

Bilateral Investment Treaty between Korea and China

Signed on September 30, 1992

DEZAN SHIRA & ASSOCIATES

Corporate Establishment, Tax, Accounting & Payroll Throughout Asia

This document was downloaded from the Dezan Shira & Associates' Online Library and was compiled by the tax experts at Dezan Shira & Associates (www.dezshira.com).

Dezan Shira & Associates is a specialist foreign direct investment practice, providing corporate establishment, business advisory, tax advisory and compliance, accounting, payroll, due diligence and financial review services to multinationals investing in emerging Asia.



ASIA BRIEFING

www.asiabriefing.com

Established in 1999, Asia Briefing Ltd. (www.asiabriefing.com) is a Dezan Shira & Associates wholly-owned subsidiary dedicated to providing individuals and enterprises with the latest business and regulatory news as well as expert commentary relating to conducting business in emerging Asia.

AGREEMENT ON THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS BETWEEN THE GOVERNMENT OF THE REPUBLIC OF KOREA AND THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA

The Government of the Republic of Korea and the Government of the People's Republic of China (hereinafter referred to as "the Contracting Parties"),

Desiring to strengthen economic cooperation between the two States,

Intending to create favourable conditions for investment by investors of each State within the territory of the other State by means of the favourable treatment and the protection accorded by each Contracting Party to investment, business activities in connection therewith, and

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

Have agreed as follows:

Article 1

For the purposes of the present Agreement:

(1) The term "investments" means every kind of asset, used as investment by investors of one State within the territory of the other State, in accordance with the applicable laws and regulations of the other State at the time of investment and shall include, in particular, though not exclusively:

- (a) movable and immovable property as well as any other property rights in rem such as mortgages, liens, pledges, usufruct and similar rights;
- (b) shares, stocks, bonds and debentures or any other forms of participation in a company, business enterprise or joint venture;
- (c) claims to money or to any performance having an economic value associated with an investment;
- (d) intellectual property rights, including copyrights, trade marks, patents, industrial designs, technical processes, know-how, trade secrets and trade names, and goodwill;
- (e) any right conferred by law or under contract and any licences and permits pursuant to law, including the right to search for, extract, cultivate or exploit natural resources.

Any alteration of the form in which assets are invested shall not affect their classification as investment.

(2) The term "returns" means the amounts yielded by an investment, and, in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties and fees. Returns from investments and, in the case of their reinvestments, returns from those reinvestments shall enjoy the same protection as investments.

(3) The term "investors" means nationals or companies of one State who invest in the territory of the other State.

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

(b) The term "companies" means:

(c) in relation to the Republic of Korea, corporations, partnerships, companies and associations whether or not with limited liability, whether or not with legal personality and whether or not for pecuniary profit; and

(d) in relation to the People's Republic of China, enterprises, other economic organizations and associations.

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

Article 2

1. Each Contracting Party shall within the territory of its own State promote as far as possible investment by investors of the other State and shall enable such investment to get admission in accordance with the applicable laws and regulations of the former State.
2. Investors of either State shall within the territory of the other State be accorded treatment no less favourable than that accorded to investors of third State in respect of the admission of investment and the matters in connection therewith.
3. Nationals of either State who wish to enter the territory of the other State and to remain therein for the purpose of making investment and carrying on business activities in connection therewith, shall be given sympathetic consideration to their applications for the entry, sojourn and residence in that State as well as to the applications for licenses and permits to conduct business activities, in accordance with the applicable legislation of that State.

Article 3

1. Investors of either State shall within the territory of the other State be guaranteed treatment no less favourable than that accorded to investors of any third State, with respect to investments, returns and business activities in connection with the investment.
2. Investors of either State shall within the territory of the other State be guaranteed treatment no less favourable than that accorded to investors of the latter State, with respect to investments, returns and business activities in connection with the investment.
3. The term "business activities in connection with the investment" referred to in the provisions of the present Article shall include, in particular, though not exclusively:
 - (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.
4. The provisions of paragraph 1 of this Article shall not be construed so as to oblige one State to extend to investors of the other State the benefit of any treatment, preference or privilege which may be extended by the former State by virtue of:
 - (a) any existing or future customs union or free trade area or a common external tariff area or a monetary union or a similar international agreement or other forms of regional cooperation to which either of the States is or may become a party; or
 - (b) any international agreement or arrangement relating wholly or mainly to taxation.

Article 4

Treatment accorded to investors of either State within the territory of the other State with respect to access to the courts of justice and administrative tribunals and authorities both in pursuit and in defence of their rights shall not be less favourable than that accorded to investors of the latter State or to investors of any third State.

Article 5

1. Investments and returns of investors of either State shall receive the most constant protection and security within the territory of the other State.

2. Investments and returns of investors of either State 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 State except for a public purpose on a non-discriminatory basis. The expropriation shall be carried out in accordance with the applicable laws and regulations and against compensation.

3. Such compensation referred to in the paragraph 2 of this Article shall be computed on the basis of the market value of the investment immediately prior to the point of time when the decision for expropriation was announced or becomes known. Where the market value can not be readily ascertained, the compensation shall be determined in accordance with generally recognized principles of valuation and on equitable principles taking into account, inter alia, the capital invested, depreciation, capital already repatriated, and other relevant factors. Such compensation shall be made without delay, shall include interest at an appropriate rate from the date of expropriation until the date of payment, and shall be effectively realizable and freely transferable at the official exchange rate in effect on the date used for the determination of amount of compensation.

4. Investors of either State shall within the territory of the other State be guaranteed treatment on a non-discriminatory basis with respect to the matters set forth in the provisions of paragraphs 1 to 3 of the present Article.

5. The investor affected shall have the right, under the law of the State making the expropriation, to prompt review by competent courts of justice or administrative tribunals or authorities of that State, concerning such measures set out in paragraphs 2, 3 and 4 of this Article, and amount of compensation.

6. Where either State expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which the investors of the other State own shares, the provisions of this Article shall apply.

Article 6

1. Investors of either State whose investments in the territory of the other State suffer losses of their investments owing to any armed conflict, a state of national emergency or civil disturbances in the territory of the latter State 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 investors of any third State.

2. Without prejudice to paragraph 1 of this Article, investors of one State who in any of the events referred to in that paragraph suffer damage or loss in the territory of the other State resulting from:

(a) requisition of their property by its forces or authorities;
(b) destruction of their property by its forces or authorities which was not caused in combat action or was not required by the necessity of the situation;
shall be accorded fair and reasonable compensation for the damage or loss sustained during the period of the requisition or as a result of the destruction of the property.

3. Resulting payments from compensation in paragraphs 1 and 2 of this Article shall be made without delay and be freely transferable at the exchange rate determined in accordance with the official exchange rate in force, on the date of determining the amount of compensation.

Article 7

If either Contracting Party or its designated agency makes payment to the investors of its own State under a guarantee it has accorded in respect of an investment in the territory of the other State, the other Contracting Party shall recognize:

- (a) the assignment, whether under the law or pursuant to a legal transaction in that State, of any right or claim by the investors to the former Contracting Party or its designated agency as well as,
- (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 that investor and shall assume the obligations related to the investment.

Article 8

1. Investors of either State shall, in accordance with the applicable laws and regulations of the other State, be guaranteed in respect of the investment, the transfer out of the territory without delay in any freely convertible currency of, in particular, though not exclusively;

- (a) the net profits, dividends, royalties, technical assistance and technical service fees, interest and other current income, accruing from any investment by investors of the former State;
- (b) the proceeds accruing from the sale or the total or partial liquidation of any investment made by an investor of the former State;
- (c) initial capital and complementary amounts necessary to increase an investment;
- (d) funds in repayment of borrowings related to an investment;
- (e) the earnings of nationals of the former State who are allowed to work in connection with an investment in the territory of the other State; and
- (f) compensation.

2. For the purpose of this Agreement, exchange rates shall be the rates in accordance with the official rate of exchange in force at the date of transfer.

Article 9

1. Any dispute between an investor of one State and the Government of the other State with respect to investment within the territory of the latter State shall, as far as possible, be settled amicably through consultation between the parties to the dispute.

2. The legal remedies under the applicable laws and regulations of one State in the territory of which the investment has been made are available for the investor of the other State on the basis of treatment no less favourable than that accorded to investments of its own investors or investors of any third State.

3. If a dispute concerning the amount of compensation referred to in the provisions of paragraph 3 of Article 5 between an investor of either State and the Government of the other State 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 amicable settlement, such dispute shall, at the request of such investor, be submitted to a conciliation board or an arbitration board (hereinafter referred to as "the 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 an investor of either State and the Government of the other State shall be submitted by mutual agreement to the 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 State, such dispute shall not be submitted to the arbitration board.

4. The arbitration board referred to in the provisions of paragraph 3 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 3 of the present Article, and the third arbitrator to be agreed upon as the President of the 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 State.

5. If the third arbitrator is not agreed upon between the arbitrators appointed by each party within the period referred to in the provision of paragraph 4 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 State which has diplomatic relations with the two States.

6. The arbitral procedures shall be determined by the arbitration board with reference to the Washington Convention.

7. 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.

8. 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.

9. When and after a case is submitted to the arbitration board referred to in the provisions of paragraph 3 of the present Article, no claim concerning such case shall be made between the two States.

10. Notwithstanding the provisions of the present Article, any dispute except those disputes which shall not be submitted to the International Centre for the Settlement of Investment Disputes established by the Washington Convention (hereinafter referred to as "the Centre") through the notification of reservation by the People's Republic of China to the Centre shall, upon request of an investor of either State or the Government of the other State, be submitted to the Centre in the event that the People's Republic of China becomes a party to the Washington Convention.

Article 10

1. Disputes between the Contracting Parties concerning the interpretation or application of this Agreement shall, if possible, be settled through consultation or negotiation.

2. If a dispute cannot be so settled within three (3) months, it shall upon the request of either Contracting Party, be submitted to an Arbitral Tribunal.

3. The Arbitral Tribunal shall be constituted for each individual case in the following way. Within two(2) months of the receipt of the request for 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 of the two Contracting Parties shall be appointed Chairman of the Tribunal (hereinafter referred to as the "Chairman"). The Chairman shall be appointed within two(2) months from the date of appointment of the other two members.

4. If within the periods specified in paragraph 3 of this Article the necessary appointment has not been made, either Contracting Party may, unless otherwise agreed, request the President of the International Court of Justice to appoint the third arbitrator. If the President is a national of either State, or if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the appointment. If the Vice-President also is a national of either State or 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 State shall be invited to make the appointment.

5. The Arbitral Tribunal shall reach its decision by a majority of votes. Such decision shall be final and binding. Each Contracting Party shall bear the cost of its own arbitrator and its representation in the arbitral proceedings; the cost of the Chairman and the remaining costs shall be borne in equal parts by both Contracting Parties. The Arbitral Tribunal shall determine its own procedure.

Article 11

This Agreement shall apply to the investments and returns made in the territory of

one State by investors of the other State,

(1) in relation to investors of the Republic of Korea, on or after the 15th of August, 1948.

(2) in relation to investors of the People's Republic of China, on or after the 1st of October, 1949.

Article 12

1. Where a matter is governed simultaneously both by this Agreement and by another international agreement to which the two States are parties, nothing in this Agreement shall prevent either Contracting Party or any of its investors who own investments in the territory of the other State from taking advantage of whichever rules are the more favourable to his case

2. If the treatment to be accorded by one State to investors of the other State in accordance with its laws and regulations or other specific provisions or contracts is more favourable than that accorded by this Agreement, the more favourable treatment shall be accorded.

Article 13

Companies of any third State in which investors of either State have a substantial interest shall within the territory of the other State be guaranteed, unless international agreement between the Governments of such other State and such third State concerning investment and protection of investments is in effect:

(1) treatment no less favourable than that accorded, within the territory of the latter State, to companies of any third State in which investors of any other third State have a substantial interest with respect to the matters set forth in the provisions of paragraph 2 of Article 2, Article 3, paragraphs 1 to 4 and 6 of Article 5, Article 6, Article 8 and Article 11; and

(2) treatment no less favourable than that accorded, within the territory of the latter State, to companies of any third State in which investors of the latter State have a substantial interest with respect to the matters set forth in the provisions of paragraph 2 of Article 2, Article 3, paragraphs 1 to 4 and 6 of Article 5, Article 6, Article 8 and Article 11.

Article 14

1. In order to facilitate the implementation of the present Agreement, the Contracting Parties agree to set up a Joint Committee composed of the representatives of the Contracting Parties.

2. The functions of the Joint Committee shall include, in particular:

(a) reviewing the implementation of the Agreement and the matters related to investment between the two States;

(b) 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 States with respect to the receiving of foreign investment;

(c) making appropriate recommendations to the Governments of both States.

3. The Joint Committee shall meet alternately in Seoul and Beijing at the request of either Contracting Party.

Article 15

The Agreement on the Encouragement and Reciprocal Protection of Investments between the Korea Trade Promotion Corporation and the China Chamber of International Commerce signed on 2 May 1992 shall cease to be effective upon the entry into force of the present Agreement.

Article 16

1. This Agreement shall come into force on the thirtieth day after the date on which each Contracting Party exchange notifications that its domestic legal procedures have been completed after the signing, and shall remain in force for a period of five years. It shall be automatically extended for successive period of one year unless either Party notifies the other in writing of its intention to terminate this Agreement at least one year prior to the expiry of this Agreement.
2. In respect of investments and returns acquired prior to the date of termination of the present Agreement, the provisions of Article 1 to 14 shall continue to be effective for a further period of fifteen years from the date of termination of the present Agreement.
3. This Agreement shall be amended by mutual consent of the Contracting Parties.

IN WITNESS WHEREOF, the undersigned duly authorised, have signed this Agreement.

DONE in duplicate at Beijing this 30th day of September 1992, in the Korean, Chinese and English languages, all three texts being equally authentic. In case of any divergence of interpretation, the English text shall prevail.

FOR THE GOVERNMENT OF THE REPUBLIC OF KOREA

FOR THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA

PROTOCOL

At the time of signing the Agreement on the Encouragement and Reciprocal Protection of Investments between the Government of the Republic of Korea and the Government of the People's Republic of China (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 affect any right or obligation with respect to intellectual property rights under the International Convention for the Protection of Industrial Property done at Paris on March 20, 1883, or any subsequent revisions thereof, or under any existing or future international agreement to which either State is or may become a party.
2. For the purpose of the provisions of paragraph 2 of Article 3 and (2) of Article 13 of the Agreement, it shall not be deemed "treatment less favourable" for the Government of either State to accord discriminatory treatment, in accordance with its applicable laws and regulations, to investors of the other State, in case it is indispensable for the reason of a public purpose, national security or sound development of national economy and, provided that such discriminatory treatment undertaken for the reason of a public purpose, national security or sound development of national economy shall not aim at specifically investors of the other State or at joint companies in which investors of the other State have holdings.
3. The provisions of paragraph 2 of Article 3 of the Agreement shall not prevent the Government of either State from prescribing special formalities in connection with the activities of foreign investors within its territory, but it shall be guaranteed that such formalities shall not impair the substance of the rights set forth in the aforesaid

paragraph.

4. With respect to paragraph 4 of Article 5;

(a) Each Contracting Party shall accord treatment to investors of the other State, which shall be no less favourable than that accorded to investors of any third State.

(b) Each Contracting Party reserves the rights to make or maintain, in accordance with its legislation in force, limited exceptions to treatment accorded to investors of the other State, which is no less favourable than that accorded to its own investors.

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

6. For the purpose of the provisions of Article 8, the term "without delay" means that the transfer shall be made within a period as is normally required for the completion of transfer formalities. Such period shall commence on the day on which the relevant transfer application has been submitted and shall not exceed six months for the transfer mentioned in Article 8.

7. The term "substantial interest" as used in the provision of Article 13 of the Agreement means such extent of interest as to permit the exercise of control or decisive influence on the company.

IN WITNESS WHEREOF, the undersigned, being duly authorised respectively, have signed the present Protocol.

DONE at Beijing on the 30th day of September 1992, in duplicate, in the Korean, Chinese and English languages, all three texts being equally authentic. In case of any divergency of interpretation, the English text shall prevail.

FOR THE GOVERNMENT OF THE REPUBLIC OF KOREA

FOR THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA