

## **CHAPTER 10 INVESTMENT**

### **Article 10.1 : Objectives**

The objectives of this Chapter are to encourage and promote the flow of investment between the Parties on a mutually advantageous basis, under conditions of transparency within a stable framework of rules to ensure the protection and security of investments by investors of the other Party within each Party's territory, while recognising the right of the Parties to regulate and the responsibility of governments to protect public health, safety and the environment.

### **Article 10.2 : Definitions**

For the purposes of this Chapter:

**appointing authority** means:

- (a) in the case of arbitration under the ICSID or ICSID Additional Facility Rules in Article 10.20.3(a) and (b), the Secretary-General of ICSID, and in the case of arbitration under the UNCITRAL Rules in Article 10.20.3(c), the Secretary General of the Permanent Court of Arbitration; or
- (b) any person as agreed between the disputing parties;

**claimant** means an investor of a Party that is a party to an investment dispute with the 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 1.5 (Definitions), and a branch of an enterprise;

**enterprise of a Party** means an enterprise constituted or organised under the domestic laws 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 Convention** means the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, done at Washington, 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, stocks or other forms of equity participation in an enterprise, including rights derived therefrom;
- (c) bonds, including government issued bonds, debentures, and loans<sup>1</sup> and other forms of debt, and rights derived therefrom;
- (d) futures, options and other derivatives;
- (e) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;
- (f) intellectual property rights;
- (g) rights conferred pursuant to law or contract such as concessions, licences, authorisations, and permits;<sup>2 3</sup> and
- (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges;<sup>4</sup>

**investor of a non-Party** means, with respect to a Party, an investor that attempts to make, 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 state enterprise thereof, 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; provided that in any dispute related to an investment of an investor of the Party, a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality;

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

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<sup>1</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 such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.

<sup>2</sup> Whether a particular type of license, 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 licenses, 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 license, authorisation, permit, or similar instrument has the characteristics of an investment.

<sup>3</sup> The term “investment” does not include an order or judgment entered in a judicial or administrative action.

<sup>4</sup> For greater certainty, market share, market access, expected gains, and opportunities for profit-making are not, by themselves, investments.

**non-disputing Party** means a 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 domestic laws and regulations, including classified government information;

**respondent** means a Party against which a claim is made under Section B; 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 A : Investment**

### **Article 10.3 : Scope**

1. This Chapter applies to measures adopted or maintained by a Party relating to:
  - (a) investors of the other Party;
  - (b) covered investments; and
  - (c) with respect to Articles 10.11 and 10.13, all investments in the territory of the Party.
2. For greater certainty, the provisions of this Chapter do 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. This Chapter shall not apply to services supplied in the exercise of governmental authority, as defined in Article 8.2 (Definitions).
4. This Chapter shall not apply to financial services as defined in Article 8.2 (Definitions).

### **Article 10.4 : 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 applies 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 10.5 : National Treatment**

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.

#### **Article 10.6 : 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, including those in Section B.

#### **Article 10.7 : Minimum Standard of Treatment<sup>5</sup>**

1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment, including fair and equitable treatment and full protection and security.
2. For greater certainty, the concepts of fair and equitable treatment and full protection and security set out in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment and do not create additional substantive rights. The obligation in paragraph 1 to provide:

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<sup>5</sup> This Article shall be interpreted in accordance with Annex 10-A.

- (a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the general principle of law of due process; and
- (b) “full protection and security” requires each Party to take such measures as may be reasonably necessary in the exercise of its police powers to ensure the protection and security of the investment.

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.

### **Article 10.8 : Treatment in Case of Armed Conflict or Civil Strife**

1. Notwithstanding Article 10.15.5(b), each Party shall accord to investors of the other Party, and to covered investments, treatment no less favourable than that which the Party accords to its own investors and their investments, or investors of any non-Party and their investments, with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to war or other armed conflict, or 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:

- (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.<sup>6</sup> Any compensation shall be prompt, adequate, and effective in accordance with paragraphs 2 through 4 of Article 10.9.

3. Paragraph 1 does not apply to existing measures relating to subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance, that would be inconsistent with Article 10.5 but for Article 10.15.5(b).

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<sup>6</sup> For great certainty, in the event of providing both restitution and compensation, their combined value shall not exceed the loss suffered.

## **Article 10.9 : Expropriation and Compensation<sup>7</sup>**

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

- (a) for a public purpose;
- (b) in a non-discriminatory manner;
- (c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2 through 4; and
- (d) in accordance with due process of law.

2. Compensation shall:

- (a) be paid without delay;
- (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (hereinafter referred to as “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.

3. If the fair market value is denominated in a freely usable currency, the compensation paid 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 paid, 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 does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance,

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<sup>7</sup> This Article shall be interpreted in accordance with Annex 10-B.

revocation, limitation, or creation is consistent with Chapter 11 (Intellectual Property Rights).<sup>8</sup>

### **Article 10.10 : Transfers**

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, interest, capital gains, royalty payments, management fees, and technical assistance and other fees;
- (c) proceeds from the sale of all or any part of a covered investment or from the partial or complete liquidation of a covered investment;
- (d) payments made under a contract entered into by the investor, or a covered investment, including payments made pursuant to a loan agreement;
- (e) payments made pursuant to Articles 10.8 and 10.9;
- (f) payments arising out of the settlement of a dispute; and
- (g) earnings and other remuneration of personnel engaged from abroad in connection with that investment.

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. Notwithstanding paragraphs 1 and 2, a Party may prevent or delay a transfer through the equitable, non-discriminatory, and good faith application of its domestic laws and regulations 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) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;
- (d) criminal or penal offenses;
- (e) ensuring compliance with orders or judgements in judicial or administrative proceedings;

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<sup>8</sup> For greater certainty, the Parties recognise that, for the purposes of this Article, the term “revocation” of intellectual property rights includes the cancellation or nullification of such rights, and the term “limitation” of intellectual property rights includes exceptions to such rights.

- (f) social security, public retirement or compulsory savings schemes; or
- (g) taxation.

### **Article 10.11 : 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>9</sup>

- (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; or
- (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.

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;
- (b) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;

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<sup>9</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 the purposes of this paragraph.



- (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. 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.

4. Paragraph 1(f) does not apply:

- (a) when a Party authorises use of an intellectual property right in accordance with Article 31 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
- (b) 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 anti-competitive under the Party's competition laws.<sup>10</sup>

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

6. Paragraphs 1(b), (c), (f), and (g), and 2(a) and (b), do not apply to government procurement.

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

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

9. 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.

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<sup>10</sup> The Parties recognise that a patent does not necessarily confer market power.

### **Article 10.12 : 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 10.13 : Investment and Environment**

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

### **Article 10.14 : Denial of Benefits**

1. Subject to notification<sup>11</sup> to the other Party, a Party may deny the benefits of this Chapter to:
  - (a) investors of the other Party and to the investments of that investor where the investment is being made by an enterprise that is owned or controlled by persons of a non-Party and the enterprise has no substantive business operations in the territory of the other Party; or
  - (b) investors of the other Party and to the investments of that investor where the investment is being made by an enterprise that is owned or controlled by persons of the denying Party and the enterprise has no substantive business operations in the territory of the other Party.
2. A Party that denies benefits pursuant to paragraph 1 shall enter into consultations promptly following notification on the request of the other Party. Such consultations shall be without prejudice to the Parties' rights under Chapter 19 (Dispute Settlement) and under the *WTO Understanding on Rules and Procedures Governing the Settlement of Disputes*.

### **Article 10.15 : Non-Conforming Measures**

1. Articles 10.5, 10.6, 10.11 and 10.12 shall not apply to:

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<sup>11</sup> A Party shall, to the extent practicable, provide such notification to the other Party prior to denying the benefits of this Chapter.

- (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; or
    - (ii) a local level of government;
  - (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 10.5, 10.6, 10.11 and 10.12.
2. Articles 10.5, 10.6, 10.11 and 10.12 do 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 10.5 and 10.6 do not apply to any measure that is an exception to, or derogation from, a Party's obligations under the TRIPS Agreement, as specifically provided for in that agreement.
5. Articles 10.5, 10.6 and 10.12 do not apply to:
- (a) government procurement; or
  - (b) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.
6. The Parties will endeavour to progressively remove the non-conforming measures.

#### **Article 10.16 : Special Formalities and Information Requirements**

1. Nothing in Article 10.5 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 the laws or regulations of the Party, 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 10.5 and 10.6, 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 10.17 : Subrogation**

1. If a Party (or any agency, institution, statutory body or corporation designated by it) makes a payment to an investor of that Party under a guarantee, a contract of insurance or other form of indemnity against non-commercial risks it has granted in respect of an investment, the other Party shall recognise the subrogation or transfer of any right or title in respect of such investment. The subrogated or transferred right or claim shall not be greater than the original right or claim of the investor.

2. Where a Party (or any agency, institution, statutory body or corporation designated by it) has made a payment to an investor of that Party and has taken over rights and claims of the investor, that investor shall not, unless authorised to act on behalf of the Party (or any agency, institution, statutory body or corporation designated by it) making the payment, pursue those rights and claims against the other Party.

### **Section B: Investor State Dispute Settlement**

#### **Article 10.18 : Settlement of Investment Disputes between a Party and an Investor of the other Party**

1. This Section shall apply to disputes between a Party and an investor of the other Party concerning an alleged breach by the former Party of an obligation under Section A directly concerning a covered investment of the investor of that other Party, provided that such breach causes loss or damage to the investor or its investments.

2. This Section shall not apply to investment disputes which have occurred prior to the entry into force of this Agreement.

3. A national possessing the nationality or citizenship of a Party shall not pursue a claim against that Party under this Section. If a national also possesses the nationality or citizenship of a non-Party, he or she shall be deemed to be exclusively a national of the state of his or her dominant and effective nationality.

### **Article 10.19 : Consultation and Negotiation**

1. In the event of an investment dispute, the claimant and the respondent shall, as far as possible, seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures.
2. The claimant shall deliver to the respondent a written request for consultations setting forth 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 10.20 : 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 10.19.2, the claimant, on its own behalf, may submit to arbitration under this Section a claim:
  - (a) that the respondent has breached an obligation under Section A, relating to the management, conduct, operation, or sale or other disposition of a covered investment; and
  - (b) that the claimant 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 (hereinafter referred to as a “notice of intent”). The notice of intent shall specify:
  - (a) the name and address of the claimant;
  - (b) for each claim, the provision of Section A alleged to have been breached and any other relevant provisions of this Agreement;
  - (c) the legal and factual basis for each claim; and
  - (d) the relief sought and the approximate amount of damages claimed.
3. A claimant may submit a claim referred to in paragraph 1 under one of the following alternatives:
  - (a) the ICSID Convention and the ICSID *Rules of Procedure for Arbitration Proceedings*, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention;
  - (b) the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention;

- (c) 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 (hereinafter referred to as "notice of arbitration"):

- (a) referred to in the ICSID Convention is received by the Secretary-General;
- (b) referred to in the ICSID Additional Facility 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.

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 appointing authority to appoint that arbitrator.

#### **Article 10.21 : 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 be deemed to 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 10.22 : Conditions and Limitations on Consent of Each Party**

1. No claim shall 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, whichever is the earlier, of a breach of an obligation under Section A causing loss or damage to the claimant.
2. No claim shall 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 by the claimant’s written waiver of any right to initiate or continue before any administrative tribunal or court under the domestic laws of either Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.20.
3. Notwithstanding paragraph 2(b), the claimant may initiate or continue an action that seeks interim 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 rights and interests during the pendency of the arbitration.

### **Article 10.23 : Selection of Arbitrators**

1. Unless the disputing parties otherwise agree, 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 appointing authority shall serve as appointing authority for an arbitration under this Section.
3. If an arbitral tribunal has not been established within 75 days of the date on which the claim was submitted to arbitration, the appointing authority, on the request of either disputing party, shall appoint, at its own discretion, the arbitrator or arbitrators not yet appointed. The appointing authority shall not appoint a national or permanent resident of either Party as the presiding arbitrator unless the disputing parties otherwise agree.
4. For the purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility 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 Rules; and
- (b) a claimant referred to in Article 10.20.1 may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant agrees in writing to the appointment of each individual member of the tribunal.

#### **Article 10.24 : Place of Arbitration**

1. The disputing parties may agree on the legal place of any arbitration under the arbitral rules applicable under Article 10.20.3. 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 the request of a disputing party, and unless the disputing parties otherwise agree, the tribunal may determine the location 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.

#### **Article 10.25 : Interpretation of Agreement**

1. The tribunal shall, on the request of the respondent, request a joint interpretation of the Joint Commission of any provision of this Agreement that is in issue in a dispute. The Joint Commission shall submit in writing any joint decision declaring its interpretation to the tribunal within 60 days of delivery of the request.

2. A joint decision issued under paragraph 1 by the Joint Commission shall be binding on the tribunal, and any award must be consistent with that joint decision. If the Joint Commission fails to issue such a decision within 60 days, the tribunal shall decide the issue on its own account.

3. The non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement. On the request of a disputing party, the non-disputing Party shall resubmit its oral submissions in writing.

#### **Article 10.26 : Conduct of the Arbitration**

1. The tribunal shall have the authority to accept and consider written *amicus curiae* submissions that may assist the tribunal in evaluating the submissions and arguments of the disputing parties from a person or entity that is not a disputing party. In determining whether



to accept such a filing, the tribunal shall consider, among other things, the extent to which the *amicus curiae* has a significant interest in the proceeding. The tribunal shall provide the disputing parties with an opportunity to respond to such written submissions.

2. Without prejudice to a tribunal's authority to address other objections as a preliminary question, such as an objection that a dispute is not within the competence of the tribunal, including an objection to the tribunal's jurisdiction, 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 10.30:

- (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, the tribunal shall assume to be true the 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 the relevant Article of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute; or
- (d) the respondent does not waive any objection as to competence, including an objection to jurisdiction, 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 3.

3. In the event that the respondent so requests within 45 days of the tribunal being constituted, the tribunal shall decide on an expedited basis an objection under paragraph 2 or any objection that the dispute is not within the tribunal's competence, including an objection that the dispute is not within the tribunal's jurisdiction. 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.

4. When it decides a respondent's objection under paragraph 2 or 3, 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.

5. A respondent shall not assert as a defence, counterclaim, 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.

6. 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 shall not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 10.20. For the purposes of this paragraph, an order includes a recommendation.

7. In any arbitration conducted under this Section, on the 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 and non-disputing Party. Within 60 days of the tribunal transmitting 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 expiration of the 60 day comment period.

8. The interim review procedure of disputing parties for the proposed decision or award in paragraph 7 shall not apply in any arbitration conducted pursuant to this Section for which an appeal has been made available pursuant to paragraph 9.

9. If a separate multilateral agreement enters into force between the Parties that establishes an appellate body for the purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment arrangements to hear investment disputes, the Parties shall strive to reach an agreement that would have such appellate body review decisions and awards rendered under this Article and Article 10.30 in arbitrations commenced after the multilateral agreement enters into force between the Parties.

10. Unless the disputing parties otherwise agree, consistent with the applicable arbitration rules, English and Korean shall be the official languages to be used in the entire arbitration proceedings, including all hearings, submissions, decisions, and awards.

#### **Article 10.27 : 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 publicly available:

- (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 10.25.3 and 10.26.1;
- (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 which may include closing the hearing for the duration of any discussion of protected information.

3. Nothing in this Section, including paragraph 4(d), requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 20.2 (Security Exceptions) or 20.7 (Disclosure of Information).

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 any 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 according to any schedule set by the tribunal;
- (c) a disputing party shall, according to any schedule set by the tribunal, submit a redacted version of the document that does not contain the information. Only the redacted version shall be disclosed in accordance with paragraph 1;
- (d) the tribunal, subject to paragraph 3, 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 sub-subparagraph (i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under sub-subparagraph (ii) of the disputing party that first submitted the information; and

- (e) On the request of a respondent, the Joint Commission 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 Commission issues a decision within 60 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 Commission does not issue a decision within 60 days, and provided that the non-disputing Party submits a written statement to the Joint Commission within that period that it agrees with the tribunal's determination, the tribunal's determination shall remain in effect.

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

#### **Article 10.28 : Governing Law**

1. Subject to paragraph 2, when a claim is submitted under Article 10.20.1, 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 Commission on the interpretation of a provision of this Agreement under Article 18.2.2 shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision.

#### **Article 10.29 : Consolidation**

1. Where two or more claims have been submitted separately to arbitration under Article 10.20.1 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 appointing authority 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 appointing authority finds within 30 days of 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 appointing authority, provided, however, that the presiding arbitrator shall not be a national of either Party.

5. If, within 60 days of the appointing authority receives a request made under paragraph 2, the respondent fails or the claimants fail to appoint an arbitrator in accordance with paragraph 4, the appointing authority, on the 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 appointing authority shall endeavour to appoint a national of the respondent, and if the claimants fail to appoint an arbitrator, the appointing authority 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 10.20.1 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 10.23 to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that:
  - (i) that tribunal, on the 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 10.20.1 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 appointing authority.

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 10.23 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 10.23 be stayed, unless the latter tribunal has already adjourned its proceedings.

### **Article 10.30 : 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. For greater certainty, when an investor of a Party submits a claim to arbitration under Article 10.20.1, it may recover only for loss or damage that it has incurred in its capacity as an investor of a Party.

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

4. A tribunal shall 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 shall 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 10.20.3(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 ensure that an award can be recognised and enforced in its jurisdiction.

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

### **Article 10.31 : Service of Documents**

Delivery of notice and other documents on a Party shall be made to the place named for that Party in Annex 10-D.

## **ANNEX 10-A**

### **CUSTOMARY INTERNATIONAL LAW**

The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Article 10.7 results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.7, 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 10-B

### EXPROPRIATION

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. Expropriation may be either direct or indirect:
  - (a) direct expropriation occurs when a Party takes an investor's property outright, by nationalisation or other direct expropriation through formal transfer of title or outright seizure; and
  - (b) indirect expropriation occurs when a Party takes an investor's property through an action or a series of actions which have an effect equivalent to direct expropriation, without formal transfer of title or outright seizure.
3. 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:
  - (a) 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;
  - (b) whether the government action breaches the government's prior binding written commitment to the investor whether by contract, licence or other legal document; and
  - (c) the character of the government action including its objectives and context.<sup>12</sup>
4. In order to constitute indirect expropriation, the Party's deprivation of the investor's property must be so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith.
5. Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, the environment, and real estate price stabilisation (through, for example, measures to improve the housing conditions for low-income households), do not constitute indirect expropriations.<sup>13</sup>

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<sup>12</sup> For actions taken by Korea, a relevant consideration could include whether the investor bears a disproportionate burden such as a special sacrifice that exceeds what the investor or investment should be expected to endure for the public interest.

<sup>13</sup> For greater certainty, the list of "legitimate public welfare objectives" in this paragraph is not exhaustive.

## **ANNEX 10-C**

### **SUBMISSION OF A CLAIM TO ARBITRATION**

#### **Korea**

1. Notwithstanding Article 10.22.2, an investor of New Zealand shall not submit to arbitration under Section B a claim that Korea has breached an obligation under Section A, if the investor has alleged that breach of an obligation under Section A in any proceedings before a court or administrative tribunal of Korea.

2. For greater certainty, where an investor of New Zealand makes an allegation that Korea has breached an obligation under Section A before a court or administrative tribunal of Korea, that election shall be final, and the investor shall not thereafter allege that breach in an arbitration under Section B.

**ANNEX 10-D**

**SERVICE OF DOCUMENTS ON A PARTY UNDER SECTION B**

**Korea**

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

International Legal Affairs Division  
Ministry of Justice of the Republic of Korea  
Building #1, Government Complex-Gwacheon  
47, Gwanmun-ro, Gwacheon-si, Gyeonggi-do  
Republic of Korea

**New Zealand**

Notices and other documents in disputes under Section B shall be served on New Zealand by delivery to:

The Secretary  
Ministry of Foreign Affairs and Trade  
195 Lambton Quay  
Private Bag 18-901  
Wellington  
New Zealand

## ANNEX 10-E

### 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 10-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 within 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.