Agreement

between the Government of Hong Kong and the
Government of the Republic of Austria
for the Promotion and Protection of Investments

AGREEMENT BETWEEN THE GOVERNMENT OF HONG KONG AND THE GOVERNMENT OF THE REPUBLIC OF AUSTRIA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

The Government of Hong Kong, having been duly authorised to conclude this agreement by the government of the sovereign State which is responsible for foreign affairs relating to Hong Kong, and the Government of the Republic of Austria, hereinafter referred to as the "Contracting Parties";

Desiring to create favourable conditions for greater investment by investors of one Contracting Party in the area of the other;

Recognising that the encouragement and reciprocal protection under agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both areas;

Have agreed as follows:

ARTICLE 1

Definitions

For the purposes of this Agreement:

(a) "area":

(i) in respect of Hong Kong includes Hong Kong Island, Kowloon and the New Territories;

(ii) in respect of the Republic of Austria means the territory of the Republic of Austria;

(b) "freely convertible" means free of all currency exchange controls and transferable abroad in any currency;

(c) "investment" means every kind of asset and in particular, though not exclusively, includes:

(i) movable and immovable property and any other property rights such as mortgages, liens, pledges or usufructs;

(ii) shares in and stock and debentures of a company and any other form of participation in a company;

(iii) claims to money or to any performance under contract having a financial value;

(iv) intellectual property rights, in particular copyrights, industrial property rights such as patents for inventions, trademarks, industrial designs, technical processes, know-how, trade names and goodwill;

(v) business concessions conferred by law to search for, cultivate, extract or exploit natural resources.

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

(d) "investors" means:

(i) in respect of Hong Kong:

– physical persons who have the right of abode in its area;

– corporations, partnerships and associations incorporated or constituted and registered where applicable under the law in force in its area;

(ii) in respect of the Republic of Austria:

– any natural person who is a citizen of the Republic of Austria;

– any juridical person as well as any commercial or other company or association having its seat in its area constituted in accordance with the legislation of the Republic of Austria;

(e) "returns" means the amounts yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties, licence and other fees.

ARTICLE 2

Promotion and Protection of Investments and Returns

(1) Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its area, and, subject to its laws and regulations, shall admit such investments.

(2) Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the area 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 area of investors of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard`to investments of investors of the other Contracting Party.

(3) The legal extension, alteration or transformation of an investment shall be considered to be as a new investment.

ARTICLE 3

Treatment of Investments and Returns

(1) Neither Contracting Party shall in its area subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any other State.

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

ARTICLE 4

Exceptions

(1) The provisions in this Agreement relative to the grant of treatment not less favourable than that accorded to the investors of either Contracting Party or to investors of any other State shall not be construed so as to oblige one Contracting Party to extend to the investors of the other the present or future benefit of any:

(a) customs union, common market, free trade area or membership of an economic community;

(b) international agreement, international arrangement or domestic legislation regarding taxation.

(2) Regulations to facilitate the frontier traffic between Austria and her neighbours shall not be invoked as the basis of most favoured nation treatment under this Agreement.

ARTICLE 5

Compensation for Losses

(1) Investors of one Contracting Party whose investments in the area 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 area 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 investors or investors of any other State. Resulting payments shall be freely convertible.

(2) Without prejudice to paragraph (1) of this Article, investors of one Contracting Party who in any of the situations referred to in that paragraph suffer losses in the area of the other Contracting Party resulting from

(a) requisitioning of their property by its forces or authorities, or

(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 restitution or reasonable compensation. Resulting payments shall be freely convertible.

(3) For the purpose of paragraph (2) of this Article the term "forces" means in respect of Hong Kong the armed forces of the government of the sovereign State which is responsible for foreign affairs relating to Hong Kong.

ARTICLE 6

Compensation for Expropriation

(1) Investors of either Contracting Party shall not be deprived of their investments nor subjected to measures having effect equivalent to such deprivation in the area of the other Contracting Party except lawfully, for a public purpose related to the internal needs of that Party, and against compensation. Such compensation shall amount to the real value of the investment immediately before the deprivation or before the impending deprivation became public knowledge whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without undue delay, be effectively realizable and be freely convertible.

(2) The investor affected shall have a right, under the law of the Contracting Party making the deprivation, to prompt review by a judicial or other competent or independent authority of that Party, of the lawfulness of the expropriation. The investor shall be entitled to have the amount of the compensation reviewed either by the judicial or other competent or independent authorities

of the Contracting Party making the deprivation or by an international arbitral tribunal in accordance with Article 9 of this Agreement.

(3) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part or its area, and in which investors of the other Contracting Party own shares, it shall ensure that the provisions of paragraphs (1) and (2) of this Article are applied to the extent necessary to guarantee compensation referred to in paragraph (1) in respect of their investment to such investors of the other Contracting Party who are the owners of those shares.

ARTICLE 7

Transfers

(1) Each Contracting Party shall in respect of investments guarantee to investors of the other Contracting Party the unrestricted right to transfer abroad their investments as defined in Article 1(c) and their returns as defined in Article 1(e). Investors shall also have the unrestricted right to transfer abroad in particular, but not exclusively:

(a) capital and additional amounts for the maintenance or extension of their investments;

(b) amounts assigned to cover expenses relating to the management of the investment;

(c) repayment of loans;

(d) proceeds from the total or partial liquidation or sale of the investment;

(e) compensation in accordance with Articles 5 and 6 of this Agreement.

(2) Transfers of currency shall be effected without delay in any freely convertible currency. Unless otherwise agreed by the investor, transfers shall be made at the rate of exchange applicable on the date of transfer. This rate of exchange shall correspond to the cross rate obtained from those rates which would be applied by the International Monetary Fund on the date of payment for conversion of the currencies concerned into Special Drawing Rights.

ARTICLE 8

Subrogation

(1) If one Contracting Party or its designated Agency makes a payment under an indemnity given in respect of an investment in the area of the other Contracting Party, the latter Contracting Party shall recognise the assignment to the former Contracting Party or its designed Agency by law or by legal transaction of all the rights and claims of the indemnified investor and that the former Contracting Party or its designated Agency is entitled to exercise such rights and enforce such claims by virtue of subrogation, to the same extent as that investor. This shall not affect the

rights of the investor of the first Contracting Party under Article 9 of this Agreement or the rights of the first Contracting Party under Article 10 of this Agreement.

(2) The former Contracting Party or its designated Agency shall be entitled in all circumstances to the same treatment in respect of the rights and claims acquired by it by virtue of the assignment and any payments received in pursuance of those rights and claims as the indemnified investor was entitled to receive by virtue of this Agreement in respect of the investment concerned and its related returns.

(3) Any payments received by the former Contracting Party or its designated Agency in pursuance of the rights and claims acquired shall be freely convertible. Such payments shall also be freely available to the former Contracting Party for the purpose of meeting any expenditure incurred in the area of the latter Contracting Party.

(4) A Contracting Party which is a party to an investment dispute under Article 9 of this Agreement shall not, at any stage of conciliation or arbitration proceedings or enforcement of the award, raise the objection that the investor who is the other party to the dispute has received by virtue of a guarantee indemnity in respect of all or some of its losses.

ARTICLE 9

Settlement of Investment Disputes

Any dispute between an investor of one Contracting Party and the other Contracting Party concerning an investment of the former in the area of the latter which has 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 between the parties to the dispute. If no such procedures have been agreed within that six month period, the parties to the dispute shall be bound to submit the dispute to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as amended by the last amendment applicable to both Contracting Parties. The parties may agree in writing to modify those Rules.

ARTICLE 10

Disputes between the Contracting Parties

(1) If any dispute arises between the Contracting Parties relating to the interpretation or application of this Agreement, the Contracting Parties shall as far as possible settle it by negotiation.

(2) If the Contracting Parties fail to reach a settlement of the dispute by negotiation within six months, it may be referred by them to such person or body as they may agree on or, at the request of either Contracting Party, shall be submitted for decision to a tribunal of three arbitrators which shall be constituted in the following manner:

(a) within thirty days after receipt of a request for arbitration, each Contracting Party shall appoint one arbitrator. A national of a State which can be regarded as neutral in relation to the dispute, who shall act as President of the tribunal, shall be appointed as the third arbitrator by agreement between the two arbitrators, within sixty days of the appointment of the second;

(b) if within the time limits specified above any appointment has not been made, either Contracting Party may request the President of the International Court of Justice, in a personal and individual capacity, to make the necessary appointment within thirty days. If the President considers that he is a national of a State which cannot be regarded as neutral in relation to the dispute or if he is otherwise unable to discharge this function, the Vice-President or if he is likewise unable to discharge this function, the most senior member who is not disqualified on those grounds shall make the appointment.

(3) Except as hereinafter provided in this Article or as otherwise agreed by the Contracting Parties, the tribunal shall determine the limits of its jurisdiction and establish its own procedure. At the direction of the tribunal, or at the request of either of the Contracting Parties, a conference to determine the precise issues to be arbitrated and the specific procedures to be followed shall be held not later than thirty days after the tribunal is fully constituted.

(4) Except as otherwise agreed by the Contracting Parties or prescribed by the tribunal, each Contracting Party shall submit a memorandum within forty five days after the tribunal is fully constituted. Replies shall be due sixty days later. The tribunal shall hold a hearing at the request of either Contracting Party, or at its discretion, within thirty days after replies are due.

(5) The tribunal shall attempt to give a written decision within thirty days after completion of the hearing or, if no hearing is held, after the date both replies are submitted. The decision shall be taken by a majority vote.

(6) The Contracting Parties may submit requests for clarification of the decision within thirty days after it is received and such clarification shall be issued within fifteen days of such request.

(7) The arbitral tribunal shall reach its decision on the basis of internationally recognized rules of law. The decision of the tribunal shall be final and binding on the Contracting Parties.

(8) Each Contracting Party shall bear the costs of the arbitrator appointed by it and of its legal representation in the arbitration proceedings. The other costs of the tribunal shall be shared equally by the Contracting Parties including any expenses incurred by the President, Vice-President or most senior member of the International Court of Justice in implementing the procedures in paragraph 2(b) of this Article. The tribunal may, however, in its award determine another distribution of costs.

ARTICLE 11

Application

The provisions of this Agreement shall apply to all investments whether made before or after the date of its entry into force.

ARTICLE 12

Entry into Force

This Agreement shall enter into force on the first day of the third month that follows the month during which the Parties have notified each other in writing that their respective requirements for the entry into force of this Agreement have been complied with.

ARTICLE 13

Duration and Termination

(1) This Agreement 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 second and final period of fifteen years in respect of investments made before the date of termination of this Agreement.

In witness whereof the undersigned, duly authorised thereto by their respective Governments, have signed this Agreement.

Done in duplicate at Vienna this 11th day of October 1996 in the Chinese, English and German languages, all texts being equally authoritative.

For the Government of
Hong Kong

For the Government of the
Republic of Austria