

CHAPTER 11

INVESTMENT

Section A: Investment

Article 11.1 Scope and Coverage

1. This Chapter applies to measures adopted or maintained by a Party relating to:
 - (a) investors of the other Party; and
 - (b) covered investments.
2. A Party's obligations under this Section shall apply to:
 - (a) all levels of government of that Party; and
 - (b) any non-governmental body when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party²⁴.
3. For greater certainty, this Chapter does not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.
4. This Chapter shall not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter 8 (Cross Border Trade in Services) or Chapter 10 (Temporary Entry for Business Persons).
5. Notwithstanding paragraph 4, for the purposes of protection of investment with respect to the commercial presence mode of service supply, Articles 11.4, 11.5, 11.6, 11.7, 11.12, 11.13 shall apply to any measure affecting the supply of a service by a service supplier of a Party through commercial presence, only to the extent that they relate to a covered investment. Section B shall apply to Articles 11.4, 11.5, 11.6,

²⁴ For greater certainty, governmental authority is delegated under the law of a Party, including through a legislative grant, and a government order, directive or other action transferring to the person, or authorizing the exercise by the person of, governmental authority. For greater certainty, "governmental authority" refers to the power that is vested in the government of a Party, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges.

11.7, 11.12, 11.13 with respect to the supply of a service through commercial presence, only to the extent that they relate to a covered investment.

Article 11.2: National Treatment²⁵

1. Each Party shall accord to investors of the other Party treatment no less favorable 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 favorable 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 11.3: Most-Favored-Nation Treatment

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. Paragraphs 1 and 2 of this Article shall not be construed to oblige any Party to extend to the investors of the other Party or covered investment any treatment, preference or privilege by virtue of any bilateral or multilateral agreement relating to investment in force or signed prior to the date of entry into force of this Agreement.

4. For greater certainty, the treatment referred to in this Article does not encompass dispute resolution mechanisms or procedures, such as those included in Section B, that are provided for in international investment or trade agreements.

²⁵ For greater certainty, whether treatment is accorded in “like circumstances” under Articles 11.2 or 11.3 depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.

Article 11.4: Minimum Standard of Treatment²⁶

1. Each Party shall accord to covered investments fair and equitable treatment and full protection and security in accordance with customary international law.
2. For great certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
 - (a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with due process of law; and
 - (b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.
3. A determination that there has been a breach of another provision of this Chapter, 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.
5. For greater certainty, the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.

Article 11.5: Compensation for Losses

1. Notwithstanding Article 11.10.5 (b), each Party shall accord to investors of the other Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict, a state of national emergency, or civil strife.
2. Notwithstanding paragraph 1, if an investor of a Party, in the situations referred

²⁶ Minimum standard of Treatment shall be interpreted in accordance with Annex 11-A.

to in paragraph 1, suffers a loss in the territory of the other Party resulting from:

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

the latter Party shall provide the investor restitution, compensation, or both, as appropriate, for such loss. Any compensation shall be made in accordance with Articles 11.6.2, 11.6.3 and 11.6.4, *mutatis mutandis*.

3. Paragraph 1 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 11.2 but for Article 11.10.5 (b).

Article 11.6: Expropriation and Compensation²⁷

1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:

- (a) for a public purpose;
- (b) in a non-discriminatory manner;
- (c) on payment of compensation in accordance with this Article; and
- (d) in accordance with due process of law.

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

- (a) be paid without delay;
- (b) be equivalent to the fair market value of the expropriated investment at the time when the expropriation was publicly announced or when the expropriation took place ("the date of expropriation"), whichever is earlier; and
- (c) be fully realizable and freely transferable.

3. If the fair market value is denominated in a freely usable currency, the compensation referred to in paragraph 1(c) shall be no less than the fair market value

²⁷ Article 11.6 shall be interpreted in accordance with Annexes 11-A and 11-B.

on the date of public announcement of expropriation or on the date of expropriation, whichever is earlier, plus interest at a commercially reasonable rate for that currency accrued from the date of expropriation until the date of payment, as appropriate.

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

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

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

6. For greater certainty, the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute an expropriation, even if there is loss or damage to the covered investment as a result.

Article 11.7: Transfers²⁸

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;
- (b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;
- (c) interest, royalty payments, management fees, and technical assistance and

²⁸ Article 11.7 does not affect each Party's ability to administer its capital account for the maintenance of the stability and soundness of its financial system, such as the foreign exchange market, stock market, bond market and financial derivatives market. For greater certainty, Annex 11-C applies to this Article.

other fees;

- (d) payments made under a contract, including a loan agreement;
- (e) payments made pursuant to Articles 11.5 and 11.6;
- (f) payments arising out of a dispute; and
- (g) earnings and remuneration of a national of a Party who works in a covered investment in the territory of the other Party.

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

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

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

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

5. For greater certainty, provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investment, paragraphs 1 through 3 shall not be construed to prevent a Party from adopting or maintaining measures that are necessary to secure compliance with laws and regulations, including those relating to the prevention of deceptive and fraudulent practices, that are not inconsistent with this Chapter.

Article 11.8: 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 the other Party or of a non-Party in its territory, impose or enforce any requirement or enforce any commitment or undertaking:²⁹

- (a) to export a given level or percentage of goods or services;
- (b) to achieve a given level or percentage of domestic content of goods or services;
- (c) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
- (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
- (e) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
- (f) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory;
- (g) to supply exclusively from the territory of the Party the goods that such investment produces or the services that it supplies to a specific regional market or to the world market;
- (h) to locate the headquarters for a specific region or the world market in its territory; or
- (i) to achieve a given percentage or value of research and development in its territory.

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 the other Party or of a non-Party, on compliance with any requirement:

²⁹ For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 2 does not constitute a “commitment or undertaking” for the purposes of paragraph 1.

- (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) Nothing in paragraph 1 shall be construed to prevent a Party, in connection with an investment in its territory of an investor of the other Party or of a non-Party, 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 such measure is consistent with paragraphs 1(f) and 1(i).
- (b) Nothing in paragraph 2 shall be construed to prevent a Party, in connection with an investment in its territory of an investor of the other Party or of a non-Party, from conditioning the receipt or continued receipt of an advantage 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.
- (c) Paragraph 1(f) does not apply:
- (i) when a Party authorizes use of an intellectual property right in accordance with Article 31 of the TRIPS Agreement, or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or
 - (ii) when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under the Party's competition laws.³⁰
- (d) Provided that such measures are not applied in an arbitrary or unjustifiable

³⁰ The Parties recognize that a patent does not necessarily confer market power.

manner, and provided that such measures do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), 1(c), 1(f), 2(a) and 2(b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:

- (i) necessary to secure compliance with laws and regulations that are not inconsistent with this Chapter;
 - (ii) necessary to protect human, animal, or plant life or health; or
 - (iii) related to the conservation of living and non-living exhaustible natural resources.
- (e) Paragraphs 1(a), 1(b), 1(c), 2(a) and 2(b), do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs.
- (f) Paragraphs 1(b), 1(c), 1(f), 1(g), 2(a) and 2(b), do not apply to government procurement.
- (g) Paragraphs 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 11.9: 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 position natural persons of any particular nationality.

2. A Party may require that a majority of the board of directors, or any committee thereof, of an enterprise of that Party that is a covered investment, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

Article 11.10: Non-Conforming Measures

1. Articles 11.2, 11.3, 11.8 and 11.9 do not apply to:
 - (a) any existing non-conforming measures that is maintained by a Party as set out by that Party in its Schedule to Annex I or Annex III;
 - (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
 - (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 11.2, 11.3, 11.8 and 11.9.
2. Articles 11.2, 11.3, 11.8 and 11.9 do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II.
3. Neither Party may, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to Annex II, require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.
4. Articles 11.2 and 11.3 do not apply to any measure covered by an exception to, or derogation from, the obligations under Article 3 or 4 of the TRIPS Agreement, as specifically provided in those Articles and in Article 5 of the TRIPS Agreement.
5. Articles 11.2, 11.3, 11.8 and 11.9 do not apply to:
 - (a) government procurement; or
 - (b) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.

Article 11.11: Special Formalities and Information Requirements

1. Nothing in Article 11.2 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as a requirement on the filing for establishment of and changes to the covered investments of the other 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 Articles 11.2 and 11.3, 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 or administrative purposes. The Party shall protect any confidential business information from any disclosure that would prejudice the competitive position of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.

Article 11.12: Subrogation

If a Party (or any statutory body, governmental agency or institution, or corporation designated by the Party) makes a payment to an investor of the Party under a guarantee, a contract of insurance or other form of indemnity that it has entered into with respect to a covered investment, the other Party, in whose territory the covered investment was made, shall recognize 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, including any rights under Section B, and the investor shall be precluded from pursuing such rights to the extent of the subrogation.

Article 11.13: Denial of Benefits

1. A Party may, at any time, including after the institution of arbitration proceedings in accordance with Section B, deny the benefits³¹ of this Chapter to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if a non-Party, or persons of a non-Party own or control the enterprise and the denying Party:

- (a) does not maintain diplomatic relations with the non-Party; or
- (b) adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.

2. A Party may, at any time, including after the institution of arbitration proceedings in accordance with Section B, deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such other Party and to investments of that investor

³¹ For greater certainty, benefits referred to in this Article include the rights of an investor of a Party to resort to the dispute settlement mechanism set out in Section B.

if the enterprise has no substantial business activities in the territory of the other Party and a non-Party, persons of a non-Party, or of the denying Party, own or control the enterprise.

Article 11.14: Disclosure of Information

Nothing in this Chapter shall be construed to require a Party to furnish or allow access to protected information, or other confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest, or which would prejudice the legitimate commercial interests of particular enterprises, public or private.

Article 11.15: Financial Services

1. Where an investor submits a claim to arbitration under Section B, and the disputing Party invokes paragraphs (1) and (2) of this Article, the investor-State tribunal established pursuant to Section B may not decide whether and to what extent it is a valid defence to the claim of the investor. It shall seek a report in writing from the Parties on this issue. The investor-State tribunal may not proceed pending receipt of such a report or of a decision of a State-State arbitral tribunal, should such a State-State arbitral tribunal be established.

2. Pursuant to a request for a report received in accordance with the above paragraph, the financial services authorities of the Parties shall engage in consultations. If the financial services authorities³² of the Parties reach a joint decision on the issue of whether and to what extent the relevant paragraphs of this Article is a valid defence to the claim of the investor, they shall prepare a written report describing their joint decision. The report shall be transmitted to the investor-State tribunal, and shall be binding on the investor-State tribunal.

3. If, after 120 days, the financial services authorities of the Parties are unable to reach a joint decision on the issue of whether and to what extent the relevant paragraphs of this Article is a valid defence to the claim of the investor, the issue shall, within 30 days, be referred by either Party to a State-State arbitral tribunal established pursuant to Chapter 21 (Dispute Settlement). In such a case, the provisions requiring consultations between the Parties in Chapter 21 (Dispute Settlement) shall not apply. The decision of the State-State arbitral tribunal shall be

³² For the purposes of this Article, the “financial services authorities” means:

- (a) for China, the one that the Party designates and notifies the other Party through the Contact Point established in Article 9.20 (Contact Point); and
- (b) for Nicaragua, the one that the Party designates and notifies the other Party through the Contact Point established in Article 20.4 (Contact Point) .

transmitted to the investor-State tribunal, and shall be binding on the investor-State tribunal. All of the members of any such State-State arbitral tribunal shall have expertise or experience in financial services law or practice, which may include the regulation of financial institutions.

4. If the respondent or the non-disputing Party has not submitted such issue to arbitration in accordance with Chapter 21 (Dispute Settlement) pursuant to paragraph 3 within 10 days of the expiration of the 120 day period referred to in paragraph 3, the arbitration under Section B may proceed with respect to the claim.

Article 11.16: Taxation

1. Except as provided in this Article, nothing in this Section shall impose obligations with respect to taxation measures.

2. Article 11.6 shall apply to all taxation measures³³, except that a claimant that asserts that a taxation measure involves an expropriation may submit a claim to arbitration under Section B only if:

(a) the claimant has first referred to the competent tax authorities³⁴ of both Parties in writing the issue of whether that taxation measure involves an expropriation; and

(b) within 180 days after the date of such referral, the competent tax authorities of both Parties fail to agree that the taxation measure is not an expropriation.

3. Nothing in this Chapter shall affect the rights and obligations of a Party under any tax convention. In the event of any inconsistency between this Chapter and any such convention, that convention shall prevail to the extent of the inconsistency. In the case of a tax convention between the Parties, the competent authorities under that convention shall have sole responsibility for determining whether any inconsistency exists between this Chapter and that convention.

³³ For greater certainty, measures regarding tax preservation or punishment against illegal activities that are non-discriminatory and adopted or implemented for the purpose of levying or collecting taxes in a fair and effective manner, do not constitute expropriations as provided in Article 11.6.

³⁴ For the purposes of this Article, “competent tax authorities” means:

(a) for China, the Ministry of Finance and State Administration of Taxation or an authorized representative of the Ministry of Finance and State Administration of Taxation; and

(b) for Nicaragua, the Ministry of Finance and Public Credit (Ministerio de Hacienda y Crédito Público (MHCP) or its successor.

Section B: Investor-State Dispute Settlement

Article 11.17: Consultations

1. In the event of an investment dispute, if the claimant intends to submit the dispute to arbitration, it shall deliver a request for consultations to the respondent³⁵ at least 180 days prior to submission of the dispute to arbitration. The request shall:

- (a) specify the name and address of the claimant and, where a claim is submitted on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, the name, address, and place of incorporation of the enterprise;
- (b) list evidences that the claimant is an investor under this Chapter;
- (c) for each claim, identify the provision of this Chapter or the investment agreement alleged to have been breached and any other relevant provisions;
- (d) for each claim, identify the measures or events giving rise to the claim;
- (e) for each claim, provide a brief summary of the legal and factual basis; and
- (f) specify the relief sought and the approximate amount of damages claimed.

2. After a request for consultations is made pursuant to this Section, the claimant and the respondent shall enter into consultations³⁶ with a view to reaching a mutually satisfactory solution.

Article 11.18: Submission of a Claim to Arbitration

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultations pursuant to Article 11.17 and 180 days have elapsed since the date of the request for consultations:

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

³⁵ For greater certainty, the request for consultations shall be sent to the central government body as listed out in Annex 11-D.

³⁶ Unless otherwise agreed by the parties to the dispute, the place for consultation should be the capital of the respondent.

- (i) that the respondent has breached
 - (A) an obligation under Articles 11.2 and 11.3, provided that the claim does not in any way relate to treatment with respect to establishment, acquisition or expansion of investments in the territory of the respondent;
 - (B) Articles 11.4, 11.5, 11.6, 11.7, 11.8 or 11.9; or
 - (C) an investment agreement; and
 - (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and
- (b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim:
- (i) that the respondent has breached
 - (A) an obligation under Articles 11.2 and 11.3, provided that the claim does not in any way relate to treatment with respect to establishment, acquisition or expansion of investments in the territory of the respondent;
 - (B) Articles 11.4, 11.5, 11.6, 11.7, 11.8 or 11.9; or
 - (C) an investment agreement; and
 - (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach³⁷,

provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(i)(C) a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.

2. An investor of a Party may not initiate or continue a claim under this Section if a claim involving the same measure or measures alleged to constitute a breach under this Article and arising from the same events or circumstances is initiated or

³⁷ For greater certainty, a minority non-controlling shareholder of an enterprise may not submit a claim on behalf of that enterprise.

continued pursuant to an agreement between the respondent and a non-Party by:

- (a) an enterprise of a non-Party that owns or controls, directly or indirectly, the investor of a Party, or
- (b) an enterprise of a non-Party that is owned or controlled, directly or indirectly, by the investor of a Party.

Notwithstanding the previous paragraph, the claim may proceed if the respondent agrees that the claim may proceed, or if the investor of a Party and the enterprise of a non-Party agree to consolidate the claims under the respective agreements before a tribunal constituted under this Section.

3. Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:

- (a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention;
- (b) under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention;
- (c) under the UNCITRAL Arbitration Rules³⁸; or
- (d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules.

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

- (a) referred to in paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General;
- (b) referred to in Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General;
- (c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 20 of the UNCITRAL Arbitration Rules, are received by the respondent; or

³⁸ In the case of arbitration under Section B pursuant to the UNCITRAL Arbitration Rules, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration shall not be applicable unless the disputing parties otherwise agree.

- (d) referred to under any arbitral institution or arbitral rules selected under paragraph 3(d) is received by the respondent;

When the claimant submits a claim pursuant to subparagraphs 1(a)(i)(C) or 1(b)(i)(C), the respondent may make a counterclaim in connection with the factual and legal basis of the claim or rely on a claim for the purpose of a set off against the claimant.

5. In addition to any other information required by the applicable arbitral rules, the notice of arbitration shall also include information addressing each of the categories in Article 11.17.1.

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

Article 11.19: Consent of Each Party to Arbitration

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

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

- (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute; and

- (b) Article II of the New York Convention for an “agreement in writing.”

Article 11.20: Conditions and Limitations on Consent of Each Party

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

2. No claim may be submitted to arbitration under this Section by national who had the nationality of the Party to the dispute on the date on which the parties consented to submit such dispute to arbitration pursuant to Article 11.18.

3. No claim may be submitted to arbitration under this Section unless:
- (a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Chapter;
 - (b) the claim arises from measures included in the request for consultations submitted by the claimant in accordance with Article 11.17; and
 - (c) the notice of arbitration is accompanied,
 - (i) for claims submitted to arbitration under Article 11.18.1(a) , by the claimant's written waiver, and
 - (ii) for claims submitted to arbitration under Article 11.18.1(b) , by the claimant's and the enterprise's written waivers,of any right to initiate or continue before any administrative tribunal or court under the law of a Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 11.18.
4. Notwithstanding paragraph 3(c)(ii), a waiver from the enterprise shall not be required if the respondent has deprived the claimant of its ownership or control of the enterprise.

Article 11.21: Constitution of the Tribunal

1. Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.
2. The Secretary-General shall serve as appointing authority for an arbitration under this Section.
3. If a tribunal has not been constituted within 90 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 and after consulting with the disputing parties, the arbitrator or arbitrators not yet appointed.
4. The appointing authority may not appoint a presiding arbitrator who is a national of a Party, unless the disputing parties to the dispute otherwise agree.
5. In the event that the appointing authority appoints a presiding arbitrator in

accordance with relevant arbitration rules, the presiding arbitrator being appointed should be a recognized expert in public international law, and should be experienced in investor-state dispute settlement.

Article 11.22: Conduct of the Arbitration

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

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

3. After consulting the disputing parties, the tribunal may allow a person or entity that is not a disputing party to file a written *amicus curiae* submission with the tribunal regarding a matter within the scope of the dispute. Such a submission shall provide the identity of such person or entity (including any controlling entity and any source of substantial financial assistance in either of the two years preceding the submission, e.g. funding around 20% of an entity's overall operations annually), disclose any connection with any disputing party, and identify any person, government or other entity that has provided or will provide any financial or other assistance in preparing the submission. In determining whether to allow such a filing, the tribunal shall consider, among other things, the extent to which:

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

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

4. Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a

claim for which an award in favor of the claimant may be made under this Section.

5. In deciding an objection under paragraph 4, the tribunal shall assume to be true claimant's factual allegations. The tribunal may also consider any relevant facts not in dispute. The tribunal shall decide on the objection on an expedited basis, and issue a decision or award on the objection(s) no later than 150 days after the date on which such objection(s) is submitted.

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

7. In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article 11.25 should be subject to that appellate mechanism.

Article 11.23: Governing Law

1. Subject to paragraph 3, when a claim is submitted under Article 11.18.1(a)(i)(A), 11.18.1(a)(i)(B), 11.18.1(b)(i)(A) or 11.18.1(b)(i)(B), the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law³⁹.

2. Subject to paragraph 3 and the other terms of this Section, when a claim is submitted under Article 11.18.1(a)(i)(C) or 11.18.1(b)(i)(C), the tribunal shall apply:

(a) the rules of law specified in the pertinent investment agreement, or as the disputing parties may otherwise agree; or

(b) if the rules of law have not been specified or otherwise agreed:

(i) the law of the respondent, including its rules on the conflict of laws;⁴⁰
and

³⁹ For greater certainty, this provision is without prejudice to any consideration of the domestic law of the respondent where it is relevant to the claim as a matter of fact.

⁴⁰ The "law of the respondent" means the law that a domestic court or tribunal of proper jurisdiction would apply in the same case.

(ii) such rules of customary international law as may be applicable.

3. A joint decision of the Parties declaring their interpretation of a provision of this Agreement shall be binding on a tribunal of any ongoing or subsequent dispute, and any decision or award issued by such a tribunal must be consistent with that joint decision.

Article 11.24: Discontinuance

If, following the submission of a claim under this Section, the claimant fails to take any steps in the proceeding during 180 consecutive days or such periods as the disputing parties may agree, the claimant shall be deemed to have withdrawn its claim and to have discontinued the proceedings. In case that a Tribunal has been established according to this Section, it shall, at the request of the respondent, and after notice to the disputing parties, take note of the discontinuance in an order and issue an award on costs. After such an order has been rendered, the authority of the Tribunal shall lapse. The claimant may not subsequently submit a claim on the same matter. This Article is without prejudice to the Tribunal's authority to discontinue the proceedings in accordance with the applicable arbitration rules.

Article 11.25: Awards

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

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

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

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

- (a) an award of restitution of property shall provide that restitution be made to the enterprise;
- (b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and

- (c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic laws.
- 3. A tribunal may not award punitive damages.
- 4. The award shall be made available to the public promptly.⁴¹
- 5. A disputing party shall not seek enforcement of a final award until:
 - (a) in the case of a final award made under the ICSID Convention:
 - (i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award; or
 - (ii) revision or annulment proceedings have been completed; and
 - (b) in the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or the rules selected pursuant to Article 11.18.4(d) :
 - (i) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award; or
 - (ii) a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.
- 6. An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.

Article 11.26: Expert Reports

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

⁴¹ For greater certainty, nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance Article 11.14.

Article 11.27: Service of Documents

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

Article 11.28: Definitions

For purposes of this Chapter:

central level of government means:

- (a) for China, the central level of government; and
- (b) for Nicaragua, the central level of government;

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

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

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 means any entity constituted or organized 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;

enterprise of a Party means an enterprise constituted or organized under the law of a Party and a branch located in the territory 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;

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

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

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

- (a) an enterprise;
- (b) shares, stock, and other forms of equity participation in an enterprise;
- (c) bonds, debentures, loans, and other debt instruments, including debt instruments issued by a Party or an enterprise;⁴²

⁴² 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.

- (d) futures, options and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing and other similar contracts;
- (f) intellectual property rights;
- (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law;^{43, 44} and
- (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges;

investment agreement means a written agreement⁴⁵ between a national authority⁴⁶ of a Party and a covered investment or an investor of the other Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor:

- (a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale;
- (b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or

⁴³ Whether a particular type of license, authorization, 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 also depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment.

⁴⁴ The term “investment” does not include an order or judgment entered in a judicial or administrative action.

⁴⁵ “Written agreement” refers to an agreement in writing, executed by both parties, whether in a single instrument or in multiple instruments, that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 11.23.2. For greater certainty, (a) a unilateral act of an administrative or judicial authority, such as a permit, license, or authorization issued by a Party solely in its regulatory capacity, or a decree, order, or judgment, standing alone; and (b) an administrative or judicial consent decree or order, shall not be considered a written agreement.

⁴⁶ For purposes of this definition, “national authority” means (a) for China, an agency of the central government; and (b) for Nicaragua, the Ministry of Development, Industry and Trade (*Ministerio de Fomento, Industria y Comercio (MIFIC)*).

telecommunications; or

- (c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government;

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

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

national means:

- (a) for China, a natural person who is a national of the People's Republic of China as defined in the Nationality Law of the People's Republic of China; and
- (b) for Nicaragua, a Nicaraguan (*nicaragüense*) as defined in Article 15 of the Political Constitution of the Republic of Nicaragua.

For the purposes of this Chapter, a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.

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

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

person means a natural person or an enterprise;

person of a Party means a national or an enterprise of a Party;

protected information means confidential business information or information that is

privileged or otherwise protected from disclosure under a Party's law;

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

Secretary-General means the Secretary-General of ICSID;

UNCITRAL Arbitration Rules means the arbitration rules of the United Nations Commission on International Trade Law.

ANNEX 11-A

CUSTOMARY INTERNATIONAL LAW

The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Article 11.4 and Annex 11-B results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 11.4, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

ANNEX 11-B

EXPROPRIATION

The Parties confirm their shared understanding that:

1. Article 11.6.1 is intended to reflect customary international law concerning the obligation of States with respect to expropriation.
2. 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.
3. Article 11.6.1 addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.
4. The second situation addressed by Article 11.6.1 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 and objective 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 moral, public health, safety, and the environment, do not constitute indirect expropriations.

ANNEX 11-C

TEMPORARY SAFEGUARD MEASURES

1. In the event of serious balance-of-payments difficulties, external financial difficulties, or threat thereof, nothing in this Chapter shall be construed to prevent a Party from adopting or maintaining restrictive measures with regard to payments or transfers relating to the movements of capital.
2. Any measures adopted or maintained under paragraph 1 shall:
 - (a) be consistent with the Articles of Agreement of the International Monetary Fund, as applicable;
 - (b) be temporary and be phased out progressively as the situation specified in paragraph 1 improves, and shall not exceed 18 months in duration; however, if extremely exceptional circumstances arise, a Party may extend such measures for one 12-month period after advance notice and consultations with the other Party;
 - (c) not be inconsistent with Articles 11.2 and 11.3;
 - (d) not be inconsistent with Article 11.6;
 - (e) not result in multiple exchange rates; and
 - (f) be promptly notified to the other Party and published as soon as practicable.

ANNEX 11-D

SERVICE OF DOCUMENTS ON A PARTY

China

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

Department of Treaty and Law
Ministry of Commerce of the People's Republic of China
2 Dong Chang'an Avenue
Beijing, 100731
People's Republic of China

Nicaragua

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

General Directorate of Foreign Trade (*Dirección General de Comercio Exterior*)
Ministry of Development, Industry and Trade (*Ministerio de Fomento, Industria y Comercio (MIFIC)*)
Km. 6, Carretera a Masaya,
Managua, Nicaragua.