

(Legislative Supplement No. 57)

LEGAL NOTICE No. 170

THE FOREIGN INVESTMENT PROTECTION ACT

(Cap. 518)

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

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 1

DEFINITIONS

For the purposes 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:

- (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

1. (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 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.

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

ARTICLE 7

SUBROGATION

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:

- (a) (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:

- (b) 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);
- (c) 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 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.

Dated the 3rd November, 2014.

HENRY ROTICH,
*Cabinet Secretary for the,
National Treasury.*

