 of this Article, investors of one Contracting Party who, in any of the situations referred to in that paragraph, suffer losses in the territory of the other Contracting Party resulting from—

- (a) requisitioning of its investment or a part thereof by the latter's authorities; or
- (b) destruction of its investment or a part thereof by the latter's authorities, which was not required by the necessity of the situation, shall be accorded by the latter Contracting Party restitution or compensation which in either case shall be prompt and full and with respect to compensation, shall be in accordance with Article 5 paragraphs 2-3 from the date of requisitioning or destruction until the date of actual payment.

ARTICLE 7 - FREE TRANSFER

1. Each Contracting Party shall ensure to investors of the other Contracting Party the free transfer, into and out of its territory, of their investments and transfer payments related to investments. Such payments shall include in particular, though not exclusively—

- (a) principal and additional amounts to maintain, develop or increase the investment;
- (b) returns;
- (c) proceeds obtained from the total or partial sale or disposal of an investment, including the sale of shares;
- (d) amounts required for the payment of expenses which arise from the operation of the investment, such as loans repayments, payment of royalties, management fees, licence fees or other similar expenses;
- (e) compensation payable pursuant to Articles 5, 6, 8 and 9;
- (f) earnings and other remuneration of personnel engaged from abroad and working in connection with an investment.

2. Each Contracting Party shall further ensure that the transfers referred to in paragraph 1 of this Article shall be made without any restriction in a freely convertible currency of the choice of the investor and at the prevailing market rate of exchange applicable on the date of transfer to the currency to be transferred and shall be promptly transferable.

3. Notwithstanding paragraphs 1 and 2 of this Article, a Contracting Party may delay a transfer through the application of measures ensuring investors' compliance with the host Contracting Party's laws and regulations on the payment of taxes and dues in force at the time the request for transfer was made, and provided that the application of such laws and regulations shall not unnecessarily impair the free transfer ensured by this Agreement.

4. In the absence of a market for foreign exchange, the rate to be used shall be the most recent exchange rate for the conversions of currencies into Special Drawing Rights.

5. In case of an unjustified delay in transfer caused by the host Contracting Party, the transfer shall also include interest at a commercial rate established on a market basis for the currency in question from the date on which the transfer was requested until the date of actual transfer and shall be borne by that Contracting Party.

ARTICLE 8 - SUBROGATION

If a Contracting Party or its designated agency makes a payment under an indemnity, guarantee or contract of insurance given in respect of an investment of an investor in the territory of the other Contracting Party, the latter Contracting Party shall recognise the assignment of any right or claim of such an investor to the former Contracting Party or its designated agency, and the right of the former Contracting Party or its designated agency to exercise by virtue of subrogation any such right and claim to the same extent as its predecessor in title.

ARTICLE 9 - DISPUTES BETWEEN AN INVESTOR AND A CONTRACTING PARTY

1. Any dispute arising directly from an investment between one Contracting Party and an investor of the other Contracting Party shall be settled amicably between the two parties to the dispute.

2. If the dispute has not been settled within three (3) months from the date on which it was raised in writing, the dispute may, at the choice of the investor, be submitted to—

- (a) the competent courts of the Contracting Party in whose territory the investment is made; or
- (b) arbitration by the International Centre for Settlement of Investment Disputes (ICSID), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965 (hereinafter referred to as the "Centre"), if the Centre is available; or
- (c) an *ad hoc* arbitration tribunal to be established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or
- (d) any other previously accepted *ad hoc* arbitration tribunal.

3. An investor who has submitted the dispute to a national court may nevertheless have recourse to one of the arbitral proceedings mentioned in paragraphs 2(b) to 2(d) of this Article if, before a judgement has been delivered on the subject matter by a national court, the investor declares not to pursue the case any longer through national proceedings and withdraws the case.

4. Any arbitration under this Article shall, at the request of either party to the dispute, be held in a State that is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), opened for signature at New York on 10 June, 1958.

Claims submitted to arbitration under this Article shall be considered to arise out of a commercial relationship or transaction for the purposes of Article 1 of the New York Convention.

5. Each Contracting Party hereby gives its unconditional consent to the submission of a dispute between it and an investor of the other Contracting Party to arbitration in accordance with this Article.

6. Neither of the Contracting Parties, which is a party to a dispute, can raise an objection, at any phase of the arbitration procedure or of the execution of an arbitral award, on account of the fact that the investor, which is the other party to the dispute, has received an indemnification covering a part or the whole of its losses by virtue of an insurance.

7. The award shall be final and binding on the parties to the dispute and shall be executed in accordance with national law of the Contracting Party in whose territory the award is relied upon, by the competent authorities of the Contracting Party by the date indicated in the award.

ARTICLE 10 - DISPUTES BETWEEN THE CONTRACTING PARTIES

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

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2. If the dispute cannot thus be settled within six (6) months following the date on which either Contracting Party requested such negotiations, it shall at the request of either Contracting Party be submitted to an Arbitral Tribunal.
3. Such an Arbitral Tribunal shall be constituted for each individual case in the following way. Within two (2) months of the receipt of the request for arbitration, each Contracting Party shall appoint one member of the Tribunal. Those two members shall then select a national of a third State who on approval by the two Contracting Parties shall be appointed Chairman of the Tribunal. The Chairman shall be appointed within four (4) months from the date of appointment of the other two members.
4. If the necessary appointments have not been made within the periods specified in paragraph 3 of this Article, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make the necessary appointments. If the President is a national of either Contracting Party or is otherwise 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 or is not otherwise prevented from discharging the said function, shall be invited to make the necessary appointments.
5. The Arbitral Tribunal shall reach its decision by a majority of votes. The decisions of the Tribunal shall be final and binding on both Contracting Parties. Each Contracting Party shall bear the costs of the member appointed by that Contracting Party and of its representation in the arbitral proceedings. Both Contracting Parties shall assume an equal share of the costs of the Chairman, as well as any other costs. The Tribunal may make a different decision regarding the sharing of the costs. In all other respects, the Arbitral Tribunal shall determine its own rules of procedure.
6. Issues subject to dispute referred to in paragraph 1 of this Article shall be decided in accordance with the provisions of this Agreement and the generally recognised principles of international law.

ARTICLE 11 - PERMITS

1. Each Contracting Party shall, subject to its laws and regulations, treat favourably the applications relating to investments and grant expeditiously the necessary permits required in its territory in connection with investments by investors of the other Contracting Party.
2. Each Contracting Party shall, subject to its laws and regulations, grant temporary entry and stay and provide any necessary confirming documentation to natural persons who are employed from abroad as executives, managers, specialists or technical personnel in connection with an investment by an investor of the other Contracting Party, and who are essential for the enterprise, as long as these persons continue to meet the requirements of this paragraph. Immediate family members of such personnel shall also be granted a similar treatment with regard to entry and temporary stay in the territory of the host Contracting Party.

ARTICLE 12 - APPLICATION OF OTHER RULES

1. If the provisions of 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, contain a regulation, whether general or specific, entitling investments made by investors of the 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.
2. Each Contracting Party shall observe any other obligation it may have with regard to a specific investment of an investor of the other Contracting Party.

ARTICLE 13 - APPLICATION 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, whether made before or after the entry

into force of this Agreement, but shall not apply to any dispute concerning an investment that arose or any claim that was settled before its entry into force.

ARTICLE 14 - GENERAL DEROGATIONS

1. Nothing in this Agreement shall be construed as preventing a Contracting Party from taking any action necessary for the protection of its essential security interests in time of war or armed conflict, or other emergency in international relations.
2. Provided, that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination by a Contracting Party, or a disguised investment restriction, nothing in this Agreement shall be construed as preventing the Contracting Parties from taking any measure necessary for the maintenance of public order.
3. The provisions of this Article shall not apply to Article 7 paragraph 1(e) of this Agreement.

ARTICLE 15 - TRANSPARENCY

1. Each Contracting Party shall promptly publish, or otherwise make available to the investor, its laws, regulations, judicial decisions of general application and other relevant information as well as international agreements, which may affect the investments of investors of the other Contracting Party in the territory of the former Contracting Party.
2. Nothing in this Agreement shall require a Contracting Party to furnish or allow access to any confidential or proprietary information, including information concerning particular investors or investments, the disclosure of which would impede law enforcement or be contrary to its laws protecting confidentiality or prejudice legitimate commercial interests of particular investors.

ARTICLE 16 - CONSULTATIONS

The Contracting Parties shall, at the request of either Contracting Party, hold consultations for the purpose of reviewing the implementation of this Agreement and studying any issue that may arise from this Agreement. Such consultations shall be held between the competent authorities of the Contracting Parties in a place and at a time agreed on through appropriate channels.

ARTICLE 17 - ENTRY INTO FORCE, DURATION AND TERMINATION

1. The Contracting Parties shall notify each other when their constitutional requirements for the entry into force of this Agreement have been fulfilled. The Agreement shall enter into force on the thirtieth day following the date of receipt of the last notification.
2. This Agreement shall remain in force for a period of twenty (20) years and shall thereafter remain in force on the same terms until either Contracting Party notifies the other in writing of its intention to terminate the Agreement in twelve (12) months.
3. In respect of investments made prior to the date of termination of this Agreement, the provisions of Articles 1 to 16 shall remain in force for a further period of twenty (20) years from the date of termination of this Agreement.

Protocol to the Agreement on the Promotion and Protection of Investments between the Government of the Republic of Finland and the Government of the Republic of Kenya

Upon signing the Agreement on the Promotion and Protection of Investments between the Government of the Republic of Finland and the Government of the Republic of Kenya, the undersigned representatives of both Contracting Parties have agreed with respect to Kenya on the following provisions, which constitute an integral part of the Agreement.

Ad Article 3 paragraph 1

The provision " ...a treatment no less favourable than the treatment it accords to its own investors and their investments..." does not apply to non-conforming measures maintained within the territory of Kenya at the time of the signing of the Agreement or to any future non-confirming measures as relates to granting incentives to its own investors in order to

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protect small and medium sized businesses and to stimulate the creation of local industries, provided that such incentives do not significantly affect the investments and activities of investors of Finland.

The principle of most favoured nation treatment shall be observed in case of foreign participation in such businesses.

Kenya will take appropriate actions to endeavour to remove such nonconforming measures.

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

[Legal Notice 149 of 2009]

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 Swiss Confederation for the Reciprocal Promotion and Protection in relation to foreign investments, entered into on the 14th November, 2006, 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 Swiss Federal Council, on behalf of the Republic of Kenya and of the Swiss Confederation respectively (hereinafter referred to as the "Contracting Parties");

Desiring to strengthen the economic co-operation for the mutual benefit of both States;

Intending to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party;

Recognizing the need to promote and protect foreign investments with the aim to foster the economic prosperity of both States.

HAVE AGREED AS FOLLOWS:

ARTICLE 1 - DEFINITIONS

For the purposes of this Agreement:

1. The term "investor" means with respect to either Contracting Party—
 - (a) natural persons who, according to the law of that Contracting Party, are considered to be its nationals;
 - (b) legal entities, including companies, corporations, business associations and other organisations, which are constituted or otherwise duly organised under the law of that Contracting Party and have their seat, together with real economic activities, in the territory of the same Contracting Party;
 - (c) legal entities not established under the law of that Contracting Party but effectively controlled by natural persons as defined in (a) above or by legal entities as defined in (b) above;
2. The term "investment" includes every kind of asset and in particular—
 - (a) movable and immovable property as well as any other rights in *rem*, such as mortgages, liens and pledges;
 - (b) shares, stocks, parts or any other kind of participation in companies;
 - (c) bonds, debentures, other debt instruments, and loans;
 - (d) claims to money or to any performance having an economic value;
 - (e) copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin), know-how and goodwill;
 - (f) concessions under public law, including concessions to search for, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of the authority in accordance with the law.

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Any change in the form in which assets are invested shall not affect their character as investments.

3. The term "returns" means the amounts yielded by an investment, in particular, though not exclusively, profits, interest, capital gains, dividends, royalties, fees and payments in kind.

4. The term "territory" means, with respect to each Contracting Party, the land territory, the internal waters, the air space and, where applicable, the territorial sea and the maritime zones beyond the territorial sea, including the seabed and the subsoil and their natural resources, over which the Contracting Party concerned exercises sovereign rights or jurisdiction in accordance with national and international law.

ARTICLE 2 - SCOPE OF APPLICATION

The present Agreement shall apply to investments in the territory of one Contracting Party made in accordance with its laws and regulations by investors of the other Contracting Party, whether prior to or after the entry into force of the Agreement. It shall however not apply to claims or disputes arising out of events which occurred prior to its entry into force.

ARTICLE 3 - PROMOTION AND ADMISSION

1. Each Contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting Party and admit such investments in accordance with its laws and regulations.

2. When a Contracting Party shall have admitted an investment in its territory, it shall grant, in accordance with its laws and regulations, the necessary permits in connection with such an investment including permits for the carrying out of licensing agreements and contracts for technical, commercial or administrative assistance.

3. Each Contracting Party shall, subject to its laws and regulations relating to the entry, stay and work of natural persons, examine and give due consideration to requests of key personnel including managerial and technical persons who are employed from abroad in connection with an investment by an investor of the other Contracting Party, to enter, remain temporarily and work in its territory. Immediate family members of such key personnel shall also, in accordance with the laws and regulations of the host Contracting Party, be granted such treatment with regard to the entry and temporary stay in the territory of that Contracting Party.

ARTICLE 4 - PROTECTION AND TREATMENT

1. Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension or disposal of such investments.

2. Each Contracting Party shall in its territory accord investments or returns of investors of the other Contracting Party treatment not less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State, whichever is more favourable to the investor concerned.

3. Each Contracting Party shall in its territory accord investors of the other Contracting Party, as regards the management, maintenance, use, enjoyment or disposal of their investments, treatment not less favourable than that which it accords to its own investors or investors of any third State, whichever is more favourable to the investor concerned.

4. The provisions of paragraphs (2) and (3) of this Article shall not prevent a Contracting Party from granting special incentives to its own nationals and companies in accordance with its laws and regulations, in order to stimulate and promote the creation of local industries, in particular small and medium sized enterprises, provided that such incentives do not significantly affect investments of investors of the other Contracting Party.

5. If a Contracting Party accords special advantages to investors of any third State by virtue of an agreement establishing a free trade area, a customs union or a common market or by virtue of an agreement on the avoidance of double taxation, it shall not be obliged to accord such advantages to investors of the other Contracting Party.

ARTICLE 5 - FREE TRANSFER

1. Each Contracting Party in whose territory investments have been made by investors of the other Contracting Party shall grant those investors the transfer without restriction or delay in a freely convertible currency of the amounts relating to such investments, and in particular—

- (a) returns;
- (b) payments relating to loans incurred, or other contractual obligations undertaken, for the investment;
- (c) amounts assigned to cover expenses relating to the management of the investment;
- (d) royalties and other payments deriving from rights enumerated in Article 1, paragraph (2)(d), (e) and (f) of this Agreement;
- (e) earnings and other remuneration of personnel engaged from abroad in connection with the investment;
- (f) the initial capital and additional amounts to maintain or increase the investment;
- (g) the proceeds of the partial or total sale or liquidation of the investment, including possible increment values.

2. Unless otherwise agreed with the investor, transfers shall be made at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force of the Contracting Party in whose territory the investment was made.

3. For clarity, it is confirmed that the application of this Article does not affect the obligation of an investor to comply with the tax laws and regulations of each Contracting Party.

ARTICLE 6 - EXPROPRIATION AND COMPENSATION

1. Neither of the Contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other measures having the same nature or the same effect against investments of investors of the other Contracting Party, unless the measures are taken in the public interest, on a non-discriminatory basis and under due process of law, and provided that provisions are made for compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriators action was taken or became public knowledge, whichever is earlier.

The amount of compensation shall include interest at a normal commercial rate from the date of dispossession until the date of payment, be settled in a freely convertible currency, be paid without delay and be freely transferable. The investor affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Contracting Party, of his case and of the valuation of his investment in accordance with this paragraph.

2. 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 investors of the other Contracting Party own shares, it shall, to the extent necessary and subject to its laws, ensure that compensation according to paragraph (1) of this Article will be made available to such investors.

ARTICLE 7 - COMPENSATION FOR LOSSES

Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party,

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shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or other settlement, a treatment no less favourable than that accorded by the latter Contracting Party to its own investors or investors of the most favoured nation, whichever, according to the investor, is the more favourable.

ARTICLE 8 - PRINCIPLE OF SUBROGATION

Where one Contracting Party or its designated agency has granted any financial guarantee against non-commercial risks in regard to an investment by one of its investors in the territory of the other Contracting Party, the latter shall recognize the rights of the first Contracting Party, or its designated agency, by virtue of the principle of subrogation to the rights of the investor when payment has been made under this guarantee by the first Contracting Party or its designated agency.

ARTICLE 9 - DISPUTES BETWEEN A CONTRACTING PARTY AND AN INVESTOR OF THE OTHER CONTRACTING PARTY

1. For the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party and without prejudice to Article 10 of this Agreement (Disputes between the Contracting Parties), consultations will take place between the parties concerned.

2. If these consultations do not result in a solution within three months from the date of the written request for consultations, the investor may submit the dispute either to the courts or tribunals of the Contracting Party in whose territory the investment has been made or to international arbitration. In the latter event, the investor has the choice between either of the following—

- (a) the International Centre for Settlement of Investment Disputes (ICSID) provided for by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington, on March 18, 1965 (hereinafter referred to as the "Convention of Washington"); and
- (b) an *ad hoc* arbitral tribunal which, unless otherwise agreed upon by the parties to the dispute, shall be established under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).

3. Each Contracting Party hereby consents to the submission of an investment dispute to international arbitration.

4. A company which has been incorporated or constituted according to the laws in force in the territory of one Contracting Party and which before a dispute arises was under the control of investors of the other Contracting Party shall, in accordance with Article 25(2)(b) of the Convention of Washington, be treated as a company of the other Contracting Party.

5. The Contracting Party which is party to the dispute shall at no time whatsoever during the process assert as a defence its sovereign immunity.

6. Neither Contracting Party shall pursue through diplomatic channels a dispute submitted to international arbitration unless the other Contracting Party does not abide by and comply with the arbitral award.

7. The arbitral award shall be final and binding for the parties to the dispute and shall be executed without delay according to the law of the Contracting Party concerned.

ARTICLE 10 - DISPUTES BETWEEN THE CONTRACTING PARTIES

1. Disputes between the Contracting Parties regarding the interpretation or application of the provisions of this Agreement shall if possible be settled through diplomatic channels.

2. If both Contracting Parties cannot reach an agreement within six months after the beginning of the dispute between themselves, the latter shall, upon request of either Contracting Party, be submitted to an arbitral tribunal of three members. Each Contracting

Party shall appoint one arbitrator, and these two arbitrators shall nominate a chairman who shall be a national of a third State.

3. If one of the Contracting Parties has not appointed its arbitrator and has not followed the invitation of the other Contracting Party to make that appointment within two months, the arbitrator shall be appointed upon the request of that Contracting Party by the President of the International Court of Justice.

4. If both arbitrators cannot reach an agreement about the choice of the chairman within two months after their appointment, the latter shall be appointed upon the request of either Contracting Party by the President of the International Court of Justice.

5. If, in the cases specified under paragraphs (3) and (4) of this Article, the President of the International Court of Justice is prevented from carrying out the said function or is a national of either Contracting Party, the appointment shall be made by the Vice-President, and if the latter is prevented or is a national of either Contracting Party, the appointment shall be made by the most senior Judge of the Court who is not a national of either Contracting Party.

6. Subject to other provisions made by the Contracting Parties, the tribunal shall determine its own procedure. Each Contracting Party shall bear the cost of its own member of the tribunal and of its representation in the arbitral proceedings. The cost of the Chairman and the remaining costs shall be borne in equal parts by the Contracting Parties, unless the arbitral tribunal decides otherwise.

7. The decisions of the tribunal are final and binding for each Contracting Party.

ARTICLE 11 - OTHER COMMITMENTS

1. If provisions in the legislation of either Contracting Party or obligations under international law entitle investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Agreement, such provisions or obligations shall to the extent that they are more favourable prevail over this Agreement.

2. Each Contracting Party shall observe any obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party.

ARTICLE 12 - FINAL PROVISIONS

1. This Agreement shall enter into force on the day when both Governments have notified each other that they have complied with the legal requirements for the entry into force of the Agreement.

2. The Agreement shall be in force for an initial period of ten years and shall remain in force thereafter for an indefinite period of time, unless terminated in accordance with paragraph 3 of this Article.

3. Either Contracting Party may terminate the Agreement at the end of the initial ten year period or at any time thereafter, by giving twelve months written notice to the other.

4. In case of termination of the present Agreement, the provisions of Articles 1 to 11 shall continue to be effective for a further period of ten years for investments made before the termination.

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

[Legal Notice 150 of 2009]

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 Islamic Republic of Iran for the Reciprocal Promotion and Protection in relation to foreign investments, entered into on the 24th February, 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 Islamic Republic of Iran and the Government of the Republic of Kenya hereinafter referred to as the Contracting Parties, desiring to intensify economic reciprocal co-operation to the mutual benefit of both states intending to utilize their economic resources and potential facilities in the areas of investments as well as to create and maintain favourable conditions for investments of the nationals of the Contracting Parties in each other territory and; recognizing the need to promote and protect investments of the nationals of the Contracting Parties in each other's territory.

HAVE AGREED AS FOLLOWS:

ARTICLE 1 - DEFINITIONS

1. For the purpose of this Agreement:

The term "investments" mean every kind of asset invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter Contracting party including in particular, though not exclusively—

- (a) movable and immovable property as well as rights related thereto such as mortgages, liens, pledges, leases, usufruct and similar rights;
- (b) reinvested returns;
- (c) shares in and stocks and debentures of a company or any other forms of participation in a company;
- (d) claims to money or rights to a performance having an economic value;
- (e) intellectual property rights such as patents, copyrights, trademarks, industrial designs, business names, geographical indications as well as technical processes, know-how and goodwill; and
- (f) concessions conferred by law, by an administrative act or under a contract by a competent authority, including concessions to search for, develop, extract or exploit natural resources.

Any change in the form in which assets are invested or reinvested does not affect their character as investments.

2. The term "returns" means the amounts yielded by investments and shall in particular though not exclusively, include profits, dividends, capital gains, royalties, fees or any payments in kind related to an investment.

3. The term "investor" means, for either Contracting Party, the following subjects who invest in the territory of other Contracting Party in accordance with the laws of the latter Contracting Party and the provisions of this Agreement—

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- (a) any natural person who is a national of either Contracting Party in accordance with its laws; or
- (b) any legal entity such as company, corporation, firm, partnership, business association, institution or organisation, 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.

4. The term "territory" refers to the areas under the sovereignty or jurisdiction of either Contracting Party as the case may be and includes their maritime areas.

ARTICLE 2 - PROMOTION OF INVESTMENTS

1. Either Contracting Party shall encourage its nationals to invest in the territory of the other Contracting Party.
2. Either Contracting Party shall within the framework of its laws and regulations, create favourable conditions for attraction of investments of nationals of the other Contracting Party in its territory.
3. Each Contracting Party shall endeavour to encourage the use of both local human and natural resources for the promotion of investments in its territory.

ARTICLE 3 - ADMISSION OF INVESTMENTS

1. Either Contracting Party shall admit investments of natural and legal persons of the other Contracting Party in its territory in accordance with its laws and regulations.
2. When an investment is admitted, either Contracting Party shall in accordance with its laws and regulations, grant all necessary permits for the realization of such investment.

ARTICLE 4 - PROTECTION OF INVESTMENTS

Investments of natural or legal persons of either Contracting Party effected within the territory of the other Contracting Party, shall receive the host Contracting Party's full legal protection and fair treatment not less favourable than that accorded to its investors or to investors of any third state who are in a comparable situation.

ARTICLE 5 - MORE FAVOURABLE PROVISIONS

Notwithstanding the terms set forth in this Agreement, more favourable provisions which have been or may be agreed upon by either of the Contracting Parties with an investor of the other Contracting Party are applicable.

ARTICLE 6 - EXEMPTIONS

The provisions of this Agreement shall not be construed so as to oblige one Contracting Party to extend to the investors and investments by investors of the other Contracting Party the benefit of any treatment, preference or privilege by virtue of any existing or future—

- (a) free trade area, customs union, common market, economic and monetary union or other similar regional economic integration agreement, including regional labour market agreements, to which one of the Contracting Parties is or may become a party; or
- (b) agreement for the avoidance of double taxation or other international agreement relating wholly or mainly to taxation.

ARTICLE 7 - EXPROPRIATION AND COMPENSATION

1. Neither of the Contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other measures having the same nature or the same effect against investments of investors of the other Contracting Party, unless the measures are taken in the public interest, on a non-discriminatory basis and under due process of law, and upon payment of prompt and full compensation.

2. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriatory action was taken or became public knowledge, whichever is earlier. The amount of compensation including financial costs from the date of dispossession until the date of payment, shall be settled in a freely convertible currency and be paid without a delay and be freely transferable.

3. The investor affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review by a judicial or other independent authority of that Contracting Party, of his case and of the valuation of his investment in accordance with this paragraph.

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 investors of the other Contracting Party own shares, it shall ensure that the provisions of paragraphs 1 to 3 of this Article are applied in respect of their investment to such investors of the contracting party who are owners of those shares.

ARTICLE 8 - COMPENSATION FOR LOSSES

Investors of one Contracting Party whose investment in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or other settlement, a treatment no less favourable than that accorded by the latter Contracting Party to its own investors or investors of the most favoured nation, whichever, according to the investor, is more favourable.

ARTICLE 9 - REPATRIATION AND TRANSFER

1. Each Contracting Party shall, in accordance with its laws and regulations, permit in good faith the following transfers related to investments referred to in this Agreement, to be made freely and without delay out of its territory—

- (a) returns;
- (b) proceeds from the sale and/or liquidation of all or part of the investment;
- (c) royalties and fees related to transfer of technology agreement;
- (d) sums paid pursuant to articles 7 and 8 of this Agreement;
- (e) loan installments related to an investment provided that they are paid out of such investment activities;
- (f) monthly salaries and wages received by the employees of an investor who have obtained in the territory of the host Contracting Party, the corresponding work permits related to that investment;
- (g) payments arising from a decision of the authority referred to in Article 13;
- (h) compensation payable pursuant to Articles 7, 8, 10 and 13.

2. The above transfers shall be effected in a convertible currency and at the current rate of exchange in accordance with the exchange regulations prevailing on the date of transfer.

3. The investor and the host Contracting Party may agree otherwise on mechanism of repatriation or transfer referred in this Article.

4. The application of this Article does not affect the obligation of an investor to comply with the tax laws and regulations of each Contracting Party.

ARTICLE 10 - SUBROGATION

If a Contracting Party or its designated agency within the framework of a legal system subrogates an investor pursuant to a payment made under an insurance or guarantee agreement against non-commercial risks—

- (a) such subrogation shall be recognized, by the other Contracting Party;

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(b) the subrogee shall be entitled to exercise any rights other than the rights which the investor would have been entitled to exercise;

(c) disputes between the subrogee and the host Contracting Party shall be settled in accordance with Article 13 of this Agreement.

ARTICLE 11 - OBSERVANCE OF COMMITMENTS

Either Contracting Party shall guarantee the observance of the commitments it has entered into with respect to investments of natural or legal persons of the other Contracting Party.

ARTICLE 12 - SCOPE OF THE AGREEMENT

1. This Agreement shall apply to investments, in the territory of one Contracting Party by investors of the other Contracting Party, approved in accordance with its laws and regulations, whether prior to or after the entry into force of the Agreement. It shall however not apply to claims or disputes arising out of events which occurred prior to its entry into force.

2. In the case of the Islamic Republic of Iran only investments approved by the competent authorities of the Contracting Party are covered by this Agreement. The competent authority in the Islamic Republic of Iran its Organization for Investment, Economic and Technical Assistance of Iran (O.I.E.T.A.I) or the agency that might succeed it.

ARTICLE 13 - SETTLEMENT OF DISPUTES BETWEEN AN INVESTOR AND A CONTRACTING PARTY

1. Any dispute arising directly from an investment between one Contracting Party and an investor of the other Contracting Party shall be settled amicably between the two parties to the dispute.

2. If the dispute has not been settled within six (6) months from the date on which it was raised in writing, the dispute may, at the choice of the investor, be submitted to—

- (a) the competent courts of the Contracting Party in whose territory the investment is made; or
- (b) arbitration by the International Centre for Settlement of Investment Disputes (ICSID), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March, 1965, if or as soon as both contracting parties have acceded; or
- (c) an *ad hoc* arbitration tribunal to be established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or
- (d) any other previously accepted *ad hoc* arbitration tribunal.

3. An investor who has submitted the dispute to a national court may nevertheless have recourse to one of the arbitral proceedings mentioned in paragraphs 2(b) to 2(d) of this Article if, before a judgement has been delivered on the subject matter by a national court, the investor declares not to pursue the case any longer through national proceedings and withdraws the case.

4. Any arbitration under this Article shall, at the request of either party to the dispute, be held in a state that is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), opened for signature at New York on 10 June 1958.

5. Where claims are submitted for arbitration under this Paragraph, the execution of the award shall be in accordance with the provisions of the New York Convention.

6. Each Contracting Party hereby gives its unconditional consent to the submission of a dispute between it and an investor of the other Contracting Party to arbitration in accordance with this Article.

7. Subject to other provisions agreed by the Contracting Parties, the arbitral tribunal shall determine its procedure and place of arbitration.

The decisions of the arbitral tribunal shall be binding on the contracting parties.

ARTICLE 14 - SETTLEMENT OF DISPUTES BETWEEN CONTRACTING PARTIES

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

2. If the dispute cannot thus be settled within six (6) months following the date on which either Contracting Party requested such negotiations, it shall at the request of either Contracting Party be submitted to an Arbitral Tribunal.

3. Such an Arbitral Tribunal shall be constituted for each individual case in the following way. Within two (2) months of the receipt of the request for arbitration, each Contracting Party shall appoint one member of the Tribunal. Those two members shall then select a national of a third State who, on approval by the two Contracting Parties, shall be appointed Chairman of the Tribunal. The Chairman shall be appointed within three (3) months from the date of appointment of the other two members. However, the Chairman of the Arbitral Tribunal shall be a national of a state having diplomatic relations with both Contracting Parties.

4. If the necessary appointments have not been made within the periods specified in paragraph 3 of this Article, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make the necessary appointments. If the President is a national of either Contracting Party or is otherwise 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 or is not otherwise prevented from discharging the said function, shall be invited to make the necessary appointments.

5. The Arbitral Tribunal shall reach its decision by a majority of votes. The decisions of the Tribunal shall be final and binding on both Contracting Parties. Each Contracting Party shall bear the costs of the member appointed by that Contracting Party and of its representation in the arbitral proceedings. Both Contracting Parties shall assume an equal share of the costs of the Chairman, as well as any other costs. The Tribunal may make a different decision regarding the sharing of the costs. In all other respects, the Arbitral Tribunal shall determine its own rules of procedure.

6. Issues subject to dispute referred to in paragraph 1 of this Article shall be decided in accordance with the provisions of this Agreement as well as the recognised rules and principles of international law.

ARTICLE 15 - VALIDITY OF THE AGREEMENT

1. This agreement shall be ratified by each Contracting Party in accordance with its laws and regulations and shall enter into force for a period of ten years after 30 days from the date of the last notification of either Contracting Party to the other Contracting Party.

2. The Agreement shall remain in force thereafter unless one of the Contracting Parties notifies the other Contracting Party in writing of its unwillingness to continue with it, one year prior to the expiration or termination thereof.

3. After the expiration of the validity or termination of this Agreement, its provisions shall apply to investments under this Agreement for a further period of ten years.

ARTICLE 16 - LANGUAGE AND NUMBER OF THE TEXTS

This Agreement is done in duplicate in the Persian and English languages, all texts being equally authentic.

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

[Legal Notice 151 of 2009]

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.

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(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

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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 in 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 the 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.

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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.

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

[Legal Notice 152 of 2009]

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 OPEC Fund for International Development for the Reciprocal Promotion and Protection in relation to foreign investments, entered into on the 15th September, 2005, 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 OPEC Fund for International Development, on behalf of the Republic of Kenya and of the OPEC Member States respectively (hereinafter referred to as the "Contracting Parties");

Whereas OPEC Member States, being conscious of the need for solidarity among all developing countries and aware of the importance of financial co-operation between them and other developing countries, have established the OPEC Fund to provide financial support to the latter countries, in addition to the existing bilateral and multilateral channels through which OPEC Member States extend financial assistance to other developing countries;

And whereas the OPEC Member States have, in addition, empowered the OPEC Fund to partake in the stimulation of capital flows thereto and, specifically, to assist in financing private sector activities involving entities located in the territories of other developing countries, including the Host Country, with a view to optimizing the aforementioned objective of financial co-operation;

And whereas the Host Country and the OPEC Fund being mindful that a stable framework for the envisaged investments will conduce to the effective utilization of economic resources and contribute towards the improvement of living standards, and, accordingly, have resolved to conclude an agreement for the promotion and protection of such investment activities.

HAVE AGREED AS FOLLOWS:

ARTICLE I - DEFINITIONS

1.01 Wherever used in this Agreement, and unless the context otherwise requires, the following terms have the following meanings—

- (a) "Investment" means every kind of investment owned or controlled directly or indirectly by the OPEC Fund in the territory of the Host Country and, without prejudice to the generality of the foregoing, includes investment consisting or taking the form of—
 - (i) shares, stock, and other form of equity participation, and bonds, credits, debentures, and other forms of debt interests, in a company;
 - (ii) tangible property, including real property; and intangible property, including rights, such as leases, mortgages, liens and pledges;
 - (iii) contractual rights, such as construction or management contracts, production or revenue-sharing contracts, concessions, or other similar contracts;
 - (iv) rights conferred by or pursuant to law, such as licenses and permits; and

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- (v) intellectual property, including copyrights and related rights, patents, industrial designs, as well as advisory services and confidential business information.
- (b) "Company" means any entity established under or pursuant to the Host Country's laws and regulations, whether or not wholly or partially owned or controlled privately or by the state or any organ thereof, including a corporation, partnership, sole or joint venture or proprietorship, association or any other organization.
- (c) "OPEC Fund" means the OPEC Fund for International Development established by the Member States of the Organization of the Petroleum Exporting Countries (OPEC) by virtue of the Agreement signed in Paris on January 28, 1976, as amended.
- (d) "Host Country" means the Republic of Kenya, including all political or administrative subdivisions thereof.
- (e) "Territory" means the territory of the Host Country, including its territorial waters as well as the exclusive economic zone over which the Host Country exercises sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea bed and of the sea bed and its sub-soil.

ARTICLE II - GENERAL PRINCIPLES

2.01. With respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments, the Host Country shall accord treatment thereto no less favourable than that it accords, in like situations, to investments in its territory by any other multilateral development finance institution operating in the Host Country (hereinafter referred to as "most favoured party").

2.02 The Host Country shall ensure that its laws, regulations, administrative practices and procedures of general applications, and adjudicatory decisions that pertain to or affect investments are promptly published or otherwise made publicly available.

2.03 The Host Country shall provide effective means of asserting claims and enforcing rights with respect to investments and shall not in any way impair, by unreasonable or discriminatory measures, that management, conduct, operation, sale or other disposition of any such investment.

2.04 The Host Country shall at all times accord to investments in its territory fair and equitable treatment and shall in no case accord less favourable treatment than that required by international law.

2.05 The Host Country shall pursuant to its laws and regulations accord to the OPEC Fund and its investments or, as the case may require, the officials, agents and other representatives of the OPEC Fund, treatment no less favourable than the Host Country accords to the most favored party and its investments (hereinafter referred to as "most favored party treatment"), and such treatment shall extend but not be limited to the issuance of visas or permits to enter and remain in its territory for the purpose of initiating, appraising, establishing or administering, winding up or otherwise terminating any investment or any other activity connected therewith located in its territory.

2.06 The most favored party treatment shall not be construed so as to oblige the Host Country to extend to investments the advantages resulting from—

- (a) any existing or future customs or economic union, a free trade area or regional economic organization of which the Host Country is or becomes a member; or
- (b) without prejudice to Article VII, any international or bilateral agreement or arrangement relating wholly or mainly to taxation.

ARTICLE III - PRIOR NOTIFICATION OF INVESTMENT PROPOSAL

3.01 The OPEC Fund shall prior to each investment inform the Government of the Host Country about the envisaged investment in the form of a written project proposal. Such a proposal will contain a summary statement regarding the envisaged investment and will be forwarded by the OPEC Fund to the Minister of Finance, or other representative of the Host Country designated in that behalf, for further consideration.

3.02 The OPEC Fund shall not finance any investment in the territory of the Host Country if the Government of the Host Country objects to such financing.

ARTICLE IV - EXPROPRIATION OR NATIONALIZATION

4.01 The Host Country shall not expropriate or nationalize an investment either directly or indirectly through measures tantamount to expropriation or nationalization except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles or treatment provided for in Article II above.

4.02 Compensation shall be paid without delay and shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken; and be fully realizable and freely transferable. The fair market value shall not reflect any change in value occurring because the expropriatory action had become known before the date of expropriation.

ARTICLE V - COMPENSATION FOR LOSSES

5.01 The Host Country shall accord most favored party treatment to investments as regards any measures relating to losses that investments suffer in its territories owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or similar events.

5.02 The Host Country shall effect restitution, or pay compensation in accordance with section 4.02 above, in the event that investments suffer losses in its territories, owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance, or similar events, that result from—

- (a) requisitioning of all or part of such investment by the Host Country's forces or authorities; or
- (b) destruction of all or part of such investments by the Host Country's forces or authorities that was not required by the necessity of the situation.

ARTICLE VI - PAYMENTS AND TRANSFERS

6.01 The Host Country shall permit all transfers relating to an investment to be made without restrictions and without delay into and out of its territory. Such transfers include—

- (a) contributions to capital;
- (b) profits, 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) principal, interest, royalties payments, management fees, technical assistance and other fees;
- (d) payments made under a contract; and
- (e) compensation pursuant to Articles IV and V.

6.02 The Host Country shall permit transfers to be made in a freely usable currency at the market rate of exchange prevailing on the date of transfer.

6.03 Notwithstanding sections 6.01 and 6.02, the Host Country 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;

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- (c) criminal or penal offences; or
- (d) ensuring compliance with orders or judgments in adjudicatory proceedings.

6.04 Notwithstanding sections 6.01 and 6.02, transfers and other payments receivable by the OPEC Fund in respect of an investment may be subject to any generally applicable foreign exchange restrictions, regulations and controls in force in the Host Country arising from exceptional balance of payments difficulties of limited duration and in consonance with the exercise in good faith of powers conferred in that behalf by law.

ARTICLE VII - EXEMPTION FROM TAXATION

7.01 In compliance with the general principles set out in Article II and, in particular, the stipulations relating to most favored party treatment, the OPEC Fund, its assets, property, operations, and any obligation or security issued or guaranteed by the OPEC Fund, and any other transactions undertaken by the OPEC Fund in connection with any investment in the territory of the Host Country, authorized by or pursuant to this Agreement, shall be immune from any withholding tax or any other form of taxation on dividends or on any other payment or transaction specified under or pursuant to section 6.01 or levies or duties chargeable or otherwise imposed by, or in the territory of, the Host Country; and references in this Article to the OPEC Fund shall, *mutatis mutandis*, be construed as including references to the officials, agents and other representatives of the OPEC Fund specified in section 2.05 above.

7.02 Notwithstanding section 7.01, it is hereby understood that—

- (a) the reference therein to the officials of the OPEC Fund shall not include nationals and other third parties resident in the Host Country;
- (b) any Company in which the OPEC Fund has an investment shall at all times be deemed to be subject to the laws of the Host Country and, without limiting the generality thereof, shall include all applicable tax or other form of fiscal legislation.

ARTICLE VIII - CONSULTATION

8.01 The parties to this Agreement agree to consult promptly, on the request of either, to resolve any dispute, controversy or claim in connection with this Agreement or the breach, termination or invalidity thereof or otherwise relating to the interpretation or application of this Agreement or the realization of the objectives of this Agreement.

ARTICLE IX - ARBITRATION CLAUSE

9.01 Any dispute, controversy or claim arising out of or relating to this Agreement or the breach, termination or invalidity thereof or otherwise relating to the interpretation or application of this Agreement, that is not resolved through consultations, shall be submitted upon request of either party to an arbitral tribunal for binding decision in accordance with the applicable rules of international law. In the absence of an Agreement by the parties to the contrary, the UNCITRAL Arbitration Rules, in force and effect on the date of this Agreement, shall govern.

9.02 The Host Country and the OPEC Fund will each appoint one arbitrator and the two arbitrators so appointed shall together appoint the third arbitrator as chairman, failing which such third arbitrator shall be appointed by the International Court of Arbitration in Paris, France. Where the UNCITRAL Arbitration Rules do not provide for a particular situation, the arbitrators shall in their absolute discretion determine what course of action should be followed and the arbitrator's shall be final.

9.03 Any arbitration under this Agreement shall be held in a State (not being the Host Country or any Member State of the OPEC Fund) that is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, United States of America, on June 10, 1958; and the English Language shall be used throughout the arbitral proceedings.

ARTICLE X - GOVERNING LAW

10.01 This Agreement and all documents executed in connection with this Agreement and their validity, enforcement, and interpretation, and all disputes arising under such document, shall be governed by the applicable principles of international law and *ex aequo et bono*.

ARTICLE XI - MAINTENANCE OF OTHER RIGHTS AND OBLIGATIONS

11.01 This Agreement shall not derogate from any of the following that entitle investments to treatment more favourable than that accorded by this Agreement—

- (a) the laws and regulations, administrative practices or procedures, or administrative or adjudicatory decisions of the Host Country;
- (b) international legal obligations; or
- (c) any other obligations assumed by the parties to this Agreement, including those contained in an investment authorization or an agreement or other legally enforceable undertaking for or in connection with an investment.

ARTICLE XII - COMMUNICATIONS

12.01 Any notice or other communication required or permitted to be given or made under this Agreement shall be in writing. Such notice or communication shall, as appropriate for the concerned requirement, be deemed to have been duly given or made when it has been delivered by hand, mail, telefax or other electronic means to the party to which it is required to be given or made, at the party's address or at any other address as the party shall have specified in writing to the party giving the notice or making the communication.

ARTICLE XIII - ENTRY INTO FORCE DURATION AND TERMINATION

13.01 This Agreement shall enter into force upon receipt by the OPEC Fund of legal opinions, including a legal opinion or other certification issued by the Host Country's Minister of Justice or Attorney-General or the competent legal department, showing that this Agreement has been duly authorized and ratified or otherwise approved or accepted by the Host Country in conformity with its constitutional requirements and constitutes a valid and binding obligation of the Host Country in accordance with its terms.

13.02 This Agreement shall remain in force for a period of ten years and shall continue in force unless terminated in accordance with section 13.03.

13.03 Each Party may terminate this Agreement at the end of the initial ten years period or at any time by giving one year's written notice to the other Party.

13.04 Notwithstanding the termination of this Agreement, all other provisions thereof, except those relating to the establishment of a new investment, shall continue to apply to any investments established or acquired prior to the date of its termination and remain in force for an additional period of ten years from the said date.

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

[Legal Notice 170 of 2014]

BODY IN EXERCISE of the powers conferred by section 8B of the Foreign Investment Promotion Act, the Cabinet Secretary for Finance declares that the arrangements specified in the Schedule, between the Government of the Republic of Kenya and the Government of the State of Kuwait, for the reciprocal promotion and protection in relation to foreign investments, entered into on the 12th of November, 2013, shall, despite anything to the contrary in the Act or any other written law, have effect in relation to the promotion and protection of investments

SCHEDULE

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

DESIRING to create favourable conditions for the development of economic cooperation between them and in particular for investments by investors of one Contracting Party in the territory of the other Contracting Party;

RECOGNIZING that the promotion and reciprocal protection of such investments will be conducive to the stimulation of business initiative and to the increase of prosperity in both Contracting Parties;

HAVE AGREED as follows:

ARTICLE I - DEFINITIONS

For the purpose of this Agreement:

1. The term "investment" shall mean every kind of asset or right in the territory of one Contracting Party that is owned or controlled directly or indirectly by an investor from the other Contracting Party in accordance with the laws and regulations of that Contracting Party, and includes assets or rights consisting or taking the form of:

- (a) shares stocks, and other forms of equity participation, and bonds, debentures, and other forms of debt interests in a company, and other debts and loans and securities issued by any investor from a Contracting Party;
- (b) claims to money and claims to any other assets, rights or performance pursuant to a contract having an economic value;
- (c) intellectual property rights, including, but not limited to, copyrights, trademarks, patents, industrial designs and patterns and technical processes, know-how, trade secrets, trade names and goodwill;
- (d) any right conferred by law, contract or by virtue of any licences or permits granted pursuant to law, including rights to prospect, explore, extract, or utilize natural resources, and rights to undertake other economic or commercial activities or to render services;
- (e) movable and immovable property or property rights such as leases, mortgages, liens and pledges.

The term "investment" shall also apply to "returns" retained for the purpose of re-investment and to proceeds from "liquidation" as these terms are defined hereinafter.

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

2. The term "investor" with respect to a Contracting Party shall mean:

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- (a) the Government of that Contracting Party;
- (b) a natural person holding the nationality of that Contracting Party in accordance with its applicable laws;
- (c) any legal entity such as institutions, development funds, agencies, foundations and other statutory establishments and authorities, and companies constituted or incorporated under the laws and regulations of that Contracting Party.

3. The term "company" shall mean any legal entity, whether or not organized for the purpose of pecuniary gain, and whether privately or governmentally owned or controlled, which is constituted under the laws of a Contracting Party or is owned or effectively controlled by investors from a Contracting Party, and includes corporations, trusts, partnerships, sole proprietorships, branches, joint ventures, associations or other similar organizations.

4. The term "returns" shall mean amounts yielded by an investment, irrespective of the form in which they are paid and in particular, though not exclusively, include profits, interest, capital gains, dividends, royalties, and management fees, technical assistance or other payments or fees, and payments in kind, regardless of its type.

5. The term "liquidation" shall mean any disposal effected for the purpose of completely or partly giving up an investment.

6. The term "territory" shall mean:

- (a) in the case of Kuwait: the territory of the State of Kuwait including any area beyond the territorial sea which in accordance with international law has been or may hereafter be designated under the laws of Kuwait, as an area over which Kuwait may exercise sovereign rights or jurisdiction.
- (b) in the case of Kenya: means the land territory, internal waters and territorial sea of the Republic of Kenya and the airspace above them, as well as the maritime zones beyond the territorial sea, including the seabed and subsoil, over which the Republic of Kenya exercises sovereign rights or jurisdiction in accordance with its national laws in force and international law, for the purpose of exploration and exploitation of the natural resources of such areas.

7. The term "freely convertible currency" shall mean any currency that the International Monetary Fund determines, from time to time, as freely usable currency in accordance with the Articles of Agreement of the International Monetary Fund and any amendment thereto.

8. The term "without delay" shall mean the transfer of payments after the necessary completion of formalities of such transfer, within a period that shall on no account exceed one month.

ARTICLE 2 - PROMOTION AND PROTECTION OF INVESTMENTS

1. Each Contracting Party shall encourage and create favourable conditions for investments of investors from the other Contracting Party in its territory, and shall in accordance with its laws and regulations, subject to its rights to exercise powers conferred by its laws, shall admit such investments.

2. Investments of investors from a Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party in a manner consistent with recognized principles of International Law and the provisions of this Agreement.

3. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in the territory of investors from the other Contracting Party.

4. Each Contracting Party shall observe any obligation or commitment it may have entered into with regard to investments of investors from the other Contracting Party.

5. Neither Contracting Party shall mandate or enforce in its territory measures on investments by investors from the other Contracting Party, such as additional performance requirements concerning purchase of materials, means of production, operation, transport, marketing of its products or similar orders having discriminatory effects. Such requirements do not include conditions for the receipt or continued receipt of an advantage.

ARTICLE 3 - TREATMENT OF INVESTMENTS

1. With respect to the establishment, acquisition, enjoyment, use, management, conduct, operation, maintenance, expansion and sale or other disposition of investments made in its territory by investors from the other Contracting Party, each Contracting Party shall accord treatment no less favourable than it accords, in similar situations, to investments of its own investors or investors of any third state, whichever, it most favourable to those investments.

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

- (a) any customs union, economic union, free trade area, or monetary union, common market or any other form of regional economic arrangement or other similar international agreement, to which either of the Contracting Party is or may become a party;
- (b) any international, regional or bilateral agreement or other similar arrangement relating wholly or mainly to taxation.

3. This Article shall not prevent a Contracting Party from granting special incentives to its own nationals and companies in accordance with its laws and regulations, in order to stimulate and promote the creation of local industries, in particular small and medium sized enterprises, provided that such incentives do not significantly affect investments of investors from the other Contracting Party.

ARTICLE 4 - COMPENSATION FOR LOSSES

1. When investments made by investors from either Contracting Party suffer losses owing to war or other armed conflict, a state of national emergency, revolt, civil disturbances, insurrection, riot or other similar events in the territory of the other Contracting Party, they shall be accorded by the latter Contracting Party, treatment, as regards restitution, indemnification, compensation or other settlement, not less favourable than that the latter Contracting Party accords to its own investors or investors of any third state, whichever is most favourable to the investors.

2. Without prejudice to paragraph 1, investors from one Contracting Party who in any of the events referred to in that paragraph suffers a loss in the territory of the other Contracting Party resulting from:

- (a) requisitioning of its investments or part thereof by its forces or authorities;
- (b) destruction of its investments or part thereof by its forces or authorities which was not caused in combat action or was not required by the necessity of the situation.

Shall be accorded restitution or compensation which in either case shall be prompt and full and effective for the damages or losses they have suffered.

ARTICLE 5 - EXPROPRIATION

- (a) Investments made by investors of any of the Contracting Parties in the territory of the other Contracting Party shall not be nationalized, expropriated, dispossessed or subjected to direct or indirect measures having effect equivalent to nationalization, expropriation or dispossession (hereinafter collectively referred to as "expropriation") by the other Contracting Party except for a public purpose related to the internal needs of that Contracting Party and against prompt, full and effective compensation and on condition

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that such measures were taken on a non-discriminatory basis and in accordance with due process of law of general application.

- (b) Such compensation shall amount to the market value of the expropriated investments and shall be determined and computed in accordance with internationally recognized principles of valuation on the basis of the fair market value of the expropriated investments at the time immediately before the expropriatory action was taken or the impending expropriatory became publicly known, whichever is earlier (hereinafter referred to as the "valuation date"). Such compensation shall be calculated in a freely convertible currency to be chosen by the investor, on the basis of the prevailing market rate of exchange for that currency on the valuation date and shall include interest at a commercial rate established on a market basis, however, in no event less than the prevailing LIBOR — rate of interest or equivalent, from the date of expropriation until the date of payment.

2. For certainly, expropriation shall include situations where a Contracting Party expropriates the assets of a company or enterprise that is incorporated or established under the laws in force in its own territory in which an investor from the other Contracting Party has an investment, including through the ownership of shares, stocks, debentures or other rights or interests.

3. For the purposes of this Agreement, the term "expropriation" shall also include any interventions or regulatory measures by a Contracting Party that have a de facto expropriatory effect, in that effect results in depriving the investor in fact from his ownership, control or substantial benefits over his investment or which may result in loss or damage to the economic value of the investment, such as the freezing or blocking of the investment, compulsory sale of all or part of the investment, or other comparable measures.

ARTICLE 6 - FREE TRANSFER

1. Each Contracting Party shall guarantee to investors from the other Contracting Party the free transfer of investments and payments in connection with such investments into and out of its territory.

2. Transfer of payments under paragraph (1) shall be effected without delay or restrictions and, except in the case of payments in kind and, in a freely convertible currency. In case of such delay in effecting the required transfers, the investor affected shall be entitled to receive interest for the period of such delay.

ARTICLE 7 - FREE TRANSFERS

1. If a Contracting Party or its designated agency (the "Indemnifying Party"), makes a payment under an indemnity or guarantee it has assumed in respect of an investment in the territory of the other Contracting Party (the "Host State"), the Host State shall recognize:

- (a) the assignment to the Indemnifying Party by law or by legal transaction of all the rights and claims resulting from such an investment;
- (b) the right of the Indemnifying Party to exercise all such rights and enforce such claims and to assume all obligations related to the investment by virtue of subrogation.

2. The Indemnifying Party shall be entitled in all circumstances to the same treatment in respect of:

- (a) the rights and claims acquired and the obligation assumed by it by virtue of the assignment referred to in paragraph 1 of this Article;
- (b) any payments received in pursuance of those rights and claims, as the original investor was entitled to receive by virtue of this Agreement in respect of the investment concerned.

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

1. Disputes arising between a Contracting Party and an investor from the other Contracting Party in respect of an investment of the latter in the territory of the former shall, as far as possible, be settled amicably.

2. If such disputes cannot be settled within a period of three months from the date on which either party to the dispute requested for amicable settlement by the delivery of a notice, in writing, to the other party, the dispute shall be submitted for resolution, at the election of the investor party to the dispute, through one of the following means:

- (a) in accordance with any applicable, previously agreed dispute-settlement procedures;
- (b) to international arbitration in accordance with the following paragraphs of this Article.

3. In the event that an investor elects to submit the dispute for resolution by international arbitration, the investor shall further provide its consent in writing for the dispute to be submitted to one of the following bodies:

(1) The International Centre for Settlement of Investment Disputes ("the Centre"), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18th March, 1965 the "Washington Convention", both Contracting Parties are parties to the Washington Convention -and the Washington Convention is applicable to the dispute;

(2) The Centre, under the rules governing the Additional Facilities for the Administration of Proceedings by the Secretariat of the Centre (the "Additional Facility Rules", if both Contracting Party of the investor or the Contracting Party to the dispute, but not both, is a party to the Washington Convention:

- (a) an arbitral tribunal established under the Arbitration Rules (the "Rules") of the United Nations Commission on International Trade Law (UNCITRAL), as those Rules may be modified by the parties to the dispute (the Appointing Authority referred to under Article 7 of the Rules shall be the Secretary General of the Centre);
- (b) an arbitral tribunal constituted pursuant to the arbitration rules of any arbitral institution mutually agreed upon between the parties to the dispute.

(4) Notwithstanding the fact that the investor may have submitted a dispute to a binding arbitration under paragraph 3, it may, prior to the institution of the arbitral proceeding or during the proceeding, seek before the judicial or administrative tribunals of the Contracting Party that is a party to the dispute, interim injunctive relief for the preservation of its rights and interest, provided it does not include request for payment of any damages.

(5) In any proceedings, judicial, arbitral or otherwise or in an enforcement of any decision or award, concerning an investment dispute between a Contracting Party and an investor of the other Contracting Party, a Contracting Party shall not assert, as a defense, its sovereign immunity. Any counterclaim or right of set-off may not be based on the fact that the investor concerned has received or will receive, pursuant to an insurance contract, indemnification or other compensation for all or part of its alleged damages from any third party whomsoever, whether public or private, including such other Contracting Party and its subdivisions, agencies or instrumentalities.

ARTICLE 9 - SETTLEMENT OF DISPUTES BETWEEN THE CONTRACTING PARTIES

1. The Contracting Parties shall, as far as possible, settle any dispute concerning the interpretation or application of this Agreement through consultations or other diplomatic channels.

2. If the dispute has not been settled within six months following the date on which such consultations or other diplomatic channels were requested by either Contracting Party and unless the Contracting Parties otherwise agree in writing, either Contracting Party may, by

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written notice to the other Contracting Party, submit the dispute to an *ad hoc* arbitral tribunal in accordance with the following provisions of this Article.

3. The arbitral tribunal shall be constituted as follows: each Contracting Party shall appoint one member, and these two members shall agree upon a national of a third state as Chairman of the arbitral tribunal to be appointed by the two Contracting Parties. Such members shall be appointed within two months, and such Chairman within four months, from the date on which either Contracting Party has informed the other Contracting Party that it intends to submit the dispute to an arbitral tribunal.

4. If the periods specified in paragraph 3 have not been complied with, either Contracting Party may, in the absence of any other arrangement, invite the President of the International Court of Justice to make the necessary appointments. If the President of the International Court of Justice is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice-President 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.

5. The arbitral tribunal shall take its decision by a majority of votes. Such decision shall be made in accordance with this Agreement and such recognized rules of international law as may be applicable and shall be final and binding on both Contracting Parties. Each Contracting Party shall bear the cost of the member of the arbitral tribunal appointed by that Contracting Party, as well as the costs for its representation in the arbitration proceedings. The expenses of the Chairman as well as any other costs of the arbitration proceedings shall be borne in equal parts by the two Contracting Parties. However, the arbitral tribunal may, at its discretion, direct that a higher proportion or all of such costs be paid by one of the Contracting Parties. In all other respects, the arbitral tribunal shall determine its own procedure.

ARTICLE 10 - APPLICATION OF OTHER RULES

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

ARTICLE 11 - SCOPE OF THE AGREEMENT

This Agreement shall apply to all investments, whether existing at or made after the date of its entry into force by investors of either Contracting Party in the territory of the other Contracting Party, however, it shall not apply to any dispute concerning an investment that arose or any claim that was settled before its entry into force.

ARTICLE 12 - TRANSPARENCY

Each Contracting Party shall promptly publish, or otherwise make available to the investor, its laws, regulations, judicial decisions of general application and other relevant information as well as international agreements, which may affect the investments of investors from the other Contracting Party in the territory of the former Contracting Party.

ARTICLE 13 - CONSULTATIONS

The Contracting Parties shall, at the request of either Contracting Party, hold consultations for the purpose of reviewing the implementation of this Agreement and studying any issue that may arise from this Agreement. Such consultations shall be held between the competent authorities of the Contracting Parties in a place and at a time agreed on through appropriate channels.

ARTICLE 14 - ENTRY INTO FORCE

Each Contracting Party shall notify the other in writing when its constitutional requirements for the entry into force of this Agreement have been fulfilled, and the Agreement shall enter into force on the thirtieth day after the date of receipt of the later notification.

ARTICLE 15 - DURATION AND TERMINATION

1. This Agreement shall remain in force for a period of twenty (20) years and shall continue in force thereafter for a similar period or periods unless, at least one year before the expiry of the initial or any subsequent period, either Contracting Party notifies the other Contracting Party in writing of its intention to terminate this Agreement.

2. 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 continue to be effective for a period of twenty (20) years from the date of termination of this Agreement.

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

[Legal Notice 3 of 2015]

IN EXERCISE of the powers conferred by section 8B of the Foreign Investment Protection Act, the 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 Slovak Republic for Promotion and Reciprocal Protection in relation to foreign investments, entered into on the 14th of December, 2011, shall notwithstanding anything to the contrary in the Foreign Investment Protection Act or in any other written law, have effect in relation to investments promotion and protection.

SCHEDULE

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

RECOGNIZING that this Agreement is concluded between the Government of the Slovak Republic and the Government of the Republic of Kenya, which act on behalf of the Slovak Republic and the Republic of Kenya respectively;

RECOGNIZING the need to protect investments of the investors of one Contracting Party in the territory of the other Contracting Party on a non-discriminatory basis;

DESIRING to promote greater economic co-operation between them, with respect to investments by nationals and companies of one Contracting Party in the territory of the other Contracting Party;

RECOGNIZING that agreement on the promotion and protection to be accorded such investments will stimulate the flow of private capital and the economic development of the Contracting Parties;

AGREEING that a stable framework for investments will contribute to maximizing the effective utilization of economic resources and improve living standards;

RECOGNIZING that the development of economic and business ties can promote respect for internationally recognized labour rights;

AGREEING that these objectives can be achieved without relaxing health, safety and environmental measures of general application; and Having resolved to conclude an Agreement concerning the promotion and protection of investments;

HAVE AGREED as follows:

ARTICLE I - DEFINITIONS

For the purpose of this Agreement:

(1) The term 'investment' means every kind of assets established or acquired by an investor of one Contracting party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter Contracting Party, including in particular, though not exclusively:

- (a) Movable and immovable property and any other property rights such as mortgages, liens, pledges, leases, usufruct and other similar rights;
- (b) Invested and reinvested returns;
- (c) Shares in stocks and debentures of, and any other forms of participation in a company or any business enterprise and rights or interest derived there from;
- (d) Claims to money or to any performance under contract having an economic value;

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- (e) Intellectual property rights such as patents, copyrights, trademarks, industrial designs, business names, franchises, geographical indications as well as technical processes, know-how, trade secrets and goodwill associated with and investment; and
- (f) Concessions, rights and permits having an economic value conferred by law, administrative decisions or under contract, including concessions to search for, develop, extract or exploit natural resources.

Investments made in the territory of one Contracting Party by any legal entity of that Contracting Party, but actually owned or controlled, directly or indirectly, by investors of the other Contracting Party, shall likewise be considered as investments of investors of the latter Contracting Party, if they have been made in accordance with the laws and regulations of the former Contracting Party.

Any change of the form in which assets are invested or reinvested shall not affect their character as an investment.

(2) The term 'returns' means amounts yielded by investments and shall, in particular, though not exclusively; include profits, dividends, interest, royalties, capital gains or any payments in kind related to the investments.

(3) The term 'investor' means for either Contracting Party, any of the following subjects invest in the territory of the other Contracting Party in accordance with the laws and regulations of the latter Contracting Party and the provisions of this Agreement:

- (a) Any natural person, who is a national of either Contracting Party in accordance with its laws and regulations; or
- (b) Any legal entity such as company, corporation, firm, partnership, business association, institution or 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.

The term 'territory' means:

- (a) As regards the Slovak Republic, the land territory, internal waters and the air space above them, over which it exercises its sovereignty, sovereign rights and jurisdiction in accordance with international law;
- (b) As regards the Republic of Kenya, the land territory, internal waters, territorial sea and the airspace above them, as well as the maritime zones beyond the territorial sea, including the seabed and subsoil, over which the Republic of Kenya exercises sovereign rights or jurisdiction in accordance with its national laws in force and international law, for the purpose of exploration and exploitation of the natural resources of such areas.

(4) The term "freely convertible currency" means the currency that is widely used to make payments for international transactions and widely exchanged in principal international exchange markets.

ARTICLE 2 - PROMOTION AND PROTECTION OF INVESTMENTS

1. Each Contracting Party shall promote in its territory investments by investors of the other Contracting Party and shall, in accordance with its laws and regulations admit such investments.

2. Each Contracting Party shall in its territory accord to investments and returns of investments of investors of the other Contracting Party fair and equitable treatment and full and constant protection and security.

3. Neither Contracting Party shall in its territory impair by unreasonable or arbitrary measures the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposal of investments of investors of the other Contracting Party.

ARTICLE 3 - TREATMENT OF INVESTMENTS

1. Each Contracting Party shall accord to investors of the other Contracting Party and to their investments a treatment no less favourable than the treatment it accords to its own investors and their investments with respect to the acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposal of investments.
2. Each Contracting Party shall accord to investors of the other contracting Party and to their investments, a treatment no less favourable than the treatment it accords to investors of the most favoured nation and to their investments with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposal of investments.
3. Neither Contracting Party shall mandate or enforce in its territory measures on investments by investors of the other Contracting Party, concerning purchase of materials, means of production, operation, transport, marketing of its products or similar orders having discriminatory effects. Such requirements do not include conditions for the receipt or continued receipt of an advantage.
4. Paragraph 1 of this Article is supplemented by a Protocol which shall be an integral part of this Agreement.

ARTICLE 4 - EXEMPTIONS

The provisions of this Agreement shall not be construed so as to oblige one Contracting Party to extend to the investors and investments by investors of the other Contracting Party the benefit of any treatment, preference or privilege by virtue of any existing or future—

- (a) Free trade area, customs union, common market, economic and monetary union or other similar regional economic integration agreement, including regional labour market agreements, to which one of the Contracting Parties is or may become a party; or
- (b) Agreement for the avoidance of double taxation or other international agreement relating wholly or mainly to taxation; or
- (c) Multilateral agreement relating wholly or mainly to investments.

ARTICLE 5 - EXPROPRIATION

1. Investments by investors of a Contracting Party in the territory of the other Contracting Party shall not be expropriated, nationalized or subjected to any other measures directly or indirectly having an effect equivalent to expropriation or nationalization (hereinafter referred to as 'expropriation'), except for a purpose which is in public interest, on a non-discriminatory basis in accordance with due process of law and against prompt and full compensation.
2. Such compensation shall amount to the fair market value of the expropriated investments at the time immediately before expropriation was taken or before the impending expropriation became public knowledge, whichever is the earlier. The fair market value shall be determined in accordance with generally accepted principles of valuation, taking into account, inter alia, the capital invested, replacement value, appreciation, current returns, the projected flow of future returns, goodwill and other relevant factors.
3. Compensation shall be fully realizable, effective and shall be paid without any restriction or delay. It shall include interest at the applicable commercial rate established on the market basis for the currency of payment from the date of dispossession of the expropriated property until the date of actual payment. Compensation shall be made in a freely convertible currency.
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 territory, and in which investors of the other Contracting Party own shares, debentures or other forms of participation, it shall ensure that the provisions of the paragraphs 1 to 3 of this Articles are applied to the extent necessary to guarantee compensation in respect of their investments to such investor of

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the other Contracting Party who are owners of those shares, debentures or other forms of participation.

5. Without prejudice to the provisions of Article 9 of this Agreement, the investor of one of the Contracting Parties whose investments are expropriated shall have the right to prompt review of its case and of the valuation of its investments in accordance with the principles set out in this Article, by a judicial or other competent and independent authority of that Contracting Party.

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, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or other settlement, a treatment no less favourable than the one accorded by the latter Contracting Party to its own investors or investors of the most favoured nation, whichever, according to the investor, is more favourable.

2. Without prejudice to paragraph 1 of this Articles, investors of one Contracting Party who, in any of the situations referred to in that paragraph, suffer losses in the territory of the other Contracting Party resulting from:

- (a) requisitioning of their investments or a part thereof by latter's authorities; or
- (b) destruction of their investments or a part thereof by latter's authorities which was not required by the necessity of the situation,

shall be accorded by latter Contracting Party restitution or compensation which in either case shall be prompt and full with respect to compensation, shall be in accordance with Article 5 paragraphs 2-3 from the date of requisitioning or destruction until the date of actual payment.

ARTICLE 7 - FREE TRANSFERS

1. Each Contracting Party shall ensure to investors of the other Contracting Party the free transfer, into and out of its territory, of their investments and transfer of payments related to investments. Such payments shall include in particular, though not exclusively:

- (a) principal and additional amounts to maintain, develop or increase the investment;
- (b) returns and any other income accruing from investments;
- (c) proceeds obtained from the total or partial sale or disposal of an investment including the sale of shares;
- (d) proceeds from total or partial liquidation of investments;
- (e) amounts required for the payment of expenses, which arise from the operation of the investment, such as loan repayments, payments of royalties, payments related to import letters of credit, management fees, license fees, advance payments and other similar expenses;
- (f) compensation payable pursuant to Articles 5, 6, 8 and 9;
- (g) earnings and other remuneration of personnel engaged from abroad and working in connection with an investment.

2. Each Contracting Party shall further ensure that the transfers referred to in paragraph 1 of this Articles shall be made without any restriction in a freely convertible currency of the choice of the investor and at the prevailing market rate of exchange applicable on the date of transfer to the currency to be transferred and shall be promptly transferable.

3. Notwithstanding paragraphs 1 and 2 of this Article, a Contracting Party may delay a transfer through the application of measures ensuring investors' compliance with the host Contracting Party's laws and regulations on the payment of taxes and dues in force at the

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

4. In the absence of a market for foreign exchange, the rate to be used shall be the most recent exchange rate for the conversions of currencies into Special Drawings Rights.

5. In case of an unjustified delay in transfer caused by the host Contracting Party, the transfer shall also include interest at a commercial rate established on a market basis for the currency in question from the date on which the transfer was requested until the date of actual transfer and shall be borne by the Contracting Party.

6. Notwithstanding paragraphs (1) and (2) above, a Contracting Party may adopt or maintain measures relating to cross-border capital and payment transactions adopted by each contracting party and particularly but not limited by the following cases:

- (a) in the event of serious balance of payments and external financial difficulties or threat thereof; or
- (b) in cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies; or
- (c) in the exceptional cases of economic sanctions:

7. Measures referred to paragraph (6) of this Article:

- (a) shall not exceed those necessary to deal with the circumstances set out in paragraph (6) of this Article;
- (b) shall be temporary and shall be eliminated as soon as conditions permit; and
- (c) shall be promptly notified to the other Contracting Party.

ARTICLE 8 - SUBROGATION

1. If a Contracting Party or its designated agency makes a payment under an indemnity, guarantee or contract of insurance given in respect of an investment of an investor in the territory of the other Contracting Party, the latter Contracting Party shall recognize the assignment of any right or claim of such investor to the former Contracting Party or its designated agency and the right of the former Contracting Party or its designated agency to exercise by virtue of subrogation any such right and claim to the same extent as its predecessor in title.

2. The subrogated rights or claims shall not exceed the original rights or claims of the investor.

ARTICLE 9 - DISPUTES BETWEEN AN INVESTOR AND A CONTRACTING PARTY

1. Any dispute arising directly from an investment between one Contracting Party and an investor of the other contracting Party should be settled amicably between the parties to the dispute.

2. If the dispute has not been settled within four (4) months from the date on which it was raised in writing, the dispute may, at choice of the investor, be submitted to:

- (a) The competent courts of the Contracting Party in whose territory the investment is made; or
- (b) Arbitration by the International Center for Settlement of Investment Disputes (ICSID) established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965 (hereinafter referred to as 'centre'), if the Centre is available; or
- (c) An *ad hoc* arbitration tribunal to be established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or
- (d) Any other previously agreed *ad hoc* arbitration tribunal;

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3. An investor who has submitted the dispute to a national court may nevertheless have recourse to one of the arbitral proceedings mentioned in paragraphs 2(b) to 2 (d) of this Article if, before a judgment has been delivered on the subject matter by a national court, the investor declares not to pursue the case any longer through national proceedings and withdraws the case.
4. Any arbitration under this Article shall, at the request of either Party to the dispute be held in a state that is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), opened for signature at New York 10th June, 1958. Claims submitted to arbitration under this Article shall be considered to arise out of a commercial relationship or transaction for the purpose of the Article 1 of the New York Convention.
5. Each Contracting Party hereby gives its unconditional consent to the submission of a dispute between it and investor of the other Contracting party to arbitration in accordance with this Article. Once the investor has submitted the dispute under any of the procedures stipulated above, that choice is final.
6. Neither of the Contracting Parties, which is the party to a dispute, can raise an objection, at any phase of the arbitration procedure or of the execution of an arbitral award, on account of the fact that the investor, which is other party to the dispute, has received an indemnification covering a part or the whole of tis losses by virtue of insurance or guarantee contract.
7. The award granted pursuant to this article shall be final and binding on the parties to the dispute and shall be executed in accordance with law of the contracting Party in whose territory the award is relied upon, by the competent authorities of the Contracting Party by dates indicated in the award.

ARTICLE 10 - DISPUTES BETWEEN THE CONTRACTING PARTIES

1. The Contracting Parties agree to consult promptly on the request of either Contracting Party to resolve any disputes in connection with this Agreement.
2. Disputes between the Contracting Parties concerning the interpretation and application of this Agreement shall, as far as possible, be settled through diplomatic channels.
3. If the dispute cannot thus be settled within nine (9) months following the date on which either Contracting Party requested such negotiations, it shall at the request of either Contracting Party be submitted to an Arbitral Tribunal.
4. Such a Arbitral Tribunal shall be constituted for each individual case in the following way. Within to (2) months of the receipt of the request for arbitration, each Contracting Party shall appoint one member of Arbitral Tribunal. The Chairman shall be appointed within four (4) months from the date of appointment of the other two members.
5. If the necessary appointments have not been made within the periods specified in paragraph 4 of this Article, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make the necessary appointments. If the President is a national of either Contracting Party or is otherwise 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 or not otherwise prevented from discharging the said function, shall be invited to make the necessary appointments.
6. The Arbitral Tribunal shall reach its decision by a majority of votes. The decisions of the Arbitral Tribunal shall be final and binding on both Contracting Party and of its representation in the arbitral proceedings. Both contracting parties shall assume an equal share of the costs of the Chairman, as well as any other costs. The Arbitrait Tribunal may make a different decision regarding the sharing of costs. In all other respects, the Arbitral Tribunal shall determine its own rules of procedure.

7. Issues subject to dispute referred to in paragraph 2 of this Article shall be decided in accordance with the provisions of this Agreement and the generally recognized principles of international law.

ARTICLE 11 - PERMITS

1. Each Contracting Party shall, subject to its laws and regulations, treat favorably the application relating to investments by investors of the other Contracting Party.
2. Each Contracting Party shall, subject to its laws and regulations, grant temporary entry and stay and provide any necessary confirming documentation to natural persons who are employed from abroad as executives, managers, specialists or technical personnel in connection with an investment by an investor of the other Contracting Party, and who are essential for the enterprise, as long as these person continue to meet the requirements of this paragraph. Immediate family members of such personnel shall also be granted a similar treatment with regard to entry and temporary stay in the territory of the host Contracting Party.

ARTICLE 12 - APPLICATION OF OTHER RULES

1. If the provisions of either Contracting Party or obligations under international law, existing at present or established hereafter between the Contracting Parties in addition to this Agreement, contain a regulation, whether general or specific, entitling investments made by investors of the 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.
2. Each Contracting Party shall observe any other obligation it may have with regard to a specific investment of an investor of the other Contracting Party.

ARTICLE 13 - APPLICATION OF THE AGREEMENT

1. This Agreement shall apply to all investments made by investors of either Contracting Party in the territory of the other Contracting Party, whether made before or after the entry into force of this Agreement, but shall not apply to any dispute concerning an investment that arose or any claim that was settled before it entry into force.
2. Notwithstanding the Most Favoured Nation treatment provisions set out in this Agreement, disputes between an investor and the other Contracting Party shall be governed by dispute settlement procedures set out in this Agreement.
3. This Agreement shall not apply to an investor whose operation does not possess real and continuous link with the economy of the other Contracting Party.

ARTICLE 14 - GENERAL DEROGATIONS

1. Nothing in this Agreement shall be construed as prevented a Contracting Party from taking any action that it considers necessary for the protection of its essential security interests in time of war or armed conflict, financial, economic, social crisis or other emergency in international relations, provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination by a contracting party, or a disguised investment restriction, nothing in this agreement shall be construed as preventing the contracting parties from taking any measure necessary for the maintenance of public order.
2. The provisions of this Article shall not apply to Article 7 paragraph (1) f of this Agreement.

ARTICLE 15 - TRANSPARENCY

1. Each contracting party shall promptly publish, or otherwise make available to the investor, its laws, regulations, judicial decisions of general application and other relevant information as well as international agreements, which may affect the investment of investors of the other contracting party in the territory of the former Contracting Party.

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2. Nothing in this Agreement shall require a Contracting Party to furnish or allow access to any confidential or proprietary information, including information concerning particular investors or investments, the disclosure of which would impede law enforcement or be contrary to its laws protecting confidentiality or prejudice legitimate commercial interests of particular investor.

ARTICLE 16 - CONSULTATIONS

The contracting parties shall, at the request of either contracting party, hold consultations for the purpose of reviewing the implementation of this Agreement and studying any issue that may arise from this Agreement. Such consultations shall be held between the competent authorities of the contracting parties in a place and at a time agreed on through appropriate channels.

ARTICLE 17 - ENTRY INTO FORCE, DURATION AND TERMINATION

1. The Contracting Parties shall notify each other when their constitutional requirements for the entry into force of this Agreement have been fulfilled. The Agreement shall enter into force on the ninetieth (90) day following the date of receipt of the last notification.

2. This agreement shall remain in force for a period of twenty (20) years and shall thereafter remain in force on the same terms until either Contracting Party notifies the other in writing of its intention to terminate the Agreement in twelve (12) months.

3. In respect of investments made prior to the date of termination of this Agreement, the provisions of Articles 1 and 16 shall remain in force for a further period of twenty (20) years from the date of termination of this Agreement.

4. This Agreement may be amended in writing by mutual consent of both Contracting Parties at any time after it is in force. Any alteration or modification of this Agreement shall be done without prejudice to the rights and obligations arising from this Agreement.

[Protocol to the Agreement on the Promotion and Protection of

Investments

Between

The Government of the Slovak Republic

And

The Government of the Republic of Kenya

Upon signing the Agreement between the Government of the Slovak Republic and the Government of the Republic of Kenya on the promotion and Protection of Investments, the undersigned representatives of both Contracting Parties have agreed with respect to Kenya on the following provisions, which constitute an integral part of the Agreement.

Ad Article 3 paragraph 1

The provision "*..a treatment no less favourable than the treatment it accords to its own investors and their investments...*" does not apply to non-conforming measures maintained within the territory of Kenya at the time of this signing of the Agreement or to any future non confirming measures as relates to granting incentives to its own investors in order to protect small and medium sized businesses and stimulate the creation of local industries, provided that such incentives do not significantly affect the investments and activities of investors of Slovak Republic.

The principle of most favoured nation treatment shall be observed in case of foreign participation in such businesses.

Kenya will take appropriate actions to endeavour to remove such non-conforming measures.

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

[Legal Notice 4 of 2015]

IN EXERCISE of the powers conferred by section 8B of the Foreign Investment Protection Act, the 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 Mauritius for Promotion and Reciprocal Protection in relation to foreign investments, entered into on the 7th of May, 2012, shall notwithstanding anything to the contrary in the Foreign Investment Protection Act or in any other written law, have effect in relation to investments promotion and protection.

SCHEDULE

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

RECOGNIZING the need to protect investments of the investors of one Contracting Party in the territory of the other Contracting Party on a non-discriminatory basis;

DESIRING to promote greater economic co-operation between them, with respect to investments by nationals and companies of one Contracting Party in the territory of the other Contracting Party;

RECOGNISING that agreement on the treatment to be accorded to such investments will stimulate the flow of private capital and the economic development of the Contracting Parties;

AGREEING that a stable framework for investments will contribute to maximizing the effective utilization of economic resources and improve living standards;

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

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

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

HAVE AGREED as follows:

Article 1 – DEFINITIONS

- (1) In this Agreement,
- (a) "investment" means every kind of asset invested in accordance with the relevant laws and regulations of the Contracting Party in whose territory the respective business undertaking is made, and in particular, though not exclusively, includes:
- (i) movable and immovable property as well as other similar rights *in rem* such as mortgages, liens or pledges;
 - (ii) shares, debentures and any other form of participation in a company or business enterprise;
 - (iii) claims to money, or to any performance under contract having an economic value;

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- (iv) industrial and intellectual property rights, in particular copyrights, patents, utility-model patents, designs, trademarks, trade-names, technical processes, know-how and goodwill;
- (v) concession rights or permits having an economic value conferred in accordance with the law or under contract, including concessions to search for, cultivate, extract or exploit natural resources;
- (vi) invested or re-invested returns;
- (b) "return" means the amount yielded by an investment and in particular, though not exclusively, profit, interest, capital gains, dividends, royalties, fees and payments-in-kind related to the investments;
- (c) "investor" means in respect to either Contracting Party:
 - (i) a "national", that is a natural person deriving his or her status as a national of that Contracting Party from the relevant law of that Contracting Party; and
 - (ii) a "company", that is a legal person, such as a corporation, firm or association, incorporated or constituted in accordance with the law of that Contracting Party;
- (d) "territory" means—
 - (i) in the case of the Republic of Mauritius—
 - (a) all the territories and islands which, in accordance with the laws of Mauritius constitute the State of Mauritius;
 - (b) the territorial sea of Mauritius; and
 - (c) any area outside the territorial sea of Mauritius which in accordance with international law has been or may hereafter be designated, under the laws of Mauritius, as an area, including the Continental Shelf, within which the rights of Mauritius with respect to the sea, the sea-bed and sub-soil and their natural resources may be exercised;
 - (ii) in the case of the Republic of Kenya, all territory of Kenya in state boundaries, including internal and territorial waters and also special economic zone and continental shelf, and all installations erected thereon as defined in the Continental Shelf Act, over which Kenya exercises its sovereign rights for the purpose of exploiting natural resources of the seabed, its subsoil and the superjacent waters, in accordance with international law;
- (2) Any change in the form in which assets are or have been invested does not affect their character as investments as defined in this Agreement.

Article 2 – SCOPE OF THE AGREEMENT

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

Article 3 – PROMOTION AND PROTECTION OF INVESTMENTS

- (1) Each Contracting Party shall promote and encourage the making of investments in its territory by investors of the other Contracting Party, and, subject to compliance with the provisions of its laws and regulations, shall admit such investments.
- (2) Each Contracting Party shall use its best endeavours to grant, in accordance with its laws, the necessary permits, clearances and licences required for the carrying out of such investments and, whenever necessary, provide the required facilitation.

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

Article 4 – TREATMENT OF INVESTMENTS

- (1) Investments and returns of investors of either Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable nor discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory by investors of the other Contracting Party.
- (2) Each Contracting Party shall accord to investors of the other Contracting Party and to their investments, a treatment no less favourable than the treatment it accords to its own investors and their investments with respect to the acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposal of investments.
- (3) Each Contracting Party shall in its territory accord to investors and to investments and returns of investors of the other Contracting Party treatment no less favourable than that which it accords to investments and returns of investors of any third State.
- (4) The provisions of paragraphs (2) and (3) shall not be construed so as to oblige either Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from:
- (a) any customs union, free trade area, common market or any similar international agreement or interim arrangement leading up to such customs union, free trade area, or common market of which either of the Contracting Parties is a member;
 - (b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation;
 - (c) special advantages to foreign development finance institutions operating in the territory of either Contracting Party for the exclusive purpose of development assistance through mainly nonprofit activities;
- (5) Each Contracting Party may, in accordance with its laws and regulations, grant incentives, treatment, preferences or privileges through special policies or measures to its own investors only for the purpose of promoting small and medium sized enterprises and infant industries in its territory, subject to the condition that these shall not significantly affect the investments and activities of the investors of the other Contracting Party.

Article 5 – COMPENSATION FOR LOSSES

- (1) Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or other settlement, a treatment no less favourable than the one accorded by the latter Contracting Party to its own investors or investors of the most favoured nation, whichever, according to the investor, is more favourable.
- (2) Without prejudice to paragraph 1 of this Articles, investors of one Contracting Party who, in any of the situations referred to in that paragraph, suffer losses in the territory of the other Contracting Party resulting from:
- (a) requisitioning of their investment or a part thereof by the forces or authorities of the latter Contracting Party, acting under and within the scope of the legal provisions relating to their competences, duties and command structures; or CAP. 518 Foreign Investments Protection

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

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

Article 6 – EXPROPRIATION

- (1) Investments of investors of either Contracting Party in the territory of the other Contracting Party shall not be nationalised, expropriated or subjected to measures having effects equivalent to nationalisation or expropriation except for public purposes, under due process of law, on a non-discriminatory basis and against prompt and full compensation.
- (2) Such compensation shall amount to the market value of the expropriated investment at the time immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier. The market value shall be determined in accordance with generally accepted principles of valuation, taking into account, *inter alia*, the capital invested, replacement value, appreciation, current returns, the projected flow of future returns, goodwill and other relevant factors.
- (3) Compensation shall be fully realisable, effective and shall be paid without any restriction or delay. It shall include interest at a commercial rate established on a market basis for the currency of payment from the date of dispossession of the expropriated investments until the date of actual payment.
- (4) The investor affected by the expropriation shall have a right, under the law of the expropriating Contracting Party to prompt review of the expropriation case, by a court of law or other independent competent authority of that Contracting Party.
- (5) Where a Contracting Party expropriates, nationalises or takes measures having effect equivalent to nationalisation or expropriation against the assets of a company which is incorporated or constituted under the laws in force in any part of its own territory, and in which investors of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this article are applied to the extent necessary to guarantee compensation as specified therein to such investors of the other Contracting Party who are owners of those shares.

Article 7 – TRANSFER OF INVESTMENTS AND RETURNS

- (1) Each Contracting Party shall, in accordance with its relevant laws, allow investors of the other Contracting Party the free transfer of funds relating to their investments and returns, including compensation paid pursuant to the provisions of Articles 5, 6, 8 and 10 of this Agreement.
- (2) All transfers shall be effected without delay in any convertible currency at the market rate of exchange applicable on the date of transfer. In the absence of such a market exchange rate, the rate to be used will be the most recent exchange rate applied to inward investments or the most recent exchange rate for conversion of currencies into Special Drawing Rights, whichever is the more favourable to the investor.
- (3) Notwithstanding paragraphs 1 and 2 of this Article, a Contracting Party may delay a transfer through the application of measures ensuring investors' compliance with the host Contracting Party's laws and regulations on the payment of taxes and dues in force at the time the request for transfer is made, and provided that the application of such laws and regulations shall not unnecessarily impair the free transfer ensured by this Agreement.

Article 8 – SETTLEMENT OF DISPUTES BETWEEN
AN INVESTOR AND A CONTRACTING PARTY

- (1) Any dispute arising directly from an investment between one Contracting Party and an investor of the other contracting Party should be settled amicably between the parties to the dispute.
- (2) If the dispute has not been settled within six months from the date on which it was raised in writing, the dispute may, at choice of the investor, be submitted to:
 - (a) The competent courts of the Contracting Party in whose territory the investment is made; or
 - (b) arbitration by the International Center for Settlement of Investment Disputes (ICSID) established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965 (hereinafter referred to as 'Centre'), if the Centre is available; or
 - (c) An *ad hoc* arbitration tribunal to be established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or
 - (d) any other previously agreed *ad hoc* arbitration tribunal;
- (3) Any arbitration under this Article shall, at the request of either party to the dispute, be held in a state that is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), opened for signature at New York on 10 June 1958. Claims submitted to arbitration under this Article shall be considered to arise out of a commercial relationship or transaction for the purposes of Article 1 of the New York Convention.
- (4) Each Contracting Party hereby gives its unconditional consent to the submission of a dispute between it and an investor of the other Contracting Party to arbitration in accordance with this Article.
- (5) Neither of the Contracting Parties, which is a party to a dispute, can raise an objection, at any phase of the arbitration procedure or of the execution of an arbitral award, on account of the fact that the investor, which is the other party to the dispute, has received an indemnification covering a part or the whole of its losses by virtue of an insurance.
- (6) Each party concerned shall bear the cost of its own arbitrator and its representation in the arbitral proceedings. The cost of the Chairman in discharging his arbitral function and the remaining costs of the tribunal shall be borne equally by the parties concerned. The tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the two parties, and this award shall be binding on both parties.
- (7) The award shall be final and binding on the parties to the dispute and shall be executed in accordance with national law of the Contracting Party in whose territory the award is relied upon, by the competent authorities of the Contracting Party by the date indicated in the award.

Article 9 – SETTLEMENT OF DISPUTES BETWEEN THE CONTRACTING PARTIES

- (1) Any dispute between the Contracting Parties concerning the interpretation or application of this Agreement should, if possible, be settled through negotiations between the Governments of the two Contracting Parties.
- (2) If the dispute cannot be settled within a period of six months following the date on which such negotiations were requested by either Contracting Party, it may upon the request of either Contracting Party, be submitted to an arbitral tribunal.
- (3) Such an arbitral tribunal shall be constituted for each individual case in the following way: within two months of the receipt of the request for arbitration,

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each Contracting Party shall appoint one arbitrator for the tribunal. Those two arbitrators shall then select a national of a third State who, upon approval by the two Contracting Parties, shall be appointed Chairman of the tribunal. The Chairman shall be appointed within two months from the date of appointment of the other two arbitrators.

- (4) If within the periods specified in paragraph (3) of this Article the necessary appointments have not been made, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointments. If the President is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting Party or if he too is prevented from discharging the said function, the Member of the International Court of Justice next in seniority who is not a national of either Contracting Party and is not otherwise prevented from discharging such functions shall be invited to make the necessary appointments.
- (5) The arbitral tribunal shall determine its own procedure and reach its decision by a majority of votes. Such decision shall be binding on both Contracting Parties. Each Contracting Party shall bear the cost of its own arbitrator to the tribunal and of its representation in the arbitral proceedings. The cost of the Chairman and the remaining costs shall be borne equally by the Contracting Parties. The tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the two Contracting Parties, and this award shall be binding on, and executed by, both Contracting Parties.

Article 10 – SUBROGATION

- (1) If a Contracting Party or its designated agency makes a payment to its own investor under a guarantee it has given in respect of an investment made in the territory of the other Contracting Party, the latter Contracting Party shall recognise the assignment to the former Contracting Party of all the rights and claims of the indemnified investor, and shall also recognise that the former Contracting Party or its designated Agency is entitled to exercise such rights and enforce such claims by virtue of subrogation, to the same extent as the original investor.
- (2) Any payment made by one Contracting Party or its designated Agency to its own investor as provided in paragraph (1) shall not affect the right of such investor to make his claims against the other Contracting Party in accordance with Article 8 provided that the exercise of such a right does not overlap and that such claims shall be limited only to any amount outstanding by virtue of subrogation under that paragraph.

Article 11 – APPLICATION OF OTHER RULES

- (1) If the provisions of the law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties, in addition to the present Agreement, contain rules, whether general or specific, entitling investments and returns of investors of the other Contracting Party to treatment more favourable than that provided for by the present Agreement, such rules shall, to the extent that they are more favourable, prevail over the present Agreement.
- (2) Each Contracting Party shall, however, honour any obligation it may have entered into with regard to investments of investors of the other Contracting Party.

Article 12 – PROHIBITIONS AND RESTRICTIONS

- (1) The provisions of this Agreement shall not be construed as preventing a Contracting Party from taking any action necessary for the protection of

its essential security interests in time of war or armed conflict, or other emergency in international relations or for the protection of public health or the prevention of diseases and pests in animals or plants.

- (2) Provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination by a Contracting Party, or a disguised investment restriction, nothing in this Agreement shall be construed as preventing the Contracting Parties from taking any measure necessary for the maintenance of public order.

Article 13 – TRANSPARENCY

- (1) Each Contracting Party shall promptly publish, or otherwise make available to the investor, its laws, regulations, judicial decisions of general application and other relevant information as well as international agreements, which may affect the investments of investors of the other Contracting Party in the territory of the former Contracting Party.
- (2) Nothing in this Agreement shall require a Contracting Party to furnish or allow access to any confidential or proprietary information, including information concerning particular investors or investments, the disclosure of which would impede law enforcement or be contrary to its laws protecting confidentiality or prejudice legitimate commercial interests of particular investors.

Article 14 – OTHER PROVISIONS

- (1) This Agreement shall apply to all investments made by investors of either Contracting Party in the territory of the other Contracting Party, whether made before or after the coming into force of this Agreement but shall not apply to any dispute concerning an investment that arose or any claim that was settled before its entry into force. For the avoidance of any doubt, it is declared that all investments shall, subject to this Agreement, be governed by the laws in force in the territory of the Contracting Party in which such investments are made.
- (2) The Contracting Parties shall, at the request of either Contracting Party, hold consultations for the purpose of reviewing the implementation of this Agreement and studying any issue that may arise from this Agreement. Such consultations shall be held between the competent authorities of the Contracting Parties in a place and at a time agreed on through appropriate channels.

Article 15 – ENTRY INTO FORCE, DURATION AND TERMINATION

- (1) The Contracting Parties shall notify each other promptly of the fulfillment of their legal procedures required for entry into force of this Agreement. The Agreement shall enter into force on the day following the date of receipt of the last notification.
- (2) This Agreement shall remain in force for a period of ten years. Thereafter it shall continue in force until the expiration of twelve months from the date on which either Contracting Party shall have given written notice of termination of this Agreement to the other Contracting Party.
- (3) In respect of investments admitted and/or made prior to the date the notice of termination of this Agreement becomes effective, the provisions of the preceding articles shall remain in force with respect to such investments for a further period of ten years from that date or for any longer period as provided for or agreed upon in the relevant contract or approval granted to the investor.

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

[Legal Notice 219 of 2016]

IN EXERCISE of the powers conferred by section 8B of the Foreign Investment Protection Act, the 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 Korea for Promotion and Reciprocal Protection in relation to foreign investments, entered into on the 7th of July, 2014, shall notwithstanding anything to the contrary in the Foreign Investment Protection Act or in any other written law, have effect in relation to investments promotion and protection.

SCHEDULE

The Government of the Republic of Korea and the Government of the Republic of Kenya (hereinafter referred to as the Contracting Parties),

DESIRING to create favourable conditions for greater investments by investors of one Contracting Party in the territory of the other Contracting Party, based on the principles of equality and mutual benefit;

RECOGNIZING that the promotion and protection of investments on the basis of this Agreement will be conducive to the stimulation of individual business initiatives and will increase prosperity in both States;

DESIRING to achieve these objectives in a manner consistent with the protection of health, safety, and the environment and the promotion of consumer protection and internationally recognized labour rights,

HAVE AGREED as follows:

Article 1 – DEFINITIONS

1. For the purpose of this Agreement, the following terms shall bear the assigned meanings:

"investment" means every kind of asset in the territory of one Contracting Party, owned or controlled directly or indirectly by an investor of the other Contracting Party, provided that the investment has been made in accordance with the laws and regulations of the former Contracting Party, including, though not exclusively:

- (a) any other tangible, intangible, movable or immovable property, and any related property rights, such as mortgages, liens, leases or pledges;
- (b) shares, stocks and other forms of equity participation in a company, or any business enterprise including a corporation, trust, partnership, sole proprietorship, branch, joint venture, association or organisation and the rights or interests derived therefrom;
- (c) bonds, debentures, loans and other forms of debt, and the rights or interests derived therefrom;
- (d) claims to money or to any performance under a contract having an economic value;
- (e) intellectual property rights including rights with respect to copyright, patents, trademarks, trade names, industrial designs, technical processes, trade secrets and know-how, and goodwill;

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- (f) any rights under a contract, including turn-key, construction, management, production, revenue-sharing and other similar contracts; and
- (g) business concessions, licenses, authorizations, permits, and similar rights having an economic value conferred by domestic law or under a contract, CAP. 518 Foreign Investments Protection

Any change in the form in which assets are invested or reinvested does not affect their character as investments.

2. "returns" means the amounts yielded by investments and in particular, though not exclusively, includes profits, interest, capital gains, dividends, royalties and all kinds of fees or any payments in kind related to an investment.
3. "investor" means, for either Contracting Party, the following subjects who invest in the territory of the other Contracting Party in accordance with the laws of the latter Contracting Party and the provisions of this Agreement:
 - (a) "natural person" means a natural person having the nationality of the former Contracting Party in accordance with its laws; and
 - (b) "juridical person" means any entity such as company, public institution, authority, foundation, partnership, firm, establishment, organisation, corporation or association incorporated or constituted in accordance with the laws and regulations of the former Contracting Party.
4. "territory" means:
 - (a) in respect of the Republic of Kenya; the land territory, internal waters and territorial sea of the Republic of Kenya and the airspace above them, as well as the maritime zones beyond the territorial sea, including the seabed and subsoil, over which the Republic of Kenya exercises sovereign right or jurisdiction in accordance with its national laws in force and international law, for the purpose of exploration and exploitation of the natural resources of such areas;
 - (b) in respect of the Republic of Korea; the territory of the Republic of Korea, as well as those maritime areas, including the seabed and subsoil adjacent to the outer limit of the territorial sea over which the Republic of Korea exercises, in accordance with international law, sovereign right or jurisdiction for the purpose of the exploration and exploitation of the natural resources of such areas.
5. "freely usable currency" means currencies that the International Monetary Fund determines, from time to time, as freely usable currencies in accordance with the Articles of Agreement of the International Monetary Fund and Amendments thereafter.

Article 2 – PROMOTION AND PROTECTION OF INVESTMENTS

1. Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its territory and shall admit such investments in accordance with its laws and regulations;
2. Each Contracting Party shall accord to investments of an investor of the other Contracting Party treatment in accordance with customary international law, including fair and equitable treatment and full protection and security;
3. For greater certainty, paragraph 2 of this Article prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of an investor of the other Contracting Party. 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 by that standard, and do not create additional substantive rights. The obligations in paragraph 2 to provide:

- (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
 - (b) "full protection and security" requires each Contracting Party to provide the level of police protection required under customary international law.
4. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.
 5. Neither Contracting Party shall take any unreasonable or discriminatory measures against the management, maintenance, use, enjoyment and disposal of investments by the investors of the other Contracting Party, nor impose unreasonable or discriminatory measures on investments by investors of the other Contracting Party concerning local content, technology transfer or export performance requirements.

Article 3 – TREATMENT OF INVESTMENTS

1. Each Contracting Party shall accord in its territory to investments made in accordance with its laws and regulations by investors of the other Contracting Party, as regards the management, maintenance, use, enjoyment or disposal of their investments, treatment no less favourable than that which it accords in like circumstances to investments of its own investors (hereinafter referred to as "national treatment") or to investments of investors of any third State (hereinafter referred to as "most-favoured-nation treatment"), whichever is more favourable.
2. Each Contracting Party shall accord in its territory to investors of the other Contracting Party, as regards the management, maintenance, use, enjoyment or disposal of their investments, treatment no less favourable than that which it accords in like circumstances to its own investors (national treatment) or to investors of any third State (most-favoured-nation treatment), whichever is more favourable.
3. The standard of national treatment as provided for in paragraphs 1 and 2 of this Article means, with respect to a sub-national government, treatment no less favourable than the most favourable treatment accorded in like circumstances by that sub-national government to investors, and to investments of investors, of the Party of which it forms a part.
4. The most-favoured-nation treatment as provided for in paragraphs 1 and 2 of this Article shall not be construed so as to oblige a Contracting Party to extend to the investors of the other Contracting Party any treatment, preference or privileges which either Contracting Party accords to investors of third States on account of:
 - (a) its present or future membership of, or association with, a customs or economic union, a common market or a free trade area or a similar international agreement; or
 - (b) bilateral or multilateral agreement relating to taxation or investments.

Article 4 – EXPROPRIATION

1. Investments of an investor of one Contracting Party shall not be nationalized, expropriated (hereinafter referred to as "direct expropriation") or otherwise subjected to any other actions having an effect equivalent to nationalization or expropriation (hereinafter referred to as "indirect expropriation") in the territory of the other Contracting Party except for public purposes and against prompt, effective and full compensation. 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 in an investment. The expropriation

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shall be carried out on a non-discriminatory basis and in accordance with due process of law.

2. Such compensation shall amount to the fair market value of the expropriated investments immediately before the expropriation was taken or before the impending expropriation became public knowledge, whichever is the earlier. The market value shall be determined in accordance CAP. 518 Foreign Investments Protection with generally accepted principles of valuation, taking into account, *inter alia*, the capital invested, replacement value, appreciation, current returns, projected flow of future returns, goodwill and other relevant factors. The compensation shall include interest at the applicable commercial rate from the date of expropriation until the date of payment, and shall be made without undue delay.
3. Compensation shall be effectively realizable and freely transferable and shall be freely convertible into the currency of the Contracting Party of the investors concerned, and into freely usable currencies as defined in the Articles of Agreement of the International Monetary Fund, at the market exchange rate prevailing on the date of expropriation.
4. Investors of one Contracting Party affected by expropriation shall have a right to prompt review by a judicial or other independent authority of the other Contracting Party of their case and of the valuation of their investments in accordance with the principles set out in this Article.

Article 5 – COMPENSATION FOR LOSSES

1. Investors of one Contracting Party, whose investments suffer losses owing to war or other armed conflict, a state of national emergency, revolt, insurrection, riot or other similar situation in the territory of the other Contracting Party, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or other forms of settlement, treatment no less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State.
2. Without prejudice to paragraph 1 of this Article, investors of one Contracting Party who, in any situations referred to in that paragraph, suffer losses in the territory of the other Contracting Party resulting from:
 - (a) requisitioning of their property by the latter Contracting Party's forces or authorities; or
 - (b) destruction of their property by the latter Contracting Party's forces or authorities which was not caused in combat action or was not required by the necessity of the situation,

shall be accorded by the latter Contracting Party restitution, compensation or both. Such compensation shall be prompt, effective and full and in accordance with Article 4 from the date of requisitioning or destruction until the date of actual payment.

Article 6 – TRANSFERS

1. Each Contracting Party shall guarantee to an investor of the other Contracting Party the free transfer of all payments relating to an investment into and out of its territory. Such transfers shall include, in particular, though not exclusively:
 - (a) the initial capital and additional amounts to maintain, develop or increase an investment;
 - (b) returns;
 - (c) payments made under a contract including a loan agreement;
 - (d) proceeds from the sale or liquidation of all or any part of an investment;
 - (e) payments made pursuant to Articles 4, 5, and 7;
 - (f) payments arising out of the settlement of a dispute; and

- (g) earnings and other remuneration of personnel engaged from abroad in connection with an investment.
2. Each Contracting Party shall further ensure that the transfers referred to in paragraph 1 of this Article shall be made without undue restriction or delay in a freely convertible currency of the choice of the investor and at the prevailing market rate of exchange applicable on the date of transfer to the currency to be transferred and shall be promptly transferable.
 3. Notwithstanding paragraphs 1 and 2 of this Article, a Contracting Party may delay or prevent a transfer, through the equitable, non-discriminatory and good faith application of its measures and laws relating to:
 - (a) bankruptcy, insolvency or the protection of the rights of creditors;
 - (b) issuing, trading or dealing in securities;
 - (c) criminal or penal offences;
 - (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;
 - (e) ensuring compliance with orders or judgments in judicatory proceedings; or
 - (f) taxation.
 4. A Contracting Party may adopt or maintain measures inconsistent with paragraphs 1 and 2 of this Article:
 - (a) in the event of serious balance-of-payments and external financial difficulties or the threat thereof; or
 - (b) in cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies.
 5. Measures referred to in paragraph 4 of this Article shall:
 - (a) be consistent with the Articles of the Agreement of the International Monetary Fund;
 - (b) be non-discriminatory;
 - (c) not exceed those necessary to deal with the circumstances set out in paragraph 4 of this Article;
 - (d) be temporary and be eliminated as soon as conditions permit; and
 - (e) be promptly notified to the other Contracting Party.
 6. In the absence of a market for foreign exchange, the rate to be used shall be the most recent exchange rate for the conversions of currencies into Special Drawing Rights.
 7. In case of an unjustified delay in transfer caused by the host Contracting Party, the transfer shall also include interest at a commercial rate established on a market basis for the currency in question from the date on which the transfer was requested until the date of actual transfer and shall be borne by that Contracting Party.

Article 7 – SUBROGATION

If a Contracting Party or its designated agency makes a payment under an indemnity, guarantee or contract of insurance given in respect of an investment of an investor in the territory of the other Contracting Party, the other Contracting Party shall recognize:

- (a) the assignment of any right or claim of such investor to the former Contracting Party or its designated agency; and
- (b) the right of the former Contracting Party or its designated agency to exercise by virtue of subrogation any such right and claim to the same extent as its predecessor in title.

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Article 8 – TRANSPARENCY

1. Each Contracting Party shall promptly publish, or otherwise make publicly available, its laws, regulations, procedures and administrative rulings and judicial decisions of general application as well as international agreements which may affect the operation of this Agreement. Where a Contracting Party establishes a policy which is not expressed in laws or regulations or by any other means listed in this paragraph but which may affect the operation of this Agreement, that Contracting Party shall promptly publish them or otherwise make them publicly available.
2. Each Contracting Party shall promptly respond to specific questions and provide, upon request, information to the other Contracting Party on matters referred to in paragraph 1 of this Article.
3. Nothing in this Agreement shall prevent one Contracting Party from requiring an investor of the other Contracting Party, or its investment, to provide routine information concerning that investment solely for informative or statistical purposes. Nothing in this Agreement requires a Contracting Party to furnish or allow access to:
 - (a) information relating to the financial affairs and accounts of individual customers of particular investors or investments; or
 - (b) any confidential or proprietary information, including information concerning particular investors or investments, the disclosure of which would impede law enforcement or be contrary to its laws protecting confidentiality or prejudice the legitimate commercial interests of a particular enterprise.

Article 9 – ENTRY AND SOJOURN OF PERSONNEL

Subject to its laws and regulations regarding the entry and sojourn of aliens, a Contracting Party shall permit natural persons who are investors of the other Contracting Party and personnel employed by companies of that other Contracting Party to enter and remain in its territory for the purpose of engaging in activities connected with investments.

Article 10 – SETTLEMENT OF DISPUTES BETWEEN CONTRACTING PARTIES

1. Disputes between the Contracting Parties concerning the interpretation or application of this Agreement shall, if possible, be settled through consultations or diplomatic channels.
2. If any dispute cannot be settled within six (6) months from the date of request for settlement, it shall, at the request of either Contracting Party, be submitted to an *ad hoc* Arbitral Tribunal in accordance with the provisions of this Article.
3. Such an Arbitral Tribunal shall be constituted for each individual case in the following way: Within two (2) months from the date of receipt of the request for arbitration, each Contracting Party shall appoint one member of the Tribunal. These two members shall then select a national of a third State, who upon approval of the two Contracting Parties shall be appointed Chairperson of the Tribunal. The Chairperson shall be appointed within two (2) months from the date of the appointment of the other two members.
4. If the necessary appointments have not been made within the periods specified in paragraph 3 of this Article, a request may be made by either Contracting Party to the President of the International Court of Justice to make such appointments. If the President is a national of either Contracting Party or otherwise prevented from discharging the said function, the Vice-President shall be invited to make the appointments. If the Vice-President is also a national of either Contracting Party or prevented from discharging the said function, the member, next in seniority, of the International Court of Justice who is not a national of either Contracting Party shall be invited to make the appointments.

5. The Arbitral Tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both Contracting Parties.
6. The Arbitral Tribunal shall determine its own procedure.
7. Each Contracting Party shall bear the costs of its own arbitrator and its representation in the arbitral proceedings. The costs of the Chairperson and any remaining costs shall be borne in equal parts by both 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.

Article 11 – SETTLEMENT OF INVESTMENT DISPUTES BETWEEN A
CONTRACTING PARTY AND AN INVESTOR OF THE OTHER CONTRACTING PARTY

1. Any dispute arising directly from an investment between one Contracting Party and an investor of the other Contracting Party should be settled amicably between the two parties to the dispute.
2. If the dispute concerning an alleged breach of an obligation of one Contracting Party under this Agreement which causes loss or damage to the investor or its investment of the other Contracting Party has not been settled within six (6) months from the date on which it was raised in writing the dispute may, at the choice of the investor, be submitted to:
 - (a) a competent court or an administrative tribunal of the Contracting Party in whose territory the investment is made; or
 - (b) an arbitration in accordance with this Article under:
 - (i) the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "ICSID Convention"), if the ICSID Convention is available;
 - (ii) the Additional Facility Rules of the Center for Settlement of Investment Disputes ("ICSID Additional Facility"), if the ICSID Additional Facility is available;
 - (iii) the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL") as revised in 2010; or
 - (iv) any other arbitration institution or any other arbitration rules if agreed by both parties to the dispute.
3. Each Contracting Party hereby consents to the submission of a dispute to international arbitration in accordance with the procedures set out in this Agreement. The consent and the submission of a claim to arbitration under this Article shall satisfy the requirements of:
 - (a) Chapter II of the ICSID Convention (Jurisdiction of the Center) and the ICSID Additional Facility Rules with regards to the written consent of the parties to the dispute; and
 - (b) Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as "the New York Convention") for an "agreement in writing."
4. Once the investor has submitted the dispute to either a court or an administrative tribunal of the disputing Contracting Party or any of the arbitration mechanisms provided for in paragraph 2, the choice of the procedure shall be final.
5. The seeking of interim relief not involving the payment of damages, from judicial or administrative tribunals, by a party to a dispute submitted to arbitration under this Article, for the preservation of its rights and interests pending resolution of the dispute, is not deemed a submission of the dispute for resolution for purposes of a Contracting Party's limitation of consent under paragraph 4 of this Article, and is permissible in arbitration under any of the provisions of paragraph 2(b) of this Article.

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6. A dispute may be submitted to arbitration ninety (90) days after the date on which notice of intent to do so was received by the Contracting Party which is party to the dispute, but no later than three (3) years from the date the investor first acquired or should have acquired knowledge of the events which gave rise to the dispute. Notice of intent shall specify:
 - (a) the name and address of the disputing investor and the investment;
 - (b) the provisions of this Agreement alleged to have been breached and any other related provisions;
 - (c) the issues and the factual basis for the claim; and
 - (d) the relief sought, including the approximate amount of any damages claimed.
7. The disputing parties may agree on the legal place of any arbitration under the arbitral rules applicable under paragraph 2(b) of this Article. If the disputing parties fail to reach an agreement, the tribunal shall determine the place in accordance with the applicable arbitral rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.
8. A Contracting Party shall not assert as a defence, counter-claim, right of set-off or for any other reason, that indemnification or other compensation for all or part of the alleged damages has been received or will be received pursuant to an indemnity, guarantee or insurance contract.
9. The arbitral tribunal, in its award, shall set out its findings of law and fact, together with the reasons for its ruling and may, at the request of a party, provide the following forms of relief:
 - (a) a declaration that the Contracting Party has failed to comply with its obligations under this Agreement;
 - (b) pecuniary compensation, which shall include interest from the time the loss or damage was incurred until the payment was made;
 - (c) restitution in kind in appropriate cases, provided that the Contracting Party may pay pecuniary compensation in lieu thereof where restitution is not practicable; and
 - (d) with the agreement of the parties to the dispute, any other form of relief.
10. Arbitration awards shall be final and binding upon the parties to the dispute. Each Contracting Party shall, in its territory, make provision for the effective enforcement of awards made pursuant to this Article and shall carry out without delay any such award issued in a proceeding to which it is a party.

Article 12 – APPLICATION OF OTHER RULES

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

Article 13 – APPLICATION OF THE AGREEMENT

1. This Agreement applies to the existing investments at the date of the entry into force of this Agreement, as well as to the investments made or acquired after this date.
2. The Agreement shall not apply to claims arising out of events which occurred, or to claims which had been settled, prior to its entry into force.

Article 14 – DENIAL OF BENEFITS

1. A Contracting Party may deny the benefits of this Agreement to an investor of the other Contracting Party that is a juridical person of such other Contracting

Party and to investments of such investor if persons of a non-Contracting Party own or control the juridical person and the denying Contracting Party adopts or maintains measures with respect to the non-Contracting Party or a person of the non-Contracting Party that prohibit transactions with the juridical person or that would be violated or circumvented if the benefits of this Agreement were accorded to the juridical person or its investments.

2. Subject to prior notification and consultation, a Contracting Party may deny the benefits of this Agreement to an investor of the other Contracting Party that is a juridical person of such other Contracting Party and to investments of such investor if the juridical person has no substantial business activities in the territory of the other Contracting Party and persons of a non-Contracting Party, or of the denying Contracting Party, own or control the juridical person.

Article 15 – SECURITY EXCEPTION

Nothing in this Agreement shall be construed:

- (a) to require a Contracting Party to furnish any information, the disclosure of which it considers contrary to its essential security interests;
- (b) to prevent a Contracting Party from taking any actions which it considers necessary for the protection of its essential security interests; or
- (c) to prevent a Contracting Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security,
- (d) Provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination by a Contracting Party, or a disguised investment restriction.

Article 16 – CONSULTATIONS

The Contracting Parties shall, at the request of either Contracting Party, hold consultations for the purpose of reviewing the implementation of this Agreement and studying any issue that may arise from this Agreement. Such consultations shall be held between the competent authorities of the Contracting Parties in a place and at a time agreed on through appropriate channels.

Article 17 – ENTRY INTO FORCE, DURATION AND TERMINATION

1. This Agreement shall enter into force thirty (30) days after the date on which the Contracting Parties have notified each other in writing that their respective legal requirements for the entry into force of this Agreement have been fulfilled.
2. This Agreement shall remain in force for a period of ten (10) years and shall remain in force thereafter indefinitely unless either Contracting Party notifies the other Contracting Party in writing one year in advance of its intention to terminate this Agreement.
3. In respect of investments made prior to the termination of this Agreement, the provisions of Articles 1 to 15 of this Agreement shall remain in force for a further period of ten (10) years from the date of the termination.
4. The Agreement may be revised by mutual written consent of the Contracting Parties. Any revision or termination of this Agreement shall be effected without prejudice to any rights or obligations accruing or incurred under this Agreement prior to the effective date of such revision or termination.

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

[Legal Notice 56 of 2017]

IN EXERCISE of the powers conferred by section 8B of the Foreign Investment Protection Act, the Cabinet Secretary for the National Treasury declares that the arrangements specified in the Schedule hereto between the Government of the Republic of Kenya and the Government of the State of Qatar for reciprocal promotion and protection of investments in relation to foreign investments entered into on the 23rd April, 2014, shall, notwithstanding anything to the contrary in the Act or any other written law, have effect in relation to investment promotion and protection.

SCHEDULE

The Government of the State of Qatar and the Government of the Republic of Kenya, hereinafter referred to as the "Contracting Parties";

DESIRING to intensify economic cooperation to the mutual benefit of both States,

INTENDING to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party,

RECOGNIZING the need to promote and protect these investments with the aim to foster the economic prosperity of both Contracting Parties,

AGREEING that fair and equitable treatment of investments is desirable in order to maintain a stable framework for investments and maximum effective utilization of economic resources,

AGREEING that these objectives can be achieved in accordance with the laws of the contracting parties; and

Having resolved to conclude an Agreement concerning the promotion and protection of investments;

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. The term "Investor": means any natural or juridical person of one Contracting Party:
 - (a) the term "natural persons",: means with regard to either Contracting Party to any natural person, who is a national of the Parties to this Agreement.
 - (b) the term "juridical person", : means with regard to either Contracting Party, to any juridical person including enterprises, companies, corporations, firms or business associations constituted, or incorporated in accordance with the applicable law of that Contracting Party and having its main office in the territory of that same Contracting Party.
2. In addition, Qatar's "juridical person" includes government, official agencies, authorities, trusts, and organizations established or organized in accordance with the respective legislation of the State of Qatar, or of a third party in which the investor referred to above exercise effective control.
3. The term "Investment" means any kind of asset invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance

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with the laws and regulations of the latter Contracting Party, and in particular, though not exclusively, shall include:

- (a) movable and immovable property and any other property rights, such as servitudes, guarantees, mortgages, liens, pledges and similar rights;
 - (b) shares in stocks, debentures of a company or any other similar forms of participation in a company;
 - (c) rights to money or to any performance under contract having an economic value;
 - (d) intellectual and industrial property rights, such as, copyrights, trademarks, patents, technical processes, know-how and goodwill;
 - (e) any rights of economic nature granted by law or agreement, such as concessions to performance activities including those to search for, process, extract and exploit natural resources.
4. The term "Returns" means outcomes of the investment and money yielded by an investment and includes, in particular although not exclusively, profits, dividends, interest, capital gains, royalties and fees;
 5. Any alteration of the form in which assets are invested or reinvested shall not affect their qualification as investments provided that, such alteration is not in conflict with the provisions of this Agreement and the legislation of the Contracting Party in whose territory the investment is made.
 6. "Territory";
 - (a) for the State of Qatar: land, inland waters and territorial of the State of Qatar and their bed and subsoil, and air space above them, and the economic zone and continental shelf, which is exercised by the State of Qatar's sovereign rights and jurisdiction, in accordance with the provisions of international law and domestic laws and regulations.
 - (b) for the Republic of Kenya, the term "territory" means all the territory of Kenya including internal waters, territorial waters and the seabed and subsoil of the territorial waters, and the air space above such territorial waters, exclusive economic zone and the continental shelf, and the sea bed and sub soil within such area which has been or may hereafter be designated as an area over which Kenya has sovereign rights or jurisdiction for the purposes of exploring and exploiting natural resources in accordance with international law and Kenya's national laws and regulations.

Article 2 – Scope of the Agreement

1. This Agreement shall apply to all investors and 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 raised before the entry into force of this Agreement.

Article 3 – Promotion and Protection of Investments

1. Each Contracting Party, as far as possible, shall encourage and create favorable 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. When a Contracting Party shall have admitted an investment in its territory, it shall grant in accordance with its laws and regulations the necessary permits in connection with such an investment and with the carrying out of licensing agreements and contracts for technical, commercial or administrative assistance. Each Contracting Party shall, in accordance with its laws and regulations, whenever needed, endeavor to issue the necessary

authorizations concerning the activities of consultants and other qualified persons of foreign nationality.

3. Investments made by investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party in accordance with the laws and regulations of each Contracting Party.
4. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the operation, management, maintenance, use, enjoyment or disposal of investments in its territory by investors of the other Contracting Party.

Article 4 – Treatment of Investments

1. Each Contracting Party shall in its territory accord to investments and returns of investors of the other Contracting Party treatment which is fair and equitable and no less favorable than that which it accords to investments and returns of its own investors or to investments and returns of investors of any third State, whichever is more favorable to the investor.
2. Each Contracting Party shall in its territory accord to investors of the other Contracting Party, as regards management, maintenance, use, enjoyment or disposal of their investments, treatment which is fair and equitable and no less favorable than that which it accords to its own investors.
3. Each Contracting Party shall in its territory accord to investors of the other Contracting Party treatment no less favorable than that which it accords to investors of any third party.
4. The treatment granted under paragraph 1 and 2 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 their investment the benefit of any treatment, preference or privilege resulting from:
 - (a) its membership of, or association with, any existing or future free trade area, customs union, economic, common market, or monetary union or other similar international agreements including other forms of regional economic organization, or
 - (b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.
5. If the domestic 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 regulation, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favorable than is provided for by this Agreement, such regulation shall, to the extent that it is more favorable, prevail over this Agreement.
6. Whenever the treatment accorded by one Contracting Party to the investors of the other Contracting Party, according to its laws and regulations or other provisions of specific contract or investment authorization or agreement, is more favorable than that provided under this agreement, the most favorable treatment shall apply.
7. Each Contracting Party may, in accordance with its laws and regulations, grant incentives, treatment, preferences or privileges through special policies or measures to its own investors only for the purpose of promoting small and medium sized enterprises and infant industries in its territory, subject to the condition that these shall not significantly affect the investments and activities of the investors of the other Contracting Party.

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Article 5 – Expropriation and Compensation

1. Neither of the Contracting Parties shall take measures of expropriation, nationalization or any other measures having the same effect against investments belonging to investors of the other Contracting Party (hereinafter: "expropriation") unless the measures are taken in the public interest, on a non-discriminatory basis and under due process of law and upon the payment of effective, adequate and full compensation.

Such compensation shall amount to the market value of the expropriated investment immediately before the expropriation or the impending expropriation became public knowledge, whichever is the earlier.

2. Such market value shall be expressed in a freely convertible currency of the investor's choice, at the market rate of exchange prevailing for that currency on the valuation date. Compensation shall be paid without delay, be effectively realizable and transferable in a freely convertible currency as determined by the investor's choice. The compensation shall include also the interest calculated on the six-month LIBOR rate from the date of expropriation until the date of payment.
3. 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 investors of the other Contracting Party own shares, it shall ensure that the provisions of this article are applied so as to guarantee adequate, effective and full compensation in respect of their investment to such investors of the other Contracting Party who are owners of those shares.
4. Investors of either Contracting Party who suffer losses of their investments in the territory of the other Contracting Party due to war or to other armed conflict, a state of national emergency, revolution, insurrection or riot shall be accorded with respect to restitution, indemnification, compensation or other settlement, a treatment which is no less favorable than that accorded to its own investors or to investors of any third state whichever is more favorable to the investor. Resulting payments shall be transferable without delay in a convertible and freely usable currency of an investor's choice.

Article 6 – Transfer

1. Each Contracting Party shall permit all funds of an investor and outcomes of an investment of the other Contracting Party related to an investment in its territory to be freely transferred and exported, without delay and on a non-discriminatory basis. Such funds would include but not limited to—
 - (a) capital and additional capital amounts used to maintain and increase investment;
 - (b) returns;
 - (c) repayments of any loan including interest thereon, relating to the investment;
 - (d) proceeds from sales of their shares;
 - (e) proceeds received by investors in case of sale or partial sale or liquidation;
 - (f) the earnings of natural persons of one Contracting Party or other personnel from abroad who work in connection with an investment in the territory of the other Contracting Party;
 - (g) payments arising from investment dispute pursuant to Articles (9) and (10) of this Agreement.
 - (h) compensation pursuant to Articles (5) and (7) of this Agreement.

2. Transfers under the present Agreement shall be made without delay in the original currency, or any other freely convertible currency, of an investor's choice at the market rate of exchange applicable on the date of transfer.
3. The Contracting Parties shall undertake to accord to transfer referred to in paragraphs 1 and 2 of this Article, a treatment no less favorable than that accorded to transfers originating from investments made by any third state.

Article 7 – Subrogation

1. 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 rights and assert the claims of those investors. The subrogated rights or claims shall not exceed the original rights or claims of such investors.
2. In case of subrogation as defined in paragraph (1) of this Article, the investor shall not be entitled to require a claim, unless he is authorized to do so by the Contracting Party or its designated agency.

Article 8 – Denial of Benefits

Following notification, a Contracting Party may deny the benefits of this Agreement to:

1. an investor of the other Contracting Party that is a juridical person of such Contracting Party and to an investment of such investor if the juridical person is owned or controlled by investors of a third party and the Denying Contracting Party does not maintain diplomatic relations with the third party;
2. an investor of the other Contracting Party that is a juridical person of such other Contracting Party and to investments of that investor, if an investor of a non - Contracting Party owns or controls the juridical person and the juridical person has no substantive business operations in the territory of the other Contracting Party.

Article 9 – Settlement of Disputes between a Contracting Party and an Investor of the Other Contracting Party

1. Any dispute under the provisions of this Agreement, arising directly from an investment between one Contracting Party and an investor of the other Contracting Party shall be settled amicably between themselves.
2. If such disputes cannot be settled according to the provisions of Paragraph (1) of this Article within four (4) months from the date of request in writing for settlement, then the investor concerned may submit, at his own choice, the dispute for settlement to:
 - (a) the competent court of the host Contracting Party for decision; or
 - (b) the International Center 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
 - (c) an Ad Hoc Arbitral Tribunal.

Once the investor has chosen one of the above mentioned ways of the settlement of dispute, he cannot follow the other two ways.
3. The Ad Hoc Arbitral Tribunal specified under paragraph (2) (c) shall be established as follows—
 - (a) 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 act

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as the Chairman of the Tribunal. 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;

- (b) if the periods specified in paragraph (3) (a) herein above have not been respected, either Party, in the absence of any of other agreement, shall invite the Secretary General, or Vice-Secretary General of the Permanent Court of Arbitration at The Hague to make the necessary appointments.

The Tribunal shall follow the Arbitration rules of the United Nations Commission for International Trade Law (UNCITRAL), 1976.

The Ad Hoc Arbitral Tribunal shall reach its decisions by a majority of vote.

These decisions shall be final and legally binding upon the parties and shall be enforced, in accordance with the International law or domestic law whichever is favorable to the investor. The decisions shall be taken in conformity with the provisions of this Agreement, the laws of the Contracting Party to the dispute and the principles of international law. Unless otherwise decided by the Tribunal, in accordance with special circumstances, each party to the dispute shall bear the cost of its representation in the arbitral proceedings; the cost of the arbitrators and the remaining costs shall be borne in equal parts by the parties to the dispute.

The Tribunal shall interpret its award and give reasons and bases of its decision at the request of either Party. Unless otherwise agreed by the Parties, the venue of arbitration shall be at the seat of the Permanent Court of Arbitration at The Hague (The Netherlands).

Article 10 – Settlement of Disputes between the Contracting Parties

1. The two Contracting Parties shall strive with good faith and mutual cooperation 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 direct objective negotiations to reach such settlement. If the disagreement has not been settled within a period of six (6) 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 Chairman 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, invites the President of the International Court of Justice to make any necessary appointments. If the President is a national of either Contracting Party or otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting Party or if he too is prevented from discharging the said function, the Member of the International Court of Justice next in seniority who is not a national of either Contracting Party 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 final and binding on both Contracting Parties. Each contracting Party shall bear the cost of its own member of the Tribunal and of its representation in the arbitral proceedings; the cost of the Chairman and

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

5. Unless agreed otherwise by the Contracting Parties, the venue of Arbitration shall be the seat of the Permanent Court of Arbitration at The Hague (The Netherlands).
6. All claims shall be submitted and all hearing session shall be completed within a period of eight (8) months from the date the third member is appointed, unless otherwise agreed. The Tribunal shall issue its decision within two (2) 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 Arbitral Tribunal pursuant to the provisions of this Article, if the same dispute was submitted to another Arbitral Tribunal pursuant to the provisions of Article (8) hereunder and which is still under hearing by that Tribunal.

Article 11 – Entry and Sojourn of Personnel

A Contracting Party shall, subject to its laws and regulations relating 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 12 – Consultations

The Contracting Parties shall, at the request of either Contracting Party, hold consultations for the purpose of reviewing the implementation of this Agreement and studying any issue that may arise from this Agreement. Such consultations shall be held between the competent authorities of the Contracting Parties in a place and at a time agreed on through appropriate channels.

Article 13 – Entry into Force

1. This Agreement, or any amendments thereof, shall enter into force on the latter date on which either Contracting Party notifies the other that its internal juridical requirements for the entry into force of this Agreement or its amendments have been fulfilled.
2. This Agreement may be amended by written agreement between the two Contracting Parties.

Article 14 – Duration and Termination

1. This Agreement shall remain in force for a period of ten (10) years and shall continue in force thereafter for similar period or periods unless, one year before the expiration of the initial or any subsequent period, either Contracting Party notifies the other Contracting Party of its intention to denounce the Agreement. The notice of termination shall become effective one year after it has been received by the other Contracting Party.
2. With respect to investments made prior to the date when the notice of termination of this Agreement become effective, the provisions of this Agreement shall continue to be effective for a period of ten years from the date of termination of this Agreement.

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

[Legal Notice 109 of 2017]

IN EXERCISE of the powers conferred by section 8B of the Foreign Investment Protection Act, the Cabinet Secretary for the National Treasury declares that the arrangements specified in the Schedule hereto between the Government of the Republic of Kenya and the Government of Japan for reciprocal promotion and protection of investments in relation to foreign investments entered into on the 28th August, 2016 shall, notwithstanding anything to the contrary in the Act or any other written law, have effect in relation to investment promotion and protection.

SCHEDULE

AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF KENYA AND THE GOVERNMENT OF JAPAN FOR THE PROMOTION AND PROTECTION OF INVESTMENT

The Government of the Republic of Kenya and the Government of Japan,

Desiring to further promote investment in order to strengthen the economic relationship between the Republic of Kenya and Japan (hereinafter referred to as "the Contracting Parties");

Intending to further create stable, equitable, favourable and transparent conditions for greater investment by investors of a Contracting Party in the Area of the other Contracting Party;

Recognising the growing importance of the progressive liberalisation of investment for stimulating initiative of investors and for promoting prosperity in the Contracting Parties;

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

Recognising the importance of the cooperative relationship between labour and management in promoting investment between the Contracting Parties;

Convinced that this Agreement will contribute to the further development of the overall relationship between the Contracting Parties; and

Recognising that this Agreement is designed to allow each Contracting Party to regulate, and to introduce new measures relating to, investments in its Area in order to meet national public policy objectives;

Have agreed as follows:

ARTICLE 1 - Definitions

For the purposes of this Agreement,

(a) the term "investment" means every kind of asset owned or controlled, directly or indirectly, by an investor and has characteristics of an investment such as commitment of capital or other resources, the expectation of gain or profit, or assumption of risk, including:

- (i) a local enterprise or branch;
- (ii) shares, stocks or other forms of equity participation in an enterprise, including rights derived therefrom;
- (iii) bonds, debentures, loans and other forms of debt, including rights derived therefrom;

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- (iv) rights under contracts, including turnkey, construction, management, production or revenue sharing contracts; claims to money and to any performance under contract having a financial value;
- (v) intellectual property rights, including copyrights and related rights, patent rights and rights relating to utility models, trademarks, industrial designs, layout designs of integrated circuits, new varieties of plants, trade names, indications of source or geographical indications and undisclosed information;
- (vi) rights conferred pursuant to laws and regulations or contracts such as concessions, licences, authorisations and permits, including those for the exploration, prospect, exploitation and extraction of natural resources; and
- (vii) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges.

An investment includes the amounts yielded by investments, in particular, profit, interest, capital gains, dividends, royalties and fees. A change in the form in which assets are invested does not affect their character as an investment.

(b) the term "investor of a Contracting Party" means:

- (i) a natural person, who under the law of the Contracting Party:
 - (A) in respect of Japan, is a national of Japan; and
 - (B) in respect of the Republic of Kenya, is a citizen or national of the Republic of Kenya; or
- (ii) an enterprise of that Contracting Party, that seeks to make, is making or has made an investment in the Area of the other Contracting Party;

(c) an enterprise is:

- (i) "owned" by an investor if more than fifty (50) percent of the equity interest in it is owned by the investor; and
- (ii) "controlled" by an investor if the investor has the power to name a majority of its directors or otherwise to legally direct its actions;

(d) the term "enterprise of a Contracting Party" means any legal person or any other entity duly constituted or organised under the applicable laws and regulations of that Contracting Party, whether or not for profit, and whether private or government owned or controlled, including any corporation, trust, partnership, sole proprietorship, joint venture, association, organisation or company;

(e) the term "investment activities" means operation, management, maintenance, use, enjoyment and sale or other disposal of investments;

(f) the term "Area" means:

- (i) in respect of the Republic of Kenya, the land territory, internal waters, territorial sea and the airspace above them, as well as the maritime zone beyond the territorial sea, including the seabed and subsoil, over which the Republic of Kenya exercises sovereign rights or jurisdiction in accordance with its national laws in force and international law, for the purpose of exploration and exploitation of the natural resources of such areas; and
- (ii) in respect of Japan, the territory of Japan, and the exclusive economic zone and the continental shelf with respect to which Japan exercises sovereign rights or jurisdiction in accordance with international law; and

(g) the term "freely usable currency" means freely usable currency as defined under the Articles of Agreement of the International Monetary Fund.

ARTICLE 2 - Promotion and Admission of Investment

1. Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its Area.

2. Each Contracting Party shall, subject to its applicable laws and regulations, including those with regard to foreign ownership and control, admit investment of investors of the other Contracting Party.

ARTICLE 3 - National Treatment

1. Each Contracting Party shall in its Area accord to investors of the other Contracting Party and to their investments treatment no less favourable than the treatment it accords in like circumstances to its own investors and to their investments with respect to investment activities.

2. Paragraph 1 shall not be construed so as to prevent a Contracting Party from adopting or maintaining a measure that prescribes special formalities in connection with investment activities of foreign investors in its Area in accordance with its laws and regulations, provided that such special formalities do not impair the substance of the rights of investors of the other Contracting Party under this Agreement.

3. Paragraph 1 shall not apply to measures adopted or maintained by a Contracting Party with respect to incentives only for the purpose of promoting small and medium sized enterprises in its Area, to the extent that such measures do not materially affect the investments or investment activities of the investors of the other Contracting Party.

ARTICLE 4 - Most-Favoured-Nation Treatment

1. Each Contracting Party shall in its Area accord to investors of the other Contracting Party and to their investments treatment no less favourable than the treatment it accords in like circumstances to investors of a non-Contracting Party and to their investments with respect to investment activities.

2. Each Contracting Party shall in its Area accord to investors of the other Contracting Party and to their investments treatment no less favourable than the treatment it accords in like circumstances to investors of a non-Contracting Party and to their investments with respect to the admission of investments.

3. The provision of paragraph 2 shall not apply to:

- (a) measures related to:
 - (i) the acquisition of land property;
 - (ii) subsidies; or
 - (iii) government procurement;
- (b) any treatment accorded by a Contracting Party to investors of a non-Contracting Party and to their investments on the basis of reciprocity;
- (c) any preferential treatment resulting from the membership to any bilateral or multilateral international agreement involving protection of new varieties of plants, aviation, fishery or maritime matters; and
- (d) any measure relating to investments in public law enforcement and correctional services, and in public social services such as income security or insurance, social security or insurance, social welfare, primary and secondary education, public training, health and child care.

4. Neither Contracting Party shall, under any measure adopted after the date of entry into force of this Agreement and listed in subparagraphs (a)(i), (a)(iii) and (d) of paragraph 3, require an investor of the other Contracting Party, by reason of its nationality, to sell or otherwise dispose of an investment that exists at the time when the measure becomes effective.

5. The provisions of paragraphs 1 and 2 shall not be construed so as to oblige a Contracting Party to extend to investors of the other Contracting Party and to their investments treatment accorded to investors of a non-Contracting Party and to their investments by virtue of any membership to:

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- (a) a customs, economic or monetary union, a common market, a free trade area, an international agreement for regional economic integration or a similar international agreement; or
- (b) multilateral agreements in respect of protection of intellectual property rights.

6. It is understood that the "treatment" referred to in this Article does not include dispute settlement procedures provided for in other international agreements, including those provided for in other investment agreements.

ARTICLE 5 - General Treatment and Improvement of Investment Environment

1. Each Contracting Party shall in its Area accord to investments of investors of the other Contracting Party fair and equitable treatment and full protection and security in accordance with customary international law.

Note: This paragraph prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of the other Contracting Party. 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 by the customary international law minimum standard of treatment of aliens and do not create additional substantive rights. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this paragraph.

2. Neither Contracting Party shall, within its Area, in any way impair investment activities of investors of the other Contracting Party by arbitrary measures.

3. Each Contracting Party shall take appropriate measures to further improve investment environment in its Area for the benefit of investors of the other Contracting Party and their investments. In this regard, each Contracting Party shall endeavour to create and maintain favourable conditions for the investors of the other Contracting Party and their investments with respect to investment activities as well as the establishment, acquisition and expansion of investments.

ARTICLE 6 - Access to the Courts of Justice

Each Contracting Party shall in its Area accord to investors of the other Contracting Party treatment no less favourable than the treatment which it accords in like circumstances to its own investors or to investors of a non-Contracting Party with respect to access to the courts of justice and administrative tribunals and agencies in all degrees of jurisdiction, both in pursuit and in defence of such investors' rights.

ARTICLE 7 - Prohibition of Performance Requirements

1. Neither Contracting Party shall impose or enforce on an investor of the other Contracting Party, as a condition for investment activities in its Area, export requirements, export-import balancing requirements or requirements regarding the amount of foreign exchange inflows associated with investments of the investor, except in accordance with applicable regional and international laws and obligations.

2. For the purposes of this Article, "applicable regional laws and obligations" means the laws and obligations applied by virtue of membership to a customs, economic or monetary union, a common market or a free trade area.

ARTICLE 8 - Transparency

1. Each Contracting Party shall promptly publish, or otherwise make publicly available, the laws, regulations, administrative procedures and administrative rulings and judicial decisions of general application as well as international agreements which pertain to or affect the implementation and operation of this Agreement.

2. Each Contracting Party shall, upon request by the other Contracting Party, promptly respond to specific questions and provide that other Contracting Party with information on matters set out in paragraph 1.

3. Paragraphs 1 and 2 shall not be construed so as to oblige either Contracting Party to disclose confidential information, the disclosure of which would impede law enforcement or otherwise be contrary to the public interest, or which would prejudice privacy or legitimate commercial interests.

ARTICLE 9 - Entry, Sojourn and Residence of Investors

Each Contracting Party shall, subject to its applicable laws and regulations relating to entry, sojourn and residence, permit a natural person having the nationality of the other Contracting Party who wishes to enter the former Contracting Party and to remain therein for the purpose of business activities in connection with investments.

ARTICLE 10 - Expropriation and Compensation

1. Neither Contracting Party shall expropriate or nationalise investments in its Area of investors of the other Contracting Party or take any measure equivalent to expropriation or nationalisation (hereinafter referred to as "expropriation") except:

- (a) for a public purpose;
- (b) in a non-discriminatory manner;
- (c) upon payment of prompt, adequate and effective compensation pursuant to paragraphs 3, 4, and 5; and
- (d) in accordance with due process of law.

2. For the purposes of this Agreement, the determination of whether a measure or a series of measures by a Contracting Party have an effect equivalent to expropriation requires a case-by-case, fact-based inquiry, and evidence that includes:

- (a) permanent and complete or near complete deprivation of the value of investment;
- (b) permanent and complete or near complete deprivation of the investor's right of management and control over the investment; or
- (c) an appropriation of the investment by the Contracting Party which results in transfer of the complete or near complete value of that investment to that Contracting Party, to an agency of that Contracting Party or to a third party.

3. The compensation shall be equivalent to the fair market value of the expropriated investments at the time when the expropriation was publicly announced or when the expropriation occurred, whichever is the earlier. The fair market value shall not reflect any change in value occurring because the expropriation had become publicly known earlier.

4. The compensation shall be paid without delay and shall include interest at a commercially reasonable rate, taking into account the length of time until the time of payment. It shall be effectively realisable and freely transferable and shall be freely convertible into the currency of the Contracting Party of the investors concerned, and into freely usable currency, at the market exchange rate prevailing on the date of expropriation.

5. Without prejudice to the provisions of Article 15, the investors affected by expropriation shall have a right of access to the courts of justice or administrative tribunals or agencies of the Contracting Party making the expropriation to seek a prompt review of the investors' case and the amount of compensation in accordance with the principles set out in this Article.

6. This Article shall 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 applicable international agreements on intellectual property to which both Contracting Parties are parties.

ARTICLE 11 - Compensation for Losses or Damages

1. Each Contracting Party shall accord to investors of the other Contracting Party that have suffered loss or damage relating to their investments in the Area of the former Contracting Party due to armed conflict or a state of emergency such as revolution, insurrection, civil

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disturbance or any other similar event in the Area of that former Contracting Party, treatment, as regards restitution, indemnification, compensation or any other settlement, that is no less favourable than that which it accords to its own investors or to investors of a non-Contracting Party, whichever is more favourable to the investors of the other Contracting Party.

2. Any payment as a means of settlement referred to in paragraph 1 shall be effectively realisable, freely transferable and freely convertible at the market exchange rate into the currency of the Contracting Party of the investors concerned and into freely usable currency.

ARTICLE 12 - Subrogation

1. If a Contracting Party or its designated agency makes a payment to any investor of that Contracting Party under an indemnity, guarantee or insurance contract, pertaining to an investment of such investor in the Area of the other Contracting Party, the latter Contracting Party shall recognise the assignment to the former Contracting Party or its designated agency of any right or claim of such investor on account of which such payment is made and shall recognise the right of the former Contracting Party or its designated agency to exercise by virtue of subrogation any such right or claim to the same extent as the original right or claim of the investor.

2. As regards payments to be made to the former Contracting Party or its designated agency by virtue of the assignment of right or claim as provided for in paragraph 1 and the transfer of such payment, the provisions of Articles 10 and 11 shall apply *mutatis mutandis*.

ARTICLE 13 - Transfers

1. Each Contracting Party shall ensure that all transfers relating to investments in its Area of an investor of the other Contracting Party may be made freely into and out of its Area without delay. Such transfers shall include, in particular, though not exclusively:

- (a) the initial capital and additional amounts to maintain or increase investments;
- (b) profits, interest, capital gains, dividends, royalties, fees and other current incomes accruing from investments;
- (c) payments made under a contract including loan payments in connection with investments;
- (d) proceeds of the total or partial sale or liquidation of investments;
- (e) earnings and remuneration of personnel from the other Contracting Party engaged in activities in connection with investments in the Area of the former Contracting Party;
- (f) payments made in accordance with Articles 10, 11 and 12; and
- (g) payments arising out of the settlement of a dispute under Article 15.

2. Each Contracting Party shall further ensure that the transfers provided for in paragraph 1 may be made without delay in freely usable currency at the market exchange rate prevailing on the date of the transfer.

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

- (a) bankruptcy, insolvency or the protection of the rights of creditors;
- (b) issuing, trading or dealing in securities;
- (c) criminal or penal offences;
- (d) ensuring compliance with orders or judgments in adjudicatory proceedings;
- (e) financial reporting or record keeping of transfers to assist law enforcement or financial regulatory authorities; or
- (f) ensuring compliance with payment of taxes.

ARTICLE 14 - Settlement of Disputes between the Contracting Parties

1. Disputes between the Contracting Parties concerning the interpretation and application of this Agreement shall, as far as possible, be settled by negotiations through diplomatic channels.
2. If the dispute referred to in paragraph 1 cannot thus be settled within six (6) months following the date on which either Contracting Party requested the negotiations as provided for in paragraph 1, it shall at the request of either Contracting Party be submitted to an Arbitral Tribunal.
3. The Arbitral Tribunal referred to in paragraph 2 shall be constituted for each individual case in the following way. Within two (2) months from the date of the receipt of the request for arbitration, each Contracting Party shall appoint one member of the Arbitral Tribunal. Those two members shall then select a national of a third State who on approval by the two Contracting Parties shall be appointed Chairperson of the Arbitral Tribunal. The Chairperson shall be appointed within four (4) months from the date when the Contracting Party which was later to appoint its member has notified the other Contracting Party of the appointment.
4. If the necessary appointments have not been made within the periods specified in paragraph 3, either Contracting Party may, in the absence of any other agreement, invite the Secretary-General of the Permanent Court of Arbitration at The Hague to make the appointments.
5. The Arbitral Tribunal shall reach its decision by a majority of votes. The decisions of the Arbitral Tribunal shall be final and binding on both Contracting Parties. Each Contracting Party shall bear the costs of its own member and of its representation in the arbitral proceedings. Both Contracting Parties shall assume an equal share of the costs of the Chairperson, as well as any other costs. The Arbitral Tribunal may make a different decision regarding the sharing of the costs. In all other respects, the Arbitral Tribunal shall determine its own rules of procedure.
6. Issues subject to dispute referred to in paragraph 1 shall be decided in accordance with the provisions of this Agreement and the generally recognised principles of international law.

ARTICLE 15 - Settlement of Investment Disputes between a Contracting Party and an Investor of the Other Contracting Party

1. For the purposes of this Article, "investment dispute" is a dispute between a Contracting Party and an investor of the other Contracting Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of any obligation of the former Contracting Party under this Agreement with respect to that investor of the other Contracting Party or its investments in the Area of the former Contracting Party.
2. Subject to paragraph 8, nothing in this Article shall be construed so as to prevent an investor who is a party to an investment dispute (hereinafter referred to in this Article as "disputing investor") from seeking administrative or judicial settlement within the Area of the Contracting Party that is a party to the investment dispute (hereinafter referred to in this Article as "disputing Party").
3. Any investment dispute shall, as far as possible, be settled amicably through consultations between the disputing investor and the disputing Party (hereinafter referred to in this Article as "the disputing parties").
4. The investment dispute may, at the choice of the disputing investor, be submitted to:
 - (a) a competent court or administrative tribunal of the disputing Party; or
 - (b) an arbitration in accordance with:
 - (i) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington, March 18, 1965 (hereinafter referred to in this Article as the "ICSID Convention"), if both Contracting Parties are parties to the ICSID Convention;

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- (ii) the Additional Facility Rules of the International Centre for Settlement of Investment Disputes, if either, but not both, Contracting Party is a party to the ICSID Convention;
- (iii) the Arbitration Rules of the United Nations Commission on International Trade Law; or
- (iv) any other arbitration rules, if agreed with the disputing Party,
- (v) provided that, for the purposes of subparagraph (b), the investment dispute cannot be settled through the consultation referred to in paragraph 3 within six (6) months from the date of the submission of the written request for consultation to the disputing Party.

5. Each Contracting Party hereby consents to the submission of an investment dispute by a disputing investor to arbitration set forth in paragraph 4 chosen by the disputing investor.

6. Notwithstanding paragraph 5, no investment disputes may be submitted to arbitration set forth in paragraph 4, if more than three (3) years have elapsed since the date on which the disputing investor acquired or should have first acquired, whichever is the earlier, the knowledge that the disputing investor had incurred loss or damage referred to in paragraph 1.

7. An arbitral tribunal established under paragraph 4 shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

8. Once the disputing investor has submitted an investment dispute to the competent court or administrative tribunal of the disputing Party or to one of the arbitrations set out in paragraph 4, the choice of the disputing investor shall be final and the disputing investor may not submit thereafter the same dispute to the other arbitrations set out in paragraph 4.

9. Notwithstanding paragraphs 4 and 5, no investment dispute may be submitted to the arbitration set out in paragraph 4 unless the disputing investor gives the disputing Party written waiver of any right to initiate or continue before any competent court or administrative tribunal of the disputing Party with respect to any measure of the disputing Party alleged to constitute a breach referred to in paragraph 1.

10. The disputing Party shall deliver to the other Contracting Party:

- (a) written notice of the investment dispute submitted to the arbitration no later than thirty (30) days after the date on which the investment dispute was submitted; and
- (b) copies of all pleadings filed in the arbitration.

11. The Contracting Party which is not the disputing Party may, upon written notice to the disputing parties, make submissions to the arbitral tribunal on a question of interpretation of this Agreement.

12. The arbitral tribunal may award only:

- (a) a judgment whether or not there has been a breach by the disputing Party of any obligation under this Agreement with respect to the disputing investor and its investments; and
- (b) one or both of the following remedies, only if there has been such a breach:
 - (i) monetary damages and applicable interest; and
 - (ii) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest, in lieu of restitution.

The arbitral tribunal may also award cost and attorney's fees in accordance with this Agreement and applicable arbitration rules.

13. The disputing Party may make available to the public in a timely manner all documents, including an award, submitted to, or issued by, an arbitral tribunal established under paragraph 4, subject to redaction of:

- (a) confidential business information;
- (b) information which is privileged or otherwise protected from disclosure under the applicable laws and regulations of either Contracting Party; and
- (c) information which shall be withheld pursuant to the relevant arbitration rules.

14. Unless the disputing parties agree otherwise, the arbitration shall be held in a country that is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 (hereinafter referred to in this Article as "the New York Convention").

15. The award rendered by the arbitral tribunal shall be final and binding upon the disputing parties. This award shall be executed in accordance with the applicable laws and regulations, as well as relevant international law including the ICSID Convention and the New York Convention, concerning the execution of award in force in the country where such execution is sought.

ARTICLE 16 - Security Exceptions

1. Notwithstanding any other provisions in this Agreement other than the provisions of Article 11, each Contracting Party may take any measure:

- (a) which it considers necessary for the protection of its essential security interests;
 - (i) taken in time of war, or armed conflict, or other emergency in that Contracting Party or in international relations; or
 - (ii) relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons; or
- (b) in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

2. In cases where a Contracting Party takes any measure, pursuant to paragraph 1 above, that does not conform with the obligations of the provisions of this Agreement other than the provisions of Article 11, that Contracting Party shall not use such measure as a means of avoiding its obligations.

ARTICLE 17 - Safeguard Measures

1. A Contracting Party may adopt or maintain measures not conforming with its obligations under Article 3 relating to crossborder capital transactions and Article 13:

- (a) in the event of serious balance-of-payments and external financial difficulties or threat thereof; or
- (b) in cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies.

2. Measures referred to in paragraph 1:

- (a) shall be consistent with the Articles of Agreement of the International Monetary Fund, so long as the Contracting Party taking the measures is a party to the said Articles;
- (b) shall not exceed those necessary to deal with the circumstances set out in paragraph 1 above;
- (c) shall be temporary and shall be eliminated as soon as conditions permit;
- (d) shall be promptly notified to the other Contracting Party; and
- (e) shall avoid unnecessary damages to the commercial, economic and financial interests of the other Contracting Party.

3. Nothing in this Agreement shall be regarded as altering the rights enjoyed and obligations undertaken by a Contracting Party as a party to the Articles of Agreement of the International Monetary Fund.

[Subsidiary]

ARTICLE 18 - Prudential Measures

1. Notwithstanding any other provisions of this Agreement, a Contracting Party shall not be prevented from taking measures relating to financial services for prudential reasons, including measures for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by an enterprise supplying financial services, or to ensure the integrity and stability of its financial system.
2. Where the measures taken by a Contracting Party pursuant to paragraph 1 do not conform with this Agreement, they shall not be used as a means of avoiding the obligations of the Contracting Party under this Agreement.

ARTICLE 19 - Intellectual Property Rights

1. The Contracting Parties shall, in accordance with their respective applicable laws and regulations, grant and ensure the adequate and effective protection of intellectual property rights, and promote efficiency and transparency in the administration of intellectual property protection system. For this purpose, the Contracting Parties shall promptly consult with each other at the request of either Contracting Party. Depending on the results of the consultation, each Contracting Party shall, in accordance with its applicable laws and regulations, take appropriate measures to remove the factors which are recognised as having adverse effects to the investments of investors of the other Contracting Party.
2. Nothing in this Agreement shall affect the rights and obligations of the Contracting Parties under multilateral agreements in respect of protection of intellectual property rights to which the Contracting Parties are parties.

ARTICLE 20 - Taxation

1. Nothing in this Agreement shall affect the rights and obligations of either Contracting Party under a convention on avoidance of double taxation. In the event of any inconsistency between this Agreement and any such convention, that convention shall prevail to the extent of the inconsistency.
2. Articles 3, 4 and 7 shall not apply to taxation measures.

ARTICLE 21 - Consultations

The Contracting Parties shall, at the request of either Contracting Party, hold consultations for the following purposes:

- (a) to discuss and review the implementation and operation of this Agreement;
- (b) to exchange information on and to discuss investment-related matters within the scope of this Agreement which relate to improvement of investment environment; and
- (c) to discuss any other investment-related matters concerning this Agreement.

Such consultations shall be held between the competent authorities of the Contracting Parties in a place and at a time agreed on by the Contracting Parties.

ARTICLE 22 - Health, Safety and Environmental Measures and Labour Standards

Each Contracting Party shall recognise the importance of encouraging investments by investors of the other Contracting Party or of a non-Contracting Party without relaxing its health, safety or environmental measures or by lowering its labour standards. To this effect each Contracting Party should not waive or otherwise derogate from such measures or standards as an encouragement for the establishment, acquisition or expansion of investments in its Area by investors of the other Contracting Party or of a non-Contracting Party.

ARTICLE 23 - Denial of Benefits

1. A Contracting Party may deny the benefits of this Agreement to an investor of the other Contracting Party that is an enterprise of the other Contracting Party and to its investments

if the enterprise is owned or controlled by an investor of a non-Contracting Party and the denying Contracting Party:

- (a) does not maintain diplomatic relations with the non-Contracting Party; or
- (b) adopts or maintains measures with respect to the non-Contracting Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Agreement were accorded to the enterprise or to its investments.

2. Subject to prior notification and consultation, a Contracting Party may deny the benefits of this Agreement to an investor of the other Contracting Party that is an enterprise of the other Contracting Party and to its investments if the enterprise is owned or controlled by an investor of a non-Contracting Party and the enterprise has no substantial business activities in the Area of the other Contracting Party.

ARTICLE 24 - Review

Upon the request of either Contracting Party, the Contracting Parties shall undertake a review of this Agreement with a view to further promoting investment between the Contracting Parties.

ARTICLE 25 - Headings

The headings of the Articles of this Agreement are inserted for convenience of reference only and shall not affect the interpretation of this Agreement.

ARTICLE 26 - Final Provisions

1. The Contracting Parties shall notify each other of the completion of their respective internal legal procedures required for the entry into force of this Agreement. This Agreement shall enter into force on the thirtieth day after the date of the receipt of the latter notification. 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 3.

2. This Agreement shall also apply to all investments of investors of either Contracting Party acquired in the Area of the other Contracting Party in accordance with the applicable laws and regulations of that other Contracting Party prior to the entry into force of this Agreement.

3. 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.

4. In respect of investments acquired prior to the date of termination of this Agreement, the provisions of this Agreement shall continue to be effective for a period of ten (10) years from the date of termination of this Agreement.

5. This Agreement shall not apply to claims arising out of events which occurred prior to its entry into force.
