

AGREEMENT BETWEEN JAPAN AND THE PEOPLE'S REPUBLIC OF CHINA CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT

The Government of the People's Republic of China and the Government of Japan.

Desiring to strengthen economic cooperation between the two countries,

Intending to create favourable conditions for investment by nationals and companies of each country within the territory of the other country, by means of the favourable treatment for and the protection of investment, business activities in connection therewith and investments, and

Recognizing that the encouragement and reciprocal protection of investment will stimulate economic and technological exchanges between the two countries.

After the negotiations between the representatives of respective Governments.

Have agreed as follows.

Article 1.

For the purposes of the present Agreement:

(1) The term "investments" comprises every kind of asset, used as investment by nationals or companies of one Contracting Party within the territory of the other Contracting Party in accordance with or not in violation of the laws and regulations of the latter Contracting Party at the time of investment, including:

(a) Shares and other types of holding of companies.

(b) Claims to money or to any performance under contract having a financial values;

(c) Rights with respect to movable and immovable property;

(d) Patents of invention, rights with respect to trade marks, trade names service marks and any other industrial property, and rights with respect to know how; and

(e) Concession rights including those for the exploration and exploitation of natural resources.

(2) The term "returns" means the amounts yielded by an investment, in particular, profit, interest, capital gains, dividends, royalties and fees.

(3) The term "nationals" means, in relation to one Contracting Party, physical persons possessing the nationality of that Contracting Party.

(4) The term "companies" means:

(a) In relation to the People's Republic of China, enterprises, other economic organizations and associations; and

(b) In relation to Japan, corporations, partnerships, companies, and associations whether or not with limited liability, whether or not with legal personality and whether or not for pecuniary profit.

Companies constituted under the applicable laws and regulations of one Contracting Party and having their seat within its territory shall be deemed companies of that Contracting Party.

Article 2.

1. Each Contracting Party shall within its territory promote as far as possible investment by nationals and companies of the other Contracting Party and admit such investment in accordance with the applicable laws and regulations of the former Contracting Party.

2. Nationals and companies of either Contracting Party shall within the territory of the other Contracting Party be accorded treatment no less favourable than that accorded to nationals and companies of any third country in respect of the admission of investment and the matters in connection therewith.

Article 3.

1. The treatment accorded by either Contracting Party within its territory to nationals and companies of the other Contracting Party with respect to investments, returns and business activities in connection with the investment shall not be less favourable than that accorded to nationals and companies of any third country.

2. The treatment accorded by either Contracting Party within its territory to nationals and companies of the other Contracting Party with respect to investments, returns and business activities in connection with the investment shall not be less favourable than that accorded to nationals and companies of the former Contracting Party.

3. The term "business activities in connection with the investment" referred to in the provisions of the present Article includes:

(a) The maintenance of branches, agencies, offices, factories and other establishments appropriate to the conduct of business activities

(b) The control and management of companies which they have established or acquired;

(c) The employment and discharge of specialists including technical experts, executive personnel and attorneys, and other workers;

(d) The making and performance of contracts.

Article 4.

The treatment accorded by either Contracting Party within its territory to nationals and companies of the other Contracting Party with respect to access to the courts of justice and administrative tribunals and agencies both in pursuit and in defence of their rights shall not be less favourable than that accorded to nationals and companies of the former Contracting Party or to nationals and companies of any third country.

Article 5.

1. Investments and returns of nationals and companies of either Contracting Party shall receive the most constant protection and security within the territory of the other Contracting Party.

2. Investments and returns of nationals and companies of either Contracting Party shall not be subjected to expropriation, nationalization or any other measures the effects of which would be similar to expropriation or nationalization, within the territory of the other Contracting Party unless such measures are taken for a public purpose and in accordance with laws and regulations, are not discriminatory, and, are taken against compensation.

3. The compensation referred to in the provisions of paragraph 2 of the present Article shall be such as to place the nationals and companies in the same financial position as that in which the nationals and companies would have been if expropriation, nationalization or any other measures the effects of which would be similar to expropriation or nationalization, referred to in the provisions of paragraph 2 of the present Article, had not been taken. Such compensation shall be paid without delay. It shall be effectively realizable and freely transferable at the exchange rate in effect on the date used for the determination of amount of compensation.

4. Nationals and companies of either Contracting Party whose investments and returns are subjected to expropriation, nationalization or any other measures the effects of which would be similar to expropriation or nationalization, shall have the right of access to the competent courts of justice and administrative tribunals and agencies of the other Contracting Party taking the measures concerning such measures and the amount of compensation in accordance with the applicable laws and regulations of such other Contracting Party.

5. The treatment accorded by either Contracting Party within its territory to nationals and companies of the other

Contracting Party with respect to the matters set forth in the provisions of paragraph 1 to 4 of the present Article shall not be less favourable than that accorded to nationals and companies of any third country.

Article 6.

Nationals and companies of either Contracting Party who suffer within the territory of the other Contracting Party damages in relation to their investments, returns or business activities in connection with their investment, owing to the outbreak of hostilities or a state of national emergency, shall, in case any measure is taken by the latter Contracting Party in relation to the outbreak of such hostilities or state of such national emergency, be accorded treatment no less favourable than that accorded to nationals and companies of any third country.

Article 7.

If either Contracting Party makes payment to any of its nationals or companies under guarantee it has assumed in respect of investments and returns in the territory of the other Contracting Party, such other Contracting Party shall recognize the transfer to the former Contracting Party of any right or claim of such national or company in such investments and returns on account of which such payment is made and the subrogation of the former Contracting Party to any claim or cause of action of such national or company arising in connection, therewith. As regards the transfer of payment to be made to that former Contracting Party by virtue of such transfer of right or claim, the provisions of paragraph 2 to 5 of Article 5 and Article 8 shall apply mutatis mutandis.

Article 8.

1. Nationals and companies of either Contracting Party shall be guaranteed by the other Contracting Party freedom of payments, remittances, and transfers of financial instruments or funds including value of liquidation of an investment between the territories of the two Contracting Parties as well as between the territories of such other Contracting Party and of any third country.

2. The provisions of paragraph 1 of the present Article shall not preclude either Contracting Party from imposing exchange restrictions in accordance with its applicable laws and regulations. paragraph 1 of the present Article shall not preclude either Contracting Party from imposing exchange restrictions in accordance with its applicable laws and regulations.

Article 9.

The present Agreement shall also apply to investments and returns of nationals and companies of either Contracting Party acquired within the territory of the other Contracting Party in accordance with the applicable laws and regulations of such other Contracting Party prior to the entering into force of the present Agreement and on or after September 29, 1972.

Article 10.

The provisions of the present Agreement shall apply irrespective of the existence of diplomatic or consular relations between the Contracting Parties.

Article 11.

1. Any dispute between a national or company of either Contracting Party and the other Contracting Party with respect to investment within the territory of the latter Contracting Party shall, as far as possible, be settled amicably through consultation between the parties to the dispute.

2. If a dispute concerning the amount of compensation referred to in the provisions of paragraph 3 of Article 5 between a national or company of either Contracting Party and the other Contracting Party or other entity, charged with the obligation for making compensation under its laws and regulations, cannot be settled within six months from the date either party requested consultations for the settlement, such dispute shall, at the request of such national or company, be submitted to a conciliation board or an arbitration board, to be established with reference to the Convention on the Settlement on Investment Disputes between States and Nationals of Other States done at Washington on March 18, 1965 (hereinafter referred to as "the Washington Convention"). Any dispute concerning other matters between a national or company of either Contracting Party and the other Contracting Party may be submitted by mutual agreement, to a conciliation board or an arbitration board as stated above. In the event that such national or company has resorted to administrative or judicial settlement within the territory of the latter Contracting Party, such dispute shall not be submitted to arbitration.

3. The arbitration board referred to in the provisions of paragraph 2 of the present Article shall be composed of three arbitrators, with each part appointing one arbitrator within a period of sixty days from the date of receipt by either party from the other party of a notice requesting arbitration of the dispute referred to in the provisions of paragraph 2 of the present Article, and the third arbitrator to be agreed upon as the President of the arbitration board by the two arbitrator so chosen within a further period of ninety days, provided that the third arbitrator shall not be a national of either Contracting Party.
4. If the third arbitrator is not agreed upon between the arbitrators appointed by each party within the period referred to in the provisions of paragraph 3 of the present Article, either party shall request the third party agreed upon in advance by both partied to appoint the third arbitrator who shall be a national of a third country which has diplomatic relations with both Contracting Parties.
5. The arbitral procedures shall be determined by the arbitration board with reference to the Washington Convention.
6. The decisions of the arbitration board shall be final and binding. Execution of the decision of the arbitration board shall be governed by the laws and regulations concerning the execution of decision in force in the State in whose territories such execution is sought. The arbitration board shall state the basis of its decision and state the reasons at the request of either party.
7. Each party shall bear the cost of its own arbitrator and its representation in the arbitral proceedings. The cost of the President of the arbitration board in discharging his duties and the remaining costs of the arbitration board shall be borne equally by the parties concerned.
8. When and after a case is submitted to the arbitration board referred to in the provisions of paragraph 2 of the present Article, no claim concerning such case shall be made between states.paragraph 2 of the present Article, no claim concerning such case shall be made between states.

Article 12.

Companies of any third country in which nationals and companies of either Contracting Party have a substantial interest shall within the territory of the other Contracting Party be accorded, unless international agreement between such other Contracting Party and such third country concerning investment and protection of investments is in effect;

(1) Treatment no less favourable than that accorded, within the territory of the latter Contracting Party, to companies of any country in which nationals and companies of any other third country have a substantial interest with respect to the matters set forth in the provisions of paragraph 2 of Article 2, Article 3, paragraphs 1 to 1 of Article 5, Article 6 and Article 9; and

(2) Treatment no less favourable than that accorded, within the territory of the latter Contracting Party, to companies of any country in which nationals and companies of the latter Contracting Party have a substantial interest with respect to the matters set forth in the provisions of Article 3, paragraph 1 to 4 of Article 5, Article 6 and Article 9.

Article 13.

1. Each Contracting Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the other Contracting Party may have with respect to any matter affecting the operation of the present Agreement.
2. Any dispute between the Contracting Party as to the interpretation or application of the present Agreement, not satisfactorily adjusted by diplomacy, shall be referred for decision to an arbitration board. Such arbitration board shall be composed of three arbitrators, with each Contracting Party appointing one arbitrator within a period of sixty days from the date of receipt by either Contracting Party from the other Contracting Party of a note requesting arbitration of the dispute, and the third arbitrator to be agreed upon as the president by the two arbitrators so chosen within a further period of ninety days, provided that the third arbitrator shall not be a national of either Contracting Party.
3. If the third arbitrator is not agreed upon between the arbitrator appointed by each Contracting Party within the period referred to in the provisions of paragraph 2 of the present Article, the Contracting Parties shall request the President of the International Court of Justice to appoint the third arbitrator who shall nor be a national of either Contracting Party.
4. The arbitration board shall reach its decisions by a majority of votes. Such decisions shall be final and binding.
5. The arbitral procedures shall be determined by the arbitration board.
6. Each Contracting Party shall bear the cost of its own arbitrator and its representation in the arbitral proceedings. The cost

of the President of the arbitration board in discharging his duties and the remaining costs of the arbitration board shall be borne equally by both Contracting Parties.

Article 14.

Both Contracting Parties shall establish a joint committee, consisting of representatives of the Governments of both Contracting Parties, for the purpose of reviewing the implementation of the present Agreement and the matters related to investment between the two countries, holding consultations on the operation and the matters related to the operation of the present Agreement in connection with the development of legal systems or of policies of either or both of the two countries with respect to the receiving of foreign investment, and, as necessary, making appropriate recommendations to the Governments of both Contracting Parties. The Joint Committee shall meet alternately in Beijing and Tokyo at the request of either Contracting Party.

Article 15.

1. The present Agreement shall enter into force on the thirtieth day after the date of exchange of notifications confirming that the procedures required under domestic laws for its entry into force have been completed in each country. It shall remain in force for a period of ten years and shall continue in force thereafter until terminated in accordance with the provisions of paragraph 2 of the present Article.

2. Either Contracting Party may, by giving one year's advance notice in writing to the other Contracting Party, terminate the present Agreement at the end of the initial ten-year period or at any time thereafter.

3. In respect of investments and returns acquired prior to the date of termination of the present Agreement, the provisions of Article 1 to 14 shall continue to be effective for a further period of fifteen years from the date of termination of the present Agreement.

DONE at Beijing on the twenty-seventh day of August, 1988, in duplicate, in the Chinese, Japanese and English languages, each text being equally authentic. In case of any divergence of interpretation, the English text shall prevail.

For the Government of Japan:

T. Nakajima

For the Government of the People's Republic of China

Zheng Tuobin

PROTOCOL

At the time of signing the Agreement between Japan and the People's Republic of China concerning the Encouragement and Reciprocal 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. Nothing in the Agreement shall be construed so as to grant any right or impose any obligation in respect of copyright.

2. Nothing in the Agreement shall be construed so as to affect the obligations undertaken by either Contracting Party towards the other Contracting Party by virtue of the provisions of the Paris Convention for the Protection of Industrial Property of March 20, 1883, or of any subsequent revision thereof, so long as such provisions are in force between the Contracting Parties.

3. For the purpose of the provisions of paragraph 2 of Article 3 of the Agreement, it shall not be deemed "treatment less favourable" for either Contracting Party to accord discriminatory treatment, in accordance with its applicable laws and regulations, to nationals and companies of the other Contracting Party, in case it is really necessary for the reason of public order, national security or sound development of national economy.

4. The provisions of paragraph 2 of Article 3 of the Agreement shall not prevent either Contracting Party from prescribing special formalities in connection with the activities of foreign nationals and companies within its territory, but such

formalities may not impair the substance of the rights set forth in the aforesaid paragraph.

5. Either Contracting Party shall in accordance with its applicable laws and regulations give sympathetic consideration to applications for the entry, sojourn and residence of nationals of the other Contracting Party who wish to enter the territory of the former Contracting Party and remain therein for the purpose of making investment and carrying on business activities in connection therewith.

6. Notwithstanding the provisions of Article 3 of the Agreement, either Contracting Party reserves the right to accord special tax advantages on the basis of reciprocity or by virtue of agreements for the avoidance of double taxation or for the prevention of fiscal evasion.

7. The provisions of paragraph 2 of Article 8 of the Agreement shall not affect the rights and obligations with respect to exchange restrictions, that either Contracting Party has or may have as a contracting party to the Articles of Agreement of the International Monetary Fund.

8. The provisions of paragraph 1 of Article 11 of the Agreement shall not be construed so as to prevent nationals and companies of either Contracting Party from seeking administrative or judicial settlement within the territory of the other Contracting Party.

9. The term "Substantial interest" as used in the provisions of Article 12 of the Agreement means such extent of interest as to permit the exercise of control or decisive influence on the company. Whether an interest held by nationals and companies of either Contracting Party amounts to a substantial interest shall be decided in each case through consultations between the Contracting Parties.

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

DONE at Beijing on the twenty-seventh day of August, 1988, in duplicate, in the Japanese, Chinese and English languages, all three texts being equally authentic. In case of any divergence of interpretation, the English text shall prevail.

For the Government of Japan:

T. Nakajima

For the Government of the People's Republic of China

Zheng Tuobin