

Kenya and Italy have entered on 16 September 1996 into a [Bilateral Agreement](#) that promotes and protects investments made by their national investors in the territory of the other country.

The term “investment” includes a large array of assets, like: movable and immovable properties and any ownership right on them (including real guarantee rights on property of a third party), to the extent that it can be invested; shares, debentures equity holdings or any other instruments of credit (as well as Government and public securities in general); credits for sums of money or any service right having an economic value connected with an investment, as well as re-invested income and capital gains; copyright, commercial trademarks, patents, industrial designs and other intellectual and industrial property rights, know-how, trade secrets, trade names and goodwill; any economic right accruing by law or by contract and any license and franchise granted in accordance with the provisions in force on economic activities, including the right to prospect for, extract and exploit natural resources; and any increase in value of the original investment.

Other forms of investments protected by the bilateral agreement are listed in an additional Protocol annexed to such agreement that extends, for instance, the protection also to the equipment imported by the investor which is necessary for the normal conduct of business affairs, like office equipment and automobiles.

According to the agreement, investments made by Italian investors in Kenya cannot be subject to any measure which might limit both permanently and temporarily their right of ownership, possession, control or enjoyment (art. 5.1). Moreover, investments cannot be nationalized, expropriated, requisitioned or subjected to any measures having an equivalent effect, except for public purposes or national interest, and upon granting of a full and effective compensation to the investor (art. 5.2).

In case of infringement of the provisions of the Agreement, a two-tier procedure applies (art. 9):

- 1) the investor must preliminarily activate the diplomatic protection for the settlement of the dispute. This implies the need to contact his diplomatic authorities (for Italians investing in Kenya, the Italian Embassy in Nairobi) and submit them a memorial with a statement of the relevant facts and a full description of the controversy, by asking them to intervene with the Kenyan government in order to try to find an amicable solution to the dispute. Under this method the Italian government will espouse the claim of its national and pursue it in its own name before the Kenyan government. It must however be noted that according to the international law, the usability of this channel depends on the political discretion of the State of

the investor's nationality. This means that the Italian government can refuse to take up the investor's claim where, for instance, the dispute is deemed to cause a possible disruption of international relations with the host state (for a precedent, see the Cerutti case, Moore, International Arbitrations, History, Vol. II, page 2117, 1898).

2) In case the Italian government has taken up the claim and any amicable solution is found within six months from the date of the written application for settlement, the investor can alternatively submit, at his choice, the dispute for settlement to:

- The Kenyan Court territorially competent to deal with the matter subject of dispute;
- An "ad hoc" Arbitration Tribunal to be established in compliance with the arbitration regulation of the [UN Commission on the International Trade Law \(UNCITRAL\)](#), by following the procedure described in the Bilateral Agreement, that binds the Italian and Kenyan Republics to accept the decision of this arbitral body as final and binding. This Arbitration Tribunal is made up of 3 members: a representative of the Italian government, a representative of the Kenyan government, plus a President who is chosen by such representatives and who must necessarily be a national of a Third State. The cost of the arbitration are covered by the governments of Italy and Kenya,. In particular, they must cover the cost and expenses of their respective members of the Arbitration Tribunal and share in equal parts the President's costs and any other extra cost of the procedure;
- The International Centre for Settlement of Investment Disputes (a body established under the Washington Convention of 18 march 1965 on the settlement of investment disputes between States and nationals of other States, also known as "ICSID Convention"). In such a case the [ICSID Convention rules and procedures](#) will apply. The ICSID Convention has been ratified by [Italy on Apr. 28, 1971](#) and [Kenya on Feb. 2, 1967](#)