

## **CHAPTER 9 INVESTMENT**

### **Section A : Investment**

#### **Article 9.1 : Scope**

1. This Chapter shall apply to measures adopted or maintained by a Party relating to:
  - (a) investors of the other Party;
  - (b) covered investments; and
  - (c) with respect to Article 9.9, all investments in the territory of the Party.<sup>1</sup>
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. This Chapter shall not apply to:
  - (a) measures adopted or maintained by a Party relating to government procurement;
  - (b) subsidies or grants provided by a Party or to any condition attached to the receipt or continued receipt of such subsidies or grants, except for Article 9.9, whether or not such subsidies or grants are offered exclusively to domestic investors or investments; or
  - (c) measures adopted or maintained by a Party affecting the supply of services by a service supplier of the other Party in its territory pursuant to Chapter 8 (Trade in Services) regardless of whether or not specific services sectors<sup>2</sup> are scheduled in the Party's Schedule of Specific Commitments in Annex 8-D (Schedule of Specific Commitments).
4. Notwithstanding subparagraph 3(c), Articles 9.5 through 9.8 and 9.14, and Section B<sup>3</sup> shall apply, *mutatis mutandis*, to any measure affecting the supply of service by a service

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<sup>1</sup> For greater certainty, an investor of a non-Party shall not claim any right based on this Chapter.

<sup>2</sup> For the purposes of the relationship between Chapter 8 (Trade in Services) and this Chapter, the Parties confirm that services encompass any service in any sector including, but not limited to those classified in service sectors, subsectors and activities under the Services Sectoral Classification List of the WTO contained in the document MTN.GNS/W/120, dated 10 July 1991.

<sup>3</sup> For greater certainty, the Annexes and exceptions to the above mentioned Articles are an integral part of this paragraph.

supplier of a Party through commercial presence<sup>4</sup> in the territory of the other Party pursuant to the provisions of Chapter 8 (Trade in Services), only to the extent that they relate to a covered investment.

### **Article 9.2 : Relation to Chapter 8 (Trade in Services)**

In the event of any inconsistency between this Chapter and Chapter 8 (Trade in Services), Chapter 8 (Trade in Services) shall prevail to the extent of the inconsistency.

### **Article 9.3 : National Treatment**

Each Party shall accord to investors of the other Party, and to their covered investments, treatment no less favorable than that it accords, in like circumstances, to its own investors and 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 in its territory.

### **Article 9.4 : Most-Favored-Nation Treatment**

1. Each Party shall accord to investors of the other Party treatment no less favorable 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 favorable 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. The treatment, as set out in paragraphs 1 and 2, shall not include:

- (a) any preferential treatment accorded to investors or their investments under any existing bilateral, regional or international agreements or any forms of economic or regional cooperation with any non-Party; and
- (b) any existing or future preferential treatment accorded to investors or their investments in any agreement or arrangement between or among ASEAN Member States.

4. Notwithstanding paragraphs 1 and 2, if a Party accords more favorable treatment to investors of any non-Party or their investments by virtue of any future agreements or arrangements to which the Party is a party, it shall not be obliged to accord such treatment to investors of the other Party or their investments. However, upon request of the other Party, it shall accord adequate opportunity to negotiate the benefits granted therein.

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<sup>4</sup> Commercial presence shall have the same meaning as that in Chapter 8 (Trade in Services).

## **Article 9.5 : Standard of Treatment<sup>5</sup>**

1. Each Party shall accord to covered investments fair and equitable treatment and full protection and security in accordance with customary international law.
2. The concepts of “fair and equitable treatment” and “full protection and security” in this Article do not require treatment in addition to or beyond that which is required by the applicable rules of customary international law and do not create additional substantive rights. For greater certainty:
  - (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; and
  - (b) “full protection and security” requires each Party to provide the level of police protection related to physical security of covered investments 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.

## **Article 9.6 : Compensation for Losses**

1. Each Party shall accord to investors of the other Party, and to covered investments, treatment no less favorable than that accorded, in like circumstances, to its own investors or to investors of any non-Party, with respect to measures it adopts or maintains relating to losses suffered by investments in its territory due 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. Any compensation shall be prompt, adequate, and effective.

## **Article 9.7 : Expropriation and Compensation<sup>6</sup>**

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<sup>5</sup> This Article shall be interpreted in accordance with Annex 9-A.

<sup>6</sup> This Article shall be interpreted in accordance with Annex 9-B.

1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (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; and
- (d) in accordance with due process of law.

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

- (a) be paid without undue delay;
- (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation occurred, or at the time when the expropriation was publicly announced, whichever is applicable;
- (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and
- (d) be fully realizable and freely transferable.

3. The compensation referred to in subparagraph 1(c) shall include appropriate interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment. The compensation, including any accrued interest, shall be payable either in the currency of the expropriating Party, or if requested by the investor, in a freely usable currency.

4. If an investor requests payment in a freely usable currency, the compensation referred to in subparagraph 1(c), including any accrued interest, shall be converted into the currency of payment at the market rate of exchange prevailing on the date of payment.

5. Notwithstanding paragraphs 1 through 4, in the case where Viet Nam is the expropriating Party, any measure of expropriation relating to land, which shall be as defined in its existing domestic laws and regulations on the date of entry into force of this Agreement, shall be, for a purpose, and upon payment, of compensation, made in accordance with the aforesaid laws and regulations. Such compensation shall be subject to any subsequent amendment to the aforesaid laws and regulations relating to the amount of compensation where such amendment follows the general trends in the market value of the land.

6. This Article shall not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation, or creation of intellectual property rights, in accordance with the TRIPS Agreement.

## **Article 9.8 : Transfers<sup>7</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) the initial capital and additional amounts to maintain or increase the investment;
  - (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 9.6 and 9.7; and
  - (f) payments arising out of the settlement of a dispute.
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 authorized 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 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) criminal or penal offenses;
  - (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;
  - (e) ensuring compliance with orders or judgments in judicial or administrative proceedings;
  - (f) social security, public retirement or compulsory savings scheme;
  - (g) severance entitlement of employees; and

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<sup>7</sup> For greater certainty, Annex 9-C applies to this Article.

- (h) taxation.

### **Article 9.9 : Performance Requirements**

1. Neither Party shall impose or enforce any of the following requirements, relating to 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:

- (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;
- (c) to relate the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with investments of the investor;
- (d) to restrict sales of goods in its territory that such investment of the investor produces or provides by relating such sales to the volume or value of its exports or foreign exchange earnings;
- (e) to export a given level or percentage of goods;
- (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 that Party the goods that such investment produces to a specific regional market or to the world.

2. Paragraph 1 shall not be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, relating to the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of the other Party or a non-Party, on compliance with any of the requirements set forth in subparagraphs 1(e) through 1(g).

3. For greater certainty, paragraphs 1 and 2 shall not apply to any requirement other than the requirements set out in those paragraphs.

4. This Article does not preclude enforcement of any commitment, undertaking, or requirement between private parties.

5. Nothing in this Article shall be construed to derogate from the rights and obligations of the Parties under the *Agreement on Trade-Related Investment Measures* in Annex 1A to the WTO Agreement.

### **Article 9.10 : Senior Management and Boards of Directors**

1. Neither Party may require an enterprise of that Party that is a covered investment to 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 9.11 : 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:
  - (a) persons of a non-Party own or control the enterprise; and
  - (b) 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.
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 the enterprise has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise. The denying Party shall, to the extent practicable, notify the other Party before denying the benefits. If the denying Party provides such notice, it shall consult with the other Party upon the other Party's request.

#### **Article 9.12 : Non-Conforming Measures**

1. Articles 9.3, 9.4, 9.9, and 9.10 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 Annex I; or
    - (ii) a local level of government;<sup>8</sup>
  - (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 at the date of entry into force of Annex I, with Articles 9.3, 9.4, 9.9, and 9.10.

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<sup>8</sup> For Korea, "local level of government" means a local government as defined in the *Local Autonomy Act*.

2. Articles 9.3, 9.4, 9.9, and 9.10 shall not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in Annex II.

3. Neither Party may, under any measure adopted after the date of entry into force of this Agreement and covered by 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. Nothing in this Chapter shall be construed to derogate from the rights and obligations under international agreements in respect of protection of intellectual property rights to which the Parties are party, including the TRIPS Agreement and other treaties concluded under the auspices of the World Intellectual Property Organization.

5. The Parties shall begin negotiations on Annexes I and II immediately after the entry into force of this Agreement with a view to concluding them within one year from the date of entry into force of this Agreement:

- (a) Articles 9.3, 9.4, 9.9, and 9.10 shall not apply until Annexes I and II have entered into force; and
- (b) The Parties shall make best endeavor to reflect the most advanced level of liberalization commitments in the Schedules of their agreements on investment at the time of the negotiations to ensure the overall balance of benefits of the Parties.<sup>9</sup>

### **Article 9.13 : Special Formalities and Information Requirements**

1. Nothing in Article 9.3 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 domestic laws and regulations,<sup>10</sup> 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 9.3 and 9.4, 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 domestic laws and regulations.

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<sup>9</sup> For greater certainty, the negotiations on Schedules to Annexes I and II do not affect the scope of this Chapter and paragraphs 1 through 4 of this Article.

<sup>10</sup> For greater certainty, for Viet Nam, this requirement includes the requirement that the covered investment to be registered in accordance with the laws and regulations of Viet Nam.



## **Article 9.14 : Subrogation**

1. Where a Party or an agency authorized by that Party has granted a contract of insurance or any form of financial guarantee against non-commercial risks with regard to a covered investment by one of its investors in the territory of the other Party and when payment has been made under this contract or financial guarantee by the former Party or the agency authorized by it, the latter Party shall recognize the rights of the former Party or the agency authorized by the former Party by virtue of the principle of subrogation to the rights of the investor.<sup>11</sup>

2. Where a Party or the agency authorized by the Party has made a payment to its investor and has taken over the rights and claims of the investor, that investor shall not, unless authorized to act on behalf of the Party or the agency authorized by the Party, making the payment, pursue those rights and claims against the other Party.

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

### **Article 9.15 : Scope of Investor-State Dispute Settlement<sup>12</sup>**

1. This Section shall apply to investment disputes between a Party and an investor of the other Party concerning a claim that the former Party has breached an obligation under Section A, other than Articles 9.11 through 9.14 and the breach has caused loss or damage, by reason of, or arising out of, that breach to:

- (a) the investor in relation to its covered investments; or
- (b) the covered investment that has been made by that investor,

relating to the management, conduct, operation or sale or other disposition of a covered investment.

2. A natural person possessing the nationality or citizenship of a Party shall not pursue a claim against that Party under this Chapter.

### **Article 9.16 : Consultation and Negotiation**

In the event of an investment dispute, the disputing investor and the disputing Party shall initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding third-party procedures. Consultations shall be held within 30 days of the submission of the notice of intent to submit a claim to arbitration, unless the disputing parties agree otherwise.

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<sup>11</sup> For greater certainty, the subrogated or transferred right or claim shall not be greater than the original right or claim of the investor.

<sup>12</sup> An investment may not make a claim under this Section.

### **Article 9.17 : Notice of Intent to Submit a Claim to Arbitration**

1. The disputing investor shall deliver to the disputing Party written notice of its intent to submit a claim to arbitration (hereinafter referred to as the “Notice of Intent”) at least 90 days before submitting the claim. The Notice of Intent shall specify:

- (a) the name and address of the disputing investor;
- (b) the provisions of this Chapter alleged to have been breached and any other relevant provisions;
- (c) the legal and the factual basis for the claim, including the measures at issue; and
- (d) the relief sought and the approximate amount of damages claimed.

2. The disputing investor shall also deliver with its Notice of Intent, evidence establishing that it is an investor of the other Party.

### **Article 9.18 : Conditions Precedent to Submission of a Claim to Arbitration**

1. A disputing investor may submit a claim to arbitration pursuant to Article 9.15 only if:

- (a) the disputing investor consents to arbitration in accordance with the procedures set out in this Agreement;
- (b) at least six months have elapsed since the events giving rise to the claim;
- (c) not more than three years have elapsed from the date on which the disputing investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the disputing investor has incurred loss or damage thereby;
- (d) the disputing investor has delivered the Notice of Intent required under Article 9.17; and
- (e) the disputing investor and, where the claim is for loss or damage to an interest in an enterprise of the other Party that is a juridical person that the disputing investor owns or controls directly or indirectly, the enterprise, waive their right to initiate before an administrative tribunal or court under the domestic laws and regulations of any Party, or other dispute settlement procedures, proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in paragraph 1 of Article 9.15, except for proceedings for interim injunctive relief, not involving the payment of damages, before an administrative tribunal or court under the domestic laws and regulations of the disputing Party.<sup>13</sup>

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<sup>13</sup> For greater certainty, the interim injunctive relief can be pursued only if the action is brought for the sole purpose of preserving the disputing investor’s rights and interests during the pendency of the arbitration.

2. A consent and waiver required by this Article shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration.
3. A waiver from the enterprise under subparagraph 1(e) shall not be required only if a disputing Party has deprived a disputing investor of control of the enterprise.
4. Failure to meet any of the conditions provided for in paragraphs 1 through 3 nullifies the consent of the Parties given in Article 9.20.

### **Article 9.19 : Submission of a Claim to Arbitration**

1. A disputing investor who meets the conditions provided for in Article 9.18 may submit the claim to arbitration:<sup>14</sup>
  - (a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, if both Parties are party to the ICSID Convention;
  - (b) under the ICSID Additional Facility Rules, if only one Party is a party to the ICSID Convention;
  - (c) under the UNCITRAL Arbitration Rules; or
  - (d) if the disputing parties agree, to any other arbitration institution or under any other arbitration rules.
2. The applicable arbitration rules shall govern the arbitration unless they are modified by this Section.
3. Once the investor has submitted the dispute to the courts or administrative tribunals of the disputing Party or any of the arbitration mechanisms provided for in paragraph 1, such choice of forum shall be final.
4. A claim shall be deemed submitted to arbitration under this Section when:
  - (a) the request for arbitration under paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General;
  - (b) the notice of arbitration under Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General;
  - (c) the notice of arbitration given under the UNCITRAL Arbitration Rules is received by the disputing Party; or
  - (d) the notice of, or request for, arbitration referred to under any arbitral institution

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<sup>14</sup> For greater certainty, a disputing investor may submit the dispute referred to in Article 9.15 to the courts or administrative tribunals of the disputing Party.

or arbitral rules selected under subparagraph 1(d) is received by the disputing Party.

#### **Article 9.20 : Consent to Arbitration**

1. Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.
2. The consent given in paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirements of:
  - (a) Chapter II of the ICSID Convention and the ICSID Additional Facility Rules for written consent of the parties; and
  - (b) Article II of the New York Convention for an agreement in writing.

#### **Article 9.21 : Arbitrators**

1. Except in respect of a Tribunal established pursuant to Article 9.22, and unless the disputing parties agree otherwise, the Tribunal shall be composed of 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. Arbitrators must:
  - (a) have expertise or experience in public international law, international trade or international investment rules, or the resolution of disputes arising under international trade or international investment agreements; and
  - (b) be independent of, and not be affiliated with or take instructions from, either Party or the disputing investor.
3. The disputing parties should agree on the arbitrators' remuneration. If the disputing parties do not agree on such remuneration before the Tribunal is constituted, the prevailing ICSID rate for arbitrators applies.
4. If a Tribunal, other than a Tribunal established pursuant to Article 9.22, is not constituted within 90 days from the date that a claim is submitted to arbitration, the Appointing Authority, at the request of either disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed. The presiding arbitrator shall not be a national of either Party.

#### **Article 9.22 : Consolidation**

1. A Tribunal established under this Article shall be established under the UNCITRAL Arbitration Rules and shall conduct its proceedings in accordance with those Rules, unless otherwise provided for in this Section.

2. If a Tribunal established under this Article is satisfied that claims submitted to arbitration under Article 9.19 have a question of law or fact in common, the Tribunal may, in the interests 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; or
- (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.

3. A disputing Party that seeks an order under paragraph 2 shall request that the Appointing Authority establish a Tribunal and shall specify in the request:

- (a) the name of the disputing investors against which the order is sought;
- (b) the nature of the order sought; and
- (c) the grounds for the order sought.

4. The disputing Party shall deliver a copy of the request to the disputing investors against which the order is sought.

5. The Secretary-General shall, within 60 days of receipt of the request, establish a Tribunal composed of three arbitrators who shall be chosen at the discretion of the Secretary-General.

6. If a Tribunal is established pursuant to this Article, a disputing investor that has submitted a claim to arbitration pursuant to Article 9.19 and that has not been named in paragraph 2 may submit a written request to the Tribunal that it be included in an order made pursuant to paragraph 2, and shall specify in the request:

- (a) the name and address of the disputing investor;
- (b) the nature of the order sought; and
- (c) the grounds for the order sought.

7. A Tribunal established pursuant to Article 9.19 does not have jurisdiction to decide a claim, or a part of a claim, over which a Tribunal established pursuant to this Article has assumed jurisdiction.

### **Article 9.23 : Conduct of the Arbitration**

1. Upon request of the Tribunal, on written notice to the disputing parties, the non-disputing Party may make oral or written submissions to a Tribunal on a question of interpretation of this Agreement. Upon request of a disputing party, the non-disputing Party

shall submit its oral submission in writing.

2. Unless otherwise agreed by the disputing parties, a Tribunal shall hold an arbitration in the territory of a Party that is party to the New York Convention, selected in accordance with:

- (a) the ICSID Additional Facility Rules, if the arbitration is under those Rules or the ICSID Convention; or
- (b) the UNCITRAL Arbitration Rules, if the arbitration is under those Rules.

3. Unless otherwise agreed by the disputing parties, the Tribunal may determine a place for meetings and hearings, other than the legal place of arbitration. In doing so, the Tribunal shall take into consideration, its convenience for the parties and the arbitrators, the location of the subject matter, and the proximity of the evidence.

4. If issues relating to jurisdiction or admissibility are raised as preliminary objections, the Tribunal shall, whenever possible, decide the matter before proceeding to the merits. The disputing parties shall be given a reasonable opportunity to present their views and observations to the Tribunal. If the Tribunal decides that the claim is manifestly without merit, or is otherwise not within the jurisdiction or competence of the Tribunal, it shall render an award to that effect.

5. The Tribunal may, if warranted, award the prevailing party reasonable costs and fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the Tribunal shall consider whether either the claim or the objection was frivolous or manifestly without merit, and shall provide the disputing parties a reasonable opportunity to comment.

6. The 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. The Tribunal shall not order the seizure of assets nor may it prevent the application of the measure alleged to constitute a breach referred to in Article 9.15. For the purposes of this Article, an order shall include a recommendation.

7. Unless otherwise agreed by the disputing parties, the language of the arbitration proceedings, including hearings, decisions, and awards, shall be:

- (a) Korean and English if Korea is a disputing Party; and
- (b) Vietnamese and English if Viet Nam is a disputing Party.

#### **Article 9.24 : Joint Interpretation**

1. The interpretation by the Joint Committee of a provision of this Agreement<sup>15</sup> shall be binding on a Tribunal established under this Section and an award under this Section shall be consistent with that interpretation.

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<sup>15</sup> For greater certainty, "a provision of this Agreement" includes all the Annexes to this Agreement.

2. If the disputing Party asserts as a defense that the measure alleged to be a breach is within the scope of a reservation or exception set out in Annex I or II, the Tribunal shall, upon request of that disputing Party, request the Joint Committee to interpret the issue. Within 60 days of delivery of the request, the Joint Committee shall submit in writing its interpretation to the Tribunal. The interpretation shall be binding on the Tribunal. If the Joint Committee fails to submit an interpretation within 60 days, the Tribunal shall decide the issue.

### **Article 9.25 : Final Award**

1. If the Tribunal makes a final award against a disputing Party, the Tribunal may award, separately or in combination, only:

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

The Tribunal may also award costs in accordance with the applicable arbitration rules.

2. The Tribunal shall not order a disputing Party to pay punitive damages.

### **Article 9.26 : Finality and Enforcement of an Award**

1. An award made by the Tribunal does not have binding force except between the disputing parties and in respect of that particular case.

2. Subject to paragraph 3 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.

3. 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; or
- (b) in the case of a final award under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules:
  - (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.

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

5. The mechanism for the settlement of investment disputes established under this Section is without prejudice to the rights and obligations of the Parties under Chapter 15 (Dispute Settlement).

6. A disputing party may seek to enforce an arbitration award under the ICSID Convention, or the New York Convention.

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

#### **Article 9.27 : Service of Documents**

Notices and other documents shall be delivered to a Party at the place named for that Party below:

- (a) for Korea:  
International Legal Affairs Division  
Ministry of Justice  
Building #1, Government Complex-Gwacheon  
47, Gwanmun-ro, Gwacheon-si, Gyeonggi-do  
Republic of Korea; and
- (b) for Viet Nam:  
Ministry of Justice of Viet Nam  
60, Tran Phu Street, Ha Noi  
Viet Nam;

or their respective successors.

### **Section C : Definitions**

#### **Article 9.28 : Definitions**

For the purposes of this Chapter:

**Appointing Authority** means:

- (a) in the case of arbitration or conciliation under the ICSID or ICSID Additional Facility Rules in subparagraphs 1(a) and 1(b) of Article 9.19, Secretary-General of ICSID;



- (b) in the case of arbitration under the UNCITRAL Rules in subparagraph 1(c) of Article 9.19, the Secretary-General of the Permanent Court of Arbitration; or
- (c) any person as agreed between the disputing parties;

**covered investment** means, with respect to a Party, an investment in its territory of an investor of the other Party, in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter, and has been admitted<sup>16</sup> in accordance with its domestic laws and regulations;

**disputing investor** means an investor that makes a claim under Section B;

**disputing parties** means a disputing investor and a disputing Party;

**disputing Party** means a Party against which a claim is made under Section B;

**disputing party** means either a disputing investor or a disputing Party;

**enterprise** means any entity constituted or organized under applicable laws and regulations, whether or not for profit, and whether privately or governmentally owned or controlled, including any corporation, trust, partnership, sole proprietorship, joint venture, or association, and a branch<sup>17</sup> of an enterprise;

**enterprise of a Party** means an enterprise constituted or organized under the domestic laws and regulations of a Party, and a branch<sup>18</sup> located in the territory of a Party and carrying out business activities there;

**freely usable currency** means any currency designated as such by the International Monetary Fund (IMF) under its Articles of Agreement and any amendments thereto;

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

**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;

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<sup>16</sup> For greater certainty, for Viet Nam, “has been admitted” means “has been specifically registered or approved in writing, as the case may be.”

<sup>17</sup> For greater certainty, a branch of a legal entity of a non-Party shall not be considered as an enterprise of a Party.

<sup>18</sup> For greater certainty, the branch in this term is that of an enterprise organized and constituted under the laws of that Party. A branch of a legal entity of a non-Party shall not be considered as an enterprise of a Party.

**investment** means<sup>19</sup> every asset that an investor owns or controls, that has the characteristics of an investment, such 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 and rights derived therefrom including futures and options;
- (c) bonds, debentures, loans and other forms of debt instruments<sup>20</sup> of an enterprise including rights derived therefrom;
- (d) turnkey, construction, management, production, concession, revenue-sharing, and other business concessions<sup>21</sup> conferred by laws or under contract;
- (e) intellectual property rights; and
- (f) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges,

but **investment** does not include claims to payment that arise solely from:

- (g) the commercial contracts for the sale of goods or services by a natural person or an enterprise in the territory of a Party to a natural person or an enterprise in the territory of the other Party; or
- (h) the extension of credit in connection with a commercial transaction, such as trade financing;

**investor of a non-Party** means, with respect to a Party, an investor that is seeking to make<sup>22</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 natural person or an enterprise of a Party, a Party<sup>23</sup> that is seeking to make,<sup>24</sup> is making, or has made an investment in the territory of the other Party;

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<sup>19</sup> The term “investment” does not include an order or judgment entered in a judicial or administrative action.

<sup>20</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>21</sup> Business concessions may include investment funds for projects such as Build-Operate and Transfer (BOT) and Build-Operate and Own Schemes (BOO).

<sup>22</sup> For greater certainty, the Parties understand that an investor that “is seeking to make” an investment refers to an investor of a non-Party that has taken active steps to initiate a notification or approval process, where applicable, for making an investment.

<sup>23</sup> For greater certainty, a Party may not pursue a claim against the other Party under Section B in all circumstances.

**natural person of a Party** means any natural person possessing the nationality or citizenship of that Party in accordance with its domestic laws and regulations;

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

**non-disputing Party** means the Party of the disputing investor;

**returns** means amounts yielded by or derived from an investment particularly, though not exclusively, any profits, interests, capital gains, dividends, royalties or fees;

**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.<sup>25</sup>

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<sup>24</sup> For greater certainty, the Parties understand that an investor that “is seeking to make” an investment refers to an investor of the other Party that has taken active steps to initiate a notification or approval process, where applicable, for making an investment.

<sup>25</sup> For greater certainty, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration shall not be applied in this Chapter.

## **ANNEX 9-A**

### **CUSTOMARY INTERNATIONAL LAW**

The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Article 9.5 and Annex 9-B results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 9.5, the applicable rules of customary international law refer to all customary international law principles that protect the economic rights and interests of aliens.

## ANNEX 9-B

### EXPROPRIATION

The Parties confirm their shared understanding that:

- (a) 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;
- (b) paragraph 1 of Article 9.7 addresses two situations. The first is direct expropriation, where a covered investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure;
- (c) the second situation addressed by paragraph 1 of Article 9.7 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:
  - (i) 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 all relevant factors relating to the investment, including:
    - (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) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
    - (C) the character of the government action, including its objectives and context.<sup>26</sup>;
  - (ii) except in rare circumstances, such as, for example, when an action or a series of actions is extremely severe or disproportionate in light of its purpose or effect, 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, do not constitute indirect expropriations.<sup>27, 28</sup>

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<sup>26</sup> For greater certainty, for Korea, relevant considerations may 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.

<sup>27</sup> For greater certainty, this subparagraph includes the right of the Party to exercise its regulatory actions in accordance with its Constitution.

<sup>28</sup> For greater certainty, the list of “legitimate public welfare objectives” in this subparagraph is not exhaustive. It may include measures such as the real estate price stabilization (through, for example, measures to improve the housing conditions for low-income households).

## ANNEX 9-C

### TRANSFERS

1. Nothing in this Chapter or Chapter 8 (Trade in Services) shall be construed to prevent a Party from adopting or maintaining temporary safeguard measures 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 economic or financial disturbance or serious difficulties for the operation of monetary policy or exchange rate policy in either Party.

2. The measures referred to in paragraph 1:

- (a) shall be phased out within one year or when conditions would no longer justify their institution or maintenance;<sup>29</sup>
- (b) shall be consistent with the *Articles of Agreement of the International Monetary Fund* (hereinafter referred to as “Articles of Agreement”), as may be amended;
- (c) shall not exceed those necessary to deal with the circumstances described in paragraph 1;
- (d) shall avoid unnecessary damage to the commercial, economic, or financial interests of the other Party;
- (e) shall be temporary and phased out progressively as the situation calling for imposition of such measures improves;
- (f) shall promptly be notified to the other Party; and
- (g) shall be applied in a manner consistent with Articles 9.3 and 8.2 (National Treatment) and Articles 9.4 and 8.3 (Most-Favored-Nation Treatment) subject to the Schedules set out in Annexes I and II<sup>30</sup> and Annex 8-D (Schedule of Specific Commitments).<sup>31</sup>

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<sup>29</sup> For greater certainty, the measures may be extended beyond the one year period should conditions warrant.

<sup>30</sup> This subparagraph shall not apply until the Parties’ Schedules to Annexes I and II have entered into force.

<sup>31</sup> For greater certainty, the measures referred to in paragraph 1 which are within the scope of this Chapter shall be applied in a manner consistent with Articles 9.3 and 9.4 subject to the Schedules set out in Annexes I and II, and the measures referred to in paragraph 1 which are within the scope of Chapter 8 shall be applied in a manner consistent with Articles 8.2 and 8.3 subject to the Schedules set out in Annex 8-D (Schedule of Specific Commitments), respectively.

3. Nothing in this Chapter or Chapter 8 (Trade in Services) shall be regarded to affect the rights enjoyed and obligations undertaken by a Party as party to the Articles of Agreement, including the use of exchange actions which are in conformity with the Articles of Agreement.