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Australian Treaty Series 1993 No 30

DEPARTMENT OF FOREIGN AFFAIRS AND TRADE

CANBERRA

**Agreement between the Government of Australia and the Government of Hong Kong for the
Promotion and Protection of Investments**

(Hong Kong, 15 September 1993)

Entry into force: 15 October 1993

AUSTRALIAN TREATY SERIES

1993 No. 30

Australian Government Publishing Service

Canberra

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

THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF HONG KONG having been duly authorised to conclude this agreement by the sovereign government which is responsible for its foreign affairs (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;

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

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 Australia includes the territorial sea, maritime zone or continental shelf where it exercises its sovereignty, sovereign rights or jurisdiction in accordance with international law;

(b) "companies" means:

(i) in respect of Hong Kong: corporations, partnerships, associations, trusts or other legally recognised entities incorporated or constituted or otherwise duly organised under the law in force in its area or under the law of a non-Contracting Party and owned or controlled by entities described in this sub-paragraph or by physical persons who have the right of abode in its area, regardless of whether or not the entities referred to in this sub-paragraph are organised for pecuniary gain, privately or otherwise owned, or organised with limited or unlimited liability;

(ii) in respect of Australia: corporations, partnerships, associations, trusts or other legally recognised entities incorporated or constituted or otherwise duly organised under the law in force in any part of its area or under the law of a non-Contracting Party and owned or controlled by entities described in this sub-paragraph or by a physical person who is an investor of Australia under its law, regardless of whether or not the entities referred to in this sub-paragraph are organised for pecuniary gain, privately or otherwise owned, or organised with limited or unlimited liability;

(c) "forces" means:

(i) in respect of Hong Kong: the armed forces of the sovereign government which is responsible for its foreign affairs;

(ii) in respect of Australia: the defence forces of the Commonwealth of Australia;

(d) "freely convertible currency" means a fully and freely convertible currency as identified by the International Monetary Fund or a currency that is widely traded in international foreign exchange markets;

(e) "investment" means every kind of asset, owned or controlled by investors of one Contracting Party and admitted by the other Contracting Party subject to its law and investment policies applicable from time to time, and in particular, though not exclusively, includes:

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

(ii) shares in and stock, bonds 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 an economic value;

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

(v) business concessions, licences and other rights conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources and to manufacture, use and sell products.

A change in the form in which assets are invested does not affect their character as investments and the term "investment" includes all investments, whether made before or after the date of entry into force of this Agreement. For the purposes of this Agreement, a physical 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;

(f) "investors" means:

(i) in respect of Hong Kong:

(A) physical persons who have the right of abode in its area; and

(B) companies as defined in paragraph (1)(b)(i) of this Article; and

(ii) in respect of Australia:

(A) physical persons possessing Australian citizenship or who are permanently residing in Australia in accordance with its law; and

(B) companies as defined in paragraph (1)(b)(ii) of this Article;

(g) "returns" means the amounts yielded by or derived from an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties and fees.

Article 2

Promotion and protection of investment 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 right to exercise powers conferred by its laws and investment policies, 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, without prejudice to its laws, 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. This Agreement shall not prevent an investor of one Contracting Party from taking advantage of the provisions of any law or policy of the other Contracting Party which are more favourable than the provisions of this Agreement.

Article 3

Treatment of investments

(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 investors of any other State.

(2) Neither Contracting Party shall in its area subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, including in connection with intellectual property rights, and the raising of funds, the purchase and sale of foreign exchange, and transfers under Article 8 of this Agreement, to treatment less favourable than that which it accords to investors of any other State.

(3) Subject to its laws applicable from time to time, each Contracting Party shall permit investors of the other Contracting Party who have made investments in the first Contracting Party's area to employ within its area, key technical and managerial personnel of their choice, and permit physical persons who are

investors of the other Contracting Party and personnel employed by companies of that other Contracting Party to enter and remain in its area for the purpose of engaging in activities related to investments. Such personnel employed from abroad shall be entitled to transfer abroad, subject to the provisions of Article 8 of this Agreement, unspent earnings and other remuneration in connection with investments.

Article 4

Transparency of laws

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

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, riot or other similar events 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 investors of any other State. Resulting payments shall be made in a freely convertible currency.

(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 made in a freely convertible currency.

Article 6

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 under due process of law, for a public purpose related to the internal needs of that Party, on a non-discriminatory basis, 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. 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. Compensation shall include interest at a normal commercial rate from the date the measures were taken until the date of payment, shall be made without undue delay, be effectively realisable, freely transferable and payable in either the original currency of the investment or, if requested by the investor, in any other freely convertible currency. 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 independent authority of that Party, of the investor's case and of the valuation of the investment in accordance with the principles set out in this paragraph.

(2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its area, and in which investors of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) 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 owners of those shares.

Article 7

Exceptions

The provisions in this Agreement relative to the grant of treatment not less favourable than that accorded 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 benefit of 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
- (b) any international agreement or arrangement relating wholly or mainly to taxation.

Article 8

Transfer of investments and returns

- (1) Subject to its laws and policies, each Contracting Party shall in respect of investments guarantee to investors of the other Contracting Party the right to transfer abroad their investments and returns.
- (2) Transfers of currency including payments in compensation for losses in accordance with Article 5 of this Agreement shall be permitted without undue 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.
- (3) A Contracting Party may protect the rights of creditors, or ensure the satisfaction of judgements in adjudicatory proceedings, through the equitable, non-discriminatory and good faith application of its law.

Article 9

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.

Article 10

Settlement of investment disputes

A 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 three 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 three month period, the parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The arbitral tribunal shall have power to award interest. The parties may agree in writing to modify those Rules.

Article 11

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 in the first place try to settle it by negotiation.
- (2) If the Contracting Parties fail to reach a settlement of the dispute by negotiation within 6 months of one Contracting Party seeking in writing such negotiation, 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. In case any arbitrator appointed as provided for in this Article 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;
 - (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 is a national of a State which cannot be regarded as neutral in relation to the dispute, or is unable to act, the Vice-President or the next most senior Member who is not disqualified on such a ground 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 give a written decision stating its legal basis and shall, when possible, do so within thirty days after completion of the hearing or, if no hearing is held, after the date both replies are submitted. The tribunal may render an award on the default of a Contracting Party. The decision shall be taken by a majority vote.
- (6) The Contracting Parties may submit requests for clarification of the decision within fifteen days after it is received and such clarification shall be issued within fifteen days of such request.
- (7) 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. The other costs of the tribunal shall be shared equally by the Contracting Parties including any expenses incurred by the President or Vice-President or Member of the International Court of Justice in implementing the procedures in paragraph 2(b) of this Article. The tribunal may decide, however, that a higher proportion of costs shall be borne by one of the Contracting Parties.

Article 12

Subrogation

- (1) If a Contracting Party or an agency of a Contracting Party makes a payment to an investor 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 investor.

(2) Where a Contracting Party has made a payment to its investor and has taken over rights and claims of the investor, that investor 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.

(3) A Contracting Party shall not assert, as a defence, counter-claim, right of set-off or otherwise, in any proceeding involving a dispute relating to an investment, that the investor 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

Application of the Agreement

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

(2) This Agreement shall not apply to a company organised under the law of a non-Contracting Party within the meaning of paragraph (b) of Article 1 where the provisions of an investment promotion and protection agreement with that non-Contracting Party have already been invoked in respect of the same matter.

(3) This Agreement shall not apply to a physical person who is an investor of a Contracting Party where the provisions of an investment promotion and protection agreement between the other Contracting Party and a non-Contracting Party of which that person is a citizen have already been invoked in respect of the same matter.

Article 14

Entry into force and duration and termination

(1) This Agreement shall enter into force thirty days after the date on 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^[1].

(2) 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 (3) of this Article.

(3) 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.

(4) Notwithstanding termination of this Agreement pursuant to paragraph (3) of this Article, the Agreement shall continue to be effective for a second and final period of fifteen years from the date of its termination 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 two originals at Hong Kong on the 15th day of September, One thousand nine hundred and ninety-three, in the English and Chinese languages, both texts being equally authoritative.

FOR THE GOVERNMENT OF FOR THE GOVERNMENT OF

AUSTRALIA: HONG KONG:

[Signed:] [Signed:]

PETER COOK CHAU TAK-HAY