

CHAPTER 7 INVESTMENT

Article 7.1: Definitions

covered investment means, with respect to a Party, an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter and which, where applicable, has been admitted according to its laws and regulations.¹

disputing parties means a disputing investor and a disputing Party;

disputing Party means a Party against which a claim is made under Article 7.19;

disputing party means a disputing investor or a disputing Party;

enterprise of a Party means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of that Party and carrying out business activities^{2,3,4}

freely usable currency means any currency that is widely used to make payments for international transactions and is widely traded in the principal exchange markets as determined by International Monetary Fund under its *Articles of Agreement* and any amendment thereto;

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*;

investment^{5,6,7} means every kind of asset that an investor owns or controls,

¹ For greater certainty, in the case of Indonesia, “admitted according to its laws and regulations” may include a requirement for specific approval in writing.

² A branch of an enterprise shall not make any claim against a Party under this Agreement.

³ For greater certainty, the inclusion of a “branch” in the definitions of “enterprise of a Party” is without prejudice to a Party’s ability to treat a branch under its laws as an entity that has no independent legal existence and is not separately organised.

⁴ A branch of a legal entity of a non-Party shall not be considered as an enterprise of a Party

⁵ Where an asset lacks the characteristics of an investment, that asset is not an investment regardless of the form it may take.

⁶ The term “investment” does not include an order or judgment entered in a judicial or administrative action.

⁷ For purpose of the definition of investment in this Article, returns that are invested shall be treated as investments and any alteration of the form in which assets are invested or reinvested shall not affect their character as investments.

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 loan^{8, 9};
- (d) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- (e) intellectual property rights;
- (f) licenses, authorizations, permits, and similar rights conferred pursuant to a Party's law¹⁰; and
- (g) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges¹¹.

For greater certainty, investment does not mean claims to money that arise solely from:

- (a) commercial contracts for sale of goods or services; or
- (b) the extension of credit in connection with such commercial contracts.

investor of a non-Party means, with respect to a Party, an investor that has made an investment in the territory of that Party, that is not an investor of

⁸ Some forms of debt, such as bonds, debentures and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.

⁹ A loan issued by one Party to the other Party is not an investment.

¹⁰ 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 Party's law. Among such instruments that do not have the characteristics of an investment are those that do not create any rights protected under the Party's law. For greater certainty, the foregoing is without prejudice to whether any asset associated with such instruments has the characteristics of an investment.

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

either Party;

investor of a Party means a natural person or an enterprise of a Party that is seeking to make¹², is making, or has made an investment in the territory of the other Party;

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

UNCITRAL Arbitration Rules means the arbitration rules of the *United Nations Commission on International Trade Law* adopted by *United Nations General Assembly* on 28 April 1976.

Article 7.2: Scope and Coverage

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

- (a) investors of the other Party; and
- (b) covered investments.

2. For greater certainty, this Chapter does not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.

3. For purposes of this Chapter, measures adopted or maintained by a Party means measures adopted or maintained by:

- (a) central, regional, or local governments and authorities; and
- (b) non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities.

4. This Chapter does not apply to:

- (a) government procurement;
- (b) subsidies or grants provided by a Party;
- (c) any taxation measure, except under Article 7.11 and Article

¹² For greater certainty, the Parties understand that an investor that “is seeking to make” an investment refers to an investor of a Party that has taken active steps to initiate a notification or approval process, where applicable, for making an investment.

7.12;

- (d) services supplied in the exercise of governmental authority such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, provided that such services are supplied neither on a commercial basis, nor in competition with one or more service suppliers; or
- (e) measures adopted or maintained by a Party to the extent that they are covered by Chapter Six (Trade in Services).

5. Notwithstanding paragraph 4(e), Article 7.6, Article 7.7, Article 7.11, Article 7.12¹³, Article 7.13, and Article 7.19 shall apply, *mutatis mutandis*, to any measure affecting the supply of service by a service supplier of a Party through commercial presence¹⁴ in the territory of the other Party pursuant to the provisions of Chapter Six (Trade in Services), only to the extent that they constitute a covered investment.¹⁵

Article 7.3: Relations to Other Chapters

1. In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.
2. A requirement by a Party that a service supplier of the other Party post a bond or other form of financial security as a condition of the cross-border supply of a service does not of itself make this Chapter applicable to measures adopted or maintained by the Party relating to such cross-border supply of the service. This Chapter 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 Six (Trade in Services).

Article 7.4: National Treatment

¹³ For greater certainty, Annex 7-B applies to Article 7.12.

¹⁴ For greater certainty, commercial presence shall have the same meaning as that in Chapter Six (Trade in Services).

¹⁵ For greater certainty, this paragraph shall not be interpreted as extending the scope and coverage of application of Article 7.19.

1. Each Party shall accord to investors of the other Party, and to covered investments of investors of the other Party, treatment no less favorable than that it accords, in like circumstances,¹⁶ to its own investors and investments with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. The treatment to be accorded by a Party under paragraph 1 means, with respect to a regional level of government, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that regional level of government to investors, and to investments of investors, of the Party of which it forms a part.

Article 7.5: Most-Favored-Nation Treatment¹⁷

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.

3. For greater certainty, the treatment referred to in this Article does not encompass international dispute resolution procedures or mechanisms, such as those included in Article 7.19.

Article 7.6: Treatment of Investment¹⁸

1. Each Party shall accord to covered investments fair and equitable treatment and full protection and security, in accordance with customary international law minimum standard of treatment of aliens.

¹⁶ For greater certainty, whether the treatment is accorded in “like circumstances” under Article 7.4 or Article 7.5 depends on the totality of the circumstances including, but not limited to, whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.

¹⁷ For greater certainty, Article 7.5 shall not apply to investor-state dispute settlement mechanisms such as those set out in Article 7.19.

¹⁸ Article 7.6 shall be interpreted in accordance with Annex 7-A.

2. For greater certainty:
 - (a) fair and equitable treatment requires each Party not to deny justice in any legal or administrative proceedings;
 - (b) full protection and security require each Party to take such measures as may be reasonably necessary to ensure the physical protection and security of the covered investment; and
 - (c) the concepts of “fair and equitable treatment” and “full protection and security” do not require treatment to covered investments in addition to or beyond that which is required under customary international law minimum standard of treatment of aliens, and do not create additional substantive rights.
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 7.7: Compensation for Losses

1. A Party shall accord to investors of the other Party whose covered investment suffered losses due to war or other armed conflict, state of national emergency, riot or other civil strife, treatment no less favorable than that accorded, in like circumstances, to its own investors or investors of a non-Party whichever is more favorable, relating to restitution, indemnification, compensation or any other forms of settlement.
2. An investor of a Party who in any of the events referred to in paragraph 1 suffers loss resulting from:
 - (a) requisitioning of its investment or part thereof by the forces or authorities of the other Party; or
 - (b) destruction of its investment or part thereof by the forces or authorities of the other Party, which was not required by the necessity of the situation;

shall in any case be accorded by the latter Party restitution or compensation which in either case shall be prompt, adequate and effective and, with respect to compensation, shall be accordance with Article 7.12.

Article 7.8: Performance Requirements^{19, 20, 21}

1. Neither Party shall impose or enforce any of the following requirements, 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:

- (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 investments of the investor;
- (d) to restrict sales of goods in its territory that such investment of the investor produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
- (e) to export a given level or percentage of goods;
- (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 to a specific regional market or to the world market.

2. Paragraph 1 does not preclude either Party from conditioning the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of a Party or of a non-Party, on compliance with any of the requirements set forth in subparagraphs 1(e) through (g).

Article 7.9: Senior Management and Boards of Directors

¹⁹ This Article shall not preclude enforcement of any requirement between private parties, if a Party did not impose the requirement. For purposes of this Article, private parties include designated monopolies or state enterprises, if such entities are not exercising delegated governmental authority.

²⁰ For greater certainty, paragraphs 1 and 2 shall not apply to any requirement other than those set out in those paragraphs.

²¹ This Article shall not be subject to Article 7.19.

1. A Party shall not require 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 7.10: Non-Conforming Measures

1. Articles 7.4, Article 7.5, Article 7.8, and Article 7.9 shall not apply to:

- (a) any existing non-conforming measure that is maintained by a Party at:
 - (i) the central level of government as set out by that Party in its Schedule to Annex I;
 - (ii) a regional level of government as set out by that Party in its Schedule to Annex I; or
 - (iii) a local level of government²²;
- (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 at the date of entry into force of the Party's Schedule to Annex I with Article 7.4, Article 7.5, Article 7.8, and Article 7.9.

2. Article 7.4, Article 7.5, Article 7.8, and Article 7.9 shall not apply to any measures that a Party adopts or maintains with respect to sectors, sub-sectors 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

²² For Korea, local level of government means a local government as defined in the *Local Autonomy Act*.

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 and, where applicable, unless otherwise specified in the initial approval by the relevant authorities.

4. Nothing in this Chapter shall be construed so as to derogate from rights and obligations under international agreements in respect of protection of intellectual property rights to which the Parties are party, including the TRIPS Agreement and other treaties concluded under the auspices of the World Intellectual Property Organization.

Article 7.11: Transfers²³

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

- (a) the initial capital and additional amounts to maintain or increase an investment;
- (b) profits, dividends, interest, capital gains, royalty payments, license fees, technical assistance fees, management fees and other current income accruing from any covered investment;
- (c) proceeds from the total or partial sale or liquidation of all or any part of the covered investment;
- (d) payments made under a contract, including a loan agreement;
- (e) payments made pursuant to Article 7.7 and Article 7.12; and
- (f) payments arising out of the settlement of a dispute.

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

3. Notwithstanding paragraphs 1 and 2, a Party may prevent a transfer through the equitable, non-discriminatory, and good faith application of its laws and regulations relating to:

- (a) bankruptcy, insolvency, or the protection of the rights of creditors;

²³ For greater certainty, Annex 7-C applies to this Article.

- (b) issuing, trading, or dealing in securities, futures, options, or derivatives;
- (c) criminal or penal offences;
- (d) ensuring compliance with the judgments in judicial or administrative proceedings;
- (e) financial reporting or record keeping of transfers including capital movements and payments when necessary to assist law enforcement or financial regulatory authorities;
- (f) taxation; or
- (g) severance entitlement of employees.

Article 7.12: Expropriation and Compensation

1. A Party shall not nationalize or expropriate covered investments of an investor of the other Party, either directly or through measures equivalent to expropriation or nationalization (referred hereto as “expropriation”), except:

- (a) for public purpose;
- (b) in accordance with due process of law;
- (c) on a non-discriminatory basis; and
- (d) upon payment of prompt, adequate and effective compensation.

2. For purposes of paragraph 1(d), compensation shall:

- (a) be equivalent to the fair market value of the expropriated investment at the time when the expropriation was publicly announced, or immediately before or when the expropriation occurred, whichever is applicable;²⁴
- (b) not reflect any change in value occurring because the intended expropriation had become known earlier;

²⁴ Where there is a dispute about whether a government conduct amounts to indirect expropriation within the meaning of this Article, the fact that compensation has not been paid while that dispute remains unresolved does not render that conduct inherently unlawful if it is subsequently found to constitute indirect expropriation within the meaning of this Article.

- (c) be settled and paid without undue delay²⁵; and
- (d) be effectively realizable and freely transferable between the territories of the Parties.

3. The compensation referred to in paragraph 1(d) shall include appropriate interest.

4. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights under the TRIPS Agreement.

Article 7.13: Subrogation

1. If a Party or designated agency of a Party makes a payment to an investor of that Party under a guarantee, a contract of insurance or other form of indemnity it has granted on non-commercial risk in respect of a covered investment, the other Party in whose territory the covered investment was made shall recognize the subrogation or transfer of any rights the investor would have possessed under this Chapter with respect to the covered investment but for the subrogation, and the investor shall be precluded from pursuing these rights to the extent of the subrogation.

2. The subrogated or transferred right or claim shall not be greater than the original right or claim of the investor.²⁶

Article 7.14: Special Formalities and Treatment of Information

1. Nothing in Article 7.4 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with establishment of investments by investors of the other Party, such as the requirement that investments be legally constituted under the laws or regulations of the Party and compliance with registration requirements, provided that such formalities do not materially impair the rights afforded by a Party to investors of the other Party and investments of investors of the other Party pursuant to this Agreement.

²⁵ The Parties understand that there may be legal and administrative processes that need to be observed before payment can be made.

²⁶ This, however, does not necessarily imply recognition of the latter Party of the merits of any case or the amount of any claims arising therefrom.

2. Notwithstanding Article 7.4 and Article 7.5, a Party may require an investor of the other Party, or its investment in its territory, to provide routine information concerning that investment solely for information or statistical purposes. The Party shall protect any confidential information which has been provided from any disclosure that would prejudice legitimate commercial interests of the investor and its covered investment, or 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 7.15: Denial of Benefits

A Party may deny the benefits of this Chapter:

- (a) to an investor of the other Party that is an enterprise of the other Party and to investments of that investor if:
 - (i) persons of a non-Party, or of the denying Party own or control the enterprise; and
 - (ii) the enterprise has no substantial business activities in the territory of the other Party;
- (b) to an investor of the other Party that is an enterprise of the other Party and to investments of that investor if:
 - (i) persons of a non-Party own or control the enterprise; and
 - (ii) 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; or
- (c) to an investor of the other Party if a person of a non-Party owns or controls the enterprise and the denying Party does not maintain diplomatic relations with that non-Party.

Article 7.16: Environmental Measures

Each Party recognizes that it is inappropriate to encourage investments by investors by relaxing its environmental measures. To this effect, each Party should not waive or otherwise derogate from such environmental measures as an encouragement for establishment, acquisition or expansion of investments in its territory.

Article 7.17: Investment Promotion

The Parties recognize the importance of promoting cross-border investment and technology flows as a means for achieving economic growth and development through, *inter alia*:

- (a) identifying investment opportunities and providing information on investment regulations;
- (b) sharing of experiences and best practices on investment promotion;
- (c) the furthering of a legal environment conducive to increased investment flows; and
- (d) developing investments partnership, in particular with small and medium enterprises.

Article 7.18: Corporate Social Responsibility

Each Party reaffirms the importance of encouraging enterprises operating within its territory to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines, and principles of corporate social responsibility that have been endorsed or are supported by that Party.

Article 7.19: Investor-State Dispute Settlement

1. This Article shall apply to investment disputes between a Party and an investor of the other Party concerning an alleged breach of Article 7.4, Article 7.5, Article 7.6, Article 7.7, Article 7.9, Article 7.11 and Article 7.12 which causes loss or damage by reason of, or arising out of, that breach to:

- (a) the investor in relation to its covered investments; or
- (b) the covered investment that has been made by that investor, relating to the management, conduct, operation or sale or other disposition of a covered investment.

2. An investment may not make a claim under this Article.
3. Without prejudice to the scope of any applicable exceptions, non-conforming measures, principles of international law or the disputing Party's ability to rely on such exceptions, non-conforming measures or principles of international law during the proceedings, no claim may be brought under this Article:
- (a) in relation to an alleged breach of Most-Favored-Nation treatment as referred to in Article 7.5 on the basis that another international agreement contains more favorable rights or obligations. For greater certainty, this shall not prevent a claim challenging measures of a Party, including measures taken pursuant to another international agreement, on the basis that those measures breach Article 7.5 and have resulted in loss or damage to the disputing investor;
 - (b) in relation to a measure that is designed and implemented to protect or promote public health;²⁷
 - (c) in relation to an investment that has been established through illegal conduct including fraudulent misrepresentation, concealment or corruption. For greater certainty, this exclusion does not apply to investments established through minor or technical breaches of law;
 - (d) in relation to investment disputes which have occurred prior to the entry into force of this Agreement;
 - (e) if the claim is frivolous or manifestly without merit;
 - (f) by a natural person possessing the nationality or citizenship of a disputing Party.
4. In the event of an investment dispute arising under this Article, the disputing parties shall as far as possible resolve the dispute through consultation and negotiation, a request of which shall be made in writing, with a view towards reaching an amicable settlement.
5. The written request for consultations shall contain information regarding the legal and factual basis for the investment dispute, including the name and address of the disputing investor, the provisions of this Agreement

²⁷ For Indonesia, measures include those comprising or relating to the Indonesia Health Service Scheme.

alleged to have been breached, the relief sought and the estimated amount of damages claimed, and evidence establishing that the claimant is an investor of the other Party and that it owns or controls the investments.

6. In the case that consultations take place in accordance with this Article, the consultations shall commence, unless the disputing parties agree to a longer period, within 60 days of the submission of the request for consultations. The place of consultation shall be Seoul where the disputing Party is Korea or Jakarta where the disputing Party is Indonesia.

7. If the dispute cannot be resolved within 180 days from the receipt by the disputing Party of the written request for consultations, the disputing Party may initiate a mediation process, which shall be mandatory for the disputing investor, with a view towards reaching an amicable settlement. Such a mediation process shall be initiated by a written request delivered by the disputing Party to the disputing investor.

8. The mediation process under this Article can only be initiated by a written request delivered by the disputing Party within 180 days from the receipt by the disputing Party of the written request for consultations.

9. Expenses incurred in relation to the mediation process shall be borne equally by the disputing parties. Each disputing party shall bear its own legal expenses.

10. Any such dispute which has not been resolved by consultations in accordance with paragraph 5 and paragraph 6 or by mediation in accordance with paragraph 7 to paragraph 9 may be submitted to the courts or administrative tribunals of the disputing Party provided that such courts or tribunals have jurisdictions over such claims or to arbitration. In the latter event, the investor has the choice among any of the following:

- (a) the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the disputing Party and the non-disputing Party are parties to the ICSID Convention;
- (b) the ICSID Additional Facility Rules, provided that either the disputing Party or the non-disputing Party, but not both, is a party to the ICSID Convention;
- (c) the UNCITRAL Arbitration Rules; or
- (d) any other arbitration institution or any other arbitration rules, if the disputing parties so agree.

11. The applicable arbitration rules shall govern the arbitration set forth in paragraph 10 unless they are modified by this Article.

12. Once the investor has submitted the dispute to either the courts or administrative tribunals of the disputing Party or any of the arbitration mechanisms provided for in paragraph 10, the choice of forum shall be final.

13. The submission of a dispute to arbitration under paragraph 10 shall be conditional upon:

- (a) the submission of the dispute to such arbitration taking place within three years and six months of the time at which the disputing investor become aware, or should reasonably have become aware, of a breach of an obligation under this Agreement and, of the loss or damage incurred by the disputing investor in relation to its covered investment or by the covered investment;
- (b) the disputing investor providing written notice, which shall be delivered at least 90 days before the claim to arbitration is submitted, to the disputing Party of its intent to submit the dispute to such arbitration and which:
 - (i) states the name and address of the disputing investor and the covered investment;
 - (ii) nominates one of the fora in paragraph 10(a), (b), (c), or (d) as the forum for dispute settlement;
 - (iii) waives its right to initiate any proceedings, before any of the other dispute settlement procedures referred to in paragraph 10 in relation to the matter under dispute; and
 - (iv) briefly summaries the alleged breach of the disputing Party under this Agreement (including the articles alleged to have been breached) and the loss or damage allegedly caused to the investor in relation to its covered investment or caused to the covered investment; or
- (c) the disputing parties spending at least 120 days on that process and the disputing investor providing written notice, which shall be delivered at least 60 days before the claim to arbitration is submitted, to the disputing Party of its intent to submit the dispute to such arbitration and which specifies the

information referred to paragraph 13(b), should the disputing Party initiate a mediation process in accordance with paragraph 7.

14. Notwithstanding paragraph 13(b), the disputing investor may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages or resolution of the substance of the matter in dispute before a court or administrative tribunals of the disputing Party, provided that the action is brought for the sole purpose of preserving the disputing investor's rights and interests during the pendency of the arbitration.

15. An investor of a Party may not initiate or continue a claim under this Article if a claim involving the same measure or measures alleged to constitute a breach under paragraph 1 and arising from the same events or circumstances is initiated or continued pursuant to an agreement between the disputing Party and a non-Party by:

- (a) a person of a non-Party that owns or controls, directly or indirectly, the investor of a Party; or
- (b) a person of a non-Party that is owned or controlled, directly or indirectly, by the investor of a Party.

16. Each Party consents to the submission of a claim to arbitration under this Article in accordance with this Agreement. The consent and the submission of a claim to arbitration under this Article shall be deemed to satisfy the requirement of:

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

17. The arbitral tribunal established under paragraph 10 shall decide the issues in dispute in accordance with this Agreement, any relevant rules of international law applicable in the relations between the Parties and, if applicable, any relevant domestic law of the disputing Party when it is relevant to the claim as a matter of fact.

18. If issues relating to jurisdiction or admissibility are raised as preliminary objections, the tribunal shall decide the matter before proceeding to the merits. The disputing parties shall be given a reasonable opportunity to present their views and observations to the tribunal. If the tribunal decides that the claim is manifestly without merit, or is otherwise not within the

jurisdiction or competence of the tribunal, it shall render an award to that effect.

19. Unless the disputing parties otherwise agree, the arbitral 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 75 days from the date a claim is submitted to arbitration under this Article, the Appointing Authority²⁸, at the request of a disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed. The Appointing Authority shall not appoint a national of either Party as the presiding arbitrator, unless the disputing parties otherwise agree.

20. Arbitrators shall have expertise or experience in public international law, international trade or international investment rules and be independent of, and not be affiliated with or take instructions from the disputing Party, the non-disputing Party or disputing investor.

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

- (a) the 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) the disputing investor may submit a claim to arbitration under this Article, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the disputing investor agrees in writing to the appointment of each individual member of the tribunal.

22. Unless the disputing parties otherwise agree, the tribunal shall determine the place of arbitration in accordance with the applicable arbitration rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.

23. Subject to subparagraphs (a) and (b), the disputing parties shall make publicly available all awards and decisions produced by the tribunal.

²⁸ Appointing Authority means:

- (i) in the case of arbitration under Article 7.5, the Secretary General of ICSID;
- (ii) in the case of arbitration under Article 7.5, the Secretary General of the Permanent Court of Arbitration; or
- (iii) any person as agreed between the disputing parties.

- (a) Any of the disputing parties that intend to use information designated as confidential information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.
- (b) Any information specifically designated as confidential that is submitted to the tribunal or the disputing parties shall be protected from disclosure to the public.

24. A disputing party may disclose to persons directly connected with the arbitral proceeding such confidential information as it considers necessary for the preparation of its case, but it shall require such confidential information is protected.

25. The tribunal shall not require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law or which it determines to be contrary to its essential security.

26. The non-disputing Party shall be entitled, at its cost, to receive from the disputing Party a copy of the notice of arbitration, no later than 30 days after the date that such document has been delivered to the disputing Party. The disputing Party shall notify the other Party of the receipt of the notice of arbitration within 30 days thereof.

27. The disputing Party may not assert as a defense, counter-claim, right of set-off or for any other reason, that the disputing investor has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract, except with respect to any subrogation as provided for in Article 7.13.

28. If a tribunal makes a final award against either of the disputing parties, the tribunal may award, separately or in combination only:

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

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

30. A Party shall not give diplomatic protection, or bring an international claim, in respect of a dispute which one of its investors and the other Party have submitted to arbitration under this Article, unless the other Party has

failed to abide by and comply with the award rendered in such dispute. Diplomatic protection, for purposes of this paragraph, shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

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

32. Subject to paragraph 33 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.

33. 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, the UNCITRAL Arbitration Rules, or the rules selected pursuant to paragraph 10(d),
 - (i) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside, or annul the award; or
 - (ii) a court has dismissed or allowed an application to revise, set aside, or annul the award and there is no further appeal.

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

ANNEX 7-A
Customary International Law

The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Article 7.6, including in relation to the customary international law minimum standard of treatment, results from a general and consistent practice of States that they follow from a sense of legal obligation.

ANNEX 7-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 7.12.1 addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.
- 3 The second situation addressed by Article 7.12.1 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
 - (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
 - (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
 - (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations²⁹; and
 - (iii) the character of the government action, including its objectives, context and whether the action is disproportionate to the public purpose³⁰.

²⁹ For greater certainty, whether investors of investment-backed expectations are reasonable depends, to the extent relevant, on factors such as whether the government provided the investors with binding written assurances, and the nature and extent of governmental regulations or the potential for governmental regulations in the relevant factors.

³⁰ For Korea, a relevant consideration could include whether the investor bears a disproportionate burden such as a special sacrifice that exceeds what the investor or investment should be expected to endure for the public interest.

- (b) 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 do not constitute indirect expropriations³¹.

³¹ For greater certainty, the list of "legitimate public welfare objectives" in paragraph 3(b) is not exhaustive.

ANNEX 7-C

Temporary Safeguard Measures

1. Nothing in this Chapter, Chapter Six (Trade in Services), or Annex 6-A (Financial Services) shall be construed to prevent a Party from adopting or maintaining temporary safeguard measures with regard to transfer, including payment and capital movements, or restrictions on trade in services on which it has undertaken specific commitments:

- (a) in the event of serious balance of payments and external financial difficulties or under threat thereof; or
- (b) in cases where, in exceptional circumstances, payments and capital movements cause or threaten to cause serious economic or financial disturbance or serious difficulties for the operation of monetary or exchange rate policies in the Party concerned³².

2. The measures referred to in paragraph 1:

- (a) are in effect for a period not to exceed one year, and can be renewed should the conditions in paragraph 1 continue to exist;
- (b) are not confiscatory;
- (c) do not constitute a dual or multiple exchange rate practice;
- (d) shall not be adopted or maintained solely for purpose of affecting investor's ability to earn a market rate of return in the territory of the Party³³;
- (e) shall be consistent with the Articles of Agreement of the International Monetary Fund, as may be amended;
- (f) avoid unnecessary damage to the commercial, economic and financial interests of the other Party;
- (g) avoid unnecessary damage to investors and covered investments of the other Party;

³² For greater certainty, any measures taken to ensure the stability of the exchange rate including to prevent speculative capital flows shall not be adopted or maintained for purpose of protecting a particular sector.

³³ For greater certainty, any inadvertent impact of the measures referred to in paragraph 1 on the economic value of an investment, standing alone, shall not be considered as affecting investor's ability to earn a market rate of return.

- (h) shall not exceed those necessary to deal with the circumstances described in paragraph 1;
- (i) are temporary and phased out progressively as the situation specified in paragraph 1 improves;
- (j) are applied in a manner consistent with a non-discriminatory basis such that no Party is treated less favorably than a non-Party, and on a national treatment basis; and
- (k) shall be promptly notified to the other Party.

Nothing in this Chapter, Chapter Six (Trade in Services), or Annex 6-A (Financial Services) shall be regarded as altering the rights enjoyed and obligation undertaken by a Party as a party to the *Articles of Agreement of the International Monetary Fund*.