

# **AGREEMENT BETWEEN THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA AND THE GOVERNMENT OF DEMOCRATIC REPUBLIC OF THE CONGO ON THE PROMOTION AND PROTECTION OF INVESTMENTS**

## **PREAMBLE**

The Government of the People's Republic of China and the Government of the Democratic Republic of the Congo (hereinafter referred to as the Contracting Parties),

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

Recognizing that the reciprocal encouragement, promotion and protection of such investment on the basis of equality and mutual benefits will be conducive to stimulating business initiative of the investors and will increase economic prosperity in both States;

Respect for economic sovereignty of Both Contracting Parties,

Desiring to intensify the cooperation of both States, to promote a healthy, stable and sustainable development of economy, and to improve the living standard of nationals,

Have agreed as follows:

## **Article 1. DEFINITIONS**

For the purpose of this Agreement,

1. The term "investment" means every kind of asset that has the characteristics of an investment, invested by investors of one Contracting Party in accordance with the laws and regulations of the other Contracting Party in the territory of the latter, and in particular, though not exclusively, includes:

- (a) movable and immovable property and other property rights such as mortgages, pledges and similar rights;
- (b) shares, debentures, stock and any other kind of participation in companies;
- (c) claims to money (1) or to any other performance having an economic value associated with an investment;
- (d) intellectual property rights, in particular copyrights, patents, trade-marks, trade-names, technical process, 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.
- (f) Bonds, including government issued bonds, debentures, loans and other forms of debt (2), and right derived therefrom.

The characteristics of an investment mean the commitment of capital or other resources, the expectation of gain or profit, and the assumption of risk.

Any change in the form in which assets are invested does not affect their character as investments provided that such change is in accordance with the laws and regulations of the Contracting Party in whose territory the investment has been made.

The investment made by an investor of one Contracting Party through an enterprise which is wholly or partially owned by the investor and having its seat in the territory of the other Contracting Party is also deemed as investment of this paragraph.

2. The term "investor" means nationals or enterprises of one Contracting Party who are investing or have invested in the territory of the other Contracting Party:

(a) the term "national" means natural persons who have nationality of either Contracting Party in accordance with the applicable laws of that Contracting Party;

(b) the term "enterprise" means any entities, including companies, firms, associations, partnerships and other organizations, incorporated or constituted under the laws and regulations of either Contracting Party and have their seats and substantial business activities in that Contracting Party, irrespective of whether or not for profit and whether it is owned or controlled by private person or government or not.

(c) legal entities constituted under the laws of a non-contracting Party but directly owned or controlled by nationals in Paragraph(a) or enterprises in Paragraph(b).

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

4. The term "territory" means,

(a) in respect of the People's Republic of China, the territory, including the land area, internal waters and the territorial sea and the air space above them, as well as any area beyond its territorial sea within which the People's Republic of China has sovereign rights or jurisdiction for the purpose of explorations and exploitations of resources of the seabed and its subsoil and superjacent water resources in accordance with Chinese law and international law.

(b) in respect of the Democratic Republic of the Congo, the territory, including the land area, internal waters and the territorial sea and the air space above them, as well as any area beyond its territorial sea within which the Democratic Republic of the Congo has sovereign rights or jurisdiction for the purpose of explorations and exploitations of resources of the seabed and subsoil and superjacent water resources in accordance with the law of the Democratic Republic of the Congo and international law.

(1) For greater certainty, investment does not mean (a) claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of the other Contracting Party; (b) claims to money that arise from marriage or inheritance and have no characteristics of investment.

(2) Loans and other forms of debt, which have been registered to the competent authority of a Party, do not mean trade debt where the debts would be non-interest earning if paid on time without penalty.

## **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. Subject to its laws and regulations, one Contracting Party shall provide assistance in and facilities for obtaining visas and working permit to nationals of the other Contracting Party engaging in activities associated with investments made in the territory of that Contracting Party.

## **Article 3. FAIR AND EQUITABLE TREATMENT**

1. Each Contracting Party shall ensure to accord to investors of the other Contracting Party and associated investments in its territory fair and equitable treatment and full protection and security, which do not mean, under any circumstances, investors shall be accorded treatment more favorable than nationals of the Contracting Party in whose territory the investment has been made.

2. "Fair and equitable treatment" includes, in particular, that investors of one Contracting Party shall not be willfully rejected to fairly judicial proceedings by the other Contracting Party or be treated with obvious discriminatory or arbitrary measures pursuant to the legal system of the latter Contracting Party and general legal principles.

3. "Full protection and security" requires that Contracting Parties shall take reasonable and necessary police measures when performing the duty of guaranteeing investment protection and security.

4. A determination that there has been a breach of other articles of this Agreement, or articles of other agreements, does not establish that there has been a breach of this article.

## **Article 4. NATIONAL TREATMENT**

Without prejudice to its applicable laws and regulations, with respect to the management, conduct, maintenance, use, enjoyment, sale or disposal of the investments in its territory, each Contracting Party shall accord to investors of the other Contracting Party and associated investments treatment not less favorable than that accorded to its own investors and associated investments in like circumstances.

## **Article 5. MOST FAVORED NATION TREATMENT**

1. Each Contracting Party shall accord to investors of the other Contracting Party and the investments thereof treatment no less favorable than that it accords, in like circumstances, to investors and the investments thereof of any third State with respect to the operation, management, maintenance, use, enjoyment, sale or disposal of investments.

2. The provisions of Paragraphs 1 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 customs union, free trade zone, economic union, monetary union and agreement resulting in such unions, or similar institutions;

(b) any international agreement or arrangement relating wholly or mainly to taxation (including customs tax);

(c) any arrangements for facilitating small scale frontier trade in border areas.

3. Paragraph 1 does not apply to the international investment dispute settlement procedure between one Contracting Party and investors of the other Contracting Party.

## **Article 6. EXPROPRIATION**

1. Neither Contracting Party shall expropriate, nationalize or take any other measure the effects of which would be equivalent to expropriation or nationalization against the investments of the investors of the other Contracting Party in its territory (hereinafter referred to as expropriation), unless the following conditions are met:

(a) for the public interests;

(b) in accordance with domestic legal procedure and relevant due process;

(c) without discrimination;

(d) against compensation.

"Measure the effects of which would be equivalent to expropriation or nationalization" means indirect expropriation.

2. The determination of whether a measure or a series of measures of one Contracting Party constitutes indirect expropriation in Paragraph 1 requires a case-by-case, fact-based inquiry that considers, among other factors:

(a) the economic influence of a measure or a series of measures, although the fact that a measure or a series of measures of the Contracting Party has an adverse effect on the economic value of investments, standing alone, does not establish that an indirect expropriation has occurred;

(b) the extent to which the measure or the series of measures grant discrimination in scope or application over investors and associated investments of the other Contracting Party;

(c) the extent to which the measure or the series of measures interfere the obviously reasonable investment expectation of investors of the other Contracting Party, such expectation arises from the specific commitments made by one Contracting Party to the investors of the other Contracting Party;

(d) the character and purpose of a measure and a series of measures, whether it is adopted for the purpose of public interest in good faith, and whether it is in appropriation to the purpose of expropriation.

3. Except in rare circumstances, such as the measures adopted severely surpassing the necessity of maintaining corresponding reasonable public welfare, non-discriminatory regulatory measures adopted by one Contracting Party for the

purpose of legitimate public welfare, such as public health, safety and environment, do not constitute indirect expropriation.

4. The compensation mentioned in Paragraph 1 of this Article shall be equivalent to the fair market value of the expropriated investments immediately before the expropriation is taken or the impending expropriation becomes public knowledge, whichever is earlier. The compensation shall also include interest at a reasonable commercial rate until the date of payment. The compensation shall be made without unreasonable delay, be effectively realizable and freely transferable.

## **Article 7. COMPENSATION FOR DAMAGES AND LOSSES**

1. Investors of one Contracting Party, whose investments in the territory of the other Contracting Party suffer losses owing to armed clash, a state of emergency, insurrection or other similar events in the territory of the latter Contracting Party, shall be accorded by the other Contracting Party, as regards restitution, indemnification, compensation and other settlements, no less favorable treatment than that accorded to the investors of its own or any third State, whichever is more favorable to the investor concerned.

2. Investments by investors of one Contracting Party that, in any of the situations referred to in Paragraph 1 of this Article, suffer losses in the territory of the other Contracting Party resulting from requisitioning or destruction of an investment or a part thereof by the latter's armed forces or authorities, which was not caused in combat action or was not required by the necessity of situation, shall be accorded restitution or appropriate compensation.

## **Article 8. TRANSFERS**

1. Each Contracting Party shall, subject to its laws and regulations, guarantee to the investors of the other Contracting Party the transfer of their returns or proceeds legitimately obtained in the former party's territory, and in particular, though not exclusively, includes:

- (a) profits, interests, dividends, capital gains, royalty fees, and other fees in connection with intellectual property rights;
- (b) payments in connection with an investment contract, including related payments made pursuant to a loan agreement;
- (c) proceeds obtained from the whole or partial sale or liquidation of investments;
- (d) earnings and remuneration of nationals of the other Contracting Party who work in connection with an investment;
- (e) payments made pursuant to Article 6 [expropriation] and Article 6 [damages and losses]; or
- (f) payments arising out of a dispute in connection with investments.

2. Except as otherwise provided for in this Agreement, each Contracting Party shall ensure that the transfers mentioned above shall be made without any delay in a freely convertible currency specified by International Monetary Fund and at the market rate of exchange applicable on the date of transfer to the currency to be transferred.

3. Notwithstanding above articles of this Agreement, a Contracting Party may prevent a transfer through the equitable, non-discriminatory and good faith application of its national laws relating to:

- (a) bankruptcy, insolvency or the protection of the rights of creditors;
- (b) issuing, trading or dealing in securities futures, options and other derivatives;
- (c) suspected of criminal or administrative offenses;
- (d) reports of transfers of cash or other monetary instruments; or
- (e) ensuring compliance with judicial or administrative proceedings.

4. In case of a serious balance of payments difficulty or of a threat thereof, each Contracting Party may temporarily restrict transfers provided that such a Contracting Party implements measures in accordance with international standards. These restrictions should be imposed on an equitable, non-discriminatory and good faith basis.

## **Article 9. SUBROGATION**

If one Contracting Party or its designated agency makes a payment to its investors under a guarantee or a contract of insurance against non-commercial risks it has accorded in respect of an investment made in the territory of the other Contracting Party, the latter Contracting Party shall recognize:

(a) the assignment, whether under the law or pursuant to a legal transaction in the former Contracting Party, of any rights or claims by the investors to the former Contracting Party or to its designated agency, as well as,

(b) that the former Contracting Party or its designated agency is entitled by virtue of subrogation to exercise the rights and enforce the claims of that investor and assume the obligations related to the investment to the same extent as the investor.

## **Article 10. DENIAL OF BENEFITS**

1. A Contracting Party may deny the benefits of this Agreement to an investor of the other Contracting Party that is an enterprise of such other Contracting Party and to investments of that investor if persons of a non-party own or control the enterprise:

(a) the denying Contracting Party does not maintain diplomatic relations with the non-party; or

(b) the denying Contracting Party adopts or maintains measures with respect to the non-party or a person of the non-party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Agreement were accorded to the enterprise or to its investments.

(c) the enterprise has no substantial commercial business in the territory of the other Contracting Party.

2. A Contracting Party may deny the benefits of this Agreement to an investor of the other Contracting Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and nationals or enterprises of the denying Party own or control the enterprise.

## **Article 11. 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 of 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 from both of them are appointed 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 12. SETTLEMENT OF DISPUTES BETWEEN INVESTORS AND ONE CONTRACTING PARTY**

1. Any legal dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.

2. If the dispute that an investor of one Contracting Party claiming that the other Contracting Party has breached an obligation under Article 2 through 9, Article 13 (2), can not be settled through negotiations within six months from the date it

has been raised by either party to the dispute, the disputing investor who incurred loss or damage from that breach may, by his choice, submit the claim:

(a) to the competent court of the Contracting Party that is a party to the dispute;

(b) to International Center for Settlement of Investment Disputes(ICSID)under the Convention on the Settlement of Disputes between States and Nationals of Other States, done at Washington on March 18, 1965.

(c) to an ad-hoc arbitral tribunal to be established under the Arbitration Rules of the United Nations Commission on the International Trade Law (UNCITRAL).

An investment may not make a claim.

The other Contracting Party may require the investor concerned to exhaust the domestic administrative review procedures specified by the laws and regulations of that Contracting Party before the submission to international arbitration.

3. If the investor has submitted the dispute to the competent court of the Contracting Party concerned or to international arbitration, the choice of one of the three procedures shall be final.

4. A dispute shall not be submitted to arbitration when more than three (3) years elapsed from the date that the investor first acquired or should have first acquired knowledge of the events which gave rise to the dispute.

5. The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the Parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting state party to the dispute (including its rules on the conflict of laws), and such rules of international law as may be applicable, in particular, this Agreement.

6. Unless the disputing parties agree otherwise, where an award affirms that a Contracting Party has breached its obligations under this Agreement, the tribunal may only award, separately or in combination:

(a) monetary damages and any applicable interest; or

(b) restitution of property, in which case the award may specify monetary damages and corresponding interest in lieu of restitution.

7. The arbitration award shall be final and binding upon both parties to the dispute. Both Contracting Parties shall commit themselves to the enforcement of the award.

8. In principle, each Contracting Party shall bear the costs of its appointed arbitrator and of any legal representation in proceedings. The costs of the presiding arbitrator and of other expenses associated with the conduct of the arbitration shall be borne equally by the Contracting Parties. The Tribunal may award one Contracting Party to bear a higher proportion of the costs and give the explanation. If the Tribunal deems that the claim of the claimant or the objection of the respondent is frivolous, it may award the losing Party to bear reasonable costs and attorney's fees of the prevailing Party incurred in objecting or opposing the objection with a reasonable cause.

## **Article 13. OTHER OBLIGATIONS**

1. If the legislation of either Contracting Party or international obligations existing at present or established hereafter between the Contracting Parties result in a position entitling investments by investors of the other Contracting Party to a treatment more favorable than is provided for by the Agreement, such position shall not be affected by this Agreement.

2. Each Contracting Party shall observe any written commitments in the form of agreement or contract it may have entered into with the investors of the other Contracting Party as regards to their investments.

3. Notwithstanding paragraph 2, the breach of one Contracting Party of the obligation under a commercial contract is not a breach of this Agreement.

## **Article 14. APPLICATION**

1. This Agreement shall apply to investment made prior to or after its entry into force by investors of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the Contracting Party concerned, but not apply to the dispute arose before its entry into force.

2. This agreement shall apply to the investor stipulated in Item 3, Paragraph 2, Article 1 only under the following circumstance: when the investment of such investor is expropriated by the other Contracting Party, there is no righteous

claim or the investor waives the righteous claim under other agreements signed by the non-contracting party, under whose laws and regulations the investor has established, and the other Contracting Party.

## **Article 15. CONSULTATIONS**

1. The representatives of the Contracting Parties shall hold meetings from time to time for the purpose of:

- (a) reviewing the implementation of this Agreement;
- (b) exchanging legal information and investment opportunities;
- (c) resolving disputes arising out of investments;
- (d) forwarding proposals on promotion of investment;
- (e) studying other issues in connection with investment.

2. When either Contracting Party requests consultation on any matter of Paragraph 1 of this Article, the other Contracting Party shall give prompt response and the consultation be held alternatively in Beijing and in Kinshasa.

## **Article 16. INTERPRETATION**

1. In the dispute settlement procedure stipulated in Article 12, upon request of one disputing Party, the arbitral tribunal shall require both Contracting Parties to interpret articles of this Agreement to the dispute together. Both Contracting Parties shall submit combined decision of interpretation in writing to the arbitral tribunal within sixty days from the request is raised.

2. Combined decision made by both Contracting Parties pursuant to Paragraph 1 shall be binding upon the arbitral tribunal. The award shall be consistent with the combined decision. If both Contracting Parties fail to make such decision within sixty days, the arbitral tribunal will make decision independently.

## **Article 17. ENTRY INTO FORCE, DURATION AND TERMINATION**

1. The Contracting Parties shall notify each other in writing through diplomatic channel the fulfillment of their domestic legal procedures in relation to the approval and entry into force of this Agreement. This Treaty shall enter into force on the thirtieth day upon the receipt of the latter notification. This Treaty shall remain in force for a period of ten (10) years. This Treaty shall continue to be in force for another ten years unless either Contracting Party has given a written notice to the other Contracting Party to terminate this Treaty one year before the expiration of the initial ten year period.

2. Either Contracting Party may give a written notice to the other Contracting Party to terminate this Agreement. This Agreement shall be no longer in force on the day six months after the notice was sent.

3. With respect to investments made prior to the date of termination of this Treaty, the provisions of Article 1 to 16 shall continue to be effective for a further period of ten years from such date of termination.

4. This Treaty may be amended with the agreement of the Contracting Parties. Any amendment shall enter into force under the procedures required for entry into force of the present Treaty.

IN WITNESS WHEREOF the undersigned representatives, duly authorized thereto by respective Governments, has signed this Agreement.

Done in triplicate on August 11th, 2011, in the Chinese, French and English languages, the three texts being equally authentic. In case of divergent interpretation, the English text shall prevail.

For the Government of The People's Republic of China

For the Government of The Democratic Republic of the Congo