

AGREEMENT BETWEEN THE PEOPLE'S REPUBLIC OF CHINA AND THE KINGDOM OF SPAIN ON THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS

The People's Republic of China and the Kingdom of Spain (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 reciprocal 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 cooperation of both States on the basis of equality and mutual benefits;

Have agreed as follows:

Article 1. Definitions

For the purposes of this Agreement,

1. The term "investment" means every kind of asset 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 or to any other performance having economic value associated with an investment;
- d) intellectual and industrial 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.

Investments made in the territory of one Contracting Party by any company of that same Contracting Party which is actually owned or controlled by investors of the other Contracting Party shall likewise be considered as investments of investors of the latter Contracting Party if they have been made in accordance with the laws and regulations of the former Contracting Party.

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.

2. The term "investor" means,

- a) natural persons who have the nationality of either Contracting Party in accordance with the laws of that Contracting Party;
- b) legal entities, including companies, associations, partnerships and other organizations, incorporated or constituted under the laws and regulations of either Contracting Party and have their seats in that Contracting Party.

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

4. The term "territory" means the territory of either Contracting Party, including the land territory, territorial sea and the airspace above them, as well as the exclusive economic zone and the continental shelf that extend beyond the territorial sea over which the Contracting Party concerned exercises sovereign rights and/or jurisdiction in accordance with its domestic law and international law.

Article 2. Promotion and Protection of Investments

1. Each Contracting Party shall encourage and create favourable conditions for 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 the constant protection and security in the territory of the other Contracting.
3. Neither Contracting Party shall take any unreasonable or discriminatory measure 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 application 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 all the time 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 no less favourable than that which it accords to the investments and associated activities by its own investors.
3. Neither Contracting Party shall subject investments and activities associated with such investments by 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 2 and 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 and their investments the benefit of any treatment, preference or privilege by virtue of:
 - a) any membership of or association with any existing or future customs union, free trade zone, economic union, monetary union and any international agreement resulting in such unions or similar institutions;
 - b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation;
 - c) any arrangements for facilitating small scale frontier trade in border areas.

Article 4. Expropriation

1. Neither Contracting Party shall expropriate, nationalize or take other similar measures having equivalent effect to nationalization or expropriation (hereinafter referred to as "expropriation") against the investments of the investors of the other Contracting Party in its territory, unless the following conditions are met:
 - a) for the public interest,
 - b) under domestic legal procedure,
 - c) without discrimination and
 - d) and against compensation.
2. The compensation mentioned in Paragraph 1 of this Article shall be equivalent to the market value of the expropriated investments immediately before the expropriation is taken or the impending expropriation becomes public knowledge, whichever is earlier. The market value shall be determined in accordance with generally recognized principles of valuation. The compensation shall include interest at a normal commercial rate from the date of expropriation until the date of

payment. The compensation shall be paid without delay, be effectively realizable and freely transferable.

3. The investor affected shall have the right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Contracting Party, of its case, including the valuation of its investment and the payment of compensation, in accordance with the principles set out in this Article.

Article 5. 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 war, a state of national emergency, insurrection, riot or other similar events in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation and other settlements, no less favourable than that accorded to the investors of its own or any third State, whichever is more favourable to the investor concerned.

2. Notwithstanding paragraph 1), an investor of one Contracting Party who, in any of the situations referred to in that paragraph, suffers a loss in the territory of the other Contracting Party resulting from:

- a) requisitioning of its investment or part thereof by the latter's forces or authorities; or
- b) destruction of its investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation,

shall be accorded by the latter Contracting Party restitution or compensation. Resulting payments shall be made without delay and be freely transferable.

Article 6. Transfers

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, though not exclusively:

- a) profits, dividends, interests and other legitimate income;
- b) proceeds obtained from the total or partial sale or liquidation of investments;
- c) payments pursuant to a loan agreement in connection with investments;
- d) royalties in relation to the matters in Paragraph 1 (d) of Article 1;
- e) payments of technical assistance or technical service fee, management fee
- f) payments in connection with contracting projects;
- g) earnings of personnel engaged from abroad who work in connection with an investment in its territory.

2. Each Contracting Party shall allow the investors of the other Contracting Party the free transfer of compensation and other payments under Articles 4 and 5 of this Agreement.

3. The transfer mentioned above shall be made without delay in a freely convertible currency at the prevailing market rate of exchange applicable within the Contracting Party accepting the investment and on the date of transfer.

Article 7. 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 to the same extent as the investor.

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 consultations through diplomatic channels.
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, 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 generally recognized principles of international law.
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 the 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 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 be notified in writing by the investor to the latter Contracting Party and, as far as possible, be settled amicably through negotiations between the parties to the dispute.
2. If the dispute cannot be settled through negotiations within six months from the date of the written notification, it shall be submitted by the choice of the investor:
 - a) to the competent court of the Contracting Party that is party to the dispute; or
 - b) to the International Centre for Settlement of Investment Disputes (ICSID) 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; or
 - c) to an ad hoc tribunal of arbitration established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

Once the investor has submitted the dispute to the competent court of the Contracting Party concerned or to the ICSID or to an ad hoc tribunal established under the Arbitration Rules of UNCITRAL, the choice of one of the three procedures shall be final.

3. The arbitration award shall be based on the law of the Contracting Party to the dispute, including its rules on the conflict of laws, the provisions of this Agreement as well as the universally accepted principles of international law.
4. 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.

Article 10. Other Obligations

1. If the legislation of either Contracting Party 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 that 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 commitments it may have entered into with investors of the other Contracting Party as regards their investments.

Article 11. Application

This Agreement shall apply to investments made prior 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.

Article 12. Transition

1. This Agreement substitutes and abrogates the Agreement on reciprocal encouragement and protection of investments between the Kingdom of Spain and the People's Republic of China, signed in Madrid on 6th February, 1992.

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 its entry into force, 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 1992 mentioned in paragraph 1 of this Article.

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. Entry Into Force, Duration and Termination

1. This Agreement shall enter into force on the first day of the following month after the date on which both Contracting Parties have notified each other in writing that their respective internal legal procedures necessary therefore have been fulfilled and shall remain in force for an initial period of ten years.

2. This Agreement shall continue in force if either Contracting Party fails to give a written notice to the other Contracting Party to terminate this Agreement one year before the expiration of the initial period specified in paragraph 1 of this Article.

3. After the expiration of the initial ten year period, either Contracting Party may at any time thereafter terminate this Agreement by giving at least one year's written notice to the other Contracting Party.

4. With respect to investments made prior to the date of termination of this Agreement, the provisions of Articles 1 to 13 shall continue to be effective for a further period of ten years from such date of termination.

5. This Agreement may be amended by written agreement between the Contracting Parties. Any amendment shall enter into force under the same procedures required for entry into force of the present Agreement.

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

DONE in duplicate at Madrid on Nov, 14, 2005 in the Spanish, Chinese and English languages, all texts being equally authentic. In case of any divergence of interpretation, the English text shall prevail.

FOR THE KINGDOM OF SPAIN

José Montilla Aguilera,

Minister for Industry, Tourism and Trade

FOR THE PEOPLE'S REPUBLIC OF CHINA

Xiaoqi Qiu,

Ambassador of the People's Republic of China to Spain

Protocol to the agreement between the people's republic of china and the kingdom of spain on the promotion and reciprocal protection of investments

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

Ad Article 1

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

Ad Article 2 and 3

1. 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 referred to in subparagraph a);
- c) any amendment to any such non-conforming measure referred to in subparagraph a) to the extent that the amendment does not increase the non-conformity of the measure

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

2. 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.

Ad Article 6

1. With regard to the People's Republic of China, the transfer referred to in the paragraph 1 of Article 6 shall comply with relevant transfer formalities stipulated by the Chinese laws and regulations relating to exchange control.

2. These formalities shall not be construed as a means of avoiding the Contracting Party's commitments or obligations under this Agreement.

3. A transfer shall be deemed "without delay" within the meaning of paragraph 3 of Article 6 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 application has been submitted with the necessary supportive documentation and may on no account exceed two months.

4. Transfer formalities relating to an investment shall in no case be more restrictive than formalities required at the time when the original investment was made.

5. A Contracting Party may, in exceptional balance of payments difficulties, exercise, through equitable, non-discriminatory and good faith basis, regulatory measures in accordance with the commitments that either Contracting Party has or may have as a Contracting Party to the Articles of Agreement of the International Monetary Fund.

Ad Article 9

The Kingdom of Spain takes note of the statement that the People's Republic of China requires that the investor concerned exhausts the domestic administrative review procedure specified by the laws and regulations of the People's Republic of China, before submission of the dispute to the arbitration procedures stipulated in paragraphs 2 (b) or 2 (c) of this Article. The People's Republic of China declares that such a procedure will take a maximum period of three months.

IN WITNESS WHEREOF the undersigned, duly authorized thereto by their respective Governments, have signed this Protocol.

FOR THE KINGDOM OF SPAIN

José Montilla Aguilera,

Minister for Industry, Tourism and Trade

FOR THE PEOPLE'S REPUBLIC OF CHINA

Xiaoqi Qiu,

Ambassador of the People's Republic of China to Spain