

# Cross-Strait Bilateral Investment Protection and Promotion Agreement

In order to protect the rights and interests of investors across the Taiwan Straits, promote mutual investments, create an impartial investment environment, and enhance cross-strait economic prosperity, in accordance with Article 5 of the ECFA, the Straits Exchange Foundation and the Association for Relations Across the Taiwan Straits reached an agreement as follows upon equal negotiations:

## Article 1. Definitions

For purpose of this Agreement:

1. "Investment" means every kind of asset invested by an investor of a Party in the other Party in accordance with the laws and regulations of the latter that has the characteristics of an investment, including but not limited to:

- (1) movable and immovable property and other property rights;
- (2) shares, capital contribution, and other forms of equity participation in an enterprise;
- (3) monetary claims or other claims to any performance that have economic value;
- (4) intellectual property rights, enterprise names and trade names, goodwill;
- (5) turnkey, construction, management, production, revenue-sharing, and other similar contract rights;
- (6) concessions, including those for breeding and cultivation as well as those for exploration, mining, extraction, or exploitation of natural resources; and
- (7) all types of secured bonds, debentures, loans, and other forms of debt.

"Characteristics of an investment" means the commitment of capital or other resources, the expectation of return or profit, and the assumption of risk. Any changes to the form of investment capital made in accordance with the laws and regulations of the place where the investment is made will not affect its characteristics as an investment.

2. "Investor" means a natural person or an enterprise of a Party that makes an investment in the other party:

- (1) "natural person of a Party" means a natural person holding the identification document of that Party;
- (2) "enterprise of a Party" means an entity constituted in a Party under the laws and regulations of that Party, including a company, trust, sole proprietorship, partnership, or other organization;
- (3) Any entity which is constituted under the laws and regulations of a third party but is owned or controlled by an Investor as described in subparagraph (1) or (2) of this paragraph is considered an enterprise of a Party.

3. "Return" means a profit earned from investments, including profits, dividends, interest, capital gains, royalty payments, and other legal earnings.

4. "Measure" means any law or regulation, policy, or other administrative action that affects investors or investments.

5. "Cross-strait Investment Dispute Settlement Institutions" means arbitration institutions, mediation centers, and other mediation institutions which are confirmed by the Parties and notified the other Party in writing by each Party after this Agreement enters into force.

## Article 2. Scope of Application and Exceptions

1. This Agreement applies to the measures adopted or maintained by a Party toward investors of the other Party and their investments.
2. This Agreement applies to investments made by an investor of a Party in the other Party prior to or after this Agreement enters into force, but does not apply to "investment disputes" as defined in Article 13 (1) of this Agreement which have been settled before this Agreement enters into force.
3. This Agreement applies to measures adopted or maintained by the authorities of all levels of either Party and by institutions authorized by such authorities to exercise administrative functions and powers.
4. A Party may adopt, maintain, or enforce any measure it considers necessary to protect its essential security interests.
5. A Party may adopt or maintain the following restrictive measures on investments based on the principle of non-arbitrary and non-unjustifiable discrimination, and provided that such measures do not constitute a disguised restriction on trade or investments:
  - (1) measures necessary to secure compliance with laws or regulations which are not inconsistent with this Agreement;
  - (2) measures necessary to protect the life or health of humans, animals, or plants;
  - (3) measures necessary to protect exhaustible natural resources.
6. A Party may adopt or maintain measures related to financial services for prudential reasons. Such measures include, but are not limited to, the following:
  - (1) measures adopted to protect investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by financial service providers;
  - (2) measures adopted to ensure the functioning and stability of the financial system.
7. This Agreement does not apply to the following:
  - (1) public procurement;
  - (2) subsidies or grants provided by a Party.
8. Except as provided below, this Agreement does not apply to taxation measures of either Party:
  - (1) If an investor of a Party claims in writing to the competent tax authority of the other Party that a taxation measure of such other Party involves Article 7 of this Agreement, the competent tax authorities of the Parties should determine jointly within six months whether such taxation measure constitutes an expropriation. If such taxation measure constitutes an act of expropriation, then this Agreement shall apply to such measure.
  - (2) If the competent tax authorities of the Parties fail to agree that the taxation measure is not an act of expropriation within six months, the investor of a Party may seek resolution under Article 13 of this Agreement and the Annex thereof.

### **Article 3. Treatment of Investments**

1. Each Party shall ensure fair and equitable treatment to investors of the other Party and their investments, and shall provide full protection and security:
  - (1) "Fair and equitable treatment" means that the measures adopted by a Party shall be in accordance with the principle of due process and shall not deny justice and fair trial to investors of the other Party, and that obviously discriminatory or arbitrary measures may not be implemented.
  - (2) "Full protection and security" means that a Party shall adopt reasonable and necessary measures to protect the safety of investors of the other Party and their investments.

A Party's breach of other provisions in this Agreement does not constitute a breach of this paragraph.
2. The Parties shall reinforce the protection of personal freedom and safety of investors and related personnel, fulfill the notification obligations related to personal freedom within the prescribed time limit under their respective laws and regulations, and strive to perfect the existing notification mechanism.
3. Treatment accorded by a Party to investors of the other Party with respect to the operation, management, maintenance, enjoyment, use, sale, or other disposition of their investments shall not be less favorable than that accorded by such Party,

in like circumstances, to its own investors and their investments.

4. Treatment accorded by a Party to investors of the other Party with respect to the establishment, expansion, operation, management, maintenance, possession, use, sale, or other disposition of their investments shall not be less favorable than that accorded by such Party, in like circumstances, to investors of any third party and their investments.

5. Paragraphs 3 and 4 of this Article do not apply to a Party's existing non-conforming measures and amendments thereto, while the Party shall gradually reduce or eliminate such non-conforming measures and provided that any amendment or change to such non-conforming measures shall not increase the restrictions on investors of the other Party and their investments.

6. Investors of the other Party may not claim to initiate dispute resolution proceedings other than those provided in this Agreement based on paragraph 4 of this Article.

## **Article 4. Transparency**

1. A Party shall, in accordance with its laws and regulations, publish or otherwise make publicly available in a timely fashion the investment-related laws, regulations, measures, procedures, etc. that are generally applicable or are specifically applicable to the other Party.

2. A Party shall, upon the request of the other Party and in accordance with its laws and regulations, provide further information with respect to any change to the laws, regulations, measures, or procedures that were already published and that affect investors of the other Party.

## **Article 5. Gradual Reduction of Investment Restrictions**

1. The Parties agree to accept and protect mutual investments on the principles of reciprocity and mutual benefit.

2. The Parties agree to gradually reduce or eliminate restrictions on investments from the other Party, to create a fair investment environment, and to strive to promote mutual investments.

## **Article 6. Investment Facilitation**

1. The Parties agree to the gradual simplification of documentation for investment application and examination procedures.

2. The Parties agree to provide the other Party with investment facilitation, including:

(1) Each Party will provide facilitation to investors of the other Party in obtaining investment information, relevant operating licenses, personnel entry and exit, and business operations and management;

(2) Each Party will facilitate the organizing and holding, by the other Party and its investors, of symposiums, seminars and other activities beneficial to investments.

## **Article 7. Expropriation**

1. A Party may not expropriate the investments or returns of an investor of the other Party in the Party (including direct expropriation and indirect expropriation), unless all of the following conditions are met:

(1) It is for a public purpose;

(2) it is in accordance with the Party's laws and regulations, and with due process;

(3) it is non-discriminatory and non-arbitrary;

(4) payment of compensation is provided in accordance with paragraph 4 of this Article.

2. "Indirect expropriation" refers to measures with effects equivalent to those of direct expropriation. The determination of whether a measure or a series of measures constitutes indirect expropriation requires a case-by-case, fact-based inquiry that considers the following factors:

(1) the economic impact of such measure on the relevant investments; however, an adverse impact of such measure on the economic value of an investment alone is insufficient to establish the occurrence of indirect expropriation;

(2) the degree of discrimination of such measure, with respect to its scope or application, against the investors of the other Party and their investments;

(3) the extent to which such measure interferes with the distinct and reasonable investment expectations of the investors of the other Party;

(4) whether such measure is adopted in good faith and for the public good, and is in compliance with the principle of proportionality between the measure and the purpose thereof.

3. Non-discriminatory regulatory measures adopted by either Party to protect the legitimate public welfare, such as public health, safety, and the environment, do not constitute indirect expropriation.

4. The compensation referred to in paragraph 1 of this Article shall be based on the fair market value of the expropriated investments or returns at the time of expropriation or when the expropriation becomes known to the public, whichever is earlier, plus interest at a commercially reasonable rate accrued from the date of expropriation to the date of payment. The compensation shall be paid without delay, and shall be effectively realizable, exchangeable, and freely transferable.

## **Article 8. Compensation for Losses**

If an investor of a Party suffers a loss with respect to its investments or returns in the other Party due to armed conflict, state of emergency or similar event that takes place in the other Party, the other Party shall provide restitution, compensation, or other resolution no less favorable than that accorded to its own investors or to the investors of any third party in like circumstances, whichever is most favorable to investors.

## **Article 9. Subrogation**

1. If a Party's designated agency makes a payment to an investor of that Party pursuant to its indemnity, guarantee, or insurance contract against investment-related non-commercial risks such as currency exchange and transfer, expropriation, etc., it may subrogate the investor in exercising the investor's rights and claims to the same extent as the original rights and claims of the investor and assume the corresponding obligations related to the investment of that investor.

2. A Party shall notify the other Party of the agency it designates pursuant to Paragraph 1 of this Article and of any changes thereto.

## **Article 10. Transfer**

1. A Party shall, in accordance with its laws and regulations, permit investors of the other Party to transfer their investments and returns, including but not limited to:

(1) capital invested for the establishment, maintenance and expansion of investment;

(2) profits, dividends, interest, capital gains, royalty payments and other fees related to intellectual property rights;

(3) payments related to investment contracts, including relevant payments arising from loan agreements;

(4) proceeds from the sale or liquidation of all or any part of the investment;

(5) earnings and remuneration of an investor who is a natural person, with respect to his/her investment;

(6) payments obtained pursuant to Articles 7 and 8; and

(7) compensation obtained pursuant to paragraph 3 of the Annex to this Agreement.

2. Unless otherwise provided under this Agreement, the Parties shall guarantee that transfers under paragraph 1 of this Article may be made without delay in a freely usable currency or any currency which is agreed upon by the Parties and is exchangeable according to the then effective laws and regulations, at the market rate of exchange on the date of transfer.

3. Notwithstanding paragraphs 1 and 2 of this Article, a Party may, based on the principles of equity, fairness and non-discrimination, prevent or delay a transfer through good faith application of the relevant laws and regulations in any of the following circumstances:

(1) bankruptcy, insolvency or the protection of the rights of creditors;

(2) issuing, trading, dealing or handling of securities, futures, options and other derivatives;

(3) necessary preservation measures during the investigations for criminal procedures or administrative acts;

(4) necessary reporting of transfers of cash or other monetary instruments; or

(5) assurance to the execution of judicial judgments or administrative disciplinary action.

4. In the event that a serious imbalance of payments occurs or is likely to occur to a Party, that Party may temporarily restrict transfers in accordance with its laws and regulations or practices provided that such restrictions follow the principles of fairness, non-discrimination and good faith.

## **Article 11. Denial of Benefits**

Where an enterprise of a Party is owned or controlled by a natural person or an enterprise of a third party and such enterprise has no substantial business activities in that Party, the other Party may deny the benefits of this Agreement to such enterprise of that Party.

## **Article 12. Settlement of Disputes between the Parties to this Agreement**

Disputes between the Parties concerning the interpretation, implementation or application of this Agreement shall be dealt with in accordance with Article 10 of the Cross-Strait Economic Cooperation Framework Agreement.

## **Article 13. Settlement of Disputes between an Investor and the Host Party**

1. A dispute arising from claims by an investor of a Party that he/she/it has suffered losses resulting from a breach by the institutions or organizations of the other Party of the obligations provided in this Agreement (hereinafter referred to as "investment dispute") may be settled through the following methods:

(1) amicable negotiation between the parties to the dispute;

(2) coordination through the coordination mechanism at the place of investment or the superior authorities thereof;

(3) resolution through the investment dispute settlement mechanism established under Article 15 of this Agreement;

(4) An investor may submit an investment compensation dispute arising out of this Agreement between an investor and the host Party to a Cross-strait Investment Dispute Settlement Institution for settlement through mediation. Every six months, the Cross-strait Investment Dispute Settlement Institutions shall report to the investment working group referred to in Article 15 of this Agreement on the status of investment compensation disputes under disposition; or

(5) recourse in accordance with the administrative remedy or judicial proceedings of the host Party.

2. When an investor resolves an investment compensation dispute in accordance with paragraph 1(4) of this Article, the Annex of this Agreement shall apply thereto.

3. After this Agreement enters into force, the Parties shall exchange and publish a list of Cross-strait Investment Dispute Settlement Institutions as referred to in paragraph 1(4) of this Article as soon as possible. The Parties may modify the list via negotiations.

4. If an investor has already chosen to settle a dispute in accordance with paragraph 1(5) of this Article, the investor may not submit the same dispute to a Cross-strait Investment Dispute Settlement Institution for mediation unless such action is in compliance with the relevant laws and regulations of the host Party.

5. For investment disputes referred to in paragraph 1 of this Article which have entered into judicial proceedings prior to the entry into force of this Agreement, unless agreed upon by the parties to the dispute and in compliance with the relevant laws and regulations of the host Party, the mediation procedure provided under paragraph 1(4) of this Article shall not apply.

## **Article 14. Investment-related Commercial Dispute**

1. The Parties affirm that when an investor of a Party enters into a commercial contract with a natural person, juridical person or other institutions of the other Party in accordance with relevant laws and regulations and the principle of autonomy of the parties, the Contracting Parties may stipulate the methods and means of commercial dispute settlement.

2. When an investor of a Party enters into a commercial contract with a natural person of the other Party, the contract may

include a provision for the arbitration of commercial disputes arising out of investments. If no arbitration provision is included, the disputing parties may consult with each other to submit a dispute to arbitration after the dispute occurs.

3. When an investor of a Party enters into a commercial contract with a juridical person or other institutions of the other Party, the contract may include a provision for the arbitration of commercial disputes arising out of investments. If no arbitration clause is included, the disputing parties may consult with each other to submit a dispute to arbitration after the dispute occurs.

4. The parties to a commercial dispute may designate an arbitration institution of either side of the strait and agree on the seat of arbitration. If no arbitration clause is included in a commercial contract, the disputing parties may consult with each other to submit a dispute to an arbitration institution of either side of the strait and settle the dispute at a mutually agreed seat.

5. The Parties affirm that the parties to a commercial contract may petition for the recognition and enforcement of arbitration awards in accordance with relevant laws and regulations.

## **Article 15. Contact Mechanisms**

1. The Parties agree that the investment working group of the Cross-Strait Economic Cooperation Committee (ECC) shall be in charge of handling affairs related to this Agreement, through the responsible contact persons designated by the competent authorities of each Party.

2. The investment working group shall establish the following working mechanisms to handle specific affairs related to this Agreement:

(1) Investment dispute settlement mechanism: provision of assistance in handling investment disputes between an investor and the host Party, and notification of each of the status of disputes under disposition;

(2) Investment consultation mechanism: exchange of investment information, launching of investment promotions and implementation of investment facilitation, and provision of consultation on dispute settlement and matters related to this Agreement.

(3) Other working mechanisms related to this Agreement as agreed by the Parties.

## **Article 16. Document Formats**

Business communication carried out under this Agreement shall use the document formats agreed upon by the Parties.

## **Article 17. Amendments**

Amendments to this Agreement shall be made upon a negotiated agreement between the Parties, and shall be confirmed in writing.

## **Article 18. Entry Into Force**

After signing this Agreement, each Party shall complete its relevant procedures and notify the other Party in writing. This Agreement shall enter into force the day after each Party has received notification from the other Party.

Chairman Straits Exchange Foundation

President Association for Relations Across the Taiwan Straits

## **Annex. Mediation procedure of the investment compensation dispute**

1. Mediation principle and procedure

(1) After an investor of a Party has applied for mediation in accordance with Article 13, paragraph 1(4) of this Agreement, a

Cross-strait Investment Dispute Settlement Institution shall accept the application in accordance with its rules and initiate the mediation procedure. The Cross-strait Investment Dispute Settlement Institution shall handle the investment compensation dispute in a manner that is objective, equitable, fair, and reasonable. The parties to the dispute shall actively participate in the mediation in good faith and shall not, without cause, delay mediation.

(2) Unless otherwise agreed upon by the parties to the dispute, the mediation process shall remain confidential.

(3) Except for matters that the parties to a dispute agree to disclose, the Cross-strait Investment Dispute Settlement Institution, its personnel, and the mediator(s) shall keep investment disputes confidential.

## 2. Settlement by Mediation

(1) Mediators shall remain impartial and facilitate the reaching of agreement by the parties to a dispute.

(2) After the disputing parties have reached a consensus through mediation, the mediator(s) shall produce a mediation settlement agreement according to the content of the consensus; the agreement shall be signed or chopped by the parties to the dispute and the mediator(s), and affixed with the seal of the Cross-strait Investment Dispute Settlement Institution.

(3) The parties should assure the establishment and completion of systems related to the enforcement of the mediated settlement agreement. An investor may apply for the enforcement of a mediated settlement agreement in accordance with the relevant laws and regulations of the Party in which enforcement is sought.

## 3. Means of Compensation

Means of compensation for investment compensation disputes are limited to the following:

(1) Monetary damages and appropriate interest;

(2) return of property or payment of monetary damages and applicable interest in lieu of return of property;

(3) other legal means of compensation agreed upon by the disputing parties.

## 4. Extinctive prescription of the right to request mediation

An investor's right to request mediation shall be extinguished if the investor does not exercise his/her/its right to request mediation within three years from the date on which the investor acquired or should have acquired knowledge of the other party's breach of obligations under this Agreement; provided, however, that any delay resulting from force majeure shall not be included in the aforementioned three-year period.

## 5. Restrictions on the use of mediation information

If an investment compensation dispute remains unsettled after undergoing the procedure provided in Article 13, paragraph 1(4) of this Agreement, unless otherwise agreed upon by the parties to the dispute neither party may, in subsequent administrative or judicial proceedings for the same dispute, cite any statements, admissions or concessions made by the other party or the mediator(s) in the aforementioned proceedings as information or evidence to the disadvantage of the other party to the dispute.

## 6. Notification of mediation rules

The mediation rules of Cross-strait Investment Dispute Settlement Institutions shall be reported to the investment working group referred to in Article 15 of this Agreement.