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AUSTRALIA-VIETNAM: AGREEMENT ON THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS
Done at Canberra, March 5, 1991

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*1065 AGREEMENT BETWEEN AUSTRALIA AND THE SOCIALIST REPUBLIC OF
VIETNAM ON THE RECIPROCAL PROMOTION AND PROTECTION OF
INVESTMENTS

Australia and the Socialist Republic of Vietnam ("the
Contracting Parties"), RECOGNISING the importance of promoting
the flow of capital for economic activity and development and
aware of its role in expanding economic relations and technical
co-operation between them, particularly with respect to
investment by nationals of one Contracting Party in the territory
of the other Contracting Party;

CONSIDERING that investment relations should be promoted and
economic co-operation strengthened in accordance with the
internationally accepted principles of mutual respect for
sovereignty, equality, mutual benefit, non-discrimination and
mutual confidence;

ACKNOWLEDGING that investments of nationals of one Contracting

Party in the territory of the other Contracting Party would be made within the framework of laws of that other Contracting Party; and

RECOGNISING that pursuit of these objectives would be facilitated by a clear statement of principles relating to the protection of investments, combined

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with rules designed to render more effective the application of these principles within the territories of the Contracting Parties, HAVE AGREED as follows:

ARTICLE 1

DEFINITIONS

(1) For the purposes of this Agreement:

(a) "investment" means every kind of asset, owned or controlled by nationals of one Contracting Party and admitted by the other Contracting Party subject to its law and investment policies applicable from time to time and includes:

(i) tangible and intangible property, including rights such as mortgage, liens and other pledges,

(ii) shares, stocks, bonds and debentures and any other form of participation in a company,

(iii) a loan or other claim to money or a claim to performance having economic value,

(iv) intellectual and industrial property rights, including rights with respect to copyright, patents, trademarks, trade names, industrial designs, trade secrets, know-how and goodwill,

(v) business concessions and any other rights required to conduct economic activity and having economic value conferred by law or *1066 under a contract, including rights to engage in agriculture, forestry, fisheries and animal husbandry, to search for, extract or exploit natural resources and to manufacture, use and sell products, and (vi) activities associated with investments, such as the organisation and operation of business facilities, the acquisition, exercise and disposition of property rights including intellectual property rights, the raising of funds and the purchase and sale of foreign exchange;

(b) "return" means an amount derived from or associated with an investment, including profits, dividends, interest, capital gains, royalty payments, management or technical assistance fees, payments in kind and all other lawful income;

(c) "national" of a Contracting Party means:

(i) a company, or

(ii) a natural person who is a citizen of a Contracting Party or whose residence in a Contracting Party is not limited as to time under its law;

(d) "company" means any corporation, association, partnership, trust or other legally recognised entity that is duly incorporated, constituted, set up, or otherwise duly organised:

(i) under the law of a Contracting Party, or

(ii) under the law of a third country and is owned or controlled by an entity described in paragraph (1)(d)(i) of this Article or by a natural person who is a national of a Contracting Party under its law, regardless of whether or not the entity is organised for pecuniary gain, privately or

otherwise owned, or organised with limited or unlimited liability;

(e) "freely convertible currency" means a convertible currency as to orig. U.S. govt. works

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classified by the International Monetary Fund or any currency that is widely traded in international foreign exchange markets;

(f) "territory" in relation to a Contracting Party includes the territorial sea, maritime zone or continental shelf where that Contracting Party exercises its sovereignty, sovereign rights or jurisdiction in accordance with international law.

(2) For the purposes of paragraph (1) (a) of this Article, returns that are invested shall be treated as investments and any alteration of the form in which assets are invested or reinvested shall not affect their character as investments.

(3) For the purposes of this Agreement, a natural person or company shall be regarded as controlling a company or an investment if the person or company has a substantial interest in the company or the investment. Any question arising out of this Agreement concerning the control of a company or an investment shall be resolved to the satisfaction of the Contracting Parties.

*1067 ARTICLE 2

APPLICATION OF AGREEMENT

(1) This Agreement shall apply to all investments made after 1 January 1986. (2) Where a company of a Contracting Party is owned or controlled by a citizen or a company of any third country, the Contracting Parties may decide jointly in consultation not to extend the rights and benefits of this Agreement to such company.

(3) A company duly organised under the law of a Contracting Party shall not be treated as a national of the other Contracting Party, but any investments in that company by nationals of that other Contracting Party shall be protected by this Agreement.

(4) This Agreement shall not apply to a company organised under the law of a third country within the meaning of paragraph (1)(d)(ii) of Article 1 where the provisions of an investment protection agreement with that country have already been invoked in respect of the same matter.

(5) This Agreement shall not apply to a natural person who is not a citizen of a Contracting Party but whose residence in that Contracting Party is not limited as to time where:

(a) the provisions of an investment protection agreement between the other Contracting Party and the country of which the person is a citizen have already been invoked in respect of the same matter; or

(b) the person is a citizen of the other Contracting Party.

ARTICLE 3

PROMOTION AND PROTECTION OF INVESTMENTS

(1) Each Contracting Party shall encourage and promote investments in its territory by nationals of the other

Contracting Party and shall, in accordance with its laws and investment policies applicable from time to time, admit investments.

(2) A Contracting Party shall ensure fair and equitable treatment in its own
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territory to investments.

(3) A Contracting Party shall, subject to its laws, accord within its territory protection and security to investments and shall not impair the management, maintenance, use, enjoyment or disposal of investments. (4) This Agreement shall not prevent a national of one Contracting Party from taking advantage of the provisions of any law or policy of, or contract with, the other Contracting Party which are more favourable than the provisions of this Agreement.

ARTICLE 4

MOST FAVOURED NATION PROVISIONS

A Contracting party shall at all times treat investments in its own territory on a basis no less favourable than that accorded to investments of nationals of any third country, provided that a Contracting Party shall not be obliged to extend to investments any treatment, preference or privilege resulting from: (a) any customs union, economic union, free trade area or regional economic integration agreement to which the Contracting Party belongs; or *1068 (b) the provisions of a double taxation agreement with a third country.

ARTICLE 5

ENTRY AND SOJOURN OF PERSONNEL

(1) A Contracting Party shall, subject to its laws applicable from time to time relating to the entry and sojourn of non-citizens, permit natural persons who are nationals of the other Contracting Party and personnel employed by companies of that other Contracting Party to enter and remain in its territory for the purpose of engaging in activities connected with investments.

(2) A Contracting Party shall, subject to its laws applicable from time to time, permit nationals of the other Contracting Party who have made investments in the territory of the first Contracting Party to employ within its territory key technical and managerial personnel of their choice regardless of citizenship.

ARTICLE 6

TRANSPARENCY OF LAWS

Each Contracting Party shall, with a view to promoting the understanding of its laws that pertain to or affect investments in its territory by nationals of the other Contracting Party, make such laws public and readily accessible.

ARTICLE 7

EXPROPRIATION AND NATIONALISATION

(1) Neither Contracting Party shall nationalise, expropriate or
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measures having effect equivalent to nationalisation or EXPROPRIATION (hereinafter referred to as "EXPROPRIATION") the investments of nationals of the other Contracting Party unless the following conditions are complied with: (a) the EXPROPRIATION is for a public purpose related to the internal needs of that Contracting Party and under due process of law;

(b) the EXPROPRIATION is non-discriminatory; and

(c) the EXPROPRIATION is accompanied by the payment of prompt, adequate and effective compensation.

(2) The compensation referred to in paragraph 1 of this Article shall be computed on the basis of the market value of the investment immediately before the EXPROPRIATION or impending EXPROPRIATION became public knowledge. Where that value cannot be readily ascertained, the compensation shall be determined in accordance with generally recognised principles of valuation and equitable principles taking into account the capital invested, depreciation, capital already repatriated, replacement value, currency exchange rate movements and other relevant factors.

(3) The compensation shall be paid without undue delay, shall include interest at a commercially reasonable rate from the date the measures were taken to the date of payment and shall be freely transferable between the territories of the Contracting Parties. The compensation shall be payable *1069 either in the currency in which the investment was originally made or, if requested by the national, in any other freely convertible currency.

ARTICLE 8

COMPENSATION FOR LOSSES

When a Contracting Party adopts any measures relating to losses in respect of investments in its territory by citizens or companies of any other country owing to war or other armed conflict, revolution, a state of national emergency, civil disturbance or other similar events, the treatment accorded to nationals of the other Contracting Party as regards restitution, indemnification, compensation or other settlement shall be no less favourable than that which the first Contracting Party accords to citizens or companies of any third country.

ARTICLE 9

TRANSFERS

(1) A Contracting Party shall, when requested by a national of the other Contracting Party, and subject to its right in exceptional financial or economic circumstances to exercise equitably and in good faith powers conferred by its law, permit all funds of that national related to an investment in its territory and earnings and other assets of personnel engaged from abroad in connection with that investment, to be transferred

freely and without unreasonable delay. Such funds include, but are not limited to, the following: (a) the initial capital plus any additional capital used to maintain or expand the investment;

(b) returns;

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(c) fees, including payments in connection with intellectual and industrial property rights;

(d) receipts from the whole or partial sale, divestment or liquidation of the investment;

(e) payments made pursuant to a loan agreement; and

(f) payments made for the losses referred to in Article 8.

(2) The transfers abroad of such funds and the earnings of personnel shall be permitted in freely convertible currency and shall be made at the exchange rate applying on the date of transfer in accordance with the law of the Contracting Party which has admitted the investment.

(3) A Contracting Party may protect the rights of creditors, or ensure the satisfaction of judgments in adjudicatory proceedings, through the equitable, non-discriminatory and good faith application of its law.

ARTICLE 10

CONSULTATIONS BETWEEN CONTRACTING PARTIES

The Contracting Parties shall consult at the request of either of them on matters concerning the interpretation or application of this Agreement.

*1070 ARTICLE 11

SETTLEMENT OF DISPUTES BETWEEN CONTRACTING PARTIES

(1) The Contracting Parties shall endeavour to resolve any dispute between them connected with this Agreement by prompt and friendly consultations and negotiations.

(2) If a dispute is not resolved by such means within six months of one Contracting Party seeking in writing such negotiations or consultations, it shall be submitted at the request of either Contracting Party to an Arbitral Tribunal established in accordance with the provisions of Annex A of this Agreement or, by agreement, to any other international tribunal.

ARTICLE 12

SETTLEMENT OF DISPUTES BETWEEN A CONTRACTING PARTY AND A NATIONAL OF THE OTHER CONTRACTING PARTY

(1) In the event of a dispute between a Contracting Party and a national of the other Contracting Party relating to an investment, the parties to the dispute shall initially seek to resolve the dispute by consultations and negotiations.

(2) If the dispute in question cannot be resolved through consultations and negotiations, either party to the dispute may:

(a) in accordance with the law of the Contracting Party which has admitted the investment, initiate proceedings before that Contracting Party's competent judicial or administrative

Nationals of Other States ("the Convention"), refer the dispute to the International Centre for the Settlement of Investment Disputes ("the Centre") for conciliation or arbitration pursuant to Articles 28 or 36 of the Convention;

(c) if both Contracting Parties are not at that time party to the Convention, or one party to the dispute has not consented to referring the dispute to the Centre, refer the dispute to an Arbitral Tribunal constituted in accordance with Annex B of this Agreement, or by agreement, to any other arbitral authority.

(3) Once an action referred to in paragraph (2) of this Article has been taken, neither Contracting Party shall pursue the dispute through diplomatic channels unless:

(a) the relevant judicial or administrative body, the Secretary-General of the Centre, the arbitral authority or tribunal or the conciliation commission, as the case may be, has decided that it has no jurisdiction in relation to the dispute in question; or

(b) the other Contracting Party has failed to abide by or comply with any judgment, award, order or other determination made by the body in question. (4) In any proceeding involving a dispute relating to an investment, a Contracting Party shall not assert, as a defence, counter-claim, right of set-off or otherwise, that *1071 the national concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of any alleged loss.

ARTICLE 13

SETTLEMENT OF DISPUTES BETWEEN NATIONALS OF THE CONTRACTING PARTIES

A Contracting Party shall in accordance with its law:

(a) provide nationals of the other Contracting Party who have made investments within its territory and personnel employed by them for activities associated with investments full access to its competent judicial or administrative bodies in order to afford means of asserting claims and enforcing rights in respect of disputes with its own nationals; (b) permit its nationals to select means of their choice to settle disputes relating to investments with the nationals of the other Contracting Party, including arbitration conducted in a third country; and (c) provide for the recognition and enforcement of any resulting judgments or awards.

ARTICLE 14

SUBROGATION

(1) If a Contracting Party or an agency of a Contracting Party makes a payment to a national of that Contracting Party under a

guarantee, a contract of insurance or other form of indemnity it has granted in respect of an investment, the other Contracting Party shall recognise the transfer of any right or title in respect of such investment. The subrogated right or claim shall not be greater than the original right or claim of the national.

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(2) Where a Contracting Party has made a payment to its national and has taken over rights and claims of the national, that national shall not, unless authorised to act on behalf of the Contracting Party making the payment, pursue those rights and claims against the other Contracting Party.

ARTICLE 15

ENTRY INTO FORCE, DURATION AND TERMINATION

(1) This Agreement shall enter into force thirty days after the date on which the Contracting Parties shall have notified each other that their Constitutional requirements for the entry into force of this Agreement have been fulfilled. It shall remain in force for a period of fifteen years and thereafter shall remain in force indefinitely, unless terminated in accordance with paragraph (2) of this Article.

(2) Either Contracting Party may terminate this Agreement at any time after it has been in force for fifteen years by giving one year's written notice to the other Contracting Party.

(3) Notwithstanding termination of this Agreement pursuant to paragraph (2) of this Article, the Agreement shall continue to be effective for a further period of fifteen years from the date of its termination in respect of investments made or acquired before the date of termination of this Agreement. *1072 IN WITNESS WHEREOF the undersigned, being duly authorised, have signed this Agreement.

DONE in duplicate at CANBERRA on the FIFTH day of MARCH, 1991 in the English and Vietnam languages, both texts being equally authentic. FOR AUSTRALIA

[Signature]

FOR THE SOCIALIST REPUBLIC OF VIETNAM

[Signature]

ANNEX A

(1) The Arbitral Tribunal referred to in Article 11 shall consist of three persons appointed as follows:

(a) each Contracting Party shall appoint one arbitrator;
(b) the arbitrators appointed by the Contracting Parties shall, within thirty days of the appointment of the second of them, by agreement, select a third arbitrator who shall be a national of a third country which has diplomatic relations with both Contracting Parties;

(c) the Contracting Parties shall, within thirty days of the selection of the third arbitrator, approve the selection of that arbitrator who shall act as Chairman of the Tribunal.

(2) Arbitration proceedings shall be instituted upon notice being given through the diplomatic channel by the Contracting Party instituting such proceedings to the other Contracting Party. Such notice shall contain a statement setting forth in summary form the grounds of the claim, the nature of the relief

sought, and the name of the arbitrator appointed by the Contracting Party instituting such proceedings. Within sixty days after the giving of such notice the respondent Contracting Party shall notify the Contracting Party

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instituting proceedings of the name of the arbitrator appointed by the respondent Contracting Party.

(3) If, within the time limits provided for in paragraph (1)(c) and paragraph (2) of this Annex, the required appointment has not been made or the required approval has not been given, either Contracting Party may request the President of the International Court of Justice to make the necessary appointment. If the President is a national of either Contracting Party or is otherwise unable to act, the Vice-President shall be invited to make the appointment. If the Vice-President is a national of either Contracting Party or is unable to act, the Member of the International Court of Justice next in seniority who is not a national of either Contracting Party shall be invited to make the appointment.

(4) In case any arbitrator appointed as provided for in this Annex shall resign or become unable to act, a successor arbitrator shall be appointed in the same manner as prescribed for the appointment of the original arbitrator and *1073 the successor shall have all the powers and duties of the original arbitrator.

(5) The Arbitral Tribunal shall convene at such time and place as shall be fixed by the Chairman of the Tribunal. Thereafter, the Arbitral Tribunal shall determine where and when it shall sit.

(6) The Arbitral Tribunal shall decide all questions relating to its competence and shall, subject to any agreement between the Contracting Parties, determine its own procedure.

(7) Before the Arbitral Tribunal makes a decision, it may at any stage of the proceedings propose to the Contracting Parties that the dispute be settled amicably. The Arbitral Tribunal shall reach its award by majority vote taking into account the provisions of this Agreement, the international agreements both Contracting Parties have concluded and the generally recognised principles of international law.

(8) Each Contracting Party shall bear the costs of its appointed arbitrator. The cost of the Chairman of the Tribunal and other expenses associated with the conduct of the arbitration shall be borne in equal parts by both Contracting Parties. The Arbitral Tribunal may decide, however, that a higher proportion of costs shall be borne by one of the Contracting Parties.

(9) The Arbitral Tribunal shall afford to the Contracting Parties a fair hearing. It may render an award on the default of a Contracting Party. Any award shall be rendered in writing and shall state its legal basis. A signed counterpart of the award shall be transmitted to each Contracting Party. (10) An award shall be final and binding on the Contracting Parties.

ANNEX B

(1) The Arbitral Tribunal referred to in paragraph (2)(c) of Article 12 shall consist of 3 persons appointed as follows:

(a) each party to the dispute shall appoint one arbitrator;

(b) the arbitrators appointed by the parties to the dispute shall, within thirty days of the appointment of the second of them, by agreement, select an arbitrator as Chairman of the Tribunal who shall be a national of a third country which has diplomatic relations with both Contracting Parties. (2) Arbitration proceedings shall be instituted by written notice setting
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forth the grounds of the claim, the nature of the relief sought and the name of the arbitrator appointed by the party instituting such proceedings.

(3) If a party to the dispute, receiving notice in writing from the other party of the institution of arbitration proceedings and the appointment of an arbitrator, shall fail to appoint its arbitrator within thirty days of receiving notice from the other party, or if, within sixty days after a party has given notice in writing instituting *1074 the arbitration proceedings, agreement has not been reached on a Chairman of the Tribunal, either party to the dispute may request the Secretary-General of the International Centre for Settlement of Investment Disputes to make the necessary appointment. (4)

In case any arbitrator appointed as provided in this Annex shall resign or become unable to act, a successor arbitrator shall be appointed in the same manner as prescribed for the appointment of the original arbitrator and the successor shall have all the powers and duties of the original arbitrator. (5) The Arbitral Tribunal shall, subject to the provisions of any agreement

between the parties to the dispute, determine its procedure by reference to the rules of procedure contained in the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States. (6) The Arbitral Tribunal shall decide all questions relating to its competence.

(7) Before the Arbitral Tribunal makes a decision it may at any stage of the proceedings propose to the parties that the dispute be settled amicably. The Arbitral Tribunal shall reach its award by majority vote taking into account the provisions of this Agreement, any agreement between the parties to the dispute and the relevant domestic law of the Contracting Party which has admitted the investment.

(8) An award shall be final and binding and shall be enforced in the territory of each Contracting Party in accordance with its law. (9) Each party to the dispute shall bear the costs of its

appointed arbitrator. The cost of the Chairman of the Tribunal and other expenses associated with the conduct of the arbitration shall be borne equally by the parties. The Arbitral Tribunal may, however, decide that a higher proportion of the costs shall be borne by one of the parties.

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 PROMOTION AND RECIPROCAL PROTECTION OF
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 Corresponding Editor for International Investment.

Introductory Note

by

Heribert Golsong

The French-U.S.S.R. Agreement on the Promotion and Reciprocal
 Protection of Investments follows the model of the first two
 bilateral investment treaties (BITs) signed by the Soviet Union,
 namely with Belgium/Luxembourg [29 I.L.M. 299 (1990)] and with
 the United Kingdom [29 I.L.M. 366 (1990)]. There are a few
 specific provisions, however, in the French-U.S.S.R. Agreement
 which deserve notice.

While endorsing in its Article 3 the concept of fair and
 equitable treatment of investments made by investors of the other
 contracting party, the Agreement qualifies such treatment by
 reference to "conformity with principles of international law".

France has used similar qualifying language of "fair and
 equitable treatment" in some of its previous BITs. The qualifier
 "in conformity with principles of international law" was used by
 France for the first time in the French-Sri Lanka BIT of 1980,
 albeit not in exactly the same wording. The Sri Lanka BIT refers
 to "general principles of international law". As pointed out by
 the International Court of Justice in the Elettronica Sicula
 Judgment of July 20, 1989, where a similar clause in the U.S.-
 Italy Friendship, Commerce, and Navigation (FCN) Treaty of 1948
 was at stake [28 I.L.M. 1137 (1989)], such a qualifier reduces

the scope of the undertaking of fair and equitable treatment. With a few exceptions, i.e. the Panama-Swiss BIT of 1983, Article 2(b), most of the other BITs do not contain similar wording.

The United States has in most cases, e.g. Bangladesh-U.S. BIT, Article II(3), followed in part traditional FCN language by stipulating that the standard of fair and equitable treatment "shall in no case be less than that required by

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international law". This latter formula, of course, does not
enshrine a restrictive qualification.

The French-Soviet Agreement further provides for a general
treatment standard of a most favored nation, plus national
treatment. This latter part is an improvement over the two
earlier BITs signed by the U.S.S.R. The Belgium/Luxembourg BIT
does not provide for national treatment. The UK BIT provides for
national treatment (Article 3) only "to the extent possible".

*318 Moreover, in a side letter which is an integral part of
the Agreement, it was agreed that the concept of fair and
equitable treatment should apply to the supply of raw materials,
energy supply and transport facilities.

The transfer provision in Article 5 goes beyond the
corresponding provision in the U.K.-U.S.S.R. BIT inasmuch as
there is no mention of phasing out over time the transfers of the
invested capital.

Article 6 deals with non-commercial risk insurance, an
important issue for French investors operating under a government
political risk insurance. The Agreement provides for subrogation
by the government which has issued the insurance into the rights
of the investor, but strangely enough the same Article states
that the investor shall not receive such insurance or guarantee
unless the host country has given its agreement to that effect.
This is a most unusual clause in a bilateral agreement. Of
course, similar provisions may make sense in a multilateral
insurance scheme like the Multilateral Investment Guarantee
Agency (MIGA) at the World Bank. There indeed [see Article 15 of
the MIGA Convention at 24 I.L.M. 1613 (1985)], the approval of
the host country for the issuance of a guarantee by MIGA is
required.

The French-Soviet BIT (Article 7) also gives the investor a
right to require settlement of a dispute by arbitration. The
scope of arbitrable subject matters is broader than in the
previous two U.S.S.R. BITs. Arbitration should be performed under
UNCITRAL arbitration rules.

The Agreement (Article 10) carries a grandfathering clause for
investments performed prior to the entry into force of the
Agreement, provided that such investment was made after January
1, 1950. There is one exception - the French Bank for Northern
Europe which operates out of Moscow shall retroactively be
covered as from 1925 [see 29 I.L.M. 332 (1990)].

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[Preamble]

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[This treaty applies only to investments made since January
1, 1950 Art. 11 - I.L.M. Page 330

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[Authentic texts: French and Russian

[Signatures]

[Interpretative letters: Regarding Arts. 3, 10] - I.L.M. Page
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*320 AGREEMENT between the Government of the French Republic
and the Government of the Union of the Soviet Socialist Republics
for the promotion and reciprocal protection of investments
(including an exchange of interpretative
letters) done in Paris on July 4, 1989

The Government of the French Republic and the Government of the

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Soviet Socialist Republics hereinafter referred to as "Contracting Parties": Desiring in their mutual interest to intensify the economic and commercial co-operation as well as the scientific and technical co-operation between both States and to create favorable conditions for French investments in the Union of the Soviet Socialist Republics as well as for Soviet investments in France; Recognizing that the promotion and mutual protection of such investment will be conducive to the stimulation of the flow of capital and the exchange of advanced technologies between the two States, and will be to the benefit of their economic development;

Have agreed as follows:

ARTICLE 1

For the purposes of this Agreement:

1. The term "investment" shall comprise every kind of *321 entitlements such as assets and rights of whatever nature and more particularly, though not exclusively:

a) movable and immovable property as well as any other rights in rem; b) shares and any other form of participation in companies constituted within the territory of one of the Contracting Parties, as well as any rights derived therefrom;

c) obligations, entitlements, and claims to performance having an economic value;

d) copyrights, industrial property rights (such as patents for invention, trademarks, industrial designs and models), technical processes, license, tradenames, know-how and other rights of a similar nature; e) rights, conferred by law or under contract, to undertake any economic and commercial activity concerning especially the exploration, the preservation, extraction or exploitation of natural resources, it being understood that these assets must be or have been invested in accordance with the legislation of the Contracting Party in the territory or in the maritime zone of which the investment has been made.

The term "investment" means also indirect investments made by investors of one Contracting Party in the other Contracting Party's territory or maritime zone through an investor from a third State.

Any change of the form in which assets are invested shall not affect their classification as an "investment" in the meaning of this Agreement, provided that such change is not in violation of the legislation of the Contracting Party in the territory or the maritime zone of which the investment has been made.

*322 2. The term "investor" shall comprise:

a) any natural person who has the nationality of one of the Contracting Parties and is authorized by the legislation of such Contracting Party to make an investment in the territory or maritime zone of the other Contracting Party; b) any legal person constituted in the territory of one of the Contracting Parties in accordance with the legislation of such Party, which

has its seats in such territory and which is authorized under the legislation of such Contracting Party to make investments in the territory or in the maritime zone of the other Contracting Party;

3. The term "returns" means all the amounts yielded by an investment, and
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notably though not exclusively, the profits, dividends, interest, license fees, commissions, payments for technical assistance and after sale services. 4. This Agreement applies to the territory of each of the Contracting Parties as well as to the maritime zone, of each of the Contracting Parties defined hereafter as the economic zone and the continental shelf which extend beyond the territorial waters of each of the Contracting Parties and over which they possess in conformity with international law, sovereign rights and jurisdiction for the purpose of prospection, of exploitation and of conservation of natural resources.

*323 ARTICLE 2

Each Contracting Party accepts and encourages, within the framework of its legislation and in accordance with this Agreement, investments made by investors from the other Contracting Party in its territory and in its maritime zone.

ARTICLE 3

1. Each Contracting Party undertakes to ensure, in its territory and in its maritime zone, a fair and equitable treatment, in conformity with principles of International Law to investments made by investors of the other Contracting Party, excluding any unreasonable or discriminatory measure which could impair the management, maintenance, enjoyment or disposal of such investments.

2. Each Contracting Party shall accord, in its territory and in its maritime zone, to investors of the other Contracting Party with respect to investments and activities associated therewith a treatment no less favorable than that enjoyed by investors from any third State.

3. Such treatment shall not apply to privileges which either Contracting Party accords to investors of a third State because of its participation in:

- a free trade area
- a customs union
- a common market

*324 - an organization for mutual economic assistance or in accordance with a treaty which has been concluded prior to the date of conclusion of this Agreement and which provides similar provisions as those accorded by the Contracting Party to participants of such association or by virtue of Convention on double taxation or any other arrangement of a fiscal nature.

4. In addition to the provisions of paragraph 2 of this Article, each Contracting Party shall accord, in conformity with its legislation, to investments, made by investors of the other Contracting Party a treatment which is not less favorable than the treatment it accords to its own investors.

ARTICLE 4

1. Investments made by investors from either Contracting Party shall enjoy in the territory and within the maritime zone of the

other Contracting Party full and complete protection and security.

2. Returns from investments, and in the case of re-investments, the returns from such re-investments, shall enjoy the same protection as the investments.

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3. The Contracting Parties shall not take in their territory or within their maritime zone, measures of EXPROPRIATION, NATIONALIZATION, or any other measures having *325 the effect to dispossess the investors of the other Contracting Party of their investments, except for a purpose which is in the public interest and provided that these measures are not discriminatory or contrary to any obligation with respect to an investor as referred to in Article 8.

Measures of dispossession which would be taken shall be accompanied by payment of prompt and adequate compensation. Such compensation shall be equivalent to the value of the investment expropriated immediately before the date these measures have been taken or have become public knowledge. This compensation shall be freely transferable and shall be paid without delay to investors in a convertible currency. As of 30 days after the measures have been taken or have become public knowledge interest at an appropriate rate shall accrue until the date of payment.

4. Investors from one Contracting Party whose investments in the territory or within the maritime zone of the other Contracting Party suffer losses owing to war, or other armed conflict, or any other circumstances having similar effects, will be granted by the latter Contracting Party treatment in accordance with Article 3 of this Agreement.

ARTICLE 5

Each Contracting Party in the territory or maritime zone of which investments have been made by investors from the other Contracting Party, shall guarantee to such investors the unrestricted transfer of payments in respect of such *326 investments, in particular, though not exclusively:

a) returns from these investments as defined in paragraph 3 of Article 1; b) royalties and other fees for the rights defined in paragraph 1, subparagraphs d and e of Article 1;

c) amounts for the re-imbusement of loans relating to the investment; d) proceeds from the sale or the total or partial liquidation of the investment, including any value for an appreciation of the invested capital; e) an appropriate amount of the compensation of nationals of the other Contracting Party who have been authorized to work on its territory or in its maritime zone in connection with an authorized investment. f) any compensation provided for under Article 4.

The transfers envisaged in the preceding paragraph shall be realized without delay at the prevailing market rate of exchange on the date of transfer.

ARTICLE 6

If either Contracting Party has established a system of guarantees against non-commercial risks for investments made *327 abroad, such guarantee may be granted on a case-by-case basis for investments by investors from that Contracting Party in the

territory or in the maritime zone of the other Contracting Party
Investments by investors from either Contracting Party on the
territory or in the maritime zone of the other Contracting Party
shall not receive the guarantee envisaged above, unless the
latter Contracting Party has given its
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agreement to that effect.

If either Contracting Party makes a payment under a guarantee given for an investment in the territory or in the maritime zone of the other Contracting Party, the former Contracting Party is subrogated into the rights and actions of such investor, in particular those envisaged in Article 7 of this Agreement.

ARTICLE 7

Any dispute between a Contracting Party and an investor from the other Contracting Party because of the effects of a measure taken by the first Contracting Party with respect to the management, the maintenance, the enjoyment or the liquidation of an investment of that investor, particularly, though not exclusively because of the effects of a measure with respect to transportation, sale of goods, dispossession or transfers envisaged in Article 5 of this Agreement, shall, as far as possible, be settled amicably between the two Parties concerned.

If such a dispute has not been settled within a period of six months of the date it was raised by one of the Parties *328 to the dispute, it may, by written request, be submitted to arbitration.

The dispute shall then be settled definitely in conformity with the Rules of Arbitration of the United Nations Commission for International Trade Law as adopted by the General Assembly of the United Nations in its Resolution 31/98 of December 15, 1976.

ARTICLE 8

Each Contracting Party shall respect any commitment it has made to an investor from the other Contracting Party about an investment made by the said investor in the territory or in the maritime zone of the former Contracting Party.

ARTICLE 9

1. Disputes between the Contracting Parties concerning the interpretation or application of this Agreement should, if possible, be settled through the diplomatic channel.

2. If within a period of six months as from the date it has been raised by one of the Contracting Parties, the dispute has not been settled, it shall upon the request of either Contracting Party be submitted to an arbitral tribunal.

3. Such an arbitral tribunal shall be constituted for each individual case in the following way: Each Contracting *329 Party shall appoint one member, and those two members shall then select a national of a third state as the chairman of the tribunal. All members shall be appointed within two months as of the date at which one of the Contracting Parties has informed the other Contracting Party that it intends to submit the dispute to arbitration.

4. If the periods specified in paragraph 3 above have not been observed, either Contracting Party may, in the absence of any agreement,

invite the Secretary General of the United Nations to make any necessary appointment. If the Secretary General is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Deputy Secretary
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General next in seniority who is not a national of either Contracting Party shall make the necessary appointments.

5. The tribunal shall determine its own procedure. It shall reach its decisions by a majority of votes. These decisions are final and binding on both Contracting Parties.

The tribunal has the power to interpret its award upon the request of either Contracting Party. Unless the Tribunal has decided otherwise by taking into account the specific circumstances of the dispute, the cost of the arbitral proceedings, including the compensation of the arbitrators shall be borne in equal parts by the Contracting Parties.

*330 ARTICLE 10

The provisions of this Agreement shall apply to all investments made as of January 1, 1950.

ARTICLE 11

Each Contracting Party shall inform the other Contracting Party in writing of the completion of the internal procedures required for the entry into force of the present Agreement. The present Agreement shall enter into force thirty days after the date of receipt of the latter of the two notifications. The present Agreement is concluded for an initial period of fifteen years. If neither of the Contracting Parties has given written notice of termination at least one year before the date of the expiration of its initial period of validity, it shall continue in force until one of the Contracting Parties shall have given written notice of termination to the other Contracting Party. In this case, the Agreement shall cease to be effective one year from the date the said notice of termination has been received by the other Contracting Party. After the date of termination of the present Agreement, investments made while it was in force shall continue to benefit of the protection by its provisions for another period of fifteen years.

*331 Done in duplicate at Paris on July 4, 1989, in the French and Russian languages, both texts are being equally authentic.

For the Government of the French Republic:

Pierre Beregovoy.

For the Government of the Union of the Soviet Socialist Republics: Lev Voronine.

Paris, July 4, 1989

To His Excellency Mr. Lev Voronine, First Vice President of the Council of Ministers of the Union of the Soviet Socialist Republics. [FNal]

FNal. Mr. Voronine, by letter of July 4, 1989, acknowledged receipt of this letter and confirmed that the Soviet Government agreed with its contents. Your Excellency,

I have the honor to refer to the Agreement signed on this date between the Government of the French Republic and the Government

of the Union of the Soviet Socialist Republics, concerning the promotion and reciprocal protection of investments, and to specify that this convention shall be interpreted as follows:

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As to Article 3:

a) The concept of fair and equitable treatment shall apply in particular to the purchase and the transportation of raw materials and auxiliary materials, of energy and fuels as well as to any other means of production and exploitation, the sale and transportation of products inside and outside the country;

b) The Contracting Parties will examine favorably within the framework of their respective internal legislation:

- applications for entry and authorization of sojourn, working permits and free movement submitted by nationals of a Contracting Party in connection with an investment in the territory or in the maritime zone of the other Contracting Party

*332 - all matters concerning the material facilities which should be available for the exercise of their professional activities to nationals of one Contracting Party permitted to work in connection with an investment in the territory or in the maritime zone of the other Contracting Party; As to Article 10:

The present Agreement shall also apply to Banque Commerciale pour l'Europe du Nord (Paris) as of the year 1925.

I would be grateful if you could let me have the agreement of your Government as to the contents of this letter.

With the assurances of my high consideration.

For the Government of the French Republic

Pierre Beregovoy

Minister of State, Minister for Economics, Finances and Budget

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FEDERAL REPUBLIC OF GERMANY-POLAND: TREATY CONCERNING THE
PROMOTION AND RECIPROCAL PROTECTION OF
INVESTMENTS

Done at Warsaw, November 10, 1989

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Introductory Note was prepared by Heribert Golsong, as I.L.M.
Corresponding Editor for International Investment.

Introductory Note

by

Heribert Golsong

The German-Polish Treaty concerning the Promotion and
Reciprocal Protection of Investments is remarkable in different
aspects. In the first place, this bilateral investment treaty
(BIT) endorses the principle of national treatment in addition to
most-favored-nation treatment (Article 3). According to paragraph
2 of the Protocol, the national treatment in this context shall
refer to matters like supply of raw material and of energy, and
to restrictions relating to means of production, sale of goods,
etc.

In addition to compensation in case of EXPROPRIATION or like
matters, this Treaty provides for compensation in case of losses
due to situations like war or insurrection, on the basis of a
national or most-favored-nation treatment (Article 4(3) and (4)).
Although there is no clarification to that effect, it has to be
assumed that the most favorable of these two standards should have
a controlling status in a given situation.

The BIT contains, of course, a clause on transfer of money
(Article 5), but it provides in the Protocol for a phasing out
over time of such transfer which is most unusual.

The dispute settlement clauses in case of dispute, between the

contracting states (Article 10) and between an investor and the host country (Article 11), are in the usual form. Investor/host country arbitration should be in the form of ad hoc arbitration. Should Poland become a party to the International Centre for Settlement of Investment Disputes (ICSID) Convention of 1965, the Treaty provides for a possibility of ICSID arbitration. The Federal Republic of Germany is already a party to the ICSID Convention of 1965. Poland has not yet signed the ICSID Convention. The eventuality of Poland becoming a party to the

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ICSID Convention and the replacement, in such event, of the ad hoc arbitration by ICSID arbitration is not envisaged in connection with Article 11 but strangely enough with Article 10 which refers to inter-state arbitration. In the case of the French-Chinese BIT of 1989, for example, both parties agreed in a side letter that, in *334 case China would adhere to the ICSID Convention, both parties would enter into negotiations with the aim of concluding a supplementary agreement on the categories of disputes which could be submitted to ICSID conciliation or arbitration. Similarly, the BIT of 1987 between Germany and Uruguay provides a role for ICSID if and when Uruguay adheres to the ICSID Convention.

In the German-Polish BIT, a similar situation is envisaged by virtue of a clause in paragraph 6 of Article 10 which in fact stipulates that if both parties have ratified the ICSID Convention, neither party can submit a matter to inter-state arbitration (i.e. exercise diplomatic protection under the umbrella of the BIT) to the extent that an arbitration agreement has been entered into by the investor and the host country as provided for in Article 25 of the ICSID Convention. It follows from this provision that Poland, if and when it ratifies the ICSID Convention, will not agree de plano to ICSID arbitration by virtue of the BIT, but will only accept ICSID arbitration in a given case in which both sides have expressly accepted ICSID arbitration. To meet such eventuality, Article 11 provides for ad hoc arbitration in limited subject matters "unless otherwise agreed to by the parties to the dispute".

Paragraph 7 of the Protocol deserves to be pointed out. The non-discrimination clause in matters of transportation is of practical significance especially for transportation by sea.

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[Done at Warsaw on 10 November 1989]

[Authentic texts: German and Polish]

[Signatures]

Protocol - I.L.M. Page 348

[Regarding Arts. 1, 3-5, 7, 9, 11]

*336 Treaty between the Federal Republic of Germany and the People's Republic of Poland concerning the Promotion and Reciprocal Protection of investments.

The Contracting Parties,
Desiring to increase economic cooperation between them,
Endeavoring to create conditions favorable to investments by each Party in the territory of the other,

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Recognizing that promotion and protection of such investments through this Treaty will stimulate business initiatives in this area,

Have agreed as follows:

Article 1

1. For the purposes of this Treaty:

a) The term "investment" means every kind of assets invested by investors of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's legislation, in particular:

- Movable and immovable property and any other related property rights such as mortgages and liens;

*337 - Shares and other form of participation in a company;

- Claims to money invested to create economic value or claims to any performance having an economic value;

- Copyrights, industrial property rights, industrial designs, trademarks, tradenames, know-how and goodwill;

- Rights to a commercial activity having an economic value, including rights to exploration, exploitation, extraction or production of natural resources, which are based on a concession granted in accordance with the legislation of the Contracting Party in the territory of which the investments have been made, or in accordance with an approval contained in an applicable agreement;

b) The term "returns" means such amounts as profits, dividends, interest, license fees, or other comparable remunerations yielded by an investment as defined in para. 1(a) of this article during a given period of time:

c) The term "investor" means a natural person having a permanent residence, or a legal entity having its seat in the *338 respective territories to which this Treaty applies, and that have the right to make investments.

2. This Treaty shall also apply to the exclusive economic zone and the continental shelf over which the respective Contracting Party may exercise, in accordance with international law, sovereign rights and jurisdiction for the purpose of exploration, exploitation and preservation of natural resources.

Article 2

1. Each Contracting Party shall, as far as possible, encourage in its territory investments by investors of the other Contracting Party and admit such investment in accordance with its laws.

Investments which have been admitted in accordance with the laws of a Contracting Party shall enjoy the protection by this Treaty. Each Contracting Party shall in any case accord fair and equitable treatment to such investments.

2. Neither Contracting Party shall in any way, in its territory impair by unreasonable or discriminatory measures the management, use, enjoyment or disposal of investments by investors of the

other Contracting Party.

*339 Article 3

1. Neither Contracting Party shall treat in its territory
investments by
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investors of the other Contracting Party or investments at which investors of the other Contracting Party participate less favorably than it treats investments of its own investors or investments of nationals of any third State.

2. Neither Contracting Party shall in its territory treat investors of the other Contracting Party with regard to investment-related activities less favorably than it treats its own investors or investors of any third State. 3. Such treatment shall not apply to privileges accorded by either Contracting Party to investors of any third State by virtue of membership in a customs or economic union, a common market, the Council for mutual economic cooperation, a free trade zone, or because of an association therewith. 4. The treatment referred to in this article shall not extend to benefits which either Contracting Party accords to investors of any third State under a double taxation agreement or other agreements on taxation.

Article 4

1. Investments by investors of either Contracting Party, shall enjoy full protection and security in the territory of the other Contracting Party. *340 2. In the territory of either Contracting Party, investments by investors of the other Contracting Party may be expropriated, nationalized or subjected to measures having effect equivalent to EXPROPRIATION or NATIONALIZATION only for a public purpose. Compensation shall correspond to the value of the expropriated investment immediately before the EXPROPRIATION or NATIONALIZATION became public knowledge. Compensation shall be paid promptly and not later than two months; interest at the normal Bank rate shall accrue as of the third month until payment; it shall effectively realizable and be freely transferable. The principle of compensation and the procedure for its payment shall be provided for at the latest at the time of EXPROPRIATION, NATIONALIZATION or equivalent measure. The lawfulness of the EXPROPRIATION, NATIONALIZATION or equivalent measure as well as the valuation of compensation shall be subject to review in the framework of an ordinary judicial proceeding. 3. Investors of either Contracting Party who suffer losses at their investment in the territory of the other Contracting Party owing to war or other armed conflict, revolution, a state of national emergency or insurrection, shall enjoy a treatment as regards restitution, indemnification, compensation or other settlement, no less favorable than that which that Contracting Party accords to its own investors. Such payments shall be freely transferable.

4. The investors of either Contracting Party enjoy in the territory of the other Contracting Party a most-favored-nation *341 statute with respect to matters referred to in this Article.

Article 5

1. Each Contracting Party shall guarantee the investors of the

other Contracting Party unrestricted transfer in respect of
payments related to an investment, in particular
a) the capital for investment and additional funds used for
the maintenance or expansion thereof;

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- b) returns;
- c) funds needed for the repayment of loans related to the investment;
- d) the proceeds in case of full or partial sale or liquidation of the investment;
- e) payments envisaged in Article 4;

Article 6

1. If a Contracting Party makes a payment to one of its investors in the form of an indemnity because of a guarantee for an investment on the territory of the other Contracting Party, that latter Contracting Party, without prejudice to the rights of the first-mentioned Contracting Party under Article 10 of this Treaty, shall recognize the assignment to the first-mentioned Contracting Party by law or by legal transaction of all rights and claims of the investor. The other Contracting Party shall also recognize the subrogation of the first-mentioned Contracting Party which has made the payment into the above-mentioned rights or claims of the *342 investor. The Contracting Party which has made the payment shall be entitled to exercise the rights and claims acquired by it only to the extent the investor indemnified was entitled to do so; on the other hand, the other Contracting Party is entitled to raise against the Contracting Party which has made the payment counter-claims which may otherwise be raised against the investor.

2. If the investor has been subrogated in his rights and claims by the Contracting Party which has made the payment, the investor may no longer raise such rights and claims against the other Contracting Party unless he has been authorized to do so by the Contracting Party which has made the payment. 3. Transfer of payments relating to the subrogated claims shall be governed mutatis mutandis by Article 4 paragraphs 2 and 3 and Article 5 of this Treaty.

Article 7

Transfers under Article 4 paragraphs 2 and 3, Article 5 or Article 6 shall be carried out promptly at the rate of exchange applicable on the date of transfer.

Article 8

1. If the statutory rules of either Contracting Party or an international undertaking which may exist, or may be established in the future between the Contracting Parties, *343 provide for a general or special regulation by virtue of which investments by investors of the other Contracting Party would benefit of a treatment more favorable than provided for by this Treaty, said regulation shall supersede the present Treaty to the extent it is more favorable.

2. Each Contracting Party shall respect any other obligation it has assumed with regard to investments by investors of the other

Contracting Party in its territory.

Article 9

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This Treaty shall also apply to matters which may arise subsequent to its entry into force with respect to investments which investors of either Contracting Party have made on the territory of the other Contracting Party according to applicable legal provisions, since September 14, 1972 until the entry into force of the present Treaty.

Article 10

1. Disputes between the Contracting Parties concerning the interpretation or application of this Treaty should, if possible, be settled by the Governments of the two Contracting Parties.

2. If a dispute cannot thus be settled, it shall, upon the request of either Contracting Party, be submitted to an arbitral tribunal.

*344 3. Such an arbitral tribunal shall be constituted for each individual case as follows: Each Contracting Party shall appoint one member and those two members shall designate a national of a third State as chairman who has to be appointed by the two Contracting Parties. The members of the Arbitral Tribunal shall be appointed within two months and the chairman within three months as of the date a Contracting Party has informed the other of its request to submit the dispute to an arbitral tribunal.

4. If within the periods specified in para. 3 of this Article the necessary 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 the necessary appointments.

5. The Arbitral Tribunal shall reach its decision by a majority of votes. Its decisions are binding on both Contracting Parties. Each Contracting Party shall bear the cost of its own member as well as the cost of its representation in the proceedings before the Arbitral Tribunal; the cost of the Chairman and the remaining costs shall be borne in equal parts by the Contracting Parties. The Arbitral Tribunal, however, is empowered to determine a different repartition of costs. The Arbitral Tribunal shall determine its own procedure.

6. If both Contracting Parties have become Parties to the Convention on the Settlement of Investment Disputes between *345 States and Nationals of other States of March 18, 1965, the Arbitral Tribunal provided for under the preceding provisions may not be seized because of Article 27 para. 1 of the said Convention, to the extent that a written consent has been agreed to between the investor of a Contracting Party and the other Contracting Party pursuant to Article 25 of the Convention. The faculty to seize the Arbitral Tribunal provided for above remains given in case of failure to abide by and comply with an award given by an Arbitral Tribunal pursuant to the said Convention (Article 27) or in case of an assignment by law or by legal transaction under Article 6 of this Treaty.

Article 11

1. Disputes concerning an investment between one of the Contracting Parties and the investor of the other Contracting Party should, if possible, be amicably settled between the parties to the dispute.

2. If a dispute concerning Article 4 para. 2 or Article 5 has not been settled within six months as from the date it was raised by one of the parties

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to the dispute, each party has the right to submit the matter to an international arbitral tribunal.

3. The provision of para. 2 shall also apply to disputes concerning matters for which the investor and the other Contracting Party have agreed on a settlement by arbitration.

*346 4. Unless otherwise agreed by the parties to the dispute, the provision of Article 10 paragraphs 3 to 5 shall apply mutatis mutandi with the provision that the members of the Arbitral Tribunal shall be appointed by the parties in dispute and that, if the time limits provided for under Article 10 para. 3 have not been complied with, each of the parties may, in the absence of other agreements, invite the chairman of the institute of arbitration at the Stockholm Chamber of Commerce to make the necessary appointments. The arbitral award shall be recognized and enforced in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958.

5. The Contracting Party involved in the dispute shall not raise an objection during the arbitral proceeding or against the enforcement of the arbitral award on the ground that the investor of the other Contracting Party had been indemnified for all or part of the loss under an insurance contract. Article 6 para. 2 remains unaffected by the foregoing.

Article 12

The present Treaty shall remain in force regardless of whether the Contracting Parties maintain diplomatic or consular relations.

Article 13

In conformity with the Agreement between the Four Powers of September 3, 1971, this Treaty shall apply to Berlin *347 (West) in accordance with established procedures.

Article 14

1. This Treaty shall be ratified; the instruments of ratification shall be exchanged in Bonn as soon as possible.

2. This Treaty shall enter into force one month after the exchange of instruments of ratification. It shall remain in force for ten years and it shall continue in force thereafter for an undetermined period of time until either Contracting Party shall have requested termination with a prior notice in writing of twelve months. After ten years have elapsed, the Treaty may be denounced at any time with a prior written notice of twelve months. 3. For investments which shall have been made until such termination, the provision of Articles 1 to 13 remain in force for another period of twenty years as of the date of termination.

Done in duplicate at Warsaw on November 10, 1989, in the German and Polish language, both texts being equally authoritative.

For the Federal Republic of Germany
Hans Dietrich Genscher
For the People's Republic of Poland

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*348 Protocol

In signing the Treaty concerning the promotion and reciprocal protection of investments between the Federal Republic of Germany and the People's Republic of Poland the following agreements have been reached which are an integral part of the Treaty:

1. As to Article 1:

a) The notion "investment" in accordance with Article 1 para. 1 lit. a covers such investments which are made for an economic purpose. b) Returns yielded by an investment and, in case of reinvestment also the returns yielded therefrom, shall receive the same protection as the investment.

2. As to Article 3:

a) "Activities" within the sense of Article 3 para. 2 means the management, the use, the economic use and the exploitation of an investment. A "treatment less favorable" in the meaning of Article 3 refers to: restriction affecting the supply of raw and auxiliary materials, energy and fuel supply as well as any means of production and manufacturing, the impairment of sale of products and measures having similar effect.

b) Measures which have to be taken in the interest of public safety and order, or for the protection of life and health or public morals, shall not be considered as "less favorable" treatment in the meaning of Article 3. c) The provisions of Article 3 do not oblige either Contracting Party to extend to natural persons or companies residing on the territory of the other Contracting Party, any tax advantages, exemptions and reliefs which are granted only to natural persons and companies residing in its territory.

d) Each Contracting Party shall examine favorably within the framework of its legislation any application for entering and residing in its territory of persons of one Contracting Party who intend to enter the territory of the other Contracting Party in immediate connection with an investment; the same shall apply to employees of the one Contracting Party who intend to enter the territory of the other Contracting Party in order to take residence there for the purpose to be employed in immediate connection with an investment. Applications for a work permit shall also be examined favorably. *349 3. As to Article 4:

The investor shall also be entitled to compensation in case of EXPROPRIATION or an equivalent measure in the meaning of Article 4 para. 2, which impairs the economic activities of an undertaking at which the investor participates, if thereby his capital investment has been affected.

4. As to Article 5:

The transfer of returns and dividends in the meaning of Article 1, para. 1 litt.b, realized in Polish currency and shown in the verified accounts of the year preceding the transfer, shall be guaranteed by the People's Republic of Poland in the following steps:

January 1, 1993, in the amount of 15% for the year 1992
as of January 1, 1994, in the amount of 25% for the year 1993
as of January 1, 1995, in the amount of 35% for the year 1994
as of January 1, 1996, in the amount of 50% for the year 1995

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as of January 1, 1997, in the amount of 75% for the year 1996
as of January 1, 1998, in the amount of 100% for the year
1997 A more favorable arrangement between the Polish
authorities and the investor remains possible.

Article 5 shall be applied without any restrictions as of the
time that the People's Republic of Poland has established the
free convertibility of its currency.

5. As to Article 7:

A transfer shall be deemed to have been made "promptly" in the
meaning of Article 7, if it has been executed within a time
period which is normally needed to conform to the transfer
formalities. This period starts to run as of the submission of a
relevant application and shall under no circumstances exceed two
months.

6. As to Article 9 and 11:

a) For investments which have been made prior to the entry
into force of the present Treaty, the transfer of proceeds out
of sale or liquidation in the meaning of Article 5 litt.(d)
shall be guaranteed by the People's Republic of Poland in the
following installments:

In the year of sale or liquidation,
at the earliest as of January 1, 1993: 20%
*350 in the following year: 30%
in the third year the remaining 50%

b) In case of serious disturbances in the balance of currency
exchange, the Contracting Parties shall enter into
consultations with the aim of agreeing on a regulation on
transfer payments different to that envisaged under litt. (a.).
In case of a divergency of opinion between a Contracting Party
and an investor from the other Contracting Party concerning the
interpretation and application of litt. (a) in conjunction with
litt. (b), the Arbitral Tribunal which may have been seized in
accordance with Article 11 has to suspend the proceedings until
the consultations between the Contracting Parties have been
completed.

c) The foregoing shall not affect a more favorable
arrangement between the Polish authorities and the investor.

7. In case of the transportation of goods and persons which is
related to an investment, the Contracting Parties, subject to
international agreements in existence between them, shall neither
exclude the transportation companies nor impair their operations
and, if necessary, accord the necessary transportation
authorization.

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Citation	Mode	23	I.L.M.	708	(1984)	Rank(R)	R	85	OF	144	Database	
ILM	Page	(CITE AS: 23 I.L.M. 708)										
International Legal Materials												
Treaties and Agreements												
July, 1984												

PANAMA-UNITED KINGDOM: AGREEMENT FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

Done at Panama City, October 7, 1983

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*708 Reproduced with the permission of the Controller of Her Britannic Majesty's Stationery Office from Command Paper 9144, February 1984. The bilateral investment treaty between Panama and Switzerland of October 19, 1983, appears at 22 I.L.M. 1255 (1983), with an introductory note comparing that treaty with one signed by Panama and the U.S.

AGREEMENT

BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE REPUBLIC OF PANAMA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Panama;

Desiring to create favourable conditions for greater investment by nationals and companies of one state in the territory of the other state; Recognising that the encouragement and reciprocal protection under International Agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both states;

Have agreed as follows;

ARTICLE 1

Definitions

For the purpose of this Agreement-

- (a) "investments" means every kind of asset and in particular includes:
- (i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
 - (ii) shares, stock and debentures of companies or interest in the property of such companies;
 - (iii) claims to money or to any performance under contract having a financial value;

(iv) intellectual property rights and goodwill;
(v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources; (b) "returns" means the amounts yielded by an investment and in particular
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includes profit, interest, capital gains, dividends, royalties or fees; (c) "nationals" means:

(i) in respect of the Republic of Panama: natural persons deriving their status as nationals of the Republic of Panama from the constitution of Panama;

(ii) in respect of the United Kingdom: natural persons deriving their status as United Kingdom nationals from the law in force in the United Kingdom;

(d) "companies" means:

(i) in respect of the Republic of Panama: all those juridical persons constituted in accordance with legislation in force in Panama *709 as well as companies and associations with or without juridical personality which have their domicile in the territory of the Republic of Panama, excepting State-owned enterprises;

(ii) in respect of the United Kingdom: corporations, firms or associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 10; (e) "territory" means:

(i) in respect of the Republic of Panama: all the national territory;

(ii) in respect of the United Kingdom: Great Britain and Northern Ireland and any territory to which this Agreement is extended in accordance with the provisions of Article 10.

ARTICLE 2

Promotion, Treatment and Protection of Investment

(1) Each Contracting Party shall encourage and create favourable conditions for nationals or companies of the other Contracting Party to invest capital in its territory and, subject to its right to exercise powers conferred by its laws, shall admit such capital.

(2) Investment of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.

ARTICLE 3

National Treatment and Most-favoured-nation Provisions

(1) Neither Contracting Party shall in its territory subject

investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies

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of any third State.

(2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.

(3) The foregoing provisions of this Article shall not be construed so as to oblige one Contracting Party to extend to the nationals or companies of the other the benefit of any treatment, preference or privilege resulting from:

(a) any existing or future customs union or similar international agreement to which either of the Contracting Parties is or may become a party, or
(b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation, or

*710 (c) domestic legislation in force at the time of signature of this Agreement relating to specific economic activities reserved to nationals or companies of one Contracting Party, as specified in the Annex to this Agreement.

ARTICLE 4

Compensation for Losses

Nationals or companies of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own nationals or companies or to nationals or companies of any third State, and in the exceptional event of losses suffered resulting from requisitioning or from destruction of property which was not caused in combat action or was not required by the necessity of the situation, the investor shall be accorded restitution or adequate compensation in accordance with the relevant laws. Resulting payments shall be freely transferable.

ARTICLE 5

EXPROPRIATION

(1) Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or EXPROPRIATION (hereinafter referred to as "EXPROPRIATION") in the territory of the other Contracting Party except for an internal public or social purpose against prompt, adequate and effective compensation, and in conformity with the internal law. Such

compensation shall amount to the fair value which the investment expropriated had immediately before the EXPROPRIATION became known, shall include interest until the date of payment, shall be made without delay, be effectively realisable and be freely

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transferable. No later than the time of the EXPROPRIATION, adequate provision shall be made for the assessment and payment of the compensation. The legality of the EXPROPRIATION and the amount of compensation shall be established by due process of law in the territory of the Contracting Party making the EXPROPRIATION.

(2) If either Contracting Party expropriates the investment of any company duly incorporated, constituted or otherwise organised in its territory, and if nationals or companies of the other Contracting Party, directly or indirectly, own, hold or have other rights with respect to the equity of such company, then the Contracting Party within whose territory the EXPROPRIATION occurs shall ensure that nationals or companies of the other Party receive compensation in accordance with the provisions of the preceding paragraph.

ARTICLE 6

Repatriation of Investments and Returns

Each Contracting Party shall in respect of investments guarantee to nationals or companies of the other Contracting Party the unrestricted transfer to the country where they reside of their investments and returns, subject to the right of each Contracting Party in exceptional balance of payments difficulties and for a limited period to exercise equitably and in good faith powers conferred by its laws.

*711 ARTICLE 7

Settlement of Investment Disputes

Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been settled amicably, shall after a period of six months from written notification of the claim be submitted to such procedures for settlement as may be agreed to between the parties to the dispute or, if no such procedures have been agreed, to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law. The parties may agree in writing to modify those Rules.

ARTICLE 8

Disputes between the Contracting Parties

(1) Disputes between the Contracting Parties concerning the interpretation or application of this Agreement should, if possible, be settled in the first instance through discussion between experts representing each Party, and failing that, through the diplomatic channel.

(2) If a dispute between the Contracting Parties cannot thus be settled, it shall be submitted to an arbitral tribunal.

(3) Such an arbitral tribunal shall be constituted for each individual case in the following way. Within two months of the receipt of the request for
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arbitration, each Contracting Party shall appoint one member of the tribunal. These two members shall then select a national of a third State who on approval by the two Contracting Parties shall be appointed Chairman of the tribunal. The Chairman shall be appointed within two months from the date of appointment of the other two members.

(4) If within the period specified in paragraph (3) of this Article the necessary 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 Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting Party or if he too is prevented from discharging the said function, the member of the International Court of Justice next in seniority who is not a national of either Contracting Party shall be invited to make the necessary appointments.

(5) The arbitral tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both Contracting Parties. Each Contracting Party shall bear the cost of its own member of the tribunal and its representation in the arbitral proceedings. The cost of the Chairman and the remaining costs shall be borne in equal parts by the Contracting Parties. The tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the two Contracting Parties, and this award shall be binding on both Contracting Parties. The tribunal shall determine its own procedure.

ARTICLE 9

Subrogation

If one Contracting Party makes payments under a indemnity it has given in respect of an investment or any part thereof in the territory of the other Contracting Party, the latter Contracting Party shall recognise: (a) the assignment, whether under law or pursuant to a legal transaction, of any right or claim from the party indemnified to the former Contracting Party (or its designated Agency), and

*712 (b) that the former Contracting Party (or its designated Agency) is entitled by virtue of subrogation to exercise the rights and enforce the claims of such a party.

The former Contracting Party (or its designated Agency) shall accordingly if it so desires be entitled to assert any such right or claim to the same extent as its predecessor in title either before a Court or tribunal in the territory of the latter Contracting Party or in any other circumstances. If the former Contracting Party acquires amounts in the lawful currency of the other Contracting Party or credits thereof by assignment under the terms of an indemnity, the former Contracting Party shall be

accorded in respect thereof treatment not less favourable than that accorded to the funds of companies or nationals of the latter Contracting Party or of any third State deriving from investment activities similar to those in which the party indemnified was engaged. Such amounts and credits shall be freely available to the former Contracting Party concerned for the purpose of meeting its expenditure in the

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ARTICLE 10

Territorial Extension

At the time of ratification of this Agreement, or at any time thereafter, the provisions of this Agreement may be extended to such territories for whose international relations the Government of the United Kingdom are responsible as may be agreed between the Contracting Parties in an Exchange of Notes.

ARTICLE 11

Entry into Force

This Agreement shall be ratified and shall enter into force on the exchange of instruments of ratification.

ARTICLE 12

Duration and Termination

This Agreement shall remain in force for a period of ten years. Thereafter it shall continue in force until the expiration of twelve months from the date on which either Contracting Party shall have given written notice of termination to the other. Provided that in respect of investments made whilst the Agreement is in force, its provisions shall continue in effect with respect to such investments for a period of ten years, after the date of termination. In witness whereof the undersigned, duly authorised thereto by their respective Governments have signed this Agreement.

Done in duplicate at Panama City this seventh day of October 1983 in the English and Spanish languages, both texts being equally authoritative.

For the Government of the United Kingdom of Great Britain and Northern Ireland:

T. H. STEGGLE

For the Government of the Republic of Panama:

CARLOS HOFFMAN

ANNEX

Pursuant to Article 3 (3) (c), the Republic of Panama states the economic sectors and activities which are constitutional and legal exceptions to be excluded from the effect of this Agreement:

Communications; agencies of foreign companies; distribution and sale of imported products; retail trade; insurance; state-owned enterprises; privately- owned public utility companies; energy production; the exercise of the liberal
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professions; customs brokerage; banking; the right to exploit
natural resources, including fishing; the production of hydro-
electric power; ownership of land within 10 kilometers of the
Panamanian frontiers.

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 Mode 28 I.L.M. 575 (1989) R 52 OF 144
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 International Legal Materials
 Treaties and Agreements
 May, 1989

CHINA-JAPAN: AGREEMENT CONCERNING THE ENCOURAGEMENT AND
 RECIPROCAL PROTECTION OF
 INVESTMENT

Done at Beijing, August 27, 1988

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 International Law, Washington,
 D.C.

*575 The text of the agreement and the Introductory Note were
 provided to International Legal Materials by Heribert Golsong,
 advisor to Sloan, Lehner & Ruiz, and I.L.M. Corresponding Editor
 for International Investment.

Introductory Note

by

Heribert Golsong

The People's Republic of China is at present a signatory to 18
 Bilateral Investment Protection treaties (BITS). [FN1] The most
 recent BITS have been signed by China with Australia +28 I.L.M.
 121 (1989)+ and with Japan. Compared with the first BIT with
 Sweden (1982) and also with the Federal Republic of Germany
 (1983), the 1988 BITS signed by China contain several noteworthy
 innovations. This is the case in particular with the BIT concluded
 with Japan.

The treaties are as follows (with date of signature): China/
 Australia, 11 July 1988
 Australia, 12 September 1985
 Belgium-Luxembourg, 4 June 1984
 Denmark, 29 April 1985
 France, 30 May 1984
 Germany, Fed. Republic of, 7 October 1983
 Finland, 4 September 1984
 Italy, 28 January 1985
 Japan, 27 August 1988
 Kuwait, 23 November 1985
 Netherlands, 17 June 1985
 Norway, 21 November 1984
 Romania, 10 February 1983
 Singapore, 21 November 1985

Sri Lanka, 13 March 1986

Sweden, 29 March 1982

Switzerland, 12 November 1986

United Kingdom, 15 May 1986

The most striking feature is the establishment, under Art. 14 of the Japan/China treaty, of a Joint Committee of representatives of both Governments

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for the broad purpose "of reviewing the implementation of the . . . 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 . . . 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 *576 Governments of both Contracting Parties". With this provision, a dynamic element has been built into the treaty. It is without precedent in the practice of BITs or of Friendship, Commerce and Navigation treaties. It offers to both countries a structured framework for a continuing dialogue on investment policy and the laws governing reciprocal investments.

All the other provisions of the BIT - be they of substantive or procedural concern - have to be assessed by taking into account the above mentioned review clause of Art.14. This is of particular importance with respect to treaty provisions which are obviously open to conflicting and thus controversial interpretation.

The present introductory note is not the appropriate place for reviewing the BIT Article by Article. It seems sufficient to draw attention to those provisions which seem of particular interest in comparison to other BITs entered into by both Parties, or to general BIT practice.

Admission of investments

In their respective previous BITs, neither China nor Japan have undertaken to admit foreign investments other than subject to the applicable national laws. In particular, neither country had accepted a most - favored - nation treatment on the issue of admission of foreign investments. In this respect, their BIT practice was in line with the practice followed by other OECD Member States with the notable exception of the United States. It was, and still is, a basic policy of the United States to use BITs as a tool to improve market access, and in this respect to get at least a mutual acceptance of the most - favored - nation principle. Art. II (1) of the US Model Treaty gives the clearest expression to this policy.

The China/Japan BIT now purports to follow the US-policy: Art. II endorses the most - favored - nation concept for the admission of investments, "in accordance with the applicable laws and regulations." This language is an improvement as compared to the relevant clause in the China/Australia BIT, Art. II (1) which, without any reference to a most - favored treatment, contains an undertaking to admit investment from the other Contracting Party but only "in accordance with its laws and investment policies applicable from time to time".

Treatment of admitted investments

The general undertakings of the Contracting Parties - spelled out in Art. 3 of the Agreement, paragraphs 3 to 6 of its Protocol and point 2 of the "Agreed Minutes" - with regard to the treatment of admitted investments is much more detailed than what can be found in any other BIT. The undertakings are based on

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a combination of (i) the concept of most - favored - nation treatment And (ii) the concept of national treatment. While the MFN treatment as stipulated in Art. 3 (1) is unrestricted, the "national treatment" as endorsed in principle in Art. 3 (2) is *577 potentially subject to an almost open-ended qualification contained in paragraph 3 of the Protocol. This latter provision allows for discriminatory treatment if warranted not only for reasons of national security, but also of public order or "sound development of national economy". Should these grounds for discriminatory treatment - especially the last one - ever be invoked by one of the Contracting Parties, it would certainly become a major issue for discussions within the Joint Committee established pursuant to Art. 14. It should be noted, however, that with the exception of the BITs with the United Kingdom (1986) and Australia (1988), China has not granted "national treatment" in any of the other BITs to which it is a Party. While the Australian formula (Art. 3) seems to be unrestricted, the corresponding provision in the UK BIT (Art. 3) provides for national treatment "to the extent possible". On the other hand, China and Japan have specifically agreed, as recorded under point 2 of the "Agreed Minutes", that the national treatment guarantee includes activities relating to "the purchase of raw or auxiliary materials, of power or fuel, or of means of production or operation of any kind; the marketing of products inside or outside the country; the obtaining loans inside or outside the country; the introduction of technology; and the establishment of branches or offices of resident representatives outside the country". In addition, Art. 3(3) of the Agreement provides that with respect to both the most - favored -nation as well as the national treatment of admitted investments, a number of specific business activities are covered by the BIT, namely:

- (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; and
- (d) the making and performance of contracts.

This portion of the China/Japan BIT was obviously inspired by somewhat similar language in the 1953 US/Japan Treaty of Friendship, Commerce and Navigation (cf. Articles VII (1) and VIII (1) of the latter treaty). The only other BIT where similar provisions can be found is the US/Cameroon BIT of 1986 (Art. II (2)). For the record: the above-mentioned provision of the China/Japan BIT is the only agreement of this type with a particular reference to "attorneys".

Compensation

The China/Japan BIT endorses in its Art. 5 the principle of compensation in a manner which corresponds to traditional

international standards. As to the amount of compensation, point 3 of the "Agreed Minutes" offers an important clarification by *578 stating that such compensation shall represent the equivalent of the value of the investments and returns at the time of EXPROPRIATION or such EXPROPRIATION was publicly announced. In line with the
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practice followed by China in most of its other BITS, any dispute over the amount of compensation may be submitted by the foreign investor concerned to international arbitration.

Scope *ratione personae*

Art. 12 contains a significant innovation with regard to protection of investments by companies established in any third country with which the host country of the investment has not entered into a BIT, provided that nationals of either Contracting Party have a substantial interest in said companies. Since the USA do not have a BIT with China, this provision could extend part of the benefit of the BIT to US registered but Japanese controlled companies making an investment in China.

Scope *ratione temporis*

In its Art. 9 the BIT provides for application of its provisions to past investments made on or after September 29, 1972. This is the date of recognition by Japan of the People's Republic of China. Similar clauses have been agreed upon in most of the other BITS concluded by China.

Settlement of Investment Disputes

Prior to the China/Australia and China/Japan BITS, China had accepted international ad hoc arbitration at the initiative of the investor only with regard to disputes concerning the amount of compensation. The above - mentioned two BITS offer the possibility for a broader dispute settlement scheme. Art. 11 (2) of the China/Japan BIT states that disputes on any other matter may be submitted by mutual agreement to ad hoc conciliation or arbitration. The China/Australia BIT contains in its Art. XII (2) a similar provision, but omits a reference to possible conciliation.

It is agreed in Art. 11 that arbitration should be handled by an ad hoc Arbitral Tribunal to be established "with reference" (sic!) to the ICSID Convention. Unlike other BITS entered into by China, the Bit with Japan does not mention any particular neutral designating authority for the appointment of the third arbitrator. This matter is left to a prior agreement between the parties to the dispute. The China/Australia BIT nominates the President of the International Bank for Reconstruction and Development (IBRD-World Bank) as the neutral designating authority.

According to Art. 11 (5), the arbitral procedures "shall be determined . . . with reference to the Washington (ICSID) Convention".

*579 While the China/Japan BIT thus provides for the settlement

of disputes between the Contracting Parties by following the usual pattern, there is, however, an important innovation retained in the BIT: in case the investor and the host country have mutually agreed to submit a dispute in a matter other than the amount of compensation to international arbitration, the same matter cannot, pursuant to Art. 11 (8), be made subject to a claim from State against
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I.L.M. Content Summary

[Preamble - I.L.M. Page 581

[To promote investment by nationals of each Party in the territory of the other Party]

Art. 1 [Definitions - I.L.M. Page 581

[Investments; returns; nationals; and companies]

Art. 2 [Encouragement and admission of investments - I.L.M. Page 582

[Duty to allow investment by nationals and companies of the other Party on at least a most-favored-nation (MFN) basis]

Art. 3 [Treatment of investments - I.L.M. Page 583

[Each Party shall accord MFN and national treatment to investors who are nationals or companies of the other Party with regard to their investments] Art. 4 [Access to judicial and administrative tribunals - I.L.M. Page 583

[On a MFN and national treatment basis]

Art. 5 [EXPROPRIATION; NATIONALIZATION - I.L.M. Page 584

[Measures taken shall be in the public interest, non-discriminatory, and with reasonable compensation for the property interest affected. The method of valuation is set forth]

Art. 6 [Hostilities or national emergency - I.L.M. Page 585

[The MFN principle applies with respect to the treatment of investment losses suffered]

Art. 7 [Recognition of subrogation of rights - I.L.M. Page 585

[Subrogation of rights by a national or company to one Party shall be recognized by the other Party]

Art. 8 [Transfers - I.L.M. Page 586

[Each Party shall permit the free transboundary transfer of investment-related funds by the other's nationals, with the exception of exchange restrictions]

Art. 9 [Retroactivity - I.L.M. Page 586

[This Agreement applies to investments made on or after September 29, 1972] Art. 10 [Diplomatic and consular relations - I.L.M. Page 586

[This Agreement is effective regardless of whether such relations exist between the Parties]

*580 Art. 11 [Settlement of disputes between one Party and a

national or company of the other Party relating to investment -
I.L.M. Page 586

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[First, through consultation. After 6 months, a dispute concerning NATIONALIZATION shall be submitted to a conciliation or arbitration board fashioned after ICSID. No arbitration if the national or company has resorted to an administrative or judicial tribunal of the Party. Composition and manner of selection of the arbitration board are set forth. The board shall determine the procedures with reference to ICSID procedures. Board decisions shall be final and binding. Costs shall be borne equally] Art. 12 [Treatment of third-country companies - I.L.M. Page 588

[MFN and national treatment of companies in which national or companies of the other Party have a "substantial interest" (see Protocol)] Art. 13 [Settlement of disputes - I.L.M. Page 589

[After consultation and diplomacy, then an arbitration board. The composition of the board, manner of selection, and voting procedures are set forth. The board establishes arbitral procedures. Costs are shared equally] Art. 14 [Joint committee - I.L.M. Page 590

[To be composed of representatives of each Party for reviewing implementation of this Agreement, consulting, and making recommendations] Art. 15 [Entry into force; duration; termination - I.L.M. Page 590

[Thirty days after exchange of instruments. After ten years, the Agreement may be terminated upon one year's notice from either Party] [Done at Beijing on 27 August 1988]

[Authentic Texts: Chinese, Japanese, and English]

[Signatures]

PROTOCOL - I.L.M. Page 591

[This Agreement shall not affect copyrights; protection of industrial property; MFN rights and obligations; certain tax agreements with third countries. Considerations of public order, national security, and sound development of the national economy override the MFN and national treatment principles. Definition of "substantial interest" (see Art. 12)] [Done at Beijing on 27 August 1988]

[Authentic Texts: Chinese, Japanese, and English]

[Signatures]

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[Emphasizing that nondiscriminatory, MFN, and national treatment be accorded to certain, described activities. Further

understanding of what constitutes compensation under Art. 5.
Definition of "without delay" under Art. 5]

[Done at Beijing on 27 August 1988]

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[Signatures]

*581 AGREEMENT BETWEEN THE PEOPLE'S REPUBLIC OF CHINA AND JAPAN
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 value;
- (c) rights with respect to movable and immovable property;
- (d) patents of invention, rights with respect to trade marks, trade names, *582 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

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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.

*583 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.

*584 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
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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. *585 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 paragraphs 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 a 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 paragraphs 2 to 5 of Article 5 and Article 8 shall apply mutatis mutandis.

*586 Article 8

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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.

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 *587 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 consultation 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 of 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 party 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 Copr. (C) West 1995 No claim to orig. U.S. govt. works

arbitration board 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.

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 parties to appoint the third arbitrator who shall be a national of a third *588 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 decision 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.

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 third 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 *589 paragraph 2 of Article 2, Article 3, paragraphs 1 to 4 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 third 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, paragraphs 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 make with respect to any matter affecting the operation of the present Agreement.

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2. Any dispute between the Contracting Parties 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 arbitrators 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 *590 shall not 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.

*591 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 Articles 1 to 14 shall

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continue to be effective for a further period of fifteen years from the date of termination of the present Agreement.

IN WITNESS WHEREOF the undersigned, being duly authorized by their respective Governments, have signed 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 the People's Republic of China:

Zheng Tuobin

For the Government of Japan:

T. Nakajima

PROTOCOL

At the time of signing the Agreement between the People's Republic of China and Japan 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 *592 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 *593 and obligations with respect to exchange restrictions, that either Contracting Party has or may have as a contracting
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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 Chinese, Japanese 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 the People's Republic of China:

Zheng Tuobin

For the Government of Japan:

T. Nakajima

*594 AGREED MINUTES

The undersigned wish to record the following understanding which they have reached during the negotiations for the Agreement between the People's Republic of China and Japan concerning the Encouragement and Reciprocal Protection of Investment (hereinafter referred to as "the Agreement") signed today: 1.

It is confirmed that, the provisions of the Agreement shall apply to assets related to offices of resident representatives established by nationals or companies of either Contracting Party within the territory of the other Contracting Party in accordance with, or not in violation of the laws and regulations of such other Contracting Party at the time of establishment. 2. Both Contracting Parties confirm that, "treatment less favourable" referred to in the provisions of paragraph 2 of Article 3 of the Agreement includes the measures taken in a discriminatory manner, which would restrict or impede following activities: the purchase of raw or auxiliary materials, of power or fuel, or of means of production or operation of any kind; the marketing of products inside or outside the country; the obtaining loans inside or outside the country; the introduction of technology; and the establishment of branches or offices of resident representatives outside the country. This paragraph shall not affect the provisions of paragraph 3 of Protocol of the Agreement.

3. It is confirmed that with reference to the provisions of Article 5 of the Agreement, the compensation referred to in the provisions of paragraph 3 of the aforesaid Article shall represent the equivalent of the value of the investments and

returns affected at the time when, EXPROPRIATION, NATIONALIZATION, or any other measures the effects of which would be similar to EXPROPRIATION or NATIONALIZATION are publicly announced or when such measure are *595 taken, whichever is the earlier, and shall carry an appropriate
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interest taking into account the length of time until the time of payment. 4. The term "without delay" referred to in the provisions of paragraph 3 of Article 5 of the Agreement shall not exclude a reasonable period of time necessary for deciding amount, way of payment and so on.

Beijing, August 27, 1988

For the Government of the People's Republic of China:

Zheng Tuobin

For the Government of Japan:

T. Nakajima

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