

Date: 23 July 1999

cc: PS/Mr Lloyd

[Redacted]

Legal Advisers

[Redacted]

Mr Butler  
Private Secretary

**UK/KENYA INVESTMENT PROMOTION AND PROTECTION AGREEMENT (IPPA):  
FULL POWERS**

ISSUE

1. We have negotiated the text of an IPPA with Kenya. Should the Secretary of State approve it and agree that the IPPA be signed by our High Commissioner in Nairobi at the end of August?

PREFERRED OPTION

2. That the Secretary of State approve the text and sign the attached Full Powers for Mr James. AD(E), Legal Advisers, LRD and British Trade International concur.

TIMING

3. Deadline of 4 August (before the Secretary of State goes on leave).

BACKGROUND

4. IPPAs are international bilateral agreements between governments which protect and encourage British investment overseas. The IPPA agreed with Kenya is close to the UK model text and preserves the high standards of protection that we seek for UK investors.

5. The Kenyan Minister of Finance (Hon Dr Masakhalia) will probably sign on behalf of his government.

PUBLIC PRESENTATION

6. DTI and Post will arrange, in conjunction with ERD.

RESOURCE IMPLICATIONS

7. None.

[Redacted]

ERD (K323)

[Redacted]

022/004

10

12a  
18/2/99

From: [REDACTED]

Date: 16 July 1999

cc: [REDACTED]

To: [REDACTED]

XP6c  
DTI  
KH 402

**SIGNING OF UK/KENYA IPPA: PUBLICITY**

1. You may have seen from my fax of 3 June to [REDACTED] (Nairobi) that I suggested I liaise with you on the question of local publicity for this event.

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2. As you may recall from the time when the UK/Uganda IPPA was signed last year, we traditionally look to geographical desks in the DTI to liaise direct with Posts on the preparation of any press releases (and speeches) in connection with IPPA signings. For ease of reference, I attach a copy of the Press Notice which XP6c prepared for the Uganda one. I think that this provides very good structure to be fleshed out with country specific information on Kenya.

3. As far as IPPA specific information is concerned (whichever country is involved), a press release would normally contain such general statements as:

- IPPAs are international bilateral treaties between governments which are designed to protect and encourage UK investment overseas.
- British companies often look for the existence of an IPPA when making investment decisions.
- The signing of the IPPA will give added confidence to UK investors in [name country] and emphasises our commitment to trade and investment with [name country].
- [In Notes for Editors part] The UK has signed IPPAs with 91 countries since 1975.

4. Since no UK Minister is to be involved, I doubt the worth of making arrangements for a Press Release in London: past experience has taught us that the British Press do not regard IPPAs as being very print-worthy (even when Ministers sign in London!). However, I shall make arrangements after signature for the CBI (and Whitehall) to be informed and for a Sales Lead to be issued on this subject.

5. As for IPPA-related ideas for the short speech which Jeffrey James might wish to make at the signing ceremony, I suggest the following bull points:

- Delighted to sign this Agreement today (obviously!).
- Agreement demonstrates commitment of both Governments to create long-term climate of confidence for investors.
- While being good for business generally, the IPPA should encourage bilateral investment flows and further strengthen trade and investment links between UK and Kenya.

The attached examples of speeches made at the recent signings of two of our other IPPAs (Croatia and Hong Kong) provide other ideas of the sort of country-specific information that might also be included.

6. I would be happy to look at any drafts mentioning IPPAs, should you so wish.

---

[REDACTED]

[REDACTED]

[REDACTED]

Economic Relations Department (FCO)

[REDACTED]

Fax: 270 2266

A  
F  
23/2

Foreign and Commonwealth Office  
Economic Relations Department

.....t

. From: [REDACTED]

. To: [REDACTED]

. cc: (see below)

. Date: 08 July 1999

. Fax No: 00-254-2-719082

. Subject: UK/KENYA IPPA

. Number of pages: 5  
(including cover)

.....g

Dear [REDACTED]

Comments

1. Many thanks for your fax of 5 July, with the welcome news that the Kenyans have agreed that we can now move forward to signature around end-August/early-September.

2. Treaty Section have no problem with your preparing both versions of the IPPA at the High Commission. Please let me know how you would like the text (on my Aramis) sent to you, either on disk or by telegram. Alternatively, I am sure that I could arrange at this end for the text to be converted on to a disk compatible with whatever software you will wish to use for preparing the text. Please advise.

3. I attach Treaty Section's useful "Guidelines for Signing a Treaty Overseas". To recap, there will be two original versions (both in English) to be signed, one with the UK precedence, the other (which the Kenyan side will obviously keep) in the Kenyan precedence. [REDACTED]

[REDACTED] As you will see, the Kenyan version will not only have the signature blocks in the order as laid out in your fax, but it will also have the "Government of Kenya" appearing first in the title. preamble and final paragraph of the treaty. But there will be only one version in the Kenyan precedence.

4. I am sending by bag 30 sheets of FCO Treaty Paper on which our version of the Agreement should be reproduced (and there should be ample left for you to use for the Kenyan version, should they not wish their own official paper to be used for some reason). Treaty Section

are happy for you to take up the kind offer of using the Kenyans' red binders for both documents at the signing ceremony.

5. I shall take forward the Full Powers Certificate in due course, perhaps once we have a specific date for the signing. As this will obviously need to mention the High Commissioner by name, I would be grateful to know whether he will wish to sign (always minus any honours or decorative titles) as "Jeffrey R James", "J R James" etc. (When the treaty is eventually published and laid before Parliament, it will bear the High Commissioner's name in block capitals under the UK signature block).

6. I look forward to hearing from you.

*Y/SWT*  
[Redacted]

cc [Redacted]  
[Redacted]  
[Redacted]  
[Redacted]

.....  
Economic Relations Department  
K323  
Foreign & Commonwealth Office  
King Charles Street  
London SW1A 2AH

[Redacted]

[Redacted]

Signature: \_\_\_\_\_

FAX MESSAGE



British High Commission Nairobi

Upper Hill Rd PO Box 30133 Nairobi

Telephone: (254) (2) 714699 Facsimile: (254) (2) 719082

Your ref:

Our ref:

Date: 5 July 1999

Fax: 000 44 171 270 2266

TO: [Redacted]

FROM: [Redacted]

CC:

Consists of [Redacted] pages including leader

E-Mail: Commercial2@Nairobi.mail.fco.gov.uk

[Redacted signature]

UK/KENYA IPPA

1. Mr Mwangi, Under Secretary of the Finance Ministry, has confirmed that he is content with the final draft agreement. Although his department has the appropriate red binders, he would prefer, if possible, for the agreement papers to be prepared by us. Apparently both the Italian and German versions of the IPPA were prepared by the respective Embassies in Kenya. Can I ask you to follow this up with Treaty Section? Mr Mwangi would like both original versions to be signed with the Government of Kenya listed first, i.e. like thus:

(in English only)

For the Government of the Republic of Kenya:

For the Government of the United Kingdom of Great Britain and Northern Ireland:

Please let me know if this is acceptable.

2. You will be pleased to know that Mr Mwangi said that his Ministry would like the agreement signed as soon as possible. He agreed that the signature should be done locally between the High Commissioner and the Kenya Minister for Finance. You will thus need to submit for a Full Powers Certificate. The ceremony is likely to place at the end of August/beginning of September. I think we are just about there..

You own

[Redacted signature]

[Redacted signature] Treaty Section (by fax)

1. May we discuss, please?

Thanks [Redacted signature]

[Redacted signature]

022/004

Mr Whittington P. Good. 8/6  
Looks like we may finally be there.  
WJ Sum 4/6

Foreign and Commonwealth Office  
Economic Relations Department

From: [REDACTED]

To: [REDACTED]

Fax No: 00-254-2-719082

Subject: UK/KENYA IPPA

Number of pages: 1  
(including cover)

per [REDACTED] 8/6

Dear [REDACTED]

3 JUNE 1999

Comments

1. As [REDACTED] confirmed in his fax to you of 18 May (while I was on leave), Finance Minister Masakhalia's letter of 21 April means that we should now be able to move to signature of this bilateral treaty (and here, I assume that the Kenyans accepted without complaint the proposed, non-controversial addition to Article 6 contained in my fax to you of 8 January). I am sending you by bag the final version of the IPPA for you to send on to the Kenyans to confirm that they are content with the whole document.

2. Since neither AD(E) nor XP6c can think of any forthcoming, suitable incoming/outgoing Ministerial visits which we might use as an opportunity for signing the Agreement, I suggest that signature be done locally by the High Commissioner (and Mr Masakhalia?) to maximise publicity. If this is acceptable to all concerned, responsibility for preparing the documents and arranging the signature ceremony would fall to the Kenyans (as I explained in my fax of 3 June to [REDACTED] on this subject). At this end, I would submit to the Secretary of State for a Full Powers Certificate to enable the High Commissioner to sign on behalf of HMG and liaise with Rozmin Blatt on the question of a Press Release.

3. Please let me know whether you and the Kenyans are happy to proceed on this basis.

Yours,  
[REDACTED]

Economic Relations Department Tel No: 270 2672 Fax No: 270 2266

cc [REDACTED]

[DRAFT] AGREEMENT [30/04/99]

BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM  
OF GREAT BRITAIN AND NORTHERN IRELAND

AND

THE GOVERNMENT OF THE REPUBLIC OF KENYA

FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya;

Desiring to create favourable conditions for greater investment by nationals and companies of one State in the territory of the other State;

Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both States;

Have agreed as follows:

#### ARTICLE 1

##### Definitions

For the purposes of this Agreement:

(a) "investment" means every kind of asset and in particular, though not exclusively, includes:

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

(ii) shares in and stock and debentures of a company and any other form of participation in a company;



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

(iv) intellectual property rights, goodwill, technical processes and know-how;

(v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

A change in the form in which assets are invested does not affect their character as investments and the term "investment" includes all investments, whether made before or after the date of entry into force of this Agreement;

(b) "returns" means the amounts yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties and fees;

(c) "nationals" means:

(i) in respect of the United Kingdom: physical persons deriving their status as United Kingdom nationals from the law in force in the United Kingdom;

(ii) in respect of the Republic of Kenya: physical persons deriving their status as Kenyan nationals from the law in force in Kenya;

(d) "companies" means:

(i) in respect of the United Kingdom: corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 12;

(ii) in respect of the Republic of Kenya: any juridical person as well as any commercial or other company or association with or without legal personality and having its residence within the Republic of Kenya, irrespective of whether or not its activities are directed at profit;

(e) "territory" means:

(i) in respect of the United Kingdom: Great Britain and Northern Ireland, including the territorial sea and any maritime area situated beyond the territorial sea of the United Kingdom which has been or might in the future be designated under the national law of the United Kingdom in accordance with international law as an area

within which the United Kingdom may exercise rights with regard to the sea-bed and subsoil and the natural resources and any territory to which this Agreement is extended in accordance with the provisions of Article 12;

(ii) in respect of the Republic of Kenya: Kenya, including the territorial waters and any maritime area situated beyond the territorial waters of Kenya which have been or might in the future be designated under the national laws of Kenya in accordance with international law as an area within which Kenya may exercise rights with regard to the sea-bed and subsoil and the natural resources.

## **ARTICLE 2**

### **Promotion and Protection of Investment**

(1) Each Contracting Party shall encourage and create favourable conditions for nationals or companies of the other Contracting Party to invest capital in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such capital.

(2) Investments of nationals or companies 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 or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.

## **ARTICLE 3**

### **National Treatment and Most-favoured-nation Provisions**

(1) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.

(2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.

(3) For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.

#### ARTICLE 4

##### Compensation for Losses

(1) Nationals or companies of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, 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 treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own nationals or companies or to nationals or companies of any third State. Resulting payments shall be freely transferable.

(2) Without prejudice to paragraph (1) of this Article, nationals or companies 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 property by its forces or authorities, or

(b) destruction of their property 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 adequate compensation. Resulting payments shall be freely transferable.

## ARTICLE 5

### Expropriation

(1) Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely transferable. The national or company 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 Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in 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 nationals or companies 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 prompt, adequate and effective compensation in respect of their investment to such nationals or companies of the other Contracting Party who are owners of those shares.

## ARTICLE 6

### Repatriation of Investment and Returns

Each Contracting Party shall in respect of investments guarantee to nationals or companies of the other Contracting Party the unrestricted transfer of their investments and returns. Transfers shall be effected without delay in the convertible currency in which the capital was originally invested or in any other convertible currency agreed by the investor and the Contracting Party concerned. Transfers shall be made at the rate of exchange applicable on the date of transfer, unless otherwise agreed.

## **ARTICLE 7**

### **Exceptions**

The provisions of this Agreement relative to the grant of treatment not less favourable than that accorded to the nationals or companies of either Contracting Party or of any third State shall not be construed so as to oblige one Contracting Party to extend to the nationals or companies of the other the benefit of any treatment, preference or privilege resulting from:

(a) any existing or future customs union or similar international agreement to which either of the Contracting Parties is or may become a party; or

(b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.

## **ARTICLE 8**

### **Reference to International Centre for Settlement of Investment Disputes**

(1) Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (hereinafter referred to as "the Centre") for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965 any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.

(2) A company which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which before such a dispute arises the majority of shares are owned by nationals or companies of the other Contracting Party shall in accordance with Article 25(2)(b) of the Convention be treated for the purposes of the Convention as a company of the other Contracting Party.

(3) If any such dispute should arise and agreement cannot be reached within three months between the parties to this dispute through pursuit of local remedies or otherwise, then, if the national or company affected also consents in writing to submit the dispute to the Centre for settlement by conciliation or arbitration under the Convention, either party may institute proceedings by addressing a request to

that effect to the Secretary-General of the Centre as provided in Articles 28 and 36 of the Convention. In the event of disagreement as to whether conciliation or arbitration is the more appropriate procedure the national or company affected shall have the right to choose. The Contracting Party which is a party to the dispute shall not raise as an objection at any stage of the proceedings or enforcement of an award the fact that the national or company which is the other party to the dispute has received in pursuance of an insurance contract an indemnity in respect of some or all of his or its losses.

(4) Neither Contracting Party shall pursue through the diplomatic channel any dispute referred to the Centre unless:

(a) the Secretary-General of the Centre, or a conciliation commission or an arbitral tribunal constituted by it, decides that the dispute is not within the jurisdiction of the Centre; or

(b) the other Contracting Party shall fail to abide by or to comply with any award rendered by an arbitral tribunal.

## ARTICLE 9

### Disputes between the Contracting Parties

(1) Disputes between the Contracting Parties concerning the interpretation or application of this Agreement should, if possible, be settled through the diplomatic channel.

(2) If a dispute between the Contracting Parties cannot thus be settled, it shall 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, 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 two months from the date of appointment of the other two members.

(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 shall be invited to make the necessary appointments.

(5) The arbitral tribunal shall 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 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, 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 both Contracting Parties. The tribunal shall determine its own procedure.

## ARTICLE 10

### Subrogation

(1) If one Contracting Party or its designated Agency ("the first Contracting Party") makes a payment under an indemnity given in respect of an investment in the territory of the other Contracting Party ("the second Contracting Party"), the second Contracting Party shall recognise:

(a) the assignment to the first Contracting Party by law or by legal transaction of all the rights and claims of the party indemnified; and

(b) that the first Contracting Party is entitled to exercise such rights and enforce such claims by virtue of subrogation, to the same extent as the party indemnified.

(2) The first Contracting Party shall be entitled in all circumstances to the same treatment in respect of:

(a) the rights and claims acquired by it by virtue of the assignment, and

(b) any payments received in pursuance of those rights and claims,

as the party indemnified was entitled to receive by virtue of this Agreement in respect of the investment concerned and its related returns.

(3) Any payments received in non-convertible currency by the first Contracting Party in pursuance of the rights and claims acquired shall be freely available to the first Contracting Party for the purpose of meeting any expenditure incurred in the territory of the second Contracting Party.

#### **ARTICLE 11**

##### **Application of other Rules**

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 the present Agreement contain rules, whether general or specific, entitling investments by nationals or companies of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement.

#### **ARTICLE 12**

##### **Territorial Extension**

At the time of signature of this Agreement, or at any time thereafter, the provisions of this Agreement may be extended to such territories for whose international relations the Government of the United Kingdom are responsible as may be agreed between the Contracting Parties in an Exchange of Notes.

#### **ARTICLE 13**

##### **Entry into Force**

This Agreement shall enter into force on the day of signature.



ARTICLE 14

Duration and Termination

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 to the other. Provided that in respect of investments made whilst the Agreement is in force, its provisions shall continue in effect with respect to such investments for a period of twenty years after the date of termination and without prejudice to the application thereafter of the rules of general international law.

In witness whereof the undersigned, duly authorised thereto by their respective Governments, have signed this Agreement.

Done in duplicate at ..... this .....  
day of ..... 199\_

For the Government of  
the United Kingdom of  
Great Britain and  
Northern Ireland:

For the Government of  
the Republic of  
Kenya:

022/004

FACSIMILE MESSAGE

17

# Overseas Trade Services

*me  
all  
4.*



*Ph  
S  
12/15/1*

To: [Redacted]  
NAIROBI

Department of  
Trade and Industry

Fax: [Redacted]

Joint Export Promotion  
Directorate  
Overseas Trade Services  
Kingsgate House  
66-74 Victoria Street  
London, SW1E 6SW

From: [Redacted]

Room: KH 929

Fax: 0171 215 4644

Telex:

Date: 08 January 1999

Page 1 of 1



## UK/KENYA IPPA

1. First of all, Happy New Year! Hope that you are settling into your new home and job OK. Now, to business. The papers on these negotiations rest with the Finance Minister's letter of 15 September to the High Commissioner, a copy of which was finally received in London by bag on 16 November (after some difficulties with our respective fax machines). I have now received both DTI's and FCO Legal Advisers' comments on it.



4. On Article 6, we can accept the language proposed by the Kenyans, with the following (underlined) addition:

"Transfers shall be made at the rate of exchange applicable on the date of transfer, unless otherwise agreed."

It is implicit in this language that both parties would need to be party to such an agreement, obviating the need to mention them.

5. I look forward to learning of the Kenyan Government's reaction in due course.

*Yours*  
[Redacted]  
[Redacted]

the department for Enterprise

22/004

(11)

Reference :

To: [REDACTED]  
TPE2b  
KH345

[REDACTED]  
[REDACTED]  
[REDACTED]

pc S  
2029

From: [REDACTED]  
Joint Export Promotion Directorate  
KH 929  
Kingsgate House  
7 215 4375  
Fax: 0171 215 4644  
Team Mail: [REDACTED]

19 November 1998

**UK/KENYA IPPA**

1. Please refer to the attached letter of 15 September from the Kenyan Finance Minister to the High Commissioner (which I received in legible form only this week!).
2. [REDACTED]
3. I would be grateful for your - and [REDACTED] - views on this, and the Minister's other point about the wording in Article 6. Here, I am inclined to go back to (and accept) the Kenyans' original wording, i.e. "Unless otherwise agreed by the investor and the Contracting Party, transfers shall be made at the rate of exchange applicable on the date of transfer".
4. Thanks.

[REDACTED]

[REDACTED]

Joint Export Promotion Directorate

5

Reference :

To: [redacted]  
TPE2b  
KH 345

Copy: [redacted] info.  
[redacted] - for info

*John S. 29/7*

From: [redacted]  
Joint Export Promotion Directorate  
KH 929  
Kingsgate House  
[redacted]  
Fax: 0171 215 4644  
[redacted]

20 July 1998

**UK/KENYA IPPA**

1. Please refer to the attached letter of 14 July from [redacted] in Nairobi, enclosing a letter from [redacted] to the High Commissioner on this matter.
2. The Kenyan Government have indeed conceded on all the points which we contested: the enclosure to my letter of 3 June to [redacted] refers (copy attached for ease of reference). Provided you are now happy with the explanation given by the Minister for their proposed wording for Article 1 (d) (ii), I believe that we can proceed towards signature. (I note from her minute to me of 29 May that [redacted] does not have any problem with this Kenyan definition.)
3. I would be grateful for your confirmation on this point.

[redacted]  
[redacted]

Q/E 4	121/001/98
23 JUL 1998	
RECEIVED	

Sent  
8033  
r/c  
(4)



14 July 1998

**British  
High Commission  
Nairobi**

[Redacted]  
**JEPD  
Overseas Trade Services  
DTI**

Commercial Department  
Upper Hill Road, Nairobi  
P.O. Box 30133

Telephone : 254 2 714699  
Facsimile : 254 2 719082

By Fax 00044 171 215 4644

[Redacted]  
**UK/Kenya IPPA**

1. I am writing in [Redacted] absence on a UK duty tour/leave to let you know that [Redacted] has now responded to the High Commissioner's letter of 5 June. Please see the following copy.
2. From a quick read of the file, this reply looks encouraging. All the points appear to have been answered, and our expanded comments secured Articles 2(2), 4(2), 12 & 14 as suggested. The CoK accept the preferred version of Article 8. This leaves their clarification of Article 1 (d) (ii). If this is deemed satisfactory, presumably a final draft document can be drawn up?
3. On timing, you should know that Jeffrey James has just left on his recreational journey and won't be back (in the office) until 3 August. This takes us well into the holiday season, though August is not treated here as the ultimate holiday month. [Redacted] may have views on timing, and should be contactable through the Country Desk. Also, I haven't seen any confirmation yet from the Kenyans as to who might sign on their behalf.

Your sincerely,

[Redacted]  
**Second Secretary, Commercial**

Enc: 2 Pages

02/EN/12/001/198

RECEIVED IN REGISTRY

23 JUL 1998

REGISTRY	PA	Action Taken

FACSIMILE MESSAGE  
Overseas Trade Services

3



To: [REDACTED]  
NAIROBI  
Fax: [REDACTED]  
From: [REDACTED]  
Room: KH 929  
Fax: [REDACTED]  
Telephone: [REDACTED]

Department of  
Trade and Industry

Q24121/001/98

RECEIVED IN REGISTRY		
23 JUL 1998		
INFAK	PA	Adm. Sec.

Directorate  
Joint Export Promotion  
Overseas Trade Services  
Kingsgate House  
66-74 Victoria Street  
London, SW1E 6SW

Telex:

Date: 03 June 1998

Page 1 of 6

UK/KENYA IPPA

1. As promised over the 'phone earlier today - and further to my fax to you of 29 May, which you received only today - I attach a suitably edited list of DTI/FCO comments on [REDACTED] letter of 13 May for onward transmission to the GoK.
2. As discussed, whether [REDACTED] visits Nairobi (so soon after [REDACTED] is entirely dependent on whether there will be an IPPA waiting for him to sign. At present, the BOTB Chairman's diary is free on 29 June before his scheduled arrival in Tanzania, but his Private Office are bound to want to go firm on dates very soon. With this in mind, [REDACTED] reckons that we need a definitive answer from you on this question by Friday 12 June, at the latest. It all depends on whether the Kenyans can concede on all our points - and quickly.
3. As the Agreement - whether signed by [REDACTED] or not - is likely to be signed in Kenya, it will be for the Kenyan authorities to prepare the necessary papers. As you will probably need to work closely with them on this, I am attaching a useful LRD (Treaty Section) checklist on the matter. DSP Political Vol 6 also provides some valuable guidance. As you will note, LRD will be happy to respond positively to any requests for material assistance from the Kenyan side.
4. We look forward to hearing from you soon.

Yours sincerely  
[REDACTED]

cc (without attachments): [REDACTED]  
[REDACTED]

dti

the department for Enterprise

**UK/KENYA INVESTMENT PROMOTION AND PROTECTION  
AGREEMENT (IPPA)**

**UK OBSERVATIONS ON THE COMMENTS OF THE GOVERNMENT OF  
KENYA ON THE UK MODEL TEXT (as contained in HE Minister of Finance's  
letter of 13 May 1998 to the British High Commissioner)**

**Article 1 (c) (ii):** No problem.

**Article 1 (d) (ii):** There also appears to be no problem here. However, clarification would be appreciated on one point. Does the reference in the Kenyan draft to corporations, firms and associations "having the legal capacity to engage in transactions of a commercial nature" mean that there are corporations etc., who do not have this capacity? This is a question about incorporation. Are there forms of incorporation which fall outside this definition and, if so, are investors directed into the various forms of incorporation, one of which would require separate authority to engage in transactions of a commercial nature?

**Article 1 (e):** No problem.

✓ **Article 2 (2):** The provision that investments should "enjoy full protection and security" is a general obligation, deliberately drafted in quite broad terms, which is given more specific expression in Articles 4 and 5 of the Agreement. The language is not meant to require 24 hour police protection: rather, it is a general requirement that authorities like the police take reasonable steps in the circumstances to protect investors and their investments. With this clarification, we hope that the original UK version can now prove acceptable; [REDACTED]  
[REDACTED]

✓ **Article 4.2:** While paragraph 1 of Article 4 requires the host State to compensate investors **only** if domestic investors would be compensated, paragraph 2 gives an absolute right to compensation for losses caused by certain activities of the armed forces. Accordingly, this concern is not taken care of in paragraph 1 and we should therefore wish to see the retention of Article 4.2 as drafted.

✓ **Article 6:** The proposed amendment of the Government of Kenya is accepted.

✓ **Article 8:** Can we assume that, as a member of ICSID, the Government of Kenya can accept the "preferred" Article 8?

✓ **Article 12:** This makes provision for the Agreement to be extended - **but only if the Government of Kenya so agrees** in a separate Exchange of Notes - to any territory for whose international relations Her Majesty's Government are responsible. In other words, the Kenyan Government would have the right of veto over any subsequent application to extend the Agreement. As such, we believe that the list approach suggested by the Government of Kenya would be rather cumbersome and not really

necessary. (Certainly, of the 89 IPPAs which the UK has concluded over the past twenty years or so, never has such an Annex been included.)

✓ **Article 13:** The choice of entry into force provision of the Government of Kenya is accepted.

✓ **Article 14:** We have three areas of difficulty with the amendments suggested by the Government of Kenya under this Article. First, the wording proposed by Kenya on the IPPA remaining in force after the initial 10 year period is not very clear. Unless it is envisaged that there will be a formal extension procedure every 10 years, our wording - which simply keeps the agreement in force indefinitely - is clearer and simpler. Second, we note the proposal that the notice period for termination of the IPPA should be 6 months, instead of one year in the UK model. We believe that 6 months' notice could be rather short and would prefer to stick with our original idea, but would be interested to learn why the Government of Kenya expressed a desire to shorten this time limit. Finally, and most significantly however, is the proposed reduction from 20 to 10 years of the period under which investments made would be covered after termination. The purpose of an IPPA generally - and this aspect of the Article, in particular - is to assure British investors **in the long term**. In this respect, a period of 20 years is stipulated in the vast majority of the UK's IPPAs, such as in those recently concluded with Kenya's East African Co-operation partners, Tanzania (in 1994) and Uganda (in April 1998). We therefore very much hope that, in the interests of making Kenya a more attractive location for UK long-term investors, the Government of Kenya can agree to the period of 20 years as originally proposed.



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SUBJECT: KENYA: PROPOSED IPPA: MY TELNO 265

#### SUMMARY

1. Kenyan agreement in principle with our model agreement. Subject to [REDACTED] approval, signature could follow quickly. Request for advice.

#### DETAIL

2. To follow up [REDACTED] discussion with [REDACTED] on 21 April (para 5 of TUR), I called on [REDACTED] on 12 May.
3. [REDACTED] said that there were no objections of principle or technical problems with our draft, which had been seen by the Investment Promotion Centre, the Central Bank and the Attorney General's Office. [REDACTED] had not been persuaded by the only reservation raised, by the Central Bank, namely the need for a bilateral agreement when Kenya was a signatory to MIGA, as this had not stopped Kenya signing similar agreements with Italy and Germany. He fully accepted the presentational benefits of signing an IPPA at this time and confirmed that all legal instruments required for signature were already in place. The draft was more or less ready to go to [REDACTED] for approval. Signature could follow quickly, even before the budget on 11 June.
4. I welcomed this positive response, and looked forward to early confirmation of [REDACTED] approval. I saw no pressing need to sign before the budget. Both sides would wish to maximise the presentational benefits, and we could work out timing and details of signature once [REDACTED] had approved.
5. I said that we would check to see whether we had any appropriate Minister visiting the region in the near future, who might be able to come for a signature ceremony. Otherwise, I assumed I would sign on behalf of HMG. [REDACTED] said he would check whether any Kenyan Minister would be in London.

#### COMMENT

6. Very good, if slightly unexpected, news after all this time, perhaps brought on by the IPPA signature in Uganda. The Kenyans may still come back with amendments, but these seem unlikely to be substantial. In the meantime, grateful for confirmation that we are prepared to go ahead on the basis of the model draft. Grateful also for advice on the prospect of a minister coming to Nairobi.

JAMES

2

①

[Redacted]



10 December, 1997

[Redacted]

British High Commission Nairobi

[Redacted]

FCO

ack 01/01/97 + pa  
CM 12/12

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[Redacted]

**KENYA: EASTERN AFRICA ASSOCIATION: INVESTMENT CONFERENCE**

1. Thank you for your teletype of 18 November. Sorry for the delay in getting back to you.
2. Next year seems to be dotted with possible Kenyan investment events in the UK. Apart from the CBI sponsored one in March which you describe, the Investment Promotion Centre is planning something mid-year (all a bit vague at the moment) and the Birmingham Chamber of Commerce, who were recently here with a trade mission, were talking about another event in October. It would of course be overkill if all of these actually came to fruition, but I am pretty sure the IPC one will never materialise. Whether there is enough interest for even two is uncertain. If you wanted a contact in Birmingham, [Redacted]

3 [Redacted]

I am not sure about the line taken by KCB. Land is of course an issue, but investors should be being steered more at joint ventures with existing firms, not only in horticulture (where there is indeed room for considerable growth) but across the board. Land tenure and licensing would then be less of a problem. I have been trying to get this message across to my Kenyan contacts for some time - [Redacted]

[Redacted] We have only one or two cases of joint ventures, the most obvious being Guinness/Kenya Breweries. This works very well, but seems unlikely to be replicated unless more work is done at this end in encouraging similar partnerships.

4. The other point on this subject is the IPPA for which we have for some 18 months been trying to attract Kenyan interest. A change of PS in the Ministry of Finance and latterly the distraction of the forthcoming elections here have been among the reasons for the lack of progress. [Redacted]

[Redacted] We will continue to persue this after the election, with a view (albeit a somewhat hopeful one) of having an IPPA signed perhaps at the Birmingham investment event if it happens. Grateful if you could copy this to DTI and DFID for me.

Yours ever

[Redacted signature]

[Redacted]



Foreign &  
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**dti**

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INDEX	996	REGISTRY
		negotiation

Direct line  
Out ref  
Your ref  
Date

0171 215 4375

16 February

*to note*  
*new file*  
*KENYA/IPP*  
*copy of*

*I think this is an excellent idea. It will be a boost if an IPPA can be done.*

## INVESTMENT PROMOTION AND PROTECTION AGREEMENTS (IPPA)

*What:*

- I have recently taken over the IPPA desk and have been reviewing our target areas. We have in the past considered Kenya but because of other commitments have not had the opportunity to start the ball rolling. There was also some indication the Kenya was content with the investment climate as it was a couple of years ago and was therefore not too concerned about discussing an IPPA. I understand this may have changed and the Kenyans would not be averse to the start of negotiations.
- FCO circular 402/95 summarised the progress JEPD had made in negotiating IPPAs and also tried to heighten awareness about the part the Agreements could play in supporting UK overseas investments. The Agreements continue to have an important role in building a climate of business confidence, particularly for investors whom I imagine the Kenyans are wishing to attract. Market Branch support the move.
- Subject to your views I would like to suggest that the High Commission approach the Kenyans with the proposal that we would welcome the opening of talks.
- You will appreciate that we attach a great deal of importance to establishing a strong and consistent UK negotiating position as early as possible in the discussions. I would therefore like to commend our standard line to take:
  - The UK model IPPA text (itself based on an OECD model) enshrines the principles which receive wide international acceptance. This has formed the basis of over 80 UK bilateral Agreements. A copy of our model text can be handed over.



(b) To commend the model text, which if acceptable can lead to an early signature. Otherwise it is likely that negotiations will take some time. We welcome comments on the proposed text from the Kenyans.

(c) In order to produce a very preliminary draft we need the Kenyans to propose their definitions "in respect of Kenya" in Article 1, in particular at 1(c)(ii), 1(d)(ii), and 1(e)(ii). We would also like to know their choice from the alternative texts available for Article 8 concerning the Settlement of Investment Disputes. Finally, which of the alternative texts for Entry into Force (Article 13) is preferred; we strongly prefer entry into force on signature as the quickest route but are willing to accommodate other methods.

[REDACTED]

5. If the Kenyans have problems with any of the text please ask them to spell out their concerns so that we can devise alternative drafting proposals. Once the preliminary hurdles have been cleared we are willing to hold face-to-face talks but only if these are absolutely necessary to overcome particular difficulties. Otherwise we are content to work through the High Commission.

6. Given the UK investment in Kenya and interest in securing further inflows we hope that you will agree with our initiative to start the IPPA ball rolling. My only cautionary word is not to expect rapid results as experience has shown that negotiations can take months, indeed years. Nevertheless, we will do our best to keep the momentum going.

7. I enclose a UK model text (please reproduce locally) and a Background Note on IPPAs. I look forward to hearing of developments.

*Regards,*

[REDACTED]

[REDACTED]