

CHAPTER 9 INVESTMENT

Section A: Investment

ARTICLE 9.1: SCOPE

1. This Chapter shall apply to measures adopted or maintained by a Party relating to:
 - (a) investors of the other Party;
 - (b) covered investments; and
 - (c) with respect to Articles 9.9 and 9.11, all investments in the territory of the Party.
2. For greater certainty, this Chapter does not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.
3. For the purposes of this Chapter, **measures adopted or maintained by a Party** means measures adopted or maintained by:
 - (a) central or local governments and authorities; and
 - (b) non-governmental bodies in the exercise of powers delegated by central or local governments or authorities.
4. 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).
5. This Chapter shall not apply to services supplied in the exercise of governmental authority in a Party's territory. A **service supplied in the exercise of governmental authority** means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.

ARTICLE 9.2: 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 the other 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 shall apply 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.

ARTICLE 9.3: NATIONAL TREATMENT

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

ARTICLE 9.4: MOST-FAVORED-NATION TREATMENT¹

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

ARTICLE 9.5: MINIMUM STANDARD OF TREATMENT²

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 customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
 - (a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings, in accordance with the principle of due process embodied in the principal legal systems of the world; and

¹ For greater certainty, Article 9.4 shall not apply to investor-state dispute settlement mechanisms such as those set out in Section B or that are provided for in an international treaty or trade agreement.

² Article 9.5 shall be interpreted in accordance with Annex 9-A.

- (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 9.6: LOSSES AND COMPENSATION

1. Notwithstanding Article 9.13.5(b), each Party shall accord to investors of the other Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict, or civil strife.

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

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

the latter Party shall provide the investor restitution or compensation for such loss, which in either case shall be in accordance with customary international law and with respect to compensation shall be prompt, adequate, and effective in accordance with Articles 9.7.2 through 9.7.4, *mutatis mutandis*.

3. Paragraph 1 shall not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 9.3 but for Article 9.13.5(b).

ARTICLE 9.7: EXPROPRIATION AND COMPENSATION³

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

- (a) for a public purpose⁴;
- (b) in a non-discriminatory manner;
- (c) on payment of prompt, adequate, and effective compensation; and

³ Article 9.7 shall be interpreted in accordance with Annexes 9-A and 9-C.

⁴ Article 9.7.1(a) shall be interpreted in accordance with Annex 9-B, with regard to the Republics of Central America.

- (d) in accordance with due process of law and Article 9.5.
- 2. The compensation referred to in paragraph 1(c) shall:
 - (a) be paid without undue 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 referred to in paragraph 1(c) 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 referred to in paragraph 1(c) – converted into the currency of payment at the market rate of exchange prevailing on the date of payment – shall be no less than:
 - (a) the fair market value on the date of 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 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 15 (Intellectual Property Rights)⁵.

ARTICLE 9.8: TRANSFERS

- 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, including the initial contribution;
 - (b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;

⁵ For greater certainty, the reference to “the TRIPS Agreement” in paragraph 5 includes any waiver in force between the Parties of any provision of that Agreement granted by WTO Members in accordance with the WTO Agreement.

- (c) interest, royalty payments, management fees, and technical assistance and other fees;
 - (d) payments made under a contract, including a loan agreement;
 - (e) payments made pursuant to Articles 9.6.1, 9.6.2 and 9.7; 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 authorized or specified in a written agreement between the Party and a covered investment or an investor of the other Party.
4. Notwithstanding paragraphs 1 through 3, a Party may prevent a transfer through the equitable, non-discriminatory, and good faith application of its laws 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.

ARTICLE 9.9: PERFORMANCE REQUIREMENTS

1. Neither Party may, 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, impose or enforce any of the following requirements or enforce any commitment or undertaking⁶:
- (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;

⁶ For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 2 shall not constitute a “commitment or undertaking” for the purposes of paragraph 1.

- (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.

2. Neither Party may condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of a Party or of a non-Party, on compliance with any of the following requirements:

- (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) shall not apply when:

- (i) a Party authorizes use of an intellectual property right in accordance with Article 31 of the TRIPS Agreement, or to measures requiring the

disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement⁷; or

- (ii) 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 laws⁸.
- (c) Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), (c), and (f), 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), shall not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs.
- (e) Paragraphs 1(b), (c), (f), and (g), and 2(a) and (b), shall not apply to government procurement.
- (f) Paragraphs 2(a) and (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.

4. For greater certainty, paragraphs 1 and 2 shall 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 9.10: SENIOR MANAGEMENT AND BOARDS OF DIRECTORS

⁷ For greater certainty, the references to "the TRIPS Agreement" in paragraph 3(b)(i) include any waiver in force between the Parties of any provision of that Agreement granted by WTO Members in accordance with the WTO Agreement.

⁸ The Parties recognize that a patent does not necessarily confer market power.

1. Neither 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 9.11: INVESTMENT AND ENVIRONMENT

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 concerns.

ARTICLE 9.12: DENIAL OF BENEFITS

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

2. A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise. The denying Party shall, to the extent practicable, notify the other Party before denying the benefits under this paragraph. If the denying Party provides such notice, it shall consult with the other Party at the other Party's request.

ARTICLE 9.13: NON-CONFORMING MEASURES

1. Articles 9.3, 9.4, 9.9, and 9.10 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, or
 - (ii) 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 9.3, 9.4, 9.9, or 9.10.
- 2. Articles 9.3, 9.4, 9.9, and 9.10 shall not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II.
- 3. Neither Party may, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to Annex II, require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.
- 4. Articles 9.3 and 9.4 shall not apply to any measure that is an exception to, or derogation from, the obligations under Article 15.7 (General Provisions) as specifically provided in that Article.
- 5. Articles 9.3, 9.4, and 9.10 shall not apply to:
 - (a) government procurement; or
 - (b) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.

ARTICLE 9.14: SPECIAL FORMALITIES AND INFORMATION REQUIREMENTS

- 1. Nothing in Article 9.3 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as a requirement that covered investments be legally constituted under its laws or regulations, provided that such formalities do not materially impair the protections afforded by the Party to investors of the other Party and covered investments pursuant to this Chapter.
- 2. Notwithstanding Articles 9.3 and 9.4, a Party may require an investor of the other Party or its covered investment to provide information concerning that investment solely for informational or statistical purposes. A Party shall only request confidential information if allowed by its legislation. The Party shall protect any confidential business information from any disclosure that would prejudice the competitive position of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.

ARTICLE 9.15: SUBROGATION

1. Where a Party or a designated agency of a Party makes a payment to any of its investors under a guarantee, a contract of insurance, or other form of indemnity, against non-commercial risks it has granted in respect of an investment of an investor of that Party, the other Party shall recognize the subrogation of any right or claim in respect of such investment. The subrogated or transferred right or claim shall not exceed the original investor's right or claim.

2. Where a Party or the agency authorized by that Party has made a payment to its investor and has taken over rights and claims of the investor, that investor shall not, unless authorized to act on behalf of the Party or agency authorized by the Party making the payment, pursue those rights and claims against the other Party.

Section B: Investor-State Dispute Settlement

ARTICLE 9.16: CONSULTATION AND NEGOTIATION

Any dispute arising in accordance with Article 9.17.1 shall be settled, to the extent possible, by consultation and negotiation, which may include the use of non-binding, third party procedures such as conciliation and mediation, and shall be notified by submitting a notice of the dispute (notice of dispute) in writing, including detailed information of the factual and legal basis, by the investor to the Party receiving the investment. The claimant must deliver evidence, establishing that he or she is an investor of the other Party with its notice of dispute.

ARTICLE 9.17: SUBMISSION OF A CLAIM TO ARBITRATION

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation in accordance with Article 9.16 within eight months, which may be extended if the disputing parties so agree:

- (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim that:
 - (i) the respondent has breached an obligation under Section A; and
 - (ii) 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 that:
 - (i) the respondent has breached an obligation under Section A; and
 - (ii) the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

2. An investor of a Party may not, under this Section, submit a claim to arbitration, concerning the breach of the other Party's obligations under Articles 9.2, 9.11 and 9.14.1.

3. 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 Section A 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. If the dispute has not been settled within the period referred to in paragraph 1, a claimant may submit a claim referred to in paragraph 1:

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

Once the investor has alleged a breach of an obligation under Section A in any proceedings before a competent court or administrative tribunal of the Party in whose territory the investment has been admitted, or in any of the arbitration mechanisms set out in this paragraph, the choice of the proceeding shall be final and the investor shall not submit the dispute to a different forum.

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 paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary General;
- (b) referred to in Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary General;

- (c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules, 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.

6. The arbitration rules applicable under paragraph 4, 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.

7. The Parties shall refrain from pursuing through diplomatic channels matters related to disputes between a Party and an investor of the other Party, submitted to court proceedings or international arbitration in accordance with the provisions of this Section.

8. 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 9.18: 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 satisfy the requirements of:

- (a) Chapter II (Jurisdiction of the Centre) of the ICSID Convention and the ICSID Additional Facility Rules for written consent of the parties to the dispute; and
- (b) Article II of the New York Convention for an "agreement in writing".

ARTICLE 9.19: 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 the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 9.17.1 and knowledge that the claimant (for claims brought under Article 9.17.1(a)) or the enterprise (for claims brought under Article 9.17.1(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 9.17.1(a), by the claimant's written waiver, and
 - (ii) for claims submitted to arbitration under Article 9.17.1(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, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 9.17.

3. The claimant (for claims brought under Article 9.17.1(a)) and the claimant or the enterprise (for claims brought under Article 9.17.1(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 9.20: 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 90 days of the date 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, after consulting the disputing parties, the arbitrator or arbitrators not yet appointed. The Secretary General shall not appoint a national of either Party as the presiding arbitrator.
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 9.17.1(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 9.17.1(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.

5. The arbitrators shall:

- (a) have experience or expertise in public international law, international investment rules, or in dispute settlement derived from international investment agreements; and
- (b) be independent from the Parties and the claimant, and not be affiliated with or receive instructions from any of them.

ARTICLE 9.21: CONDUCT OF THE ARBITRATION

1. The disputing parties may agree on the legal place of any arbitration under the arbitral rules applicable under Article 9.17.4. If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with the applicable arbitral rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.

2. The non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement. On the request of a disputing party, the non-disputing Party should resubmit its oral submission in writing.

3. After consulting the disputing parties, the tribunal may allow a party or entity that is not a disputing party to file a written *amicus curiae* submission according to the Annex 9-G with the tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the tribunal shall consider, among other things, the extent to which:

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

- (c) the *amicus curiae* has a significant interest in the proceeding.

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

4. Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 9.27.

- (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 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 Article 18 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 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 of the date the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on 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, or 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, except with respect to any subrogation as provided for in Article 9.15.

8. 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 9.17. For the 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 Party. Within 60 days after the date 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 no later than 45 days after the date the 60-day comment period expires.

10. The Parties by mutual agreement may consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 9.27.

ARTICLE 9.22: TRANSPARENCY OF ARBITRAL PROCEEDINGS

1. Subject to paragraphs 2, 3, and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Party 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 Articles 9.21.2, 9.21.3 and 9.26;
- (d) minutes or transcripts of hearings of the tribunal, where 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. 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.

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 23.2 (Essential Security) or Article 23.4 (Disclosure of Information).

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 the 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 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 provided to the non-disputing Party and made public in accordance with paragraph 1; and
- (d) the tribunal shall decide any objection by a disputing party 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 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 (i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under (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.

ARTICLE 9.23: GOVERNING LAW

1. Subject to paragraph 2, when a claim is submitted under Article 9.17.1(a)(i) or Article 9.17.1(b)(i), the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

2. A decision of the Joint Committee declaring its interpretation of a provision of this Agreement under Article 21.1 (Joint Committee) shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision.

ARTICLE 9.24: INTERPRETATION OF ANNEXES

1. Where a respondent asserts as a defense that the measure alleged to be a breach is within the scope of an entry set out in Annex I or Annex II, the tribunal shall, on request of the respondent, request the interpretation of the Joint Committee on the issue. The Joint Committee shall submit in writing any decision declaring its interpretation under Article 21.1 (Joint Committee) to the tribunal within 90 days of delivery of the request.

2. A decision issued by the Joint Committee 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 Committee fails to issue such a decision within 90 days, the tribunal shall decide the issue.

ARTICLE 9.25: EXPERT REPORTS

Without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, the 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 9.26: CONSOLIDATION

1. Where two or more claims have been submitted separately to arbitration under Article 9.17.1 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 either Party.

5. If, within 60 days after 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 the request of any disputing party sought to be covered by the order, shall appoint the arbitrator or arbitrators not yet appointed. If the respondent fails to appoint an arbitrator, the Secretary General shall appoint a national of the disputing Party, and if the claimants fail to appoint an arbitrator, the Secretary General shall appoint a national of the non-disputing Party.

6. Where a tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration under Article 9.17.1 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 9.20 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 9.17.1 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 proceedings in accordance with the UNCITRAL Arbitration Rules, except as modified by this Section.

9. A tribunal established under Article 9.20 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 9.20 be stayed, unless the latter tribunal has already adjourned its proceedings.

ARTICLE 9.27: AWARDS

1. The tribunal, in its final award shall set out its findings of law and fact, together with the reasons for its ruling. Where a tribunal makes a final award against a respondent, the tribunal may, provided that it does not exceed the request of the claimant, 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. A tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules.

3. Subject to paragraph 1, where a claim is submitted to arbitration under Article 9.17.1(b):

- (a) an award of restitution of property shall provide that restitution be made to the enterprise;
- (b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and
- (c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.

4. A tribunal is not authorized to award punitive damages.
5. An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.
6. Subject to paragraph 7 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.
7. 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 9.17.4(d),
 - (i) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside, or annul the award; or
 - (ii) a court has dismissed or allowed an application to revise, set aside, or annul the award and there is no further appeal.
8. Each Party shall provide for the enforcement of an award in its territory.
9. If the respondent fails to abide by or comply with a final award, on delivery of a request by the non-disputing Party, a panel shall be established under Article 22.7 (Establishment of Panel). 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 22.10 (Panel Report), a recommendation that the respondent abide by or comply with the final award.
10. A disputing party may seek enforcement of an arbitration award under the ICSID Convention or the New York Convention regardless of whether proceedings have been taken under paragraph 9.
11. 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.

ARTICLE 9.28: SERVICE OF DOCUMENTS

Delivery of notice and other documents on a Party shall be made to the place named for that Party in Annex 9-D.

Section C: Definitions

ARTICLE 9.29: 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 the other Party;

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 1.6 (Definitions), and a branch of an enterprise;

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

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;

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;⁹ 10
- (d) futures, options, and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- (f) intellectual property rights;
- (g) licenses, authorizations, permits, and similar rights conferred pursuant to the law of the Party¹¹ 12; and
- (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges¹³.

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

investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts¹⁴ to make, is making, or has made an investment in the territory of the other 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;

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 the 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;

⁹ 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 are less likely to have such characteristics.

¹⁰ For the purposes of this Agreement, claims to payment that are immediately due and result from the sale of goods or services are not investments.

¹¹ 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 the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under the law of the Party. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment.

¹² The term "investment" does not include an order or judgment entered in a judicial or administrative action.

¹³ For greater certainty, market share, market access, expected gains, and opportunities for profit-making are not, by themselves, investments.

¹⁴ For greater certainty, it is understood that an investor "attempts to make an investment" only when the investor has taken concrete steps necessary to make the said investment, such as when the investor has duly filed an application for a permit or a license required to make an investment or has obtained the financing providing it with the funds to set up the investment.

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, as revised in 2010 or as subsequently agreed between the Parties.

Section D: Termination of Bilateral Investment Treaties

ARTICLE 9.30: TERMINATION OF BILATERAL INVESTMENT TREATIES

1. Subject to paragraph 2, as of the entry into force of this Agreement between the Republic of Korea and each of the Republics of Central America, the Parties hereby agree that the following Agreements for the Promotion and Protection of Investment (hereinafter referred to as the “Investment Promotion and Protection Agreements”), as well as all the rights and obligations derived from the Investment Promotion and Protection Agreements, will cease to have effect:

- (a) Agreement between the Government of the Republic of Korea and the Government of the Republic of Costa Rica for the Promotion and Protection of Investments, signed in San José on August 11th, 2000 and entered into force on August 25th, 2002.
- (b) Agreement between the Government of the Republic of Korea and the Government of the Republic of El Salvador for the Reciprocal Promotion and Protection of Investments, signed in Seoul, on July 6th, 1998 and entered into force on May 25th, 2002.
- (c) Agreement between the Government of the Republic of Korea and the Government of the Republic of Honduras for the Promotion and Protection of Investments, signed in Tegucigalpa on October 24th, 2000 and entered into force on July 19th, 2001.
- (d) Agreement between the Government of the Republic of Korea and the Government of the Republic of Nicaragua for the Promotion and Protection of Investments, signed on May 15th, 2000 and entered into force on June 22th, 2001.
- (e) Agreement between the Government of the Republic of Korea and the Government of the Republic of Panama for the Promotion and Protection of Investments, signed in Seoul on July 10th, 2001 and entered into force on February 8, 2002.

2. Regarding claims made while the Investments Promotion and Protection Agreement was in force, any and all investments made pursuant to the Investment Promotion and Protection Agreement will be governed by the rules and procedures of the applicable Investment

Promotion and Protection Agreement. An investor may only submit an arbitration claim pursuant to the Investment Promotion and Protection Agreement, regarding any matter arising while the Investment Promotion and Protection Agreement was in force, in accordance with the rules and procedures established in it, and provided that no more than three years have elapsed since the date of entry into force of this Agreement.

ANNEX 9-A
CUSTOMARY INTERNATIONAL LAW

The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Articles 9.5 and 9.6, and Annex 9-C results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 9.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

ANNEX 9-B
PUBLIC PURPOSE

For the effects of Article 9.7.1 (a), “public purpose” shall be understood as:

- (a) for Costa Rica: public utility or public interest;
- (b) for El Salvador: public utility or social interest;
- (c) for Honduras: public purpose or public interest;
- (d) for Nicaragua: public utility or social interest; and
- (e) for Panama: the concept of public purpose includes public order or social interest.

ANNEX 9-C EXPROPRIATION

The Parties confirm their shared understanding that:

1. Article 9.7.1 is intended to reflect customary international law set out in Annex 9-A concerning the obligations of States with respect to expropriation.
2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right in an investment.
3. Article 9.7.1 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 9.7.1 is indirect expropriation, where an action or a 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 a 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 all relevant factors relating to the investment, including:
 - (i) the economic impact of the government action, although the fact that an action or a 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 expectations¹⁵; and
 - (iii) the character of the government action, including its objectives and context¹⁶.
 - (b) Except in rare circumstances, such as, for example, when an action or a series of actions is extremely severe or disproportionate in light of its purpose or effect, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment do not constitute indirect expropriations¹⁷.

¹⁵ For greater certainty, whether an investor's investment-backed expectations are reasonable may include consideration of the nature and extent of government regulation in the relevant sector.

¹⁶ A relevant consideration could include whether the investor bears a disproportionate burden such as a special sacrifice that exceeds what the investor or investment should be expected to endure for the public interest.

¹⁷ For greater certainty, the list of "legitimate public welfare objectives" in subparagraph (b) is not exhaustive.

ANNEX 9-D
SERVICE OF DOCUMENTS ON A PARTY UNDER SECTION B

Korea

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

Office of International Legal Affairs
Ministry of Justice of the Republic of Korea
Government Complex, Gwacheon
Korea.

Costa Rica

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

General Directorate of Foreign Trade (Dirección General de Comercio Exterior)
Ministry of Foreign Trade (Ministerio de Comercio Exterior)
Plaza Tempo, Escazú,
San José, Costa Rica.

El Salvador

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

The Trade Administration Bureau (Dirección de Administración de Tratados Comerciales)
Ministry of Economy (Ministerio de Economía)
Alameda Juan Pablo II y Calle Guadalupe,
Edificio C1- C2, Plan Maestro, Centro de Gobierno,
San Salvador, El Salvador.

Honduras

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

General Directorate of Administration and Negotiation of Agreements (Dirección General de Administración y Negociación de Tratados)
Secretariat of State in the Office of Economic Development (Tercer Nivel de la Secretaría de Estado en el Despacho de Desarrollo Económico)
Colonia Humuya, Edificio San José, sobre el Boulevard José Cecilio del Valle,
Tegucigalpa, Honduras.

Nicaragua

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

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

Panama

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

National Directorate for the Administration of International Trade Agreements and Trade Defense (Dirección Nacional de Administración de Tratados Internacionales y Defensa Comercial)
Ministry of Commerce and Industries (Ministerio de Comercio e Industrias)
Plaza Edison, Segundo Piso,
Avenida Ricardo J. Alfaro y Vía El Paical,
Panamá, República de Panamá.

ANNEX 9-E

TAXATION AND EXPROPRIATION

The determination of whether a taxation measure, in a specific fact situation, constitutes an expropriation requires a case-by-case, fact-based inquiry that considers all relevant factors relating to the investment, including the factors listed in Annex 9-B and the following considerations:

- (a) the imposition of taxes does not generally constitute an expropriation. The mere introduction of a new taxation measure or the imposition of a taxation measure in more than one jurisdiction in respect of an investment generally does not in and of itself constitute an expropriation;
- (b) a taxation measure that is consistent with internationally recognized tax policies, principles, and practices should not constitute an expropriation. In particular, a taxation measure aimed at preventing the avoidance or evasion of taxation measures generally does not constitute an expropriation;
- (c) a taxation measure that is applied on a non-discriminatory basis, as opposed to a taxation measure that is targeted at investors of a particular nationality or at specific taxpayers, is less likely to constitute an expropriation; and
- (d) a taxation measure does not constitute an expropriation if it was already in force when the investment was made and information about the measure was publicly available.

ANNEX 9-F TRANSFERS

1. Nothing in this Chapter, Chapter 10 (Cross-Border Trade in Services), or Chapter 11 (Financial Services) shall be construed to prevent a Party from adopting or maintaining temporary safeguard measures pursuant to the Party's laws and regulations with regard to payments and capital movements:

- (a) in the event of serious balance of payments and external financial difficulties or under threat thereof; or
- (b) in cases where, in exceptional circumstances, payments and capital movements cause or threaten to cause serious difficulties for the operation of monetary or exchange rate policies in the Party concerned.

2. The measures referred to in paragraph 1 shall:

- (a) be in effect for a period not to exceed one year; however, if extremely exceptional circumstances arise such that the Party seeks to extend such measures, such Party will coordinate in advance with the other Party concerning the implementation of any proposed extension¹⁸;
- (b) not constitute a dual or multiple exchange rate practice except as prescribed by the Articles of Agreement of the International Monetary Fund;
- (c) avoid unnecessary damage to the commercial, economic, or financial interests of the other Party;
- (d) be temporary and phased out progressively as the situation calling for imposition of such measures improves;
- (e) be applied on a national treatment basis and MFN Treatment basis;
- (f) be promptly notified to the other Party;
- (g) not exceed those necessary to deal with the circumstances described in paragraph 1;
- (h) be consistent with the Articles of Agreement of the International Monetary Fund, as may be amended; and
- (i) not restrict payments or transfers for current transactions, unless the imposition of such measures complies with the procedures stipulated in the Articles of Agreement of the International Monetary Fund.

¹⁸ For greater certainty, any extension of safeguard measures shall not be subject to authorization of the Parties.

ANNEX 9-G
AMICUS CURIAE

The Tribunal may receive *amicus curiae* briefs from interested natural persons of a Party or legal persons, established in the territory of the Parties.

1. The briefs submitted to the Tribunal shall:
 - (a) be dated and signed by the interested person or its representative, and include the contact information of such person;
 - (b) be addressed to the chair person and shall be also communicated to the disputing parties in the language or languages chosen by the disputing parties; and
 - (c) be concise and in no case exceed 15 typed pages, including any annexes.
2. The briefs shall be accompanied by a written declaration clearly indicating
 - (a) a description of the interested persons who present them, including their place of incorporation in case of legal persons and address in case of natural persons, the nature of their activities, their sources of financing and, where relevant, documentation corroborating said information;
 - (b) whether the interested persons have any direct or indirect relation with any of the disputing parties as well as if they have received any financial or other type of contribution from any of the disputing parties, another government, natural persons or legal persons, generally or in the preparation of the brief; and
 - (c) a brief summary of how the interested persons brief would assist the tribunal in the determination of a factual or legal issue related to the proceeding.
3. The Tribunal shall not consider *amicus curiae* briefs which do not conform to the above rules.