

# **Agreement between the Kingdom of the Netherlands and the Macao Special Administrative Region of the People's Republic of China on encouragement and reciprocal protection of investments**

The Kingdom of the Netherlands,

And

The Macao Special Administrative Region of the People's Republic of China, duly authorized to conclude this Agreement by the Central People's Government of the People's Republic of China,

Hereinafter referred to as the Contracting Parties,

Desiring to strengthen their traditional ties of friendship and to extend and intensify the economic relations between them, particularly with respect to investments by the investors of one Contracting Party in the area of the other Contracting Party.

Recognizing that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties and that fair and equitable treatment of investment is desirable,

Have agreed as follows:

## **Article 1.**

For the purposes of this Agreement:

a) The term "investments" means every kind of asset and more particularly, though not exclusively:

- (i) Movable and immovable property as well as any other rights in rem in respect of every kind of asset; in rem in respect of every kind of asset;
- (ii) Rights derived from shares, bonds and other kinds of interests in companies and joint ventures;
- (iii) Claims to money, to other assets or to any performance having an economic value;
- (iv) Rights in the field of intellectual property, technical processes, goodwill and know-how;
- (v) Rights granted under public law or under contract, including rights to prospect, explore, extract and win natural resources.

b) The term "investors" shall comprise:

- (i) With regard to the Kingdom of Netherlands, natural persons having the nationality of the Kingdom of the Netherlands and legal persons constituted under the laws applicable in the Kingdom;
- (ii) With regard to the Macao Special Administrative Region, natural persons entitled to the Resident Identity Card and legal persons constituted under the law of the Macao Special Administrative Region;
- (iii) With regard to either Contracting Party legal persons not constituted under the law of the other Contracting Party but controlled by natural persons or by legal persons as defined in (i) or (ii) above. (i) or (ii) above.

For greater clarity as to whether a legal person not constituted under the law of a Contracting Party is controlled by natural or legal persons of that Contracting Party as referred to in 1 b) (i) or (ii), control means de facto control, determined after an examination of the actual circumstances. In any such examination, all relevant factors should be considered, including:

1. Financial interest, including equity interest, in the controlled investor;
2. Ability to exercise substantial influence over the management and operation of the controlled investor; and
3. Ability to exercise decisive influence over the selection of members of the board of directors or any other managing body.

Where there is doubt as to whether direct or indirect control exists, an investor claiming such control has to provide the evidence.

With respect to physical persons, an individual who possesses both the nationality of the Kingdom of the Netherlands and is entitled to the Resident Identity Card of the Macao Special Administrative Region at the time of the investment, who invests in the Macao Special Administrative Region, shall not be considered an investor of the Kingdom of the Netherlands, for the purposes of this Agreement.

c) The term "area":

(i) In respect of the Kingdom of the Netherlands, is the territory of the Kingdom of the Netherlands and includes any area adjacent to the territorial sea which, under the laws applicable in the Kingdom of Netherlands, and in accordance with international law, is the exclusive economic zone or continental shelf of the Kingdom, in which it exercises jurisdiction or sovereign rights;

(ii) In respect of the Macao Special Administrative Region of the People's Republic of China, is the peninsula of Macao and the islands of Taipa and Coloane.

## **Article 2.**

Either Contracting Party shall, within the framework of its laws and regulations, promote economic co-operation through the protection in its area of investments of investors of the other Contracting Party. Subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments.

## **Article 3.**

1. Each Contracting Party shall ensure fair and equitable treatment of the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors. Each Contracting Party shall accord to such investments, full physical security and protection.

2. More particularly, each Contracting Party shall accord to such investments treatment which in any case shall not be less favourable than that accorded either to investments of its own investors or to investments of investors of any third State, whichever is more favourable to the investor concerned.

3. If a Contracting Party has accorded special advantages to investors of any third State by virtue of agreements establishing customs unions, economic unions, monetary unions or similar institutions, or on the basis of interim agreements leading to such unions or institutions, that Contracting Party shall not be obliged to accord such advantages to investors of the other Contracting Party.

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

5. 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 a regulation, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such regulation shall, to the extent that it is more favourable, prevail over the present Agreement.

6. The provisions of this Article shall be without prejudice to the provisions of article 4 of this Agreement. article 4 of this Agreement.

## **Article 4.**

With respect to taxes, fees, charges and to fiscal deductions and exemptions, each Contracting Party shall accord to investors of the other Contracting Party who are engaged in any economic activity in its area, treatment not less favourable than that accorded to its own investors or to those of any third State who are in the same circumstances, whichever is more

favourable to the investors concerned. For this purpose, however, there shall not be taken into account any special fiscal advantages accorded by that Party:

- a) Under an agreement for the avoidance of double taxation; or
- b) By virtue of its participation in a customs union, economic union or similar institution; or
- c) On the basis of reciprocity with a third State.

## **Article 5.**

The Contracting Parties shall guarantee that payments relating to an investment may be transferred. The transfers shall be made in a freely convertible currency, without restriction or delay. Such transfers include in particular though not exclusively:

- a) Profits, interests, dividends and other current income;
- b) Funds necessary
  - (i) For the acquisition of raw or auxiliary materials, semi-fabricated or finished products, or
  - (ii) To replace capital assets in order to safeguard the continuity of an investment;
- c) Additional funds necessary for the development of an investment;
- d) Funds in repayment of loans;
- e) Royalties or fees;
- f) Earnings of natural persons;
- g) The proceeds of sale or liquidation of the investment;
- h) Payments arising under Article 7. Article 7.

## **Article 6.**

1. Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with:

- a) The measures are taken in the public interest and under the due process of law;
- b) The measures are not discriminatory or contrary to any undertaking which the Contracting Party, which takes such measures, may have given;
- c) The measures are taken against just compensation. Such compensation:
  - (i) Shall represent the genuine value of the investments affected and shall be at least equal to the value of the expropriated investment on the date immediately prior to that in which expropriation, or any other proceeding of similar force, has taken place or became public knowledge;
  - (ii) Shall include interest at a normal commercial rate until the date of payment; and
  - (iii) Shall, in order to be effective for the claimants, be paid and made transferable, without delay, to the country or region designated by the claimants concerned in any freely convertible currency accepted by the claimants.

2. Without prejudice to the right to seek international arbitration, the investor shall be entitled to have the legality of the expropriation reviewed by the competent authorities of the Contracting Parties having induced the expropriation.

## **Article 7.**

Investors of the one Contracting Party who suffer losses in respect of their investments in the area of the other Contracting Party owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which that Contracting Party accords to its own investors or to investors of any third

State, whichever is more favourable to the investors concerned.

## **Article 8.**

If the investments of an investor of the one Contracting Party are insured against non-commercial risks or otherwise give rise to payment of indemnification in respect of such investments under a system established by law, regulation or government contract, any subrogation of the insurer or re-insurer or agency designated by the one Contracting Party to the rights of the said investor pursuant to the terms of such insurance or under any other indemnity given shall be recognized by the other Contracting Party.

## **Article 9.**

1. Disputes which might arise between one of the Contracting Parties and an investor of the other Contracting Party concerning an investment of that investor in the area of the former Contracting Party shall, whenever possible, be settled amicably between the parties concerned.
2. If the dispute cannot be settled amicably within a reasonable lapse of time, the dispute shall at the request of the investor concerned be submitted to:
  - a) The International Centre for Settlement of Investment Disputes, for settlement by arbitration or conciliation 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; Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965;
  - b) The International Centre for Settlement of Investment Disputes under the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (Additional Facility of Rules);
  - c) An international ad hoc arbitral tribunal under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).
3. With respect to a legal person of one Contracting Party, which before such a dispute arises is controlled by an investor of the other Contracting Party, Article 25 (2) (b) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States is applicable. Article 25 (2) (b) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States is applicable.
4. The decision to submit the dispute to one of the preceding procedures is irreversible. The arbitral awards shall be final and binding on both parties to the dispute.
5. An investor may also decide to submit a dispute to a competent domestic court.
6. Each Contracting Party hereby gives its unconditional consent to submit investment disputes for resolution to the alternative disputes settlement fora mentioned in the preceding paragraphs.

## **Article 10.**

The provisions of this Agreement shall, from the date of entry into force thereof, also apply to investments, which have been made before that date, but not to investment disputes that arose before its entry into force.

## **Article 11.**

Either Contracting Party may propose to the other Party that consultations be held on any matter concerning the interpretation or application of the Agreement. The other Party shall accord sympathetic consideration to the proposal and shall afford adequate opportunity for such consultations.

## **Article 12.**

1. Any dispute between the Contracting Parties concerning the interpretation or application of the present Agreement, which cannot be settled within a reasonable lapse of time by means of negotiations between the Parties, shall, unless the Parties have otherwise agreed, be submitted, at the request of either Party, to an arbitral tribunal, composed of three members. Each Party shall appoint one arbitrator and the two arbitrators thus appointed shall together appoint a third arbitrator as their chairman who is not a national of the Kingdom of the Netherlands and not a resident of the Macao

Administrative Region.

2. If one of the Parties fails to appoint its arbitrator and has not proceeded to do so within two months after an invitation from the other Party to make such appointment, the latter Party may invite the President of the International Court of Justice to make the necessary appointment.
3. If the two arbitrators are unable to reach agreement, in the two months following their appointment, on the choice of the third arbitrator, either Party may invite the President of the International Court of Justice to make the necessary appointment.
4. If, in the cases provided for in the paragraphs (2) and (3) of this Article, the President of the International Court of Justice is prevented from discharging the said function or is a national of the Kingdom of the Netherlands or a resident of the Macao Special Administrative Region, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is prevented from discharging the said function or is a national of the Kingdom of the Netherlands or a resident of the Macao Special Administrative Region, the most senior member of the Court available who is not a national of the Kingdom of the Netherlands and not a resident of the Macao Special Administrative Region shall be invited to make the necessary appointments. paragraphs (2) and (3) of this Article, the President of the International Court of Justice is prevented from discharging the said function or is a national of the Kingdom of the Netherlands or a resident of the Macao Special Administrative Region, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is prevented from discharging the said function or is a national of the Kingdom of the Netherlands or a resident of the Macao Special Administrative Region, the most senior member of the Court available who is not a national of the Kingdom of the Netherlands and not a resident of the Macao Special Administrative Region shall be invited to make the necessary appointments.
5. The tribunal shall decide on the basis of respect for the law. Before the tribunal decides, it may at any stage of the proceedings propose to the Parties that the dispute be settled amicably. The foregoing provisions shall not prejudice settlement of the dispute ex aequo et bono if the Parties so agree.
6. Unless the Parties decide otherwise, the tribunal shall determine its own procedure.
7. The tribunal shall reach its decision by a majority of votes. Such decision shall be final and binding on the Parties.

### **Article 13.**

As regards the Kingdom of the Netherlands, the present Agreement shall apply to the part of the Kingdom in Europe, to the Netherlands Antilles and to Aruba, unless the notification provided for in Article 14, paragraph (1) provides otherwise.

### **Article 14.**

1. The present Agreement shall enter into force on the first day of the second month following the date on which the Contracting Parties have notified each other in writing that their required legal procedures have been complied with, and shall remain in force for a period of fifteen years.
2. Unless notice of termination has been given by either Contracting Party at least six months before the date of the expiry of its validity, the present Agreement shall be extended tacitly for periods of ten years, whereby each Contracting Party reserves the right to terminate the Agreement upon notice of at least six months before the date of expiry of the current period of validity.
3. In respect of investments made before the date of the termination of the present Agreement, the foregoing Articles shall continue to be effective for a further period of fifteen years from that date.

In case the present agreement has been terminated for any of the parts of the Kingdom of the Netherlands separately, the period of fifteen years shall apply to those parts of the Kingdom for which the present Agreement has been terminated.

4. Subject to the period mentioned in paragraph (2) of this Article, the Kingdom of the Netherlands shall be entitled to terminate the application of the present Agreement separately in respect of any of the parts of the Kingdom. paragraph (2) of this Article, the Kingdom of the Netherlands shall be entitled to terminate the application of the present Agreement separately in respect of any of the parts of the Kingdom.

DONE in two originals at Macau, on the 22nd of May 2008, in the Netherlands, Chinese, Portuguese and English languages,

all texts being authentic. In case of difference of interpretation the English text will prevail.

For the Kingdom of the Netherlands: J.A. SOER