

CHAPTER EIGHT INVESTMENT

SECTION A: INVESTMENT

ARTICLE 8.1: SCOPE¹

1. This Chapter shall apply to measures adopted or maintained by a Party related to:
 - (a) investors of the other Party;
 - (b) covered investments; and
 - (c) with respect to Articles 8.9 and 8.11, all investments in the territory of the Party.
2. For greater certainty, this Chapter shall 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 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 related to investors of the other Party, and investments of such investors, in financial institutions in the Party's territory.
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 8.2: 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.

¹ For greater certainty, nothing in this Chapter shall be construed to impose an obligation on a Party to privatize any investment that it owns or controls or to prevent a Party from designating a monopoly.

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 into its territory 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 8.3: 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 of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

ARTICLE 8.4: MOST-FAVORED-NATION TREATMENT²

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 8.5: MINIMUM STANDARD OF TREATMENT³

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

² For greater certainty, Article 8.4 shall not apply to investor-state dispute settlement mechanisms such as those set out in Section B (Investor-State Dispute Settlement).

³ Article 8.5 shall be interpreted in accordance with Annex 8-A.

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
- (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 8.6: LOSSES AND COMPENSATION

1. Notwithstanding Article 8.13.5(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 related 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 caused in combat action or was not required by the necessity of the situation,

the latter Party shall provide the investor restitution, compensation, or both, as appropriate, for such loss. Any compensation shall be prompt, adequate, and effective in accordance with Articles 8.7.2 through 8.7.4, *mutatis mutandis*.

3. Paragraph 1 shall not apply to existing measures related to subsidies or grants that would be inconsistent with Article 8.3 but for Article 8.13.5(b).

ARTICLE 8.7: EXPROPRIATION AND COMPENSATION⁴

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

⁴ Article 8.7 shall be interpreted in accordance with Annexes 8-A and 8-B.

- (a) for a public purpose⁵;
 - (b) in a non-discriminatory manner;
 - (c) on payment of prompt, adequate, and effective compensation; and
 - (d) in accordance with the principle of due process of law embodied in the principal legal systems of the world.
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 (hereinafter referred to as 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 does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with Chapter 15 (Intellectual Property Rights).

⁵ The term “public purpose” is a concept of public international law and shall be interpreted in accordance with international law. Domestic law may express this or a similar concept using different terms, such as “social interest,” “public necessity,” or “public use.”

ARTICLE 8.8: TRANSFERS⁶

1. Each Party shall permit all transfers related to a covered investment to be made freely, and without undue 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;
- (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 8.6.1 and 8.6.2 and Article 8.7; and
- (f) payments arising out of a dispute.

2. Each Party shall permit transfers related 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 related 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 related 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 8.9: 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

⁶ For greater certainty, Annex 8-C shall apply to Article 8.8.

of an investor of a Party or of a non-Party, impose or enforce any requirement or enforce any commitment or undertaking⁷:

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

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 requirement:

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

3. (a) Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an

⁷ For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 2 does not constitute a “commitment or undertaking” for purposes of paragraph 1.

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 territory⁸.

- (b) Paragraph 1(f) shall not apply:
 - (i) when 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 Agreement; or
 - (ii) when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under the Party's competition laws⁹.
- (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 related to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

⁸ For greater certainty, nothing in paragraph 1 shall be construed to prevent a Party, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, from imposing or enforcing a requirement or enforcing a commitment or undertaking to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory, provided that such activity is consistent with paragraph 1(f).

⁹ The Parties recognize that a patent does not necessarily confer market power.

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 shall 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. For purposes of this Article, private parties include designated monopolies or state enterprises, where such entities are not exercising delegated governmental authority.

ARTICLE 8.10: SENIOR MANAGEMENT AND BOARDS OF DIRECTORS

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 8.11: 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 8.12: 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:

- (a) persons of a non-Party own or control the enterprise; and
- (b) 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. If, before denying the benefits of this Chapter, the denying Party knows that the enterprise has no substantial business activities in the territory of the other Party and that 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. If the denying Party provides such notice, it shall consult with the other Party at the request of the other Party.

ARTICLE 8.13: NON-CONFORMING MEASURES

1. Articles 8.3, 8.4, 8.9, and 8.10 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^{10 11};
 - (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 8.3, 8.4, 8.9, or 8.10.
2. Articles 8.3, 8.4, 8.9, and 8.10 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 8.3 and 8.4 shall not apply to any measure that is an exception to, or derogation from, the obligations under Article 15.4.2 (Basic Principles) as specifically provided in that Article.
5. Articles 8.3, 8.4, and 8.10 shall not apply to:
 - (a) government procurement; or
 - (b) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.

ARTICLE 8.14: SPECIAL FORMALITIES AND INFORMATION REQUIREMENTS

¹⁰ For Korea, **local level of government** means a local government as defined in the *Local Autonomy Act*.

¹¹ For greater certainty, for Colombia the *Departamentos* are part of the local level of government.

1. Nothing in Article 8.3 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 8.3 and 8.4, 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. 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 8.15: 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.

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 8.16: SETTLEMENT OF INVESTMENT DISPUTES BETWEEN A PARTY AND AN INVESTOR OF THE OTHER PARTY

1. This Section shall apply to disputes between a Party and an investor of the other Party concerning an alleged breach by the former Party of an obligation under Section A, provided that such breach causes loss or damage to the investor or its investments.

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 8.2, 8.11, and 8.14.1.

3. 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, unless one of the disputing parties has failed to comply with the court decision or arbitral award, under the terms established in the respective decision or arbitral award.

ARTICLE 8.17: CONSULTATION AND NEGOTIATION

1. Any dispute arising in accordance with Article 8.16.1 shall be settled, to the extent possible, by consultation and negotiation 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.
2. Nothing in this Section shall be construed as to prevent the disputing parties from referring their dispute, by mutual agreement, to *ad hoc* or institutional mediation or conciliation before or during an arbitral proceeding.

ARTICLE 8.18: SUBMISSION OF A CLAIM

1. If the dispute has not been settled within eight months from the date of notice of dispute, a claim may be submitted, at the discretion of the investor, to:
 - (a) any competent court or administrative tribunal of the Party to the dispute; or
 - (b) arbitration in accordance with this Section under:
 - (i) the ICSID Convention, if the ICSID Convention is available;
 - (ii) the ICSID Additional Facility Rules, if the ICSID Additional Facility Rules are available;
 - (iii) the UNCITRAL Arbitration Rules; or
 - (iv) if agreed by both parties to the dispute, any other arbitration institution or any other arbitration rules.
2. The respondent may require the claimant to initiate the domestic non-judicial administrative review procedure, in accordance with applicable laws and regulations of the respondent before submission of a claim for settlement under paragraph 1(b)¹².
3. The claimant may only submit a claim to arbitration if the term established in paragraph 1 has elapsed, and if the claimant has delivered to the respondent, at least 90 days before the claim to arbitration is submitted, a written notice of its intention to submit a claim to arbitration (notice of intent). Such a notice shall specify:
 - (a) the name and address of the claimant and its investment;
 - (b) the provisions of this Chapter alleged to have been breached and any other related provisions;

¹² Such procedure shall normally not exceed three months from the date of its initiation by the claimant and any decision made under the domestic administrative review procedure shall not prevent the claimant from submitting the investment dispute to the arbitration set out in paragraph 1.

- (c) the legal and factual basis for the claim; and
- (d) the relief sought, including the approximate amount of any damages claimed.

4. Once the investor has submitted the dispute to either a competent court or administrative tribunal of the Party, in whose territory the investment has been admitted, or any of the arbitration mechanisms set out in paragraph 1, the choice of the procedure shall be final and the investor shall not submit the same dispute to a different forum.

ARTICLE 8.19: CONSENT OF EACH PARTY TO ARBITRATION

Each Party hereby gives irrevocable consent to the submission of a dispute to international arbitration established in Article 8.18.1(b), in accordance with the procedures set out in this Agreement. The consent 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 with regards to the written consent of the parties to the dispute; and
- (b) Article II of the New York Convention for an “agreement in writing.”

ARTICLE 8.20: CONDITIONS AND LIMITATIONS ON CONSENT OF EACH PARTY

1. No claim may be submitted to arbitration under this Section if more than three years and six months have elapsed from the date the claimant first acquired, or should have first acquired, knowledge of the events which gave rise to the dispute and of the alleged losses and damages incurred by the claimant or its investment.
2. The seeking of interim injunctive relief not involving the payment of monetary damages, before judicial or administrative tribunals of the respondent, by the claimant for the preservation of its rights and interests pending resolution of the dispute, is not deemed to be a submission of the dispute for resolution for purposes of Article 8.18.4, and is permissible in arbitration under any of the provisions of Article 8.18.1(b).

ARTICLE 8.21: CONSTITUTION OF AN ARBITRAL TRIBUNAL

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. If a tribunal has not been constituted within the terms established under the applicable arbitration rules from 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.

2. 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.

3. The decision on any proposal by a disputing party to disqualify an arbitrator shall be taken by the Secretary-General. If it is decided that the disqualification proposal is well-founded the arbitrator shall be replaced.

4. The disputing parties may agree on the fees to be paid to the arbitrators. If the disputing parties do not reach an agreement on the fees to be paid to the arbitrators before the constitution of the tribunal, the fees established for arbitrators by ICSID shall apply.

ARTICLE 8.22: CONDUCT OF THE ARBITRATION

1. The disputing parties may agree on the legal place of any arbitration under the arbitral rules applicable under Article 8.18.1(b). If the disputing parties fail to reach an 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. Before ruling on the merits, the tribunal shall address and decide the preliminary questions that a dispute is not within the tribunal's competence or jurisdiction, or 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 8.26. When deciding on the objection of the respondent, the tribunal shall rule on the costs and attorney's fees incurred during the proceedings, considering whether or not the objection prevailed. The tribunal shall consider whether either the claim of the claimant or the objection of the respondent was frivolous, and shall provide the disputing parties a reasonable opportunity to comment. In the event of a frivolous claim or objection, the tribunal shall award costs and attorney's fees to the prevailing disputing party.

3. A respondent shall not assert as a defense, counter-claim, 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 indemnity, guarantee, or insurance contract, except with respect to any subrogation as provided for under Article 8.15.

4. In any arbitration conducted under this Section, at the request of a disputing party, the tribunal shall, before issuing a decision or award on liability, provide its draft decision or award to the disputing parties. Within 60 days thereafter, the disputing parties may submit written comments to the tribunal concerning any aspect of the draft decision or award. The tribunal shall consider any such comments and issue its decision or award no later than 45 days after the 60-day comment period expires.

ARTICLE 8.23: GOVERNING LAW

The dispute settlement mechanisms provided in this Section will be based on the provisions of this Agreement and applicable rules of international law.

ARTICLE 8.24: EXPERT REPORTS

Without prejudice to the designation of other kinds of experts as authorized by the applicable arbitration rule, a tribunal, at the request of a disputing party or 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 the terms and conditions agreed by the disputing parties.

ARTICLE 8.25: CONSOLIDATION

1. Where two or more claims have been submitted separately to arbitration under this Section, and the claims raised 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 set forth in 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, specifying:

- (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 in conformity with 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 consolidation order otherwise agree, the 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 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 respondent, 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 in accordance with Article 8.18 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 claims, the determination of which it considers would assist in the resolution of the other claims; or
- (c) instruct a tribunal previously established under Article 8.21 to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that:
 - (i) that tribunal, at the request of any claimant not previously a disputing party before that tribunal, shall be reconstituted with its original members, except that the arbitrator for the claimants shall be appointed pursuant to paragraphs 4 (a) and 5; and
 - (ii) that tribunal shall decide whether any previous hearing must be repeated.

7. Where a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration pursuant to Article 8.18 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 issued under paragraph 6, specifying:

- (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 provide the Secretary-General and the respondent with a copy of its request.

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

9. A tribunal established under Article 8.21 shall not have jurisdiction to decide a claim, or a part of a claim, over which a tribunal established or instructed under this Article has assumed jurisdiction.

10. On application of a disputing party, a tribunal established pursuant to this Article, pending its decision under paragraph 6, may order that the proceedings of a tribunal established under Article 8.21 be stayed, unless the latter tribunal has already adjourned its proceedings.

ARTICLE 8.26: AWARDS

1. A tribunal, in its award, shall set out its findings of law and fact, together with the reasons for its ruling, and may, at the request of the claimant, award the following forms of relief:

- (a) a declaration that the respondent has failed to comply with its obligations under this Agreement;
- (b) pecuniary compensation, which shall include applicable interest from the time the loss or damage was incurred until the payment was made;
- (c) restitution in kind as appropriate, in which case the award shall provide that the respondent may pay pecuniary compensation in lieu of restitution where the restitution is not practicable; and
- (d) with the agreement of the disputing parties, any other form of relief.

2. A tribunal may not award punitive damages.

3. A tribunal shall not be competent to rule on the legality of the measure as a matter of domestic law.

4. A tribunal shall be competent to rule on the consistency of the measures at issue with this Agreement and international law. For greater certainty, this shall not preclude any disputing party from submitting, as a matter of fact, evidence related to the legality of a measure under domestic law.

5. Arbitration awards shall be final and binding for the disputing parties, and each Party shall provide for the enforcement of an award in its territory. An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.

6. A disputing party may not request enforcement of the final award until:

- (a) in the case the final award was issued under the ICSID Convention,

- (i) 120 days have elapsed since the date the award was rendered and no disputing party has requested revision or annulment of the award; or
 - (ii) the proceedings of revision or annulment have been completed; and
- (b) in the case the final award was issued under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or the rules selected in accordance with Article 8.18.1.(b)(iv),
 - (i) 90 days have elapsed since 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 admitted an application to revise, set-aside, or annul the award, and there is no further appeal.

ARTICLE 8.27: SERVICE OF DOCUMENTS

Delivery of the notice of intent and other documents to a Party shall be made in the place designated by that Party in Annex 8-D.

SECTION C: DEFINITIONS

ARTICLE 8.28: DEFINITIONS

For purposes of this Chapter:

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 1.3 (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 means the International Centre for Settlement of Investment Disputes (ICSID) established by the ICSID Convention;

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 loans¹³;
- (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 domestic law¹⁴ ¹⁵; and
- (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges¹⁶.

But **investment** does **not** mean:

- (a) public debt operations¹⁷;

¹³ 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.

¹⁴ 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 domestic law. 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.

¹⁵ The term “investment” does not include an order or judgment entered in a judicial or administrative action.

¹⁶ For greater certainty, market share, market access, expected gains, and opportunities for profit-making are not, by themselves, investments.

¹⁷ Notwithstanding, public debt operations are subject to Articles 8.3 and 8.4. No award may be made in favor of a claimant for a claim under Article 8.18 with respect to default or non-payment of public debt operations, unless the claimant meets its burden of proving that such default or non-payment constitutes a breach of obligation under Article 8.3 or 8.4.

- (b) claims to money that arise solely from:
 - (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of the other Party;
 - (ii) the extension of credit in connection with a commercial transaction, such as trade financing; or
 - (iii) an order entered in a judicial or administrative action;

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 attempts to make¹⁸, 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;

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.

For greater certainty, a claim under Article 8.18 for breach of obligations under Article 8.3 or 8.4 with respect to default or non-payment of public debt operations shall be solely based in breach of obligations under such articles and shall not be based in breach of obligations under any other article of Section A such as Article 8.7.

¹⁸ 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.

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 economic rights and interests of aliens.

ANNEX 8-B

EXPROPRIATION

The Parties confirm their shared understanding that:

1. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right in an investment.
2. Article 8.7.1 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.
3. The second situation addressed by Article 8.7.1 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 related 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 expectations¹⁹; and
 - (iii) the character of the government action, including its objectives and context. Relevant considerations could include whether the investor bears a disproportionate burden²⁰ that exceeds what the investor or investment should be expected to endure for the public interest.
 - (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, the environment, and real estate price stabilization (through, for

¹⁹ 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 or whether at the time the investment was made the host Party had particular regulatory power over the relevant sector can be considered.

²⁰ In the case of the government action taken by Korea, whether a special sacrifice has been imposed on the particular investor or investment will be put into consideration.

example, measures to improve the housing conditions for low-income households), do not constitute indirect expropriations²¹.

²¹ For greater certainty, the list of “legitimate public welfare objectives” in subparagraph (b) is not exhaustive.

ANNEX 8-C TRANSFERS

1. Nothing in this Agreement 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 or external financial difficulties or threat thereof; or
- (b) where, in exceptional circumstances, payments and capital movements cause or threaten to cause serious difficulties for the operation of monetary policy or exchange rate policy in either Party.

2. The measures referred to in paragraph 1 shall:

- (a) not exceed a period of one year; however, under exceptional circumstances and for justified reasons a Party may extend the period for application of such measures for an additional year. The Party seeking an extension shall notify in advance to the other Party of such extension;
- (b) be consistent with the *Articles of Agreement of the International Monetary Fund*;
- (c) not exceed those necessary to deal with the circumstances described in paragraph 1;
- (d) be temporary and phased out progressively as the situation described in paragraph 1 improves;
- (e) not be confiscatory;
- (f) promptly be notified to the other Party;
- (g) be applied on a national treatment basis;
- (h) ensure that the other Party is treated as favorably as any non-Party;
- (i) not constitute a dual or multiple exchange rate practice;
- (j) 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*; and

- (k) not restrict outward payments or transfers associated with foreign direct investment²².

3. For the purpose of the present Annex, **foreign direct investment** means an investment of an investor of a Party other than a foreign credit, made in order to:

- (a) establish an enterprise in or increase the capital of an existing enterprise of the other Party; or
- (b) acquire equity of an existing enterprise of the other Party, but excludes such an investment that is of a purely financial character and is designed only to gain indirect access to the financial market of the other Party.

²² For greater certainty, the Parties may exercise any controls on inward capital transfers as are necessary to regulate international capital movements in accordance with the *Articles of Agreement of the International Monetary Fund*. Such measures may include controls, such as an obligation to deposit part of the amount of such transactions.

ANNEX 8-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:

International Legal Affairs Division
Ministry of Justice of the Republic of Korea
Government Complex-Gwacheon
Gwacheon-City, Gyeonggi-Do
427-720, Korea

Colombia

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

Dirección de Inversión Extranjera y Servicios
Ministerio de Comercio, Industria y Turismo
Calle 28 # 13 A – 15
Bogotá D.C., Colombia