

Agreement Between the People's Republic of China and the Republic of Austria Concerning the Encouragement and Reciprocal Protection of Investments

The People's Republic of China and the Republic of Austria,

Desiring to develop economic cooperation between the two countries;

Recognizing that the encouragement and reciprocal protection of investments will be conducive to the growth of such investments and hence make greater contribution to the development of economic relations between the two countries;

Through the negotiations between the representatives of the two Governments,

Have agreed as follows;

Article 1

For the purpose of this Agreement:

1. The term "investment" means every kind of asset permitted by either Contracting Party in accordance with its laws in force, including, in particular:

(1) movable and immovable property and other property rights such as mortgages, pledges, usufruct or other similar right;

(2) shares of companies and the other forms of interests in such companies;

(3) claims to money creating a financial value or claims to any performance having a financial value;

(4) copyrights, industrial property rights, technical process, know-how, trade names, and,

(5) concessions to search for, and exploit natural resources.

A change in the form in which assets are invested does not affect their character as investments.

2. The term "returns" means profit, dividends, interest and the other legitimate income yielded by an investment.

3. The term "investors" means

In respect of the People's Republic of China,

(1) physical persons who have nationality of the People's Republic of China;

(2) juridical persons and organizations or associations legally established in accordance with the law of the People's Republic of China and domiciled in the territory of the People's Republic of China, regardless of whether they are in possession of a juridical person status or not;

(3) juridical person and organizations or associations regardless of whether they possess a juridical person status or not, and domiciled in a third country, in which the above-defined investors in sections (1) and (2) have essential interests.

In respect of the Republic of Austria,

(1) physical persons who have nationality of the Republic of Austria;

(2) juridical persons and organizations or associations legally established in accordance with the law of the Republic of Austria and domiciled in the territory of the Republic of Austria, regardless of whether they are in possession of a juridical person status or not;

(3) juridical persons and organizations or associations regardless of whether they possess a juridical person status or not, and domiciled in a third country, in which the above-defined investors in sections (1) and (2) have essential interests.

Article 2

1. Either Contracting Party shall encourage investment in its territory by investors of the other Contracting Party and permit such investment in accordance with its laws and regulations.

2. Either Contracting Party shall accord to such investment at all times fair and equitable treatment.

3. The investment permitted under paragraph 1 above and its returns shall be fully protected. Such protection shall also be applicable to reinvestment and its returns.

Article 3

1. Neither Contracting Party shall in its territory subject investments of investors of the other Contracting Party to treatment less favorable than that accords to investment of investors of any third country.

2. Neither Contracting Party shall in its territory subject investors of the other Contracting Party as regards their activities associated with investments such as, in particular, maintenance, maintenance, use and disposal of their investments to treatment less favourable than that accords to investors of any third country.

3. The treatment as stated above does not apply to:

(1) the preference accorded to investors of a third country by either Contracting Party based on customs union, free trade area or an economic community to which that Contracting Party is a member;

(2) the preference accorded to investors of a third country by either Contracting Party based on an agreement for the avoidance of double taxation or arrangement relating to taxation that Contracting Party has concluded;

(3) the preference accorded to investors of a third country by either Contracting Party for facilitating frontier trade.

4. Without prejudice to the legislation on the joint venture with foreign equity participation and foreign wholly-owned enterprises, either Contracting Party shall guarantee not to take discriminatory measures against the joint ventures in which the investors of the other Contracting Party participates and investments the investors of the other Contracting Party have made.

Article 4

1. Investment of investors of either Contracting Party shall not be expropriated or subjected to measures having a similar effect in the territory of the other Contracting Party except for a public purpose, under the legal procedure and against compensation. Such compensation shall amount to the value of the investment expropriated immediately before the expropriation becomes public knowledge. Such compensation shall be made without undue delay, be convertible and freely transferable

2. Where one Contracting Party expropriates the assets of a national or company in which the investor of the other Contracting Party holds equity and which are deemed as the assets of the investor of that other Contracting Party under Paragraph 3 of Article 1 of this Agreement, the provisions of Paragraph 1 of this Article shall apply so as to ensure appropriate compensation to the said investor.

3. Investors of one Contracting Party, whose investment or joint ventures in which such investors own shares in the territory of the other Contracting Party suffer losses owing to war, other armed conflict, a state of national emergency or other similar event, shall be accorded treatment no less favorable than that accorded to investors of any third country as regards the relevant measures taken by the other Contracting Party.

4. The investor is entitled to request the competent authority of the Contracting Party taking expropriatory measures to review the legality of the expropriation.

5. The investor is entitled to request the competent authority of the Contracting Party taking the expropriatory measures or an international arbitration tribunal to review the amount of compensation for the expropriation.

6. The investors of either Contracting Party shall enjoy the most favored nation treatment in the territory of the other Contracting Party in respect of the matters provided in this Article.

Article 5

Either Contracting Party shall guarantee to investors of the other Contracting Party free transfer of the proceeds related to their investments, mainly;

- (1) capital or additional funds that are necessary to maintain the operation of or to increase the investment;
- (2) returns;
- (3) repayment of loans similar to shares provided by investors;
- (4) royalties and other fees derived from the rights as defined in section (4) of Paragraph 1 of Article 1;
- (5) proceeds resulting from the sale of total or partial liquidated investment;
- (6) compensation mentioned in Paragraph 1 of Article 4.

Article 6

If one Contracting Party or its designated agency makes a payment to its investors under an indemnity given in respect of an investment made in the territory of the other Contracting Party, the other Contracting Party shall recognise the assignment to the former Contracting Party by law or by legal transactions of all the rights or claims of the investor and the subrogation of the former Contracting Party to such rights or claims without prejudice to the rights of the former Contracting Party provided in Article 10. However, the rights or claims the former Contracting Party are subrogated to shall not exceed the original rights or claims to which such investor was entitled. The other Contracting Party can make counter-claim to the rights or claims to which the former Contracting Party is subrogated. As regards the transfer of payments to be made by the former Contracting Party by virtue of such claim assignment, the provisions of Articles 4 and 5 shall apply respectively

Article 7

1. In the absence of approval given by the competent authority of the Contracting Party receiving the investment to any other arrangement made between the parties concerned, the transfer mentioned in Articles 4, 5 and 6 of this Agreement shall be made without undue delay in the currency agreed upon by the parties concerned at the actual rate applicable on the date of transfer.
2. The rate of exchange mentioned above shall correspond to the cross rate obtained from those rates which would be applied by the international Monetary Fund on the date of transfer for conversion of the currencies concerned into Special Drawing Rights.

Article 8

1. Where the general or specific terms contained in the legislation of either Contracting Party or obligations undertaken under international law existing at present or established thereafter between the Contracting Party that are not found in this Agreement but that provide a more favorable treatment to the investment of investors of the other Contracting Party such terms shall prevail.

2. Each Contracting Party shall observe any contractual obligations it may have entered into with the investors of the other Contracting Party in respect of its approved investments in its territory.

Article 9

The Agreement shall also apply to investments that have, prior to this Agreement coming into force, been undertaken by investors of either Contracting Party in the territory of the other Contracting Party in accordance with its laws and regulations.

Article 10

1. Dispute between the Contracting Parties concerning the interpretation or application of this Agreement shall as far as possible be settled through friendly consultations.

2. If such a dispute cannot thus be settled within six months it shall, at the request of either Contracting Party, be submitted to an arbitration tribunal.

3. Such an ad hoc arbitration tribunal shall be constituted as follows; each Contracting Party shall appoint an arbitrator, and these two arbitrators shall agree upon a national of a third country which has diplomatic relations with both Contracting Parties as the Chairman to be appointed by the Governments of the two Contracting parties. Arbitrators shall be appointed within two months from the date on which either Contracting party has informed its counterpart of its intention to submit the dispute to an arbitration, and the Chairman be appointed within two months thereafter.

4. If, within the periods specified in Paragraph 3 above, the appointments have not been made, 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 if he is otherwise prevented from discharging the said function, the member of the International Court of Justice in seniority who is not a national of either Contracting Party shall be invited to make the necessary appointments.

5. The arbitration tribunal shall make its decision on the basis of this Agreement, other arrangements concluded between the Contracting Parties and general principles of International law. Such decision shall be reached by a majority of votes, and shall be final and binding.

6. Each Contracting Party shall bear the cost of its own appointed arbitrator and of its representation in the arbitration proceedings; the cost of the Chairman and the remaining costs shall be borne equal parts by the Contracting Parties concerned.

7. The arbitration tribunal shall determine its own procedure.

Article 11

1. This Agreement shall enter into force one month from the day when the Contracting parties have informed each other in writing that the necessary domestic procedures required for the bringing into force of this Agreement are fulfilled. It shall remain in force

for a period of ten years and continue in force until twelve months after its expiration from the date on which either Contracting Party shall have given written notice of termination to the other Contracting Party.

2. In respect of investments made whilst the Agreement is in force, the provisions from Article 1 to 10 shall continue to be in effect with respect to such investments for a period of fifteen years after the date of termination of this a Agreements.

Done in duplicate at Beijing on 12th September, 1985 in the Chinese and German languages, both texts being equally authoritative.

(Zheng Tuobin)

(Norbert Steger)

for the People's Republic of China

for the Republic of Austria

Protocol

On signing the Agreement between the People's Republic of China and the Republic of Austria concerning the Encouragement and Reciprocal Protection of Investments the undersigned plenipotentiaries of the two Contracting Parties have agreed on the following provisions as an integral part of the Agreement:

1. Re Article 2

Investment made by investors of either Contracting Party in accordance with the laws and regulations of the other Contracting Party within the scope over which the other Contracting Party exercises its sovereignty or jurisdiction shall enjoy full protection of the Agreement.

2. Re Article 3

(1) "The treatment less favorable" in Paragraph 2 of Article 3 and "discriminatory measures" in Paragraph 4 of Article 3 are taken to mean imposition of restrictions on the on the procurement of raw or auxiliary materials, of energy or fuel, or of means of production of operation of production of operation of any other measures having similar effect.

(2) "Discriminatory measures" mentioned in Paragraph 4 of Article 3 shall exclude:

a. measures taken by either Contracting Party in the in the interests of public security and order, public health or morality;

b. measures taken by either Contracting Party in line with its national economic priorities and not directed specially against investors of the other Contracting Party or the joint ventures in which investors of the other Contracting Party have participated.

(3) Either Contracting party shall, within the framework of its legislation, issue visas as soon as possible to persons who wish to make investments or conduct activities in connection with the investments in the territory of that Contracting Party. Either Contracting Party shall give sympathetic consideration to applications for work and make prompt decisions thereof.

3. Re Article 4

(1) If either Contracting Party expropriates in its territory the investment of a juridical person and organization or association of a third country whether it possesses a juridical person status or not and in which the investor of the other Contracting a juridical person status or not and in which the investor of the other Contracting Party owns essential interests, the Provision of Paragraph 1 of Article 4 of the Agreement shall apply to such investment, provided that such juridical person or organization or association in a third country or such third country is not entitled to or abandons its rights for compensation.

(2) The international arbitration tribunal mentioned in Paragraph 5 of Article 4 of the Agreement shall be constituted specifically as follows: each party concerned shall appoint an arbitrator and the two arbitrators shall appoint a Chairman from the nationals of a third country which has diplomatic relations with both Contracting Parties. The arbitrators shall be appointed within two months from the day when the investor to the dispute notifies the other Contracting Party of its request to submit the dispute to arbitration and thereafter, the Chairman be appointed within another two months.

If the necessary appointments are not made within the period specified above, either Party may, in the absence of any other arrangement, request the Chairman of the International Arbitration Institute of the Stockholm Chamber of Commerce to make the necessary appointments. The Arbitration Tribunal shall determine its own arbitral procedures guided by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States done on March 18, 1965. The decision shall be made by a majority vote, be final, binding and enforceable in accordance with the domestic law. The arbitration tribunal shall state the basis of its decision and, at the request of either party concerned, explain the reasons for its decision.

Each Party shall bear the cost of its own appointed arbitrator and its representation in the arbitral proceedings. The cost of the Chairman and the remaining costs shall be borne equally by the parties.

4. Re Article 5

The term "Either Contracting Party shall guarantee to investors of the other Contracting Party, free transfer of the proceeds related to their investments" mentioned in Article 5 of the Agreement, means in respect of the People's Republic of China:

(1) The payment mentioned in Paragraph (6) of Article 5 of the Agreement for compensation shall be guaranteed by the competent authority of the Chinese Government for free transfer in convertible currency.

(2) The payment of amounts mentioned in Paragraph (1) to (5) of Article 5 shall be transferred abroad from the foreign exchange deposit account of the joint or foreign wholly-owned enterprise in accordance with the applicable foreign exchange control regulations in the absence of a more preferential provision in the foreign exchange control regulations of the People's Republic of China.

In case the foreign exchange deposit account of such enterprise mentioned in this Paragraph has no sufficient foreign exchange for transfer, the Chinese Government may under the following conditions, provide the necessary foreign exchange for transfer:

(a) Payment of the amount in Paragraphs (1), (4) and (5) of Article 5 of this Agreement:

(b) Payment of the amount in paragraph (3) of 5 of the Agreement if it has been guaranteed by the Bank of China;

(c) amount in paragraph (2) of Article 5 of this Agreement obtained by the jointly or foreign wholly-owned enterprise which has special approval from the competent authority of the State for the sale of its products in non-convertible currency.

5. Re Paragraph 1 of Article 7

The term "without undue delay" in paragraph 1 of Article 7 means that the transfer shall be made within a period normally required for the completion of transfer formalities. Such period shall commence on the day when the relevant transfer application has been submitted and shall not exceed three months as regards paragraphs (1) to (5) of Article 5 and shall not exceed as regards paragraph (6) of Article 5 for the transfer

Done in duplicate at Beijing on September 12, 1985 in the Chinese and German languages, both texts being equally authoritative.

(Zheng Tuobin)

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for the Republic of Austria