



# Trans-Pacific Partnership treaty: Advanced Investment Chapter working document for all 12 nations (January 20, 2015 draft)

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## Description

This is an advanced January 2015 version of the confidential draft treaty chapter from the Investment group of the Trans Pacific Partnership (TPP) talks between the United States, Mexico, Canada, Australia, Malaysia, Chile, Singapore, Peru, Vietnam, New Zealand and Brunei Darussalam. The treaty is being negotiated in secret by delegations from each of these 12 countries, who together account for 40% of global GDP. The chapter covers agreements on investments from one TPP nation to another, including empowering foreign firms to "sue" other states' governments, as well as regulations around investor-state dispute settlements and tribunals. This document was prepared by TPP investment chapter negotiators in advance of the informal round of negotiations held in New York City 26th January to 1st February, 2015.

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## **INVESTMENT**

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**CHAPTER II**  
**INVESTMENT**

**Section A**

*<<Note: CNs have agreed that this Chapter will not include an objectives article, subject to the drafting of language on objectives in this Chapter and other Chapters in the preamble.*

*Four Parties have proposed that the following elements be included in the preamble: to encourage and promote the flow of investment between the Parties on a mutually advantageous basis and as a means to promote economic growth, under conditions of transparency within a stable framework of rules to ensure the protection and security of investments by investors of other Parties within each Party's territory, while recognizing the rights of Parties to regulate and the responsibility of governments to protect public welfare, including public health, safety and the environment.*

*Parties have agreed to the following text in the preamble: "Recognizing the inherent right to regulate and resolving to preserve the flexibility of the Parties to protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, and public morals;">>*

**Article II.1: Definitions**

For purposes of this Chapter:

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

**claimant** means an investor of a Party that is a party to an investment dispute with another Party. Where that investor is a natural person, who is a permanent resident of a Party, and a national of another Party, that natural person may not submit a claim to arbitration against that latter Party;

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

**disputing parties** means the claimant and the respondent;

**disputing party** means either the claimant or the respondent;

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**enterprise** means any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including any corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization 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;<sup>1</sup>

**freely usable currency** means “freely usable currency” as determined by the International Monetary Fund under its *Articles of Agreement*;

**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;

**Inter-American Convention** means the *Inter-American Convention on International Commercial Arbitration*, done at Panama, January 30, 1975;

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

- (a) an enterprise;
- (b) shares, stock and other forms of equity participation in an enterprise;
- (c) bonds, debentures, other debt instruments, and loans;<sup>23</sup>
- (d) futures, options and other derivatives;

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<sup>1</sup> For greater certainty, the inclusion of a “branch” in the definitions of “enterprise” and “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 organized.

<sup>2</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>3</sup> Loans issued by one Party to another Party are not investments.

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- (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>4</sup> and
- (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens and pledges;

but investment does not mean an order or judgment entered in a judicial or administrative action.

**[investment agreement]** means a written agreement<sup>5</sup> [that takes effect after the date of entry into force of this Agreement] between a national authority<sup>6</sup> of a Party and a covered investment or an investor of another Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor:

- (a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale;
- (b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications; or

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<sup>4</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 the Party. Among such 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 such instruments has the characteristics of an investment.

<sup>5</sup> “Written agreement” refers to an agreement in writing, executed by both parties, whether in a single instrument or in multiple instruments, that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article II.24(2). For greater certainty, (a) a unilateral act of an administrative or judicial authority, such as a permit, license, or authorization issued by a Party solely in its regulatory capacity, or a subsidy or grant, or a decree, order, or judgment, standing alone; and (b) an administrative or judicial consent decree or order, shall not be considered a written agreement.]

<sup>6</sup> For purposes of this definition, “national authority” means (a) for the United States, an authority at the central level of government; and (b) for [Country], [ ].]

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- (c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government;]

**[investment authorization**<sup>7</sup> means an authorization that the foreign investment authority of a Party<sup>8</sup> grants to a covered investment or an investor of another Party;]

**investor of a non-Party** means, with respect to a Party, an investor that attempts to make,<sup>9</sup> is making, or has made an investment in the territory of that Party, that is not an investor of a Party;

**investor of a Party** means a Party, or a national or an enterprise of a Party, that attempts to make,<sup>10</sup> is making, or has made an investment in the territory of another Party;

**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 its terms, 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;

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

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

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<sup>7</sup> For greater certainty, actions taken by a Party to enforce laws of general application, such as competition, environmental, health, or other regulatory laws, are not encompassed within this definition.]

<sup>8</sup> [As of the entry into force of this Agreement,] For purposes of this definition, “foreign investment authority” means (a) for Australia, the Treasurer of the Commonwealth of Australia under Australia’s foreign investment policy including the Foreign Acquisitions and Takeovers Act 1975; (b) for Mexico, the National Commission on Foreign Investment (Comisión Nacional de Inversiones Extranjeras);] [and (c) for Singapore and Japan, the term “foreign investment authority of a Party” is not applicable as it does not have such an authority at the time of entry into force of this Agreement. <<Note: xx to drop (c) if Parties accept text above and have not Party-specific clarifications except for II-H Parties; xx considering>>].

<sup>9</sup> For greater certainty, the Parties understand that an investor “attempts to make” an investment when that investor has taken concrete action or actions to make an investment, such as channeling resources or capital in order to set up a business, or applying for permits or licenses.

<sup>10</sup> For greater certainty, the Parties understand that an investor “attempts to make” an investment when that investor has taken concrete action or actions to make an investment, such as channeling resources or capital in order to set up a business, or applying for permits or licenses.

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**protected information** means confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law, including classified government information;

**respondent** means the Party that is a party to an investment dispute;

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

**UNCITRAL Arbitration Rules** means that arbitration rules of the United Nations Commission on International Trade Law.

## **Article II.2: Scope and Coverage**

1. This Chapter applies to measures adopted or maintained by a Party relating to:
  - (a) investors of another Party;
  - (b) covered investments; and
  - (c) with respect to Articles 11.9 (Performance Requirements) and II.15 (Investment and Environmental, Health and other Regulatory Objectives), all investments in the territory of the Party.
2. A Party's obligations under this Chapter shall apply to measures adopted or maintained by:
  - (a) the central, regional, or local governments and authorities of that Party; and
  - (b) any person, including a state enterprise or any other body, when it exercises any governmental authority delegated to it by central, regional, or local governments or authorities of that Party.<sup>11</sup>
3. For greater certainty, the provisions of this Chapter do not bind any 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.

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<sup>11</sup> For greater certainty, governmental authority is delegated under the law of the Party, including through a legislative grant, or a government order, directive or other action transferring, or authorizing the exercise of, governmental authority.

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### **Article II.3: 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 another 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 KK (Financial Services).

### **Article II.4: National Treatment<sup>12</sup>**

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
3. For greater certainty, the treatment to be accorded by a Party under paragraphs 1 and 2 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.

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<sup>12</sup> [For greater certainty, whether treatment is accorded in “like circumstances” depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.] <<xx is still consulting; xx still considering>>



### **Article II.5: Most-Favored-Nation Treatment<sup>13</sup>**

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or 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 other Party, or 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 Section B.

### **Article II.6: Minimum Standard of Treatment<sup>14</sup>**

1. Each Party shall accord to covered investments treatment in accordance with applicable customary international law principles, 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 standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligations 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

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<sup>13</sup> [For greater certainty, whether treatment is accorded in “like circumstances” depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.]

<<xx is still consulting; xx still considering>>

<sup>14</sup> Article II.6 (Minimum Standard of Treatment) shall be interpreted in accordance with Annex II-A (Customary International Law).

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- (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 II.6bis: Treatment in Case of Armed Conflict or Civil Strife**

1. Notwithstanding Article II.11(5)(b) (Non-Conforming Measures), each Party shall accord to investors of another Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

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

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

the latter Party shall provide the investor restitution, compensation, or both, as appropriate, for such loss.

3. Paragraph 1 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article II.4 (National Treatment) but for Article II.11(5)(b) (Non-Conforming Measures).

### **Article 11.7: Expropriation and Compensation<sup>15</sup>**

1. No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (“expropriation”), except:

- (a) for a public purpose<sup>1617</sup>;

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<sup>15</sup> Article II.7 (Expropriation and Compensation) shall be interpreted in accordance with Annex II-B and is subject to Annex II-C.

- (b) in a non-discriminatory manner;
- (c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2 through 4; and
- (d) in accordance with due process of law.

2. Compensation shall:

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

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<sup>16</sup> For greater certainty, for purposes of this Article the term “public purpose” refers to a concept in customary international law. Domestic law may express this or a similar concept using different terms, such as “public necessity,” “public interest,” or “public use.”

<sup>17</sup> For the avoidance of doubt: (i) where Brunei Darussalam is the expropriating Party, any measure of direct expropriation relating to land shall be for the purposes as set out in the Land Code (Cap. 40) and the Land Acquisition Act (Cap. 41), as at the date of entry into force of the Agreement; and (ii) where Malaysia is the expropriating Party, any measure of direct expropriation relating to land shall be for the purposes as set out in the Land Acquisition Act 1960, Land Acquisition Ordinance 1950 of the State of Sabah and the Land Code 11958 of the State of Sarawak, as at the date of entry into force of the Agreement.

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- (b) interest, at a commercially reasonable rate for the freely usable currency, accrued from the date of expropriation until the date of payment.

5. The 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 QQ.\_ (Intellectual Property Rights) and the TRIPS Agreement.<sup>18</sup>

6. For greater certainty, a Party's decision not to issue, renew, or maintain a subsidy or grant,

- (a) in the absence of any specific commitment under law or contract to issue, renew, or maintain that subsidy or grant; or
- (b) in accordance with any terms or conditions attached to the issuance, renewal or maintenance of that subsidy or grant,

standing alone, does not constitute an expropriation. <<ad ref for xx>>

#### **Article II.8: Transfers [19]**

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

- (a) contributions to capital;<sup>20</sup>
- (b) profits, dividends, interest, capital gains, royalty payments, management fees, and technical assistance and other fees;
- (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;
- (d) payments made under a contract, including a loan agreement;

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<sup>18</sup> For greater certainty, the Parties recognize that, for the purposes of this Article, the term "revocation" of intellectual property rights includes the cancellation or nullification of such rights, and the term "limitation" of intellectual property rights includes exceptions to such rights.

[<sup>19</sup> For greater certainty, Article II.8 is subject to Annex II-E.]

<sup>20</sup> For greater certainty, contributions to capital include the initial contribution.

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- (e) payments made pursuant to Article II.6*bis* (Treatment in Case of Armed Conflict or Civil Strife) and Article II.7 (Expropriation and Compensation); and
  - (f) payments arising out of a dispute.
2. Each Party shall permit transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer.
3. Each Party shall permit returns in kind relating to a covered investment to be made as authorized or specified in a written agreement between the Party and a covered investment or an investor of another Party.
4. Notwithstanding paragraphs 1, 2, and 3, a Party may prevent or delay a transfer through the equitable, non-discriminatory, and good faith application of its laws<sup>21</sup> relating to:
- (a) bankruptcy, insolvency, or the protections of the rights of creditors;
  - (b) issuing, trading, or dealing in securities, futures, options, or derivatives;
  - (c) criminal or penal offences;
  - (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.
5. Notwithstanding paragraph 3, a Party may restrict transfers of returns in kind in circumstances where it could otherwise restrict such transfers under this Agreement, including as set out in paragraph 4.

## **Article II.9: Performance Requirements**

1. No Party may, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor

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<sup>21</sup> For greater certainty, the Article does not preclude the equitable, non-discriminatory, and good faith application of a Party's laws relating to its social security, public retirement, or compulsory savings programs.

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of a Party or of a non-Party in its territory, impose or enforce any requirement or enforce any commitment or undertaking:<sup>22</sup>

- (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;
- (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; or
- (h) (i) to purchase, use, or accord a preference to, in its territory, technology of the Party or of persons of the Party<sup>23</sup>; or  
(ii) that prevents the purchase or use of, or the according of a preference to, in its territory, particular technology
- (i) to adopt:
  - (i) a given rate or amount of royalty under a license contract; or
  - (ii) a given duration of the term of a license contract,

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<sup>22</sup> For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 2 does not constitute a “requirement” or a “commitment or undertaking” for the purposes of paragraph 1.

<sup>23</sup> For purposes of this Article, the term “technology of the Party or of persons of the Party” includes technology that is owned by the Party or persons of the Party, and technology for which the Party holds, or persons of the Party hold, an exclusive license.

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in regard to any existing or future license contract<sup>24</sup> freely entered into between the investor and a person in its territory, provided that the requirement is imposed or the commitment or undertaking is enforced in a manner that constitutes direct interference with that license contract by an exercise of non-judicial governmental authority of a Party;

For greater certainty, paragraph 1(i) does not apply when the license contract is concluded between the investor and a Party.

2. No 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 of an investor of a Party or of a non-Party in its territory, 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 investment of an investor of a Party or of a non-Party in its territory, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

- (b) Paragraphs 1(f), (h), and (i) do not apply:

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<sup>24</sup> A “license contract” referred to in this subparagraph means any contract concerning the licensing of technology, a production process, or other proprietary knowledge.

- (i) when a Party authorizes use of an intellectual property right in accordance with Articles 31<sup>25</sup> 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 laws.<sup>2627</sup>
- (*bbis*) Paragraph (1)(i) does not apply when the requirement is imposed or the commitment or undertaking is enforced by a tribunal as equitable remuneration under the Party's copyright laws.
- (c) Provided that such measures are not applied in an arbitrary or unjustifiable manner, or 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), do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs.

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<sup>25</sup> The reference to "Article 31" includes any amendment to the TRIPS Agreement implementing paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health (WT/MIN(01)/DEC/2).

<sup>26</sup> The Parties recognize that a patent does not necessarily confer market power.

<sup>27</sup> In the case of Brunei Darussalam, for the period of 10 years after the entry into force of this Agreement or until Brunei Darussalam establishes a competition authority or authorities, whichever occurs earlier, the reference to the Party's competition laws includes competition regulations.

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- (e) Paragraphs 1(b), (c), (f), (g), and (h), and (i) and 2(a) and (b), do not apply to government procurement.
- (f) Paragraphs 2(a) and (b) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.
- (g) Paragraph (1)(h) and (1)(i) shall not be construed to prevent a Party from adopting or maintaining measures to protect legitimate public welfare objectives, provided that such measures are not applied in an arbitrary or unjustifiable manner, or in a manner that constitutes a disguised restriction on international trade or investment.

*3bis.* 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 employ or train workers in its territory provided that such employment or training does not require the transfer of a particular technology, production process, or other proprietary knowledge to a person in its territory.

4. For greater certainty, paragraphs 1 and 2 do not apply to any commitment, undertaking, or requirement other than those set out in those paragraphs.

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

#### **Article II.10: Senior Management and Boards of Directors**

1. No 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.

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## Article II.11: Non-Conforming Measures

1. Articles II.4 (National Treatment), II.5 (Most-Favored-Nation Treatment), II.9 (Performance Requirements) and II.10 (Senior Management and Board of Directors) 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 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 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 Articles II.4 (National Treatment), II.5 (Most-Favored-Nation Treatment), II.9 (Performance Requirements) and II.10 (Senior Management and Board of Directors).

2. Articles II.4 (National Treatment), II.5 (Most-Favored-Nation Treatment), II.9 (Performance Requirements) and II.10 (Senior Management and Board of Directors) do 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.

*2bis.* If a Party considers that a non-conforming measure applied by a regional level of government of another Party as referenced in subparagraph 1(a)(ii) of this Article creates a material impediment to investment in relation to the former Party, that former Party may request consultations with regard to that measure. The Parties shall enter into consultations with a view to exchanging information on the operation of the measure and to considering whether further steps are necessary and appropriate.<sup>28</sup>

3. No 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 another Party, by

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<sup>28</sup> For greater certainty, any Party may request consultations with another Party regarding a non-conforming measure applied by a central level of government as referenced in subparagraph 1(a)(i).

reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

4. Articles II.4 (National Treatment) and II.5 (Most-Favored-Nation Treatment) do not apply any measure that is an exception to, or derogation from, [a Party's obligations under the TRIPS Agreement,] [the obligations under Article QQ.\_ (Intellectual Property Rights Chapter; General Provisions Article; Paragraph on national treatment).] [the obligations under Article QQ.\_ or the obligations under Article 4 of the TRIPS Agreement] as specifically provided in that [agreement] [Article]. <<Note: subject to the outcome of discussions in the IP Chapter (Art QQ A.9 (National Treatment)).>>

5. Articles II.4 (National Treatment), II.5 (Most-Favored Nation Treatment) and II.10 (Senior Management and Board of Directors) do not apply to:

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

6. For greater certainty, any amendments or modifications to a Party's Schedules to Annexes I or II, pursuant to this Article, shall be made in accordance with Article DDD.2 (Amendments) of the Final Provisions Chapter.

#### **Article II.12: Subrogation**

If a Party (or any agency, institution, statutory body, or corporation designated by it) makes a payment to an investor of the Party under a guarantee, a contract of insurance or other form of indemnity that it has entered into with respect to 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 such rights to the extent of the subrogation.

#### **Article II.13: Special Formalities and Information Requirements**

1. Nothing in Article II.4 (National Treatment) shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as residency requirements for registration or 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 another Party and covered investments pursuant to this Chapter.

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2. Notwithstanding Articles II.4 (National Treatment) and II.5 (Most-Favored Nation Treatment), a Party may require an investor of another Party or its covered investment to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect such information that is confidential 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 II.14: Denial of Benefits**

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

- (a) is owned or controlled either by persons of a non-Party or of the denying Party; and
- (b) has no substantial business activities in the territory of any Party other than the denying Party.

2. A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.

#### **Article II.15: Investment and Environmental, Health and other Regulatory Objectives**

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, health, or other regulatory objectives.

#### **Article II.16: Corporate Social Responsibility**

The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction 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.

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## Section B: Investor-State Dispute Settlement <sup>[29]</sup>

### Article II.17: Consultation and Negotiation

1. In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures, such as good offices, conciliation and mediation.
2. The claimant shall deliver to the respondent a written request for consultations setting forth a brief description of facts regarding the measure or measures at issue.
3. For greater certainty, the initiation of consultations and negotiations shall not be construed as recognition of the jurisdiction of the tribunal.

### Article II.18: Submission of a Claim to Arbitration

1. If an investment dispute has not been resolved within 6 months of the receipt by the respondent of a written request for consultations pursuant to Article II.17(2):<sup>[30]</sup>
  - (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim
    - (i) that the respondent has breached
      - (A) an obligation under Section A,
      - [ (B) an investment authorization, or]
      - [ (C) an investment agreement;]

<sup>[29]</sup> Section B does not apply to Australia or an investor of Australia. Notwithstanding any provision of this Agreement, Australia does not consent to the submission of a claim to arbitration under this Section. <<xx note: deletion of footnote is subject to certain conditions>>]

<sup>[30]</sup> Without prejudice to a claimant's right to submit to arbitration other claims under Article II.18, a claimant may not submit to arbitration a claim under Article II.18(1)(a)(i)(B) or Article II.18(1)(b)(i)(B) that a Party covered by Annex II-H has breached an investment authorization by enforcing conditions or requirements under which the investment authorization was granted, unless such enforcement is used as a disguised means to repudiate or otherwise breach its own commitments by invalidly withdrawing the authorization.] [**Alternative xx-proposed working text:** For greater certainty, a claim for breach of an investment authorization does not arise solely because a Party requires compliance with, seeks to enforce, or enforces, conditions or requirements under which the investment authorization is granted to an investor.]

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and

- (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and
- (b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim
  - (i) that the respondent has breached
    - (A) an obligation under Section A,
    - [ (B) an investment authorization, or]
    - [ (C) an investment agreement;]

and

- (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach,

[provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(i)(C) a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement].

2. At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration (“notice of intent”). The notice shall specify:

- (a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;
- (b) for each claim, the provision of this Agreement [, investment authorization] [,or investment agreement] alleged to have been breached and any other relevant provisions;
- (c) the legal and factual basis for each claim; and
- (d) the relief sought and the approximate amount of damages claimed.

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[3. At least one year before submitting any claims to arbitration under this Section pursuant to paragraph (1)(a)(i)(C) or (1)(b)(i)(C), a claimant shall initiate and pursue for the duration of that time period the same claims in a forum designated for dispute settlement, if any, under the investment agreement.]

3. The claimant may submit a claim referred to in paragraph 1 under one of the following alternatives:

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

4. A claim shall be deemed submitted to arbitration under this Section when the claimant's notice of or request for arbitration ("notice of arbitration"):

- (a) referred to in the ICSID Convention is received by the Secretary-General;
- (b) referred to in the ICSID Additional Facility Rules is received by the Secretary-General;
- (c) referred to in the UNCITRAL Arbitration Rules, together with the statement of claim referred to therein are received by the respondent; or
- (d) referred to under any arbitral institution or arbitral rules selected under paragraph 3(d) is received by the respondent.

A claim asserted by the claimant for the first time after such notice of arbitration is submitted shall be deemed submitted to arbitration under this Section on the date of its receipt under the applicable arbitral rules.

5. The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Agreement.

6. The claimant shall provide with the notice of arbitration:

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- (a) the name of the arbitrator that the claimant appoints; or
- (b) the claimant's written consent for the Secretary-General to appoint that arbitrator.

**Article II.19: Consent of Each Party to Arbitration**

1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.
2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall be deemed to satisfy the requirements 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;
  - (b) Article II of the New York Convention for an "agreement in writing"; and
  - (c) Article I of the Inter-American Convention for an "agreement".

**Article II.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 on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article II.18(1) and knowledge that the claimant (for claims brought under Article II.18(1)(a)) or the enterprise (for claims brought under Article II.18(a)(b)) has incurred loss or damage.
2. No claim may be submitted to arbitration under this Section unless:
  - (a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and
  - (b) the notice of arbitration is accompanied,
    - (i) for claims submitted to arbitration under Article II.18(1)(a), by the claimant's written waiver, and
    - (ii) for claims submitted to arbitration under Article II.18(1)(b), by the claimant's and the enterprises' written waivers

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of any right to initiate or continue before any court or administrative tribunal under the law of a Party, or any other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article II.18.

3. Notwithstanding paragraph 2(b), the claimant (for claims brought under Article II.18(1)(a)) and the claimant or the enterprise (for claims brought under Article II.18(1)(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.

### **Article II.21: Selection of Arbitrators**

1. Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.

2. The Secretary-General shall serve as appointing authority for an arbitration under this Section.

3. If a tribunal has not been constituted within 75 days from the date that 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, the arbitrator or arbitrators not yet appointed. The Secretary General shall not appoint a national of either the respondent or the Party of the claimant as the presiding arbitrator unless the disputing parties agree otherwise.

4. 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 respondent agrees to the appointment of each individual member of a tribunal established under the ICSID Convention or the ICSID Additional Facility Rules;
- (b) a claimant referred to in Article II.18(1)(a) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant agrees in writing to the appointment of each individual member of the tribunal; and
- (c) a claimant referred to in Article II.18(1)(b) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the

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ICSID Additional Facility Rules, only on condition that the claimant and the enterprise agree in writing to the appointment of each individual member of the tribunal.

## **Article II.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 II.18(3). If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with the applicable arbitral rules, provided that the place shall be in the territory of a State that is party to the New York Convention.

2. A non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement.

3. After consultation with the disputing parties, the tribunal may accept and consider written *amicus curiae* submissions regarding a matter of fact or law within the scope of the dispute that may assist the tribunal in evaluating the submissions and arguments of the disputing parties from a person or entity that is not a disputing party that has a significant interest in the arbitral proceedings. Each submission shall identify the author, disclose any affiliation, direct or indirect, with any disputing party, and identify any person, government, or other entity that has provided, or will provide, any financial or other assistance in preparing the submission. Each submission shall be in a language of the arbitration, and comply with any page limits and deadlines set by the tribunal. The tribunal shall provide the disputing parties with an opportunity to respond to such submissions. The tribunal shall ensure that the submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

4. Without prejudice to a tribunal's authority to address other objections as a preliminary question, such as an objection that a dispute is not within the competence of the tribunal, including an objection to the tribunal's jurisdiction, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article II.28.

- (a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment).

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- (b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceeding on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.
- (c) In deciding an objection under this paragraph, the tribunal shall assume to be true the claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in the relevant article of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.
- (d) The respondent does not waive any objection as to competence, including an objection to jurisdiction, or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.

5. In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 or any objection that the dispute is not within the tribunal's competence, including an objection that the dispute is not within the tribunal's jurisdiction. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

6. When it decides as respondent's objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

7. A respondent may not assert as a defense, counterclaim, right of set-off, or for any other reason that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract.

8. A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including

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an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article II.18. For purposes of this paragraph, an order includes a recommendation.

9. In any arbitration conducted under this Section, at the request of a disputing party, a tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or award to the disputing parties. Within 60 days after the tribunal transmits its proposed decision or award, the disputing parties may submit written comments to the tribunal concerning any aspect of its proposed decision or award. The tribunal shall consider any such comments and issue its decision or award not later than 45 days after the expiration of the 60-day comment period.

10. In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article II.28 should be subject to that appellate mechanism. The Parties shall strive to ensure that any such appellate mechanism they consider adopting provides for transparency of proceedings similar to the transparency provisions established in Article II.23.

#### **Article II.23: Transparency of Arbitral Proceedings**

1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Parties and make them available to the public:

- (a) the notice of intent;
- (b) the notice of arbitration;
- (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article II.22(2) and II.22(3) and Article II.27;
- (c) minutes or transcripts of hearings of the tribunal, where available; and
- (d) orders, awards, and decisions of the tribunal.

2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information that is designated as protected information or otherwise subject to paragraph 3 in a hearing shall so advise the tribunal. The

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tribunal shall make appropriate arrangements to protect such information from disclosure which may include closing the hearing for the duration of any discussion of such information.

3. Nothing in this Section, including paragraph 4(d), requires a respondent to make available to the public or otherwise disclose during or after the arbitral proceedings, including the hearing, protected information or to furnish or allow access to information that it may withhold in accordance with Article CCC.2 (Exceptions Chapter; Security Exceptions Article) or Article CCC.6 (Exceptions Chapter; Disclosure of Information Article).<sup>31</sup>

4. Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:

- (a) Subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to any non-disputing party or to the public any protected information where the disputing party that provided the information clearly designates it in accordance with subparagraph (b);
- (b) Any disputing party claiming that certain information constitutes protected information shall clearly designate the information according to any schedule set by the tribunal;
- (c) A disputing party shall, according to any schedule set by the tribunal, submit a redacted version of the document that does not contain the information. Only the redacted version shall be disclosed in accordance with paragraph 1; and
- (d) The tribunal, subject to paragraph 3, shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may (i) withdraw all or part of its submission containing such information, or (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (c). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under (i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under (ii) of the disputing party that first submitted the information.

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<sup>31</sup> For greater certainty, when a respondent chooses to disclose the tribunal information that may be withheld under Article CCC.2 (Exceptions Chapter; Security Exceptions Article) or Article CCC.6 (Exceptions Chapter; Disclosure of Information Article), the respondent may still withhold that information from disclosure to the public.

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5. Nothing in this Section requires a respondent to withhold from the public information required to be disclosed by its laws. The respondent should endeavor to apply such laws in a manner sensitive to protecting from disclosure information that has been designated as protected information.

#### **Article II.24: Governing Law**

1. Subject to paragraph 3, when a claim is submitted under Article II.18(1)(a)(i)(A) or Article II.18(1)(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with the Agreement and applicable rules of international law<sup>32</sup>.

[2. Subject to paragraph 3 and the other terms of this Section, when a claim is submitted under Article II.18(1)(a)(i)(B) [or (C)], or Article II.18(1)(b)(i)(B) [or (C)] , the tribunal shall apply:

- (a) the rules of law specified in the pertinent investment authorization or investment agreement, or as the disputing parties may otherwise agree; or
- (b) if the rules of law have not been specified or otherwise agreed:
  - (i) the law of the respondent, including its rules on the conflict of laws;<sup>33</sup> and
  - (ii) such rules of international law as may be applicable.]

3. A decision of the Trans-Pacific Partnership Commission on the interpretation of a provision of this Agreement under Article AAA.2.2(f) (Administrative and Institutional Provisions Chapter, Functions of the Commission) shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision.

#### **Article II.25: Interpretation of Annexes**

1. Where a respondent asserts as a defence that the measure alleged to be a breach is within the scope of a non-conforming measure set out in Annex I or Annex II, the tribunal shall, on request of the respondent, request the interpretation of the Trans-Pacific Partnership Commission on the issue. The Trans-Pacific Partnership Commission shall submit in writing

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<sup>32</sup> For greater certainty, this provision is without prejudice to any consideration of the domestic law of the respondent where it is relevant to the claim as a matter of fact.

[<sup>33</sup> The “law of the respondent” means the law that a domestic court or tribunal of proper jurisdiction would apply in the same case.]

any decision on its interpretation under Article AAA.2.2(f) (Administrative and Institutional Provisions Chapter, Functions of the Commission) to the tribunal within 90 days of delivery of the request.

2. A decision issued by the Trans-Pacific Partnership Commission under paragraph 1 shall be binding on the tribunal, and any decision or award issued by the tribunal must be consistent with that decision. If the Trans-Pacific Partnership Commission fails to issue such a decision within 90 days, the tribunal shall decide the issue.

#### **Article II.26: Expert Reports**

Without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, a tribunal, at the request of a disputing party or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

#### **Article II.27: Consolidation**

1. Where two or more claims have been submitted separately to arbitration under Article II.18(1) and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 2 through 10.

2. A disputing party that seeks a consolidation order under the Article shall deliver, in writing, a request to the Secretary-General and to all the disputing parties sought to be covered by the order and shall specify the request:

- (a) the names and addresses of all the disputing parties sought to be covered by the order;
- (b) the nature of the order sought; and
- (c) the grounds on which the order is sought.

3. Unless the Secretary-General finds within 30 days after receiving a request under paragraph 2 that the request is manifestly unfounded, a tribunal shall be established under this Article.

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4. Unless all the disputing parties sought to be covered by the order otherwise agree, a tribunal established under the 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 the respondent or of a Party of any claimant.
5. If, within 60 days after the Secretary-General receives a request made under paragraph 2, the respondent fails or the claimants fail to appoint an arbitrator in accordance with paragraph 4, the Secretary-General, on the request of any disputing party sought to be covered by the order, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.
6. Where a tribunal established under the Article is satisfied that two or more claims that have been submitted to arbitration under Article II.18(1) have a question of law or fact in common, and arise out of the same events or circumstances, the tribunal may, in the interest of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:
- (a) assume jurisdiction over, and hear and determine together, all or part of the claims;
  - (b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others; or
  - (c) instruct a tribunal previously established under Article II.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 prior hearing shall be repeated.
7. Where a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration under Article II.18(1) and that has not been named in a

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request made under paragraph 2 may make a written request to the tribunal that it be included in any order made under paragraph 6, and shall specify in the request:

- (a) the name and address of the claimant;
- (b) the nature of the order sought; and
- (c) the grounds on which the order is sought.

The claimant shall deliver a copy of its request to the Secretary-General.

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

9. A tribunal established under Article II.21 shall not have jurisdiction to decide a claim, or part of a claim, over which a tribunal established or instructed under this Article has assumed jurisdiction.

10. On application of a disputing party, a tribunal established under this Article, pending its decision under paragraph 6, may order that the proceedings of a tribunal established under Article II.21 be stayed, unless the latter tribunal has already adjourned its proceedings.

#### **Article II.28: Awards**

1. Where a tribunal makes a final award against a respondent, 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 respondent may pay monetary damages and any applicable interest in lieu of restitution.

2. For greater certainty, when an investor of a Party submits a claim to arbitration under Article II.18.1(a), it may recover only for loss or damage that it has incurred in its capacity as an investor of a Party.

3. A tribunal may also award costs and attorney's fees incurred by the disputing parties in connection with the arbitral proceeding and shall determine how and by whom those costs and attorney's fees shall be paid, in accordance with this Section and the applicable arbitration rules.

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*3bis.* For greater certainty, for claims alleging the breach of an obligation under Section A with respect to an attempt to make an investment, the only damages that may be awarded are those that the claimant has proven were sustained in the attempt to make the investment, provided that the claimant also proves that the breach was the proximate cause of those damages. If the tribunal determines such claims to be frivolous, the tribunal may award to the respondent reasonable costs and attorney's fees. <<*ad ref for xx*>>

4. Subject to paragraph 1, where a claim is submitted to arbitration under Article II.18(1)(b):

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

5. A tribunal may not award punitive damages.

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

7. Subject to paragraph 8 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.

8. A disputing party may not seek enforcement of a final award until:

- (a) in the case of a final award made under the ICSID Convention,
  - (i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award; or
  - (ii) revision or annulment proceedings have been completed; and
- (b) in the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or the rules selected pursuant to Article II.18(3)(d),

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- (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.
9. Each Party shall provide for the enforcement of an award in its territory.
10. If the respondent fails to abide by or comply with a final award, on delivery of a request by the Party of the claimant, a panel shall be established under Article BBB.7 (Dispute Settlement Chapter; Establishment of an Arbitral Tribunal Article). The requesting Party may seek in such proceeding:
- (a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Agreement; and
  - (b) in accordance with Article BBB.16 (Dispute Settlement Chapter; Initial Report Article), a recommendation that the respondent abide by or comply with the final award.
11. A disputing party may seek enforcement of an arbitration award under the ICSID Convention, the New York Convention, or the Inter-American Convention regardless of whether proceedings have been taken under paragraph 10.
12. A claim that is submitted to arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention and Article I of the Inter-American Convention.

#### **Article II.29: Service of Documents**

Delivery of notice and other documents on a Party shall be made to the place named for that Party in Annex II-D (Service of Documents on a Party Under Section B). A Party shall promptly make publicly available and notify to the other Parties any change to the place referred to in that annex.

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**Annex II-A**

**Customary International Law**

The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Article II.6 (Minimum Standard of Treatment) results from a general and consistent practice of States that they follow from a sense of legal obligation. The customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the investments of aliens.

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## Annex II-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 or property interest in an investment.
2. Article II.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 II.7(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 expectations;<sup>34</sup>
    - (iii) the character of the government action.
  - (b) Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations, except in rare circumstances.

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<sup>34</sup> For greater certainty, whether an investor's investment-backed expectations are reasonable depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector. <<Note: Para 3 is subject to ad-referendum consideration by xx>>

## Annex II-C

### Expropriation Relating to Land

Notwithstanding the obligations under Article II.7 (Expropriation and Compensation), where Singapore is the expropriating Party, any measure of direct expropriation relating to land shall be for a purpose and upon payment of compensation at market value, in accordance with the applicable domestic legislation<sup>35</sup> and any subsequent amendments thereto relating to the amount of compensation where such amendments provide for the method of determination of the compensation which is no less favorable to the investor for its expropriated investment than such method of determination in the applicable domestic legislation as at the time of entry into force of the Agreement.

Notwithstanding, the obligations under Article II.7 (Expropriation and Compensation), where Viet Nam is the expropriating Party, any measure of direct expropriation relating to land shall be (i) for a purpose in accordance with the applicable domestic legislation,<sup>36</sup> and (ii) upon payment of compensation equivalent to the market value, while recognizing the applicable domestic legislation.

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<sup>35</sup> The applicable domestic legislation is the Land Acquisition Act (Cap. 152) as at the date of entry into force of the Agreement.

<sup>36</sup> The applicable domestic legislation is Viet Nam's Land Law, Law No. 45/2013/QH13 and Decree 44/2014/ND-CP Regulating Land Prices, as at the date of entry into force of the Agreement.

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**Annex II-D**

**Service of Documents on a Party Under Section B (Investor-State Dispute Settlement)**

**Australia**

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

Department of Foreign Affairs and Trade  
R.G. Casey Building  
John McEwen Crescent  
Barton ACT 0221  
Australia

**Brunei Darussalam**

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

The Permanent Secretary (Trade)  
Ministry of Foreign Affairs and Trade  
Jalan Subok  
Bandar Seri Begawan, BD 2710  
Brunei Darussalam

**Canada**

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

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

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**Chile**

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

Dirección de Asuntos Jurídicos del Ministerio de Relaciones  
Exteriores de la República de Chile  
Teatinos 180  
Santiago  
Chile

**Japan**

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

Ministry of Foreign Affairs  
2-2-1 Kasumigaseki, Chiyoda-ku  
Tokyo  
Japan

**Malaysia**

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

Attorney General's Chambers  
Level 16, No. 45 Persiaran Perdana  
Precinct 4  
Federal Government Administrative Center  
62100 Putrajaya  
Malaysia

**Mexico**

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

Dirección General de Consultoría Jurídica de Comercio Internacional  
Alfonso Reyes #30, piso 17  
Col. Hipódromo Condesa  
Del. Cuauhtémoc  
México D.F.  
C.P. 06140

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**New Zealand**

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

The Secretary  
Ministry of Foreign Affairs and Trade  
195 Lambton Quay  
Private Bag 18 901  
Wellington  
New Zealand

**Peru**

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

Dirección General de Asuntos de Economía Internacional,  
Competencia y Productividad  
Ministerio de Economía y Finanzas  
Jirón Lampa 277, piso 5  
Lima, Perú

**Singapore**

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

Permanent Secretary  
Ministry of Trade & Industry  
100 High Street #09-01  
Singapore 179434

**United States**

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

Executive Director (L/EX)  
Office of the Legal Advisor  
Department of State  
Washington, D.C. 20520  
United States of America

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**Viet Nam**

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

General Director  
Department of International Law  
Ministry of Justice  
60 Tran Phu Street  
Ba Dinh District  
Ha Noi  
Viet Nam

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**Annex II-E<sup>37</sup>**

**Transfers**

**Chile**

1. Chile reserves the right of the Central Bank of Chile (*Banco Central de Chile*) to maintain or adopt measures in conformity with Law 18.840, Constitutional Organic Law of the Central Bank of Chile (*Ley 18.840, Ley Orgánica Constitucional del Banco Central de Chile*) or other legislation, in order to ensure currency stability and the normal operation of domestic and foreign payments. For this purpose, the Central Bank of Chile is empowered to regulate the supply of money and credit in circulation and international credit and foreign exchange operations. The Central Bank of Chile is empowered as well to issue regulations governing monetary, credit, financial, and foreign exchange matters. Such measures include, *inter alia*, the establishment of restrictions or limitations on current payments and transfers (capital movements) to or from Chile, as well as transactions related to them, such as requiring that deposits, investments or credits from or to a foreign country, be subject to a reserve requirement (*encaje*).

2. Notwithstanding paragraph 1, the reserve requirements that the Central Bank of Chile can apply pursuant to Article 49 No 2 of Law 18.840, shall not exceed 30 percent of the amount transferred and shall not be imposed for a period which exceeds two years.

3. When applying measures under this Annex, Chile, as established in legislation, shall not discriminate between a TPP Party and any third country with respect to transactions of the same nature.]

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<sup>37</sup> [For greater certainty, Annex II-E applies to transfers covered by Article II.8]

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**Annex II – F**

**DL 600**

**Chile**

1. The obligations and commitments contained in this Chapter do not apply to Decree Law 600, Foreign Investment Statute (*Decreto Ley 600, Estatuto de la Inversión Extranjera*) (hereinafter referred to in this Annex as “DL 600”), and to Law 18.657, Foreign Capital Investment Fund Law (*Ley 18.657, Ley de Fondos de Inversión de Capital Extranjero*) or its successor, with respect to:

- (a) The right of the Foreign Investment Committee of Chile (*Comité de Inversiones Extranjeras*) or its successor to accept or reject applications to invest through an investment contract under DL 600<sup>38</sup> and the right to regulate the terms and conditions of foreign investment under DL 600 and Law 18.657.
- (b) The right to maintain existing requirements that transfers from Chile of proceeds from the sale of all or any part of an investment of an investor of a Party or from the partial or complete liquidation of the investment which may not take place until a period not to exceed:
  - (i) in the case of an investment made pursuant to DL 600, one year from the date of transfer to Chile; or
  - (ii) in the case of an investment made pursuant to Law 18.657, five years from the date of transfers to Chile.
- (c) The right to adopt measures, consistent with this Annex, establishing future special voluntary investment programs in addition to the general regime for foreign investment in Chile, except that any such measures may restrict transfers from Chile of proceeds from the sale of all or any part of an investment of an investor of another Party or from the partial or complete liquidation of the investment for a period not to exceed five years from the date of transfer to Chile.

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[<sup>38</sup> The authorization and execution of an investment contract under DL 600 by an investor of a Party or a covered investment does not create any right on the part of the investor or the covered investment to engage in particular activities in Chile.]

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2. For greater certainty, the investment entered through an investment contract under DL 600, through Law 18.657 or through any future special voluntary investment program, will be subject to the obligations and commitments of this Chapter, to the extent that the investment is a covered investment under Chapter II (Investment).]

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## **Annex II-G**

### **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 claimant for a claim under Article II.18.1(a)(i)(A) or Article II.18.1(b)(i)(A) with respect to default or non-payment of debt issued by a Party unless the claimant meets its burden of proving that such default or non-payment constitutes a breach of any obligation under Section A, including an uncompensated expropriation pursuant to Article II.7.
2. No claim that a restructuring of debt issued by a Party breaches an obligation under Section A may be submitted to, or if already submitted continue in, arbitration under Section B 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 II.4 or II.5.
3. Notwithstanding Article II.18.3, and subject to paragraph 2 of this Annex, an investor of another Party may not submit a claim under Section B that a restructuring of debt issued by a Party breaches an obligation under Section A (other than Article II.4 or II.5) unless 270 days have elapsed from the date of receipt by the respondent of the written request for consultations pursuant to Article II.17(2).<sup>39</sup>

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<sup>39</sup> Paragraphs 2 and 3 of this Annex do not apply to Singapore or the United States.

**Annex II-H**

A decision under: Australia's foreign investment policy, which consists of the Foreign Acquisitions and Takeovers Act of 1975, Foreign Acquisitions and Takeovers Regulations 1989, Financial Sector (Shareholdings) Act 1998 and associated Ministerial Statements by the Treasurer of the Commonwealth of Australia or a minister acting on his or her behalf, on whether or not to approve a foreign investment proposal, shall not be subject to the dispute settlement provisions under Section B (Investor-State Dispute Settlement) or Chapter BBB (Dispute Settlement) of this Agreement.

A decision by Canada following a review under the *Investment Canada Act* (R.S.C. 1985, c.28 (1st Supp.)), with respect to whether or not to permit an investment that is subject to review, is not subject to the dispute settlement provisions under Section B (Investor-State Dispute Settlement) or Chapter BBB (Dispute Settlement) of this Agreement.

A decision by National Commission on Foreign Investment ("Comisión Nacional de Inversiones Extranjeras") following a review pursuant to Annex I, Mexico (Existing Measures), [number 3] [page xxx] with respect to whether or not to permit an acquisition that is subject to review, shall not be subject to the dispute settlement provisions of Section B (Investor-State Dispute Settlement) or Chapter BBB (Dispute Settlement) of this Agreement.

A decision under New Zealand's Overseas Investment Act 2005 to grant consent, or to decline to grant consent, to an overseas investment transaction that requires prior consent under that Act shall not be subject to the dispute settlement provisions under Section B (Investor-State Dispute Settlement) or Chapter BBB (Dispute Settlement) of this Agreement.

**[Annex II-I**

Measures adopted or maintained by Canada with respect to cultural industries are not subject to the provisions of Section B (Investor-State Dispute Settlement)

Cultural industry means a person engaged in the following activities:

- a. the publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing;
- b. the production, distribution, sale or exhibition of film or video recordings;
- c. the production, distribution, sale or exhibition of audio or video music recordings;
- d. the publication, distribution or sale of music in print or machine-readable form; or
- e. radio communications in which the transmissions are intended for direct reception by the general public, and all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services.]

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## **Annex II-J**

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

1. An investor of a Party may not submit to arbitration under Section B a claim that Chile, Peru, Mexico or Viet Nam has breached an obligation under Section A either:

- (a) on its own behalf under paragraph II.18(1)(a), or
- (b) on behalf of an enterprise of Chile, Peru, Mexico, or Viet Nam, that is a juridical person that the investor owns or controls directly or indirectly under II.18(1)(b),

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

2. For greater certainty if an investor of a Party elects to submit a claim of the type described in paragraph 1 to a court or administrative tribunal of Chile, Peru, Mexico or Viet Nam, that election shall be definitive and exclusive, and the investor may not thereafter submit the claim to arbitration under Section B.

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**Annex II-L**

Measures adopted or maintained by Malaysia related to government procurement are not subject to the provisions of Section B (Investor-State Dispute Settlement).]

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<< Note: Final placement proposed to be in Exceptions Chapter >>

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### **Article CCC.3: Temporary Safeguard Measures**

1. Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining restrictive measures with regard to transfers or payments for current account transactions in the event of serious balance of payments and external financial difficulties or threats thereof.

2. Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining restrictive measures with regard to [the movement of capital, or] payments or transfers relating to the movements of capital:

- (a) in the event of serious balance of payments and external financial difficulties or threats thereof; or
- (b) where, in exceptional circumstances, [the movement of capital, or] payments or transfers relating to capital movements cause or threaten to cause serious difficulties for macroeconomic management, in particular, the operation of monetary policy or exchange rate policy.

3. Any measure adopted or maintained under paragraphs 1 or 2 shall:

- (a) be applied on a non-discriminatory basis such that no Party is treated less favorably than any other Party or non-Party;
- (b) be consistent with the Articles of Agreement of the International Monetary Fund;
- (c) avoid unnecessary damage to the commercial, economic and financial interests of any other Party;
- (d) not exceed those necessary to deal with the circumstances described in paragraphs 1 or 2; and
- (e) be temporary and be phased out progressively as the situation specified in paragraphs 1 or 2 improves.

4. In the case of trade in goods, [in order to safeguard the external financial position and balance of payments of Parties,] Article XII of the GATT and the Understanding on the Balance of Payments provisions of the GATT 1994 are incorporated *mutatis mutandis*.

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[5. In the case of trade in services, nothing in this Agreement shall be construed to prevent a Party from adopting trade restrictive measures in order to safeguard its external financial position and balance of payments. These restrictive trade measures shall be in accordance with the General Agreement on Trade in Services (GATS).]

[In the case of trade in services, [in order to safeguard the external financial position and balance of payments of Parties,] paragraphs 1, 2 and 3 of Article XII of the GATS are incorporated *mutatis mutandis*.]

6. A Party adopting or maintaining measures under [paragraphs 1, 2 [4] [or 5] [paragraphs 1 or 2] shall:

- (a) promptly notify the other Parties of the measures, including any changes therein; and
- (b) promptly commence consultations with the other Parties in order to review the measures adopted or maintained by it.
  - (i) In the case of capital movements, respond to any other Party that requests consultations in relation to the measures adopted by it, provided that such consultations are not otherwise taking place outside of this Agreement.
  - (ii) In the case of current account transactions, if consultations in relation to the measures adopted by it are not taking place at the WTO, a Party, if requested, shall promptly commence consultations with any interested Party.]]

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*[alternative working compromise text:*

**Article CCC.3: Temporary Safeguard Measures**

1. Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining restrictive measures with regard to transfers relating to the movements of capital:
  - (a) in the event of serious balance of payments and external financial difficulties or threats thereof; or
  - (b) where, in exceptional circumstances, transfers relating to capital movements cause or threaten to cause serious difficulties for macroeconomic management.
2. Any measure adopted or maintained under paragraph 1 shall:
  - (a) be applied on a non-discriminatory basis such that no Party is treated less favorably than any other Party or non-Party;
  - (b) be consistent with the Articles of Agreement of the International Monetary Fund;
  - (c) avoid unnecessary damage to the commercial, economic and financial interests of any other Party;
  - (d) not exceed those necessary to deal with the circumstances described in paragraph 1;
  - (e) be temporary and be phased out progressively as the situation specified in paragraph 1 improves, and in no case shall exceed one year in duration;
  - (f) be price-based;
  - (g) not be confiscatory;
  - (h) not interfere with investors' ability to earn a market rate of return in the territory of the restricting Party; and
  - (i) not be used as a substitute for or avoid necessary macroeconomic adjustment, including exchange rate adjustment.
3. Measures referred to in paragraph 1 shall not apply to transfers associated with equity investments.

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4. In the case of trade in goods, Article XII of the GATT and the Understanding on the Balance of Payments provisions of the GATT 1994 are incorporated *mutatis mutandis*. Any measure adopted or maintained under this paragraph shall not impair the relative benefits accorded to the other Parties under this Agreement.
5. A Party adopting or maintaining measures under paragraphs 1 or 4 shall:
- (a) notify within 30 days the other Parties of the measures, including any changes therein, along with the rationale for their imposition; and
  - (b) promptly commence consultations with the other Parties in order to review the measures adopted or maintained by it.
    - (i) In the case of capital movements, immediately respond to any other Party that requests consultations in relation to the measures adopted by it, provided that such consultations are not otherwise taking place outside of this Agreement.
    - (ii) In the case of import restrictions, if consultations in relation to the measures adopted by it are not taking place at the WTO, a Party, if requested, shall promptly commence consultations with any interested Party.]

## **Annex II-K: Non-Conforming Measures for Ratchet Mechanism**

1. Notwithstanding Article II.11.1(c), for Viet Nam for 3 years after the entry into force of the Agreement:
  - (a) Articles II.4 (National Treatment), II.5 (Most-Favored-Nation Treatment), II.9 (Performance Requirements) and II.10 (Senior Management and Board of Directors) do not apply to an amendment to any non-conforming measure referred to in Article II.11.1(a) to the extent that the amendment does not decrease the conformity of the measure, as it existed at the time of entry into force of the Agreement for Viet Nam, with Articles 11.4 (National Treatment), II.5 (Most Favored-Nation Treatment), II.7 (Performance Requirements) and II.10 (Senior Management and Board of Directors);
  - (b) Viet Nam shall not withdraw a right or benefit from an investor or covered investment of another Party, in reliance on which the investor or covered investment has taken any concrete action,<sup>40</sup> through an amendment to any non-conforming measure referred to in Article II.11.1(a) that decreases the conformity of the measure as it existed immediately before the amendment;
  - (c) Viet Nam shall provide to each Party the details of any amendment to any non-conforming measure referred to in Article II.11.1(a) that would decrease the conformity of the measure, as it existed immediately before the amendment, at least 90 days before making the amendment.

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<sup>40</sup> Such action includes the channeling of resources or capital in order to establish or expand a business and applying for permits and licenses.

**[Annex II-M**

**Annex on Health**

The following measures of Australia shall not be subject to the dispute settlement procedures under Section B (Investor-State Dispute Settlement) of the Investment Chapter: measures comprising or related to the Pharmaceutical Benefits Scheme, Medicare Benefits Scheme, Therapeutic Goods Administration and the Office of the Gene Technology Regulator.<sup>41]</sup>

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<sup>41</sup> A reference to a body or program in this Annex is a reference to that body or program from time to time and includes any successor of that body or program.

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