

## CHAPTER 13

### INVESTMENT

#### Section A: Definitions

##### Article 13.1: Definitions

For the purposes of this Chapter:

**algorithm** means a defined sequence of steps, taken to solve a problem or obtain a result;

**claimant** means an investor of a Party that makes a claim under Article 13.25 (Submission of a Claim to Arbitration);

**confidential information** means confidential business information or information that is privileged or otherwise protected from disclosure under the law of a Party;

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

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

**enterprise** means an enterprise as defined in Article 1.5 (Initial Provisions and General Definitions - General Definitions) and a branch<sup>1</sup> of an enterprise;

**existing** means in effect on the date of entry into force of this Agreement;

**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* in their most recent form;

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

**intellectual property rights** means copyright and related rights, trademark rights, rights in geographical indications, rights in industrial designs, patent rights, rights in layout designs of integrated circuits, rights in relation to protection of undisclosed information, and plant breeders' rights;

**investment** means:

- (a) any of the following:
  - (i) an enterprise;
  - (ii) a share, stock, or other form of equity participation in an enterprise, or any other kind of interest in an enterprise recognized under the domestic law of the Party;

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<sup>1</sup> For greater certainty, the inclusion of "branch" in the definition of "enterprise" is without prejudice to a Party's ability, under its law, to treat a branch as an entity that has no independent legal existence and is not separately organised.

- (iii) a bond, debenture, or other debt instrument of an enterprise;<sup>2</sup>
- (iv) a loan to an enterprise;
- (v) an interest arising from the commitment of capital or other resources in the territory of a Party to economic activity in that territory, such as under a contract involving the presence of an investor's property in the territory of the Party, including a turnkey or construction contract, a concession, or other similar contract;
- (vi) intellectual property rights; and
- (vii) any other tangible or intangible, moveable or immovable, property and related property rights;
- (b) in each case shall involve the commitment of capital or other resources, the expectation of gain or profit, certain duration, or the assumption of risk; and
- (c) for the purposes of this definition, "investment" does not mean:
  - (i) a claim to money that arises solely from:
    - (A) a commercial contract for the sale of a good or service by a national or enterprise in the territory of a Party to an enterprise in the territory of the other Party, or
    - (B) the extension of credit in connection with a commercial transaction, such as trade financing;
  - (ii) an order or judgment in a judicial or administrative action; or
  - (iii) any other claim to money, that does not involve the kinds of interests set out in sub-subparagraphs (a)(i) to (vii);

**investor of a Party** means a Party, or a national<sup>3</sup> or an enterprise of a Party, other than a branch, that seeks to make<sup>4</sup>, is making, or has made an investment in the territory of the other Party. For the purposes of this definition, **enterprise of a Party** means:

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<sup>2</sup> Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to constitute 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 involve the elements set out in subparagraph (b) and therefore to constitute an investment.

<sup>3</sup> For greater certainty, a natural person who is a dual citizen shall be deemed to be exclusively a national of the Party of his or her dominant and effective nationality.

<sup>4</sup> For greater certainty, the Parties understand that, for the purposes of the definition of "investor of a Party", an investor "seeks to make" an investment when that investor has taken concrete actions 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.

- (a) an enterprise that is constituted or organized under the law of that Party and that has substantial business activities in the territory of that Party. A determination of whether an enterprise has substantial business activities in the territory of a Party requires a case-by-case, fact-based inquiry; or
- (b) an enterprise that is constituted or organised under the law of that Party, and is directly or indirectly owned or controlled by a national of that Party or by an enterprise mentioned under subparagraph (a);

**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;

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

**respondent Party** means a Party against which a claim is made under Article 13.25 (Submission of a Claim to Arbitration);

**third party funding** means any funding or other equivalent support provided by a person who is not a disputing party in order to finance part or all of the cost of the proceedings including through a donation or grant, or in return for remuneration dependent on the outcome of the dispute;

**Tribunal** means an arbitration tribunal established under Section D (Investor-State Dispute Settlement); and

**UNCITRAL Arbitration Rules** means the arbitration rules of the United Nations Commission on International Trade Law, adopted by the United Nations General Assembly on 15 December 1976, as revised in 2010.

## **Section B: Investment Protections**

### **Article 13.2: Scope**

1. This Chapter applies to a measure adopted or maintained by a Party relating to:
  - (a) an investor of the other Party;
  - (b) a covered investment; and
  - (c) with respect to Article 13.5 (Regulatory Objectives) and Article 13.12 (Performance Requirements), an investment in the territory of that Party.
2. A Party's obligations under this Chapter apply to a measure adopted or maintained by:
  - (a) the central, regional, or other governments or authorities of that Party; and

- (b) any person, including a state enterprise or any other body, when it exercises any governmental authority delegated to it by central, regional, or other governments or authorities of that Party.
- 3. This Chapter does not apply to:
  - (a) procurement by a Party;
  - (b) a subsidy or grant provided by a Party, including a government supported loan, guarantee, or insurance.
- 4. This Chapter does 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 13.3: Relation to other Chapters**

- 1. This Chapter does not apply to a measure adopted or maintained by a Party to the extent that it is covered by Chapter 8 (Trade in Services) or Chapter 10 (Financial Services).
- 2. Notwithstanding paragraph 1, this Chapter applies to a measure adopted or maintained by a Party relating to the supply of a service in its territory through commercial presence as defined in Article 8.1 (Trade in Services – Definitions) by a service supplier, to the extent that such a measure is covered by Article 13.2.1 (Scope).
- 3. 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 a measure adopted or maintained by the Party relating to the cross-border supply of the service. This Chapter applies to a measure 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
- 4. In the event of any inconsistency between this Chapter and any other Chapter of this Agreement, the other Chapter shall prevail to the extent of the inconsistency, except that, where paragraph 2 applies, this Chapter prevails over Chapter 8 (Trade in Services).

### **Article 13.4: Right to Regulate**

- 1. The Parties reaffirm the right of each Party to regulate within its territory to achieve legitimate policy objectives.
- 2. For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner that negatively affects an investment or interferes with an investor's expectations, including its expectation of profits, does not amount to a breach of an obligation under this Chapter.

**Article 13.5: Regulatory Objectives**

The Parties recognize the importance of encouraging investments that respect health, safety, the environment, and other regulatory objectives or the rights of Indigenous Peoples.<sup>5</sup> Accordingly, a Party shall not relax, waive, or otherwise derogate from, or offer to relax, waive, or otherwise derogate from, these measures in order to encourage the establishment, acquisition, expansion, or management of the investment of an investor in its territory.

**Article 13.6: National Treatment**

1. Each Party shall accord to an investor of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of an investment in its territory.
2. Each Party shall accord to a covered investment treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of an investment in its territory.
3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a government other than at the central level, treatment accorded, in like circumstances, by that government to investors, and to investments of investors, of the Party of which it forms a part.
4. Whether treatment is accorded in like circumstances depends on the totality of the circumstances. Such circumstances include whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public policy objectives, and, if relevant, competition in the economic or business sector concerned and the applicable legal and regulatory framework.
5. Paragraphs 1 and 2 prohibit discrimination based on nationality. A difference in treatment accorded to an investor or covered investment and a Party’s own investors or investments of its own investors does not, in and of itself, establish discrimination based on nationality.

**Article 13.7: Most-Favoured-Nation Treatment**

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

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<sup>5</sup> Indigenous Peoples refers to:

- (a) for Canada, Aboriginal peoples (including First Nations, Inuit, and Métis peoples) as defined in subsection 35(2) of the Constitution Act, 1982 of Canada;
- (b) for Indonesia, Masyarakat Hukum Adat in accordance with Indonesia’s laws and regulations.

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

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a government other than at the central level, treatment accorded, in like circumstances, by that government to investors, and to investments of investors, of the Party of which it forms a part.

4. Whether treatment is accorded in like circumstances depends on the totality of the circumstances. Such circumstances include whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public policy objectives, and, if relevant, competition in the economic or business sector concerned and the applicable legal and regulatory framework.

5. Paragraphs 1 and 2 prohibit discrimination based on nationality. A difference in treatment accorded to an investor or covered investment and a non-Party's investors or investments of a non-Party's investors does not, in and of itself, establish discrimination based on nationality.

6. The treatment referred to in paragraphs 1 and 2 does not include procedures or mechanisms for the resolution of investment disputes between investors and States provided for in other international investment treaties and other trade agreements

7. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute treatment, and thus cannot give rise to a breach of this Article, in the absence of measures adopted or maintained by a Party pursuant to those obligations.

#### **Article 13.8: Treatment in Case of Armed Conflict or Civil Strife**

1. Each Party shall accord to an investor of the other Party and to a covered investment, with respect to measures it adopts or maintains relating to restitution, indemnification, compensation, or other settlement for losses incurred by investments in its territory as a result of armed conflict or civil strife, treatment no less favourable than it accords, in like circumstances, to:

- (a) its own investors and their investments; or
- (b) investors of a non-Party and their investments.

2. Notwithstanding paragraph 1, if an investor of a Party, in a situation referred to in paragraph 1, suffers a loss in the territory of the other Party resulting from:

- (a) requisitioning of its covered investment or part thereof by the latter's forces or authorities; or

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

the latter Party shall provide the investor restitution, compensation, or both, as appropriate, for that loss.<sup>6</sup>

### **Article 13.9: Minimum Standard of Treatment**

1. Each Party shall accord in its territory to a covered investment of the other Party and to an investor with respect to their covered investment treatment in accordance with the customary international law minimum standard of treatment of aliens. A Party breaches this obligation only if a measure constitutes:

- (a) denial of justice in criminal, civil, or administrative proceedings;
- (b) fundamental breach of due process in judicial and administrative proceedings;
- (c) manifest arbitrariness;<sup>7</sup>
- (d) targeted discrimination on manifestly wrongful grounds such as gender, race, or religious beliefs;
- (e) abusive treatment of investors, such as physical coercion, duress, and harassment; or
- (f) a failure to provide full protection and security.<sup>8</sup>

2. 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.

3. The fact that a measure breaches domestic law does not establish a breach of this Article.

### **Article 13.10: Expropriation**

1. A Party shall not expropriate a covered investment either directly or indirectly, except:

- (a) for a public purpose;<sup>9 10</sup>
- (b) in accordance with due process of law;

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<sup>6</sup> For greater certainty, the value of the restitution or compensation shall not exceed the loss suffered.

<sup>7</sup> A measure is manifestly arbitrary when it is evident that the measure is not rationally connected to a legitimate policy objective, such as when a measure is based on prejudice or bias rather than on reason or fact.

<sup>8</sup> For greater certainty, full protection and security refers only to physical security. Each Party is required to take measures that are reasonable under the circumstances to ensure full protection and security.

<sup>9</sup> For Canada, the meaning of "public purpose" may apply differently for the purposes of an Indigenous government.

<sup>10</sup> For greater certainty, for the purposes of this Article, the term "public purpose" refers to a concept in customary international law. A Party's domestic law may express this or a similar concept by using different terms, such as "public necessity", "public interest", or "public use".

- (c) in a non-discriminatory manner; and
  - (d) on payment of compensation in accordance with paragraph 5.
2. A direct expropriation occurs only when a covered investment is nationalised or taken by a Party through formal transfer of title or outright seizure.
3. An indirect expropriation may occur when a measure or a series of measures of a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure. A non-discriminatory measure of a Party that is adopted and maintained in good faith to protect legitimate public welfare objectives, such as health, safety, and the environment, does not constitute an expropriation. The determination of whether a measure or a series of measures of a Party has an effect equivalent to direct expropriation requires a case-by-case, fact-based inquiry that shall consider:
- (a) the economic impact of the measure or the series of measures, although the sole fact that a measure or a series of measures of a Party has an adverse effect on the economic value of a covered investment does not establish that an indirect expropriation has occurred;
  - (b) the duration of the measure or series of measures of a Party;
  - (c) the extent to which the measure or the series of measures interferes with distinct, reasonable investment-backed expectations; and
  - (d) the character of the measure or the series of measures.
4. A measure of a Party cannot violate this Article unless it expropriates a covered investment that is a tangible or intangible property right under the domestic law of the Party in which the investment was made. This determination requires the consideration of relevant factors, such as the nature and scope of the tangible or intangible property right under the applicable domestic law of the Party in which the investment was made.
5. The compensation referred to in paragraph 1 shall:
- (a) be paid without delay<sup>11</sup> in a freely convertible currency of the expropriating Party's choice;
  - (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"). Appropriate valuation criteria include going concern value, asset value including the declared tax value of tangible property, and other criteria, which may be appropriate or relevant under the circumstances, to determine fair market value;
  - (c) not reflect any change in value occurring because the intended expropriation had become known earlier;
  - (d) include interest at a commercially reasonable rate for that currency accrued from the date of expropriation until the date of payment; and
  - (e) be freely transferable.

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<sup>11</sup> The Parties understand that there may be legal and administrative processes that need to be observed before payment can be made.



6. With respect to direct expropriation relating to land, in the case of Indonesia, the concepts of “public purpose” under paragraph 1 and compensation “equivalent to the fair market value” under paragraph 5 are implemented in domestic laws and regulations.

7. A measure of a Party that would otherwise constitute an expropriation of an intellectual property right does not constitute a breach of this Article if it is consistent with Chapter 14 (Intellectual Property) and the TRIPS Agreement and any waiver or amendment of the TRIPS Agreement accepted by that Party.

#### **Article 13.11: Transfer of Funds**

1. Each Party shall permit all transfers of funds relating to a covered investment to be made freely, and without delay, into and out of its territory. Those transfers include:

- (a) contributions to capital;
- (b) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance fees, and other fees;
- (c) proceeds from the sale or liquidation of the whole or part of the covered investment;
- (d) payments made under a contract entered into by the investor or the covered investment, including payments made pursuant to a loan agreement;
- (e) payments made under Article 13.8 (Treatment in Case of Armed Conflict or Civil Strife) and Article 13.10 (Expropriation);
- (f) earnings and other remuneration of foreign personnel working in connection with an investment; and
- (g) payments arising out of a dispute.

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

3. A Party shall not require its investors to transfer, or penalize one of its investors for failing to transfer, the income, earnings, profits, or other amounts derived from, or attributable to, an investment in the territory of the other Party.

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

- (a) bankruptcy, insolvency, or the protection of the rights of a creditor;
- (b) issuing, trading, or dealing in securities;
- (c) criminal or penal offences;
- (d) financial reporting or record keeping of transfers if necessary to assist law enforcement or financial regulatory authorities;

- (e) ensuring compliance with an order or judgment in judicial or administrative proceedings;
- (f) taxation; or
- (g) social security, public retirement, or compulsory savings programmes.

#### **Article 13.12: Performance Requirements**

1. A Party shall not, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory, impose or enforce a requirement, or enforce a commitment or undertaking:

- (a) to export a given level or percentage of a good or service;
- (b) to achieve a given level or percentage of domestic content;
- (c) to purchase, use, or accord a preference to a good produced or service provided in its territory, or to purchase a good or service from a person in its territory;
- (d) to relate the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with that investment;
- (e) to restrict sales of a good or service in its territory that the investment produces or provides by relating those sales to the volume or value of its exports or foreign exchange earnings;
- (f) to transfer technology, a production process, source code of software, or other proprietary knowledge to a person in its territory; or
- (g) to supply exclusively from the territory of the Party a good that the investment produces or a service it provides to a specific regional market or to the world market.

2. A Party shall not 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, on compliance with a requirement:

- (a) to achieve a given level or percentage of domestic content;
- (b) to purchase, use, or accord a preference to a good produced in its territory, or to purchase a good from a producer in its territory;
- (c) to relate the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with that investment; or
- (d) to restrict sales of a good or service in its territory that the investment produces or provides by relating those sales to the volume or value of its exports or foreign exchange earnings.

3. The provisions of:

- (a) paragraph 2 do not prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with any investments, on compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development in its territory;
- (b) subparagraphs 1(a), 1(b), 1(c), 2(a), and 2(b) do not apply to a qualification requirement for a good or service with respect to export promotion and foreign aid programs;
- (c) subparagraphs 2(a) and 2(b) do not apply to a requirement imposed by an importing Party relating to the content of a good necessary to qualify for a preferential tariff or preferential quota;
- (d) subparagraph 1(f) do not apply:
  - (i) if a Party authorizes use of an intellectual property right in accordance with Article 31<sup>12</sup> of the TRIPS Agreement, or to a measure requiring the disclosure of proprietary information that falls within the scope of, and is consistent with, Article 39 of the TRIPS Agreement; or
  - (ii) if the requirement is imposed or the requirement, commitment, or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy an alleged violation of domestic competition law;
- (e) subparagraphs 1(b), 1(c), 1(f), 2(a), and 2(b) do not prevent a Party from adopting or maintaining a measure to achieve a legitimate public policy objective, provided that the measure:
  - (i) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and
  - (ii) does not impose restrictions greater than are required to achieve the objective; and
- (f) subparagraph 1(f) do not preclude a regulatory body or judicial authority of a Party from requiring a person of the other Party to preserve and make available the source code of software, or an algorithm expressed in that source code, to the regulatory body for a specific investigation, inspection, examination, enforcement action, or judicial proceeding,<sup>13</sup> subject to safeguards against unauthorized disclosure.

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<sup>12</sup> The reference to “Article 31” includes any waiver or amendment to the TRIPS Agreement implementing paragraph 6 of the *Doha Declaration on the TRIPS Agreement and Public Health* (WT/MIN(01)/DEC/2).

<sup>13</sup> This disclosure shall not be construed to negatively affect the software source code’s status as a trade secret, if such status is claimed by the trade secret owner.

### **Article 13.13: Senior Management and Boards of Directors**

1. A Party shall not require that an enterprise of that Party that is a covered investment appoint to a senior management position an individual of a particular nationality.
2. A Party may require that up to a majority of the board of directors, or a 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.
3. A Party should encourage enterprises to consider greater diversity in senior management positions or on their board of directors, which may include a requirement to nominate women.

### **Article 13.14: Subrogation**

1. If a Party or an agency of a Party makes a payment on non-commercial risks to one of its investors under a guarantee or a contract of insurance, or other form of indemnity it has entered into in respect of a covered investment:
  - (a) the other Party in whose territory the covered investment was made shall recognize the validity of the subrogation or transfer of any rights the investor would have possessed with respect to the covered investment but for the subrogation or transfer; and
  - (b) the investor shall be precluded from pursuing these rights to the extent of the subrogation or transfer, unless the other Party or an agency of the other Party authorizes the investor in writing to act on its behalf.
2. The subrogated or transferred right or claim shall not be greater than the original right or claim of the investor.

### **Article 13.15: Denial of Benefits**

A Party may, at any time prior to its principal submission on the merits, such as the counter-memorial, in an arbitration under this Chapter, deny the benefits of this Chapter to an investor of the other Party that is an enterprise of that Party and to investments of that investor if an investor of a non-Party owns or controls the enterprise and the denying Party:

- (a) adopts or maintains a measure with respect to that non-Party or investors of that non-Party that prohibits transactions with the enterprise or would be violated or circumvented if the benefits of this Agreement were accorded to the enterprise or to its investment; or
- (b) does not maintain diplomatic relations with that non-Party.

### **Article 13.16: Special Formalities and Information Requirements**

1. Nothing in Article 13.6 (National Treatment) shall be construed to prevent a Party from adopting or maintaining any measure that prescribes special formalities in connection with covered investments, such as a requirement that investors be residents of the Party, that an investor register or otherwise notify the appropriate authorities of its covered investment, or that covered investments be legally constituted under the laws or regulations of the Party, provided that these formalities do not materially impair the protection afforded by the Party to investors of the other Party and covered investments pursuant to this Chapter.

2. Notwithstanding Articles 13.6 (National Treatment) and 13.7 (Most-Favoured-Nation Treatment), a Party may require an investor of the other Party or a covered investment to provide information concerning that investment for informational or statistical purposes. The Party shall protect such information that is confidential 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 obtaining or disclosing information in connection with the equitable and good faith application of its law.

### **Article 13.17: Promotion of Investment**

1. The Parties recognise the importance of cooperating to promote investment in priority sectors as a means to effectively achieve economic growth and development based on common interest and mutual benefits.

2. The cooperation referred to in paragraph 1 may include:

- (a) promoting the principles underlying the obligations contained in this Chapter to investors;
- (b) organising joint investment promotion activities, such as business matching events or identifying investment opportunities;
- (c) organising and supporting the organisation of various briefings and seminars on investment opportunities and on investment laws, regulations, and policies; and
- (d) conducting information exchanges on other issues of mutual interest relating to investment promotion.

## Section C: Reservations, Exceptions, Exclusions

### Article 13.18: Non-Conforming Measures and Exceptions

1. Article 13.6 (National Treatment), Article 13.7 (Most-Favoured-Nation Treatment), Article 13.12 (Performance Requirements), Article 13.13 (Senior Management and Boards of Directors) do not apply to:

- (a) any existing non-conforming measure maintained in the territory of a Party at:
  - (i) the central level of government, as set out by that Party in its Schedule to Annex I-A (Reservations for Existing Measures – ratchet);
  - (ii) a regional level of government, as set out by that Party in its Schedule to Annex I-A (Reservations for Existing Measures – ratchet); or
  - (iii) a government other than the central or regional levels;
- (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 Article 13.6 (National Treatment), Article 13.7 (Most-Favoured-Nation Treatment), Article 13.12 (Performance Requirements), and Article 13.13 (Senior Management and Boards of Directors).<sup>14</sup>

2. Article 13.6 (National Treatment), Article 13.7 (Most-Favoured-Nation Treatment), Article 13.12 (Performance Requirements) and Article 13.13 (Senior Management and Boards of Directors) do not apply to:

- (a) any existing non-conforming measure maintained in the territory of a Party at:
  - (i) the central level of government, as set out by that Party in its Schedule to Annex I-B (Reservations for Existing Measures – standstill); or
  - (ii) a regional level of government as set out by that Party in its Schedule to Annex I-B (Reservations for Existing Measures – standstill);
- (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or

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<sup>14</sup> For greater certainty, only a measure listed in a Party's Schedule to Annex I-A (Reservations for Existing Measures - ratchet), or any other measure that becomes subject to paragraph 1 pursuant to Article 13.19 (Review), is subject to subparagraph 1(c).

- (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 this Agreement, with Article 13.6 (National Treatment), Article 13.7 (Most-Favoured-Nation Treatment), Article 13.12 (Performance Requirements), and Article 13.13 (Senior Management and Boards of Directors).

3. Article 13.6 (National Treatment), Article 13.7 (Most-Favoured-Nation Treatment), Article 13.12 (Performance Requirements), and Article 13.13 (Senior Management and Boards of Directors) shall not apply to a measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II (Reservations for Future Measures).

4. Notwithstanding subparagraph 2(c), a Party shall not withdraw a right or benefit from a covered investment, in reliance on which a covered investment has been granted an investment permit, through an amendment to a limitation on foreign equity participation that decreases the conformity of the measure as it existed immediately before the amendment.

5. A Party shall not, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to Annex II (Reservations for Future Measures), 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. For greater certainty, this paragraph does not apply to this requirement if specified in the initial approval of the investment by the relevant authorities.

6. In respect of intellectual property rights, a Party may derogate from Article 13.6 (National Treatment) and Article 13.7 (Most-Favoured-Nation Treatment) in a manner that is consistent with:

- (a) Article 14.10 (Intellectual Property – National Treatment);
- (b) the TRIPS Agreement, if the derogation relates to matters not addressed by Chapter 14 (Intellectual Property); or
- (c) an amendment of or waiver to the TRIPS Agreement in force for both Parties.

#### **Article 13.19: Review**

The Parties shall, three years after the date of entry into force of this Agreement but no later than five years, and every three years thereafter, unless otherwise agreed, hold consultations to review their respective non-conforming measures referred to in paragraphs 1 and 2 of Article 13.18 (Non-Conforming Measures and Exceptions). The Parties shall, without prejudice to the result, hold these consultations with a view to increasing the conformity of these non-conforming measures with this Agreement.

#### **Article 13.20: Committee on Investment**

1. The Parties hereby establish a Committee on Investment consisting of government representatives of the Parties.

2. The functions of the Committee on Investment are to:

- (a) review the implementation of this Chapter;

- (b) recommend to the Joint Committee, established under Article 23.1 (Administrative and Institutional Provisions – Establishment of the Joint Committee), to adopt an interpretation of this Agreement pursuant to Article 13.30 (Applicable Law and Interpretation);
- (c) consider any other matters related to this Chapter identified by either Party;
- (d) discuss and coordinate with the Committee on Trade in Services, established under Article 8.14.1 (Trade in Services – Committee on Trade in Services), on matters related to this Chapter and to Chapter 8 (Trade in Services) including with respect to non-conforming measures pursuant to Article 13.18 (Non-Conforming Measures and Exceptions); and
- (e) report to the Joint Committee as required.

#### **Article 13.21: Exclusions**

Section D (Investor-State Dispute Settlement) and Chapter 24 (Dispute Settlement) do not apply to matters set out in Annex 13-A (Exclusions from Dispute Settlement).

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

#### **Article 13.22: Scope and Purpose**

1. Without prejudice to the rights and obligations of the Parties under Chapter 24 (Dispute Settlement), the Parties establish in this Section a mechanism for the settlement of investment disputes.
2. Under this Section, an investor of a Party may submit a claim that the other Party has breached an obligation under Section B (Investment Protections), other than Article 13.5 (Regulatory Objectives), Article 13.12 (Performance Requirements), or Article 13.13 (Senior Management and Boards of Directors).

#### **Article 13.23: Request for Consultations**

1. In the event of an investment dispute under this Agreement, an investor of a Party shall seek to resolve the dispute through consultations, with a view towards reaching an amicable settlement. Efforts to reach an amicable settlement may also include the use of non-binding, third party procedures, such as good offices, conciliation, or mediation.
2. An investor of a Party shall deliver to the other Party a written request for consultations, which shall specify:
  - (a) whether the investor intends to claim under paragraph 1 or 2 of Article 13.25 (Submission of a Claim to Arbitration);
  - (b) the name and address of the investor and evidence to establish that the investor is an investor of the other Party;



- (c) the investment at issue and evidence to establish that the investor owns or controls the investment, including, if the investment is an enterprise, the name, address, and place of incorporation of the enterprise;
- (d) for each claim:
  - (i) the provision of this Agreement alleged to have been breached; and
  - (ii) the factual basis for the alleged breach, including the measure at issue; and
- (e) the relief sought and the approximate amount of damages claimed.

3. An investor of a Party may, when submitting a request for consultations, propose to hold the consultations by videoconference, telephone, or similar means of communication as appropriate. The other Party should give sympathetic consideration to that request.

4. The request for consultations shall be submitted to the other Party under this Article no later than:

- (a) three years from the date on which the investor or, as applicable, the enterprise referred to in Article 13.25.2 (Submission of a Claim to Arbitration), first acquired or should have first acquired knowledge of the alleged breach and knowledge that the investor or, as applicable, the enterprise, has incurred loss or damage by reason of, or arising out of, that breach; or
- (b) if the investor or, as applicable, the enterprise, has initiated a claim or proceeding before an administrative tribunal or court under the law of a Party with respect to the measure at issue in the investor's request for consultations delivered pursuant to paragraph 2, two years after:
  - (i) the investor or, as applicable, the enterprise, ceases to pursue that claim; or
  - (ii) when that proceeding has otherwise ended;

provided that it is no later than seven years after the date on which the investor or, as applicable, the enterprise, first acquired or should have first acquired knowledge of the alleged breach and knowledge that the investor or, as applicable, the enterprise, has incurred loss or damage by reason of, or arising out of, that breach.

Neither a continuing breach nor the occurrence of similar or related acts or omissions may renew or interrupt the periods set out in subparagraphs (a) and (b).

5. Unless otherwise agreed, consultations shall be held within 90 days of the delivery of the request for consultations pursuant to paragraph 2.

6. Unless otherwise agreed, the place of consultations shall be the capital city of the other Party.

7. If the investor has not submitted a claim under Article 13.25 (Submission of a Claim to Arbitration) within one year of the delivery of the request for consultations, the investor is deemed to have withdrawn its request for consultations and shall not submit a claim under this Section with respect to the same measure. This period may be extended by agreement between the investor of a Party and the other Party.

#### **Article 13.24: Mediation**

The disputing parties may at any time agree to have recourse to mediation. Recourse to mediation is without prejudice to the legal position or rights of the disputing parties under this Section and is governed by the rules agreed to by the disputing parties, including any applicable rules for mediation adopted by the Joint Committee. If the disputing parties agree to have recourse to mediation, paragraphs 4 and 7 of Article 13.23 (Request for Consultations) and all timelines pursuant to an arbitration under this Section are suspended from the date on which the disputing parties agreed to have recourse to mediation, and shall resume on the date on which either disputing party decides to terminate the mediation. A decision by a disputing party to terminate the mediation shall be transmitted by way of letter to the mediator and the other disputing party. Unless otherwise agreed, expenses incurred in relation to the process under this Article shall be borne equally by the disputing parties. Each disputing party shall bear its own expenses derived from the participation in the process.

#### **Article 13.25: Submission of a Claim to Arbitration**

1. An investor of a Party may make a claim that the other Party has breached an obligation in accordance with Article 13.22 (Scope and Purpose), and that the investor has incurred loss or damage by reason of, or arising out of, that breach, only if:

- (a) the investor has fulfilled the requirements of Article 13.23 (Request for Consultations);
- (b) 180 days have elapsed since the receipt by the other Party of a request for consultations under Article 13.23 (Request for Consultations);
- (c) the claim relates to measures identified in the investor's request for consultations under Article 13.23 (Request for Consultations);
- (d) the investor consents to dispute settlement in accordance with the procedures set out in this Agreement; and

- (e) the investor and, if the claim is for loss or damage to an interest in an enterprise of the other Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waives its right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedure, any proceeding with respect to the measure of the other Party that is alleged to be a breach referred to in Article 13.23.2 (Request for Consultations), except for a proceeding for injunctive, declaratory, or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the other Party.

2. An investor of a Party, on behalf of an enterprise of the other Party that is a juridical person that the investor owns or controls directly or indirectly, may make a claim that the other Party has breached an obligation in accordance with Article 13.22 (Scope and Purpose), and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach, only if:

- (a) the investor has fulfilled the requirements of Article 13.23 (Request for Consultations);
- (b) 180 days have elapsed since the receipt by the other Party of a request for consultations under Article 13.23 (Request for Consultations);
- (c) the claim relates to measures identified in the investor's request for consultations under Article 13.23 (Request for Consultations);
- (d) the investor consents to dispute settlement in accordance with the procedures set out in this Agreement; and
- (e) both the investor and the enterprise waive their right to initiate or continue before an administrative tribunal or court under the law of either Party, or other dispute settlement procedure, any proceeding with respect to the measure of the other Party that is alleged to be a breach referred to in Article 13.23.2 (Request for Consultations), except for a proceeding for injunctive, declaratory, or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the other Party.

3. A consent and waiver required by this Article shall be in writing, shall be delivered to the respondent Party, and shall be included in the submission of a claim to arbitration.

4. Notwithstanding paragraph 3, a waiver from the enterprise under paragraph 1(e) or 2(e) is not required if the other Party has deprived the investor of control of the enterprise.

5. If an investor of a Party makes a claim under paragraph 2 and the investor or a non-controlling investor in the enterprise makes a claim under paragraph 1 arising out of the same events or circumstances, and two or more of the claims are submitted to dispute settlement under this Article, the claims should be heard together by a Tribunal constituted under Article 13.32 (Consolidation), unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.

6. An investor of a Party may submit a claim to dispute settlement under:
  - (a) the ICSID Convention, provided that both Parties are parties to the ICSID Convention;
  - (b) the ICSID Additional Facility Rules, if only one Party is a party to the ICSID Convention;
  - (c) the UNCITRAL Arbitration Rules; or
  - (d) any other rules on agreement of the disputing parties.
7. Except to the extent modified by this Agreement, the arbitration shall be governed by the arbitration rules applicable under paragraph 6 that are in effect on the date that the claim is submitted to dispute settlement under this Article.
8. If the claimant proposes rules pursuant to subparagraph 6(d), the respondent Party shall reply to the claimant's proposal within 45 days of receipt of the proposal. If the disputing parties have not agreed on those rules within 60 days of receipt, the claimant may submit a claim under the rules provided for in subparagraph 6(a), 6(b), or 6(c).
9. A claim is submitted to arbitration under this Article when:
  - (a) the request for arbitration under Article 36(1) of the ICSID Convention is received by the Secretary-General of ICSID;
  - (b) the request for arbitration under Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretariat of ICSID; or
  - (c) the notice of arbitration under Article 3 of the UNCITRAL Arbitration Rules is received by the respondent Party.

#### **Article 13.26: Consent to Arbitration**

1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with the provisions of this Agreement, including the requirements of Article 13.23 (Request for Consultations) and Article 13.25 (Submission of a Claim to Arbitration).
2. The consent under paragraph 1 and the submission of a claim to arbitration under Article 13.25 (Submission of a Claim to Arbitration) shall satisfy the requirement 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;
  - (b) Article II of the New York Convention for an "agreement in writing".

### **Article 13.27: Discontinuance**

If the claimant fails to take a step in the proceeding within 180 days of the submission of a claim to arbitration under Article 13.25 (Submission of a Claim to Arbitration), or such other time period as agreed to by the disputing parties, the claimant is deemed to have withdrawn its claim and to have discontinued the proceeding. The Tribunal, if constituted, shall, at the request of the respondent Party, and after notice to the disputing parties, in an order take note of the discontinuance. After the order has been rendered the authority of the Tribunal shall cease.

### **Article 13.28: Arbitrators**

1. Except in respect of a Tribunal established under Article 13.32 (Consolidation), and unless the disputing parties agree otherwise, the Tribunal shall be composed of three arbitrators. Each disputing party shall appoint one arbitrator, and the third arbitrator, who will be the presiding arbitrator, shall be appointed by agreement of, or pursuant to an appointment process agreed to by, the disputing parties. The disputing parties are encouraged to consider greater diversity in arbitrator appointments, including through the appointment of women.
2. Arbitrators should have expertise or experience in public international law, international investment law, or international trade law, or dispute resolution arising under international investment or international trade agreements.
3. Arbitrators shall be independent of, and not be affiliated with or take instructions from, a Party or the disputing investor.
4. If the disputing parties do not agree on the remuneration of the arbitrators before the Tribunal is constituted, the prevailing ICSID rate for arbitrators shall apply.
5. If a Tribunal, other than a Tribunal established under Article 13.32 (Consolidation), has not been constituted within 90 days of the submission of a claim to arbitration, a disputing party may ask the Secretary-General of ICSID to appoint the arbitrator or arbitrators not yet appointed. In accordance with this Article, the Secretary-General of ICSID shall make the appointment at his or her own discretion and, to the extent practicable, shall make this appointment in consultation with the disputing parties. The Secretary-General of ICSID shall not appoint as presiding arbitrator a national of a Party.
6. Arbitrators shall abide by the United Nations Commission on International Trade Law (UNCITRAL) *Code of Conduct for Arbitrators in International Investment Dispute Resolution* adopted on 7 July 2023, as modified by this Article.
7. Upon appointment, an arbitrator shall refrain, for the duration of the proceeding, or any time thereafter to the extent it would amount to a breach of the arbitrator's duty of independence and impartiality, from acting as counsel or party-appointed expert or witness in any pending or new investment dispute under this Agreement or any other international investment treaty.

### **Article 13.29: Agreement to Appointment of Arbitrators by ICSID**

For the purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator based on a ground other than nationality:

- (a) the respondent Party agrees to the appointment of each individual member of a Tribunal established under the ICSID Convention or the ICSID Additional Facility Rules;
- (b) an investor of a Party referred to in Article 13.25.1 (Submission of a Claim to Arbitration) may submit a claim to arbitration or continue a claim under the ICSID Convention or the ICSID Additional Facility Rules only if the investor agrees in writing to the appointment of each member of the Tribunal; and
- (c) an investor of a Party referred to in Article 13.25.2 (Submission of a Claim to Arbitration) may submit a claim to arbitration or continue a claim under the ICSID Convention or the ICSID Additional Facility Rules only if the investor and the enterprise agree in writing to the appointment of each member of the Tribunal.

### **Article 13.30: Applicable Law and Interpretation**

1. A Tribunal constituted under this Section shall apply this Agreement as interpreted in accordance with the *Vienna Convention on the Law of Treaties*, done at Vienna on 23 May 1969, and other rules and principles of international law applicable between the Parties.
2. If serious concerns arise as regards matters of interpretation of this Chapter, the Committee on Investment may recommend, pursuant to Article 13.20.2(b) (Committee on Investment), that the Joint Committee may adopt an interpretation of this Agreement which shall be binding on a Tribunal established under this Section.
3. A Tribunal has no jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Chapter, under the domestic law of a Party. In determining the consistency of a measure with this Chapter, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party, and any meaning given to domestic law by the Tribunal is not binding on the courts or authorities of that Party.
4. If an investor of a Party submits a claim to arbitration under Article 13.25 (Submission of a Claim to Arbitration), including a claim that a Party breached Article 13.9 (Minimum Standard of Treatment), the investor has the burden of proving all elements of its claim, consistent with the general principles of international law applicable to international arbitration.

### **Article 13.31: Preliminary Objections**

1. Without prejudice to a Tribunal's authority to address other questions as a preliminary objection, a Tribunal shall address and decide as a preliminary question an objection by the respondent Party that, as a matter of law, a claim submitted is not a claim for which an award in favour of the investor may be made under this Agreement, including that a dispute is not within the competence of the Tribunal, or that a claim is manifestly without legal merit.
2. An objection under paragraph 1 shall be submitted to the Tribunal within 60 days of constitution of the Tribunal. The Tribunal shall suspend any proceeding on the merits and issue a decision or award on the objection, stating the grounds therefor, within 180 days of the objection. 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 disputing party requests a hearing, 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.
3. When deciding an objection under paragraph 1, the Tribunal shall assume to be true the factual allegations in the claim to arbitration under Article 13.25 (Submission of a Claim to Arbitration), or any amendment to that claim. The Tribunal may also consider relevant facts not in dispute.
4. Whether or not a respondent Party raises an objection under paragraph 1 concerning the competence of the Tribunal, the respondent Party shall have the right to raise, and the Tribunal the authority to address and decide, a question pertaining to its competence in the course of the proceedings.
5. The provisions on costs in Article 13.39.3 (Final Award) shall apply to decisions or awards issued under this Article.

### **Article 13.32: Consolidation**

1. If two or more claims have been submitted separately to arbitration under Article 13.25 (Submission of a Claim to Arbitration) and the claims have a question of law or fact in common and arise out of the same events or circumstances, a disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 2 through 10.
2. A disputing party that seeks a consolidation order under this Article shall deliver, in writing, a request to the Secretary-General of ICSID to establish a Tribunal and shall specify in the request:
  - (a) the name of the respondent Party, or the investors, against which the order is sought;
  - (b) the nature of the order sought; and
  - (c) the grounds for the order sought.
3. The disputing party shall deliver a copy of the request to the respondent Party, or the investors, against which the order is sought.

4. Unless the disputing parties sought to be covered by the order agree to a different appointment process, the Secretary-General of ICSID shall, within 60 days of receiving the request, establish a Tribunal composed of three arbitrators. The Secretary-General of ICSID shall appoint one member who is a national of the respondent Party, one member who is a national of the Party of the investors that submitted the claims, and a presiding arbitrator who is not a national of a Party.

5. A Tribunal established under this Article shall be established under the UNCITRAL Arbitration Rules and shall conduct its proceedings in accordance with the UNCITRAL Arbitration Rules, except as modified by this Section.

6. If a Tribunal established under this Article is satisfied that the claims submitted to arbitration under Article 13.25 (Submission of a Claim to Arbitration) have a question of law or fact in common, the Tribunal may, in the interest of fair and efficient resolution of the claims and after hearing the disputing parties, by order:

- (a) assume jurisdiction over, and hear and determine together, all or part of the claims; or
- (b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in resolving the other claims.

7. If a Tribunal has been established under this Article, an investor that has submitted a claim to arbitration under Article 13.25 (Submission of a Claim to Arbitration) and that has not been named in a request made under paragraph 2 may make a written request to the Tribunal that it be included in an order made under paragraph 6. The request shall specify:

- (a) the name and address of the investor;
- (b) the nature of the order sought; and
- (c) the grounds on which the order is sought.

8. An investor referred to in paragraph 7 shall deliver a copy of its request to the disputing parties named in a request under paragraph 1.

9. A Tribunal established under Article 13.25 (Submission of a Claim to Arbitration) does not have jurisdiction to decide a claim, or a part of a claim, over which a Tribunal established under this Article has assumed jurisdiction.

10. On application of a disputing party, a Tribunal established under this Article, pending its decision under paragraph 6, may order that the proceedings of a Tribunal established under Article 13.25 (Submission of a Claim to Arbitration) be stayed unless the latter Tribunal has already adjourned its proceedings.

### **Article 13.33: Seat of Arbitration**

The disputing parties may agree on the seat of arbitration under the arbitration rules applicable under Article 13.25 (Submission of a Claim to Arbitration) or Article 13.32 (Consolidation). If the disputing parties fail to agree, the Tribunal shall determine the seat of arbitration in accordance with the applicable arbitration rules, provided that the legal seat of arbitration shall be in the territory of a State that is a party to the New York Convention.



### **Article 13.34: Transparency of Proceedings**

1. Subject to paragraphs 2 and 4, the respondent Party shall, after receiving the following documents, promptly transmit them to the non-disputing Party and make them available to the public:

- (a) a claim submitted pursuant to Article 13.25 (Submission of a Claim to Arbitration);
- (b) pleadings, memorials, briefs, and other submissions made to the Tribunal by a disputing party;
- (c) minutes or transcripts of hearings of the Tribunal, if available; and
- (d) orders, awards, and decisions of the Tribunal.

2. The Tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. If a disputing party intends to use information in a hearing that is designated as confidential information or otherwise subject to paragraph 3, it shall so advise the Tribunal. The Tribunal shall make appropriate arrangements to protect such information from disclosure which may include closing the hearing for the duration of the discussion of that information.

3. Nothing in this Section, requires a respondent Party to make available to the public or otherwise disclose during or after the arbitral proceedings, including the hearing, confidential information, or to furnish or allow access to information that it may withhold in accordance with Article 25.3 (Exceptions and General Provisions – National Security) or Article 25.8 (Exceptions and General Provisions – Disclosure of Information and Confidentiality).

4. Any confidential information that is submitted to the Tribunal shall be protected from disclosure in accordance with the following procedures:

- (a) subject to subparagraph (d), neither the disputing parties nor the Tribunal shall disclose to a non-disputing Party or to the public any confidential information if the disputing party that provided the information clearly designates it in accordance with subparagraph (b);
- (b) any disputing party claiming that certain information constitutes confidential information shall clearly designate the information according to any schedule set by the Tribunal;
- (c) a disputing party shall, according to any schedule set by the Tribunal, submit a redacted version of the document that does not contain the confidential information. Only the redacted version shall be disclosed in accordance with paragraph 1; and
- (d) the Tribunal, subject to paragraph 3, shall decide any objection regarding the designation of information claimed to be confidential information.

5. Nothing in this Section requires a respondent Party to withhold from the public information required to be disclosed by its law. The respondent Party should endeavour to apply those laws in a manner sensitive to protecting from disclosure information that has been designated as confidential information.

6. A disputing party may disclose to other persons in connection with the proceedings, including witnesses and experts, unredacted documents that it considers necessary to disclose in the course of proceedings under this Section. However, the disputing party shall ensure that those persons protect the confidential information in those documents as directed by the Tribunal.

7. A Party may disclose to government officials and officials of a government other than at the central level, if applicable, unredacted documents that it considers necessary to disclose in the course of proceedings under this Section. However, that Party shall ensure that those persons protect the confidential information in those documents as directed by the Tribunal.

**Article 13.35: Participation of a Non-Disputing Party**

1. The Tribunal shall accept or, after consultation with the disputing parties, may invite oral or written submissions from the non-disputing Party regarding the interpretation of this Agreement. The non-disputing Party may attend a hearing held under this Section.
2. The Tribunal shall not draw any inference from the absence of a submission pursuant to paragraph 1.
3. The Tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on a submission by the non-disputing Party.

**Article 13.36: Expert Reports**

Without prejudice to the appointment of other kinds of experts if authorized by the applicable arbitration rules, the Tribunal may, at the request of a disputing party or, unless the disputing parties disapprove, on its own initiative, appoint one or more experts to report to it in writing on any factual issue, including the rights of Indigenous Peoples<sup>15</sup> or scientific matters raised by a disputing party in a proceeding, subject to any terms and conditions agreed on by the disputing parties.

**Article 13.37: Interim Measures of Protection**

A Tribunal may order an interim measure of protection to preserve the rights of a disputing party or to ensure that the Tribunal’s jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal’s jurisdiction. A Tribunal shall not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 13.25 (Submission of a Claim to Arbitration). For the purposes of this paragraph, an order includes a recommendation.

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<sup>15</sup> Indigenous Peoples refers to:

- (a) for Canada, Aboriginal peoples (including First Nations, Inuit, and Métis peoples) as defined in subsection 35(2) of the Constitution Act, 1982 of Canada;
- (b) for Indonesia, Masyarakat Hukum Adat in accordance with Indonesia’s laws and regulations.

### **Article 13.38: Security for Costs**

1. At the request of a disputing party, the Tribunal may order the other disputing party to provide security for all or part of the costs, if there are reasonable grounds to believe that there is a risk the disputing party may not be able to honour a potential costs award against it.
2. In determining whether to order a disputing party to provide security for costs, the Tribunal shall consider all relevant circumstances, including:
  - (a) that disputing party's ability to comply with an adverse decision on costs;
  - (b) that disputing party's willingness to comply with an adverse decision on costs;
  - (c) the effect that providing security for costs may have on that disputing party's ability to pursue its claim or counterclaim; and
  - (d) the conduct of the disputing parties.
3. The Tribunal shall consider all evidence adduced in relation to the circumstances in paragraph 2, including the existence of third party funding.
4. The Tribunal shall specify any relevant terms in an order to provide security for costs and shall fix a time limit of 30 days for compliance with the order, or within any other time period set by the Tribunal.
5. If a disputing party fails to comply with an order to provide security for costs, the Tribunal may suspend the proceeding. If the proceeding is suspended for more than 90 days, the Tribunal may, after consulting with the disputing parties, order the discontinuance of the proceeding.
6. A disputing party shall promptly disclose any material change in the circumstances upon which the Tribunal ordered security for costs.
7. The Tribunal may at any time modify or revoke its order on security for costs, on its own initiative or upon a disputing party's request.

### **Article 13.39: Final Award**

1. If a Tribunal makes a final award against the respondent Party, in respect of its finding of liability, 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 Party may pay monetary damages and any applicable interest in lieu of restitution.

2. Subject to paragraph 1, if a claim is made under Article 13.25.2 (Submission of a Claim to Arbitration):

- (a) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise;
- (b) an award of restitution of property shall provide that restitution be made to the enterprise;
- (c) an award of costs in favour of the investor shall provide that the sum be paid to the investor; and
- (d) the award shall provide that it is made without prejudice to a right that a person, other than a person which has provided a waiver pursuant to Article 13.25 (Submission of a Claim to Arbitration), may have in monetary damages or property awarded under a Party's domestic law.

3. The Tribunal shall make an order with respect to the costs of the arbitration, which shall in principle be borne by the unsuccessful disputing party or parties. In determining the appropriate apportionment of costs, the Tribunal shall consider all relevant circumstances, including:

- (a) the outcome of any part of the proceeding, including the number or extent of the successful parts of the claims or defences;
- (b) the disputing parties' conduct during the proceeding, including the extent to which they acted in an expeditious and cost-effective manner;
- (c) the complexity of the issues; and
- (d) the reasonableness of the costs claimed.

4. The Tribunal and the disputing parties shall make every effort to ensure the dispute settlement process is carried out in a timely manner. The Tribunal shall issue its final award within 12 months of the final date of the hearing on the merits. It may, with good cause and notice to the disputing parties, delay issuing its final award by an additional brief period.

5. Monetary damages in an award:

- (a) shall not be greater than the loss or damage incurred by the investor, or, as applicable, by the enterprise referred to in Article 13.25.2 (Submission of a Claim to Arbitration), as valued on the date of the breach;<sup>16</sup>
- (b) shall only reflect loss or damage incurred by reason of, or arising out of, the breach; and
- (c) shall be determined with reasonable certainty, and shall not be speculative or hypothetical.

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<sup>16</sup> In the case of a breach of Article 13.10 (Expropriation), the valuation of the loss or damage incurred by the investor, or, as applicable, by the enterprise referred to in Article 13.25 (Submission of a Claim to Arbitration), as valued on the date of the breach, shall be made in accordance with Article 13.10.5.

6. In making an award under paragraph 5, the Tribunal shall calculate monetary damages based only on the submissions of the disputing parties, and shall consider, as applicable:

- (a) contributory fault, whether deliberate or negligent;
- (b) failure to mitigate damages;
- (c) prior damages or compensation received for the same loss; or
- (d) restitution of property, or repeal, or modification of the measure.

7. The Tribunal may award monetary damages for lost future profits only insofar as such damages satisfy the requirements under paragraph 5. Such determination requires a case-by-case, fact-based inquiry that takes into consideration, among other factors, whether a covered investment has been in operation in the territory of the respondent Party for a sufficient period of time to establish a performance record of profitability.

8. The Tribunal shall not award punitive damages.

9. The Tribunal shall not award monetary damages under Article 13.25.1 (Submission of a Claim to Arbitration) for loss or damage incurred by the investment.

#### **Article 13.40: Finality and Enforcement of an Award**

1. An award made by a Tribunal has no binding force except between the disputing parties and in respect of that particular case.

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

3. A disputing party shall not seek enforcement of a final award until:

- (a) in the case of a final award made under the ICSID Convention:
  - (i) 120 days have elapsed from the date the award was rendered provided that a disputing party has not requested the award be revised or annulled; or
  - (ii) revision or annulment proceedings have been completed; and
- (b) in the case of a final award under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules:
  - (i) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside, or annul the award; or
  - (ii) a court has dismissed or allowed an application to revise, set aside, or annul the award, and there is no further appeal.

4. Each Party shall provide for the enforcement of an award in its territory.
5. A claim submitted to arbitration under Article 13.25 (Submission of a Claim to Arbitration) shall be considered to arise out of a commercial relationship or transaction for the purposes of Article I of the New York Convention.

#### **Article 13.41: Third Party Funding**

1. A claimant benefiting from a third party funding arrangement shall disclose to the respondent Party and to the Tribunal the name and address of the third party funder.
2. The claimant shall make the disclosure under paragraph 1 at the time of the submission of a claim to arbitration under Article 13.25 (Submission of a Claim to Arbitration), or, if the third party funding is arranged after the submission of a claim, within 10 days of the date on which the third party funding was arranged.
3. The claimant shall have a continuing obligation to disclose any changes to the information referred to in paragraph 1 occurring after its initial disclosure, including termination of the third party funding arrangement.

#### **Article 13.42: Service of Documents**

1. Delivery of notice and other documents to a Party shall be made to:  
  
For Indonesia: Director General for Legal Affairs and International Treaties,  
Ministry of Foreign Affairs, Jalan Taman Pejambon  
No.6 Jakarta 10110 Indonesia.  
  
For Canada: Office of the Assistant Deputy Attorney General of Canada,  
50 O'Connor Street, 5th Floor, Ottawa, Ontario K1A 0HB.
2. A Party shall promptly make publicly available and notify the other Party of any change to the place referred to in paragraph 1.

#### **Article 13.43: Receipts under Insurance or Guarantee Contracts**

In an arbitration under this Section, a respondent Party may not assert as a defence, counterclaim, right of set-off, or otherwise, that the claimant has received or will receive, under an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.

## **ANNEX 13-A**

### **EXCLUSIONS FROM DISPUTE SETTLEMENT**

1. Section D (Investor-State Dispute Settlement) and Chapter 24 (Dispute Settlement) of this Agreement do not apply to a measure adopted or maintained relating to a review under the *Investment Canada Act*, R.S.C. 1985, c. 28, as amended, with respect to whether or not to permit an investment that is subject to review.
2. Section D (Investor-State Dispute Settlement) of this Agreement does not apply to a tobacco control measure adopted or maintained by a Party. A “tobacco control measure” means a measure of a Party related to the production or consumption of manufactured tobacco products (including products made or derived from tobacco), their distribution, labelling, packaging, advertising, marketing, promotion, sale, purchase, or use, as well as enforcement measures, such as inspection, recordkeeping, and reporting requirements. A measure with respect to tobacco leaf that is not in the possession of a manufacturer of tobacco products, or that is not part of a manufactured tobacco product, is not a tobacco control measure.