

Bilateral Investment Treaty between the Netherlands and China

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Agreement on encouragement and reciprocal protection of investments between
the Government of the People's Republic of China
and the Government of the Kingdom of the Netherlands.

The Government of the People's Republic of China

and

the Government of the Kingdom of the Netherlands,

hereinafter referred to as the Contracting Parties,

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

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

Have agreed as follows,

ARTICLE 1

DEFINITIONS

For the purpose of this Agreement,

1. The term "investment" means every kind of asset invested 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 participation 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, trade-marks, trade-names, technological process, know-how and goodwill;
 - (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) natural persons who have nationality of either Contracting Party in accordance with the laws of that Contracting Party;

(b) economic entities, including companies, corporations, associations, partnerships and other organizations, incorporated and constituted under the laws and regulations of either Contracting Party and have their seats in that Contracting Party, irrespective of whether or not for profit and whether their liabilities are limited or not.

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

4. For the purposes of this Agreement, the term "territory" means respectively:

- for the People's Republic of China, the territory of the People's Republic of China (including the territorial sea and air space above it) as well as any area beyond its territorial sea within which the People's Republic of China has sovereign rights of exploration for and exploitation of resources of the seabed and its sub-soil and superjacent water resources in accordance with Chinese law and international law;

- for the Kingdom of the Netherlands, the territory of the Kingdom of the Netherlands and any area adjacent to the territorial sea which, under the laws applicable in the Kingdom of the Netherlands, and in accordance with international law, is the exclusive economic zone or continental shelf of the Kingdom of the Netherlands, in which the Kingdom of the Netherlands exercises jurisdiction or sovereign rights.

ARTICLE 2

PROMOTION AND ADMISSION OF INVESTMENTS

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.

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. Investments of the investors of either Contracting Party shall enjoy the constant protection and security in the territory of the other Contracting Party.
- 2) Neither Contracting Party shall take any unreasonable or discriminatory measures against the management, maintenance, use, enjoyment and disposal of the investments by the investors of the other Contracting Party.
- 3) 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 accorded to investments and activities by its own investors or investors of any third State.
- 4) Each Contracting Party shall observe any commitments it may have entered into with the investors of the other Contracting Party with regard to their investments.
- 5) If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain a regulation, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such regulation shall, to the extent that it is more favourable, prevail over the present Agreement.

6) The provisions of Paragraphs 1 to 5 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) agreements establishing customs unions, economic unions, monetary unions or similar institutions, or on the basis of interim agreements leading to such unions or institutions;

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

(c) any international agreement or arrangement for facilitating small scale investments in border areas.

ARTICLE 4

ENTRY AND SOJOURN OF PERSONNEL

Each Contracting Party shall, within the framework of its legislation, give sympathetic consideration to application for visas and working permits to investors of the other Contracting Party engaging in activities associated with investments made in the territory of that Contracting Party.

ARTICLE 5

EXPROPRIATION

1. Neither Contracting Party shall expropriate, nationalise or take other similar measures (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) the expropriation is done in the public interest and under domestic legal procedures;
- b) the expropriation is not discriminatory or contrary to any undertaking which the Contracting Party, which takes such measures, may have given;
- c) the expropriation is done against compensation. Such compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation measures were taken. The fair market value shall not reflect any change in value because the expropriation had become publicly known earlier. It shall include interest at the prevailing commercial rate from the date the expropriation was done until the date of payment and shall, in order to be effective for the affected investors, be paid and made transferable, without delay to the country designated by the investor concerned and in the currency of the country of the affected investor, or in any freely convertible currency accepted by the affected investor.

ARTICLE 6

COMPENSATION FOR DAMAGES AND LOSSES

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.

ARTICLE 7

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, 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 investors of the other Contracting Party who work in connection with an investment in its territory.
- 2) Nothing in Paragraph 1 of this Article shall affect the free transfer of compensation paid under Articles 5 and 6 of this Agreement.
- 3) The transfer mentioned above shall be made in a freely convertible currency and at the prevailing market rate of exchange applicable within the Contracting Party accepting the investments on the date of transfer.

ARTICLE 8

SUBROGATION

If one Contracting Party or its designated agency makes a payment to its investor under an indemnity 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 the same extent as the investor.

ARTICLE 9

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, 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 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 applicable 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 arbitral proceedings. The relevant costs of the Chairman and tribunal shall be borne in equal parts by the Contracting Parties.

ARTICLE 10
SETTLEMENT OF DISPUTES BETWEEN AN INVESTOR AND A
CONTRACTING PARTY

- 1) Disputes which might arise between one of the Contracting Parties and an investor of the other Contracting Party concerning an investment of that investor in the territory of the former Contracting Party shall, whenever possible, be settled amicably between the Parties concerned.
- 2) An investor may decide to submit a dispute to a competent domestic court. In case a legal dispute concerning an investment in the territory of the People's Republic of China has been submitted to a competent domestic court, this dispute may be submitted to international dispute settlement, on the condition that the investor concerned has withdrawn its case from the domestic court. If a dispute concerns an investment in the territory of the Kingdom of the Netherlands an investor may choose to submit a dispute to international dispute settlement at any time.
- 3) If the dispute has not been settled amicably within a period of six months, from the date either party to the dispute requested amicable settlement, each Contracting Party gives its unconditional consent to submit the dispute at the request of the investor concerned to:
 - a) the International Centre for Settlement of Investment Disputes, for settlement by arbitration or conciliation under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965; or

b) an ad hoc arbitral tribunal, unless otherwise agreed upon by the parties to the dispute, to be established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

- 4) The ad hoc tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In absence of such agreement the tribunal shall apply the law of the Contracting Party to the dispute (including its rules on the conflict of laws), the provisions of this Agreement and such rules of international law as may be applicable.
- 5) The arbitral awards shall be final and binding on both parties to the dispute.

ARTICLE 11

CONSULTATIONS

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

ARTICLE 12

APPLICATION

This present Agreement shall also apply to investments which have been made prior to its entry into force by investors of the one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the Contracting Party concerned, which were in force at the time the investment was made. The provisions of the present Agreement shall apply irrespective of the existence of diplomatic or consular relations between the Contracting Parties.

ARTICLE 13

TRANSITION

- 1) This Agreement substitutes and replaces the Agreement on reciprocal encouragement and protection of investments between the Government of the People's Republic of China and the Government of the Kingdom of the Netherlands, signed June 17th, 1985 in the Hague.
- 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 1985 mentioned in paragraph 1 of this Article.

ARTICLE 14

APPLICATION AND TERMINATION OF THE AGREEMENT CONCERNING

THE KINGDOM OF THE NETHERLANDS

As regards the Kingdom of the Netherlands, the present Agreement shall apply to the part of the Kingdom of the Netherlands in Europe and shall also apply to the Netherlands Antilles and to Aruba, unless the notification provided for in Article 15, paragraph (1) states otherwise.

Subject to the provisions of Article 15, the Kingdom of the Netherlands shall be entitled to terminate the application of the present Agreement separately in respect of the Kingdom of the Netherlands in Europe, of the Netherlands Antilles and of Aruba.

ARTICLE 15

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 remain in force for a period of fifteen years.
- 2) Unless notice of termination has been given by either Contracting Party at least six months before the date of the expiry of its validity, the present Agreement shall be extended tacitly for periods of five years.
- 3) With respect to investments made prior to the date of termination of this Agreement, the preceding provisions of Article 1 to 14 shall continue to be effective for a further period of fifteen years from such date of termination.

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

Done in two originals at -----on -----,200. in the Chinese, Netherlands and English languages, all texts being equally authoritative. In case of difference of interpretation the English text will prevail.

For the Government of
the People's Republic of China

For the Government of
the Kingdom of the Netherlands

PROTOCOL

Protocol to the Agreement on encouragement and reciprocal protection of investments between the People’s Republic of China and the Kingdom of the Netherlands.

On the signing of the Agreement on encouragement and reciprocal protection of investments between the People’s Republic of China and the Kingdom of the Netherlands, the undersigned representatives have agreed on the following provisions which constitute an integral part of the Agreement:

Ad Article 1

The term “investments” mentioned in Article 1 (1) includes investments of legal persons of a third State which are owned or controlled by investors of one Contracting Party and which have been made in the territory of the other Contracting Party in accordance with the laws and regulations of the latter. The relevant provisions of this Agreement shall apply to such investments only when such third State has no right or abandons the right to claim compensation after the investments have been expropriated by the other Contracting Party.

The Agreement shall also apply to reinvestments made by investors of one Contracting Party in the territory of the other Contracting Party and in accordance with the laws and regulations of that Party.

Ad Article 3, paragraph 2 and 3

In respect of the People’s Republic of China, Paragraphs 2 and 3 of Article 3 do not apply to:

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

- b) the continuation of any non-conforming measure referred to in subparagraph a);
- c) an amendment to any non-conforming measure referred to in subparagraph a) to the extent that the amendment does not increase the non-conformity of the measure, as it existed immediately before the amendment, with those obligations.

It will be endeavoured to progressively remove the non-conforming measures.

Ad Article 7

1. With regard to the People's Republic of China, the transfer referred to in Article 7 of this Agreement shall comply with relevant formalities stipulated by the present Chinese laws and regulations relating to exchange control.
2. In this respect the People's Republic of China shall accord to the investors of the Kingdom of the Netherlands treatment not less favourable than that accorded to the investors of any third State.
3. These formalities shall not be used as a means of avoiding the Contracting Party's commitments or obligations under this Agreement.
4. The provisions of Article 7 of this Agreement shall not affect the rights and obligations with respect to exchange restrictions that either Contracting Party has or may have as a member to the International Monetary Fund.

Ad Article 10

The Kingdom of the Netherlands 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 international

arbitration under Article 10, paragraph 3. The People's Republic of China declares that such a procedure will take a maximum period of three months.

For the Government of
the People's Republic of China

For the Government of
the Kingdom of the Netherlands