

## CHAPTER 14

### INVESTMENT

#### Section A

##### Article 14.1: Definitions

For the purposes of this Chapter:

**enterprise** means an enterprise as defined in Article 1.4 (General Definitions) of Chapter 1 (Initial Provisions and General Definitions), and a branch of such an enterprise;

**enterprise of a Party** means an enterprise constituted or organised in accordance with the laws of a Party, and carrying out business activities there;

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

**government procurement** means the process by which a government obtains the use of or acquires goods or services, or any combination thereof, for governmental purposes and not with a view to commercial sale or resale or use in the production or supply of goods or services for commercial sale or resale;

**investment**<sup>12</sup> means every asset that an investor owns or controls, 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:

- (i) an enterprise;
- (ii) shares, stocks and other forms of equity participation in an enterprise;

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<sup>1</sup> The term “investment” does not include an order or judgment entered in a judicial or administrative action or an arbitral award made in an arbitral proceeding.

<sup>2</sup> For the purpose of the definition of investment in this Article, 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;

- (iii) bonds, debentures and other debt instruments and loans;<sup>34</sup>
- (iv) intellectual property rights;
- (v) claims to money or to any contractual performance related to a business and having financial value;<sup>5</sup>
- (vi) turnkey, construction, management, production concession, revenue-sharing and other similar contracts;
- (vii) licences, authorisations, permits and similar rights conferred in accordance with the Party's laws;<sup>6</sup> and
- (viii) other tangible or intangible, moveable or immovable property, and related property rights, such as leases, mortgages, liens and pledges.

**investor of a Party** means a Party, or a natural person of a Party or an enterprise of a Party, that seeks to make,<sup>7</sup> is making, or has made an investment in the territory of the other Party; and

**investor of a non-Party** means, with respect to a Party, an investor that seeks to make, is making, or has made an investment in the territory of that Party, that is not an investor of the other Party; and

**TRIPS Agreement** means the *Agreement on Trade-Related Aspects of Intellectual Property Rights* in Annex 1C to the WTO Agreement.

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<sup>3</sup> Some forms of debt, such as bonds, debentures and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, 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>4</sup> A loan issued by one Party to the other Party is not an investment.

<sup>5</sup> For greater certainty, investment does not mean claims to money that arise solely from:

- (a) commercial contracts for sale of goods or services; or
- (b) the extension of credit in connection with such commercial contracts.

<sup>6</sup> Whether a particular type of licence, authorisation, permit or similar instrument (including a concession to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the Party's law. Among such instruments that do not have the characteristics of an investment are those that do not create any rights protected under the Party's law. For greater certainty, the foregoing is without prejudice to whether any asset associated with such instruments has the characteristics of an investment.

<sup>7</sup> For greater certainty, the Parties understand that an investor that "seeks to make" an investment refers to an investor of the other Party that has taken active steps to make an investment. Where a notification or approval process is required for making an investment, an investor that "seeks to make" an investment refers to an investor of the other Party that has initiated such notification or approval process.

## **Article 14.2: 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) for Article 14.6, all investments in the territory of that Party.
2. A Party's obligations under this Chapter shall apply to measures adopted or maintained by:
  - (a) central, regional or local governments and authorities; and
  - (b) any person, including a state-owned enterprise or any other body, when it exercises any governmental authority delegated to it by central, regional or local governments or authorities of that Party.<sup>8</sup>
3. This Chapter shall not apply to:
  - (a) government procurement; or
  - (b) subsidies or grants provided by a Party, including government-supported loans, guarantees and insurance.
4. For greater certainty, this Chapter shall not bind a Party in relation to an act or fact that took place or a situation that ceased to exist before the date of entry into force of this Agreement.

## **Article 14.3: Relation to Other Chapters**

1. This Chapter shall not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter 9 (Trade in Services) or Chapter 10 (Financial Services).
2. Notwithstanding paragraph 1, the following provisions shall apply to any measure affecting the supply of a service by a service supplier of a Party through commercial presence in the territory of the other Party within the meaning of Chapter 9 (Trade in Services) and Chapter 10 (Financial Services) to the extent that the measure falls within the scope of this Chapter:

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<sup>8</sup> For greater certainty, governmental authority is delegated under a Party's law, including through a legislative grant or a government order, directive or other action transferring or authorising the exercise of governmental authority.

- (a) Articles 14.4 through 14.16;
- (b) Section B (Investor-State Dispute Settlement); and
- (c) Annex 14-A, Annex 14-B, Annex 14-C and Annex 14-D.

3. Further to paragraph 2, for the purposes of the application of Article 14.14 to measures affecting the supply of a service by a service supplier of a Party through commercial presence in the territory of the other Party, an entry in a Party's Schedule to Annex I (Trade in Services and Investment Schedules) or Annex II (Trade in Services and Investment Schedules) in respect of Article 9.3 (National Treatment) and Article 9.4 (Most-Favoured-Nation Treatment) of Chapter 9 (Trade in Services), shall also be considered an entry in that Party's Schedule in respect of the corresponding obligation in this Chapter.

4. In the event of any inconsistency between this Chapter and another Chapter of this Agreement, the other Chapter shall prevail to the extent of the inconsistency, except that, where paragraphs 1 through 3 apply, this Chapter shall prevail over Chapter 9 (Trade in Services).

5. A requirement of a Party that a service supplier of the other Party post a bond or other form of financial security as a condition for the cross-border supply of a service does not of itself make this Chapter applicable to measures adopted or maintained by the Party relating to such cross-border supply of the service. This Chapter shall apply to measures adopted or maintained by the Party relating to the posted bond or financial security, to the extent that the bond or financial security is a covered investment.

#### **Article 14.4: National Treatment**

1. Each Party shall accord to investors of the other Party treatment no less favourable than it accords, in like circumstances,<sup>9</sup> 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 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.

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<sup>9</sup> For greater certainty, whether treatment is accorded in "like circumstances" under Article 14.4 or Article 14.5 depends on the totality of the circumstances, including the relevant economic or business sector or sectors concerned and whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives or on the basis of nationality. Where treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives, that treatment is not inconsistent with Article 14.4 or Article 14.5.

3. For greater certainty, the treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favourable than the most favourable treatment accorded in like circumstances, by that regional level of government to investors, and to investments of investors, of the Party of which it forms a part.

#### **Article 14.5: Most-Favoured Nation Treatment**

1. Each Party shall accord to investors of the other Party treatment no less favourable than it accords, in like circumstances, to investors and their investments 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 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 shall not encompass international dispute resolution procedures or mechanisms, such as those included in Section B (Investor-State Dispute Settlement).

#### **Article 14.6: Prohibition of Performance Requirements<sup>101112</sup>**

1. Neither Party shall, 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:

- (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;

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<sup>10</sup> This Article shall not preclude enforcement of any requirement between private parties, if a Party did not impose the requirement. For the purposes of this Article, private parties include designated monopolies or state enterprises, if such entities are not exercising delegated governmental authority.

<sup>11</sup> For greater certainty, paragraphs 1 and 2 shall not apply to any requirement other than those set out in those paragraphs.

<sup>12</sup> This Article shall not be subject to Section B (Investor-State Dispute Settlement).

(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 region 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 of an investor of a Party or of a non-Party in its territory, 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. For greater certainty, nothing in paragraph 1 shall be construed to prevent a Party, 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, from imposing or enforcing a requirement or enforcing a commitment or undertaking to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development in its territory, provided that it is consistent with paragraph 1(f).

4. Paragraph 1(f) shall not apply:

(a) if a Party authorises use of an intellectual property right in accordance with 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) if the requirement is imposed or the commitment or undertaking enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under that Party's competition laws and regulations.<sup>13</sup>

5. 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 of an investor of a Party or of a non-Party in its territory, 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.

6. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), 1(c), 1(f), 2(a) and 2(b) shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:

(a) necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement;

(b) necessary to protect human, animal or plant life or health; or

(c) related to the conservation of living and non-living exhaustible natural resources.

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

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

#### **Article 14.7: Minimum Standard of Treatment**

1. Each Party shall accord to covered investments fair and equitable treatment and full protection and security.

2. For greater certainty:

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<sup>13</sup> The Parties recognise that a patent does not necessarily confer market power.

(a) “fair and equitable treatment” requires each Party to not deny justice in any legal or administrative proceedings;

(b) “full protection and security” requires each Party to take such measures as may be reasonably necessary to ensure the protection and security of the covered investment; and

(c) the concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required under the customary international law minimum standard of treatment,<sup>14</sup> and do not create additional substantive rights.

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

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

#### **Article 14.8: Treatment in Case of Armed Conflict or Civil Strife**

1. Each Party shall accord to investors of the other Party, and to covered investments, with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife, treatment no less favourable than that it accords, in like circumstances, to:

(a) its own investors and their investments; and

(b) investors of a non-Party and their investments.

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,

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<sup>14</sup> “Customary international law” results from a general and consistent practice of states that they follow from a sense of legal obligation. The customary international law referred to in this Article refers to relevant customary international law principles that protect the investments of aliens.



the latter Party shall provide the investor with restitution, compensation or both, as appropriate, for such loss.<sup>15</sup>

#### **Article 14.9: Transfers**

1. Each Party shall allow 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, capital gains, dividends, royalties, technical assistance and technical and management fees, interest and other current income accruing from any covered investment;
- (c) proceeds from the total or partial sale or liquidation of any covered investment;
- (d) payments made under a contract, including a loan agreement;
- (e) payments made in accordance with Article 14.8 and Article 14.11;
- (f) payments arising out of the settlement of a dispute by any means including adjudication, arbitration or the agreement of the parties to the dispute; and
- (g) earnings and other remuneration of personnel engaged from abroad in connection with that investment.

2. Each Party shall allow such 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 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 offences and the recovery of the proceeds of crime;

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<sup>15</sup> For greater certainty, when providing (i) restitution, (ii) compensation or (iii) both restitution and compensation, the value shall not exceed the loss suffered.

- (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) taxation;
- (g) social security, public retirement, or compulsory savings schemes; and
- (h) severance entitlements of employees.

#### **Article 14.10: Senior Management and Boards of Directors**

1. Neither Party shall require that an enterprise of that Party that is a covered investment appoint to a senior management position a natural person of any particular nationality.
2. A Party may require that a majority or less than 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 14.11: Expropriation and Compensation<sup>16</sup>**

1. A Party shall not expropriate or nationalise a covered investment either directly or through measures equivalent to expropriation or nationalisation (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 paragraph 1(c) shall:

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<sup>16</sup> This Article shall be interpreted in accordance with Annex 14-B.

- (a) be paid without delay;<sup>17</sup>
- (b) be equivalent to the fair market value of the expropriated investment at the time when or immediately before the expropriation was publicly announced, or when the expropriation occurred, whichever is applicable;
- (c) not reflect any change in value because the intended expropriation had become known earlier; and
- (d) be effectively realisable and freely transferable between the territories of the Parties.

3. The compensation referred to in paragraph 1(c) shall include appropriate interest. 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 useable currency, the compensation referred to in paragraph 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. This Article does not apply to the issuance of compulsory licences 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 the issuance, revocation, limitation or creation is consistent with the TRIPS Agreement.<sup>18</sup>

#### **Article 14.12: Subrogation**

1. If a Party or designated agency of a Party makes a payment to an investor of that Party under a guarantee, a contract of insurance or other form of indemnity it has granted on non-commercial risk in respect of a covered investment, the other Party in whose territory the covered investment was made shall recognise the subrogation or transfer of any rights the investor would have possessed under this Chapter with respect to the covered investment but for the subrogation, and the investor shall be precluded from pursuing these rights to the extent of the subrogation.

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<sup>17</sup> The Parties understand that there may be legal and administrative processes that need to be observed before payment can be made.

<sup>18</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 those rights and the term “limitation” of intellectual property rights includes exceptions to those rights.

2. The subrogated or transferred right or claim shall not be greater than the original right or claim of the investor.<sup>19</sup>

#### **Article 14.13: Denial of Benefits<sup>20</sup>**

A Party may deny the benefits of this Chapter:

(a) to an investor of the other Party that is an enterprise of the other Party and to investments of that investor if:

(i) persons of a non-Party or the denying Party own or control the enterprise; and

(ii) the enterprise has no substantial business activities in the territory of the other Party;

(b) to an investor of the other Party that is an enterprise of the other Party and to investments of that investor if:

(i) persons of a non-Party own or control the enterprise; and

(ii) 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; or

(c) to an investor of the other Party if a person of a non-Party owns or controls the enterprise and the denying Party does not maintain diplomatic relations with that non-Party.

#### **Article 14.14: Non-Conforming Measures**

1. Article 14.4, Article 14.5, Article 14.6 and Article 14.10 shall not apply to:

(a) any existing non-conforming measure that is maintained by a Party at:

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<sup>19</sup> This, however, does not necessarily imply recognition of the latter Party of the merits of any case or the amount of any claims arising therefrom.

<sup>20</sup> For greater certainty, the benefits of this Chapter may be denied at any time before or after an investment is made, including after an investor has submitted a claim to arbitration under Article 14.25.

- (i) the central level of government, as set out by that Party in its Schedule to Annex I (Trade in Services and Investment Schedules);  
or
  - (ii) a regional level of government, as set out by that Party in its Schedule to Annex I (Trade in Services and Investment Schedules);  
or
  - (iii) 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 at the date of entry into force of the Party's Schedule to Annex I (Trade in Services and Investment Schedules), with Article 14.4, Article 14.5, Article 14.6 or Article 14.10.

2. Article 14.4, Article 14.5, Article 14.6 and Article 14.10, shall 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 II (Trade in Services and Investment Schedules).

3. Article 14.4 and Article 14.5 shall not apply to any measure that falls within Article 5 of the TRIPS Agreement, and any measure that is covered by an exception to, or derogation from, the obligations under Article 3 or Article 4 of the TRIPS Agreement.

#### **Article 14.15: Special Formalities and Disclosure of Information**

1. Nothing in Article 14.4 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as a residency requirement for registration or a requirement that covered investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not substantially impair the protections afforded by a Party to investors of the other Party and covered investments in accordance with this Chapter.

2. Notwithstanding Article 14.4, 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 information which has been provided from any disclosure that would prejudice legitimate commercial interests of the investor or its 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 14.16: Promotion of Regulatory Objectives**

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, health, public morals, social welfare, consumer protection or the promotion and protection of cultural diversity or other regulatory objectives.

#### **Article 14.17: Corporate Social Responsibility**

Each Party reaffirms the importance of encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party.

#### **Article 14.18: Committee on Investment**

1. The Parties hereby establish a Committee on Investment (Investment Committee) consisting of representatives of the Parties.
2. The Investment Committee shall meet within two years from the date of entry into force of this Agreement and thereafter as agreed by the Parties. Meetings may be conducted in person, or by any other means as determined by the Parties.
3. The Investment Committee's functions shall be:
  - (a) to monitor and review the implementation of this Chapter;
  - (b) to consider any other matters related to this Chapter identified by the Parties;
  - (c) to report to the Joint Committee as required; and
  - (d) to consider and recommend to the Joint Committee any amendments to this Chapter.

## Section B: Investor-State Dispute Settlement

### Article 14.19: Definitions

For the purposes of this Section:

**Appointing Authority** means:

- (i) In the case of arbitration under Article 14.25, the Secretary General of ICSID;
- (ii) In the case of arbitration under Article 14.25, the Secretary General of the Permanent Court of Arbitration; or
- (iii) Any person as agreed between the disputing parties;

**disputing investor** means an investor of a Party that makes a claim against another Party;

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

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

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

**ICSID** means the International Centre for Settlement of Investment Disputes;

**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 of the Settlement of Investment Disputed between States and National of other States*, done at Washington on 18 March 1965;

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

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

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

### **Article 14.20: Scope**

1. This Section shall apply to disputes between a Party and an investor of another Party concerning an alleged breach of an obligation of the former under Section A which causes loss or damage to the covered investment of the investor (“investment dispute”).
2. This Section shall not apply to investment disputes which have occurred prior to the date of entry into force of this Agreement.
3. A natural person possessing the nationality or citizenship of a Party may not pursue a claim against that Party under this Section.

### **Article 14.21: Exclusion of Claims**

1. Without prejudice to the scope of any applicable exceptions, non-conforming measures, principles of international law or the disputing Party’s ability to rely upon such exceptions, non-conforming measures or principles of international law during the proceedings, no claim may be brought under this Section:
  - (a) alleging a breach of, or otherwise invoking, Article 14.5 on the basis that another international agreement contains more favourable rights or obligations. For greater certainty, this shall not prevent a claim challenging measures of a Party, including measures taken in accordance with another international agreement, on the basis that those measures breach Article 14.5 and have resulted in loss or damage to the disputing investor;
  - (b) in relation to a measure that is designed and implemented to protect or promote public health<sup>21</sup>;
  - (c) in relation to an investment that has been established through illegal conduct including fraudulent misrepresentation, concealment or corruption. For greater certainty, this exclusion does not apply to investments established through minor or technical breaches of law; or
  - (d) if the claim is frivolous or manifestly without merit.

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<sup>21</sup> For greater certainty:

1. for Australia, such measures include measures that comprise or relate to the:
  - (i) Pharmaceutical Benefits Scheme;
  - (ii) Medicare Benefits Scheme;
  - (iii) Therapeutic Goods Administration; and
  - (iv) Office of the Gene Technology Regulator.
2. for Indonesia, such measures include measures that comprise or relate to the Indonesia Health Service Scheme.



2. If the disputing Party considers that a claim brought under this Section is covered by paragraph 1, it may submit an objection on that basis as a preliminary question in accordance with Article 14.30, without prejudice to its ability to raise such an objection at another stage in the proceedings.

#### **Article 14.22: Consultations**

1. In the event of an investment dispute referred to in Article 14.20, the disputing parties shall as far as possible resolve the dispute through consultation, with a view towards reaching an amicable settlement. Such consultations shall be initiated by a written request for consultations delivered by the disputing investor to the disputing Party.

2. With the objective of resolving an investment dispute through consultations, a disputing investor shall provide the disputing Party, prior to the commencement of consultations, with information regarding the legal and factual basis for the investment dispute.

3. For greater certainty, the initiation of consultations shall not be construed as recognition of the jurisdiction of the tribunal.

#### **Article 14.23: Conciliation**

1. If the dispute cannot be resolved within 180 days from the date of receipt by the disputing Party of the written request for consultations, the disputing Party may initiate a conciliation process, which shall be mandatory for the disputing investor, with a view towards reaching an amicable settlement. Such a conciliation process shall be initiated by a written request delivered by the disputing Party to the disputing investor.

2. The conciliation process under this Article can only be initiated by a written request delivered by the disputing Party within 180 days from the date of receipt by the disputing Party of the written request for consultations.

3. Expenses incurred in relation to the conciliation process shall be borne equally by the disputing parties. Each disputing party shall bear its own legal expenses.

#### **Article 14.24: Claim by an Investor of a Party**

1. If an investment dispute has not been resolved by consultations in accordance with Article 14.22 or conciliation in accordance with Article 14.23, in accordance with the timeframes in Article 14.26.2(a) or Article 14.26.2(b) respectively;

- (a) the disputing investor, on his or her own behalf, may submit to arbitration under this Section a claim:
  - (i) that the disputing Party has breached an obligation under Article 14.4, Article 14.5 and Articles 14.7 through 14.12 of Section A; and
  - (ii) that the disputing investor has incurred loss or damage by reason of, or arising out of, that breach; and
- (b) the disputing investor, on behalf of an enterprise<sup>22</sup> of the disputing Party that the disputing investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim:
  - (i) that the disputing Party has breached an obligation under Article 14.4, Article 14.5 and Article 14.7 through Article 14.12 of Section A; and
  - (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

#### **Article 14.25: Submission of a Claim**

1. A disputing investor may submit a claim referred to in Article 14.24 to one of the following fora:
  - (a) if Indonesia is the disputing Party, to the courts or tribunals of that Party, provided that such court or tribunal has jurisdiction over such claim;
  - (b) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings;
  - (c) under the ICSID Additional Facility Rules;
  - (d) under the UNCITRAL Arbitration Rules; or
  - (e) if the disputing parties agree, to any other arbitration institution or under any other arbitration rules.
2. A claim shall be deemed submitted to arbitration under this Article when the disputing investor's notice or of request for arbitration made in accordance with this Section ("notice of arbitration") is received under the applicable arbitration rules.

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<sup>22</sup> For greater certainty, an enterprise may not itself submit a claim against that Party in which it is established.

3. The arbitration rules applicable under paragraphs 1(a) through (e), as in effect on the date the claim or claims were submitted to arbitration under this Article, shall govern the arbitration except to the extent modified by this Section.
4. In the event that an investment dispute has been submitted for resolution under one of the fora provided for in paragraph 1 of this Article, the same investment dispute shall not be submitted under any other fora provided for in paragraph 1 of this Article.
5. In relation to a specific investment dispute or class of disputes, the applicable arbitration rules may be waived, varied or modified by written agreement between the disputing parties. Such rules shall be binding on the relevant tribunal or tribunals established in accordance with this Section, and on individual arbitrators serving on such tribunals.
6. The disputing investor shall provide with the notice of arbitration:
  - (a) the name of the arbitrator that the disputing investor appoints; or
  - (b) the disputing investor's written consent for the Appointing Authority to appoint that arbitrator.

#### **Article 14.26: Conditions and Limitations on Submission of a Claim**

1. No claim shall be submitted to arbitration under this Section if more than three years and six months have elapsed from the date on which the disputing investor first acquired, or should have first acquired, knowledge of the breach alleged under Article 14.24 and knowledge that the disputing investor (for claims brought under Article 14.24(1)(a) or the enterprise (for claims brought under Article 14.24(1)(b)) has incurred loss or damage.
2. No claim shall be submitted to arbitration under this Section unless:
  - (a) if the disputing Party has not initiated a conciliation process in accordance with Article 14.23, at least 180 days have elapsed since the date of the receipt by the disputing Party of a request for consultations and the disputing investor has provided written notice to the disputing Party of its intent to submit the investment dispute to arbitration at least 90 days before the claim is submitted under Article 14.24; or
  - (b) if the disputing Party has initiated a conciliation process Article 14.23, at least 120 days has elapsed since the initiation of the conciliation and the disputing investor has provided written notice to the disputing Party of its intent to submit the investment dispute to arbitration at least 60 days before the claim is submitted under Article 14.24; and

(c) a notice of intent referred to in subparagraphs (a) and (b) briefly summarises the alleged breach of the disputing Party (including the articles or provisions alleged to have been breached) and the loss or damaged allegedly caused to the disputing investor or a covered investment.

3. No claim shall be submitted to arbitration under this Section unless:

(a) the disputing investor consents in writing to arbitration in accordance with the procedures set out in this Agreement; and

(b) the notice of arbitration is accompanied by:

(i) for claims under Article 14.24(1)(a), the disputing investor's written waiver; and

(ii) for claims under Article 14.24(1)(b), the disputing investor's and the enterprise's written waiver

of any right to initiate or continue before any court or administrative tribunal under the law of either Party, or any other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 14.24.

4. Notwithstanding paragraph 3(b), neither Party shall prevent the disputing investor from initiating or continuing an action that seeks interim measures of protection for the sole purpose of preserving its rights and interests and does not involve the payment of damages or resolution of the substance of the matter in dispute, before the courts or administrative tribunals of the disputing Party.

5. No Party shall give diplomatic protection, or bring an international claim, in respect of a dispute which has been submitted to conciliation or arbitration under this Article, unless such other Party has failed to abide by and comply with the award rendered in such dispute. Diplomatic protection, for the purposes of this paragraph, shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

6. A disputing Party shall not assert, as a defence counter-claim, right of set off or otherwise, that the disputing investor or the covered investment has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of any alleged loss.

#### **Article 14.27: Selection of Arbitrators**

1. Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators:

- (a) one arbitrator appointed by each of the disputing parties; and
  - (b) a third arbitrator, who shall be the presiding arbitrator, appointed by agreement of the disputing parties, shall be a national of a non-Party which has diplomatic relations with the disputing Party and non-disputing Party, and shall not have permanent residence in either the disputing Party or non-disputing Party.
2. Arbitrators shall have expertise or experience in public international law, international trade or international investment rules and be independent of, and not be affiliated with or take instructions from the disputing Party, the non-disputing Party or disputing investor.
3. The Appointing Authority shall serve as appointing authority for arbitration under this Article.
4. If a tribunal has not been constituted within 75 days from the date that a claim is submitted to arbitration under this Section, the Appointing Authority, on the request of a disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.
5. The disputing parties may establish rules relating to expenses incurred by the tribunal, including the arbitrators' remuneration.
6. If any arbitrator appointed as provided for in this Article resigns or becomes unable to act, a successor shall be appointed in the same manner as prescribed for the appointment of the original arbitrator, and the successor shall have all the powers and duties of the original arbitrator.
7. Arbitrators appointed under this Section shall comply with Annex 14-A (Code of Conduct of Arbitrators).

#### **Article 14.28: Security for Costs**

1. For greater certainty, on request of the disputing Party, the tribunal may order the disputing investor to provide security for all or a part of the costs if there are reasonable grounds to believe that the claimant risks not being able to honour a possible decision on costs issued against it.
2. If the security for costs is not provided in full within 30 days after the tribunal's order or within any other time period set by the tribunal, the tribunal shall so inform the disputing parties and thereafter the tribunal may order the suspension or termination of the proceedings.

### **Article 14.29: Consolidation**

Where two or more claims have been submitted separately to arbitration under Article 14.24 and the claims have a question of law or fact in common and arise out of the same or similar events or circumstances, all concerned disputing parties may agree to consolidate those claims in any manner they deem appropriate.

### **Article 14.30: Conduct of the Arbitration**

1. Where issues relating to jurisdiction or admissibility are raised as preliminary objections, a tribunal shall decide the matter before proceeding to the merits.
2. A disputing Party may, no later than 60 days after the constitution of the tribunal, file as a preliminary objection that a claim is excluded under Article 14.20. A disputing Party may also file an objection that a claim is otherwise outside of the jurisdiction or competence of the tribunal. The disputing Party shall specify as precisely as possible the basis for the objection. This is without prejudice to a disputing Party's ability to raise such an objection at another stage of the proceedings.
3. The tribunal shall address any such objection as a preliminary question apart from the merits of the claim. 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 excluded under Article 14.20, or is otherwise not within the jurisdiction or competence of the tribunal, it shall render an award to that effect.
4. In the event that the disputing Party so requests within 60 days after the tribunal is constituted, the tribunal shall decide on an expedited basis any preliminary objection raised under this Article. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection, stating the grounds therefore, 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.
5. 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 a State that is a party to the New York Convention.

### **Article 14.31: Transparency of Arbitral Proceedings**

1. Subject to paragraphs 2 and 3, the disputing Party shall make publicly available all awards and decisions produced by the tribunal.
2. Any of the disputing parties that intend to use information designated as confidential information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.
3. Any information specifically designated as confidential that is submitted to the tribunal or the disputing parties shall be protected from disclosure to the public.
4. A disputing party may disclose to persons directly connected with the arbitral proceeding such confidential information as it considers necessary for the preparation of its case, but it shall require that such confidential information is protected.
5. The tribunal shall not require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting Cabinet confidences, personal privacy or the financial affairs and accounts of individual customers of financial institutions, or which it determines to be contrary to its essential security.
6. The non-disputing Party shall be entitled, at its cost, to receive from the disputing Party a copy of the notice of arbitration, no later than 30 days after the date that such document has been delivered to the disputing Party. The disputing Party shall notify the other Party of the receipt of the notice of arbitration within 30 days thereof.

### **Article 14.32: Third Party Funding**

1. If there is third party funding, the disputing investor benefiting from it shall notify to the disputing Party and to the tribunal, or where the tribunal is not established, to the Appointing Authority of the tribunal, the name and address of the third party funder.
2. Such notification shall be made at the time of submission of a claim, or, where the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as such agreement is concluded or the donation or grant is made.
3. If a disputing investor fails to disclose third party funding under this Article, the tribunal may order the suspension or termination of the proceedings.

### **Article 14.33: Governing Law**

1. Subject to paragraphs 2 and 3, when a claim is submitted under Article 14.24, the tribunal shall decide the issues in dispute in accordance with this Agreement, any other applicable agreements between the Parties, any relevant rules of international law applicable in the relations between the Parties and, if applicable, any relevant domestic law of the disputing Party.
2. The tribunal shall, on its own account or at the request of a disputing party, request a joint interpretation of any provision of this Agreement that is in issue in a dispute. The Parties shall submit in writing any joint decision declaring their interpretation to the tribunal within 60 days of the delivery of the request. Without prejudice to paragraph 3, if the Parties fail to issue such a decision within 60 days, any interpretation submitted by a Party shall be forwarded to the disputing parties and the tribunal, which shall decide the issue on its own account.
3. A joint decision of the Parties, declaring their interpretation of a provision of this Agreement shall be binding on a tribunal, and any decision or award issued by a tribunal and any decision or award issued by a tribunal must be consistent with that joint decision.

### **Article 14.34: Awards**

1. If a tribunal makes a final award against either of the disputing parties, 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 disputing Party may pay monetary damages and any applicable interest in lieu of restitution.
2. A tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules.
3. If the tribunal determines that a claim is brought in contravention of Article 14.21 the tribunal shall make an award requiring the disputing investor to pay all costs and attorney's fees incurred by the disputing Party to respond to the claim, unless the tribunal considers that there are exceptional circumstances that warrant the disputing parties to bear costs in other specified proportions.
4. A tribunal may not award punitive damages.
5. Subject to paragraph 1, if a claim is submitted to arbitration under Article 14.24.1(b) and an award is made in favour of the enterprise:



- (a) an award of restitution of property shall provide that restitution be made to the enterprise; and
  - (b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise.
- 6. An award made by a tribunal shall be final and binding upon the disputing parties. An award shall have no binding force except between the disputing parties and in respect of the particular case.
- 7. Subject to paragraph 8 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.
- 8. A disputing party may not seek enforcement of a final award until:
  - (a) In the case of a final award under the ICSID Convention:
    - (i) 120 days has 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, the UNCITRAL Arbitration Rules, or the rules selected in accordance with Article 14.25:
    - (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.
- 9. Each Party shall provide for the enforcement of an award in its territory.

#### **Article 14.35: Service of Documents**

- 1. Notices and other documents in disputes under this Section shall be served on Australia by delivery to:

Department of Foreign Affairs and Trade  
R.G. Casey Building  
John McEwen Crescent  
Barton ACT 0221

Australia

2. Notices and other documents in disputes under this Section shall be served on Indonesia by delivery to:

Directorate General of Legal Affairs and International Treaties  
Ministry of Foreign Affairs  
Jalan Taman Pejambon 6  
10110 DKI Jakarta  
Indonesia

## ANNEX 14-A

### CODE OF CONDUCT OF ARBITRATORS

#### *Responsibilities to the Process*

1. Every arbitrator shall avoid impropriety and the appearance of impropriety, be independent and impartial, avoid direct and indirect conflicts of interests and observe high standards of conduct so that the integrity and impartiality of the dispute settlement process is preserved. Former arbitrators shall comply with the obligations in paragraphs 16, 17, 18 and 19.

#### *Disclosure Obligations*

2. Prior to confirmation of his or her selection as an arbitrator under this Agreement, a candidate shall disclose any interest, relationship or matter that is likely to affect his or her independence or impartiality or that might reasonably create an appearance of impropriety or bias in the proceeding. To this end, a candidate shall make all reasonable efforts to become aware of any such interests, relationships and matters.

3. Once selected, an arbitrator shall continue to make all reasonable efforts to become aware of any interests, relationships and matters referred to in paragraph 2 and shall disclose them by communicating them in writing to the disputing parties. The obligation to disclose is a continuing duty, which requires an arbitrator to disclose any such interests, relationships and matters that may arise during any stage of the proceeding.

#### *Performance of Duties by Arbitrators*

4. An arbitrator shall comply with the provisions of this Chapter and the applicable rules of procedure.

5. On selection, an arbitrator shall perform his or her duties thoroughly and expeditiously throughout the course of the proceeding with fairness and diligence.

6. An arbitrator shall not deny other arbitrators the opportunity to participate in all aspects of the proceeding.

7. An arbitrator shall consider only those issues raised in the proceeding and necessary to rendering a decision and shall not delegate the duty to decide to any other person.

8. An arbitrator shall take all appropriate steps to ensure that his or her assistant and staff are aware of, and comply with, paragraphs 1, 2, 3, 18, 19 and 20.

9. An arbitrator shall not engage in *ex parte* contacts concerning the proceeding.

10. An arbitrator shall not communicate matters concerning actual or potential violations by another arbitrator unless the communication is to both disputing parties or is necessary to ascertain whether that arbitrator has violated or may violate this Annex.

#### *Independence and Impartiality of Arbitrators*

11. An arbitrator shall be independent and impartial. An arbitrator shall act in a fair manner and shall avoid creating an appearance of impropriety or bias.

12. An arbitrator shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a Party or a disputing party or fear of criticism.

13. An arbitrator shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere, or appear to interfere, with the proper performance of his or her duties.

14. An arbitrator shall not use his or her position on the arbitral tribunal to advance any personal or private interests. An arbitrator shall avoid actions that may create the impression that others are in a special position to influence the arbitrator. An arbitrator shall make every effort to prevent or discourage others from representing themselves as being in such a position.

15. An arbitrator shall not allow past or existing financial, business, professional, family or social relationships or responsibilities to influence the arbitrator's conduct or judgment.

16. An arbitrator shall avoid entering into any relationship, or acquiring any financial interest, that is likely to affect his or her impartiality or that might reasonably create an appearance of impropriety or bias.

#### *Duties in Certain Situations*

17. An arbitrator or former arbitrator shall avoid actions that may create the appearance that the arbitrator was biased in carrying out his or her duties or would benefit from the decision or award of the arbitral tribunal.

#### *Maintenance of Confidentiality*

18. An arbitrator or former arbitrator shall not at any time disclose or use any non-public information concerning the proceeding or acquired during the proceeding except for the purposes of the proceeding and shall not, in any case, disclose or use

any such information to gain personal advantage or advantage for others or to affect adversely the interest of others.

19. An arbitrator shall not disclose an arbitral tribunal award or parts thereof prior to its publication.

20. An arbitrator or former arbitrator shall not at any time disclose the deliberations of an arbitral tribunal, or any arbitrator's view, except as required by legal or constitutional requirements.

## ANNEX 14-B

### EXPROPRIATION AND COMPENSATION

1. An action or a series of related actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in a covered investment.
2. Article 14.11.1 of this Chapter addresses two situations:
  - (a) the first situation is direct expropriation, where a covered investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and
  - (b) the second situation is where an action or series of related actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
3. The determination of whether an action or series of related actions by a Party, in a specific fact situation, constitutes an expropriation of the type referred to in paragraph 2(b) 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 series of related actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that such an indirect expropriation has occurred;
  - (b) whether the government action breaches the government's prior binding written commitment to the investor whether by contract, license or other legal document; and
  - (c) the character of the government action, including, its objective and whether the action is disproportionate to the public purpose<sup>23</sup>.
4. Non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety and the environment do not constitute expropriation of the type referred to in paragraph 2(b).

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<sup>23</sup> "Public purpose" shall be read with reference to Article 24.11.1(a).

## ANNEX 14-C

### FOREIGN INVESTMENT POLICY

1. A decision under Australia's Foreign Investment Framework, which comprises: Australia's Foreign Investment Policy, the *Foreign Acquisition and Takeovers Act 1975* (Cth); *Foreign Acquisitions and Takeovers Regulations 2015* (Cth); *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (Cth); *Foreign Acquisitions and Takeovers Fees Imposition Regulation 2015* (Cth); *Financial Sector (Shareholdings) Act 1998* (Cth); and Ministerial Statements shall not be subject to the dispute settlement provisions of Section B (Investor-State Dispute Settlement) or Chapter 20 (Consultations and Dispute Settlement).

2. If, in the future, Indonesia establishes a foreign investment screening mechanism equivalent to Australia's Foreign Investment Review Board, a decision made under that mechanism shall also not be subject to the dispute settlement provisions of Section B (Investor-State Dispute Settlement) or Chapter 20 (Consultations and Dispute Settlement).

## ANNEX 14-D

### ANNEX ON PUBLIC DEBT

1. The Parties recognise that the purchase of debt issued by a Party entails commercial risk. For greater certainty, no award shall be made in favour of a claimant for a claim under Article 14.25 with respect to default or non-payment of debt issued by a Party unless the claimant meets its burden of proving that such default or non-payment constitutes a breach of an obligation under Section A, including an uncompensated expropriation in accordance with Article 14.11.

2. No claim that a restructuring of debt issued by a Party breaches an obligation under Section A shall be submitted to, or if already submitted continue in, arbitration under Section B (Investor-State Dispute Settlement) if the restructuring is a negotiated restructuring at the time of submission, or becomes a negotiated restructuring after that submission, except for a claim that the restructuring violates Article 14.4 or Article 14.5.

3. Notwithstanding Article 14.25, and subject to paragraph 2, an investor of a Party shall not submit a claim under Section B (Investor-State Dispute Settlement) that a restructuring of debt issued by a Party breaches an obligation under Section A, other than Article 14.4 and Article 14.5, unless:

- (a) 270 days have elapsed from the date of receipt by the respondent of the written request for consultations in accordance with Article 14.22; or
- (b) 120 days have elapsed from the date of initiation of conciliation in accordance with Article 14.23, provided that such conciliation was made after a request for consultation under subparagraph (a).