

# **AGREEMENT AMONG THE GOVERNMENT OF JAPAN, THE GOVERNMENT OF THE REPUBLIC OF KOREA AND THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA FOR THE PROMOTION, FACILITATION AND PROTECTION OF INVESTMENT**

The Government of Japan, the Government of the Republic of Korea and the Government of the People's Republic of China,

Desiring to further promote investment in order to strengthen the economic relationship among Japan, the Republic of Korea and the People's Republic of China (hereinafter referred to in this Agreement as "the Contracting Parties");

Intending to create stable, favorable and transparent conditions for investment by investors of one Contracting Party in the territory of the other Contracting Parties;

Recognizing that the reciprocal promotion, facilitation and protection of such investment and the progressive liberalization of investment will be conducive to stimulating business initiative of the investors and increase prosperity among the Contracting Parties;

Recognizing that these objectives can be achieved without relaxing health, safety and environmental measures of general application;

Recognizing the importance of investors' complying with the laws and regulations of a Contracting Party in the territory of which the investors are engaged in investment activities, which contribute to the economic, social and environmental progress; and

Bearing in mind their respective rights and obligations under the WTO Agreement and other multilateral instruments of cooperation;

Have agreed as follows:

## **Article 1. Definitions**

For the purposes of this Agreement:

(1) the term "investments" means every kind of asset that an investor owns or controls, directly or indirectly, which has the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that investments may take include:

- (a) an enterprise and a branch of an enterprise;
- (b) shares, stocks or other forms of equity participation in an enterprise, including rights derived therefrom;
- (c) bonds, debentures, loans and other forms of debt, including rights derived therefrom;
- (d) rights under contracts, including turnkey, construction, management, production or revenuesharing contracts;
- (e) claims to money and claims to any performance under contract having a financial value associated with investment;
- (f) intellectual property rights, including copyrights and related rights, patent rights and rights relating to utility models, trademarks, industrial designs, layout-designs of integrated circuits, new varieties of plants, trade names, indications of source or geographical indications and undisclosed information;
- (g) rights conferred pursuant to laws and regulations or contracts such as concessions, licenses, authorizations and permits; and

(h) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges;

Note: Investments also include the amounts yielded by investments, in particular, profit, interest, capital gains, dividends, royalties and fees.

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

(2) the term "investor of a Contracting Party" means a natural person or an enterprise of a Contracting Party that makes investments in the territory of another Contracting Party;

(3) the term "natural person of a Contracting Party" means a natural person that has the nationality of that Contracting Party in accordance with its applicable laws and regulations;

(4) the term "enterprise of a Contracting Party" means any legal person or any other entity constituted or organized under the applicable laws and regulations of that Contracting Party, whether or not for profit, and whether private-or government-owned or controlled, and includes a company, corporation, trust, partnership, sole proprietorship, joint venture, association or organization;

Note: For greater certainty, a branch of an enterprise is not, in and by itself, deemed to be an enterprise.

(5) the term "investment activities" means management, conduct, operation, maintenance, use, enjoyment and sale or other disposition of investments;

(6) the term "freely usable currencies" means freely usable currencies as defined under the Articles of Agreement of the International Monetary Fund;

(7) the term "ICSID Convention" means the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington, March 18, 1965;

(8) the term "UNCITRAL Arbitration Rules" means the arbitration rules of the United Nations Commission on International Trade Law;

(9) the term "WTO Agreement" means the Marrakesh Agreement Establishing the World Trade Organization, done at Marrakesh, April 15, 1994;

(10) the term "ICSID Additional Facility Rules" means the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes.

## **Article 2. Promotion and Protection of Investments**

1. Each Contracting Party shall encourage and create favorable conditions for investors of the other Contracting Parties to make investments in its territory.

2. Each Contracting Party shall, subject to its rights to exercise powers in accordance with the applicable laws and regulations, including those with regard to foreign ownership and control, admit investment of investors of another Contracting Party.

## **Article 3. National Treatment**

1. Each Contracting Party shall in its territory accord to investors of another Contracting Party and to their investments treatment no less favorable than that it accords in like circumstances to its own investors and their investments with respect to investment activities.

2. Paragraph 1 shall not apply to non-conforming measures, if any, existing at the date of entry into force of this Agreement maintained by each Contracting Party under its laws and regulations or any amendment or modification to such measures, provided that the amendment or modification does not decrease the conformity of the measure as it existed immediately before the amendment or modification.

Treatment granted to investment once admitted shall in no case be less favorable than that granted at the time when the original investment was made.

3. Each Contracting Party shall take, where applicable, all appropriate steps to progressively remove all the nonconforming measures referred to in paragraph 2.

Note: The People's Republic of China confirms that its measures referred to in paragraph 2 shall not be inconsistent with paragraph 2 of Article 3 of, and paragraph 3 of the Protocol to, the Agreement between Japan and the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investment, signed at Beijing, August 27, 1988.

## **Article 4. Most-favored-nation Treatment**

1. Each Contracting Party shall in its territory accord to investors of another Contracting Party and to their investments treatment no less favorable than that it accords in like circumstances to investors of the third Contracting Party or of a non-Contracting Party and to their investments with respect to investment activities and the matters relating to the admission of investment in accordance with paragraph 2 of Article 2.

2. Paragraph 1 shall not be construed so as to oblige a Contracting Party to extend to investors of another Contracting Party and to their investments any preferential treatment resulting from its membership of:

(a) any customs union, free trade area, monetary union, similar international agreement leading to such union or free trade area, or other forms of regional economic cooperation;

(b) any international agreement or arrangement for facilitating small scale trade in border areas; or

(c) any bilateral and multilateral international agreements involving aviation, fishery and maritime matters including salvage.

3. It is understood that the treatment accorded to investors of the third Contracting Party or any nonContracting Party and to their investments as referred to in paragraph 1 does not include treatment accorded to investors of the third Contracting Party or any nonContracting Party and to their investments by provisions concerning the settlement of investment disputes between a Contracting Party and investors of the third Contracting Party or between a Contracting Party and investors of any non-Contracting Party that are provided for in other international agreements.

Note: For the purposes of this Article, the term "non-Contracting Parties" shall not include any separate customs territory within the meaning of the General Agreement on Tariffs and Trade or of the WTO Agreement that is a member of the World Trade Organization as of the date of entry into force of this Agreement.

## **Article 5. General Treatment of Investments**

1. Each Contracting Party shall accord to investments of investors of another Contracting Party fair and equitable treatment and full protection and security. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond any reasonable and appropriate standard of treatment accorded in accordance with generally accepted rules of international law. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not ipso facto establish that there has been a breach of this paragraph.

2. Each Contracting Party shall observe any written commitments in the form of an agreement or contract it may have entered into with regard to investments of investors of another Contracting Party.

## **Article 6. Access to the Courts of Justice**

Each Contracting Party shall in its territory accord to investors of another Contracting Party treatment no less favorable than that it accords in like circumstances to its own investors, investors of the third Contracting Party or of a non-Contracting Party, with respect to access to the courts of justice and administrative tribunals and agencies in all degrees of jurisdiction, both in pursuit and in defense of such investors' rights.

## **Article 7. Prohibition of Performance Requirements**

1. The provisions of the Agreement on Trade-Related Investment Measures in Annex 1A to the WTO Agreement are incorporated into and made part of this Agreement, mutatis mutandis and shall apply with respect to all investments under this Agreement.

2. No Contracting Party shall, in its territory, impose unreasonable or discriminatory measures on investment by investors of another Contracting Party concerning performance requirements on export or transfer of technology.

## **Article 8. Entry of Personnel**

Each Contracting Party shall endeavor, to the extent possible, in accordance with its applicable laws and regulations, to facilitate the procedures for the entry, sojourn and residence of natural persons of another Contracting Party who wish to enter the territory of the former Contracting Party and to remain therein for the purpose of conducting business activities in connection with investments.

## **Article 9. Intellectual Property Rights**

1. (a) Each Contracting Party shall, in accordance with its laws and regulations, protect intellectual property rights.

(b) Each Contracting Party shall establish and maintain transparent intellectual property rights regimes, and will, under the existing consultation mechanism on intellectual property, promote cooperation and communications among the Contracting Parties in the intellectual property field.

2. Nothing in this Agreement shall be construed so as to derogate from the rights and obligations under international agreements in respect of protection of intellectual property rights to which two or more Contracting Parties are parties.

3. Nothing in this Agreement shall be construed so as to oblige a Contracting Party to extend to investors of another Contracting Party and their investments treatment accorded to investors of the third Contracting Party or of a non-Contracting Party and their investments by virtue of international agreements in respect of protection of intellectual property rights, to which, respectively, the first-mentioned Contracting Party and the third Contracting Party and the first-mentioned Contracting Party and the non-Contracting Party are parties.

## **Article 10. Transparency**

1. Each Contracting Party shall promptly publish, or otherwise make publicly available, its laws, regulations, administrative procedures and administrative rulings and judicial decisions of general application as well as international agreements to which the Contracting Party is a party and which pertain to or affect investment activities. The Government of each Contracting Party shall make easily available to the public, the names and addresses of the competent authorities responsible for such laws, regulations, administrative procedures and administrative rulings.

2. When a Contracting Party introduces or changes its laws or regulations that significantly affect the implementation and operation of this Agreement, the Contracting Party shall endeavor to provide a reasonable interval between the time when such laws or regulations are published or made publicly available and the time when they enter into force, except for those laws or regulations involving national security, foreign exchange rates or monetary policies and other laws or regulations the publication of which would impede law enforcement.

3. Each Contracting Party shall, upon the request by another Contracting Party, within a reasonable period of time and through existing bilateral channels, respond to specific questions from, and provide information to, the latter Contracting Party with respect to any actual or proposed measure of the former Contracting Party, which might materially affect the interests of the latter Contracting Party and its investors under this Agreement.

4. Each Contracting Party shall, in accordance with its laws and regulations:

(a) make public in advance regulations of general application that affect any matter covered by this Agreement; and

(b) provide a reasonable opportunity for comments by the public for those regulations related to investment and give consideration to those comments before adoption of such regulations.

5. The provisions of this Article shall not be construed so as to oblige any Contracting Party to disclose confidential information, the disclosure of which:

(a) would impede law enforcement;

(b) would be contrary to the public interest; or

(c) could prejudice privacy or legitimate commercial interests.

## **Article 11. Expropriation and Compensation**

1. No Contracting Party shall expropriate or nationalize investments in its territory of investors of another Contracting Party or take any measure equivalent to expropriation or nationalization (hereinafter referred to in this Agreement as "expropriation") except:

- (a) for a public purpose;
- (b) on a non-discriminatory basis;
- (c) in accordance with its laws and international standard of due process of law; and
- (d) upon compensation pursuant to paragraphs 2, 3 and

2. The compensation shall be equivalent to the fair market value of the expropriated investments at the time when the expropriation was publicly announced or when the expropriation occurred, whichever is the earlier. The fair market value shall not reflect any change in market value occurring because the expropriation had become publicly known earlier.

3. The compensation shall be paid without delay and shall include interest at a commercially reasonable rate, taking into account the length of time from the time of expropriation to the time of payment. It shall be effectively realizable and freely transferable and shall be freely convertible, at the market exchange rate prevailing on the date of expropriation, into the currency of the Contracting Party of the investors concerned, and into freely usable currencies.

4. Without prejudice to the provisions of Article 15, the investors affected by expropriation shall have a right of access to the courts of justice or the administrative tribunals or agencies of the Contracting Party making the expropriation to seek a prompt review of the investors' case and the amount of compensation in accordance with the principles set out in this Article.

## **Article 12. Compensation for Losses or Damages**

1. Each Contracting Party shall accord to investors of another Contracting Party that have suffered loss or damage relating to their investments in the territory of the former Contracting Party due to armed conflict or a state of emergency such as revolution, insurrection, civil disturbance or any other similar event in the territory of that former Contracting Party, treatment, as regards restitution, indemnification, compensation or any other settlement, that is no less favorable than that it accords to its own investors, to investors of the third Contracting Party or to investors of a non-Contracting Party, whichever is more favorable to the investors of another Contracting Party.

2. Any payments as a means of settlement referred to in paragraph 1 shall be effectively realizable, freely transferable and freely convertible at the market exchange rate into the currency of the Contracting Party of the investors concerned and into freely usable currencies.

## **Article 13. Transfers**

1. Each Contracting Party shall ensure that all transfers relating to investments in its territory of an investor of another Contracting Party may be made freely into and out of its territory without delay. Such transfers shall include, in particular, though not exclusively:

- (a) the initial capital and additional amounts to maintain or increase investments;
- (b) profits, capital gains, dividends, royalties, interests, fees and other current account incomes accruing from investments;
- (c) proceeds from the total or partial sale or liquidation of investments;
- (d) payments made under a contract including loan payments in connection with investments;
- (e) earnings and remuneration of personnel from the latter Contracting Party who work in connection with investments in the territory of the former Contracting Party;
- (f) payments made in accordance with Articles 11 and 12; and
- (g) payments arising out of the settlement of a dispute under Article 15.

2. Each Contracting Party shall further ensure that such transfers may be made in freely usable currencies at the market exchange rate prevailing on the date of each transfer.

3. Notwithstanding paragraphs 1 and 2, a Contracting Party may delay or prevent such transfers through the equitable, non-discriminatory and good faith application of its laws relating to:

- (a) bankruptcy, insolvency or the protection of the rights of creditors;
- (b) issuing, trading or dealing in securities, futures, options or other derivatives;

(c) criminal or penal offenses;

(d) ensuring compliance with orders or judgments in adjudicatory proceedings; or

(e) reports of transfers of currency or other monetary instruments.

4. The transfers referred to in this Article shall comply with relevant formalities stipulated by the laws and regulations, if any, of each Contracting Party relating to exchange administration which are in force at the time of investment by investors of another Contracting Party.

These formalities include, but are not limited to those related to:

(a) overseas investment;

(b) liquidation, transfer of ownership and registered capital reduction, including those related to reinvestment of funds derived therefrom;

(c) the repayment of principal and interest of registered external debts (including loans from foreign investors); or

(d) external guarantee provided by domestic guarantors.

5. The period required for the completion of the formalities referred to in paragraph 4 shall commence on the day on which a written request for each transfer with necessary documentation is submitted by the investor referred to in paragraph 1 to the foreign exchange authorities of the Contracting Party in the territory of which the investor's investments exist. The necessary authorizations should be granted in a period of approximately one month, which shall not exceed two months, from the submission of the request. Such formalities shall not be used as a means of avoiding the obligations of the Contracting Party under this Agreement.

## **Article 14. Subrogation**

1. If a Contracting Party or its designated agency makes a payment to any of its investors pursuant to an indemnity, guarantee or insurance contract, pertaining to investments of that investor in the territory of another Contracting Party, the latter Contracting Party shall:

(a) recognize the assignment, to the former Contracting Party or its designated agency, of any right or claim of the investor that formed the basis of such payment; and

(b) recognize the right of the former Contracting Party or its designated agency to exercise by virtue of subrogation such right or claim to the same extent as the original right or claim of the investor.

2. If a Contracting Party or its designated agency has made a payment to its investors and thereby entered into the rights of the investor, the investor may not make a claim based on these rights against another Contracting Party without the consent of the former Contracting Party or its designated agency making the payment. For greater certainty, the investor shall continue to be entitled to exercise its rights that have not been subrogated pursuant to paragraph 1.

3. Articles 11, 12 and 13 shall apply mutatis mutandis as regards payment to be made to the Contracting Party or its designated agency referred to in paragraph 1 by virtue of such assignment of right or claim, and the transfer of such payment.

## **Article 15. Settlement of Investment Disputes between a Contracting Party and an Investor of Another Contracting Party**

1. For the purposes of this Article, an investment dispute is a dispute between a Contracting Party and an investor of another Contracting Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of any obligation of the former Contracting Party under this Agreement with respect to the investor or its investments in the territory of the former Contracting Party.

2. Any investment dispute shall, as far as possible, be settled amicably through consultation between the investor who is a party to the investment dispute (hereinafter referred to in this Article as "disputing investor") and the Contracting Party that is a party to the investment dispute (hereinafter referred to in this Article as "disputing Contracting Party"). A written request for consultation shall be submitted to the disputing Contracting Party by the disputing investor before the submission of the investment dispute to the arbitration set out in paragraph 3. Such a written request shall specify:

(a) the name and address of the disputing investor;

- (b) the obligations under this Agreement alleged to have been breached;
- (c) a brief summary of the facts of the investment dispute; and
- (d) the relief sought and the approximate amount of damages.

Note: The written consultation request shall be delivered to the following competent authorities of the disputing Contracting Party:

- (a) in the case of the People's Republic of China, the Treaty and Law Department, Ministry of Commerce;
- (b) In the case of Japan, the Ministry of Foreign Affairs or the entity in lieu of or replacing the aforementioned; and
- (c) in the case of the Republic of Korea, International Legal Affairs Division, Ministry of Justice.

3. The investment dispute shall at the request of the disputing investor be submitted to either:

- (a) a competent court of the disputing Contracting Party;
- (b) arbitration in accordance with the ICSID Convention, if the ICSID Convention is available;
- (c) arbitration under the ICSID Additional Facility Rules, if the ICSID Additional Facility Rules are available;
- (d) arbitration under the UNCITRAL Arbitration Rules; or
- (e) if agreed with the disputing Contracting Party, any arbitration in accordance with other arbitration rules,

Provided that, for the purposes of subparagraphs (b) through (e):

- (i) the investment dispute cannot be settled through the consultation referred to in paragraph 2 within four months from the date of the submission of the written request for consultation to the disputing Contracting Party; and
- (ii) the requirement concerning the domestic administrative review procedure set out in paragraph 7, where applicable, is met.

Note: For the purposes of subparagraph (a), this Paragraph shall not be construed to prevent, where applicable, preliminary trial by administrative tribunals or agencies.

4. Each Contracting Party hereby gives its consent to the submission of an investment dispute by a disputing investor to the arbitration set out in paragraph 3 in accordance with the provisions of this Article.

5. Once the disputing investor has submitted an investment dispute to the competent court of the disputing Contracting Party or to one of the arbitrations set out in paragraph 3, the choice of the disputing investor shall be final and the disputing investor may not submit thereafter the same dispute to the other arbitrations set out in paragraph 3.

6. Notwithstanding paragraphs 3 and 4, no claim may be submitted to the arbitration set out in paragraph 3 unless the disputing investor gives the disputing Contracting Party written waiver of any right to initiate before any competent court of the disputing Contracting Party with respect to any measure of the disputing Contracting Party alleged to constitute a breach referred to in paragraph 1.

7. When the disputing investor submits a written request for consultation to the disputing Contracting Party under paragraph 2, the disputing Contracting Party may require, without delay, the investor concerned to go through the domestic administrative review procedure specified by the laws and regulations of that Contracting Party before the submission to the arbitration set out in paragraph 3.

The domestic administrative review procedure shall not exceed four months from the date on which an application for the review is filed. If the procedure is not completed by the end of the four months, it shall be deemed to be completed and the disputing investor may submit the investment dispute to the arbitration set out in paragraph 3. The investor may file an application for the review unless the four months consultation period as provided in paragraph 3 has elapsed.

Note: It is understood that any decision made under the domestic administrative review procedure shall not prevent the disputing investor from submitting the investment dispute to the arbitration set out in paragraph 3.

8. The applicable arbitration rules shall govern the arbitration set out in paragraph 3 except to the extent modified in this Article.

9. The award rendered by an arbitral tribunal established under paragraph 3 (hereinafter referred to in this Article as the

"Tribunal") shall include:

(a) a finding whether or not there has been a breach by the disputing Contracting Party of any obligation under this Agreement with respect to the disputing investor and its investments; and

(b) one or both of the following remedies, only if the disputing investor's loss or damage is attributed to such breach:

(i) monetary damages and applicable interest; and

(ii) restitution of property, in which case the award shall provide that the disputing Contracting Party may pay monetary damages and any applicable interest, in lieu of restitution.

10. The award which is rendered by the Tribunal shall be final and binding upon both parties to the investment dispute. This award shall be executed in accordance with the applicable laws and regulations concerning the execution of award in force, in the country in whose territory such execution is sought.

11. Notwithstanding paragraph 3, no claim may be submitted to the arbitration set out in that paragraph, if more than three years have elapsed from the date on which the disputing investor first acquired, or should have first acquired, whichever is the earlier, the knowledge that the disputing investor had incurred the loss or damage referred to in paragraph 1.

12. Paragraph 3 (except subparagraph (a)) and paragraph 4 shall not apply to any investment dispute with respect to:

(a) the obligations of a Contracting Party under subparagraph 1(b) of Article 9; and

(b) the measures of a Contracting Party that fall within the scope of Article 20.

## **Article 16. Special Formalities and Information Requirements**

1. Nothing in Article 3 shall be construed to prevent a Contracting Party from adopting or maintaining a measure that prescribes special formalities in connection with investment activities by investors of another Contracting Party in its territory, such as the requirement that investments be legally constituted under the laws or regulations of the former Contracting Party, provided that such formalities are consistent with this Agreement and do not materially impair the protections afforded by the former Contracting Party to investors of the latter Contracting Party and their investments pursuant to this Agreement.

2. Notwithstanding Articles 3 and 4, a Contracting Party may require an investor of another Contracting Party, in its territory, to provide information concerning its investments solely for informational or statistical purposes. The former Contracting Party shall protect such information that is confidential from any disclosure that would prejudice the competitive position of the investor of the latter Contracting Party or its investments. Nothing in this paragraph shall be construed so as to prevent a Contracting Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.

## **Article 17. Settlement of Disputes Among Contracting Parties**

1. Any Contracting Party may request in writing consultations with another Contracting Party to resolve any dispute relating to the interpretation or application of this Agreement. The former Contracting Party (hereinafter referred to in this Article as "the complaining Party") shall at the time of the request deliver to the third Contracting Party a copy of that request. Where the third Contracting Party considers that it has a substantial interest in the dispute, it shall be entitled to participate in such consultations.

2. (a) Where the consultations referred to in paragraph

1 do not satisfactorily resolve the dispute within six months after the date of receipt of the request referred to in that paragraph, the complaining Party or the Contracting Party to which such request was addressed (hereinafter collectively referred to in this Article as "the disputing Parties") may, upon written request to the other disputing Party, submit the dispute to an arbitral tribunal.

(b) The disputing Party that submits the dispute to an arbitral tribunal under subparagraph (a) shall deliver to the third Contracting Party a copy of the request for arbitration under that subparagraph.

(c) The third Contracting Party may make submissions to the arbitral tribunal referred to in subparagraph (a) on a question of the interpretation of this Agreement, upon written notice to the disputing Parties.

(d) Where the third Contracting Party considers that it has a substantial interest in the dispute, it shall be entitled to



participate in the arbitration proceedings by joining either of the disputing Parties on delivery of a written notice of its intention to participate to the disputing Parties and to the arbitral tribunal referred to in subparagraph (a). Such written notice shall be delivered to the disputing Parties at the earliest possible time and in any event no later than seven days after the date of delivery of the copy of the request under subparagraph (b).

3. Unless otherwise provided for in this Article, or in the absence of an agreement by the disputing Parties to the contrary, the UNCITRAL Arbitration Rules shall apply mutatis mutandis to the proceedings of the arbitral tribunal. However, these rules may be modified by the disputing Parties or modified by the arbitrators appointed pursuant to paragraph 4, provided that none of the disputing Parties objects to the modification. The arbitral tribunal may, for its part, determine its own rules and procedures.

4. Within sixty days from the date of receipt of the request under subparagraph 2(a), each disputing Party shall appoint an arbitrator. The two arbitrators shall, in consultation with the disputing Parties, select a third arbitrator as the chairperson, who shall be a national of a non-Contracting Party. The UNCITRAL Arbitration Rules applicable to appointing members of three-member panels shall apply mutatis mutandis to other matters relating to the appointment of the arbitrators of the arbitral tribunal provided that the appointing authority referenced in those rules shall be the President of the International Court of Justice. If the President is a national of any Contracting Party or otherwise prevented from discharging the said function, the Vice-President shall be invited to make the appointment. If the Vice-President also is a national of any Contracting Party or otherwise prevented from discharging the said function, the member of the International Court of Justice next in seniority who is not a national of any Contracting Party shall be invited to make the appointment.

5. Unless otherwise agreed by the disputing Parties, all submissions of documents shall be made and all hearings shall be completed within a period of one hundred and eighty days from the date of selection of the third arbitrator. The arbitral tribunal shall render its award, in accordance with the provisions of this Agreement and the rules of international law applicable to the disputing Parties, within sixty days from the date of the final submissions of documents or the date of the closing of the hearings, whichever is the later. Such award shall be final and binding upon the disputing Parties.

6. The third Contracting Party that is not participating in the arbitration proceedings in accordance with subparagraph 2(d) shall, on delivery of a written notice to the disputing Parties and to the arbitral tribunal, be entitled to attend all hearings, to make written and oral submissions to the arbitral tribunal and to receive a copy of the written submissions of the disputing Parties to the arbitral tribunal.

7. Unless otherwise agreed by the disputing Parties, expenses incurred by the chairperson and other arbitrators, and other costs of the proceedings, shall be borne equally by the disputing Parties.

## **Article 18. Security Exceptions**

1. Notwithstanding any other provisions in this Agreement other than the provisions of Article 12, each Contracting Party may take any measure:

(a) which it considers necessary for the protection of its essential security interests;

(i) taken in time of war, or armed conflict, or other emergency in that Contracting Party or in international relations; or

(ii) relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons;

(b) in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

2. In cases where a Contracting Party takes any measure, pursuant to paragraph 1, that does not conform with the obligations of the provisions of this Agreement other than the provisions of Article 12, that Contracting Party shall not use such measure as a means of avoiding its obligations.

## **Article 19. Temporary Safeguard Measures**

1. A Contracting Party may adopt or maintain measures not conforming with its obligations under Article 3 relating to cross-border capital transactions and Article 13:

(a) in the event of serious balance-of-payments and external financial difficulties or threat thereof; or

(b) in cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies.

2. The measures referred to in paragraph 1:

(a) shall be consistent with the Articles of Agreement of the International Monetary Fund, so long as the Contracting Party taking the measures is a party to the said Articles;

(b) shall not exceed those necessary to deal with the circumstances set out in paragraph 1;

(c) shall be temporary and eliminated as soon as conditions permit;

(d) shall be promptly notified to the other Contracting Parties in an appropriate manner;

(e) shall ensure that any of the other Contracting Parties is treated as favorably as the third Contracting Party and any non-Contracting Party; and

(f) shall be adopted or maintained endeavoring to avoid unnecessary damage to the commercial, economic and financial interests of the other Contracting Parties.

3. Nothing in this Agreement shall be regarded as altering the rights enjoyed and obligations undertaken by a Contracting Party as a party to the Articles of Agreement of the International Monetary Fund.

## **Article 20. Prudential Measures**

1. Notwithstanding any other provisions of this Agreement, a Contracting Party shall not be prevented from taking measures relating to financial services for prudential reasons, including measures for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by an enterprise supplying financial services, or to ensure the integrity and stability of the financial system.

2. Where the measures referred to in paragraph 1 do not conform with the provisions of this Agreement, they shall not be used as a means of avoiding the Contracting Party's obligations under this Agreement.

## **Article 21. Taxation**

1. Nothing in this Agreement shall apply to taxation measures except as expressly provided for in paragraphs 3, 4 and 5.

2. Nothing in this Agreement shall affect the rights and obligations of any Contracting Party under any tax convention. In the event of any inconsistency between this Agreement and any such convention, that convention shall prevail to the extent of the inconsistency.

Note: In resolving issues relating to taxes, the competent authorities of each Contracting Party under the relevant tax convention shall determine whether or not such convention governs such issues.

3. Article 11 shall apply to taxation measures.

4. Article 15 shall apply to disputes under paragraph 3.

5. (a) No investor may invoke Article 11 as the basis

For the submission of an investment dispute to the arbitration set out in paragraph 3 of Article 15, where it has been determined pursuant to subparagraph (b) the taxation measure in question is not an expropriation.

(b) The disputing investor shall refer the issue, at the time of the submission of a written request for consultation to the disputing Contracting Party under paragraph 2 of Article 15, to the competent authorities of the Contracting Party of the disputing investor and the disputing Contracting Party to determine whether such measure is not an expropriation. If the competent authorities of both Contracting Parties do not consider the issue or, having considered it, fail to determine that the measure is not an expropriation within six months from the date on which the written request for consultation is submitted to the disputing Contracting Party under paragraph 2 of Article 15, the investor may submit its claim to the arbitration set out in paragraph 3 of Article 15.

(c) For the purposes of subparagraph (b), the term "competent authorities" means:

(i) in the case of the People's Republic of China, the Ministry of Finance and State Administration of Taxation or their authorized representatives;

(ii) in the case of Japan, the Minister of Finance or his or her authorized representatives, who shall consider the issue in consultation with the Minister for Foreign Affairs or his or her authorized representatives; and

(iii) in the case of the Republic of Korea, the Deputy Minister for Tax and Customs Office of the Ministry of Strategy and Finance or his or her authorized representatives.

## **Article 22. Denial of Benefits**

1. A Contracting Party may deny the benefits of this Agreement to an investor of another Contracting Party that is an enterprise of the latter Contracting Party and to its investments if the enterprise is owned or controlled by an investor of a non-Contracting Party and the denying Contracting Party:

(a) does not maintain normal economic relations with the non-Contracting Party; or

(b) adopts or maintains measures with respect to the non-Contracting 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.

2. A Contracting Party may deny the benefits of this Agreement to an investor of another Contracting Party that is an enterprise of the latter Contracting Party and to its investments if the enterprise is owned or controlled by an investor of a non-Contracting Party or of the denying Contracting Party, and the enterprise has no substantial business activities in the territory of the latter Contracting Party.

Note: For the purposes of this Article, the term "non-Contracting Parties" shall not include any separate customs territory within the meaning of the General Agreement on Tariffs and Trade or of the WTO Agreement that is a member of the World Trade Organization as of the date of entry into force of this Agreement.

## **Article 23. Environmental Measures**

Each Contracting Party recognizes that it is inappropriate to encourage investment by investors of another Contracting Party by relaxing its environmental measures. To this effect each Contracting Party should not waive or otherwise derogate from such environmental measures as an encouragement for the establishment, acquisition or expansion of investments in its territory.

## **Article 24. Joint Committee**

1. The Contracting Parties shall establish a Joint Committee (hereinafter referred to in this Article as the "Committee") with a view to accomplishing the objectives of this Agreement. The functions of the Committee shall be:

(a) to discuss and review the implementation and operation of this Agreement; and

(b) to discuss other investment-related matters concerning this Agreement, including the scope of the existing non-conforming measures referred to in paragraphs 2 and 3 of Article 3.

2. The Committee may, as necessary, decide to make appropriate recommendations to the Contracting Parties for the more effective functioning or the attainment of the objectives of this Agreement.

3. The Committee shall be composed of representatives of the Governments of the Contracting Parties and may decide to invite representatives of relevant entities other than the Governments of the Contracting Parties with the necessary expertise relevant to the issues to be discussed. The Committee shall decide on the modalities of its operation as necessary.

4. Any decision of the Committee shall be made by consensus.

5. Unless otherwise decided by the Contracting Parties, the Committee shall convene once a year.

## **Article 25. Relation to other Agreements**

Nothing in this Agreement shall affect the rights and obligations of a Contracting Party, including those relating to treatment accorded to investors of another Contracting Party, under any bilateral investment agreement between those two Contracting Parties existing on the date of entry into force of this Agreement, so long as such a bilateral agreement is in force.

Note: It is confirmed that, when an issue arises between an investor of a Contracting Party and another Contracting Party, nothing in this Agreement shall be construed so as to prevent the investor from relying on the bilateral investment agreement between those two Contracting Parties which is considered by the investor to be more favorable than this

Agreement.

## **Article 26. Headings**

The headings of the Articles of this Agreement are inserted for convenience of reference only and shall not affect the interpretation of this Agreement.

## **Article 27. Final Provisions**

1. The Governments of the Contracting Parties shall notify one another, through diplomatic channels, of the completion of their respective internal procedures necessary for the entry into force of this Agreement. This Agreement shall enter into force on the thirtieth day after the latest of the dates of receipt of the notifications.

2. This Agreement shall remain in force for a period of ten years after its entry into force and shall continue in force thereafter except as provided in paragraphs 5 and 6. This Agreement shall also apply to all investments of investors of any Contracting Party acquired in the territory of another Contracting Party in accordance with the applicable laws and regulations of the latter Contracting Party prior to the entry into force of this Agreement.

3. The Contracting Parties shall undertake a general review of this Agreement, as well as a review of its implementation and operation, so as to further facilitate investment and create more open investment environment in the Contracting Parties, every three years after the entry into force of this Agreement or upon the request of any Contracting Party, unless otherwise agreed by the Contracting Parties.

4. The Contracting Parties shall, at the request of any Contracting Party, enter into negotiations through appropriate channels for the purpose of amending this Agreement. This Agreement may be amended by agreement among the Contracting Parties. Such amendment shall be accepted by the Contracting Parties in accordance with their respective legal procedures, and shall enter into force on the date to be agreed upon by the Contracting Parties. Amendments shall not affect the rights and obligations of the Contracting Parties provided for under this Agreement until the amendments enter into force.

5. A Contracting Party may, by giving one year's advance notice in writing to the other Contracting Parties, withdraw from this Agreement at the end of the initial ten year period or at any time thereafter. If a Contracting Party withdraws, this Agreement shall remain in force for the remaining Contracting Parties. In respect of investments acquired prior to the date of withdrawal from this Agreement, the provisions of this Agreement shall continue to be effective for that withdrawing Contracting Party for a period of ten years from the date of such withdrawal.

6. This Agreement shall terminate when either of the remaining Contracting Parties as are stipulated in paragraph 5 withdraws in accordance with that paragraph.

In respect of investments acquired prior to the date of termination of this Agreement, the provisions of this Agreement shall continue to be effective for those remaining Contracting Parties for a period of ten years from the date of termination of this Agreement.

7. This Agreement shall not apply to claims arising out of events which occurred, or to claims which had been settled, prior to its entry into force.

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

DONE in triplicate at Beijing, on this day of May, 2012, in the English language.

FOR THE GOVERNMENT OF JAPAN:

FOR THE GOVERNMENT OF THE REPUBLIC OF KOREA:

FOR THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA:

## **PROTOCOL**

At the time of signing the Agreement among the Government of Japan, Government of the Republic of Korea and the Government of the People's Republic of China for the Promotion, Facilitation and Protection of Investment (hereinafter referred to as "the Agreement"), the undersigned have agreed upon the following provisions which shall form an integral part of the Agreement:

1. Paragraph 1 of Article 4 of the Agreement shall not apply to matters related to the acquisition of land property.

2. (a) The Contracting Parties confirm their shared understanding that paragraph 1 of Article 11 of the Agreement addresses the following two situations:

(i) the first situation is direct expropriation, where investments are nationalized or otherwise directly expropriated through formal transfer of title or outright seizure; and

(ii) the second situation is indirect expropriation, where an action or a series of actions by a Contracting Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(b) The determination of whether an action or a series of actions by a Contracting Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the action or series of actions, although the fact that such action or series of actions has an adverse effect on the economic value of investments, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the action or series of actions interferes with distinct and reasonable expectations arising out of investments; and

(iii) the character and objectives of the action or series of actions, including whether such action is proportionate to its objectives.

(c) Except in rare circumstances, such as when an action or a series of actions by a Contracting Party is extremely severe or disproportionate in light of its purpose, non-discriminatory regulatory actions adopted by the Contracting Party for the purpose of legitimate public welfare do not constitute indirect expropriation.

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

DONE in triplicate at Beijing, on this day of May, 2012, in the English language.

FOR THE GOVERNMENT OF JAPAN:

FOR THE GOVERNMENT OF THE REPUBLIC OF KOREA:

FOR THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA: