

## CHAPTER 9 INVESTMENT

### ARTICLE 9.1 DEFINITION

For the purposes of this Chapter:

**claimant** means an investor of a Party that is a party to an investment dispute with the other Party;

**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;

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

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

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

**enterprise** means any entity constituted or organised under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization; and a branch of an enterprise;

**freely usable currency** means “freely usable currency” as determined by the International Monetary Fund under its *Articles of Agreement of the International Monetary Fund* and any amendments thereto;

**ICC Arbitration Rules** means the *Rules of Arbitration of the International Chamber of Commerce*, in force as from 1 January 2012;

**investment** means every kind of asset, owned or controlled, directly or indirectly, by an investor, that has the characteristics of an investment<sup>16</sup>. Forms that an investment may take include but are not limited to:

- (a) an enterprise;
- (b) shares, stock, and other forms of equity participation in an enterprise, including rights derived therefrom;

---

<sup>16</sup> Where an asset lacks the characteristics of an investment, that asset is not an investment regardless of the form it may take. The characteristics of an investment include the commitment of capital, the expectation of gain or profit, or the assumption of risk.

- (c) bonds, debentures, and loans and other debt instruments<sup>17</sup>, including rights derived therefrom;
- (d) futures, options, and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- (f) claims to money or to any contractual performance related to a business and having an economic value;
- (g) intellectual property rights and goodwill;
- (h) licences, authorisations, permits, and similar rights conferred pursuant to applicable domestic laws, including any concession to search for, cultivate, extract or exploit natural resources<sup>18</sup>; and
- (i) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges;

**investor of a Party** means:

- (a) a Party;
- (b) an enterprise of a Party; or
- (c) a natural person who resides in the territory of a Party or elsewhere and who under the law of that Party:
  - (i) is a citizen of that Party; or
  - (ii) has the right of permanent residence in that Party,

that attempts to make, is making, or has made an investment in the territory of the other Party;

**Local Government Act** means the Local Government Act, amended and promulgated by the authorities of Chinese Taipei on 3 February 2010;

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

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

---

<sup>17</sup> For the purpose of this Chapter, **loans and other debt instruments** described in (c) and **claims to money or to any contractual performance** described in (f) of this Article refer to assets which relate to a business activity and do not refer to assets which are of a personal nature, unrelated to any business activity.

<sup>18</sup> The term **investment** does not include an order or judgment entered in a judicial or administrative action.

**return** means an amount yielded by or derived from an investment, including profits, dividends, interest, capital gains, royalty payments, payments in connection with intellectual property rights, and all other lawful income. For the purposes of the definition of “investment”, returns that are invested shall be treated as investments and any alteration of the form in which assets are invested or reinvested shall not affect their character as investments; and

**UNCITRAL Arbitration Rules** means the arbitration rules of the United Nations Commission on International Trade Law, approved by the United Nations General Assembly on 15 December 1976.

## **ARTICLE 9.2 SCOPE AND COVERAGE**

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 Article 9.9 (Performance Requirements), all investments in the territory of the Party.
2. This Chapter shall not apply to services supplied in the exercise of governmental authority within the territory of a Party. For the purposes of this Chapter, a service supplied in the exercise of governmental authority means any service which is supplied neither on a commercial basis nor in competition with one or more service suppliers.
3. In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail over this Chapter to the extent of the inconsistency.
4. The requirement by a Party that a service provider of the other Party post a bond or other form of financial security as a condition of providing a service into its territory does not of itself make this Chapter applicable to the provision of that cross-border service. This Chapter applies to that Party’s treatment of the posted bond or financial security, to the extent that such bond or financial security is a covered investment.
5. For greater certainty, the provisions of this Chapter do not impose any obligation on 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.

**ARTICLE 9.3 FINANCIAL SERVICES<sup>19</sup>**

1. This Chapter shall not apply to measures adopted or maintained by a Party in respect of investors of the other Party, and investments of such investors in financial institutions<sup>20</sup> in the former Party's territory, except for the following provisions:

- (a) Article 9.6 (Special Formalities and Information Requirements);
- (b) Article 9.7 (Minimum Standard of Treatment);
- (c) Article 9.8 (Compensation for Losses);
- (d) Article 9.12 (Expropriation);
- (e) Article 9.13 (Transfers);
- (f) Article 16.5 (Restrictions to Safeguard the Balance of Payments);
- (g) Article 9.14 (Denial of Benefits);
- (h) Article 9.16 (Settlement of Disputes between a Party and an Investor of the Other Party);
- (i) Article 9.17 (Savings Clause); and
- (j) Annex 9.

The Parties reaffirm their commitments under the GATS with respect to financial services, which shall be incorporated into this Chapter.

2. For the purposes of paragraph 1, Article 9.16 (Settlement of Disputes between a Party and an Investor of the Other Party) shall apply solely for claims that a Party has breached Articles 9.12 (Expropriation), 9.13 (Transfers), and 9.14 (Denial of Benefits).

3. This Chapter shall not apply to measures adopted or maintained by a Party relating to:

- (a) activities or services forming part of a public retirement plan or statutory system of social security;
- (b) activities or services conducted for the account or with the guarantee or using the financial resources of the Party, including its public entities; or
- (c) activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies;

---

<sup>19</sup> For the purposes of this Article, **financial services** is as defined in subparagraph 5(a) of the Annex on Financial Services in the GATS.

<sup>20</sup> **Financial institution** means any financial intermediary or other enterprise that is authorised to do business and regulated or supervised as a financial institution under the law of the Party in whose territory it is located.

except that the provisions referred to in paragraph 1 shall apply if a Party allows any of the activities or services referred to in subparagraphs (a) or (b) to be conducted by its financial institutions in competition with a public entity or a financial institution.

4. Notwithstanding Article 9.13 (Transfers), a Party may prevent or limit transfers by a financial institution or financial services supplier to, or for the benefit of, an affiliate of or person related to such institution or supplier, through the equitable, non-discriminatory, and good faith application of measures relating to maintenance of the safety, soundness, integrity, or financial responsibility of financial institutions or financial services suppliers. This paragraph does not prejudice any other provision of this Agreement that permits a Party to restrict transfers.

5. Nothing in this Chapter shall be construed to prevent the adoption or enforcement by any Party of measures necessary to secure compliance with laws or regulations that are not inconsistent with this Chapter, including those relating to the prevention of deceptive and fraudulent practices or to deal with the effects of a default on financial services contracts, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on investment in financial institutions.

6. Nothing in this Chapter shall be construed to require a Party to disclose information relating to the affairs and accounts of individual consumers or any confidential or proprietary information in the possession of public entities.

#### **ARTICLE 9.4 PRUDENTIAL MEASURES**

Notwithstanding any other provisions of this Chapter, each Party may adopt or maintain measures for prudential reasons, such as: the protection of investors, depositors, policy-holders or persons to whom a fiduciary duty is owed by a financial institution or financial services supplier; the maintenance of the safety, soundness, integrity or financial responsibility of financial services suppliers; and ensuring the integrity and stability of a Party's financial system. Such measures shall not be used as a means of avoiding a Party's obligations under the provisions referred to in Article 9.3 (Financial Services).

#### **ARTICLE 9.5 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 9.6 SPECIAL FORMALITIES AND INFORMATION REQUIREMENTS**

1. Nothing in Article 9.5 (National Treatment) shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as residency requirements or requirements for covered investments to be legally constituted under the laws or regulations of the Party, provided that such formalities do not materially impair the protections afforded by a Party to investors of the other Party and covered investments pursuant to this Chapter.

2. Notwithstanding Article 9.5 (National Treatment), a Party may require an investor of the other Party, or a 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 within its territory.

## **ARTICLE 9.7 MINIMUM STANDARD OF TREATMENT**

1. Each Party shall accord to covered investments treatment in accordance with customary international law minimum standard of treatment of aliens<sup>21</sup>, including fair and equitable treatment and full protection and security.

2. The concepts of “fair and equitable treatment” and “full protection and security” in paragraph 1 do not require treatment in addition to or beyond what is required by the customary international law minimum standard of treatment of aliens and do not create additional substantive rights.

(a) The obligation to provide “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.

(b) The obligation to provide “full protection and security” requires each Party to provide the level of police protection required under customary international law.

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

---

<sup>21</sup> Customary international law results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to this article, 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.

## **ARTICLE 9.8 COMPENSATION FOR LOSSES**

1. Notwithstanding subparagraph 4(b) of Article 9.11 (Non-Conforming Measures), investors of one Party whose investments in the territory of the other Party suffer losses owing to war or other armed conflict, revolt, insurrection, riot, or other similar situations in the territory of the latter Party, shall be accorded by the latter Party treatment, as regards restitution, indemnification, compensation or other settlement, if any, no less favourable than that which the latter Party accords to investors of any non-Party or to its own investors, whichever is more favourable. Any resulting compensation shall be made in freely usable currency and be freely transferable in accordance with Article 9.13 (Transfers).

2. Paragraph 1 does not apply to existing measures relating to subsidies or grants provided by a Party, including government-supported loans, guarantees and insurance, or to any conditions attached to the receipt or continued receipt of such subsidies or grants, whether or not such subsidies or grants are offered exclusively to investors of the Party or investments of investors of the Party, that would be inconsistent with Article 9.5 (National Treatment) but for Article 9.11 (Non-Conforming Measures).

## **ARTICLE 9.9 PERFORMANCE REQUIREMENTS**

1. Neither Party may, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement or enforce any commitment or undertaking<sup>22</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.

---

<sup>22</sup> For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 2 does not constitute a “requirement” or a “commitment or undertaking” for the purposes of paragraph 1.

2. Neither Party may 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;
- (c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or
- (d) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

3. (a) For greater certainty, nothing in paragraph 1 shall be construed to prevent a Party from, in connection with the establishment, acquisition, expansion, management, conduct, operation or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, imposing or enforcing a requirement or enforcing a commitment or undertaking to employ or train workers in its territory, provided that such employment or training does not require the transfer of a particular technology, production process, or other proprietary knowledge to a person in its territory.

(b) For greater certainty, 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, employ or train workers, construct or expand particular facilities, or carry out research and development, in its territory.

(c) Subparagraph 1(f) does not apply:

(i) when a Party authorizes use of an intellectual property right in accordance with Article 31<sup>23</sup> of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* in Annex 1C to the WTO Agreement (hereinafter referred to as “TRIPS Agreement”), or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or

(ii) when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to

---

<sup>23</sup> The reference to “Article 31” includes footnote 7 to Article 31.



remedy a practice determined after judicial or administrative process to be anti-competitive under the Party's competition laws<sup>24</sup>.

- (d) Subparagraphs 1(a), 1(b), and 1(c), and 2(a) and 2(b), do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs.
- (e) Subparagraphs 1(b), 1(c), 1(f), and 1(g), and 2(a) and 2(b), do not apply to government procurement.
- (f) Subparagraphs 2(a) and 2(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.

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

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

#### **ARTICLE 9.10 SENIOR MANAGEMENT AND BOARDS OF DIRECTORS**

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

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

#### **ARTICLE 9.11 NON-CONFORMING MEASURES**

1. Articles 9.5 (National Treatment), 9.9 (Performance Requirements) and 9.10 (Senior Management and Board of Directors) do not apply to:

- (a) any existing non-conforming measure that is maintained by Singapore as set out in its Schedule to Annex 8B:I;
- (b) any existing non-conforming measure that is maintained by Chinese Taipei at:
  - (i) the central level of government as set out in its Schedule to Annex 8B:I; or

---

<sup>24</sup> The Parties note that a patent does not necessarily confer market power.

- (ii) a local level of government on the administration of self-governing matters under its Local Government Act;
  - (c) the continuation or prompt renewal of any non-conforming measure referred to in subparagraphs (a) and (b); or
  - (d) an amendment to any non-conforming measure referred to in subparagraphs (a) and (b) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 9.5 (National Treatment), 9.9 (Performance Requirements) and 9.10 (Senior Management and Board of Directors).
2. Articles 9.5 (National Treatment), 9.9 (Performance Requirements) and 9.10 (Senior Management and Board of Directors) do not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors, or activities, as set out in its Schedule to Annex 8B:II.
3. Neither Party may, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to Annex 8B:II, require an investor of the other Party, by reason of its nationality/citizenship, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.
4. Articles 9.5 (National Treatment) and 9.10 (Senior Management and Boards of Directors) do not apply to:
- (a) government procurement; or
  - (b) subsidies or grants provided by a Party, including government-supported loans, guarantees and insurance, or to any conditions attached to the receipt or continued receipt of such subsidies or grants, whether or not such subsidies or grants are offered exclusively to investors of the Party or investments of investors of the Party.
5. Articles 9.5 (National Treatment) 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.

#### **ARTICLE 9.12 EXPROPRIATION<sup>25</sup>**

1. Neither Party shall nationalise, expropriate or subject to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") a covered investment unless such a measure is taken on a non-discriminatory basis, for a public purpose, in accordance with due process of law, and upon payment of compensation in accordance with this Article.
2. The expropriation shall be accompanied by the payment of prompt, adequate and effective compensation. Compensation shall be equivalent to the fair market value of the

---

<sup>25</sup> Article 9.12 (Expropriation) is to be interpreted in accordance with Annex 9.

expropriated investment immediately before the expropriation or impending expropriation became public knowledge. Compensation shall carry an appropriate interest, taking into account the length of time from the time of expropriation until the time of payment. Such compensation shall be effectively realisable, freely transferable in accordance with Article 9.13 (Transfers) and made without delay.

3. Notwithstanding paragraphs 1 and 2, any measure of expropriation relating to land shall be for a purpose and upon payment of compensation in accordance with the applicable domestic legislation of the expropriating Party<sup>26</sup>.

4. This Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the TRIPS Agreement.

### **ARTICLE 9.13 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, capital gains, and proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;
- (c) interest, royalty payments, management fees, and technical assistance and other fees;
- (d) payments made under a contract entered into by the investor, or its investment, including payments made pursuant to a loan agreement;
- (e) payments made pursuant to Article 9.12 (Expropriation) and Article 9.8 (Compensation for Losses); and
- (f) payments arising under Article 9.16 (Settlement of Disputes between a Party and an Investor of the Other Party).

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

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

4. Notwithstanding paragraphs 1, 2, and 3, a Party may delay or prevent a transfer through the equitable, non-discriminatory, and good faith application of its laws relating to:

---

<sup>26</sup> In the case of Singapore, the applicable legislation is the Land Acquisition Act (Cap. 152), and any amendments thereto.

- (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 offences;
- (e) ensuring compliance with orders or judgments in judicial or administrative proceedings; or
- (f) social security<sup>27</sup>, public retirement or compulsory savings schemes.

5. Nothing in this Chapter shall affect the rights and obligations of the members of the International Monetary Fund under the *Articles of Agreement of the International Monetary Fund*, including the use of exchange actions which are consistent with such *Articles of Agreement*, provided that a Party shall not impose restrictions on any capital transactions inconsistently with its obligations under this Chapter regarding such transactions, except under Article 16.5 (Restrictions to Safeguard the Balance of Payments) or at the request of the International Monetary Fund.

#### **ARTICLE 9.14 DENIAL OF BENEFITS**

Subject to prior notification and consultation, a Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such Party and to investments of such an investor where the Party establishes that the enterprise is owned or controlled by persons of a non-Party, or of the denying Party, and has no substantive business operations in the territory of the other Party.

#### **ARTICLE 9.15 SUBROGATION**

1. If a Party (or any agency, institution, statutory body or corporation designated by it) makes a payment to any of its investors under a guarantee, a contract of insurance or other form of indemnity it has granted in respect of a covered 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 the designated agency of the Party making the payment, pursue those rights and claims against the other Party.

---

<sup>27</sup> For greater certainty, social security schemes include compulsory health insurance schemes.

**ARTICLE 9.16 SETTLEMENT OF DISPUTES BETWEEN A PARTY AND AN INVESTOR OF THE OTHER PARTY**

1. This Article shall apply to disputes between a Party and an investor of the other Party concerning an alleged breach of an obligation of the former under this Chapter which causes loss or damage to the investor or its investment.
2. The disputing parties shall initially seek to resolve the dispute by consultations and negotiations. Such consultations and negotiations shall be initiated by a written request for consultations and negotiations delivered by the claimant to the respondent.
3. Where the dispute cannot be resolved as provided for under paragraph 2 within six (6) months from the date of a written request for consultations and negotiations, unless the disputing parties agree otherwise, the claimant may submit the dispute:
  - (a) under the ICC Arbitration Rules;
  - (b) under the UNCITRAL Arbitration Rules; or
  - (c) to any other arbitral institutions or under any other arbitration rules, if the disputing parties so agree.

For the avoidance of doubt, the claimant may submit the claim on its own behalf, or on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly.

4. Each Party hereby consents to the submission of a dispute to arbitration under paragraph 3 in accordance with the provisions of this Article, conditional upon:
  - (a) the submission of the dispute to such arbitration taking place within three years of the time at which the claimant became aware, or should reasonably have become aware, of a breach of an obligation under this Chapter causing loss or damage to the claimant or its investment;
  - (b) the claimant not being an enterprise of the respondent until the claimant refers the dispute for arbitration pursuant to paragraph 3;
  - (c) the claimant providing written notice, which shall be submitted at least thirty (30) days before the claim is submitted, to the respondent of its intent to submit the dispute to such arbitration and which:
    - (i) states the name and address of the claimant and, where a dispute is submitted on behalf of an enterprise, the name, address, and place of constitution of the enterprise;
    - (ii) nominates either subparagraph 3(a), 3(b) or 3(c) as the forum for dispute settlement;
    - (iii) waives its right to initiate or continue any proceedings (excluding proceedings for interim measures of protection referred to in paragraph

9) before any of the other dispute settlement fora referred to in paragraph 3, or before any administrative tribunal or court under the law of either Party, in relation to the matter under dispute; and

(iv) briefly summarises the alleged breach of the respondent under this Chapter (including the provisions alleged to have been breached), the legal and factual basis for the dispute, and the loss or damage allegedly caused to the claimant or its investment by reason of that breach; and

(d) the claimant consenting to the submission of the dispute in accordance with the provisions of this Article.

5. The consent under paragraph 4 and the submission of a claim to arbitration under this Article shall satisfy the requirements of Article II of the New York Convention for an “agreement in writing”.

6. Unless the disputing parties otherwise agree, the arbitral tribunal shall be composed of three arbitrators. Each disputing party shall appoint one arbitrator and the disputing parties shall agree upon a third arbitrator, who shall be the chairman of the arbitral tribunal. If an arbitral tribunal has not been established within ninety (90) days from the date on which the claim was submitted to arbitration, either because a disputing party failed to appoint an arbitrator or because the disputing parties failed to agree upon the chairman, the Secretary-General of the Permanent Court of Arbitration, upon request of either disputing party, shall appoint, at his own discretion, the arbitrator or arbitrators not yet appointed. Nevertheless, the Secretary-General of the Permanent Court of Arbitration, when appointing the chairman, shall ensure that he or she is a citizen or permanent resident of neither of the Parties.

7. Unless the disputing parties otherwise agree, the tribunal shall determine the place of arbitration in accordance with the applicable arbitration rules, provided that the place shall be in the territory of either Party or a State that is a party to the New York Convention.

8. The tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of customary international law.

9. Neither Party shall prevent the claimant from seeking interim measures of protection, not involving the payment of damages or resolution of the substance of the matter in dispute before the courts or administrative tribunals of the respondent, prior to the institution of proceedings before any of the dispute settlement fora referred to in paragraph 3, for the preservation of its rights and interests.

10. Neither Party shall espouse a claim or bring an international claim, in respect of a dispute which one of its investors and the other Party shall have consented to submit or have submitted to arbitration under this Article, unless such other Party has failed to abide by and comply with the award rendered in such dispute. The espousal of a claim, for the purposes of this paragraph, shall not include informal exchanges between the Parties for the sole purpose of facilitating a settlement of the dispute.

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

12. The award rendered by the arbitral tribunal shall include:
- (a) a judgment whether or not there has been a breach by the disputing Party of any obligation under this Chapter with respect to the disputing investor and its investments; and
  - (b) a remedy if there has been such breach. The remedy shall be limited to one or both of the following:
    - (i) payment of monetary damages and applicable interest; and
    - (ii) 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.

Costs may also be awarded in accordance with the applicable arbitration rules.

13. Any arbitral award shall be final and binding upon the disputing parties. Each Party shall ensure the recognition and enforcement of the award in accordance with its relevant laws and regulations.

#### **ARTICLE 9.17 SAVINGS CLAUSE**

1. For fifteen (15) years from the date of termination of this Agreement, the following provisions (including the relevant Annexes and Appendices) shall continue to apply to covered investments in existence at the date of termination, and without prejudice to the application thereafter of the rules of general international law:

- (a) the provisions of this Chapter;
- (b) the provisions of Chapter 15 (Dispute Settlement);
- (c) the provisions of Chapter 16 (General Exceptions); and
- (d) such other provisions in the Agreement as may be necessary for or consequential to the application or interpretation of this Chapter.

2. For the avoidance of doubt, paragraph 1 shall not apply to the establishment, acquisition or expansion of investments after the date of termination.

## **ANNEX 9 EXPROPRIATION**

The Parties confirm their shared understanding that:

1. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.
2. Paragraph 1 of Article 9.12 (Expropriation) addresses two situations. The first is direct expropriation, where an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure.
3. The second situation addressed by paragraph 1 of Article 9.12 (Expropriation) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
  - (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:
    - (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
    - (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
    - (iii) the character of the government action.
  - (b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations.