

Explanation on the Signing of the Cross-Strait Investment Protection Agreement

Mainland Affairs Council, Executive Yuan

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I. Background

1. Investment protection is an issue of long-term concern to Taiwanese businessmen in mainland China. The government has consistently advocated that the two sides should promptly negotiate and sign an agreement to protect the investment interests and personal and property safety of Taiwanese businessmen. At as early as the first preparatory discussion for the Second Koo-Wang Talks in May 1995, Taiwan proposed that the two sides make this issue a priority for consultations. However, the handling of this matter was subsequently delayed after the Mainland side unilaterally broke off talks.
2. Institutionalized cross-strait negotiations resumed in June 2008. At the First Chiang-Chen Talks, Taiwan re-tabled a request to the Mainland side that consultations be held on a cross-strait investment protection agreement. At the Fifth Chiang-Chen Talks on June 29, 2010, the two sides agreed to list the Investment Protection Agreement as a priority issue for follow-up negotiations to the Cross-Strait Economic Cooperation Framework Agreement (ECFA). On September 12, 2010, the

ECFA formally came into effect. Soon after, on September 15, the Mainland Affairs Council (MAC) authorized the Straits Exchange Foundation (SEF) to make relevant arrangements and hold discussions with the Association for Relations Across the Taiwan Straits (ARATS) on this issue.

3. Due to the broad scope and complexity of the agreement content, as well as the many cross-strait differences in terms of administrative systems, the competent authorities of the two sides have held numerous talks on operational issues over the past year or so. They have also been working steadily towards a consensus and finding ways to reconcile the differences between the two sides. The negotiation teams of the two sides have made positive progress and reached a consensus on the Agreement content and related documents. The competent authorities of the two sides remain in contact and communication over the implementation details. The two sides expect to sign the Agreement at the Eighth Chiang-Chen Talks to be held on August 9 this year.

II. Negotiation Principles for the Cross-Strait Investment Protection Agreement

1. Adhering to the principle of "putting Taiwan first for the benefit of the people"

The government adheres firmly to the principles of

"putting Taiwan first for the benefit of the people" and "parity, dignity, and reciprocity" in promoting negotiations on the Cross-Strait Investment Protection Agreement. In order to ensure that the Agreement corresponds to Taiwan's best interests, the government has referred to frameworks and contents of general international investment protection agreements in the process of researching and drafting the Agreement. Other important factors such as cross-strait characteristics, urgent concerns of Taiwanese investors, and agreement implementation matters, are also taken into consideration.

2. Striving for "public support"

The Ministry of Economic Affairs (MOEA) and the MAC have proceeded prudently on the Cross-Strait Investment Protection Agreement and continuously sought out the views on the Agreement among Taiwanese businesses, major domestic industrial and commercial organizations, legislators, and the media. This outreach has been conducted through the three annual festival gatherings of Taiwanese businessmen and small-to-medium-sized discussions and meetings with Taiwanese businesses held on an irregular or unofficial basis. The government has broadly sought out the views of Taiwanese businessmen, held discussions with Taiwanese businesses that have suffered damage, arranged seminars with industrial and commercial organizations, experts and scholars, and held

public hearings to largely hear public opinion and seek support.

3. Realizing "legislative oversight"

In keeping with the precedents of other cross-strait agreements, the MAC, the MOEA, and other related agencies have continuously presented progress reports on the Investment Protection Agreement to the relevant committees of the Legislative Yuan and communicated with legislators involved. Once signed, the Agreement will be submitted to the Legislative Yuan to complete related procedures in accordance with the relevant provisions of the Act Governing Relations between the People of the Taiwan Area and the Mainland Area in order to show full respect to the authority of legislative oversight. After the Sixth and the Seventh Chiang-Chen Talks, the MAC presented consultation progress reports on the Investment Protection Agreement to the Internal Administration Committee of the Legislative Yuan. The MOEA and the MAC also presented a special report on the Agreement to the Economics Committee at the end of 2010.

III. Main Contents of the Agreement

The Cross-Strait Investment Protection Agreement contains important clauses on: definitions, scope of application and exceptions, investment treatments, transparency, gradual reduction of investment restrictions, investment

facilitation, levies, compensation, subrogation, transfers, refusal to grant benefits, bilateral dispute settlement, investor-state dispute settlement, investment and commercial disputes, and liaison mechanisms. The main contents are as follows:

1. Expanding the definition of "investors": In general, international investment agreements limit the scope of application to investors of either side of the agreement who directly invest in the other side. Considering that the great majority of Taiwanese businesses invest in the Mainland via a third place, the definition of investors under the Cross-Strait Investment Protection Agreement also includes such investors in order to protect their rights and interests.
2. Special investment treatments: "Investment treatments" under the Agreement is defined in reference to common practice in international investment agreements, covering treatments related to investments and investors in the place of investment. It also considers the uniqueness of cross-strait relations and the needs of Taiwanese businesses, establishing norms related to the personal safety of investors and related personnel in particular.
3. Personal freedom and security guarantees:
 - (1) Protection of personal safety has been one of the issues of greatest concern to Taiwanese businessmen over the

years. After steady efforts and demands by the Taiwan side, along with numerous cross-strait consultations, the government finally secured agreement from the other side to include provisions on the protection of personal freedom and security of investors and related personnel. It should be specially noted that most international investment protection agreements do not contain explicit provisions on protecting personal freedom and safety of investors.

(2) Taiwan has secured approval from the Mainland side to include in the Investment Protection Agreement requirements that notification to family members be made within 24 hours when the personal freedom of a Taiwanese businessperson, his employees and dependents is limited. Such notifications should be made through the reporting mechanisms established under the Cross-Strait Joint Crime-Fighting and Judicial Mutual Assistance Agreement. The establishments of such notifications and reporting mechanisms will further strengthen protections of the personal safety of Taiwanese businessmen in the Mainland. The conveyance and notification of related information can also relieve the apprehension of family members.

4. Transparent and reasonable levies and compensation: In the past, uncertainties in the way levies were imposed and compensation was provided in the Mainland have resulted in property losses for Taiwanese businesses. After consultations, the two sides agreed that levies

(including direct and indirect levies) should conform to public purpose and other basic principles and that compensation should be provided at fair market value.

5. Diversified dispute settlement channels: The Investment Protection Agreement will cover dispute settlement between the governments of the two sides (G-G), between investors and the government of the investment location (P-G), and between investors (P-P). Key points are summarized as follows:

(1) G-G dispute settlement: Until consultations on a dispute settlement pact are completed, related disputes will be handled in accordance with provisions in the ECFA.

(2) P-G dispute settlement: Taiwanese businesses operating in the Mainland may become involved in disputes with state-owned enterprises or local governments, or other units. Therefore, the two sides have established various relief channels based on international practice and the legal systems of the two sides.

(3) P-P economic and trade dispute settlement: Most international investment agreements do not stipulate norms on handling disputes between private investors. However, according to the 2010 statistics from the SEF, 65% of economic and trade disputes involving Taiwanese businesses in the Mainland are P-P disputes. Therefore, the government actively communicated with the Mainland side to secure inclusion of a P-P dispute settlement

mechanism in the Agreement. This provision specifies that arbitration may be used to resolve disputes and that related operations should conform to the principle of party autonomy.

6. Contact mechanisms: The competent authorities of the two sides will establish a contact platform and related coordination mechanisms to effectively implement the Agreement and strengthen related services for investors on the two sides.
7. Other issues: Clauses related to compensation, subrogation, transfers and other issues of deep concern to Taiwanese businesses have been specified in the Agreement in reference to international customs and practice.

IV. Benefits of Signing the Cross-Strait Investment Protection Agreement

1. Creating comprehensive investment protections
 - (1) The closeness of cross-strait economic and trade relations and Mainland-bound investment by Taiwanese enterprises have driven demand for trade with Taiwan, bringing an impact on domestic industries and related employment. The Cross-Strait Investment Protection Agreement not only provides direct guarantees for Taiwanese businesses in mainland China, but also indirectly protects the interests of Taiwanese

industries and personnel related to Taiwanese and Taiwan-invested enterprises in the Mainland. The government therefore has looked at overall interests when promoting the Agreement.

- (2) The Cross-Strait Investment Protection Agreement provides comprehensive protections for the rights and interests of Taiwanese businessmen in the Mainland, including property rights, management rights, and personal safety rights. Furthermore, these protections will be retroactively effective: investments made prior to the effective date of the Agreement will be covered and such investments can seek protection in accordance with relevant provisions of the Agreement. The Agreement is also uniformly applicable to all industries and will have positive benefits for investment in all industries.

2. Institutionalization of investment protections

Prior to the signing of the Cross-Strait Investment Protection Agreement, the protection of Taiwanese businesses' investment rights and interests in the Mainland has depended entirely on the Law of the Peoples Republic of China on the Protection of Investment by Compatriots from Taiwan and its enforcement rules. Because the Law has been inconsistently implemented in different areas and can change at any time, it does not provide true protections for Taiwanese businesses. The Cross-Strait Investment Protection Agreement will

provide institutionalized protections for the investment interests of Taiwanese companies. The competent authorities of the two sides will supervise the implementation of the Agreement and related affairs will all be administered by the competent authorities. Through communication channels established under the Agreement, the competent authorities can understand and handle related cases and problems involving the rights and interests of Taiwanese businesses, strengthening protections for the legitimate investment interests of Taiwanese companies.

3. Strengthening the investment environment

The signing of the Cross-Strait Investment Protection Agreement will help create a sound investment environment through measures related to the transparency of investment laws and regulations and protection of rights and interests. The Agreement will also apply to both Taiwanese and Mainland companies, as a result, even though the treatment granted by Taiwan to Mainland companies is no better than that extended to foreign companies, it will still have a positive impact on promoting Mainland investment in Taiwan as well as two-way investment across the Strait. It will also further attract foreign investments to Taiwan, benefit Taiwan's economic developments, and improve Taiwan's overall competitiveness.

V. Conclusion

1. The Mainland is the biggest overseas investment area for Taiwanese businesses. Before the Cross-Strait Investment Protection Agreement is signed, the investment interests of Taiwanese companies were only protected by unilateral measures on the Mainland side. When Taiwanese investors in the Mainland encountered economic or trade disputes or situations in which their investment rights and interests or personal safety were harmed, their only recourse was to go through the SEF and request the ARATS for help in notifying the matter to the relevant departments for handling. The signing of the Cross-Strait Investment Protection Agreement will provide institutionalized and diversified protections for Taiwanese businesses' investment rights and interests in the Mainland. On the foundation of the Agreement, the competent authorities of the two sides will be able to directly communicate and handle relevant matters. The Agreement will not only further protect the investment rights and interests and personal safety of Taiwanese businessmen in the Mainland, but also apply to Taiwanese employees and their family members. In practice, it will also indirectly protect the interests of Taiwanese industries and personnel associated with Taiwanese and Taiwan-invested enterprises in the Mainland.
2. Once signed, the Cross-Strait Investment Protection Agreement will be submitted to the Legislative Yuan to

complete related procedures according to the Act Governing Relations between the People of the Taiwan Area and the Mainland Area. In addition to fulfilling the principle of "legislative oversight," the government will continue to communicate with Taiwanese businessmen, scholars and experts, the legislature, and the public to broadly understand views on the implementation of the Agreement. Therefore, the signing of the Agreement is only the first step in protecting the related rights and interests of Taiwanese businesses. The focus will be on future promotion, advancement and implementation of the Agreement. The government will remain true to the principle of "putting Taiwan first for the benefit of the people" in promoting the Agreement. It will also continue to strengthen implementation and enhance the content of the Agreement to meet the needs of Taiwan's economic developments, the needs of cross-strait economic, trade and health-related interactions, and the needs to protect the rights and interests of Taiwanese businesses, thereby securing Taiwan's best interests.