

## **CHAPTER NINE INVESTMENT**

### **SECTION A: INVESTMENT**

#### **ARTICLE 9.1: SCOPE OF APPLICATION**

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 9.7 and 9.9, all investments in the territory of the Party.
2. For greater certainty, this Chapter does not bind a 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. A Party's obligations under this Section shall apply to non-governmental bodies<sup>1</sup> when they exercise any regulatory, administrative, or other governmental authority delegated to them by that Party, such as the authority to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges.

#### **ARTICLE 9.2: RELATION TO OTHER CHAPTERS**

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

#### **ARTICLE 9.3: NATIONAL TREATMENT**

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment,

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<sup>1</sup> For purposes of this Chapter, the term "non-governmental bodies" includes state enterprises.

acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

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

#### ARTICLE 9.4: MOST-FAVORED-NATION TREATMENT<sup>2</sup>

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 a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

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

#### ARTICLE 9.5: MINIMUM STANDARD OF TREATMENT

1. Each Party shall accord to covered investments treatment in accordance with customary international law minimum standard of treatment of aliens<sup>3</sup>, including fair and equitable treatment and full protection and security.

2. The concepts of “fair and equitable treatment” and “full protection and security” in paragraph 1 do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

- (a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
- (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.

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<sup>2</sup> For greater certainty, Article 9.4 shall be interpreted in accordance with Annex 9A.

<sup>3</sup> Customary international law results from a general and consistent practice of States that they follow from a sense of legal obligation. Regarding Article 9.5, 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.

#### ARTICLE 9.6: 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 9.7: PERFORMANCE REQUIREMENTS

1. Neither Party may impose or enforce any requirement, or enforce any commitment or undertaking<sup>4</sup>, 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 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 or services provided in its territory, or to purchase goods or services 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 provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
  - (f) to transfer technology<sup>5</sup>, a production process, or other proprietary knowledge to a person in its territory; or

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<sup>4</sup> For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 3 shall not constitute a “commitment or undertaking” for purposes of paragraph 1.

<sup>5</sup> 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 in its territory of an investor of a Party or of a non-Party, from imposing or enforcing a requirement or enforcing a commitment or undertaking to train workers in its territory, provided that such training does not require the transfer of a particular technology, a production process, or other proprietary knowledge to a person in its territory.

- (g) to supply exclusively from the territory of the Party the goods that such investment produces or the services that such investment provides to a specific regional market or to the world market.

2. A measure that requires an investment to use a technology to meet generally applicable health, safety, or environmental requirements shall not be construed to be inconsistent with paragraph 1(f). For greater certainty, Articles 9.3 and 9.4 apply to the measure.

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

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

4. (a) Nothing in paragraph 3 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

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

- (i) a Party authorizes use of an intellectual property right in accordance with Article 31 of the TRIPS Agreement, and 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) the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority, to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement.<sup>6</sup>

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

- (c) Provided that such measures are not applied in an arbitrary, discriminatory, 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 3(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) necessary to the conservation of living or non-living exhaustible natural resources.

5. Paragraphs 1 and 3 shall not apply to any commitment, undertaking, or requirement other than those set out in those paragraphs.

6. The provisions of:

- (a) paragraphs 1(a), (b), and (c), and 3(a) and (b) shall not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs;
- (b) paragraphs 1(b), (c), (f), and (g), and 3(a) and (b) shall not apply to procurement as defined in Article 16.20 (Definitions); and
- (c) paragraphs 3(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.

7. Nothing in this Article shall be construed to derogate from the rights and obligations of the Parties under the TRIMs Agreement.

8. This Article does not preclude enforcement of any commitment, undertaking, or requirement between private parties, where a Party did not impose or require the commitment, undertaking, or requirement.

#### ARTICLE 9.8: NON-CONFORMING MEASURES

1. Articles 9.3, 9.4, 9.6, and 9.7 do not apply to:

- (a) any existing non-conforming measure that is maintained by a Party at:
  - (i) the central level of government, as set out by that Party in its Schedule set out in Annex I; or
  - (ii) a local level of government;

- (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
- (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Article 9.3, 9.4, 9.6, or 9.7.

2. Articles 9.3, 9.4, 9.6, and 9.7 do not apply to measures that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule set out in 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 set out in Annex II, require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

4. Articles 9.3 and 9.4 do not apply to any measure that is an exception to, or derogation from, a Party's obligations under the TRIPS Agreement, as specifically provided in that agreement.

5. Articles 9.3, 9.4, and 9.6 shall not apply to:

- (a) procurement as defined in Article 16.20 (Definitions); or
- (b) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.

#### ARTICLE 9.9: HEALTH, SAFETY, AND ENVIRONMENTAL MEASURES

1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

2. The Parties recognize that it is inappropriate to encourage investment by relaxing their health, safety, or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion, or retention in its territory of an investment of an investor. If a Party considers that the other Party has offered such encouragement, the Parties shall consult, upon request, with a view to avoiding any such encouragement.

#### ARTICLE 9.10: SPECIAL FORMALITIES AND INFORMATION REQUIREMENTS

1. Nothing in Article 9.3 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered

investments, such as a requirement that covered investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not materially impair the protections afforded by a Party to investors of the other Party and covered investments in accordance with this Chapter.

2. Notwithstanding Articles 9.3 and 9.4, a Party may require an investor of the other Party or its covered investments to provide information on 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 9.11: COMPENSATION FOR LOSSES

1. Each Party shall accord to investors of the other Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains related to losses suffered by investments in its territory owing to armed conflict or civil strife.

2. Paragraph 1 shall not apply to existing measures related to subsidies or grants that would be inconsistent with Article 9.3 but for Article 9.8.5(b).

#### ARTICLE 9.12: EXPROPRIATION<sup>7</sup>

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

- (a) for a public purpose<sup>8</sup>;
- (b) in a non-discriminatory manner;
- (c) on payment of prompt, adequate, and effective compensation; and
- (d) in accordance with due process of law and Article 9.5.

2. The compensation referred to in paragraph 1(c) shall:

- (a) be paid without delay;
- (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“date of expropriation”);

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<sup>7</sup> Article 9.12 shall be interpreted in accordance with Annex 9B.

<sup>8</sup> The term “public purpose” is a treaty term to be interpreted in accordance with international law. It is not meant to create any inconsistency with the same or similar concepts in the domestic law of the Parties, such as “national security” or “public necessity.”

- (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. The investor affected shall have a right, under the law of the Party making the expropriation, to promptly review, by a judicial or other independent authority of that Party, its case and the valuation of its investment in accordance with the principles set out in this Article.

6. 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 Seventeen (Intellectual Property Rights).

#### ARTICLE 9.13: TRANSFERS<sup>9</sup>

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

- (a) contributions to capital, including the initial contribution;
- (b) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance, and other fees, returns in kind, and other amounts derived from the investment;
- (c) proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;

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<sup>9</sup> For greater certainty, Annex 9C applies to this Article.



- (d) payments made under a contract entered into by the investor, or the covered investment, including payments made pursuant to a loan agreement;
  - (e) payments made in accordance with Articles 9.11 and 9.12; and
  - (f) payments arising under Section B.
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. Notwithstanding paragraphs 1 and 2, 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 judgements in judicial or administrative proceedings.
4. Neither Party may require its investors to transfer or penalize its investors that fail to transfer the income, earnings, profits, or other amounts derived from, or attributable to, investments in the territory of the other Party.
5. Paragraph 4 shall not be construed to prevent a Party from imposing any measure through the equitable, non-discriminatory, and good faith application of its laws related to the matters set out in subparagraphs (a) through (e) of paragraph 3.
6. Notwithstanding paragraph 1, a Party may restrict transfers in kind in circumstances where it could otherwise restrict transfers under this Agreement and as set out in paragraph 3.

#### ARTICLE 9.14: DENIAL OF BENEFITS

Subject to prior notification and consultations, and in accordance with the procedures set out in Article 21.2 (Notification and Provision of Information), a Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such Party and to investments of such investor where the Party establishes that the enterprise is owned or controlled by persons of a non-Party, or of the denying Party, and has no substantive business operations in the territory of the other Party.

#### ARTICLE 9.15: SUBROGATION

1. If 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 it has granted in respect of an investment of an investor of that Party, the other Party shall recognize the subrogation or transfer of any right or claim in respect of such investment. The subrogated or transferred right or claim shall not be greater than the original right or claim of the investor.

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

## **SECTION B: SETTLEMENT OF DISPUTES BETWEEN AN INVESTOR AND THE HOST PARTY**

### **ARTICLE 9.16: INVESTOR-STATE DISPUTE SETTLEMENT**

1. This Article shall apply to disputes between a Party and an investor of the other Party concerning an alleged breach of an obligation of the former Party under this Chapter, which causes loss or damage to the investor or its investments.

2. The disputing parties shall initially seek to resolve the dispute by consultations and negotiations, which may include the use of non-binding third-party procedures.

3. Any such dispute which has not been settled within a period of six months from the date of request for consultations and negotiations may be submitted to the courts or administrative tribunals of the Party concerned 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 Party of the disputing investor are parties to the ICSID Convention;
- (b) the *ICSID Additional Facility Rules*, provided that either the disputing Party or the Party of the disputing investor, 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 disputing parties so agree.

4. 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 3, the choice of the procedure shall be definitive and exclusive.

5. Each Party hereby consents to the submission of a dispute to arbitration under paragraphs 3(a), (b), and (c) in accordance with this Article, provided that:<sup>10</sup>

- (a) the submission of the dispute to such arbitration takes place within three years from the date on which the disputing investor became aware, or should reasonably have become aware, of a breach of an obligation under this Chapter and of the loss or damage incurred by the disputing investor or its investment; and
- (b) the disputing investor gives written notice which shall be delivered at least 90 days before the claim to arbitration is submitted, to the disputing Party of its intention to submit the dispute to such arbitration and which<sup>11</sup>:
  - (i) states the name and address of the disputing investor;
  - (ii) selects one of the fora in paragraph 3 as the forum for dispute settlement;
  - (iii) waives its right to initiate any proceedings, excluding proceedings for interim injunctive relief referred to in paragraph 6, before any of the other dispute settlement fora referred to in paragraph 3 in relation to the matter under dispute; and
  - (iv) briefly summarizes the alleged breaches of the disputing Party under this Chapter (including the articles alleged to have been breached) and the loss or damage allegedly caused to the investor or its investment.

6. Notwithstanding paragraph 4, the disputing investor may initiate or continue an action that seeks interim injunctive relief that does not involve the payment of monetary damages or the resolution of the substance of the matter in dispute before a court or administrative tribunal 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.

7. The arbitral tribunal established under paragraph 3 shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

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<sup>10</sup> In case where the Parties agree to submit the dispute to other arbitration institution or in accordance with any other arbitration rules, provided for in paragraph 3(d), the conditions established in paragraphs 5(a) and (b) shall apply.

<sup>11</sup> The request for consultations and negotiations and the notice of intent should be referred to the competent authorities of the disputing Party, as follows:

For Peru: *General Directorate of International Economy, Competition and Private Investment Affairs*  
*(Dirección General de Asuntos de Economía Internacional, Competencia e Inversión Privada)*  
*Ministry of Economy and Finance (Ministerio de Economía y Finanzas)*  
Jirón Lampa 277, 5<sup>th</sup> floor (Jirón Lampa # 277 piso 5)  
Lima 1, Perú

For Korea: *Office of International Legal Affairs*  
*Ministry of Justice*  
Government Complex, Gwacheon  
Korea

8. The arbitral tribunal shall decide as a preliminary question any objection by the disputing Party 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 disputing investor may be made under paragraph 9.

9. The award rendered by the arbitral tribunal shall include:

- (a) a judgment whether or not there has been a breach by the disputing Party of any obligation under Section A with respect to the disputing investor and its investments; and
- (b) a remedy if there has been such breach. The remedy shall be limited to one or both of the following:
  - (i) payment of monetary damages and applicable interest; and
  - (ii) 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.

Costs may also be awarded in accordance with the applicable arbitration rules.

10. The award rendered in accordance with paragraph 9 shall be final and binding to the disputing parties.

11. The assumption of expenses incurred by the disputing parties in the arbitration shall be established:

- (a) by the arbitration institution to which the dispute has been submitted, in accordance with its rules of procedure for arbitration proceedings; or
- (b) in accordance with the rules of procedure for arbitration proceedings agreed by the disputing parties, where applicable.

12. Neither Party shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its investors and the other Party shall have consented to submit or have submitted to arbitration under this Article, unless such 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.

#### ARTICLE 9.17: TERM OF THE BILATERAL INVESTMENT TREATY

1. Subject to paragraph 2, the Parties hereby agree that the Bilateral Investment Treaty, as well as all the rights and obligations derived from the said Treaty, will cease to have effect on the date of entry into force of this Agreement.

2. Any and all investments made pursuant to the Bilateral Investment Treaty before the entry into force of this Agreement will be governed by the rules of the said Treaty regarding any matter arising while the Treaty was in force. An investor may only submit an arbitration claim pursuant to the Bilateral Investment Treaty, regarding any matter arising while the said Treaty was in force, in accordance with the rules and procedures established in it, and provided that no more than three years have elapsed since the date of entry into force of this Agreement.

## SECTION C: DEFINITIONS

### ARTICLE 9.18: DEFINITIONS

For purposes of this Chapter:

**Bilateral Investment Treaty** means the *Agreement between the Government of the Republic of Korea and the Government of the Republic of Peru for the Promotion and Reciprocal Protection of Investments*, done at Seoul, June 3, 1993;

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

**disputing parties** means the disputing investor and the disputing Party;

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

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

**enterprise** means an enterprise as defined in Article 1.4 (General Definitions), and its branch;

**freely usable currency** means any currency designated as such by the IMF and any amendments thereto;

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

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

**investment** means every asset that an investor owns or controls, directly or indirectly, and that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

- (a) an enterprise;
- (b) shares, stock, and other forms of equity participation in an enterprise;

- (c) bonds, debentures, other debt instruments, and loans<sup>12 13 14</sup>;
- (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 law<sup>15 16</sup>; and
- (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.<sup>17</sup>

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

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

**investor of a non-Party** means an investor other than an investor of a Party, that seeks to make<sup>18</sup>, is making, or has made an investment;

**investor of a Party** means a Party or state enterprise thereof, or a national or an enterprise of a Party, that seeks to make<sup>19</sup>, is making, or has made an investment in the territory of the

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<sup>12</sup> Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, 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.

<sup>13</sup> Loans issued by a Party to the other Party are not investments.

<sup>14</sup> Subparagraph(c) shall be interpreted in accordance with Annex 9D.

<sup>15</sup> 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 a Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under the law of a Party. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment.

<sup>16</sup> The term “investment” does not include an order or judgment entered in a judicial or administrative action.

<sup>17</sup> For greater certainty, market share, market access, expected gains, and opportunities for profit-making are not, by themselves, investments.

<sup>18</sup> For greater certainty, it is understood that an investor “seeks to make an investment” only when the investor has taken concrete steps necessary to make said investment, such as when the investor has made an application for a permit or license authorizing the establishment of an investment.

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;

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

**state enterprise** means an enterprise that is owned or controlled through ownership interests by a Party;

**TRIMs Agreement** means the *Agreement on Trade-Related Investment Measures*, contained in Annex 1A to the WTO Agreement; and

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

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<sup>19</sup> For greater certainty, it is understood that an investor “seeks to make an investment” only when the investor has taken concrete steps necessary to make said investment, such as when the investor has made an application for a permit or license authorizing the establishment of an investment.

**ANNEX 9A**  
**MOST-FAVORED-NATION TREATMENT**

For greater certainty, treatment “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments” referred to in paragraphs 1 and 2 of Article 9.4 does not encompass dispute resolution mechanisms, such as those set out in Section B, that are provided for in international treaties or trade agreements.



## **ANNEX 9B**

### **EXPROPRIATION**

The Parties confirm their shared understanding that:

- (a) 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.
- (b) Article 9.12.1 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.
- (c) The second situation addressed by Article 9.12.1 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.
  - (i) 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:
    - (A) 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;
    - (B) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
    - (C) the character of the government action, including its objectives and context. Relevant considerations 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.
  - (ii) Except in rare circumstances, such as, for example, when a measure or series of measures have an extremely severe or disproportionate effect in light of its purpose, 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 policy measures (for example, measures to improve the housing conditions for low-income households), do not constitute indirect expropriations<sup>20</sup>.

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<sup>20</sup> For greater certainty, the list of “legitimate public welfare objectives” in subparagraph (c)(ii) is not exhaustive.

**ANNEX 9C**  
**TEMPORARY SAFEGUARD MEASURES**

1. Nothing in this Chapter, Chapter Ten (Cross-Border Trade in Services), or Twelve (Financial Services) shall be construed to prevent a Party from adopting or maintaining temporary safeguard measures 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 macroeconomic management, in particular, the operation of monetary policy or exchange rate policy in either Party.

2. Measures referred to in paragraph 1:

- (a) shall not exceed a period of one year; however, if extremely exceptional circumstances arise such that a Party seeks to extend such measures, the Party will coordinate in advance with the other Party concerning the implementation of any proposed extension;
- (b) shall be consistent with the *Articles of Agreement of the International Monetary Fund*;
- (c) shall not exceed those necessary to deal with the circumstances described in paragraph 1;
- (d) shall avoid unnecessary damage to the commercial, economic, or financial interests of the other Party;
- (e) shall not otherwise interfere with investors' ability to earn a market rate of return in the territory of the Party on any restricted assets<sup>21</sup>;
- (f) shall be temporary and phased out progressively as the situation described in paragraph 1 improves;
- (g) shall not be confiscatory;
- (h) shall promptly be notified to the other Party;
- (i) are applied in a manner consistent with Articles 9.3, 10.2 (National Treatment), and 12.2 (National Treatment) and Articles 9.4, 10.3 (Most-Favored-Nation Treatment), and 12.3 (Most-Favored-Nation Treatment) subject to the Schedules set out in Annex I, Annex II, and Annex III, and relevant Annexes in this Chapter, Chapter Ten (Cross-Border Trade in Services), or Twelve (Financial Services);

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<sup>21</sup> For greater certainty, for Korea, the term "restricted assets" in subparagraph (e) refers only to assets invested in the territory of Korea by an investor of Peru that are restricted from being transferred out of the territory of Korea.

- (j) shall not constitute a dual or multiple exchange rate practice; and
- (k) shall not restrict payments or transfers associated with foreign direct investment<sup>22</sup>.

3. Nothing in this Chapter, Chapter Ten (Cross-Border Trade in Services), or Chapter Twelve (Financial Services) shall be regarded to affect the rights enjoyed and obligations undertaken by a Party as a party to the *Articles of Agreement of the International Monetary Fund*.

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<sup>22</sup> For greater certainty, for Peru, payments or transfers associated with foreign direct investment refers to proceeds that come from the stocks, acquired by a foreign investor, proceeds from the sale of stocks, the principal, interest, and service charges paid for a loan extended to a foreign-capital invested company by its overseas holding company or by a company in a relationship with the holding company of the capital investment, and the compensation paid in accordance with a contract for the introduction of technology.

**ANNEX 9D**  
**PUBLIC DEBT**

1. The Parties recognize that the purchase of debt issued by a Party entails commercial risk. For greater certainty, no award may be made in favor of a disputing investor for a claim with respect to default or nonpayment of debt issued by a Party unless the disputing investor meets its burden of proving that such default or nonpayment constitutes an uncompensated expropriation for purposes of Article 9.12 or a breach of any other obligation under this Chapter.
2. No claim that a restructuring of debt issued by a Party breaches an obligation under this Chapter may be submitted to, or if already submitted continue in, arbitration under this Chapter if the restructuring is a negotiated restructuring at the time of submission, or becomes a negotiated restructuring after such submission, except for a claim that the restructuring violates Article 9.3 or 9.4.
3. Subject to paragraph 2, an investor of the other Party may not submit a claim under this Chapter that a restructuring of debt issued by a Party breaches an obligation under this Chapter (other than Article 9.3 or 9.4) unless 270 days have elapsed from the date of the events giving rise to the claim.