

## CHAPTER 11

## INVESTMENT

### Section A: Definitions

#### Article 11.1: Definitions

For purposes of this Chapter:

**Centre** means the International Centre for Settlement of Investment Disputes (ICSID) established by the ICSID Convention;

**claimant** means an investor of a Party that is a party to an investment dispute with the other Party. If that investor is a natural person, who is a national of the other Party, that natural person shall not submit a claim to arbitration against that other Party;

**disputing parties** means the claimant and the respondent;

**disputing party** means either the claimant or the respondent;

**enterprise** means an enterprise as defined in Article 1.2 (General Definitions), and a branch of an enterprise;<sup>1 2</sup>

**enterprise of a Party** means an enterprise constituted or organised under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there;

**ICSID Additional Facility Rules** means the *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes*;

**ICSID Additional Facility Arbitration Rules** means the Rules that apply to any arbitration proceeding conducted pursuant to the ICSID Additional Facility Rules;

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<sup>1</sup> For greater certainty, a branch of an enterprise does not have any right to make any claim against any Party under this Agreement.

<sup>2</sup> For greater certainty, the inclusion of a “branch” in the definition of “enterprise” is without prejudice to a Party’s ability to treat a branch under its law as an entity that has no independent legal existence and is not separately organised.

**ICSID Convention** means the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, done at Washington, on 18 March 1965;

**investment** means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

- (a) an enterprise;
- (b) shares, stock and other forms of equity participation in an enterprise;
- (c) bonds, debentures, other debt instruments and loans;<sup>3</sup> <sup>4</sup>
- (d) futures, options and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing and other similar contracts;
- (f) intellectual property rights;
- (g) licences, authorisations, permits and similar rights conferred pursuant to domestic law;<sup>5</sup> and
- (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens and pledges.<sup>6</sup>

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<sup>3</sup> Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt are less likely to have such characteristics.

<sup>4</sup> A loan issued by one Party to the other Party is not an investment.

<sup>5</sup> Whether a particular type of licence, authorisation, permit or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licences, authorisations, permits and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the licence, authorisation, permit or similar instrument has the characteristics of an investment.

<sup>6</sup> For greater certainty, market share, market access, expected gains, and opportunities for profit-making are not, by themselves, investments.

The term “investment” does not include an order or judgment entered in a judicial or administrative action.

For purposes of this Agreement, a claim to payment that arises solely from the commercial sale of goods and services is not an investment, unless it is a loan that has the characteristics of an investment.

**investor of a non-Party** means, with respect to a Party, an investor that attempts to make,<sup>7</sup> is making, or has made an investment in the territory of that Party, that is not an investor of either Party;

**investor of a Party** means a Party, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party;

**New York Convention** means the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, done at New York, on 10 June 1958;

**non-disputing Party** means the Party that is not a party to an investment dispute;

**protected information** means confidential business information or information that is privileged or otherwise protected from disclosure under a Party’s law;

**respondent** means the Party that is a party to an investment dispute;

**Secretary-General** means the Secretary-General of ICSID; and

**UNCITRAL Arbitration Rules** means the arbitration rules of the United Nations Commission on International Trade Law, as revised in 2010 or as subsequently agreed between the Parties.

## Section B: Investment

### Article 11.2: Scope

1. This Chapter shall apply to measures adopted or maintained by a Party relating to:

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<sup>7</sup> For greater certainty, the Parties understand that, for purposes of the definitions of “investor of a non-Party” and “investor of a Party,” an investor “attempts to make” an investment when that investor has taken concrete action or actions to make an investment, such as channelling resources or capital in order to set up a business, or applying for a permit or licence.

- (a) investors of the other Party;
- (b) covered investments; and
- (c) with respect to Article 11.10, all investments in the territory of the Party.

2. For greater certainty, this Chapter does not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.

3. For purposes of this Chapter, “measures adopted or maintained by a Party” means measures adopted or maintained by:

- (a) central, regional or local governments and authorities; and
- (b) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.

4. This Chapter shall not apply to:

- (a) services supplied in the exercise of governmental authority within the territory of the respective Party. For purposes of this Chapter, a service supplied in the exercise of governmental authority means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers;
- (b) subsidies or grants provided by a Party; and
- (c) government procurement.
- (d) financial services as defined in Article 1.2 (General Definitions).

### **Article 11.3: Relation to Other Chapters**

1. In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.
2. A requirement by a Party that a service supplier of the other Party post a bond or other form of financial security as a condition of the cross-border supply of a service does not of itself make this Chapter applicable to measures adopted or maintained by the Party relating to such cross-border supply of the service. This Chapter shall apply to measures adopted or maintained by the

Party relating to the posted bond or financial security, to the extent that such bond or financial security is a covered investment.

#### **Article 11.4: National Treatment<sup>8</sup>**

1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.
2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.
3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favourable than the most favourable treatment accorded, in like circumstances, by that regional level of government to investors and to investments of investors, of the Party of which it forms a part.

#### **Article 11.5: Most-Favoured-Nation Treatment**

1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.
2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.
3. For greater certainty, the treatment referred to in this Article does not encompass international dispute resolution procedures or mechanisms, such as those included in Section C.

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<sup>8</sup> For greater certainty, whether treatment is accorded in “like circumstances” under Article 11.4 or 11.5 depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.

## **Article 11.6: Minimum Standard of Treatment<sup>9</sup>**

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard and do not create additional substantive rights. The obligation in paragraph 1 to provide:

- (a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
- (b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Agreement or of a separate international agreement, does not establish that there has been a breach of this Article.

4. For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor’s expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.

## **Article 11.7: Compensation for Losses**

1. Each Party shall accord to investors of the other Party and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to war or other armed conflict, revolt, insurrection, riot or other civil strife.

2. Notwithstanding paragraph 1, if an investor of a Party, in the situations referred to in paragraph 1, suffers a loss in the territory of the other Party resulting from:

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<sup>9</sup> This Article shall be interpreted in accordance with Annex 11-A.

- (a) requisitioning of its covered investment or part thereof by the latter's forces or authorities; or
- (b) destruction of its covered investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation,

the latter Party shall provide the investor restitution, compensation or both, as appropriate, for such loss.

#### **Article 11.8: Expropriation and Compensation<sup>10</sup>**

1. Neither Party shall expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation (expropriation), except:

- (a) for a public purpose;<sup>11</sup>
- (b) in a non-discriminatory manner;
- (c) on payment of prompt, adequate and effective compensation; and
- (d) in accordance with due process of law.

2. The compensation referred to in paragraph 1(c) shall:

- (a) be paid without delay;
- (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (the date of expropriation);
- (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and
- (d) be fully realisable and freely transferable.

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<sup>10</sup> This Article shall be interpreted in accordance with Annexes 11-A and 11-B.

<sup>11</sup> For the avoidance of doubt, if Malaysia is the expropriating Party, any measure of direct expropriation relating to land shall be for the purposes as set out in the *Land Acquisitions Act 1960*, *Land Acquisition Ordinance 1950 of the State of Sabah* and the *Land Code 1958 of the State of Sarawak*, as of the date of entry into force of this Agreement for it.

3. If the fair market value is denominated in a freely usable currency, the compensation referred to in paragraph 1(c) shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

4. If the fair market value is denominated in a currency that is not freely usable, the compensation referred to in paragraph 1(c), converted into the currency of payment at the market rate of exchange prevailing on the date of payment, shall be no less than:

- (a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date; plus
- (b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

5. This Article shall not apply to the issuance of compulsory licences granted in relation to intellectual property rights in accordance with the TRIPS Agreement.

### **Article 11.9: Transfers<sup>12</sup>**

1. Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include:

- (a) contributions to capital, including the initial contribution;
- (b) profits, dividends, capital gains and proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;
- (c) interest, royalty payments, management fees and technical assistance and other fees;
- (d) payments made under a contract, including a loan agreement;
- (e) payments made pursuant to Articles 11.7 and 11.8; and
- (f) payments arising out of a dispute.

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<sup>12</sup> For greater certainty, Annex 11-E shall apply to this Article.

2. Each Party shall permit transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer.

3. Each Party shall permit returns in kind relating to a covered investment to be made as authorised or specified in a written agreement between the Party and a covered investment or an investor of the other Party.

4. Notwithstanding paragraphs 1 through 3, a Party may prevent or delay a transfer through the equitable, non-discriminatory and good faith application of its laws<sup>13</sup> relating to:

- (a) bankruptcy, insolvency, or the protection of the rights of creditors;
- (b) issuing, trading, or dealing in securities, futures, options or derivatives;
- (c) criminal or penal offenses;
- (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or
- (e) ensuring compliance with orders or judgments in judicial or administrative proceedings.

5. Notwithstanding paragraph 3, a Party may restrict transfers of returns in kind in circumstances where it could otherwise restrict such transfers under this Agreement, including as set out in paragraph 4.

## **Article 11.10: Performance Requirements**

1. Neither Party shall, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of a Party or of a non-Party, impose or enforce any requirement or enforce any commitment or undertaking:<sup>14</sup>

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<sup>13</sup> For greater certainty, this Article does not preclude the equitable, non-discriminatory and good faith application of a Party's laws relating to its social security, public retirement or compulsory savings programs.

<sup>14</sup> For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 2 does not constitute a "commitment or undertaking" for purposes of this paragraph.

- (a) to export a given level or percentage of goods or services;
- (b) to achieve a given level or percentage of domestic content;
- (c) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
- (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
- (e) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
- (f) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory;
- (g) to supply exclusively from the territory of the Party the goods that such investment produces or the services that it supplies to a specific regional market or to the world market; or
- (h) to adopt a given rate or amount of royalty under a licence contract, in regard to any licence contract in existence at the time the requirement is imposed or enforced, or any future licence contract freely entered into between the investor and a person in its territory, provided that the requirement is imposed or enforced in a manner that constitutes direct interference with that licence contract by an exercise of non-judicial governmental authority of a Party.<sup>15</sup> For greater certainty, this subparagraph shall not apply when the licence contract is concluded between the investor and a Party.

2. Neither Party shall condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of a Party or of a non-Party, on compliance with any requirement:

- (a) to achieve a given level or percentage of domestic content;

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<sup>15</sup> For purposes of this subparagraph, a “licence contract” means any contract concerning the licensing of technology, a production process, or other proprietary knowledge.

- (b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
- (c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or
- (d) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

3. (a) Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

(b) Paragraphs 1(f) and 1(h) shall not apply:

- (i) when a Party authorises use of an intellectual property right in accordance with Article 31 or Article 31bis of the TRIPS Agreement, or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or
- (ii) when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under the Party's competition laws.<sup>16</sup>

(c) Paragraph 1(h) shall not apply if the requirement is imposed or enforced by a tribunal or competent authority as equitable remuneration under the Party's copyright laws and regulations.

(d) Provided that such measures are not applied in an arbitrary or unjustifiable manner, or provided that such measures do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), 1(c), 1(f), 2(a) and 2(b) shall not

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<sup>16</sup> The Parties recognise that a patent does not necessarily confer market power.

be construed to prevent a Party from adopting or maintaining measures, including environmental measures:

- (i) necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement;
- (ii) necessary to protect human, animal or plant life or health; or
- (iii) related to the conservation of living or non-living exhaustible natural resources.

(e) Paragraphs 1(a), 1(b), 1(c), 2(a) and 2(b), shall not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programmes.

(f) Paragraphs 2(a) and 2(b) shall not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

(g) Paragraph 1(h) shall not be construed to prevent a Party from adopting or maintaining measures to protect legitimate public welfare objectives, provided that such measures are not applied in an arbitrary or unjustifiable manner, or in a manner that constitutes a disguised restriction on international trade or investment.

4. For greater certainty, paragraphs 1 and 2 shall not apply to any commitment, undertaking or requirement other than those set out in those paragraphs.

5. This Article does not preclude enforcement of any commitment, undertaking or requirement between private parties, where a Party did not impose or require the commitment, undertaking or requirement.

#### **Article 11.11: Senior Management and Boards of Directors**

1. Neither Party shall require that an enterprise of that Party that is a covered investment appoint to senior management positions natural persons of any particular nationality.

2. A Party may require that a majority of the board of directors or any committee thereof, of an enterprise of that Party that is a covered investment, be

of a particular nationality or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

### **Article 11.12: Denial of Benefits**

1. A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise:

- (a) is owned or controlled by a person of a non-Party or of the denying Party; and
- (b) has no substantial business activities in the territory of the other Party.

2. A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.

### **Article 11.13: Non-Conforming Measures**

1. Articles 11.4, 11.5, 11.10 and 11.11 shall not apply to:

- (a) any existing non-conforming measure that is maintained by a Party at:
  - (i) the central level of government, as set out by that Party in its Schedule to Annex I,
  - (ii) a regional level of government, as set out by that Party in its Schedule to Annex I, or
  - (iii) a local level of government;<sup>17</sup>

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<sup>17</sup> For Korea, “local level of government” means a local government as defined in the *Local Autonomy Act*.

- (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
- (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 11.4, 11.5, 11.10 or 11.11.

2. Articles 11.4, 11.5, 11.10 and 11.11 shall not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II.

3. Neither Party shall, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to Annex II, require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

4. Articles 11.4 and 11.5 shall not apply to any measure that falls within Article 5 of the TRIPS Agreement, and any measure that is covered by an exception to, or derogation from, the obligations imposed by Article 3 or 4 of the TRIPS Agreement.

#### **Article 11.14: Special Formalities and Information Requirements**

1. Nothing in Article 11.4 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as a requirement that covered investments be legally constituted under its laws or regulations, provided that such formalities do not materially impair the protections afforded by the Party to investors of the other Party and covered investments pursuant to this Chapter.

2. Notwithstanding Articles 11.4 and 11.5, a Party may require an investor of the other Party or its covered investment to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect any confidential business information from any disclosure that would prejudice the competitive position of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.

### **Article 11.15: Subrogation**

If a Party, or any agency, institution, statutory body or corporation designated by it, makes a payment to an investor of the Party under a guarantee, a contract of insurance or other form of indemnity that it has entered into in respect of a covered investment, the other Party in whose territory the covered investment was made shall recognise the subrogation or transfer of any rights the investor would have possessed under this Chapter in respect of such covered investment but for the subrogation, and the investor shall be precluded from pursuing such rights to the extent of the subrogation.

## **Section C: Investor-State Dispute Settlement**

### **Article 11.16: Consultation and Negotiation**

1. In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures, such as good offices, conciliation or mediation.
2. The claimant shall deliver to the respondent a written request for consultations setting out a brief description of facts regarding the measure or measures at issue.
3. For greater certainty, the initiation of consultations and negotiations shall not be construed as recognition of the jurisdiction of the tribunal.

### **Article 11.17: Good Offices, Conciliation and Mediation**

The disputing parties may agree to engage in a third-party procedure such as good offices, conciliation or mediation, which may begin and be terminated at any time.

### **Article 11.18: Submission of a Claim to Arbitration**

1. If an investment dispute, has not been resolved within six months of the receipt by the respondent of a written request for consultations pursuant to Article 11.16.2:

- (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim:

- (i) that the respondent has breached an obligation under Section B; and
- (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and

(b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim:

- (i) that the respondent has breached an obligation under Section B; and
- (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

2. At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration (notice of intent). The notice shall specify:

- (a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address and place of incorporation of the enterprise;
- (b) for each claim, the provision of this Agreement alleged to have been breached and any other relevant provisions;
- (c) the legal and factual basis for each claim; and
- (d) the relief sought and the approximate amount of damages claimed.

3. The claimant may submit a claim referred to in paragraph 1:

- (a) under the ICSID Convention and the ICSID Arbitration Rules, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention;
- (b) under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention;
- (c) under the UNCITRAL Arbitration Rules; or

- (d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules.

4. A claim shall be deemed submitted to arbitration under this Section when the claimant's notice of, or request for, arbitration (notice of arbitration):

- (a) referred to in the ICSID Convention is received by the Secretary-General;
- (b) referred to in the ICSID Additional Facility Arbitration Rules is received by the Secretary-General;
- (c) referred to in the UNCITRAL Arbitration Rules, together with the statement of claim referred to in the UNCITRAL Arbitration Rules, are received by the respondent; or
- (d) referred to under any arbitral institution or arbitral rules selected under paragraph 3(d) is received by the respondent.

A claim asserted by the claimant for the first time after such notice of arbitration is submitted shall be deemed submitted to arbitration under this Section on the date of its receipt under the applicable arbitral rules.

Once the investor has alleged a breach of an obligation under Section B in any proceedings before a competent court or administrative tribunal of the Party in whose territory the investment has been admitted, or in any of the arbitration mechanisms set out in this paragraph, the choice of the proceeding shall be final and the investor shall not submit the dispute to a different forum.

5. The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Agreement.

6. The claimant shall provide with the notice of arbitration:

- (a) the name of the arbitrator that the claimant appoints; or
- (b) the claimant's written consent for the Secretary-General to appoint that arbitrator.

#### **Article 11.19: Consent of Each Party to Arbitration**

1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.

2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall satisfy the requirements of:

- (a) Chapter II (Jurisdiction of the Centre) of the ICSID Convention and the ICSID Additional Facility Rules for written consent of the parties to the dispute; and
- (b) Article II of the New York Convention for an “agreement in writing”.

#### **Article 11.20: Conditions and Limitations on Consent of Each Party**

1. No claim may be submitted to arbitration under this Section if more than three years and six months have elapsed from the date the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 11.18.1 and knowledge that the claimant (for claims brought under Article 11.18.1(a)) or the enterprise (for claims brought under Article 11.18.1(b)) has incurred loss or damage.

2. No claim may be submitted to arbitration under this Section unless:

- (a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and
- (b) the notice of arbitration is accompanied:
  - (i) for claims submitted to arbitration under Article 11.18.1(a), by the claimant’s written waiver; and
  - (ii) for claims submitted to arbitration under Article 11.18.1(b), by the claimant’s and the enterprise’s written waivers,

of any right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 11.18.

3. Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 11.18.1(a)) and the claimant or the enterprise (for claims brought under Article 11.18.1(b)) may initiate or continue an action that seeks injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action

is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.

4. (a) An investor of a Party may not initiate or continue a claim under this Section if a claim involving the same measure or measures alleged to constitute a breach under Article 11.18 and arising from the same events or circumstances is initiated or continued pursuant to an agreement between the respondent and a non-Party by:
  - (i) a person of a non-Party that owns or controls, directly or indirectly, the investor of a Party; or
  - (ii) a person of a non-Party that is owned or controlled, directly or indirectly, by the investor of a Party.
- (b) Notwithstanding subparagraph (a), the claim may proceed if the respondent agrees that the claim may proceed, or if the investor of a Party and the person of a non-Party agree to consolidate the claims under the respective agreements before a tribunal constituted under this Section.

### **Article 11.21: Selection of Arbitrators**

1. Unless the disputing parties agree otherwise, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.
2. The Secretary-General shall serve as appointing authority for an arbitration under this Section.
3. If a tribunal has not been constituted within 75 days of the date a claim is submitted to arbitration under this Section, the Secretary-General, on request of a disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed. The Secretary-General shall not appoint a national of either Party as the presiding arbitrator unless the disputing parties agree otherwise.
4. For purposes of Article 39 of the ICSID Convention and Rule 21 of the ICSID Additional Facility Arbitration Rules, and without prejudice to an objection to an arbitrator on a ground other than nationality:

- (a) the respondent agrees to the appointment of each individual member of a tribunal established under the ICSID Convention or the ICSID Additional Facility Arbitration Rules;
- (b) a claimant referred to in Article 11.18.1(a) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Arbitration Rules, only on condition that the claimant agrees in writing to the appointment of each individual member of the tribunal; and
- (c) a claimant referred to in Article 11.18.1(b) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Arbitration Rules, only on condition that the claimant and the enterprise agree in writing to the appointment of each individual member of the tribunal.

5. Arbitrators shall have expertise or experience in public international law, international trade or international investment law, or the resolution of disputes arising under international trade or international investment agreements. They shall be independent of, and not be affiliated with or take instructions from, either Party or disputing investors.

### **Article 11.22: Conduct of the Arbitration**

1. The disputing parties may agree on the legal place of any arbitration under the arbitral rules applicable under Article 11.18.3. If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with the applicable arbitral rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.

2. On request of a disputing party, and unless the disputing parties otherwise agree, the tribunal may determine the place of meetings, including consultations and hearings, taking into consideration appropriate factors, including the convenience of the parties and the arbitrators, the location of the subject matter and the proximity of evidence. The preceding sentence is without prejudice to any appropriate factors a tribunal may consider under paragraph 1.

3. Unless the disputing parties agree otherwise, English shall be the official language to be used in the entire arbitration proceedings, including all hearings, submissions, decisions and awards.

4. The non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement. On request of a

disputing party, the non-disputing Party should resubmit its oral submission in writing.

5. After consulting the disputing parties, the tribunal may allow a party or entity that is not a disputing party to file a written *amicus curiae* submission with the tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the tribunal shall consider, among other things, the extent to which:

- (a) the *amicus curiae* submission would assist the tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
- (b) the *amicus curiae* submission would address a matter within the scope of the dispute; and
- (c) the *amicus curiae* has a significant interest in the proceeding.

The tribunal shall ensure that the *amicus curiae* submission does not disrupt the proceeding or unduly burden or unfairly prejudice either disputing party and that the disputing parties are given an opportunity to present their observations on the *amicus curiae* submission.

6. Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favour of the claimant may be made under Article 11.28 or that a claim is manifestly without legal merit.

- (a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment.
- (b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question and issue a decision or award on the objection, stating the grounds therefor.
- (c) In deciding an objection under this paragraph that a claim submitted is not a claim for which an award in favour of the

claimant may be made under Article 11.28, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 20 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.

(d) The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 7.

7. In the event that the respondent so requests within 45 days of the date the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 6 and any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

8. When it decides a respondent's objection under paragraph 6 or 7, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

9. For greater certainty, if an investor of a Party submits a claim under this Section, including a claim alleging that a Party breached Article 11.6, the investor has the burden of proving all elements of its claims, consistent with general principles of international law applicable to international arbitration.

10. A respondent may not assert as a defence, counterclaim or right of set-off, or for any other reason, that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract, except with respect to any subrogation as provided for in Article 11.15.

11. A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal

may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 11.18. For purposes of this paragraph, an order includes a recommendation.

12. In any arbitration conducted under this Section, on request of a disputing party, a tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or award to the disputing parties. Within 60 days after the date the tribunal transmits its proposed decision or award, the disputing parties may submit written comments to the tribunal concerning any aspect of its proposed decision or award. The tribunal shall consider any such comments and issue its decision or award not later than 45 days after the date the 60-day comment period expires.

### **Article 11.23: Transparency of Arbitral Proceedings**

1. Subject to paragraphs 2 through 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Party and make them available to the public:

- (a) the notice of intent;
- (b) the notice of arbitration;
- (c) pleadings, memorials and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Articles 11.22.4, 11.22.5 and 11.27;
- (d) minutes or transcripts of hearings of the tribunal, where available; and
- (e) orders, awards and decisions of the tribunal.

2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

3. Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 15.1 (Disclosure of Information) or 15.4 (Security Exceptions).

4. Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:

- (a) Subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to the non-disputing Party or to the public any protected information where the disputing party that provided the information clearly designates it in accordance with subparagraph (b);
- (b) Any disputing party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal;
- (c) A disputing party shall, at the time it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the non-disputing Party and made public in accordance with paragraph 1;
- (d) The tribunal shall decide any objection by a disputing party regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may:
  - (i) withdraw all or part of its submission containing such information; or
  - (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (c).

In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under subparagraph (i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under subparagraph (ii) of the disputing party that first submitted the information; and

- (e) On request of a disputing Party, the Joint Committee shall consider issuing a decision in writing regarding a determination by the tribunal that information claimed to be protected was not properly designated. If the Joint Committee issues a decision within 90 days of such a request, it shall be binding on the

tribunal, and any decision or award issued by the tribunal must be consistent with that decision. If the Joint Committee does not issue a decision within 90 days, the tribunal's determination shall remain in effect only if the non-disputing Party submits a written statement to the Joint Committee within that period that it agrees with the tribunal's determination.

5. Nothing in this Section requires a respondent to withhold from the public information required to be disclosed by its laws.

#### **Article 11.24: Governing Law**

1. Subject to paragraph 2, when a claim is submitted under Article 11.18.1(a)(i) or 11.18.1(b)(i), the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.
2. A decision of the Joint Committee declaring its interpretation of a provision of this Agreement under Article 18.2.2(e) (Functions of the Joint Committee) shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision.

#### **Article 11.25: Interpretation of Annexes**

1. Where a respondent asserts as a defence that the measure alleged to be a breach is within the scope of an entry set out in Annex I or Annex II, the tribunal shall, on request of the respondent, request the interpretation of the Joint Committee on the issue. The Joint Committee shall submit in writing any decision declaring its interpretation under Article 18.2.2(e) (Functions of the Joint Committee) to the tribunal within 90 days of delivery of the request.
2. A decision issued by the Joint Committee under paragraph 1 shall be binding on the tribunal, and any decision or award issued by the tribunal must be consistent with that decision. If the Joint Committee fails to issue such a decision within 90 days, the tribunal shall decide the issue.

#### **Article 11.26: Expert Reports**

Without prejudice to the appointment of other kinds of experts where authorised by the applicable arbitration rules, a tribunal, on request of a disputing party or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

## **Article 11.27: Consolidation**

1. Where two or more claims have been submitted separately to arbitration under Article 11.18.1 and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 2 through 10.

2. A disputing party that seeks a consolidation order under this Article shall deliver, in writing, a request to the Secretary-General and to all the disputing parties sought to be covered by the order and shall specify in the request:

- (a) the names and addresses of all the disputing parties sought to be covered by the order;
- (b) the nature of the order sought; and
- (c) the grounds on which the order is sought.

3. Unless the Secretary-General finds within 30 days after receiving a request under paragraph 2 that the request is manifestly unfounded, a tribunal shall be established under this Article.

4. Unless all the disputing parties sought to be covered by the order otherwise agree, a tribunal established under this Article shall comprise three arbitrators:

- (a) one arbitrator appointed by agreement of the claimants;
- (b) one arbitrator appointed by the respondent; and
- (c) the presiding arbitrator appointed by the Secretary-General, provided, however, that the presiding arbitrator shall not be a national of either Party.

5. If, within 60 days after the Secretary-General receives a request made under paragraph 2, the respondent fails or the claimants fail to appoint an arbitrator in accordance with paragraph 4, the Secretary-General, on request of any disputing party sought to be covered by the order, shall appoint the arbitrator or arbitrators not yet appointed. If the respondent fails to appoint an arbitrator, the Secretary-General shall endeavour to appoint a national of the disputing

Party, and if the claimants fail to appoint an arbitrator, the Secretary-General shall endeavour to appoint a national of the non-disputing Party.

6. Where a tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration under Article 11.18.1 have a question of law or fact in common, and arise out of the same events or circumstances, the tribunal may, in the interest of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

- (a) assume jurisdiction over, and hear and determine together, all or part of the claims;
- (b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others; or
- (c) instruct a tribunal previously established under Article 11.21 to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that:
  - (i) that tribunal, on request of any claimant not previously a disputing party before that tribunal, shall be reconstituted with its original members, except that the arbitrator for the claimants shall be appointed pursuant to paragraphs 4(a) and 5; and
  - (ii) that tribunal shall decide whether any prior hearing shall be repeated.

7. Where a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration under Article 11.18.1 and that has not been named in a request made under paragraph 2 may make a written request to the tribunal that it be included in any order made under paragraph 6, and shall specify in the request:

- (a) the name and address of the claimant;
- (b) the nature of the order sought; and
- (c) the grounds on which the order is sought.

The claimant shall deliver a copy of its request to the Secretary-General.

8. A tribunal established under this Article shall conduct its proceedings in accordance with the UNCITRAL Arbitration Rules, except as modified by this Section.

9. A tribunal established under Article 11.21 shall not have jurisdiction to decide a claim, or a part of a claim, over which a tribunal established or instructed under this Article has assumed jurisdiction.

10. On application of a disputing party, a tribunal established under this Article, pending its decision under paragraph 6, may order that the proceedings of a tribunal established under Article 11.21 be stayed, unless the latter tribunal has already adjourned its proceedings.

### **Article 11.28: Awards**

1. Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only:

- (a) monetary damages and any applicable interest; and
- (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.

2. A tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules.

3. Subject to paragraph 1, where a claim is submitted to arbitration under Article 11.18.1(b):

- (a) an award of restitution of property shall provide that restitution be made to the enterprise;
- (b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and
- (c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.

4. A tribunal may not award punitive damages.

5. An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.

6. Subject to paragraph 7 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.

7. A disputing party may not seek enforcement of a final award until:
  - (a) in the case of a final award made under the ICSID Convention:
    - (i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award; or
    - (ii) revision or annulment proceedings have been completed; and
  - (b) in the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or the rules selected pursuant to Article 11.18.3(d):
    - (i) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award; or
    - (ii) a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.

8. Each Party shall provide for the enforcement of an award in its territory.

9. If the respondent fails to abide by or comply with a final award, the non-disputing Party may refer the matter to a dispute settlement panel under Chapter 16 (Dispute Settlement). The non-disputing Party may seek in such proceedings:

- (a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Agreement; and
- (b) a recommendation that the respondent abide by or comply with the final award.

10. A disputing party may seek enforcement of an arbitration award under the ICSID Convention or the New York Convention regardless of whether proceedings have been taken under paragraph 9.

11. A claim that is submitted to arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention.

## **Article 11.29: Service of Documents**

Delivery of notice and other documents on a Party shall be made to the place named for that Party in Annex 11-C.

## **Section D: Sub-Committee on Services and Investment**

### **Article 11.30: Sub-Committee on Services and Investment**

1. The Parties hereby establish a Sub-Committee on Services and Investment, comprising representatives of each Party.

2. The functions of the Sub-Committee on Services and Investment may include:

- (a) discussing and reviewing the implementation and operation of this Chapter, Chapters 8 (Cross-Border Trade in Services), 9 (Temporary Entry for Business Persons) and 10 (Telecommunications Services);
- (b) consulting any matter arising under this Agreement that affects cross-border trade in services, investment, temporary entry for business persons and telecommunications services;
- (c) promoting and facilitating cooperation on investment.

3. The Sub-Committee on Services and Investment may, as necessary, decide to make appropriate recommendations to the Parties for the more effective functioning or the attainment of the objectives of this Chapter, Chapters 8 (Cross-Border Trade in Services), 9 (Temporary Entry for Business Persons) and 10 (Telecommunications Services) in the areas of trade in services and investment;

4. Any decision of the Sub-Committee on Services and Investment shall be made by consensus.

5. The Sub-Committee on Services and Investment shall meet on request of either Party or the Joint Committee to consider any matter arising under this Chapter, Chapters 8 (Cross-Border Trade in Services), 9 (Temporary Entry for Business Persons) and 10 (Telecommunications Services).

### **Annex 11-A Customary International Law**

The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Article 11.6 and Annex 11-B results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 11.6, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

## **Annex 11-B Expropriation**

The Parties confirm their shared understanding that:

1. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right in an investment.
2. Article 11.8.1 addresses two situations. The first is direct expropriation, where an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure.
3. The second situation addressed by Article 11.8.1 is indirect expropriation, where an action or a series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
  - (a) The determination of whether an action or a series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
    - (i) the economic impact of the government action, although the fact that an action or a series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
    - (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations,<sup>18</sup> and
    - (iii) the character of the government action, including its objectives and context.<sup>19</sup>
  - (b) Non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare

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<sup>18</sup> For greater certainty, whether an investor's investment-backed expectations are reasonable depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector.

<sup>19</sup> For Korea, relevant considerations could include whether the government action imposes a special sacrifice on the particular investor or investment that exceeds what the investor or investment should be expected to endure for the public interest.

objectives, such as the protection of public health, safety, the environment, and real estate price stabilisation, do not constitute indirect expropriations.<sup>20</sup>

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<sup>20</sup> For greater certainty, the list of “legitimate public welfare objectives” in this subparagraph is not exhaustive.

## **Annex 11-C Service of Documents on a Party under Section C**

### **Korea**

Notices and other documents in disputes under Section C shall be served on Korea by delivery to:

International Investment Dispute Settlement Division  
Ministry of Justice of the Republic of Korea  
Government Complex, Gwacheon  
Korea

### **Malaysia**

Notices and other documents in disputes under Section C shall be served on Malaysia by delivery to:

Secretary General  
Ministry of Investment, Trade and Industry  
Menara MITI,  
No. 7, Jalan Sultan Haji Ahmad Shah,  
50480 Kuala Lumpur,  
MALAYSIA  
(Attn: Investment Policy and Trade Facilitation Division)

## **Annex 11-D Taxation and Expropriation**

The determination of whether a taxation measure, in a specific fact situation, constitutes an expropriation requires a case-by-case, fact-based inquiry that considers all relevant factors relating to the investment, including the factors listed in Annex 11-B and the following considerations:

- (a) The imposition of taxes does not generally constitute an expropriation. The mere introduction of a new taxation measure or the imposition of a taxation measure in more than one jurisdiction in respect of an investment generally does not in and of itself constitute an expropriation;
- (b) A taxation measure that is consistent with internationally recognised tax policies, principles, and practices should not constitute an expropriation. In particular, a taxation measure aimed at preventing the avoidance or evasion of taxation measures generally does not constitute an expropriation;
- (c) A taxation measure that is applied on a non-discriminatory basis, as opposed to a taxation measure that is targeted at investors of a particular nationality or at specific taxpayers, is less likely to constitute an expropriation; and
- (d) A taxation measure generally does not constitute an expropriation if it was already in force when the investment was made and information about the measure was publicly available.

## Annex 11-E Transfers

1. Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining temporary safeguard measures pursuant to the Party's laws and regulations with regard to payments and capital movements:

- (a) in the event of serious balance of payments or external financial difficulties or threat thereof; or
- (b) where, in exceptional circumstances, payments and capital movements cause or threaten to cause serious difficulties for the operation of monetary policy or exchange rate policy in either Party.

2. The measures referred to in paragraph 1 shall:

- (a) not exceed a period of 18 months; however, under exceptional circumstances and for justified reasons a Party may extend the period for application of such measures for an additional year. The Party seeking an extension shall notify in advance to the other Party of such extension;
- (b) be consistent with the *Articles of Agreement of the International Monetary Fund* (hereinafter referred to as the "Articles of Agreement");
- (c) not exceed those necessary to deal with the circumstances described in paragraph 1;
- (d) be temporary and phased out progressively as the situation described in paragraph 1 improves;
- (e) not be inconsistent with Article 11.8;<sup>21</sup>
- (f) promptly be notified to the other Party;
- (g) be applied on a national treatment basis;
- (h) ensure that the other Party is treated as favourably as any non-Party;

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<sup>21</sup> For greater certainty, measures referred to in paragraph 1 may be non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives as referred to in the paragraph 3(b) of Annex 11-B.

- (i) not restrict payments or transfers for current transactions, unless the imposition of such measures complies with the procedures stipulated in the Articles of Agreement; and
- (j) not restrict outward payments or transfers associated with foreign direct investment.<sup>22</sup>

3. For purposes of this Annex, “foreign direct investment” means a type of investment by an investor of a Party in the territory of the other Party, through which the investor exercises ownership or control over, or a significant degree of influence on the management of, an enterprise or other direct investment, and tends to be undertaken in order to establish a lasting relationship. For example, ownership of at least 10 percent of the voting power of an enterprise over a period of at least 12 months generally would be considered foreign direct investment.

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<sup>22</sup> For greater certainty, the Parties may exercise any controls on inward capital transfers as are necessary to regulate international capital movements in accordance with the Articles of Agreement. Such measures may include controls, such as an obligation to deposit part of the amount of such transactions.