

INVESTMENT

Article 12.2: Definitions

For 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;

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 or established, acquired, or expanded thereafter [which has been legally constituted in accordance with its laws and regulations, provided that such formalities do not materially impair the protections afforded by the Party to the investors of another Party or covered investments under this Chapter];

disputing parties means the claimant and the respondent;

disputing party means either the claimant or the respondent;

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

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

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

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 International 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 [¹] [but does not include a debt instrument of a Party or of a state enterprise] ;]
- [
 - (c) debt securities and loans, as follows:
 - (i) a debt security of an enterprise:
 - (A) where the enterprise is an affiliate of the investor, or
 - (B) where the original maturity of the debt security is at least three years,
 - (ii) a loan to an enterprise² :
 - (A) where the enterprise is an affiliate of the investor, or
 - (B) where the original maturity of the debt security is at least three years;]
- (d) futures, options and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing and other similar contracts;
- (g) intellectual property rights [which are conferred pursuant to domestic laws of each Party];
- (h) licenses, authorizations, permits and similar rights conferred pursuant to domestic law, ;³ and

[¹ 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.]

[² For greater certainty, loans issued by one Party to another Party are not investments.]

³ Whether a particular type of license, authorization permit or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among such instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with such instruments has the characteristics of an investment.

- (i) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens and pledges; but investment does not mean
 - (a) claims to money that arise solely from
 - (i) commercial contracts for the sale of goods or services by a national enterprise in the territory of a Party to an enterprise in the territory of the other Party, or
 - (ii) the extension of a credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (c); and
 - (b) an order or judgment entered in a judicial or administrative action.

[investment agreement means a written agreement⁴ between a national authority⁵ of a Party and a covered investment or an investor of another Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor:

- (a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale;
- (b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications; or
- (c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government;]

[investment authorization⁶ means an authorization that the foreign investment authority of a Party grants to a covered investment or an investor of another Party;]

[⁴ “Written agreement” refers to an agreement in writing, executed by both parties, whether in a single instrument or in multiple instruments, that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 12.24(2). For greater certainty, (a) a unilateral act of an administrative or judicial authority such as a permit, license, or authorization issued by a Party solely in its regulatory capacity, or a decree, order, or judgment, standing alone; and (b) an administrative or judicial consent decree or order, shall not be considered a written agreement.]

[⁵For purposes of this definition, “national authority” means (a) for the United States, an authority at the central level of government; and (b) for [Country], [.]

[⁶ For greater certainty, actions taken by a Party to enforce laws of general application, such as competition laws, are not encompassed within this definition.]

investor of a non-Party means, with respect to a Party, an investor that attempts to make⁷, 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 make⁸, is making, or has made an investment in the territory of another Party; [provided, however, that a natural person] who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality;] [provided, however, that a natural person who is a national of more than one Party shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality]

[negotiated restructuring] means the restructuring or rescheduling of a debt instrument that has been effected through (i) a modification or amendment of such debt instrument, as provided for under its terms, or (ii) a comprehensive debt exchange or other similar process in which the holders of no less than 75 percent of the aggregate principal amount of the outstanding debt under such debt instrument have consented to such debt exchange or other process.]

New York Convention means the *United Nations 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;

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

⁷ For greater certainty, the Parties understand that an investor "attempts to make" an investment when that investor has taken concrete action or actions to make an investment, such as channeling resources or capital in order to set up a business, or applying for permits or licenses.

⁸ For greater certainty, the Parties understand that an investor "attempts to make" an investment when that investor has taken concrete action or actions to make an investment, such as channeling resources or capital in order to set up a business, or applying for permits or licenses.

Article 12.3: Scope and Coverage [⁹]

1. This Chapter applies to measures adopted or maintained by a Party relating to:
 - (a) investors of another Party;
 - (b) covered investments; and
 - (c) [with respect to Articles 12.7 (Performance Requirements) [and 12.15 (Investment and Environment)] , all investments in the territory of the Party.]
2. A Party's obligations under this [Chapter] [Section] shall apply to measures adopted or maintained by:
 - (a) the central, regional, or local governments and authorities of that Party; and
 - (b) [a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party such as the authority to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges.¹⁰][non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities;]
3. For greater certainty, the provisions of this Chapter do not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.

Article 12.3bis: Relation to Other Chapters

1. In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.
2. A requirement by a Party that a service supplier of another Party post a bond or other form of financial security as a condition of 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 applies to measures adopted or maintained by the Party relating to the posted bond or financial security, to the extent that such bond or financial security is a covered investment.
3. This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter 14 (Financial Services).

[⁹ For greater certainty this chapter is subject to and shall be interpreted in accordance with Annexes 12-A through 12-XX.]

[¹⁰ For greater certainty, government authority that has been delegated includes a legislative grant, and a government order, directive or other action transferring to the state enterprise or other person, or authorizing the exercise by the state enterprise or other person of, governmental authority.]

Article 12.4: National Treatment

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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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 12.5: 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

Article 12.6: Minimum Standard of Treatment¹¹

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
2. For greater certainty, paragraph 1 prescribes the [applicable rules of] customary international law [minimum] standard of treatment of aliens as the [minimum] [general] 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
 - (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.

Article 12.6bis: Treatment in Case of Armed Conflict or Civil Strife

1. Notwithstanding Article 12.9.5(b) (Non-Conforming Measures, subsidies and grants carveout), 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.

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2. Notwithstanding paragraph 1, if an investor of a Party, in the situations referred to in paragraph 1, suffers a loss in the territory of 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 such loss. Any compensation shall be prompt, adequate, and effective in accordance with Article 12.12.2 through 12.12.4 (Expropriation and Compensation, paragraphs 2 through 4), *mutatis mutandis.*]

¹¹ Article 12.6 (Minimum Standard of Treatment) shall be interpreted in accordance with Annex 12-B (Customary International Law).

3. Paragraph 1 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 12.4 (National Treatment) but for Article 12.9.5(b) (Non-Conforming Measures, subsidies and grants carveout).

Article 12.7: Performance Requirements

1. No Party may, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party [or of a non-Party] in its territory, impose or enforce any requirement or enforce any commitment or undertaking:¹²
 - (a) to export a given level or percentage of goods [or services] ;
 - (b) to achieve a given level or percentage of domestic content;
 - (c) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
 - (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
 - (e) to restrict sales of goods [or services] in its territory that such investment produces [or supplies] by relating such sales in any way to the volume or value of its exports or foreign exchange earnings; [
 - (f) to transfer a particular technology, a production process or other proprietary knowledge to a person in its territory;] [or]
 - (g) to supply exclusively from the territory of the Party the goods that such investment produces [or the services that it supplies] to a specific regional market or to the world market [; or
 - (h) (i) to purchase, use, or accord a preference to, in its territory, technology of the Party or persons of the Party¹³ ; or

(ii) that prevents the purchase or use of, or the according of a preference to, in its territory, particular technology, so as to afford protection on the basis of nationality to its own investors or investments or to technology of the Party or of persons of the Party] .

¹² 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.

¹³ For the purposes of this Article, the term “technology of the Party or of persons of the Party” includes technology that is owned by the Party or persons of the Part, and technology for which the Party holds, or persons of the Party hold, an executive license.]

2. No Party may condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of a Party [or of a non-Party,] on compliance with any requirement:
 - (a) to achieve a given level or percentage of domestic content;
 - (b) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
 - (c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or
 - (d) to restrict sales of goods [or services] in its territory that such investment produces [or supplies] by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.
3. (a) Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party [or of a non-Party,] on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

[

(b) Paragraph 1(f) does not apply:]

[(b) Paragraphs 1(f) and (h) do not apply:]

- (i) when a Party authorizes use of an intellectual property right in accordance with [Article 31¹⁴ of the TRIPS Agreement] [Article ____ (Intellectual Property Rights Chapter; Patents Article; Paragraph on use of the subject matter of a patent without the authorization of the right holder)], or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or
- (ii) when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under the Party's competition laws. [¹⁵]

[¹⁴ The reference to "Article 31" includes footnote 7 to article 31.]

[¹⁵ The Parties recognize that a patent does not necessarily confer market power.]

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- (c) 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), (c), [and] [(f)], [and (h),] and 2(a) and (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.]
 - (d) Paragraphs 1(a), (b), and (c), and 2(a) and (b), do not apply to qualification requirements for goods [or services] with respect to export promotion and foreign aid programs.

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- (e) Paragraphs 1(b), (c), (f), [and] (g), [and (h),] and 2(a) and (b) , do not apply to government procurement.]
 - (f) Paragraphs 2(a) and (b) do not apply to requirements imposed by an importing Party relating to the content of the goods necessary to qualify for preferential tariffs or preferential quotas.

3bis 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 such employment or training does not require the transfer of a particular technology, production process, or other proprietary knowledge to a person in its territory.]

- 4. For greater certainty, paragraphs 1 and 2 do not apply to any commitment, undertaking, or requirement other than those set out in those paragraphs.
- 5. This Article does not preclude enforcement of any commitment, undertaking, or requirement between private parties, where a Party did not impose or require the commitment, undertaking, or requirement.

Article 12.8: Senior Management and Boards of Directors

1. No Party may require that an enterprise of that Party that is a covered investment appoint to senior management positions natural persons of any particular nationality.
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 12.9: Non-Conforming Measures

1. Articles 12.4 (National Treatment), 12.5 (Most-Favoured-Nation Treatment), 12.7 (Performance Requirements) and 12.8 (Senior Management and Board of Directors) do 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] [at the date of entry into force of the Party's Schedule to Annex XX] , with Articles 12.4 (National Treatment), 12.5 (Most-Favoured-Nation Treatment), 12.7 (Performance Requirements) and 12.8 (Senior Management and Board of Directors).
2. Articles 12.4 (National Treatment), 12.5 (Most-Favoured-Nation Treatment), 12.7 (Performance Requirements) and 12.8 (Senior Management and Board of Directors) do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities as set out in its Schedule to Annex II.

3. No Party may, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to Annex II, require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.
4. Articles 12.4 (National Treatment) and 12.5 (Most-Favoured-Nation Treatment) do not apply to any measure that is an exception to, or derogation from, [a Party's obligations under the TRIPS Agreement,] [the obligations under Article ___ (Intellectual Property Rights Chapter; General Provisions Article; Paragraph on national treatment),] as specifically provided in that [agreement [Article] .
5. Articles 12.4 (National Treatment), 12.5 (Most-Favoured-Nation Treatment), and 12.8 (Senior Management and Board of Directors) do not apply to:
 - (a) government procurement; or
 - (b) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.

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Article 12.10 Modification of Schedules

For greater certainty, any amendments or modifications to a Party's schedules to Annexes I or II of non conforming measures, pursuant to this Article shall be made in accordance with Article X2 (Amendments) of the Final Provisions Chapter.]

Parties agree to further consider reference to modification and placement- for example in Final Provisions Chapter- given that the same issue arises in at least two other Chapters.

Article 12.11: Transfers [¹⁶] [¹⁷]

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 **Footnote** ;
 - (b) profits, dividends, interest, capital gains, royalty payments, management fees, and technical assistance and other fees;

[¹⁶ For greater certainty, Article 12.11 is subject to Annex 12-I.]

[¹⁷ For greater certainty, Annex 12-A (Temporary Safeguard Measures) applies to this Article.]

For greater certainty, contributions to capital for the purposes of this Article, 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 [entered into by the investor, or the covered investment] , including a loan agreement;
 - (e) payments made pursuant to Article 12.x (Treatment in case of Armed Conflict or Civil Strife) and Article 12.12 (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 and the time of transfer.
[
3. No party may require its investors to transfer, or penalize its investors that fail to transfer, the income, earnings, profits, or other amounts derived from, or attributable to, investments in the territory of another Party.]
- [*3bis*. 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 [,] [and] 2 [and *3bis*] , a Party may prevent or delay a transfer through the equitable, non-discriminatory, and good faith application of its laws relating to:
- (a) bankruptcy, insolvency, or the protection of the rights of creditors;
 - (b) issuing, trading, or dealing in securities, futures , options, or derivatives;
 - (c) criminal or penal offenses;
 - (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or
 - (e) ensuring compliance with orders or judgments in judicial or administrative proceedings. [
 - (f) social security, public retirement, or compulsory savings schemes.
[
5. Notwithstanding paragraph 1, 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.]

Article 12.12: Expropriation and Compensation¹⁸

1. No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (“expropriation”), except:
 - (a) for a public purpose [¹⁹] ;
 - (b) in a non-discriminatory manner;
 - (c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2 through 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 realizable 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.
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.

¹⁸ Article 12.12 (Expropriation and Compensation) shall be interpreted in accordance with [Annex/ Annexes ____].

[¹⁹ For greater certainty, for 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 using different terms, such as “public necessity,” “public interest,” or “public use.”]

5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement [, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with Chapter ____ (Intellectual Property Rights)] .

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Article 12.12 *bis*: Subrogation

1. If a Party (or any agency, institution, statutory body or corporation designated by it) makes a payment to an investor of that Party under a guarantee, a contract of insurance against non-commercial risks or other form of indemnity it has granted in respect of an investment, the other Party shall recognise the subrogation or transfer of any right or title in respect of such investment. The subrogated or transferred right or claim shall not be greater than the original right or claim of the investor.
2. Where a Party (or any agency, institution, statutory body, or corporation designated by it) has made a payment to an investor of that Party and has taken over rights and claims of the investor, that investor shall not, unless authorized to act on behalf of the Party or the agency of the Party making the payment, pursue those rights and claims against the other Party. [In cases where the former Party elects not to exercise those subrogated rights or claims, such payment to the said investor shall not affect the investors' right to make claims against other Party in accordance with Section B [Investor-State Dispute Settlement].]

Article 12.13: Special Formalities and Information Requirements

1. Nothing in Article 12.4 (National Treatment shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as residency requirements for registration or a requirement that covered investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not materially impair the protections afforded by a Party to investors of another Party and covered investments pursuant to this Chapter.
2. Notwithstanding Articles 12.4 (National Treatment) and 12.5 (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 12.14: Denial of Benefits

1. A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if the enterprise:
 - (a) is owned or controlled either by persons of a non-Party or of the denying Party; and
 - (b) has no [substantive business operations] [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 such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party:
 - (a) does not maintain diplomatic relations with the non-Party; or
 - (b) adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.]

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Article 12.15: Investment and Environment] [,Health Safety and Labour] [Article 12.15: Health Safety and Environmental Measures][

1. 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, safety, or labour] [, health or safety] concerns.]

[
2. The Parties recognise that it is inappropriate to encourage investment by relaxing its health safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion, or retention in its territory of an investment of an investor.]

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Article 12.15 bis: Corporate Social Responsibility

[Each Party should encourage][nothing in this Chapter shall be construed to prevent a Party from encouraging] enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies, such as statements of principle that have been endorsed or are supported

by the Parties. [These principles address issues such as labour, the environment, human rights, community relations and anti-corruption. The Parties remind those enterprises of the importance of incorporating such corporate social responsibility standards in their internal policies.]]

[

Article 12.16: Implementation

The Parties shall consult [annually], or as otherwise agreed, to review the implementation of this Chapter and consider any investment matter of mutual interest, including consideration of the development of procedures that could contribute to greater transparency of measures described in Article 12.9 (Non-Conforming Measures).]

Section B: Investor-State Dispute Settlement [²⁰]

[Article 12.16bis: Scope

Section B applies where there is a dispute between a Party and an investor of another Party related to a covered investment made in the territory of a Party in accordance with its laws, regulations and investment policies.]

[Section B does not apply where there is a dispute between a Party and an investor of a Party related to government procurement or the provision of a subsidy or grant.]

Article 12.17: Consultation and Negotiation

1. In the event of an investment dispute, [[between a Party and an investor of another Party concerning an alleged breach of an obligation of the former under Section A of this Chapter [which causes loss or damage to the investor or its investment]] the claimant and the respondent [shall] [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 and mediation. [Such consultations shall be initiated by written request for consultations delivered by the claimant to the respondent [, and shall state the nature of the dispute].

[

2. Upon the receipt of a notice referred to in paragraph 1, the state Party may require the investor concerned to pursue any applicable domestic administrative review procedures

[²⁰Section B does not apply to Australia or an investor of Australia. Notwithstanding any provision of this Agreement, Australia does not consent to the submission of a claim to arbitration under this Section.]

specified by the laws and regulations of the state party, which may not exceed three months, before the submission of the claim to arbitration under Article 12.18 (Submission of a Claim to Arbitration).]

[

3. The disputing parties shall endeavour to commence consultations within 30 days of receipt by the respondent of the written request for consultations, unless the disputing parties otherwise agree.]

[

4. With the objective of resolving an investment dispute through consultations, a claimant shall make all reasonable efforts to provide the respondent, prior to the commencement of the consultations, with information regarding the legal and factual basis for the investment dispute.
5. For greater certainty, the initiation of consultations and negotiations shall not be construed as recognition of the jurisdiction of the tribunal.

Article 12.18: Submission of a Claim to Arbitration

1. If an investment dispute has not been resolved within 6 months of the [receipt by the respondent of the written request for consultations:] [events giving rise to the claim:]
 - (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 authorization, 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 authorization, 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. At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration (“notice of intent”). The notice shall specify:
 - (a) the name and address of the claimant and, where 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 authorization, 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.

3. The claimant may submit a claim referred to in paragraph 1:
 - (a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the Party of the claimant are parties to the ICSID Convention;
 - (b) under the ICSID Additional Facility Rules, provided that either the respondent or the Party of the claimant is a party to the ICSID Convention;
 - (c) under the UNCITRAL Arbitration Rules; or
 - (d) if the claimant and respondent agree, to any other arbitration institution [such as the Kuala Lumpur Regional Centre for Arbitration] or under any other arbitration rules.

4. A claim shall be deemed submitted to arbitration under this Section when the claimant's notice of or request for arbitration ("notice of arbitration");
 - (a) referred to in 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 arbitral rules selected under paragraph 3(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 arbitral rules.

5. The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this [Agreement].
6. 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 12.19: Consent of Each Party to Arbitration

1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this 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 ; [and]
 - (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”] [, where applicable] .

Article 12.20: Conditions and Limitations on Consent of Each Party

1. No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 12.18(1) and knowledge that the claimant (for claims brought under Article 12.18(1)(a)) [or the enterprise (for claims brought under Article 12.18(1)(b))] has incurred loss or damage.
2. No claim may be submitted to arbitration under this Section unless:
 - (a) the claimant consents in writing to arbitration in accordance with the procedures set out in this [Agreement]; and
 - (b) the notice of arbitration is accompanied,
 - (i) for claims submitted to arbitration under Article 12.18(1)(a), by the claimant’s written waiver [, and
 - (ii) for claims submitted to arbitration under Article 12.18(1)(b), by the claimant’s and the enterprise’s written waivers] of any right to initiate [or continue] before any administrative tribunal or court under the law of either Party, or other dispute

settlement procedures^[21], any proceeding with respect to any measure alleged to constitute a breach referred to in Article 12.18.

[3. Once the investor has submitted the dispute to either the courts or administrative tribunals of the disputing Party or to any of the arbitration mechanisms provided for in Article 12.18(3) the choice of the procedure shall be definitive and exclusive.]

3. Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 12.18(1)(a)) [and the claimant or the enterprise (for claims brought under Article 12.18(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.

[
4. No Party shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its investors and another Party shall have consented to submit or have submitted to arbitration under Article 12.19, unless such other Party has failed to abide and comply with the award rendered in such dispute. Diplomatic protection, for the purposes of this paragraph, shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of a dispute.]

²¹ [For greater certainty, this includes any dispute settlement mechanism under any existing trade or bilateral investment agreement.]

Article 12.21: Selection of Arbitrators

1. Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.
2. The Secretary-General shall serve as appointing authority for an arbitration under this Section.
3. If a tribunal has not been constituted within 75 days from 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 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; [and]
- (b) a claimant referred to in Article 12.18(1)(a) 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 12.18(1)(b) 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] .]

[4. Pursuant to paragraph 1, where the disputing parties have agreed on a sole arbitrator or each individual member of the tribunal and one or more of those arbitrators has the nationality of one of the disputing parties, the appointment shall be in writing.

[5. Even without the consent of the tribunal that he or she was a member, where any arbitrator appointed as provided for in this Section resigns or becomes unable to act, a successor shall be appointed in the same manner as prescribed for the appointment of the original arbitrator and the successor shall have the powers and duties of the original arbitrator.]

Article 12.22: Conduct of the Arbitration

1. The disputing parties may agree on the legal place of any arbitration under the arbitral rules applicable under Article 12.18(3). If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with the applicable arbitral rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.

[At the request of a disputing party, the Tribunal may determine the place of meetings, including consultations and hearing, taking into consideration appropriate factors, including the convenience of the parties and the arbitrators, the location of the subject matter, and the proximity of evidence.]

[

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

[

3. The tribunal shall have the authority to accept and consider *amicus curiae* submissions [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. Each submission shall identify the author and any person, government, or other entity that has provided, or will provide, any financial or other assistance in preparing the submission. The tribunal shall provide the parties with an opportunity to respond to such written submissions.]

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 12.28.

(a) Such objection 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, 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 the objection(s), 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 it decides a respondent's objection under paragraph 4 or 5, the tribunal 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. A respondent may not assert as a defense, 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. \

[

8. [At the request of a disputing party,] A tribunal may order [either of the disputing parties to implement] 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 12.18. For purposes of this paragraph, an order includes a recommendation.]

9. In any arbitration conducted under this section, at the request of a disputing party, a tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or award

to the disputing parties [and to the non-disputing Parties] [and to the non-disputing Party] .
[The draft decision and/or the award shall be confidential 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 such comments and issue its decision or award not
later than 45 days after the expiration of the 60-day comment period.

I

10. 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 12.28 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 12.23]

[Article 12.22bis:

Proposal on Amicus Curiae Submissions

1. After consultation with the disputing parties the arbitral tribunal may allow a person that is not a disputing party and not a non-disputing Party to the treaty (“third person(s)”) to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute.
2. A third person wishing to make a submission shall apply to the arbitral tribunal, and provide the following written information in a language of the arbitration, in a concise manner, and within such page limits as may be set by the arbitral tribunal: (a) description of the third person, including, where relevant, its membership and legal status (e.g. trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the third person); (b) disclosure whether or not the third person has any affiliation, direct or indirect, with any disputing party; (c) information on any government, person or organization that has provided any financial or other assistance in preparing the submission; (d) description of the nature of the interest that the third person has in the arbitration; and (e) identification of the specific issues of fact or law in the arbitration that the third person wishes to address in its written submission.
3. In determining whether to allow such a submission, the arbitral tribunal shall take into consideration, among other things (a) whether the third person has a significant interest in the arbitral proceedings and (b) the extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.
4. The submission filed by the third person shall: (a) be dated and signed by the person filing the submission; (b) be concise, and in no case longer than as authorized by the arbitral tribunal; (c) set out a precise statement of the third person’s position on issues; and (d) only address matters within the scope of the dispute.

5. The arbitral tribunal shall ensure that the submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

6. The arbitral tribunal shall also ensure that the disputing parties are given an opportunity to present their observations on the submission by the third person.]

Article 12.23: Transparency of Arbitral Proceedings

1. [Subject to paragraphs 2 and 4,] the respondent shall, after receiving the following documents [promptly] transmit them to the [Party] [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 12.22(2) and 12.22(3) and Article 12.27;

(d) minutes or transcripts of the hearings of the tribunal, where available; and]

(e) orders, awards and decisions of the tribunal.

[

2. The tribunal shall [subject to the consent of the disputing parties,] conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate

logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure which may include closing the hearing for the duration of any discussion of protected information] .

3. Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article ____ (Exceptions Chapter; Essential Security Article) or Article ____ (Exceptions Chapter; Disclosure of Information Article).

[

4. Information that may be designated as confidential information is limited to any sensitive factual information that is not available in the public domain.]

[

5. 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 where 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 at the time it is submitted to the tribunal;
 - (c) A disputing party shall, at the time it submits a document containing the information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version shall be disclosed in accordance with paragraph 1; [and
 - (d) The tribunal shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may (i) withdraw all or part of its submission containing such information, or (ii) agree to

resubmit complete and redacted documents with corrected designation 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 (i) by the disputing party that first submitted the information or redesignate the information consisted with the designation under (ii) of the disputing party that first submitted the information.]

[

6. Nothing in this Section requires a respondent to withhold from the public information required to be disclosed by its laws.]

Article 12.24: Governing Law

1. Subject to paragraph 3, when a claim is submitted under article 12.18(1)(a)(i)(A) [or Article 12.18(1)(b)(i)(A)], the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law. [and where applicable, any relevant domestic law of the disputing Party.]

[

2. Subject to paragraph 3 and the other terms of this Section, when a claim is submitted under Article 12.18(1)(a)(i)(B) or (C), or Article 12.18(1)(b)(i)(B) or (C), the tribunal shall apply:

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

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

- (i) the law of the respondent, including its own rules on the conflict of laws;²² and
- (ii) such rules of international law as may be applicable.]

3. [(a)] A decision of the [Joint Commission] on the interpretation of a provision of this Agreement under Article ___ (Administrative and Institutional Provisions Chapter; Joint

[²² The "law of the respondent" means the law that a domestic court or tribunal or proper jurisdiction would apply in the same case.]

Commission Article) shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision.]

(b) The tribunal shall, on request of the respondent, request a decision of the joint Commission on the interpretation of a provision of this Agreement that is at issue in a dispute. The Joint Commission shall submit in writing any decision declaring its interpretation to the tribunal within 60 days of delivery of the request. If the Joint Commission fails to issue such a decision within 60 days, the tribunal shall decide the issue on its own account.]

Article 12.25: Interpretation of Annexes

1. Where a respondent asserts as a defense 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 the request of the respondent, request the interpretation of the [Joint Commission] on the issue. The [Joint Commission] shall submit in writing any decision on its interpretation under Article ___ (Administrative and Institutional Provisions Chapter; Joint Commission Article) to the tribunal within 90 days of delivery of the request.
2. A decision issued by the [Joint 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 [Joint Commission] fails to issue such a decision within 90 days, the tribunal shall decide the issue.

[Article 12.26: Expert Reports

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

Article 12.27: Consolidation

1. Where two or more claims have been submitted separately to arbitration under Article 12.18(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.
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 30 days after 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 otherwise agree, 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, however, that the presiding arbitrator shall not be a national of the respondent or of a Party of any claimant.
5. If, within 60 days after the Secretary-General receives a request made under paragraph 2, the respondent fails to or the claimants fail to appoint an arbitrator in accordance with paragraph 4, the Secretary-General, on the 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. Where a tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration under Article 12.18(1) have a question of law or fact in common, and arise out of 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 12.21 to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that
 - (i) that tribunal, at the request of any claimant 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 any prior hearing shall be repeated.

7. Where a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration under Article 12.18(1) 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, and shall specify in the request:
 - (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 proceeding in accordance with the UNCITRAL Arbitration Rules, except as modified by this Section.
9. A tribunal established under Article 12.21 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 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 12.21 be stayed, unless the latter tribunal has already adjourned its proceedings.

Article 12.28: Awards

1. Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination; only:
 - (a) monetary damages and any applicable interest; and
 - (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.

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

[

2. Subject to paragraph 1, where a claim is submitted to an arbitration under Article 12.18(1)(b):
 - (a) an award of restitution of property shall provide that restitution be made to the enterprise;
 - (b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and
 - (c) the award shall provide that it is made without prejudice to any right that any person may have {under applicable domestic law} in the relief {provided in the award}.
3. A tribunal may not award punitive damages.

4. An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.
5. Subject to paragraph 6 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.
6. A disputing party may 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 12.18(3)(d),
 - (i) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside, or annul the award; or
 - (ii) a court has dismissed or allowed an application to revise, set aside, or annul the award and there is no further appeal.
7. Each Party shall provide for the enforcement of an award in its territory.
- [
8. 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 ___ (Dispute Settlement Chapter; Establishment of an Arbitral Tribunal Article).] [The requesting Party may seek in such 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 ___ (Dispute Settlement Chapter; Initial Report Article), a recommendation that the respondent abide by or comply with the final award.]
- 9. 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 8.]
- 10. A claim that is submitted to arbitration under this section shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention [and Article I of the Inter-American Convention] . [
- 11. The assumption of expenses incurred by the disputing parties in the arbitration shall be established:
 - (a) by the arbitration institution to which the dispute has been submitted, in accordance with its rules of procedure for arbitration proceedings; or
 - (b) in accordance with the rules of procedure for arbitration proceedings agreed by the disputing parties, where applicable.]
- [11. Subject to paragraph 12:
 - (a) the costs of arbitration shall be borne equally by the disputing parties unless the tribunal decides otherwise; and
 - (b) the prevailing ICSID rate for arbitrators shall apply.
- 12. The disputing parties may establish rules relating to expenses incurred by the tribunal, including arbitrator's remuneration.]

Article 12.29: Service of Documents

Delivery of notice and other documents on a Party shall be made to the place named for that Party in Annex 12-G (Service of Documents on a Party Under Section B).

Annex 12-B
Customary International Law

The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Article 12.6 (Minimum Standard of Treatment) [and Annex 12-C (Expropriation)] results from a general and consistent practice of States that they follow from a sense of legal obligation. [With regard to Article 12.6 (Minimum Standard of Treatment),] [T]he customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights [and interests] of aliens.]

Annex 12-C Expropriation

The parties confirm their shared understanding that:

1. Article 12.12(1) (Expropriation and Compensation) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.]
2. An action or series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.
3. Article 12.12(1) addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.
4. The second situation addressed by Article 12.12(1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
 - (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
 - (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
 - (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
 - (iii) the character of the government action.
 - (b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect the legitimate public welfare objectives [²³], such as public health, safety, and the environment, do not constitute indirect expropriations.]

[²³ For greater certainty, the list of legitimate public welfare objective in this subparagraph is not exhaustive.]

Annex 12-D

Expropriation

1. An action or a series of actions by a Party [cannot] [shall not] constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.
2. Expropriation may be either direct or indirect:
 - (a) direct expropriation occurs when a state takes an investor's property outright, including by nationalization, compulsion of law or seizure;
 - (b) indirect expropriation occurs when a state takes an investor's property in a manner equivalent to direct expropriation, in that it deprives the investor in substance of the use of the investor's property, although the means used fall short of those specified in subparagraph (a) above.
3. In order to constitute indirect expropriation, the state's deprivation of the investor's property must be:
 - (a) either severe or for an indefinite period; and
 - (b) disproportionate to the public purpose.
4. A deprivation of property shall be particularly likely to constitute indirect expropriation where it is either:
 - (a) discriminatory in its effect, either as against the particular investor or against a class of which the investor forms part; or
 - (b) in breach of the state's prior binding written commitment to the investor, whether by contract, license or other legal document.
5. Except in rare circumstances to which paragraph 4 applies, such measures taken in the exercise of a state's regulatory powers as may be reasonably justified in the protection of the public welfare, including public health, safety and the environment, shall not constitute indirect expropriation.] [5. Non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment do not constitute indirect expropriation.]]

Annex 12-E

Expropriation Relating to Land

Notwithstanding the obligations under Article 12.12 (Expropriation and Compensation), where Brunei, Malaysia or Singapore is the expropriating Party, any measure of expropriation relating to land shall be for a purpose and upon payment of compensation in accordance with the applicable domestic legislation of the expropriating Party.^{24]}

[²⁴ In the case of Brunei, the applicable legislation are the Land Code (Cap. 40) and the Land Acquisition Act (Cap. 41) and any amendments thereto. In the case of Malaysia, the applicable legislation are the Land Acquisition Act 1960, Land Acquisition Ordinance 1950 of the State of Sabah and the Land Code 1958 of the State of Sarawak, and any amendments thereto. In the case of Singapore, the applicable legislation is the Land Acquisition Act (Cap. 152), and any amendments thereto.]

Annex 12-G

Service of Documents on a Party Under Section B [Investor-State Dispute Settlement]

Brunei

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

Chile

Notices and other documents in disputes under Section B 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

Malaysia

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

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

New Zealand

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

The Secretary
Ministry of Foreign Affairs and Trade
195 Lambton Quay
Private Bag 18 901
Wellington
New Zealand

Peru

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

Singapore

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

United States

Notices and other documents in disputes under Section B 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

Vietnam

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

[Annex 12-I

Transfers

Chile

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 18.84, Ley Orgánica Constitucional del Banco Central de Chile*) or other legislation, in order to ensure currency stability and the normal operation of domestic and foreign payments. For this purpose, the central bank of Chile is empowered to regulate the supply of money and credit in circulation and international credit and foreign exchange operations. The Central Bank of Chile is empowered as well to issue regulations governing monetary, credit, financial and foreign exchange matters. 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*).]

Annex 12-J

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”), and to Law 18.657, Foreign Capital Investment Fund Law (*Ley 18.657, Ley de Fondos de Inversión de Capital Extranjero*), to the continuation or prompt renewal of such laws, to amendments to those laws or to any special and/or voluntary investment regime that may be adopted in the future by Chile.
2. For greater certainty, it is understood that the Foreign Investment Committee of Chile has the right to accept and reject applications to invest through DL 600 and Law 18.657. Additionally, the Foreign Investment Committee has the right to regulate the terms and conditions of foreign investment under DL 600 and Law 18.657.
3. Notwithstanding paragraphs 1 and 2, Chile shall accord to an investor of the other Parties or its investment that is a party to an investment contract under DL 600, the better of the treatment required under Section A of this Chapter or the treatment under the investment contract
4. Chile shall permit an investor of the other Parties or its investment that has entered into an investment contract under DL 600 to amend the investment contract to make it consistent with the obligation referred to in paragraph 3.
5. Notwithstanding any other provision in this Agreement, Chile may prohibit an investor of another Party or a covered investment from transferring from Chile proceeds of the sale of all or any part of an investment made pursuant to a contract under DL 600 for up to one year after the date that the investor or covered investment transferred funds to Chile to establish the investment.]

Annex 12.K**Public Debt**

1. The Parties recognize that the purchase of debt issued by a Party entails commercial risk. For greater certainty, no award may be made in favor of a claimant for a claim under Article 12.18.1(a)(i)(A) or Article 12.18.1(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 and uncompensated expropriation for purposes of Article 12.12.1 or a breach of any other obligation under Section A.
2. No claim that a restructuring of debt issued by a Party breaches an obligation under Section A may be submitted to, or if already submitted continue in, arbitration under Section B if the restructuring is a negotiated restructuring at the time of submission or becomes a negotiated restructuring after such submission, except for a claim that the restructuring violates Article 12.4 or 12.5.
3. Notwithstanding Article 12.18.3, and subject to paragraph 2 of this Annex, an investor of another Party may not submit a claim under Section B that a restructuring of debt issued by a Party breaches an obligation under Section A (other than Article 12.4 or 12.5) unless 270 days have elapsed from the date of the events giving rise to the claim.]
4. [/

Article XX.3: Measures to Safeguard the Balance of Payments

1. Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining temporary safeguard measures with regard to transfers or payments for current account transactions if there is serious balance of payments or external financial difficulties [or threats thereof] .
2. Nothing in this agreement shall be construed to prevent a Party from adopting or maintaining temporary safeguard measures with regard to payments or transfers relating to the movement of capital:
 - (a) in the event of serious balance of payments or external financial difficulties or threat thereof; or
 - (b) where, in exceptional circumstances, payments or transfers relating to capital movements cause or threaten to cause serious difficulties for macroeconomic management, in particular, the operation of monetary policy or exchange rate policy.
3. Measures referred to in paragraphs 1 or 2 shall:

- (a) be applied on a non discriminatory basis among the Parties;
 - (b) be consistent with the Articles of Agreement of the International Monetary Fund, so long as the Party taking the measures is a party to the said Articles;
 - (c) avoid unnecessary damage to commercial, economic, and financial interests of the other Parties;
 - (d) not exceed those necessary to deal with the circumstances described in paragraphs 1 or 2;
 - (e) be temporary and be phased out progressively as the situation specified in paragraphs 1 or 2 improves.
4. In the case of trade in goods, nothing in this Agreement shall be construed to prevent a Party from adopting restrictive import measures in order to safeguard its external financial position and balance of payments. These restrictive import measures shall be in accordance with the General Agreement on Tariffs and Trade (GATT) 1994 and the Understanding on Balance of Payment Provisions of the GATT 1994.
5. The Party undertaking measures referred to in paragraphs 1,2 or 4 shall:
- (a) promptly notify the other Parties; and
 - (b) promptly commence consultations with the other Parties in order to review the measures adopted or maintained by it.
 - (i) In the case of capital movements, respond to any other Party that requests consultations in relation to the measures adopted by it, if such consultations are not otherwise taking place outside of this Agreement.
 - (ii) In the case of current account transactions, if consultations in relation to the measures adopted by it are not taking place at the WTO, a Party, if requested, shall promptly commence consultations with any interested Party.]