

## CHAPTER 9

### INVESTMENT

#### Section A

##### Article 9.1: Definitions

For the purposes of this Chapter:

**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 another Party. If that investor is a natural person, who is a permanent resident of a Party and a national of another Party, that natural person may not submit a claim to arbitration against that latter Party;

**covered investment** means, with respect to a Party, an investment in its territory of an investor of another Party in existence as of the date of entry into force of this Agreement for those Parties 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 an enterprise as defined in Article 1.3 (General Definitions), and a branch of an enterprise;

**enterprise of a Party** means an enterprise constituted or organised under the law of a Party, or a branch located in the territory of a Party and carrying out business activities there;<sup>1</sup>

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

**ICC Arbitration Rules** means the arbitration rules of the International Chamber of Commerce;

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

**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, March 18, 1965;

**Inter-American Convention** means the *Inter-American Convention on International Commercial Arbitration*, done at Panama, January 30, 1975;

**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, other debt instruments and loans;<sup>2, 3</sup>
- (d) futures, options and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing and other similar contracts;
- (f) intellectual property rights;
- (g) licences, authorisations, permits and similar rights conferred pursuant to the Party's law;<sup>4</sup> and

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<sup>2</sup> Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.

<sup>3</sup> A loan issued by one Party to another Party is not an investment.

<sup>4</sup> Whether a particular type of licence, authorisation, permit or similar instrument (including a concession to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the Party's law. Among such instruments that do not have the characteristics of an investment are those that do not create any rights protected under the Party's law. For greater certainty, the foregoing is without prejudice to whether any asset associated with such instruments has the characteristics of an investment.

- (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens and pledges,

but investment does not mean an order or judgment entered in a judicial or administrative action.

**investment agreement** means a written agreement<sup>5</sup> that is concluded and takes effect after the date of entry into force of this Agreement<sup>6</sup> between an authority at the central level of government<sup>7</sup> of a Party and a covered investment or an investor of another Party and that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 9.25.2 (Governing Law), on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, and that grants rights to the covered investment or investor:

- (a) with respect to natural resources that a national authority controls, such as oil, natural gas, rare earth minerals, timber, gold, iron ore and other similar resources,<sup>8</sup> including for their exploration, extraction, refining, transportation, distribution or sale;

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<sup>5</sup> “Written agreement” refers to an agreement in writing, negotiated and executed by both parties, whether in a single instrument or in multiple instruments. For greater certainty:

- (a) a unilateral act of an administrative or judicial authority, such as a permit, licence, authorisation, certificate, approval, or similar instrument issued by a Party in its regulatory capacity, or a subsidy or grant, 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.

<sup>6</sup> For greater certainty, a written agreement that is concluded and takes effect after the entry into force of this Agreement does not include the renewal or extension of an agreement in accordance with the provisions of the original agreement, and on the same or substantially the same terms and conditions as the original agreement, which has been concluded and entered in force prior to the entry into force of this Agreement.

<sup>7</sup> For the purposes of this definition, “authority at the central level of government” means, for unitary states, an authority at the ministerial level of government. Ministerial level of government means government departments, ministries or other similar authorities at the central level of government, but does not include: (a) a governmental agency or organ established by a Party’s constitution or a particular legislation that has a separate legal personality from government departments, ministries or other similar authorities under a Party’s law, unless the day to day operations of that agency or organ are directed or controlled by government departments, ministries or other similar authorities; or (b) a governmental agency or organ that acts exclusively with respect to a particular region or province.

<sup>8</sup> For the avoidance of doubt, this subparagraph does not include an investment agreement with respect to land, water or radio spectrum.

- (b) to supply services on behalf of the Party for consumption by the general public for: power generation or distribution, water treatment or distribution, telecommunications, or other similar services supplied on behalf of the Party for consumption by the general public;<sup>9</sup> or
- (c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams or pipelines or other similar projects; provided, however, that the infrastructure is not for the exclusive or predominant use and benefit of the government;

**investment authorisation**<sup>10</sup> means an authorisation that the foreign investment authority of a Party<sup>11</sup> grants to a covered investment or an investor of another Party;

**investor of a non-Party** means, with respect to a Party, an investor that attempts to make,<sup>12</sup> is making, or has made an investment in the territory of that Party, that is not an investor of a Party;

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

**LCIA Arbitration Rules** means the arbitration rules of the London Court of International Arbitration;

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<sup>9</sup> For the avoidance of doubt, this subparagraph does not cover correctional services, healthcare services, education services, childcare services, welfare services or other similar social services.

<sup>10</sup> For greater certainty, the following are not encompassed within this definition: (i) actions taken by a Party to enforce laws of general application, such as competition, environmental, health or other regulatory laws; (ii) non-discriminatory licensing regimes; and (iii) a Party's decision to grant to a covered investment or an investor of another Party a particular investment incentive or other benefit, that is not provided by a foreign investment authority in an investment authorisation.

<sup>11</sup> For the purposes of this definition, "foreign investment authority" means, as of the date of entry into force of this Agreement: (a) for Australia, the Treasurer of the Commonwealth of Australia under Australia's foreign investment policy including the *Foreign Acquisitions and Takeovers Act 1975*; (b) for Canada, the Minister of Industry, but only when issuing a notice under Section 21 or 22 of the *Investment Canada Act*; (c) for Mexico, the National Commission of Foreign Investments (*Comisión Nacional de Inversiones Extranjeras*); and (d) for New Zealand, the Minister of Finance, the Minister of Fisheries or the Minister for Land Information, to the extent that they make a decision to grant consent under the *Overseas Investment Act 2005*.

<sup>12</sup> For greater certainty, the Parties understand that, for the purposes of the definitions of "investor of a non-Party" and "investor of a Party", an investor "attempts to make" an investment when that investor has taken concrete action or actions to make an investment, such as channelling resources or capital in order to set up a business, or applying for a permit or licence.

**negotiated restructuring** means the restructuring or rescheduling of a debt instrument that has been effected through (a) a modification or amendment of that debt instrument, as provided for under its terms, or (b) a comprehensive debt exchange or other similar process in which the holders of no less than 75 per cent of the aggregate principal amount of the outstanding debt under that debt instrument have consented to the debt exchange or other process;

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

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

**protected information** means confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law, including classified government information;

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

**Secretary-General** means the Secretary-General of ICSID; and

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

## **Article 9.2: Scope**

1. This Chapter shall apply to measures adopted or maintained by a Party relating to:

- (a) investors of another Party;
- (b) covered investments; and
- (c) with respect to Article 9.10 (Performance Requirements) and Article 9.16 (Investment and Environmental, Health and other Regulatory Objectives), all investments in the territory of that Party.

2. A Party's obligations under this Chapter shall apply to measures adopted or maintained by:

- (a) the central, regional or local 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 local governments or authorities of that Party.<sup>13</sup>

3. For greater certainty, this Chapter shall not bind a Party in relation to an act or fact that took place or a situation that ceased to exist before the date of entry into force of this Agreement for that Party.

### **Article 9.3: Relation to Other Chapters**

1. In the event of any inconsistency between this Chapter and another Chapter of this Agreement, the other Chapter shall prevail to the extent of the inconsistency.

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

3. This Chapter shall not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter 11 (Financial Services).

### **Article 9.4: National Treatment<sup>14</sup>**

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

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

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<sup>13</sup> For greater certainty, governmental authority is delegated under the Party's law, including through a legislative grant or a government order, directive or other action transferring or authorising the exercise of governmental authority.

<sup>14</sup> For greater certainty, whether treatment is accorded in "like circumstances" under Article 9.4 (National Treatment) or Article 9.5 (Most-Favoured-Nation Treatment) 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.

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

#### **Article 9.5: Most-Favoured-Nation Treatment**

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

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

3. For greater certainty, the treatment referred to in this Article does not encompass international dispute resolution procedures or mechanisms, such as those included in Section B (Investor-State Dispute Settlement).

#### **Article 9.6: Minimum Standard of Treatment<sup>15</sup>**

1. Each Party shall accord to covered investments treatment in accordance with applicable customary international law principles, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the 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 obligations 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 the principle of due process embodied in the principal legal systems of the world; and

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<sup>15</sup> Article 9.6 (Minimum Standard of Treatment) shall be interpreted in accordance with Annex 9-A (Customary International Law).

- (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 Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

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

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 9.7: Treatment in Case of Armed Conflict or Civil Strife**

1. Notwithstanding Article 9.12.6(b) (Non-Conforming Measures), each Party shall accord to investors of another 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 or civil strife.

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 another 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.

3. Paragraph 1 shall not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 9.4 (National Treatment) but for Article 9.12.6(b) (Non-Conforming Measures).



## **Article 9.8: Expropriation and Compensation**<sup>16</sup>

1. No Party shall expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation (expropriation), except:

- (a) for a public purpose;<sup>17, 18</sup>
- (b) in a non-discriminatory manner;
- (c) on payment of prompt, adequate and effective compensation in accordance with paragraphs 2, 3 and 4; and
- (d) in accordance with due process of law.

2. Compensation shall:

- (a) be paid without delay;
- (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (the date of expropriation);
- (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and
- (d) be fully realisable and freely transferable.

3. If the fair market value is denominated in a freely usable currency, the compensation paid shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

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<sup>16</sup> Article 9.8 (Expropriation and Compensation) shall be interpreted in accordance with Annex 9-B (Expropriation) and is subject to Annex 9-C (Expropriation Relating to Land).

<sup>17</sup> For greater certainty, for the purposes of this Article, the term “public purpose” refers to a concept in customary international law. Domestic law may express this or a similar concept by using different terms, such as “public necessity”, “public interest” or “public use”.

<sup>18</sup> For the avoidance of doubt: (i) if Brunei Darussalam is the expropriating Party, any measure of direct expropriation relating to land shall be for the purposes as set out in the *Land Code* (Cap. 40) and the *Land Acquisition Act* (Cap. 41), as of the date of entry into force of the Agreement for it; and (ii) if Malaysia is the expropriating Party, any measure of direct expropriation relating to land shall be for the purposes as set out in the *Land Acquisitions Act 1960*, *Land Acquisition Ordinance 1950* of the State of Sabah and the *Land Code 1958* of the State of Sarawak, as of the date of entry into force of the Agreement for it.

4. If the fair market value is denominated in a currency that is not freely usable, the compensation paid, 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 expropriation, 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 shall not apply to the issuance of compulsory licences granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation or creation of intellectual property rights, to the extent that the issuance, revocation, limitation or creation is consistent with Chapter 18 (Intellectual Property) and the TRIPS Agreement.<sup>19</sup>

6. For greater certainty, a Party's decision not to issue, renew or maintain a subsidy or grant, or decision to modify or reduce a subsidy or grant,

- (a) in the absence of any specific commitment under law or contract to issue, renew or maintain that subsidy or grant; or
- (b) in accordance with any terms or conditions attached to the issuance, renewal, modification, reduction and maintenance of that subsidy or grant,

standing alone, does not constitute an expropriation.

### **Article 9.9: Transfers<sup>20</sup>**

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

- (a) contributions to capital;<sup>21</sup>
- (b) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance fees and other fees;

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<sup>19</sup> For greater certainty, the Parties recognise that, for the purposes of this Article, the term "revocation" of intellectual property rights includes the cancellation or nullification of those rights, and the term "limitation" of intellectual property rights includes exceptions to those rights.

<sup>20</sup> For greater certainty, this Article is subject to Annex 9-E (Transfers).

<sup>21</sup> For greater certainty, contributions to capital include the initial contribution.

- (c) proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;
- (d) payments made under a contract, including a loan agreement;
- (e) payments made pursuant to Article 9.7 (Treatment in Case of Armed Conflict or Civil Strife) and Article 9.8 (Expropriation and Compensation); and
- (f) payments arising out of a dispute.

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

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

4. Notwithstanding paragraphs 1, 2 and 3, a Party may prevent or delay a transfer through the equitable, non-discriminatory and good faith application of its laws<sup>22</sup> relating to:

- (a) bankruptcy, insolvency or the protection of the rights of creditors;
- (b) issuing, trading or dealing in securities, futures, options or derivatives;
- (c) criminal or penal offences;
- (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. Notwithstanding paragraph 3, a Party may restrict transfers of returns in kind in circumstances where it could otherwise restrict such transfers under this Agreement, including as set out in paragraph 4.

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<sup>22</sup> For greater certainty, this Article does not preclude the equitable, non-discriminatory and good faith application of a Party's laws relating to its social security, public retirement or compulsory savings programmes.

## Article 9.10: Performance Requirements

1. No Party shall, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement, or enforce any commitment or undertaking:<sup>23</sup>

- (a) to export a given level or percentage of goods or services;
- (b) to achieve a given level or percentage of domestic content;
- (c) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
- (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with the investment;
- (e) to restrict sales of goods or services in its territory that the investment produces or supplies by relating those 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 the investment produces or the services that it supplies to a specific regional market or to the world market;
- (h)
  - (i) to purchase, use or accord a preference to, in its territory, technology of the Party or of a person of the Party;<sup>24</sup> or
  - (ii) that prevents the purchase or use of, or the according of a preference to, in its territory, a particular technology; or
- (i) to adopt:

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<sup>23</sup> For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 2 does not constitute a “requirement” or a “commitment or undertaking” for the purposes of paragraph 1.

<sup>24</sup> For the purposes of this Article, the term “technology of the Party or of a person of the Party” includes technology that is owned by the Party or a person of the Party, and technology for which the Party or a person of the Party holds an exclusive licence.

- (i) a given rate or amount of royalty under a licence contract;  
or
- (ii) a given duration of the term of a licence contract,

in regard to any licence contract in existence at the time the requirement is imposed or enforced, or any commitment or undertaking is enforced, or any future licence contract<sup>25</sup> freely entered into between the investor and a person in its territory, provided that the requirement is imposed or the commitment or undertaking is enforced in a manner that constitutes direct interference with that licence contract by an exercise of non-judicial governmental authority of a Party. For greater certainty, paragraph 1(i) does not apply when the licence contract is concluded between the investor and a Party.

2. No Party shall condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, on compliance with any requirement:

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

3. (a) Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment of an investor of a Party or of a non-Party in its territory, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

- (b) Paragraphs 1(f), 1(h) and 1(i) shall not apply:

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<sup>25</sup> A “licence contract” referred to in this subparagraph means any contract concerning the licensing of technology, a production process, or other proprietary knowledge.

- (i) if a Party authorises use of an intellectual property right in accordance with Article 31<sup>26</sup> 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) if 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.<sup>27, 28</sup>
- (c) Paragraph 1(i) shall not apply if the requirement is imposed or the commitment or undertaking is enforced by a tribunal as equitable remuneration under the Party's copyright laws.
- (d) Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), 1(c), 1(f), 2(a) and 2(b) shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:
- (i) necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement;
  - (ii) necessary to protect human, animal or plant life or health; or
  - (iii) related to the conservation of living or non-living exhaustible natural resources.
- (e) Paragraphs 1(a), 1(b), 1(c), 2(a) and 2(b) shall 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), 1(h), 1(i), 2(a) and 2(b) shall not apply to government procurement.

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<sup>26</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>27</sup> The Parties recognise that a patent does not necessarily confer market power.

<sup>28</sup> In the case of Brunei Darussalam, for a period of 10 years after the entry into force of this Agreement for it or until it establishes a competition authority or authorities, whichever occurs earlier, the reference to the Party's competition laws includes competition regulations.

- (g) Paragraphs 2(a) and 2(b) shall not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.
- (h) Paragraphs (1)(h) and (1)(i) shall not be construed to prevent a Party from adopting or maintaining measures to protect legitimate public welfare objectives, provided that such measures are not applied in an arbitrary or unjustifiable manner, or in a manner that constitutes a disguised restriction on international trade or investment.

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

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

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

#### **Article 9.11: Senior Management and Boards of Directors**

1. No Party shall require that an enterprise of that Party that is a covered investment appoint to a senior management position a natural person of any particular nationality.

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

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

1. Article 9.4 (National Treatment), Article 9.5 (Most-Favoured-Nation Treatment), Article 9.10 (Performance Requirements) and Article 9.11 (Senior Management and Boards of Directors) shall not apply to:

- (a) any existing non-conforming measure that is maintained by a Party at:
  - (i) the central level of government, as set out by that Party in its Schedule to Annex I;
  - (ii) a regional level of government, as set out by that Party in its Schedule to Annex I; or
  - (iii) a local level of government;
- (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
- (c) an amendment to any non-conforming measure referred to in subparagraph (a), to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Article 9.4 (National Treatment), Article 9.5 (Most-Favoured-Nation Treatment), Article 9.10 (Performance Requirements) or Article 9.11 (Senior Management and Boards of Directors).<sup>29</sup>

2. Article 9.4 (National Treatment), Article 9.5 (Most-Favoured-Nation Treatment), Article 9.10 (Performance Requirements) and Article 9.11 (Senior Management and Boards of Directors) shall not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors or activities, as set out by that Party in its Schedule to Annex II.

3. If a Party considers that a non-conforming measure applied by a regional level of government of another Party, as referred to in paragraph 1(a)(ii), creates a material impediment to investment in relation to the former Party, it may request consultations with regard to that measure. These Parties shall enter into consultations with a view to exchanging information on the operation of the measure and to considering whether further steps are necessary and appropriate.<sup>30</sup>

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<sup>29</sup> With respect to Viet Nam, Annex 9-I (Non-Conforming Measures Ratchet Mechanism) applies.

<sup>30</sup> For greater certainty, any Party may request consultations with another Party regarding a non-conforming measure applied by a central level of government, as referred to in paragraph 1(a)(i).



4. No Party shall, under any measure adopted after the date of entry into force of this Agreement for that Party and covered by its Schedule to Annex II, require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

5. (a) Article 9.4 (National Treatment) shall not apply to any measure that falls within an exception to, or derogation from, the obligations which are imposed by:

(i) Article 18.8 (National Treatment); or

(ii) Article 3 of the TRIPS Agreement, if the exception or derogation relates to matters not addressed by Chapter 18 (Intellectual Property).

(b) Article 9.5 (Most-Favoured-Nation Treatment) shall not apply to any measure that falls within Article 5 of the TRIPS Agreement, or an exception to, or derogation from, the obligations which are imposed by:

(i) Article 18.8 (National Treatment); or

(ii) Article 4 of the TRIPS Agreement.

6. Article 9.4 (National Treatment), Article 9.5 (Most-Favoured-Nation Treatment) and Article 9.11 (Senior Management and Boards of Directors) shall not apply to:

(a) government procurement; or

(b) subsidies or grants provided by a Party, including government-supported loans, guarantees and insurance.

7. For greater certainty, any amendments or modifications to a Party's Schedules to Annex I or Annex II, pursuant to this Article, shall be made in accordance with Article 30.2 (Amendments).

### **Article 9.13: Subrogation**

If a Party, or any agency, institution, statutory body 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 recognise the subrogation or transfer of any rights the investor would have possessed under this Chapter with respect to the

covered investment but for the subrogation, and the investor shall be precluded from pursuing these rights to the extent of the subrogation.

#### **Article 9.14: Special Formalities and Information Requirements**

1. Nothing in Article 9.4 (National Treatment) shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with a covered investment, such as a residency requirement for registration or a requirement that a covered investment be legally constituted under the laws or regulations of the Party, provided that these formalities do not materially impair the protections afforded by the Party to investors of another Party and covered investments pursuant to this Chapter.

2. Notwithstanding Article 9.4 (National Treatment) and Article 9.5 (Most-Favoured-Nation Treatment), a Party may require an investor of another Party or its covered investment to provide information concerning that investment solely 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 otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.

#### **Article 9.15: Denial of Benefits**

1. A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of that other Party and to investments of that investor if the enterprise:

- (a) is owned or controlled by a person of a non-Party or of the denying Party; and
- (b) has no substantial business activities in the territory of any Party other than the denying Party.

2. A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of that other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.

## **Article 9.16: Investment and Environmental, Health and other Regulatory Objectives**

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.

## **Article 9.17: Corporate Social Responsibility**

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

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

### **Article 9.18: Consultation and Negotiation**

1. In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third party procedures, such as good offices, conciliation or mediation.
2. The claimant shall deliver to the respondent a written request for consultations setting out a brief description of facts regarding the measure or measures at issue.
3. For greater certainty, the initiation of consultations and negotiations shall not be construed as recognition of the jurisdiction of the tribunal.

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

1. If an investment dispute has not been resolved within six months of the receipt by the respondent of a written request for consultations pursuant to Article 9.18.2 (Consultation and Negotiation):
  - (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim:
    - (i) that the respondent has breached:

- (A) an obligation under Section A;
  - (B) an investment authorisation;<sup>31</sup> 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 Section A;
      - (B) an investment authorisation; or
      - (C) an investment agreement; and
    - (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach,

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. When the claimant submits a claim pursuant to paragraph 1(a)(i)(B), 1(a)(i)(C), 1(b)(i)(B) 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.<sup>32</sup>

3. At least 90 days before submitting any claim to arbitration under this Section, the claimant shall deliver to the respondent a written notice of its

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<sup>31</sup> Without prejudice to a claimant's right to submit to arbitration other claims under this Article, a claimant shall not submit to arbitration a claim under subparagraph (a)(i)(B) or subparagraph (b)(i)(B) that a Party covered by Annex 9-H has breached an investment authorisation by enforcing conditions or requirements under which the investment authorisation was granted.

<sup>32</sup> In the case of investment authorisations, this paragraph shall apply only to the extent that the investment authorisation, including instruments executed after the date the authorisation was granted, creates rights and obligations for the disputing parties.

intention to submit a claim to arbitration (notice of intent). The notice shall specify:

- (a) the name and address of the claimant and, if a claim is submitted on behalf of an enterprise, the name, address and place of incorporation of the enterprise;
- (b) for each claim, the provision of this Agreement, investment authorisation or investment agreement alleged to have been breached and any other relevant provisions;
- (c) the legal and factual basis for each claim; and
- (d) the relief sought and the approximate amount of damages claimed.

4. The claimant may submit a claim referred to in paragraph 1 under one of the following alternatives:

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

5. 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 the ICSID Convention is received by the Secretary-General;
- (b) referred to in the ICSID Additional Facility Rules is received by the Secretary-General;
- (c) referred to in the UNCITRAL Arbitration Rules, together with the statement of claim referred to therein, are received by the respondent; or
- (d) referred to under any arbitral institution or arbitration rules selected under paragraph 4(d) is received by the respondent.

A claim asserted by the claimant for the first time after such notice of arbitration is submitted shall be deemed submitted to arbitration under this Section on the date of its receipt under the applicable arbitration rules.

6. The arbitration rules applicable under paragraph 4 that are 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 Agreement.

7. The claimant shall provide with the notice of arbitration:

- (a) the name of the arbitrator that the claimant appoints; or
- (b) the claimant's written consent for the Secretary-General to appoint that arbitrator.

#### **Article 9.20: 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 Agreement.

2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall be deemed to 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;
- (b) Article II of the New York Convention for an "agreement in writing"; and
- (c) Article I of the Inter-American Convention for an "agreement".

#### **Article 9.21: Conditions and Limitations on Consent of Each Party**

1. No claim shall be submitted to arbitration under this Section if more than three years and six months have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 9.19.1 (Submission of a Claim to Arbitration) and knowledge that the claimant (for claims brought under Article 9.19.1(a)) or the enterprise (for claims brought under Article 9.19.1(b)) has incurred loss or damage.

2. No claim shall 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 Agreement; and

- (b) the notice of arbitration is accompanied:
  - (i) for claims submitted to arbitration under Article 9.19.1(a) (Submission of a Claim to Arbitration), by the claimant's written waiver; and
  - (ii) for claims submitted to arbitration under Article 9.19.1(b) (Submission of a Claim to Arbitration), by the claimant's and the enterprise's written waivers,

of any right to initiate or continue before any court or administrative tribunal under the law of a Party, or any other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 9.19 (Submission of a Claim to Arbitration).

3. Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 9.19.1(a) (Submission of a Claim to Arbitration)) and the claimant or the enterprise (for claims brought under Article 9.19.1(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.

## **Article 9.22: Selection of Arbitrators**

1. Unless the disputing parties agree otherwise, 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 a period of 75 days after the date that a claim is submitted to arbitration under this Section, the Secretary-General, on the request of a disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed. The Secretary-General shall not appoint a national of either the respondent or the Party of the claimant as the presiding arbitrator unless the disputing parties agree otherwise.

4. 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 on a ground other than nationality:

- (a) the respondent agrees to the appointment of each individual member of a tribunal established under the ICSID Convention or the ICSID Additional Facility Rules;
- (b) a claimant referred to in Article 9.19.1(a) (Submission of a Claim to Arbitration) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant agrees in writing to the appointment of each individual member of the tribunal; and
- (c) a claimant referred to in Article 9.19.1(b) (Submission of a Claim to Arbitration) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant and the enterprise agree in writing to the appointment of each individual member of the tribunal.

5. In the appointment of arbitrators to a tribunal for claims submitted under Article 9.19.1(a)(i)(B) (Submission of a Claim to Arbitration), Article 9.19.1(b)(i)(B), Article 9.19.1(a)(i)(C) or Article 9.19.1(b)(i)(C), each disputing party shall take into account the expertise or relevant experience of particular candidates with respect to the relevant governing law under Article 9.25.2 (Governing Law). If the parties fail to agree on the appointment of the presiding arbitrator, the Secretary-General shall also take into account the expertise or relevant experience of particular candidates with respect to the relevant governing law under Article 9.25.2.

6. The Parties shall, prior to the entry into force of this Agreement, provide guidance on the application of the Code of Conduct for Dispute Settlement Proceedings under Chapter 28 (Dispute Settlement) to arbitrators selected to serve on investor-State dispute settlement tribunals pursuant to this Article, including any necessary modifications to the Code of Conduct to conform to the context of investor-State dispute settlement. The Parties shall also provide guidance on the application of other relevant rules or guidelines on conflicts of interest in international arbitration. Arbitrators shall comply with that guidance in addition to the applicable arbitral rules regarding independence and impartiality of arbitrators.

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

1. The disputing parties may agree on the legal place of any arbitration under the arbitration rules applicable under Article 9.19.4 (Submission of a Claim to Arbitration). If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with the applicable arbitration rules, provided



that the place shall be in the territory of a State that is a party to the New York Convention.

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

3. After consultation with the disputing parties, the tribunal may accept and consider written *amicus curiae* submissions regarding a matter of fact or law within the scope of the dispute that may assist the tribunal in evaluating the submissions and arguments of the disputing parties from a person or entity that is not a disputing party but has a significant interest in the arbitral proceedings. Each submission shall identify the author; disclose any affiliation, direct or indirect, 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. Each submission shall be in a language of the arbitration and comply with any page limits and deadlines set by the tribunal. The tribunal shall provide the disputing parties with an opportunity to respond to such submissions. The tribunal shall ensure that the submissions do not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

4. Without prejudice to a tribunal's authority to address other objections as a preliminary question, such as an objection that a dispute is not within the competence of the tribunal, including an objection to the tribunal's jurisdiction, 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 favour of the claimant may be made under Article 9.29 (Awards) or that a claim is manifestly without legal merit.

- (a) An objection under this paragraph shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment.
- (b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.
- (c) In deciding an objection under this paragraph that a claim submitted is not a claim for which an award in favour of the claimant may be made under Article 9.29 (Awards), the tribunal shall assume to be true the claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment

thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in the relevant article of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.

- (d) The respondent does not waive any objection as to competence, including an objection to jurisdiction, or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.

5. In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 or any objection that the dispute is not within the tribunal's competence, including an objection that the dispute is not within the tribunal's jurisdiction. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection, stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

6. When the tribunal decides a respondent's objection under paragraph 4 or 5, it may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

7. For greater certainty, if an investor of a Party submits a claim under this Section, including a claim alleging that a Party breached Article 9.6 (Minimum Standard of Treatment), the investor has the burden of proving all elements of its claims, consistent with general principles of international law applicable to international arbitration.

8. A respondent may not assert as a defence, counterclaim, right of set-off or for any other reason, that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract.

9. 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 may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 9.19 (Submission of a Claim to

Arbitration). For the purposes of this paragraph, an order includes a recommendation.

10. 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. 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 comments and issue its decision or award no later than 45 days after the expiration of the 60 day comment period.

11. 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 9.29 (Awards) should be subject to that appellate mechanism. The Parties shall strive to ensure that any such appellate mechanism they consider adopting provides for transparency of proceedings similar to the transparency provisions established in Article 9.24 (Transparency of Arbitral Proceedings).

#### **Article 9.24: Transparency of Arbitral Proceedings**

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

- (a) the notice of intent;
- (b) the notice of arbitration;
- (c) pleadings, memorials and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 9.23.2 (Conduct of the Arbitration) and Article 9.23.3 and Article 9.28 (Consolidation);
- (d) minutes or transcripts of hearings of the tribunal, if available; and
- (e) 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 protected 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, including paragraph 4(d), requires a respondent to make available to the public or otherwise disclose during or after the arbitral proceedings, including the hearing, protected information, or to furnish or allow access to information that it may withhold in accordance with Article 29.2 (Security Exceptions) or Article 29.7 (Disclosure of Information).<sup>33</sup>

4. Any protected 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 any non-disputing Party or to the public any protected 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 protected 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 protected 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 protected information. If the tribunal determines that the information was not properly designated, the disputing party that submitted the information may:
  - (i) withdraw all or part of its submission containing that information; or
  - (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (c).

In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under subparagraph (d)(i) by the

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<sup>33</sup> For greater certainty, when a respondent chooses to disclose to the tribunal information that may be withheld in accordance with Article 29.2 (Security Exceptions) or Article 29.7 (Disclosure of Information), the respondent may still withhold that information from disclosure to the public.

disputing party that first submitted the information or redesignate the information consistent with the designation under subparagraph (d)(ii) of the disputing party that first submitted the information.

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

#### **Article 9.25: Governing Law**

1. Subject to paragraph 3, when a claim is submitted under Article 9.19.1(a)(i)(A) (Submission of a Claim to Arbitration) or Article 9.19.1(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.<sup>34</sup>

2. Subject to paragraph 3 and the other provisions of this Section, when a claim is submitted under Article 9.19.1(a)(i)(B) (Submission of a Claim to Arbitration), Article 9.19.1(a)(i)(C), Article 9.19.1(b)(i)(B) or Article 9.19.1(b)(i)(C), the tribunal shall apply:

- (a) the rules of law applicable to the pertinent investment authorisation or specified in the pertinent investment authorisation or investment agreement, or as the disputing parties may agree otherwise; or
- (b) if, in the pertinent investment agreement 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;<sup>35</sup> and
  - (ii) such rules of international law as may be applicable.

3. A decision of the Commission on the interpretation of a provision of this Agreement under Article 27.2.2(f) (Functions of the Commission) shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision.

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<sup>34</sup> For greater certainty, this provision is without prejudice to any consideration of the domestic law of the respondent when it is relevant to the claim as a matter of fact.

<sup>35</sup> The “law of the respondent” means the law that a domestic court or tribunal of proper jurisdiction would apply in the same case. For greater certainty, the law of the respondent includes the relevant law governing the investment agreement, including law on damages, mitigation, interest and estoppel.

### **Article 9.26: Interpretation of Annexes**

1. If a respondent asserts as a defence that the measure alleged to be a breach is within the scope of a non-conforming measure set out in Annex I or Annex II, the tribunal shall, on request of the respondent, request the interpretation of the Commission on the issue. The Commission shall submit in writing any decision on its interpretation under Article 27.2.2(f) (Functions of the Commission) to the tribunal within 90 days of delivery of the request.

2. A decision issued by the Commission under paragraph 1 shall be binding on the tribunal, and any decision or award issued by the tribunal must be consistent with that decision. If the Commission fails to issue such a decision within 90 days, the tribunal shall decide the issue.

### **Article 9.27: Expert Reports**

Without prejudice to the appointment of other kinds of experts when authorised by the applicable arbitration rules, a tribunal, on 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 scientific matters raised by a disputing party in a proceeding, subject to any terms and conditions that the disputing parties may agree.

### **Article 9.28: Consolidation**

1. If two or more claims have been submitted separately to arbitration under Article 9.19.1 (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, any 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 and to all the disputing parties sought to be covered by the order and shall specify in the request:

- (a) the names and addresses of all the disputing parties sought to be covered by the order;
- (b) the nature of the order sought; and
- (c) the grounds on which the order is sought.

3. Unless the Secretary-General finds within a period of 30 days after the date of receiving a request under paragraph 2 that the request is manifestly unfounded, a tribunal shall be established under this Article.

4. Unless all the disputing parties sought to be covered by the order agree otherwise, a tribunal established under this Article shall comprise three arbitrators:

- (a) one arbitrator appointed by agreement of the claimants;
- (b) one arbitrator appointed by the respondent; and
- (c) the presiding arbitrator appointed by the Secretary-General, provided that the presiding arbitrator is not a national of the respondent or of a Party of any claimant.

5. If, within a period of 60 days after the date when the Secretary-General receives a request made under paragraph 2, the respondent fails or the claimants fail to appoint an arbitrator in accordance with paragraph 4, the Secretary-General, on request of any disputing party sought to be covered by the order, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.

6. If a tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration under Article 9.19.1 (Submission of a Claim to Arbitration) have a question of law or fact in common, and arise out of the same events or circumstances, 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;
- (b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others; or
- (c) instruct a tribunal previously established under Article 9.22 (Selection of Arbitrators) to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that:
  - (i) that tribunal, on request of a claimant that was not previously a disputing party before that tribunal, shall be reconstituted with its original members, except that the arbitrator for the claimants shall be appointed pursuant to paragraphs 4(a) and 5; and
  - (ii) that tribunal shall decide whether a prior hearing shall be repeated.

7. If a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration under Article 9.19.1 (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 any order made under paragraph 6. The request shall specify:

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

The claimant shall deliver a copy of its request to the Secretary-General.

8. A tribunal established under this Article shall conduct its proceedings in accordance with the UNCITRAL Arbitration Rules, except as modified by this Section.

9. A tribunal established under Article 9.22 (Selection of Arbitrators) shall not have jurisdiction to decide a claim, or a part of a claim, over which a tribunal established or instructed under this Article has assumed jurisdiction.

10. On the 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 9.22 (Selection of Arbitrators) be stayed, unless the latter tribunal has already adjourned its proceedings.

#### **Article 9.29: Awards**

1. When a tribunal makes a final award, 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.

2. For greater certainty, if an investor of a Party submits a claim to arbitration under Article 9.19.1(a) (Submission of a Claim to Arbitration), it may recover only for loss or damage that it has incurred in its capacity as an investor of a Party.

3. A tribunal may also award costs and attorney's fees incurred by the disputing parties in connection with the arbitral proceeding, and shall determine



how and by whom those costs and attorney's fees shall be paid, in accordance with this Section and the applicable arbitration rules.

4. For greater certainty, for claims alleging the breach of an obligation under Section A with respect to an attempt to make an investment, when an award is made in favour of the claimant, the only damages that may be awarded are those that the claimant has proven were sustained in the attempt to make the investment, provided that the claimant also proves that the breach was the proximate cause of those damages. If the tribunal determines such claims to be frivolous, the tribunal may award to the respondent reasonable costs and attorney's fees.

5. Subject to paragraph 1, if a claim is submitted to arbitration under Article 9.19.1(b) (Submission of a Claim to Arbitration) and an award is made in favour of the enterprise:

- (a) an award of restitution of property shall provide that restitution be made to the enterprise;
- (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 under applicable domestic law with respect to the relief provided in the award.

6. A tribunal shall not award punitive damages.

7. An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.

8. Subject to paragraph 9 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.

9. 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 9.19.4(d) (Submission of a Claim to Arbitration):

- (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.

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

11. If the respondent fails to abide by or comply with a final award, on delivery of a request by the Party of the claimant, a panel shall be established under Article 28.7 (Establishment of a Panel). The requesting Party may seek in those proceedings:

- (a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Agreement; and
- (b) in accordance with Article 28.17 (Initial Report), a recommendation that the respondent abide by or comply with the final award.

12. A disputing party may seek enforcement of an arbitration award under the ICSID Convention, the New York Convention or the Inter-American Convention regardless of whether proceedings have been taken under paragraph 11.

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

### **Article 9.30: Service of Documents**

Delivery of notice and other documents to a Party shall be made to the place named for that Party in Annex 9-D (Service of Documents on a Party Under Section B). A Party shall promptly make publicly available and notify the other Parties of any change to the place referred to in that Annex.

## **ANNEX 9-A**

### **CUSTOMARY INTERNATIONAL LAW**

The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Article 9.6 (Minimum Standard of Treatment) results from a general and consistent practice of States that they follow from a sense of legal obligation. The customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the investments of aliens.

## ANNEX 9-B

### EXPROPRIATION

The Parties confirm their shared understanding that:

1. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.
2. Article 9.8.1 (Expropriation and Compensation) addresses two situations. The first is direct expropriation, in which an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure.
3. The second situation addressed by Article 9.8.1 (Expropriation and Compensation) is indirect expropriation, in which 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;<sup>36</sup> and
    - (iii) the character of the government action.
  - (b) Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as

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<sup>36</sup> For greater certainty, whether an investor's investment-backed expectations are reasonable depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector.

public health,<sup>37</sup> safety and the environment, do not constitute indirect expropriations, except in rare circumstances.

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<sup>37</sup> For greater certainty and without limiting the scope of this subparagraph, regulatory actions to protect public health include, among others, such measures with respect to the regulation, pricing and supply of, and reimbursement for, pharmaceuticals (including biological products), diagnostics, vaccines, medical devices, gene therapies and technologies, health-related aids and appliances and blood and blood-related products.

## ANNEX 9-C

### EXPROPRIATION RELATING TO LAND

1. Notwithstanding the obligations under Article 9.8 (Expropriation and Compensation), where Singapore is the expropriating Party, any measure of direct expropriation relating to land shall be for a purpose and upon payment of compensation at market value, in accordance with the applicable domestic legislation<sup>38</sup> and any subsequent amendments thereto relating to the amount of compensation where such amendments provide for the method of determination of the compensation which is no less favourable to the investor for its expropriated investment than such method of determination in the applicable domestic legislation as at the time of entry into force of this Agreement for Singapore.

2. Notwithstanding the obligations under Article 9.8 (Expropriation and Compensation), where Viet Nam is the expropriating Party, any measure of direct expropriation relating to land shall be: (i) for a purpose in accordance with the applicable domestic legislation;<sup>39</sup> and (ii) upon payment of compensation equivalent to the market value, while recognising the applicable domestic legislation.

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<sup>38</sup> The applicable domestic legislation is the *Land Acquisition Act* (Cap. 152) as at the date of entry into force of this Agreement for Singapore.

<sup>39</sup> The applicable domestic legislation is Viet Nam's *Land Law*, Law No. 45/2013/QH13 and *Decree 44/2014/ND-CP Regulating Land Prices*, as at the date of entry into force of this Agreement for Viet Nam.

## **ANNEX 9-D**

### **SERVICE OF DOCUMENTS ON A PARTY UNDER SECTION B (INVESTOR-STATE DISPUTE SETTLEMENT)**

#### **Australia**

Notices and other documents in disputes under Section B (Investor-State Dispute Settlement) shall be served on Australia by delivery to:

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

#### **Brunei Darussalam**

Notices and other documents in disputes under Section B (Investor-State Dispute Settlement) shall be served on Brunei Darussalam by delivery to:

The Permanent Secretary (Trade)  
Ministry of Foreign Affairs and Trade  
Jalan Subok  
Bandar Seri Begawan, BD 2710  
Brunei Darussalam

#### **Canada**

Notices and other documents in disputes under Section B (Investor-State Dispute Settlement) shall be served on Canada by delivery to:

Office of the Deputy Attorney General of Canada  
Justice Building  
239 Wellington Street  
Ottawa, Ontario  
K1A 0H8  
Canada

**Chile**

Notices and other documents in disputes under Section B (Investor-State Dispute Settlement) shall be served on Chile by delivery to:

Dirección de Asuntos Jurídicos del Ministerio de Relaciones Exteriores de  
la República de Chile  
Teatinos 180  
Santiago  
Chile

**Japan**

Notices and other documents in disputes under Section B (Investor-State Dispute Settlement) shall be served on Japan by delivery to:

Economic Affairs Bureau  
Ministry of Foreign Affairs  
2-2-1 Kasumigaseki, Chiyoda-ku  
Tokyo  
Japan

**Malaysia**

Notices and other documents in disputes under Section B (Investor-State Dispute Settlement) shall be served on Malaysia by delivery to:

Attorney General's Chambers  
Level 16, No. 45 Persiaran Perdana  
Precint 4  
Federal Government Administrative Centre  
62100 Putrajaya  
Malaysia



**Mexico**

Notices and other documents in disputes under Section B (Investor-State Dispute Settlement) shall be served on Mexico by delivery to:

Dirección General de Consultoría Jurídica de Comercio Internacional  
Secretaría de Economía  
Alfonso Reyes #30, piso 17  
Col. Hipódromo Condesa  
Del. Cuauhtémoc  
México D.F.  
C.P. 06140

**New Zealand**

Notices and other documents in disputes under Section B (Investor-State Dispute Settlement) shall be served on New Zealand by delivery to:

The Secretary  
Ministry of Foreign Affairs and Trade  
195 Lambton Quay  
Wellington 6011  
New Zealand

**Peru**

Notices and other documents in disputes under Section B (Investor-State Dispute Settlement) shall be served on Peru by delivery to:

Dirección General de Asuntos de Economía Internacional,  
Competencia y Productividad  
Ministerio de Economía y Finanzas  
Jirón Lampa 277, piso 5  
Lima, Perú

**Singapore**

Notices and other documents in disputes under Section B (Investor-State Dispute Settlement) shall be served on Singapore by delivery to:

Permanent Secretary  
Ministry of Trade & Industry  
100 High Street #09-01  
Singapore 179434  
Singapore

**United States**

Notices and other documents in disputes under Section B (Investor-State Dispute Settlement) shall be served on the United States by delivery to:

Executive Director (L/EX)  
Office of the Legal Adviser  
Department of State  
Washington, D.C.20520  
United States of America

**Viet Nam**

Notices and other documents in disputes under Section B (Investor-State Dispute Settlement) shall be served on Viet Nam by delivery to:

General Director  
Department of International Law  
Ministry of Justice  
60 Tran Phu Street  
Ba Dinh District  
Ha Noi  
Viet Nam

## ANNEX 9-E<sup>40</sup>

### TRANSFERS

#### Chile

1. Notwithstanding Article 9.9 (Transfers), Chile reserves the right of the Central Bank of Chile (*Banco Central de Chile*) to maintain or adopt measures in conformity with Law 18.840, Constitutional Organic Law of the Central Bank of Chile (*Ley 18.840, Ley Orgánica Constitucional del Banco Central de Chile*), and *Decreto con Fuerza de Ley N°3 de 1997, Ley General de Bancos* (General Banking Act) and *Ley 18.045, Ley de Mercado de Valores* (Securities Market Law), in order to ensure currency stability and the normal operation of domestic and foreign payments. Such measures include, *inter alia*, the establishment of restrictions or limitations on current payments and transfers (capital movements) to or from Chile, as well as transactions related to them, such as requiring that deposits, investments or credits from or to a foreign country, be subject to a reserve requirement (*encaje*).

2. Notwithstanding paragraph 1, the reserve requirements that the Central Bank of Chile can apply pursuant to Article 49 No. 2 of Law 18.840, shall not exceed 30 per cent of the amount transferred and shall not be imposed for a period which exceeds two years.

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<sup>40</sup> For greater certainty, this Annex shall apply to transfers covered by Article 9.9 (Transfers) and payments and transfers covered by Article 10.12 (Payments and Transfers).

## ANNEX 9-F

### DL 600

#### Chile

1. The obligations and commitments contained in this Chapter do not apply to Decree Law 600, Foreign Investment Statute (*Decreto Ley 600, Estatuto de la Inversión Extranjera*) (hereinafter referred to in this Annex as “DL 600”), or its successors, and to Law 18.657, Foreign Capital Investment Fund Law (*Ley 18.657, Ley de Fondos de Inversión de Capital Extranjero*), with respect to:

- (a) The right of the Foreign Investment Committee of Chile (*Comité de Inversiones Extranjeras*) or its successor to accept or reject applications to invest through an investment contract under DL 600<sup>41</sup> and the right to regulate the terms and conditions of foreign investment under DL 600 and Law 18.657.
- (b) The right to maintain existing requirements that transfers from Chile of proceeds from the sale of all or any part of an investment of an investor of a Party or from the partial or complete liquidation of the investment which may not take place until a period not to exceed:
  - (i) in the case of an investment made pursuant to DL 600, one year from the date of transfer to Chile; or
  - (ii) in the case of an investment made pursuant to Law 18.657,<sup>42</sup> five years from the date of transfer to Chile.
- (c) The right to adopt measures, consistent with this Annex, establishing future special voluntary investment programmes in addition to the general regime for foreign investment in Chile, except that any such measures may restrict transfers from Chile of proceeds from the sale of all or any part of an investment of an investor of another Party or from the partial or complete liquidation

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<sup>41</sup> The authorisation and execution of an investment contract under DL 600 by an investor of a Party or a covered investment does not create any right on the part of the investor or the covered investment to engage in particular activities in Chile.

<sup>42</sup> Law 18.657 was derogated on May 1, 2014 by law 20.712. The transfer requirement established under subparagraph (b)(ii) will only be applicable to investments made pursuant to Law 18.657 prior to May 1, 2014 and not to investments made pursuant to Law 20.712.

of the investment for a period not to exceed five years from the date of transfer to Chile.

2. For greater certainty, except to the extent that paragraph 1(b) or (c) provides an exception to Article 9.9 (Transfers), the investment entered through an investment contract under DL 600, through Law 18.657 or through any future special voluntary investment programme, will be subject to the obligations and commitments of this Chapter, to the extent that the investment is a covered investment under Chapter 9 (Investment).

## ANNEX 9-G

### PUBLIC DEBT

1. The Parties recognise that the purchase of debt issued by a Party entails commercial risk. For greater certainty, no award shall be made in favour of a claimant for a claim under Article 9.19.1(a)(i)(A) (Submission of a Claim to Arbitration) or Article 9.19.1(b)(i)(A) with respect to default or non-payment of debt issued by a Party unless the claimant meets its burden of proving that such default or non-payment constitutes a breach of an obligation under Section A, including an uncompensated expropriation pursuant to Article 9.8 (Expropriation and Compensation).

2. No claim that a restructuring of debt issued by a Party breaches an obligation under Section A shall be submitted to, or if already submitted continue in, arbitration under Section B (Investor-State Dispute Settlement) if the restructuring is a negotiated restructuring at the time of submission, or becomes a negotiated restructuring after that submission, except for a claim that the restructuring violates Article 9.4 (National Treatment) or Article 9.5 (Most-Favoured-Nation Treatment).

3. Notwithstanding Article 9.19.4 (Submission of a Claim to Arbitration), and subject to paragraph 2, an investor of another Party shall not submit a claim under Section B (Investor-State Dispute Settlement) that a restructuring of debt issued by a Party breaches an obligation under Section A, other than Article 9.4 (National Treatment) or Article 9.5 (Most-Favoured-Nation Treatment), unless 270 days have elapsed from the date of receipt by the respondent of the written request for consultations pursuant to Article 9.18.2 (Consultation and Negotiation).<sup>43</sup>

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<sup>43</sup> Paragraphs 2 and 3 of this Annex do not apply to any claim under Section B (Investor-State Dispute Settlement) against Singapore or the United States.

## ANNEX 9-H

1. A decision under Australia's foreign investment policy, which consists of the *Foreign Acquisitions and Takeovers Act 1975*, *Foreign Acquisitions and Takeovers Regulations 1989*, *Financial Sector (Shareholdings) Act 1998* and associated Ministerial Statements by the Treasurer of the Commonwealth of Australia or a minister acting on his or her behalf, on whether or not to approve a foreign investment proposal, shall not be subject to the dispute settlement provisions under Section B (Investor-State Dispute Settlement) or Chapter 28 (Dispute Settlement).
2. A decision by Canada following a review under the *Investment Canada Act* (R.S.C. 1985, c.28 (1st Supp.)), with respect to whether or not to permit an investment that is subject to review, shall not be subject to the dispute settlement provisions under Section B (Investor-State Dispute Settlement) or Chapter 28 (Dispute Settlement).
3. A decision by the National Commission on Foreign Investment (*Comisión Nacional de Inversiones Extranjeras*) following a review pursuant to the entry at Annex I – Mexico – 6 with respect to whether or not to permit an acquisition that is subject to review, shall not be subject to the dispute settlement provisions of Section B (Investor-State Dispute Settlement) or Chapter 28 (Dispute Settlement).
4. A decision under New Zealand's *Overseas Investment Act 2005* to grant consent, or to decline to grant consent, to an overseas investment transaction that requires prior consent under that Act shall not be subject to the dispute settlement provisions under Section B (Investor-State Dispute Settlement) or Chapter 28 (Dispute Settlement).

## ANNEX 9-I

### NON-CONFORMING MEASURES RATCHET MECHANISM

Notwithstanding Article 9.12.1(c) (Non-Conforming Measures), for Viet Nam for three years after the date of entry into force of this Agreement for it:

- (a) Article 9.4 (National Treatment), Article 9.5 (Most-Favoured-Nation Treatment), Article 9.10 (Performance Requirements) and Article 9.11 (Senior Management and Boards of Directors) shall not apply to an amendment to any non-conforming measure referred to in Article 9.12.1(a) (Non-Conforming Measures) 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 for Viet Nam, with Article 9.4 (National Treatment), Article 9.5 (Most-Favoured-Nation Treatment), Article 9.10 (Performance Requirements) or Article 9.11 (Senior Management and Boards of Directors);
- (b) Viet Nam shall not withdraw a right or benefit from an investor or covered investment of another Party, in reliance on which the investor or covered investment has taken any concrete action,<sup>44</sup> through an amendment to any non-conforming measure referred to in Article 9.12.1(a) (Non-Conforming Measures) that decreases the conformity of the measure as it existed immediately before the amendment; and
- (c) Viet Nam shall provide to the other Parties the details of any amendment to a non-conforming measure referred to in Article 9.12.1(a) (Non-Conforming Measures) that would decrease the conformity of the measure, as it existed immediately before the amendment, at least 90 days before making the amendment.

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<sup>44</sup> Concrete action includes the channelling of resources or capital in order to establish or expand a business and applying for permits and licences.



## ANNEX 9-J

### SUBMISSION OF A CLAIM TO ARBITRATION

1. An investor of a Party may not submit to arbitration under Section B (Investor-State Dispute Settlement) a claim that Chile, Mexico, Peru or Viet Nam has breached an obligation under Section A either:

- (a) on its own behalf under Article 9.19.1(a) (Submission of a Claim to Arbitration); or
- (b) on behalf of an enterprise of Chile, Mexico, Peru, or Viet Nam, that is a juridical person that the investor owns or controls directly or indirectly under 9.19.1(b) (Submission of a Claim to Arbitration),

if the investor or the enterprise, respectively, has alleged that breach of an obligation under Section A in proceedings before a court or administrative tribunal of Chile, Mexico, Peru or Viet Nam.

2. For greater certainty, if an investor of a Party elects to submit a claim of the type described in paragraph 1 to a court or administrative tribunal of Chile, Mexico, Peru or Viet Nam, that election shall be definitive and exclusive, and the investor may not thereafter submit the claim to arbitration under Section B (Investor-State Dispute Settlement).

## **ANNEX 9-K**

### **SUBMISSION OF CERTAIN CLAIMS FOR THREE YEARS AFTER ENTRY INTO FORCE**

#### **Malaysia**

Without prejudice to a claimant's right to submit other claims to arbitration pursuant to Article 9.19 (Submission of a Claim to Arbitration), Malaysia does not consent to the submission of a claim that Malaysia has breached a government procurement contract with a covered investment, below the specified contract value, for a period of three years after the date of entry into force of this Agreement for Malaysia. The specified contract values are: (a) for goods, SDR 1,500,000; (b) for services, SDR 2,000,000; and (c) for construction, SDR 63,000,000.

## ANNEX 9-L

### INVESTMENT AGREEMENTS

#### A. Agreements with selected international arbitration clauses

1. An investor of a Party may not submit to arbitration a claim for breach of an investment agreement under Article 9.19.1(a)(i)(C) (Submission of a Claim to Arbitration) or Article 9.19.1(b)(i)(C) if the investment agreement provides the respondent's consent for the investor to arbitrate the alleged breach of the investment agreement and further provides that:

- (a) a claim may be submitted for breach of the investment agreement under at least one of the following alternatives:
  - (i) the ICSID Convention and the ICSID *Rules of Procedure for Arbitration Proceedings*, provided that both the respondent and the Party of the investor are parties to the ICSID Convention;
  - (ii) the ICSID Additional Facility Rules, provided that either the respondent or the Party of the investor is a party to the ICSID Convention;
  - (iii) the UNCITRAL Arbitration Rules;
  - (iv) the ICC Arbitration Rules; or
  - (v) the LCIA Arbitration Rules; and
- (b) in the case of arbitration not under the ICSID Convention, the legal place of the arbitration shall be:
  - (i) in the territory of a State that is party to the New York Convention; and
  - (ii) outside the territory of the respondent.

2. Notwithstanding Article 9.21.2(b) (Conditions and Limitations on Consent of Each Party), if a claimant submits to arbitration a claim that the respondent has breached:

- (a) an obligation under Section A pursuant to Article 9.19.1(a)(i)(A) (Submission of a Claim to Arbitration) or Article 9.19.1(b)(i)(A); or
- (b) an investment authorisation pursuant to Article 9.19.1(a)(i)(B) (Submission of a Claim to Arbitration) or Article 9.19.1(b)(i)(B),

the claimant's submission of a written waiver shall not preclude its right to initiate or continue an arbitration under an investment agreement, if that investment agreement meets the criteria in paragraph 1, with respect to any measure alleged to constitute a breach referred to in Article 9.19 (Submission of a Claim to Arbitration).

3. If a claimant:

- (a) submits to arbitration a claim that the respondent has breached an obligation under Section A pursuant to Article 9.19.1(a)(i)(A) (Submission of a Claim to Arbitration) or Article 9.19.1(b)(i)(A) or an investment authorisation pursuant to Article 9.19.1(a)(i)(B) or Article 9.19.1(b)(i)(B); and
- (b) submits a claim to arbitration under an investment agreement that meets the criteria in paragraph 1, and the claims have a question of law or fact in common and arise out of the same events or circumstances,

any 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 of Article 9.28 (Consolidation).

## **B. Certain agreements between Peru and covered investments or investors<sup>45</sup>**

1. Pursuant to Legislative Decrees 662 and 757, Peru may enter into agreements known as “stability agreements” with covered investments or investors of another Party.

2. As part of a stability agreement referred to in paragraph 1, Peru accords certain benefits to the covered investment or the investor that is a party to the agreement. These benefits typically include a commitment to maintain the

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<sup>45</sup> The fact that this Annex addresses only agreements entered into by Peru shall not prejudice the determination by a tribunal established under Section B (Investor-State Dispute Settlement) regarding whether an agreement entered into by the government of another Party meets the definition of “investment agreement” in Article 9.1 (Definitions).

existing income tax regime applicable to such covered investment or investor during a specified period of time.

3. A stability agreement referred to in paragraph 1 may constitute one of multiple written instruments that make up an “investment agreement”, as defined in Article 9.1 (Definitions).<sup>46</sup> If that is the case, a breach of such a stability agreement by Peru may constitute a breach of the investment agreement of which it is a part.

4. If a stability agreement does not constitute one of multiple instruments that make up an “investment agreement”, as defined in Article 9.1 (Definitions), a breach of such a stability agreement by Peru shall not constitute a breach of an investment agreement.

### **C. Limitation of Mexico’s consent to arbitration**

1. Without prejudice to a claimant’s right to submit other claims pursuant to Article 9.19 (Submission of a Claim to Arbitration), Mexico does not consent to the submission of any claim to arbitration under Article 9.19.1(a)(i)(C) or 9.19.1(b)(i)(C) if the submission to arbitration of that claim would be inconsistent with the following laws with respect to the relevant acts of authority<sup>47</sup>:

- (a) *Hydrocarbons Law*, Articles 20 and 21;
- (b) *Law on Public Works and Related Services*, Article 98, paragraph 2;
- (c) *Public Private Partnerships Law*, Article 139, paragraph 3;
- (d) *Law on Roads, Bridges, and Federal Motor Carriers*, Article 80;
- (e) *Ports Law*, Article 3, paragraph 2;
- (f) *Airports Law*, Article 3, paragraph 2;
- (g) *Regulatory Law of the Railway Service*, Article 4, paragraph 2;

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<sup>46</sup> For greater certainty, for multiple written instruments to make up an “investment agreement”, as defined in Article 9.1 (Definitions), one or more of those instruments must grant rights to the covered investment or the investor as defined in subparagraph (a), (b) or (c) of that definition. A stability agreement may constitute one of multiple written instruments that make up an “investment agreement” even if the stability agreement is not itself the instrument in which such rights are granted.

<sup>47</sup> For greater certainty, the term “act of authority” includes omissions.

- (h) *Commercial and Navigation Maritimes Law*, Article 264, paragraph 2;
- (i) *Civil Aviation Law*, Article 3, paragraph 2; and
- (j) *Political Constitution of the United Mexican States*, Article 28, paragraph 20, subparagraph VII, and *Federal Telecommunications and Broadcasting Law*, Article 312,

provided, however, that the application of the provisions referred to in subparagraphs (a) through (i) shall not be used as a disguised means to repudiate or breach the investment agreement.

2. If any law referred to in paragraph 1 is amended to permit the submission to arbitration of such a claim after the entry into force of this Agreement for Mexico, the limitation of Mexico's consent specified in paragraph 1 shall not apply with respect to that law.<sup>48</sup>

#### **D. Specific Canadian entities under subpart (c) of definition**

For Canada, authority at the central level of government includes entities listed under Schedule III of the *Financial Administration Act* (R.S.C. 1985, c. F-11), and port or bridge authorities, that have concluded an investment agreement under subpart (c) of the definition of "investment agreement" only if the government directs or controls the day to day operations or activities of the entity or authority in carrying out its obligations under the investment agreement.

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<sup>48</sup> For greater certainty, when any law referred to in paragraph 1 is amended consistent with paragraph 2, any subsequent amendment of that law may not re-establish the applicability of paragraph 1.