

LEGAL NOTICE No. 20

THE INCOME TAX ACT

(Cap. 470)

THE DOUBLE TAXATION RELIEF (FEDERAL REPUBLIC OF GERMANY)

NOTICE, 1980

IN EXERCISE of the powers conferred by section 41 of the Income Tax Act, the Vice-President and Minister for Finance declares that the arrangements specified in the Schedule hereto, being arrangements made between the Government of the Republic of Kenya and

the Government of the Federal Republic of Germany in articles of agreement signed on the 17th May, 1977 as amended by a protocol signed on the 17th May 1977, with a view to affording relief from double taxation in relation to income tax under the Act and any taxes of a similar character imposed by the laws of the Federal Republic of Germany, shall, notwithstanding anything to the contrary in the Act or in any other written law, have effect in relation to income tax under the Act.

SCHEDULE

The Government of the Republic of Kenya and the Government of the Federal Republic of Germany;

Desiring to conclude an agreement for the avoidance of double taxation with respect to taxes on income and capital;

Have agreed as follows:

ARTICLE 1

Personal Scope

This Agreement shall apply to persons who are residents of one or both of the Contracting States.

ARTICLE 2

Taxes Covered

(1) This Agreement shall apply to taxes on income and on capital imposed on behalf of each Contracting State or of its political subdivisions or local authorities, irrespective of the manner in which they are levied.

(2) There shall be regarded as taxes on income and on capital all taxes imposed on total income, on total capital, or on elements of income or of capital, including taxes on gains from the alienation of any property, whether immovable or other than immovable, as well as taxes on capital appreciation.

(3) The existing taxes to which this Agreement shall apply, are—

(a) in the Federal Republic of Germany—

- (i) the income tax (Einkommensteuer) including the surcharge (Erganzungsabgabe) thereon;
- (ii) the corporation tax (Körperschaftsteuer) including the surcharge (Erganzungsabgabe) thereon;
- (iii) the capital tax (Vermögensteuer); and
- (iv) the trade tax (Gewerbesteuer) (hereinafter referred to as "German Tax").

(b) in Kenya—

the income tax (hereinafter referred to as "Kenyan tax").

(4) This Agreement shall also apply to any identical or substantially similar taxes which are subsequently imposed in addition to, or in place of, those referred to in paragraph (3). The competent autho-

ities of the Contracting States shall notify to each other any changes which have been made in their respective taxation laws.

(5) The provisions of this Agreement in respect of taxation of income or capital shall likewise apply to the German trade tax, computed on a basis other than income or capital.

ARTICLE 3

General Definitions

(1) In this Agreement, unless the context otherwise requires:—

(a) the terms "a Contracting State" and "the other Contracting State" mean the Federal Republic of Germany or the Republic of Kenya as the context requires, and, when used in a geographical sense, the territory in which the tax law of the State concerned is in force;

(b) the term "tax" means German tax or Kenyan tax as the context requires, but shall not include any tax which is payable in respect of any default or omission in relation to the taxes to which this Agreement applies or which represents a penalty imposed relating to those taxes;

(c) the term "person" means an individual and a company;

(d) the term "company" means any body corporate or any body of persons which is treated as an entity for tax purposes;

(e) the terms "enterprise of a Contracting State" and "enterprise of the other Contracting State" mean respectively an enterprise carried on by a resident of a Contracting State and an enterprise carried on by a resident of the other Contracting State;

(f) the term "nationals" means:

(i) in respect of the Federal Republic of Germany—
all Germans in the meaning of paragraph 1 of Article 116 of the Basic Law for the Federal Republic of Germany and all legal persons, partnerships and associations deriving their status as such from the law in force in the Federal Republic of Germany;

(ii) in respect of Kenya—
all individuals possessing the nationality of Kenya and all legal persons, partnerships and associations deriving their status as such from the law in force in Kenya;

(g) the term "competent authority" means—

(i) in the case of the Federal Republic of Germany the Federal Minister of Finance;

(ii) in the case of Kenya the Minister for Finance or his authorized representative;

(h) the term "international traffic" means any voyage of a ship or aircraft operated by an enterprise of a Contracting State except where the voyage is confined solely to places within

the other Contracting State and it includes traffic between places in one country in the course of a voyage which extends over more than one country.

(2) In the application of this Agreement by a Contracting State any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws in force in that Contracting State relating to the taxes which are the subject of this Agreement.

ARTICLE 4

Fiscal Domicile

(1) For the purposes of this Agreement, the term "resident of a Contracting State" means, subject to the provisions of paragraphs (2) and (3) any person who, under the laws of that Contracting State, is liable to taxation therein by reason of his domicile, residence, place of management or any other criterion of a similar nature.

(2) Where by reason of the provisions of paragraph (1) an individual is a resident of both Contracting States, then his case shall be determined in accordance with the following rules—

- (a) he shall be deemed to be a resident of the Contracting State in which he has a permanent home available to him. If he has a permanent home available to him in both Contracting States, he shall be deemed to be a resident of the Contracting State with which his personal and economic relations are closest (hereinafter referred to as his centre of vital interests);
- (b) if the Contracting State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either Contracting State, he shall be deemed to be a resident of the Contracting State in which he has an habitual abode;
- (c) if he has an habitual abode in both Contracting States or in neither of them, he shall be deemed to be a resident of the Contracting State of which he is a national;
- (d) if he is a national of both Contracting States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

(3) Where by reason of the provisions of paragraph (1) a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident of the Contracting State in which its place of effective management is situated.

ARTICLE 5

Permanent Establishment

(1) For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business in which the business of the enterprise is wholly or partly carried on.

- (2) The term "permanent establishment" shall include especially—
- (a) a place of management;

- (b) a branch;
- (c) an office;
- (d) a factory;
- (e) a workshop;
- (f) a mine, oil well, quarry or other place of extraction of natural resources;
- (g) a farm, plantation or other place where agricultural, forestry, plantation or related activities are carried on;
- (h) a building site or construction or assembly project which exists for more than six months.

(3) The term "permanent establishment" shall not be deemed to include—

- (a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
- (b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
- (c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
- (d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or for collecting information for the enterprise;
- (e) the maintenance of a fixed place of business solely for the purpose of advertising for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character, for the enterprise.

(4) A person acting in a Contracting State on behalf of an enterprise of the other Contracting State—other than an agent of an independent status to whom paragraph (6) applies—shall be deemed to be a permanent establishment of that enterprise in the first-mentioned State if he has and habitually exercises in that State an authority—

- (a) to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for that enterprise; or
- (b) to fulfil orders on behalf of the enterprise from a stock of goods or merchandise which he habitually maintains in that State and which belongs to the enterprise.

(5) An insurance enterprise of a Contracting State shall, except in regard to reinsurance, be deemed to have a permanent establishment in the other State if it collects premiums in the territory of that State or insures risks situated therein through an employee or through a representative who is not an agent of an independent status within the meaning of paragraph (6).

(6) An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, where such persons are acting in the ordinary course of their business.

(7) The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute for either company a permanent establishment of the other.

ARTICLE 6

Income from Immovable Property

(1) Income from immovable property may be taxed in the Contracting State in which such property is situated.

(2) The term "immovable property" shall be defined in accordance with the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of or the right to work mineral deposits, sources and other natural resources. Ships, boats and aircraft shall not be regarded as immovable property.

(3) The provisions of paragraph (1) shall apply to income derived from the direct use, letting or use in any other form of immovable property.

(4) The provisions of paragraphs (1) and (3) shall also apply to the income from immovable property used for the performance of professional services.

ARTICLE 7

Business Profits

(1) The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.

(2) Where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing at arm's length with the enterprise of which it is a permanent establishment.

(3) In the determination of the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purpose of the permanent establishment including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere.

(4) Insofar as it has been customary in a Contracting State according to the law, to determine the profits to be attributed to a permanent establishment on the basis of an apportionment of the total profits of the enterprise to its various parts, nothing in paragraph (2) shall preclude that State from determining the profits to be taxed by such an apportionment as may be customary; the method of apportionment adopted shall, however, be such that the result be in accordance with the principles of this Article.

(5) No portion of any profits arising to an enterprise of a Contracting State shall be attributed to a permanent establishment situated in the other Contracting State by reason of the mere purchase of goods or merchandise within that other State by the enterprise.

(6) For the purpose of the preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

(7) Where profits include items of income which are dealt with separately in other Articles of this Agreement then the provisions of those Articles shall not be affected by the provisions of this Article.

ARTICLE 8

Shipping and Air Transport

(1) Profits from the operation of ships or aircraft in international traffic carried on by an enterprise of a Contracting State shall be taxable only in that State.

(2) The provisions of paragraph (1) shall likewise apply in respect of participations in pooled services, in a joint business or in an international operations agency of any kind by enterprises engaged in the operation of ships or aircraft in international traffic.

ARTICLE 9

Associated Enterprises

Where—

- (a) an enterprise of a Contracting State participates directly or indirectly in the management or control of capital of an enterprise of the other Contracting State; or
- (b) the same persons participate directly or indirectly in the management or control of capital of an enterprise of a Contracting State and an enterprise of the other Contracting State,

and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises,

then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued may be included in the profits of that enterprise and taxed accordingly.

ARTICLE 10

Dividends

(1) Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State, unless the dividends are excluded from the basis upon which German tax is imposed according to paragraph (2) (a) of Article 23.

(2) However, such dividends may be taxed in the Contracting State of which the company paying the dividends is a resident, and according to the laws of that State, but the tax so charged shall not exceed 15 per cent of the gross amount of the dividends.

(3) Notwithstanding the provisions of paragraph (2) German tax on dividends paid to a company being a resident of Kenya by a company being a resident of the Federal Republic of Germany, at least 25 per cent of the voting shares of which is owned directly or indirectly by the former company itself, or by it together with other persons controlling it or being under common control with it, shall not exceed 25 per cent of the gross amount of such dividends as long as the rate of German corporation tax on distributed profits is lower than that on undistributed profits and the difference between those two rates is 15 percentage points or more.

(4) The term "dividends" as used in this Article means income from shares or other rights, not being debt-claims, participating in profits, as well as income from other corporate rights assimilated to income from shares or any other item which is deemed to be a dividend or distribution of a company by the taxation law of the Contracting State of which the company making the distribution is a resident, distributions on certificates of an investment trust and also, in the Federal Republic of Germany, income derived by a sleeping partner from his participation as such.

(5) The provisions of paragraphs (1), (2) and (3) shall not apply if the recipient of the dividends, being a resident of a Contracting State, has in the other Contracting State, of which the company paying the dividends is a resident, a permanent establishment with which the holding by virtue of which the dividends are paid is effectively connected. In such a case, the provisions of Article 7 shall apply.

(6) Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other State may not impose any tax on the dividends paid by the company to persons who are not residents of that other State, or subject the company's undistributed profits to a tax on undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in the other State.

ARTICLE 11

Interest

(1) Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

(2) However, such interest may be taxed in the Contracting State in which it arises, and according to the laws of that State, but the tax so charged shall not exceed 15 per cent of the gross amount of the interest.

(3) Notwithstanding the provisions of paragraph (2)—

(a) interest arising in the Federal Republic of Germany and paid to the Kenya Government or the Central Bank of Kenya shall be exempt from German tax;

(b) interest arising in Kenya and paid to the German Government or the Deutsche Bundesbank shall be exempt from Kenya tax.

The competent authorities of the Contracting States may determine by mutual agreement any other governmental institution to which this paragraph shall apply.

(4) The term "interest" as used in this Article means income from Government securities, bonds or debentures, whether or not secured by mortgage and whether or not carrying a right to participate in profits and other debt-claims of every kind as well as other income assimilated to income from money lent by the taxation law of the Contracting State in which the income arises.

(5) The provisions of paragraphs (1) and (2) of this Article shall not apply if the recipient of the interest, being a resident of a Contracting State, has in the other Contracting State in which the interest arises a permanent establishment with which the debt-claim from which the interest arises is effectively connected. In such a case the provisions of Article 7 shall apply.

(6) Interest shall be deemed to arise in a Contracting State when the payer is that Contracting State itself, a political subdivision, a local authority or a resident of that State. Where, however, the person paying the interest, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment in connexion with which the indebtedness on which the interest is paid was incurred, and such interest is borne by that permanent establishment, then such interest shall be deemed to arise in the Contracting State in which the permanent establishment is situated.

(7) Where, owing to a special relationship between the payer and the recipient or between both of them and some other person, the amount of the interest paid, having regard to the debt-claim for which it is paid, exceeds the amount which would have been agreed upon by the payer and the recipient in the absence of such relationship, the provisions of this Article shall apply only to the last mentioned amount, and in that case, the excess part of the payments shall remain taxable according to the law of each Contracting State, due regard being had to the other provisions of this Agreement.

ARTICLE 12

Royalties and Management Fees

(1) Royalties and management fees arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

(2) However, such payments may be taxed in the Contracting State in which they arise, and according to the laws of that State, but the tax so charged shall not exceed 15 per cent of the gross amount of the payments.

(3) The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work (including cinematograph films, and films or tapes for radio or television broadcasting), any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment or for information concerning industrial, commercial or scientific experience.

(4) The term "management fees" as used in this Article shall be deemed to include payments of any kind to any persons other than to an employee of the person making the payments in consideration of any services of a managerial, technical or consultancy nature as well as payments made in consideration of the independent activities of physicians, lawyers, engineers, architects, dentists and accountants.

(5) The provisions of paragraphs (1) and (2) shall not apply if the recipient of the royalties or management fees, being a resident of a Contracting State, has in the other Contracting State in which the royalties or management fees arise a permanent establishment with which the right or property giving rise to the royalties is effectively connected or to which the management fees are attributable. In such a case, the provisions of Article 7 shall apply.

(6) Royalties and management fees shall be deemed to arise in a Contracting State when the payer is that Contracting State itself, a political subdivision, a local authority or a resident of that State. Where, however, the person paying the royalties or management fees, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment in connexion with which the liability to pay the royalties or management fees was incurred, and such royalties or management fees are borne by such permanent establishment, such royalties or management fees shall be deemed to arise in the Contracting State in which the permanent establishment is situated.

(7) Where, owing to a special relationship between the payer and the recipient or between both of them and some other person, the amount of royalties or management fees paid exceeds the amount which would have been agreed upon by the payer and the recipient in the absence of such relationship, the provisions of this Article shall apply only to the last mentioned amount, and in that case, the excess part of the payments shall remain taxable according to the law of each Contracting State, due regard being had to the other provisions of this Agreement.

ARTICLE 13

Capital Gains

(1) Gains from the alienation of immovable property, as defined in paragraph (2) of Article 6 may be taxed in the Contracting State in which such property is situated.

(2) Gains from the alienation of any property other than immovable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of any property other than immovable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing professional services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such a fixed base, may be taxed in that other State.

(3) Notwithstanding the provisions of paragraph (2), gains derived by an enterprise of a Contracting State from the alienation of ships and aircraft which it operates in international traffic and any property other than immovable property pertaining to the operation of such ships and aircraft shall be taxable only in that State.

(4) Gains from the alienation of shares of a company which is a resident of a Contracting State may be taxed in that State.

(5) Gains derived by a resident of a Contracting State from the alienation of any property other than those mentioned in paragraphs (1), (2), (3) and (4) shall be taxable only in that State.

ARTICLE 14

Independent Personal Services

Income derived by a resident of a Contracting State in respect of independent scientific, literary, artistic, educational or teaching activities shall be taxable only in that State unless—

(a) he has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities, in which case so much of the income may be taxed in that other State as is attributable to that fixed base; or

(b) he is present in the other Contracting State for the purpose of performing his activities for a period or periods exceeding in the aggregate 183 days in the calendar year concerned,

in which case so much of the income may be taxed in that other State as is attributable to the activities performed in that other State.

ARTICLE 15

Dependent Personal Services

(1) Subject to the provisions of Articles 16, 17, 18, 19, and 20, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other

Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.

(2) Notwithstanding the provisions of paragraph (1), remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if—

- (a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in the calendar year concerned; and
- (b) the remuneration is paid by, or on behalf of, an employer who is not a resident of that other State; and
- (c) the remuneration is not borne by a permanent establishment or a fixed base which the employer has in that other State.

(3) Notwithstanding the provisions of paragraphs (1) and (2), remuneration in respect of an employment exercised aboard a ship or aircraft operated in international traffic by an enterprise of a Contracting State may be taxed in that State.

ARTICLE 16

Directors' Fees

Directors' fees and similar payments derived by a resident of a Contracting State in his capacity as a member of the board of directors of a company which is a resident of the other Contracting State may be taxed in that other State.

ARTICLE 17

Artistes and Athletes

(1) Notwithstanding the provisions of Articles 14 and 15, income derived by public entertainers, such as theatre, motion picture, radio or television artistes, and musicians, and by athletes, from their personal activities as such may be taxed in the Contracting State in which these activities are exercised.

(2) Notwithstanding anything contained in this Agreement, where the services of a public entertainer or an athlete mentioned in paragraph (1) are provided in a Contracting State by an enterprise of the other Contracting State the profits derived by that enterprise from providing those services may be taxed in the first-mentioned State.

(3) The provisions of paragraphs (1) and (2) shall not apply to services of public entertainers and athletes, if their visit to a Contracting State is supported wholly or substantially from public funds of the other Contracting State.

ARTICLE 18

Public Funds

(1) Remuneration paid by, or out of funds created by a Contracting State, a political subdivision or a local authority thereof, to any individual in respect of an employment shall be taxable only in that State. If, however, the employment is exercised in the other Contracting

State by an individual who is neither a national of the first-mentioned State nor resident in the other State solely for the purpose of rendering those services, the remuneration shall be taxable only in other State.

(2) The provisions of this Article shall not apply to remuneration in respect of an employment in connexion with any business carried on by a Contracting State, a political subdivision or a local authority thereof for the purpose of profits, or to remuneration the cost of which is reimbursed to the Contracting State first-mentioned in paragraph (1) out of funds earned or provided in the other Contracting State.

ARTICLE 19

Pensions and Annuities

(1) Any pension (other than a pension of the kind referred to in paragraph (3)) or any annuity paid to a resident of a Contracting State may be taxed in that State.

(2) However, such pension or annuity, derived by an individual who is a resident of a Contracting State from sources within the other Contracting State may be taxed in that other State, but the tax so charged shall not exceed 5 per cent of the gross amount of the payment.

(3) Any pension paid by, or of funds created by, a Contracting State, a political subdivision or a local authority thereof, to any individual shall be taxable only in that State.

(4) The term "pension" means a periodic payment made in consideration of services rendered in the past or by way of compensation for injuries received.

(5) The term "annuity" means a stated sum payable periodically at stated times, during life, or during a specified or ascertainable period of time, under an obligation to make the payments in return for adequate and full consideration in money or money's worth.

ARTICLE 20

Teachers and Students

(1) A professor or teacher who is, or was immediately before visiting a Contracting State, a resident of the other Contracting State and who is present in the first-mentioned State for a period not exceeding two years for the purpose of carrying out advanced study or research or for teaching at a university, college, school or other education institute, shall be exempt from tax in the first-mentioned State in respect of any remuneration which he received for such work, provided that such remuneration is derived by him from outside that State.

(2) A student or business apprentice who is, or was immediately before visiting a Contracting State, a resident of the other Contracting State and who is present in the first-mentioned State solely for the purpose of his education or training shall be exempt from tax in the first mentioned State on—

(a) payments made to him by persons residing outside the first-mentioned State for the purposes of his maintenance, education or training; and

(b) remuneration not exceeding 6,000 DM or the equivalent in Kenya currency for a calendar year from personal services undertaken in that first-mentioned State to supplement resources available to him for his maintenance and education.

The benefits of this paragraph shall extend only for such period of time as may be reasonable or customarily required to complete the education or training undertaken, but in no event shall any individual have the benefits of this paragraph for more than three consecutive years.

(3) An individual who is, or was immediately before visiting a Contracting State, a resident of the other Contracting State and who is temporarily present in the first-mentioned State solely for the purpose of study, research or training as recipient of a grant, allowance or award from a scientific, educational, religious or charitable organization or under a technical assistance programme entered into by the Government of a Contracting State shall, from the date of his first arrival in the first-mentioned State in connexion with that visit, be exempt from tax in that State—

(a) on the amount of such grant, allowance or award; and

(b) on all remittances from abroad for the purposes of his maintenance, education or training.

(4) This Article shall not apply to income from research if such research is undertaken not in the public interest but primarily for the private benefit of a specific person or persons.

ARTICLE 21

Income Not Expressly Mentioned

Items of income of a resident of a Contracting State which are not expressly mentioned in the foregoing Articles of this Agreement shall be taxable only in that State.

ARTICLE 22

Taxes on Capital

(1) Capital represented by immovable property, as defined in paragraph (2) of Article 6, may be taxed in the Contracting State in which such property is situated.

(2) Capital represented by property other than immovable property forming part of the business property of a permanent establishment of an enterprise, or by such property pertaining to a fixed base used for the performance of professional services, may be taxed in the Contracting State in which the permanent establishment or fixed base is situated.

(3) Ships and aircraft operated in international traffic by an enterprise of a Contracting State and property other than immovable property pertaining to the operation of such ships and aircraft, shall be taxable only in that State.

- (4) All other elements of capital of a resident of a Contracting State shall be taxable only in that State.

ARTICLE 23

Elimination of Double Taxation

(1) Tax shall be determined in the case of a resident of the Federal Republic of Germany as follows:

(a) Unless the provisions of sub-paragraph (b) apply, there shall be excluded from the basis upon which German tax is imposed, any item of income derived from Kenya and any item of capital situated within Kenya, which, according to this Agreement, may be taxed in Kenya. In the determination of its rate of tax applicable to any item of income or capital not so excluded, the Federal Republic of Germany will, however, take into account the item of income and capital so excluded. The foregoing provisions shall likewise apply to dividends paid to a company being a resident of the Federal Republic of Germany by a company being a resident of Kenya if at least 25 per cent of the voting shares of the Kenyan company is owned directly by the German company. There shall also be excluded from the basis upon which German tax is imposed any shareholding, the dividends of which, if paid, would be excluded from the basis upon which tax is imposed according to the immediately foregoing sentence.

(b) Subject to the provisions of German tax law regarding credit for foreign tax, there shall be allowed as a credit against German income and corporation tax, including the surcharge thereon, payable in respect of the following items of income derived from Kenya, the Kenyan tax paid under the laws of Kenya and in accordance with this Agreement on—

- (i) dividends to which sub-paragraph (a) does not apply;
- (ii) interest to which paragraph (2) of Article 11 applies;
- (iii) royalties and management fees to which paragraph (2) of Article 12 applies;
- (iv) capital gains to which paragraph (4) of Article 13 applies;
- (v) remuneration to which Article 16 applies;
- (vi) income to which Article 17 applies;
- (vii) pensions and annuities, to which paragraph (2) of Article 19 applies.

The credit shall not, however, exceed that part of the German tax, as computed before the credit is given, which is appropriate to such items of income.

(c) For the purposes of credit referred to in sub-paragraph (b)—

- (i) where Kenyan tax on dividends, interest or management fees is wholly relieved or reduced below the rates of tax provided for in Articles 10, 11 or 12 by special incentive

measures under Kenyan law designed to promote economic development in Kenya, there shall be allowed as a credit against German income tax and corporation tax, including the surcharge thereon, on such dividends, interest or management fees an amount corresponding to the rate of tax provided for in the respective Article;

- (ii) Kenyan tax on royalties shall be deemed to be 20 per cent of the gross amount of the royalties.

The credit allowed under the foregoing provisions shall, however, not exceed the amount of Kenyan tax, which would have been payable under Kenyan law but for special incentive measures as mentioned before.

(2) Tax shall be determined in the case of a resident of Kenya as follows—

- (a) where income is derived from sources within the Federal Republic of Germany which, in accordance with the provisions of this Agreement, is exempt from Kenyan tax but may be taxed in the Federal Republic of Germany, then Kenya may, in calculating the tax on the remaining income of that person, apply the rate of tax which would have been applicable if the income derived from sources within the Federal Republic of Germany had not been so exempted;
- (b) where income is derived from sources within the Federal Republic of Germany which may be taxed in both Contracting States, then Kenya shall allow as a deduction from the tax on the income of that person an amount equal to the tax paid in the Federal Republic of Germany. Such deduction, however, shall not exceed that part of the Kenyan tax as computed before the deduction is given, which is appropriate to the income derived from the Federal Republic of Germany.

ARTICLE 24

Non-Discrimination

(1) The nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances are or may be subjected.

(2) The taxation of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favourably levied in that other State than the taxation levied on enterprises of that other State carrying on the same activities. This provision shall not be construed as obliging a Contracting State to grant to residents of the other Contracting State any personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities or any other personal circumstances which it grants to its own residents.

(3) Enterprises of a Contracting State the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other State, shall not be subjected in the

first-mentioned Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of that first-mentioned State are or may be subjected.

(4) In this Article the term "taxation" means taxes of every kind and description.

(5) The application of the provisions of this Article shall not be limited by the provisions of Article 1.

ARTICLE 25

Mutual Agreement Procedure

(1) Where a resident of a Contracting State considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with this Agreement, he may notwithstanding the remedies provided by the national laws of those Contracting States, present his case to the competent authority of the State of which he is a resident. The case must be presented within three years of the date of such action or the latest of such actions as the case may be.

(2) The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at an appropriate solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation not in accordance with this Agreement.

(3) The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of this Agreement. They may also consult together for the elimination of double taxation in cases not provided for in this Agreement.

(4) The competent authorities of the Contracting States may communicate with each other directly for the purposes of applying the provisions of this Agreement. When it seems advisable in order to reach agreement to have an oral exchange of opinions, such exchange may take place through a Commission consisting of representatives of the competent authorities of the Contracting States.

ARTICLE 26

Exchange of Information

(1) The competent authorities of the Contracting States shall exchange such information as is necessary for the carrying out of this Agreement. Any information so exchanged shall be treated as secret and shall not be disclosed to any persons or authorities other than those concerned with the assessment or collection of the taxes which are the subject of this Agreement or the determination of appeals or the prosecution of offences in relation thereto.

(2) In no case shall the provisions of paragraph (1) be construed so as to impose on one of the Contracting States the obligation—

(a) to carry out administrative measures at variance with the laws or the administrative practice of that or of the other Contracting State;

(b) to supply particulars which are not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

(c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy.

(3) In order to prevent fraud or fiscal evasion concerning the taxes covered by Article 2 the competent authorities of the Contracting States may by mutual agreement exchange any relevant information. In such a case the provisions of paragraphs (1) and (2) shall likewise apply.

ARTICLE 27

Diplomatic and Consular Privileges

Nothing in this Agreement shall affect the fiscal privileges of diplomatic or consular officials under the general rules of international law or under the provisions of special agreements.

ARTICLE 28

Land Berlin

The Agreement shall also apply to Land Berlin, provided that the Government of the Federal Republic of Germany has not made a contrary declaration to the Government of the Republic of Kenya within three months from the date of entry into force of this Agreement.

ARTICLE 29

Entry into Force

(1) This Agreement shall be ratified and the instruments of ratification shall be exchanged at Bonn as soon as possible.

(2) This Agreement shall enter into force on the day after the date of exchange of the instruments of ratification and have effect—

(a) in the Federal Republic of Germany, in respect of income and capital taxable for the assessment period in which this Agreement enters into force and subsequent assessment periods;

(b) in Kenya, in respect of income arising for the year of income in which this Agreement enters into force and subsequent years.

ARTICLE 30

Termination

This Agreement shall continue in effect indefinitely but either of the Contracting States may, on or before the Thirtieth day of June in any calendar year beginning after the expiration of a period of five years from the date of its entry into force, give to the other Contracting State, through diplomatic channels, written notice of termination and, in such event, this Agreement shall cease to be effective—

(a) in the Federal Republic of Germany, in respect of income and capital taxable for the assessment period next following

that in which the notice of termination is given and subsequent assessment periods;

- (b) in Kenya, in respect of income arising for the year of income next following that in which the notice of termination is given and subsequent years.

PROTOCOL

1. *With Reference to Article 5,*

- (a) an enterprise shall be deemed to have a permanent establishment in a Contracting State if it carries on supervisory activities in that State for more than six months in connexion with a building site or construction or assembly project, as defined in paragraph (2) (h), which is being undertaken in that State;
- (b) the term "construction or assembly project" shall be deemed for the purposes of paragraph (2) (h) to include an installation of machinery or plant but shall not include the mere provision of auxiliary services in connexion with the sale of such machinery or plant.

2. *With Reference to Articles 6 to 21,*

where any income, other than interest to which paragraph (3) of Article 11 applies, derived from outside of a Contracting State by a resident of that State is not subject to tax in the State by reason of its foreign origin, the provisions of these Articles shall not apply in the other Contracting State in respect of such income.

3. *With Reference to Article 7,*

- (a) if an enterprise of a Contracting State, which has a permanent establishment in the other Contracting State, sells goods or merchandise of the same or similar kind as those sold by the permanent establishment, or renders services of the same or similar kind as those rendered by the permanent establishment, the profits of such activities may be attributed to the permanent establishment unless the enterprise proves that such sales or services are not attributable to the activity of the permanent establishment;
- (b) paragraph (3) shall not be construed as obliging a Contracting State to allow the deduction of expenses which under its domestic legislation would not be deduction by an independent enterprise of that State.

4. *With Reference to Article 11,*

the provisions of paragraph (3) shall also apply to interest arising in Kenya and paid to the Kreditanstalt für Wiederaufbau or to the Deutsche Gesellschaft für wirtschaftliche Zusammenarbeit (Entwicklungsgesellschaft).

5. *With Reference to Article 18,*

the provisions of the first sentence of paragraph (1) shall likewise apply in respect of remuneration paid under a development assistance programme of a Contracting State, or of a political subdivision or local Authority thereof, out of funds exclusively supplied by that State, or by a political subdivision or local authority thereof, to a specialist or volunteer seconded to the other Contracting State with the consent of that other State.

6. *With Reference to Article 23,*

notwithstanding the provisions of paragraph (2) (a), the provisions of paragraph (2) (b) but not of paragraph (2) (c) shall apply likewise to the profits of, and to the capital represented by property forming part of the business property of, a permanent establishment to dividends paid by, and to the shareholding in, a company; or to gains referred to in paragraph (2) of Article 13 of the Agreement, provided that the resident of the Federal Republic of Germany concerned does not prove that the receipts of the permanent establishment or company are derived exclusively or almost exclusively—

- (a) from producing or selling goods and merchandise, giving technical advice or rendering engineering services, or doing banking or insurance business, within Kenya; or
- (b) from dividends paid by one or more companies, being residents of Kenya, more than 25 per cent of the voting shares of which is owned by the first mentioned company, which themselves derive their receipts exclusively or almost exclusively from producing or selling goods or merchandise, giving technical advice or rendering engineering services, or doing banking or insurance business, within Kenya.

7. *With Reference to Article 24,*

- (a) in the application of paragraph (1), nationals of a Contracting State who are taxable in the other Contracting State shall, if they are residents of that other Contracting State, receive any personal allowances, reliefs and reductions for taxation purposes on account of civil status which that other Contracting State grants to its residents;
- (b) paragraph (2) shall not be construed as disallowing Kenya to impose a tax not exceeding 9 per cent of the profits of a permanent establishment which a German company has in Kenya in addition to tax at the rate levied on profits of similar enterprises of Kenya.

Made on the 11th February, 1980.

MWAI KIBAKI,
Vice-President and Minister for Finance.