

Agreement between the People's Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments

The Federal Republic of Germany and the People's Republic of China

(hereinafter referred to as the "Contracting Parties"),

Intending to create favourable conditions for investment by investors of one Contracting Party in the territory of the other Contracting Party,

Recognizing that the encouragement, promotion and protection of such investment will be conducive to stimulating business initiative of the investors and will increase prosperity in both States,

Desiring to intensify the economic cooperation of both States,

Have agreed as follows:

Article 1. Definitions

For the purpose of this Agreement

1. the term "investment" means every kind of asset invested directly or indirectly by investors of one Contracting Party in the territory of the other Contracting Party, and in particular, though not exclusively, includes:

- (a) Movable and immovable property and other property rights such as mortgages and pledges;
- (b) Shares, debentures, stock and any other kind of interest in companies;
- (c) Claims to money or to any other performance having an economic value associated with an investment;
- (d) Intellectual property rights, in particular copyrights, patents and industrial designs, trade-marks, trade-names, technical processes, trade and business secrets, know-how and good-will;
- (e) Business concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources;

Any change in the form in which assets are invested does not affect their character as investments;

2. The term "investor" means

(a) In respect of the Federal Republic of Germany:

- Germans within the meaning of the Basic Law for the Federal Republic of Germany,
- any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the territory of the Federal Republic of Germany, irrespective of whether or not its activities are directed at profit;

(b) In respect of the People's Republic of China:

- natural persons who have nationality of the People's Republic of China in accordance with its laws,
- economic entities, including companies, corporations, associations, partnerships and other organizations, incorporated and constituted under the laws and regulations of and with their seats in the People's Republic of China, irrespective of whether or not for profit and whether their liabilities are limited or not;

3. The term "return" means the amounts yielded from investments, including profits, dividends, interests, capital gains, royalties, fees and other legitimate income.

Article 2. Promotion and Protection of Investment

(1) Each Contracting Party shall encourage investors of the other Contracting Party to make investments in its territory and admit such investments in accordance with its laws and regulations.

(2) Investments of the investors of either Contracting Party shall enjoy constant protection and security in the territory of the other Contracting Party.

(3) Neither Contracting Party shall take any arbitrary or discriminatory measures against the management, maintenance, use, enjoyment and disposal of the investments by the investors of the other Contracting Party.

(4) Subject to its laws and regulations, either Contracting Party shall give sympathetic consideration to applications for obtaining visas and working permits to nationals of the other Contracting Party engaging in activities associated with investments made in the territory of that Contracting Party.

Article 3. Treatment of Investment

(1) Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party.

(2) Each Contracting Party shall accord to investments and activities associated with such investments by the investors of the other Contracting Party treatment not less favourable than that accorded to the investments and associated activities by its own investors.

(3) Neither Contracting Party shall subject investments and activities associated with such investments by the investors of the other Contracting Party to treatment less favourable than that accorded to the investments and associated activities by the investors of any third State.

(4) The provisions of Paragraphs 1 to 3 of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege by virtue of

(a) Any membership or association with any existing or future customs union, free trade zone, economic union, common market;

(b) Any double taxation agreement or other agreement regarding matters of taxation.

Article 4. Expropriation and Compensation

(1) Investments by investors of either Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party.

(2) Investments by investors of either Contracting Party shall not directly or indirectly be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party (hereinafter referred to as expropriation) except for the public benefit and against compensation. Such compensation shall be equivalent to the value of the investment immediately before the expropriation is taken or the threatening expropriation has become publicly known, whichever is earlier. The compensation shall be paid without delay and shall carry interest at the prevailing commercial rate until the time of payment; it shall be effectively realizable and freely transferable. Precautions shall have been made in an appropriate manner at or prior to the time of expropriation for the determination and payment of such compensation. At the request of the investor the legality of any such expropriation and the amount of compensation shall be subject to review by national courts, notwithstanding the provisions of Article 9. Article 9.

(3) Investors of either Contracting Party shall enjoy most-favoured-nation treatment in the territory of the other Contracting Party in respect of the matters provided for in this Article.

Article 5. Compensation for Damages and Losses

Investors of either Contracting Party whose investments suffer losses in the territory of the other Contracting Party owing to war or other armed conflict, revolution, a state of national emergency or revolt, shall be accorded treatment by such other

Contracting Party not less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State as regards restitution, indemnification, compensation or other valuable consideration.

Article 6. Repatriation of Investments and Returns

(1) Each Contracting Party shall guarantee to the investors of the other Contracting Party the transfer of their investments and returns held in its territory, including:

- (a) The principal and additional amounts to maintain or increase the investment;
- (b) Returns;
- (c) Proceeds obtained from the total or partial sale or liquidation of investments or amounts obtained from the reduction of investment capital;
- (d) Payments pursuant to a loan agreement in connection with investments;
- (e) Payments in connection with contracting projects;
- (f) Earnings of nationals of the other Contracting Party who work in connection with an investment in its territory.

(2) Each Contracting Party shall guarantee to the investors of the other Contracting Party the free transfer of compensation and other payments under Article 4 and 5.

(3) The transfer mentioned above shall be made without delay in a freely convertible currency and at the prevailing market rate of exchange applicable within the Contracting Party accepting the investments and on the date of transfer. In the event that the market rate of exchange does not exist, the rate of exchange shall correspond to the cross rate obtained from those rates which would be applied by the International Monetary Fund on the date of payment for conversions of the currencies concerned into Special Drawing Rights.

Article 7. Subrogation

If one Contracting Party or its designated agency makes a payment to its investor under a guarantee given in respect of an investment made in the territory of the other Contracting Party, the latter Contracting Party shall recognize the assignment of all the rights and claims of the indemnified investor to the former Contracting Party or its designated agency, by law or by legal transactions, and the right of the former Contracting Party or its designated agency to exercise by virtue of subrogation any such right to same extent as the investor. As regards the transfer of payments made by virtue of such assigned claims, Article 6 shall apply *mutatis mutandis*.

Article 8. Settlement of Disputes between Contracting Parties

(1) Any dispute between the Contracting Parties concerning the interpretation or application of this Agreement shall, as far as possible, be settled with consultation through diplomatic channel.

(2) If a dispute cannot thus be settled within six months, it shall, upon the request of either Contracting Party, be submitted to an ad-hoc arbitral tribunal.

(3) Such tribunal comprises three arbitrators. Within two months of the receipt of the written notice requesting arbitration, each Contracting Party shall appoint one arbitrator. Those two arbitrators shall, within further two months, together select a national of a third State having diplomatic relations with both Contracting Parties as Chairman of the arbitral tribunal.

(4) If the arbitral tribunal has not been constituted within four months from the receipt of the written notice requesting arbitration, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointments. If the President is a national of either Contracting Party or is otherwise prevented from discharging the said functions, the Member of the International Court of Justice next in seniority who is not a national of either Contracting Party or is not otherwise prevented from discharging the said functions shall be invited to make such necessary appointments.

(5) The arbitral tribunal shall determine its own procedure. The arbitral tribunal shall reach its award in accordance with the provisions of this Agreement and the principles of international law recognized by both Contracting Parties.

(6) The arbitral tribunal shall reach its award by a majority of votes. Such award shall be final and binding upon both Contracting Parties. The arbitral tribunal shall, upon the request of either Contracting Party, explain the reasons of its award.

(7) Each Contracting Party shall bear the costs of its appointed arbitrator and of its representation in arbitral proceedings. The relevant costs of the Chairman and tribunal shall be borne in equal parts by the Contracting Parties.

Article 9. Settlement of Disputes between Investors and One Contracting Party

(1) Any dispute concerning investments between a Contracting Party and an investor of the other Contracting Party should as far as possible be settled amicably between the parties in dispute.

(2) If the dispute cannot be settled within six months of the date when it has been raised by one of the parties in dispute, it shall, at the request of the investor of the other Contracting State, be submitted for arbitration.

(3) The dispute shall be submitted for arbitration under the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID), unless the parties in dispute agree on an ad-hoc arbitral tribunal to be established under the Arbitration Rules of the United Nations Commission on the International Trade Law (UNCITRAL) or other arbitration rules.

(4) Any award by an ad-hoc tribunal shall be final and binding. Any award under the procedures of the said Convention shall be binding and subject only to those appeals or remedies provided for in this Convention. The awards shall be enforced in accordance with domestic law.

Article 10. Other Obligations

(1) If the legislation of either Contracting Parties or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to this 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 this Agreement, such regulation shall to the extent that it is more favourable prevail over this Agreement.

(2) Each Contracting Party shall observe any other obligation it has entered into with regard to investments in its territory by investors of the other Contracting Party.

Article 11. Application

This Agreement shall apply to investments, which are made prior to or after its entry into force by investors of either Contracting Party in accordance with the laws and regulations of the other Contracting Party in the territory of the latter.

Article 12. Relations between Contracting Parties

The provisions of the present Agreement shall apply irrespective of the existence of diplomatic or consular relations between the Contracting Parties.

Article 13. Consultations

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

Article 14. Protocol

The attached protocol shall form an integral part of this Agreement.

Article 15. Entry Into Force, Duration and Termination

(1) This Agreement shall enter into force one month from the date on which both Contracting Parties have notified each other in writing that the national requirements for such entry into force have been fulfilled. The relevant date shall be the day on which the last notification is received.

(2) This Agreement shall remain in force for a period of ten years and shall be extended thereafter for an unlimited period unless denounced in writing through diplomatic channels by either Contracting Party twelve months before its expiration.

(3) After the expiration of the initial ten years period, either Contracting Party may at any time thereafter terminate this

Agreement by giving at least twelve month's written notice through diplomatic channels to the other Contracting Party.

(4) With respect to investments made prior to the date of termination of this Agreement, the provisions of Article 1 to 14 shall continue to be effective for a further period of twenty years from such date of termination. Article 1 to 14 shall continue to be effective for a further period of twenty years from such date of termination.

Article 16. Transition

(1) Upon entry into force of this Agreement the Agreement of 7 October 1983 between the Federal Republic of Germany and the People's Republic of China on the Encouragement and Reciprocal Protection of Investments shall terminate.

(2) The present Agreement shall apply to all investments made by investors of either Contracting Party in the territory of the other Contracting Party, whether made before or after the entry into force of this Agreement, but shall not apply to any dispute or any claim concerning an investment which was already under judicial or arbitral process before its entry into force. Such disputes and claims shall continue to be settled according to the provisions of the Agreement of 7 October 1983 mentioned in paragraph 1 of this Article.

For the Federal Republic of Germany Chrobog For the People's Republic of China Yu Guangzhou

On signing the Agreement between the People's Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments, the plenipotentiaries, being duly authorized, have, in addition, agreed on the following provisions, which shall be regarded as an integral part of the said Agreement:

1. Ad Article 1

(a) For the avoidance of doubt, the Contracting Parties agree that investments as defined in Article 1 are those made for the purpose of establishing lasting economic relations in connection with an enterprise, especially those which allow to exercise effective influence in its management.

(b) "Invested indirectly" means invested by an investor of one Contracting Party through a company which is fully or partially owned by the investor and having its seat in the territory of the other Contracting Party

(c) Returns from the investment and from reinvestments shall enjoy the same protection as the investment.

2. Ad Article 2

The Agreement shall apply to the territory of each Contracting Party including the territorial sea as well as to the areas of the exclusive economic zone and the continental shelf insofar as international law permits the Contracting Party concerned to exercise sovereign rights or jurisdiction in these areas.

3. Ad Article 2 and 3

With regard to the People's Republic of China paragraph 3 of Article 2 and paragraph 2 of Article 3 do not apply to

(a) any existing non-conforming measures maintained within its territory;

(b) the continuation of any such non-conforming measure;

(c) any amendment to any such non-conforming measure to the extent that the amendment does not increase the non-conformity of these measures.

The People's Republic of China will take all appropriate steps in order to progressively remove the non-conforming measures.

4. Ad Article 3

(a) The following shall more particularly, though not exclusively, be deemed "activity" within the meaning of Article 3 (2): the management, maintenance, use, enjoyment and disposal of an investment. The following shall, in particular, be deemed "treatment less favourable" within the meaning of Article 3: unequal treatment in the case of restrictions on the purchase of raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind as well as any other

measures having similar effects. Measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed "treatment less favourable" within the meaning of Article 3.

(b) The provisions of Article 3 do not oblige a Contracting Party to extend to investors resident in the territory of the other Contracting Party tax privileges, tax exemptions and tax reductions which according to its tax laws are granted only to investors resident in its territory.

5. Article 6

(a) With regard to the People's Republic of China: - Article 6, paragraph 1 (c) will apply provided that the transfer shall comply with the relevant formalities stipulated by the present Chinese laws and regulations relating to exchange control. - Article 6, paragraph 1 (d) will apply provided that a loan-agreement has been registered with the relevant foreign exchange administration authority. To the extent that the formalities mentioned above are no longer required according to the relevant provisions of Chinese law, Article 6 shall apply without restrictions.

(b) A transfer shall be deemed to have been made "without delay" within the meaning of Article 6 (3) if effected within such period as is normally required for the completion of transfer formalities. The said period shall commence on the day on which the relevant request has been submitted to the relevant foreign exchange administration with full and authentic documentation and information and may on no account exceed two months.

6. To Article 9 With respect to investments in the People's Republic of China an investor of the Federal Republic of Germany may submit a dispute for arbitration under the following conditions only: (a) the investor has referred the issue to an administrative review procedure according to Chinese law, (b) the dispute still exists three months after he has brought the issue to the review procedure, and (c) in case the issue has been brought to a Chinese court, it can be withdrawn by the investor according to Chinese law.

7. The investors of either Contracting Party are free to choose international means of transport for the transport of persons and/or capital-goods directly connected with an investment within the meaning of this Agreement.

For the People's Republic of China Federal Republic of Germany