

## **CHAPTER EIGHT**

### **INVESTMENT**

#### **Section A – Investment**

##### **Article 8.1: Scope and Coverage**

1. This Chapter applies 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 8.8, 8.10, and 8.16, all investments in its territory.
2. For greater certainty, this Chapter does not apply to an act or fact that took place or a situation that ceased to exist before the date of entry into force of this Agreement.
3. For the purposes of this Chapter, measures adopted or maintained by a Party means measures adopted or maintained by:
  - (a) a national, sub-national, or local government and authority; or
  - (b) a non-governmental body of a Party in the exercise of powers delegated by a national, sub-national, or local government and authority of the Party.

##### **Article 8.2: Relation to Other Chapters**

1. In the event of an inconsistency between this Chapter and another Chapter, the other Chapter prevails 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 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 Ten (Financial Services).

### **Article 8.3: National Treatment**

1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of 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 of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a sub-national government, treatment no less favourable than the most favourable treatment accorded, in like circumstances, by that sub-national government to investors, and to investments of investors, of the Party of which it forms a part.

#### **Article 8.4: Most-Favoured-Nation Treatment<sup>1,2</sup>**

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

#### **Article 8.5: Minimum Standard of Treatment<sup>3</sup>**

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 accorded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
3. 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; and

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<sup>1</sup> For greater certainty, the treatment accorded by a Party under this Article means, with respect to a sub-national government, treatment accorded, in like circumstances, by that sub-national government to investors, and to investments of investors, of a non-party.

<sup>2</sup> For greater certainty, treatment “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments” referred to in paragraphs 1 and 2 does not encompass Investor-State Dispute Settlement mechanisms, such as those in Section B of this Chapter that are provided for in international treaties or trade agreements.

<sup>3</sup> This Article shall be interpreted in accordance with Annex 8-A.

- (b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.

4. A breach of another provision of this Agreement, or of a separate international agreement, does not establish a breach of this Article.

#### **Article 8.6: Compensation for Losses**

1. 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. Paragraph 1 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 8.3, but for Article 8.9.5(b).

#### **Article 8.7: Senior Management and Boards of Directors**

1. A Party shall not require an enterprise of that Party, which is a covered investment, to appoint natural persons of a particular nationality to senior management positions.
2. A Party may require that a majority of the board of directors, or a committee, of an enterprise of that Party, which is a covered investment, be of a particular nationality, or resident in the territory of that Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

#### **Article 8.8: Performance Requirements**

1. A Party shall not, in connection with the establishment, acquisition, expansion, management, conduct, or operation of an investment in its territory of an investor of a Party or of a non-party, impose or enforce a requirement or enforce a commitment or undertaking<sup>4</sup>:

- (a) to export a given level or percentage of goods or services;

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<sup>4</sup> For greater certainty, a condition for the receipt or continued receipt of an advantage pursuant to paragraph 3 does not constitute a “commitment or undertaking” for the purposes of this paragraph.

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

2. A measure that requires an investment to use a technology to meet generally applicable health, safety, or environmental requirements is not to be construed to be inconsistent with paragraph 1(f). For greater certainty, Articles 8.3 and 8.4 apply to the measure.

3. A Party shall not make the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, or operation of an investment in its territory of an investor of a Party or of a non-party, conditional 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 the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with that investment; or
- (d) to restrict sales of goods or services in its territory that the investment produces or supplies by relating those sales to the volume or value of its exports or foreign exchange earnings.

4. Paragraph 3 is not to be construed to prevent a Party from making 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, conditional 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.<sup>5</sup>

5. Paragraph 1(f) does not apply:

- (a) if a Party authorises use of an intellectual property right pursuant to Article 31 of the TRIPS Agreement, or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or
- (b) if the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be anti-competitive under the Party's competition laws.<sup>6</sup>

6. The provisions of:

- (a) paragraphs 1(b), (c), (f) and (g), and 3(a) and (b) do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs;
- (b) paragraphs 1(b), (c), (f) and (g), and 3(a) and (b) do not apply to procurement by a Party or a state enterprise; and
- (c) paragraphs 3(a) and (b) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

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<sup>5</sup> For greater certainty, paragraph 1 is not to be construed to prevent a Party, in connection with the establishment, acquisition, expansion, management, conduct, or operation 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 locate production, train or employ workers, or construct or expand particular facilities, in its territory, provided that such activity is consistent with paragraph 1(f).

<sup>6</sup> The Parties recognise that a patent does not necessarily confer market power.

7. Paragraphs 1 and 3 do not apply to a commitment, undertaking, or requirement other than those set out in those paragraphs.

8. This Article does not preclude enforcement of a commitment, undertaking, or requirement between private parties, if a Party did not impose or require the commitment, undertaking, or requirement. For the purposes of this Article, private parties include designated monopolies or state enterprises, if such entities are not exercising delegated governmental authority.

#### **Article 8.9: Non-Conforming Measures**

1. Articles 8.3, 8.4, 8.7, and 8.8 do not apply to:

- (a) an existing non-conforming measure that is maintained by:
  - (i) the national government of a Party, as set out in its Schedule to Annex I;
  - (ii) a sub-national government of a Party, as set out by that Party in its Schedule to Annex I<sup>7</sup>; or
  - (iii) a local government of a Party<sup>8</sup>;
- (b) the continuation or prompt renewal of a non-conforming measure referred to in subparagraph (a); or
- (c) an amendment to a non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not diminish the conformity of the measure, with Articles 8.3, 8.4, 8.7 and 8.8, as it existed immediately before the amendment.

2. Articles 8.3, 8.4, 8.7, and 8.8 do not apply to a measure that a Party adopts or maintains with respect to sectors, sub-sectors, or activities, as set out in its Schedule to Annex II.

3. A Party shall not, under a measure adopted after the date of entry into force of this Agreement and set out in 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.

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<sup>7</sup> For the purposes of this Article, sub-national government does not include local government.

<sup>8</sup> For Korea, local government means a local government as defined in the *Local Autonomy Act*.

4. Articles 8.3 and 8.4 do not apply to a measure that is an exception to, or derogation from, the obligations under Article 16.6 (National Treatment) as specifically provided in that Article.

5. Articles 8.3, 8.4, and 8.7 do not apply to:

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

#### **Article 8.10: Investment and Environment**

1. This Chapter is not to be construed to prevent a Party from adopting, maintaining, or enforcing a measure 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.

2. The Parties recognise that it is inappropriate to encourage investment by relaxing domestic 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. If a Party considers that the other Party has offered such an encouragement, that Party may request consultations with the other Party and the Parties shall consult with a view to avoiding any such encouragement.

#### **Article 8.11: Expropriation and Compensation<sup>9</sup>**

1. A Party shall not expropriate or nationalise a covered investment, directly or indirectly, through a measure equivalent to expropriation or nationalisation (hereinafter referred to as “expropriation”), except:

- (a) for a public purpose;
- (b) in a non-discriminatory manner;
- (c) in accordance with due process of law; and

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<sup>9</sup> For greater certainty, Article 8.11.1 shall be interpreted in accordance with Annex 8-B.



- (d) on payment of prompt, adequate, and effective compensation.
2. The compensation referred to in paragraph 1(d) 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) include interest at a commercially reasonable rate accrued from the date of expropriation until the date of payment;
  - (d) not reflect any change in value that occurs as a result of prior knowledge of the intended expropriation;
  - (e) be fully realisable and freely transferable; and
  - (f) be payable in a freely usable or freely convertible currency.
3. The affected investor shall have the right under the law of the expropriating Party to a prompt review, by a judicial or other independent authority of that Party, of its case and of the valuation of its investment in accordance with the principles set out in this Article.
4. This Article does not apply to compulsory licenses granted in relation to intellectual property rights under the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, provided that the issuance, revocation, limitation, or creation is consistent with the WTO Agreement.

#### **Article 8.12: Transfers**

1. Each Party shall permit transfers relating to a covered investment to be made freely, and without delay, into and out of its territory. Those transfers include:
- (a) contributions to capital, including the initial contribution;
  - (b) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance, and other fees;

- (c) proceeds from the sale of all or 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 payments made pursuant to a loan agreement;
  - (e) payments made pursuant to Articles 8.6 and 8.11; 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. Transfers shall be made at the market rate of exchange prevailing at the time of transfer.
3. Each Party shall permit returns in kind relating to a covered investment to be made as authorised or specified in a written agreement between the Party and a covered investment or an investor of the other Party.
4. Notwithstanding paragraphs 1, 2, and 3, a Party may prevent a transfer through the equitable, non-discriminatory, and good faith application of its domestic law relating to:
- (a) bankruptcy, insolvency, or the protection of the rights of creditors;
  - (b) issuing, trading or dealing in securities, futures, options, or derivatives;
  - (c) criminal or penal offences;
  - (d) financial reports of transfers when necessary to assist law enforcement or financial regulatory authorities; or
  - (e) compliance with orders or judgments in judicial or administrative proceedings.
5. A Party shall not require its investors to transfer, or penalise its investors for failure to transfer the income, earnings, profits, or other amounts derived from, or attributable to investments in the territory of the other Party.
6. Paragraph 5 is not to be construed to prevent a Party from imposing a measure through the equitable, non-discriminatory, and good faith application of its domestic law relating to the matters referred to in paragraphs 4(a) through (e).

7. Notwithstanding paragraph 1, a Party may restrict transfers of returns in kind in circumstances where it could otherwise restrict those transfers under this Agreement and as set out in paragraph 4.

#### **Article 8.13: Subrogation**

1. If a Party or an agency of a Party makes a payment to one of its investors under a guarantee or a contract of insurance that it has entered into in respect of an investment, the other Party shall recognise the validity of the subrogation in favour of that Party or the agency of the Party to a right or title held by the investor.

2. A Party or an agency of a Party which is subrogated to the rights of an investor in accordance with paragraph 1, is entitled in all circumstances to the same rights as those of the investor in respect of the investment. These rights may be exercised by the Party or an agency of the Party, or by the investor if the Party or an agency of the Party so authorises.

#### **Article 8.14: 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 that 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 that Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party under whose domestic law it is constituted or organised and persons of a non-party, or of the denying Party, own or control the enterprise.

### **Article 8.15: Special Formalities and Information Requirements**

1. Article 8.3 is not to be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with the establishment of investments by investors of the other Party, including a requirement that investments be legally constituted under the laws or regulations of the Party, provided that those formalities do not materially impair the protections afforded by a Party to investors of the other Party and investments of investors of the other Party under this Chapter.
2. Notwithstanding Articles 8.3 and 8.4, a Party may require an investor of the other Party, or its investment in the Party's territory, to provide routine information concerning that investment solely for informational or statistical purposes. The Party shall protect such business information that is confidential from disclosure that would prejudice the competitive position of the investor or the investment. This paragraph is not to 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 8.16: Corporate Social Responsibility**

Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognised standards of corporate social responsibility in their practices and their internal policies, including statements of principle that are endorsed or supported by the Parties. These principles address issues such as labour, environment, human rights, community relations, and anti-corruption.

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

### **Article 8.17: Purpose**

Without prejudice to the rights and obligations of the Parties under Chapter Twenty-One (Dispute Settlement), this Section establishes a mechanism for the settlement of investment disputes.

### **Article 8.18: Claim by an Investor of a Party on Its Own Behalf**

An investor of a Party may submit to arbitration under this Section a claim that the other Party has breached an obligation under Section A, other than Articles 8.10, 8.15, and 8.16 and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

### **Article 8.19: Claim by an Investor of a Party on Behalf of an Enterprise**

1. An investor of a Party, on behalf of an enterprise of the other Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under Section A, other than Articles 8.10, 8.15, and 8.16 and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.
2. If an investor makes a claim pursuant to this Article and the investor or a non-controlling investor in the enterprise makes a claim pursuant to Article 8.18 arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration pursuant to Article 8.23, the claims should be heard together by a Tribunal established under Article 8.28, unless the Tribunal finds that the interests of a disputing party would be prejudiced as a result.
3. An investment shall not make a claim under this Section.

#### **Article 8.20: Notice of Intent to Submit a Claim to Arbitration**

1. The disputing investor shall deliver to the disputing Party written notice of its intent to submit a claim to arbitration (hereinafter referred to as the “Notice of Intent”) at least 90 days before submitting the claim. The Notice of Intent must specify:

- (a) the name and address of the disputing investor and, if a claim is made under Article 8.19, the name and address of the enterprise;
- (b) the provisions of this Agreement alleged to have been breached and any other relevant provisions;
- (c) the legal and the factual basis for the claim, including the measures at issue;  
and
- (d) the relief sought and the approximate amount of damages claimed.

2. The disputing investor shall also deliver, with its Notice of Intent, evidence establishing that it is an investor of the other Party. Examples of evidence that might be relevant include a copy of a title to property, a deed of incorporation of the enterprise, share certificates, and a joint venture agreement.

#### **Article 8.21: Consultation and Negotiation**

In the event of an investment dispute, the disputing investor and the disputing Party shall initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding third-party procedures.

#### **Article 8.22: Conditions Precedent to Submission of a Claim to Arbitration**

1. A disputing investor may submit a claim to arbitration pursuant to Article 8.18 only if:

- (a) the disputing investor consents to arbitration in accordance with the procedures set out in this Agreement;
- (b) at least six months have elapsed since the events giving rise to the claim;

- (c) not more than three years have elapsed from the date on which the disputing investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the disputing investor has incurred loss or damage thereby;
- (d) the disputing investor has delivered the Notice of Intent required under Article 8.20; and
- (e) the disputing investor and, if the claim is for loss or damage to an interest in an enterprise of the other Party that is a juridical person that the disputing investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before an administrative tribunal or court under the domestic law of any Party, or other dispute settlement procedures, proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 8.18, except as set out in Annex 8-C.

2. A disputing investor may submit a claim to arbitration pursuant to Article 8.19 only if:

- (a) both the disputing investor and the enterprise consent to arbitration in accordance with the procedures set out in this Agreement;
- (b) at least six months have elapsed since the events giving rise to the claim;
- (c) not more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage thereby;
- (d) the disputing investor has delivered the Notice of Intent required pursuant to Article 8.20; and
- (e) both the disputing investor and the enterprise waive their right to initiate or continue before an administrative tribunal or court under the domestic law of any Party, or other dispute settlement procedures, proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 8.19, except as set out in Annex 8-C.

3. A consent and waiver required by this Article shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration.
4. A waiver from the enterprise under paragraph 1(e) or 2(e) shall not be required only if a disputing Party has deprived a disputing investor of control of the enterprise.
5. Failure to meet any of the conditions precedent provided for in paragraphs 1, 2, and 3 nullifies the consent of the Parties given in Article 8.24.

#### **Article 8.23: Submission of a Claim to Arbitration**

1. Except as provided in Annex 8-C, a disputing investor who meets the conditions precedent provided for in Article 8.22 may submit the claim to arbitration:
  - (a) under the ICSID Convention, if both Parties are party to the Convention;
  - (b) under the ICSID Additional Facility Rules, if only one Party is a party to the ICSID Convention;
  - (c) under the UNCITRAL Arbitration Rules; or
  - (d) if the disputing parties agree, to any other arbitration institution or under any other arbitration rules.
2. The applicable arbitration rules govern the arbitration unless they are modified by this Section.

#### **Article 8.24: Consent to Arbitration**

1. Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.
2. The consent given in paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of:
  - (a) Chapter II of the ICSID Convention and the ICSID Additional Facility Rules for written consent of the parties; and



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

#### **Article 8.25: Arbitrators**

1. Except in respect of a Tribunal established pursuant to Article 8.28, and unless the disputing parties agree otherwise, the Tribunal shall be composed of 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. Arbitrators must:
  - (a) have expertise or experience in public international law, international trade or international investment rules, or the resolution of disputes arising under international trade or international investment agreements; and
  - (b) be independent of, and not be affiliated with or take instructions from, either Party or the disputing investor.
3. The disputing parties should agree on the arbitrators' remuneration. If the disputing parties do not agree on such remuneration before the Tribunal is constituted, the prevailing ICSID rate for arbitrators applies.

#### **Article 8.26: Constitution of a Tribunal by the Secretary-General**

1. The Secretary-General shall serve as appointing authority for an arbitration under this Section if a Party fails to appoint an arbitrator or the disputing parties are unable to agree on a presiding arbitrator.
2. If a Tribunal, other than a Tribunal established pursuant to Article 8.28, is not constituted within 90 days from the date that a claim is submitted to arbitration, the Secretary-General, at the request of either disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed. The presiding arbitrator shall not be a national of either Party.

### **Article 8.27: Agreement to Appointment of Arbitrators**

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

- (a) the disputing Party agrees to the appointment of each individual member of a Tribunal established under the ICSID Convention or the ICSID Additional Facility Rules;
- (b) a disputing investor referred to in Article 8.18 may submit a claim to arbitration, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only if the disputing investor agrees in writing to the appointment of each individual member of the Tribunal; and
- (c) a disputing investor referred to in Article 8.19.1 may submit a claim to arbitration, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only if the disputing investor and the enterprise agree in writing to the appointment of each individual member of the Tribunal.

### **Article 8.28: Consolidation**

1. A Tribunal established under this Article shall be established under the UNCITRAL Arbitration Rules and shall conduct its proceedings in accordance with those Rules, unless otherwise provided in this Section.
2. If a Tribunal established under this Article is satisfied that claims submitted to arbitration under Article 8.23 have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:
  - (a) assume jurisdiction over, and hear and determine together, all or part of the claims; or
  - (b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others.

3. A disputing party that seeks an order under paragraph 2 shall request that the Secretary-General establish a Tribunal and shall specify in the request:

- (a) the name of the disputing Party or disputing investors against which the order is sought;
- (b) the nature of the order sought; and
- (c) the grounds for the order sought.

4. The disputing party shall deliver a copy of the request to the disputing Party or disputing investors against which the order is sought.

5. The Secretary-General shall, within 60 days of receipt of the request, establish a Tribunal composed of three arbitrators appointed from the ICSID Panel of Arbitrators. To the extent arbitrators are not available from that Panel, appointments shall be at the discretion of the Secretary-General. The Secretary-General shall appoint one member who is a national of the disputing Party, one member who is a national of the Party of the disputing investors and a presiding arbitrator, who is not a national of either Party.

6. If a Tribunal is established pursuant to this Article, a disputing investor that has submitted a claim to arbitration pursuant to Article 8.23 and that has not been named in a request made pursuant to paragraph 3 may submit a written request to the Tribunal that it be included in an order made pursuant to paragraph 2, and shall specify in the request:

- (a) the name and address of the disputing investor;
- (b) the nature of the order sought; and
- (c) the grounds for the order sought.

7. A disputing investor referred to in paragraph 6 shall deliver a copy of its request to the disputing parties named in a request made pursuant to paragraph 3.

8. A Tribunal established pursuant to Article 8.23 does not have jurisdiction to decide a claim, or a part of a claim, over which a Tribunal established pursuant to this Article has assumed jurisdiction.

9. On the application of a disputing party, a Tribunal established pursuant to this Article, pending its decision pursuant to paragraph 2, may order that the proceedings of a Tribunal established pursuant to Article 8.23 be stayed, unless the latter Tribunal has already adjourned its proceedings.

#### **Article 8.29: Notice to the Non-Disputing Party**

A disputing Party shall deliver to the non-disputing Party a copy of the Notice of Intent and other documents, such as the Notice of Arbitration and the Statement of Claim, within 30 days of the date that those documents are delivered to the disputing Party.

#### **Article 8.30: Documents**

1. The non-disputing Party is entitled, at its cost, to receive from the disputing Party:
  - (a) a copy of the evidence that has been tendered to the Tribunal;
  - (b) copies of all pleadings filed in the arbitration; and
  - (c) copies of the written arguments of the disputing parties.
2. The non-disputing Party receiving information pursuant to paragraph 1 shall treat the information on the same basis as the Party providing the information treats them.

#### **Article 8.31: Participation by the Non-Disputing Party**

1. On written notice to the disputing parties, the non-disputing Party may make oral or written submissions to a Tribunal on a question of interpretation of this Agreement. Upon the request of a disputing party, the non-disputing Party shall submit its oral submission in writing.
2. The non-disputing Party shall treat the information it receives at hearings on the same basis as the Party providing the information treats them.

### **Article 8.32: Place of Arbitration**

1. Unless otherwise agreed by the disputing parties, a Tribunal shall hold an arbitration in the territory of a Party that is a party to the New York Convention, selected in accordance with:

- (a) the ICSID Additional Facility Rules, if the arbitration is under those Rules or the ICSID Convention; or
- (b) the UNCITRAL Arbitration Rules, if the arbitration is under those Rules.

2. Unless otherwise agreed by the disputing parties, the Tribunal may determine a place for meetings and hearings, other than the legal place of arbitration. In doing so, the Tribunal shall take into consideration, its convenience for the parties and the arbitrators, the location of the subject matter, and the proximity of the evidence.

### **Article 8.33: Language of Proceedings**

1. Unless otherwise agreed by the disputing parties, the language of the arbitration proceedings, including hearings, decisions, and awards, shall be:

- (a) Korean and English if Korea is a disputing Party; and
- (b) French and English if Canada is a disputing Party.

2. Communications, submissions, witness statements and documentary evidence can be submitted in either one of the language of the arbitration without a translation.

### **Article 8.34: Preliminary Objections to Jurisdiction or Admissibility**

If issues relating to jurisdiction or admissibility are raised as preliminary objections, the Tribunal shall, whenever possible, decide the matter before proceeding to the merits.

### **Article 8.35: Transparency of Arbitral Proceedings**

1. Subject to paragraphs 2, 3, and 4, the disputing Party 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 8.28, 8.31, and 8.36;
- (d) minutes or transcripts of hearings of the Tribunal, if available; and
- (e) orders, awards, and decisions of the Tribunal.

2. The Tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, a disputing party that intends to use information designated as protected information in a hearing shall advise the Tribunal. The Tribunal shall make appropriate arrangements to protect the information from disclosure.

3. This Section does not require a disputing Party to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Articles 22.2 (National Security) and 22.5 (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), the disputing parties or the Tribunal shall not disclose to the non-disputing Party or to the public any protected information if the disputing party that provided the information clearly designates it in accordance with subparagraph (b);
- (b) a 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, also submit a redacted version of the document that does not contain such protected information. Only the redacted version shall be provided to the non-disputing Party and made public in accordance with paragraph 1;
- (d) the Tribunal shall decide an 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, if 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; and

- (e) at the request of a disputing Party, the Commission shall consider issuing a decision in writing regarding a determination by the Tribunal that information claimed to be protected was not properly designated. If the Commission issues a decision within 60 days of such a request, it shall be binding on the Tribunal, and the decision or award issued by the Tribunal must be consistent with that decision. If the Commission does not issue a decision within 60 days, the Tribunal's determination shall remain in effect only if the non-disputing Party submits a written statement to the Commission within that period that it agrees with the Tribunal's determination.

5. This Section does not require a disputing Party to withhold from the public information required to be disclosed in accordance with its domestic law.

6. Each Party may share with officials of its respective national, sub-national, and local governments all relevant unredacted documents in the course of dispute settlement under this Agreement, but it shall ensure that those persons protect any confidential information in those documents.

#### **Article 8.36: Submissions by a Non-Disputing Party**

1. Any person of a Party, or a person with a significant presence in the territory of a Party, that wishes to file a written submission with a Tribunal (hereinafter referred to as the “applicant”) shall apply for leave from the Tribunal to file a non-disputing party submission, in accordance with Annex 8-D. The applicant shall attach the submission to the application.
2. The applicant shall serve the application for leave to file a non-disputing party submission and its written submission on all disputing parties and the Tribunal.
3. The Tribunal shall set an appropriate date for the disputing parties to comment on the application for leave to file a non-disputing party submission.
4. In determining whether to grant leave to file a non-disputing party submission, the Tribunal shall consider, among other things, the extent to which:
  - (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
  - (b) the non-disputing party submission would address a matter within the scope of the dispute; and
  - (c) the non-disputing party has a significant interest in the arbitration.
5. The Tribunal shall ensure that:
  - (a) the non-disputing party submission does not disrupt the proceedings;
  - (b) the non-disputing party submission does not unduly burden or unfairly prejudice a disputing party; and



- (c) disputing parties are given an opportunity to present their observations on the non-disputing party submission.

6. After consulting the disputing parties, the Tribunal shall decide whether to grant leave to file a non-disputing party submission. If leave to file a non-disputing party submission is granted, the Tribunal shall set an appropriate date for the disputing parties to respond in writing to the non-disputing party submission. By that date, the non-disputing Party may, pursuant to Article 8.31, address any issues of interpretation of this Agreement presented in the non-disputing party submission.

7. The Tribunal that grants leave to file a non-disputing party submission is not required to address the submission at any point in the arbitration, and the non-disputing party that files the submission is not entitled to make further submissions in the arbitration.

8. The provisions pertaining to public access to hearings and documents pursuant to Article 8.35 govern access to hearings and documents by non-disputing parties that file applications pursuant to this Article.

#### **Article 8.37: Governing Law**

1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

2. The Commission's interpretation of a provision of this Agreement shall be binding on a Tribunal established under this Section and an award under this Section shall be consistent with that interpretation.

#### **Article 8.38: Interpretation of Annexes**

1. If the disputing Party asserts as a defence that the measure alleged to be a breach is within the scope of a reservation or exception set out in Annex I, Annex II or Annex III, the Tribunal shall, at the request of that disputing Party, request the Commission to interpret the issue. Within 60 days of delivery of the request, the Commission shall submit in writing its interpretation to the Tribunal.

2. Further to Article 8.37.2, the interpretation by the Commission submitted under paragraph 1 is binding on the Tribunal. If the Commission fails to submit an interpretative decision within 60 days, the Tribunal shall decide the issue.

### **Article 8.39: Expert Reports**

Without prejudice to the appointment of other kinds of experts, if authorised 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 a 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 8.40: Interim Measures of Protection**

The 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. The Tribunal shall not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 8.18 or 8.19. For the purposes of this Article, an order includes a recommendation.

### **Article 8.41: Final Award**

1. If the Tribunal makes a final award against a disputing Party, the Tribunal may award, separately or in combination, only:

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

The Tribunal may also award costs in accordance with the applicable arbitration rules.

2. Subject to paragraph 1, if a claim is made pursuant to Article 8.19.1:

- (a) an award of monetary damages and any applicable interest shall state that the monetary damages and interest are paid to the enterprise;

- (b) an award of restitution of property shall provide that restitution be made to the enterprise; and
  - (c) the award shall provide that it is made without prejudice to a right that a person may have in the relief under applicable domestic law.
- 3. The Tribunal shall not order a disputing Party to pay punitive damages.

#### **Article 8.42: Finality and Enforcement of an Award**

- 1. An award made by the Tribunal does not have binding force except between the disputing parties and in respect of that particular case.
- 2. Subject to paragraph 3 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.
- 3. A disputing party shall not seek enforcement of a final award until:
  - (a) in the case of a final award made under the ICSID Convention:
    - (i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award; or
    - (ii) revision or annulment proceedings have been completed; or
  - (b) in the case of a final award under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules:
    - (i) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside, or annul the award; or
    - (ii) a court has dismissed or allowed an application to revise, set aside, or annul the award, and there is no further appeal.

4. Each Party shall provide for the enforcement of an award in its territory.
5. If the disputing Party fails to abide by or comply with a final award, the Party of the disputing investor may refer the matter to a dispute settlement panel under Chapter Twenty-One (Dispute Settlement). The Party of the disputing investor may seek the following in these 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) a recommendation that the disputing Party abide by or comply with the final award.
6. A disputing investor may seek to enforce an arbitration award under the ICSID Convention, or the New York Convention regardless of whether proceedings are taken pursuant to paragraph 5.
7. A claim that is submitted to arbitration under this Section is considered to arise out of a commercial relationship or transaction for the purposes of Article I of the New York Convention.

#### **Article 8.43: Procedural and Other Matters**

##### *Time when a Claim is Submitted to Arbitration*

1. A claim is submitted to arbitration under this Section when:
  - (a) the Request for Arbitration pursuant to paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General;
  - (b) the Notice of Arbitration pursuant to Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General; or
  - (c) the Notice of Arbitration given under the UNCITRAL Arbitration Rules is received by the disputing Party.

### *Service of Documents*

2. Notices and other documents shall be delivered to a Party at the place named for that Party below:

(a) for Korea:

International Legal Affairs Division  
Building #1, Government Complex-Gwacheon  
47, Gwanmun-ro, Gwacheon-si, Gyeonggi-do  
Republic of Korea; and

(b) for Canada:

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

or their respective successors.

### *Receipts under Insurance or Guarantee Contracts*

3. In an arbitration under this Section, a disputing Party shall not assert, as a defence, counterclaim, right of setoff, or otherwise, that the disputing investor has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.

### **Article 8.44: Exclusions**

The dispute settlement provisions of this Section and of Chapter Twenty-One (Dispute Settlement) shall not apply to the matters referred to in Annex 8-F.

## Section C – Definitions

### Article 8.45: Definitions

For the purposes of this Chapter:

**confidential information** means confidential business information and information that is privileged or otherwise protected from disclosure under a Party's domestic law;

**covered investment** means, with respect to a Party, an investment in its territory of an investor of the other Party existing on the date of entry into force of this Agreement, or established, acquired, or expanded thereafter;

**disputing investor** means an investor that makes a claim under Section B;

**disputing Party** means a Party against which a claim is made under Section B;

**disputing party** means the disputing investor or the disputing Party;

**enterprise** means an “enterprise” as defined in Article 1.8 (Definitions of General Application) and a branch of an enterprise;

**enterprise of a Party** means an enterprise constituted or organised under the domestic law of a Party, and a branch of that enterprise 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 and amendments thereto;

**ICSID** means the International Centre for Settlement of Investment Disputes;

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

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

**investment** means any 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, the assumption of risk, and a certain duration. Forms that an investment may take include:

- (a) an enterprise;
- (b) shares, stock, and other forms of equity participation in an enterprise;
- (c) bonds, debentures, other debt instruments, and loans<sup>10</sup>;
- (d) futures, options, and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- (f) intellectual property rights; and
- (g) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges<sup>11</sup>.

For the purposes of this Agreement, a claim to payment that arises solely from the commercial sale of goods and services is not an investment, unless it is a loan that has the characteristics of an investment.

**investment of an investor of a Party** means an investment owned or controlled directly or indirectly by an investor of that Party;

**investor of a Party**<sup>12</sup> means a Party or a state enterprise thereof, or a national or enterprise of a Party that seeks to make, is making, or has made an investment in the territory of the other Party, provided however that:

- (a) a natural person who is a dual citizen is deemed to be exclusively a national of the State of his or her dominant and effective citizenship; and

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<sup>10</sup> Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt are less likely to have such characteristics.

<sup>11</sup> For greater certainty, market share, market access, expected gains, and opportunities for profit-making are not, by themselves, investments.

<sup>12</sup> For greater certainty, it is understood that an investor of a Party “seeks” to make an investment in the territory of the other Party only if the investor has taken concrete steps necessary to make said investment, such as when the investor has made an application for a permit or license authorising the establishment of an investment.

- (b) a natural person who is a citizen of a Party and a permanent resident of the other Party is deemed to be exclusively a national of the Party of which that natural person is a citizen;

**investor of a non-party** means an investor other than an investor of a Party, that seeks to make, is making, or has made an investment;

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

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

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

**transfers** include international payments;

**Tribunal** means an arbitration tribunal established pursuant to Article 8.23 or Article 8.28;

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



## **Annex 8-A**

### **Customary International Law**

The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Article 8.5 results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 8.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the investments of aliens.

## **Annex 8-B**

### **Expropriation**

The Parties confirm their shared understanding that:

- (a) indirect expropriation results from an action or a series of actions by a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure;
- (b) an action or series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right in an investment and eliminates all or nearly all of its value;
- (c) the determination of whether an action or a series of actions by a Party, in a specific fact situation, constitute 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 sole fact that an action or a series of actions by a Party, in a specific fact situation, has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;
  - (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations<sup>13</sup>; and
  - (iii) the character of the government action, including its objectives and context. Relevant considerations could include whether the government action imposes a special sacrifice on the particular investor or investment that exceeds what the investor or investment should be expected to endure for the public interest; and

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<sup>13</sup> For greater certainty, whether an investor's investment-backed expectations are reasonable depends in part, on the nature and extent of governmental regulation in the relevant sector. For example, an investor's expectations that regulations will not change are less likely to be reasonable in a heavily regulated sector than in a less heavily regulated sector.

- (d) except in rare circumstances, such as, for example, when an action or a series of actions are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory regulatory actions of a Party that are designed and applied to protect legitimate public welfare objectives, such as, public health, safety, environment, and real estate price stabilisation through, for example, measures to improve the housing conditions for low-income households, do not constitute indirect expropriations<sup>14</sup>.

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<sup>14</sup> For greater certainty, the list of “legitimate public welfare objectives” in subparagraph (d) is not exhaustive.

## **Annex 8-C**

### **Submission of a Claim to Arbitration**

1. An investor of Canada shall not submit to arbitration under Section B a claim that Korea has breached an obligation under Section A:

- (a) on the investor's own behalf pursuant to Article 8.18; or
- (b) on behalf of an enterprise of Korea that is a juridical person that the investor owns or controls directly or indirectly pursuant to Article 8.19,

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

2. If an investor of Canada or an enterprise of Korea that is a juridical person that an investor of Canada owns or controls directly or indirectly makes an allegation that Korea has breached an obligation under Section A before a judicial or administrative tribunal of Korea, that election is final and that investor shall not thereafter allege the same breach in an arbitration under Section B.

3. Paragraphs 1 and 2 do not preclude an investor of Canada from initiating an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of Korea, provided that the action is brought for the sole purpose of preserving the disputing investor's or the enterprise's rights and interests during the pendency of the arbitration.

4. An investor of Korea may initiate or continue proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before a judicial or administrative tribunal under the domestic law of Canada.

## **Annex 8-D**

### **Submissions by Non-Disputing Parties**

1. An application for leave to file a non-disputing party submission must:
  - (a) be made in writing, and be dated and signed by the person filing the application, and include the address and other contact details of the applicant;
  - (b) not exceed five typed pages;
  - (c) describe the applicant, including, if relevant, its membership and legal status (for example, company, trade association or other non-governmental organisation), its general objectives, the nature of its activities, and any parent organisation (including any organisation that directly or indirectly controls the applicant);
  - (d) disclose whether the applicant has an affiliation, direct or indirect, with a disputing party;
  - (e) identify any government, person or organisation that has provided any financial or other assistance to prepare the submission;
  - (f) specify the nature of the interest that the applicant has in the arbitration;
  - (g) identify the specific issues of fact or law in the arbitration that the applicant has addressed in its written submission;
  - (h) explain, by referring to the factors specified in Article 8.36.4, why the Tribunal should accept the submission; and
  - (i) be made in a language of the arbitration.
2. The submission filed by a non-disputing party must:
  - (a) be dated and signed by the person filing the submission;
  - (b) be concise, and not exceed 20 typed pages, including any appendices;
  - (c) set out a precise statement supporting the applicant's position on the issues; and
  - (d) only address matters within the scope of the dispute.

## **Annex 8-E**

### **Possibility of a Bilateral Appellate Mechanism**

Within three years after the date this Agreement enters into force, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered pursuant to Article 8.42 in arbitrations commenced after they establish the appellate body or similar mechanism.

## **Annex 8-F**

### **Exclusions from Dispute Settlement**

A decision by Canada following a review under the *Investment Canada Act*, with respect to whether or not to permit an investment that is subject to review, is not subject to the dispute settlement provisions of Section B of this Chapter or of Chapter Twenty-One (Dispute Settlement).