

## CHAPTER 11

### INVESTMENT

#### SECTION A

##### Article 1

##### Scope

1. This Chapter shall apply to measures adopted or maintained by a Party relating to:
  - (a) investors of any other Party; and
  - (b) covered investments.
2. This Chapter shall not apply to:
  - (a) government procurement;
  - (b) subsidies or grants provided by a Party; and
  - (c) services supplied in the exercise of governmental authority by the relevant body or authority of a Party. For the purposes of this Chapter, a service supplied in the exercise of governmental authority means any service which is supplied neither on a commercial basis nor in competition with one or more service suppliers.

##### Article 2

##### Definitions

For the purposes of this Chapter:

- (a) **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, and which, where applicable, has been admitted<sup>1</sup> by the host Party, subject to its relevant laws, regulations and policies;

- (b) **freely usable currency** means a freely usable currency as determined by the International Monetary Fund in accordance with the IMF Articles of Agreement and any amendments thereto;
- (c) **investment**<sup>2</sup> means every kind of asset owned or controlled by an investor, including but not limited to the following:
  - (i) movable and immovable property and other property rights such as mortgages, liens or pledges;
  - (ii) shares, stocks, bonds and debentures and any other forms of participation in a juridical person and rights derived therefrom;
  - (iii) intellectual property rights which are recognised pursuant to the laws and regulations of each Party and goodwill;

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<sup>1</sup> For greater certainty:

- (a) in the case of Thailand, protection under this Chapter shall be accorded to covered investments which have been specifically approved in writing for protection by the competent authorities;
- (b) in the case of Viet Nam, “has been admitted” means “has been specifically registered or approved in writing, as the case may be”.

<sup>2</sup> The term “investment” does not include an order or judgment entered in a judicial or administrative action.

- (iv) claims to money or to any contractual performance related to a business and having financial value<sup>3</sup>;
- (v) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts; and
- (vi) business concessions required to conduct economic activity and having financial value conferred by law or under a contract, including any concession to search for, cultivate, extract or exploit natural resources.

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

- (d) **investor of a Party** means a natural person of a Party or a juridical person of a Party that seeks to make<sup>4</sup>, is making, or has made an investment in the territory of another Party;
- (e) **juridical person** means any entity duly constituted or otherwise organised under applicable law, whether for profit or otherwise,

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<sup>3</sup> For greater certainty, investment does not mean claims to money that arise solely from:

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

<sup>4</sup> For greater certainty, the Parties understand that an investor that “seeks to make” an investment refers to an investor of another Party that has taken active steps to make an investment. Where a notification or approval process is required for making an investment, an investor that “seeks to make” an investment refers to an investor of another Party that has initiated such notification or approval process.

and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship, association or similar organisation;

- (f) **juridical person of a Party** means a juridical person constituted or organised under the law of that Party;
- (g) **measure** means any measure by a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form;
- (h) **measures by a Party** includes measures taken by:
  - (i) central, regional, or local governments and authorities; and
  - (ii) non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities;
- (i) **natural person of a Party** means any natural person possessing the nationality or citizenship of, or right of permanent residence in that Party in accordance with its laws and regulations; and
- (j) **return** means an amount yielded by or derived from an investment, including profits, dividends, interest, capital gains, royalties and all other lawful income.

### **Article 3** **Relation to other Chapters**

1. This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by

Chapter 8 (Trade in Services) or Chapter 9 (Movement of Natural Persons).

2. Notwithstanding Paragraph 1, Article 6 (Treatment of Investment), Article 7 (Compensation for Losses), Article 8 (Transfers), Article 9 (Expropriation and Compensation), Article 10 (Subrogation) and Section B (Investment Disputes between a Party and an Investor) shall apply, *mutatis mutandis*, to any measure affecting the supply of service by a service supplier of a Party through commercial presence in the territory of any one of the other Parties pursuant to Chapter 8 (Trade in Services), but only to the extent that any such measures relate to a covered investment and an obligation under this Chapter, regardless of whether such a service sector is scheduled in a Party's schedule of specific services commitments in Annex 3 (Schedules of Specific Services Commitments).

#### **Article 4 National Treatment<sup>5</sup>**

Each Party shall accord to investors of another Party, and to covered investments, in relation to the establishment, acquisition, expansion, management, conduct, operation, liquidation, sale, transfer or other disposition of investments, treatment no less favourable than that it accords, in like circumstances, to its own investors and their investments.

#### **Article 5 Prohibition of Performance Requirements**

No Party shall apply in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party in its territory any measure which is inconsistent with the *Agreement on Trade-Related Investment Measures* in Annex 1A to the WTO Agreement.

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<sup>5</sup> The application of this Article is subject to Article 16 (Work Programme).

## **Article 6**

### **Treatment of Investment**

1. Each Party shall accord to covered investments fair and equitable treatment and full protection and security.
2. For greater certainty<sup>6</sup>:
  - (a) fair and equitable treatment requires each Party not to deny justice in any legal or administrative proceedings;
  - (b) full protection and security requires each Party to take such measures as may be reasonably necessary to ensure the protection and security of the covered investment; and
  - (c) the concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required under customary international law, and do not create additional substantive rights.
3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

## **Article 7**

### **Compensation for Losses**

Each Party shall accord to investors of another Party, and to covered investments, with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict, civil strife or state of

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<sup>6</sup> In the case of Indonesia, only Paragraph 2(a) and (b) shall apply where Indonesia is the Party according treatment under this Article.

emergency, treatment no less favourable than that it accords, in like circumstances, to:

- (a) its own investors and their investments; and
- (b) investors of any other Party or non-Party and their investments.

### **Article 8 Transfers**

1. Each Party shall allow 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, including the initial contribution;
- (b) profits, capital gains, dividends, royalties, licence fees, technical assistance and technical and management fees, interest and other current income accruing from any covered investment;
- (c) proceeds from the total or partial sale or liquidation of any covered investment;
- (d) payments made under a contract, including a loan agreement;
- (e) payments made pursuant to Article 7 (Compensation for Losses) and Article 9 (Expropriation and Compensation);
- (f) payments arising out of the settlement of a dispute by any means including adjudication, arbitration or the agreement of the parties to the dispute; and

- (g) earnings and other remuneration of personnel engaged from abroad in connection with that investment.

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

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

- (a) bankruptcy, insolvency, or the protection of the rights of creditors;
- (b) issuing, trading, or dealing in securities, futures, options, or derivatives;
- (c) criminal or penal offences and the recovery of the proceeds of crime;
- (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;
- (e) ensuring compliance with orders or judgments in judicial or administrative proceedings;
- (f) taxation;
- (g) social security, public retirement, or compulsory savings schemes; and
- (h) severance entitlements of employees.

4. Nothing in this Chapter shall affect the rights and obligations of each Party as a member of the International Monetary Fund under the IMF Articles of Agreement,

including the use of exchange actions which are in conformity with the IMF Articles of Agreement, provided that a Party shall not impose restrictions on any capital transactions inconsistently with its specific commitments under this Chapter regarding such transactions, except under Article 4 (Measures to Safeguard the Balance of Payments) of Chapter 15 (General Provisions and Exceptions) or at the request of the International Monetary Fund.

### **Article 9 Expropriation and Compensation<sup>7</sup>**

1. A Party shall not expropriate or nationalise a covered investment either directly or through measures equivalent to expropriation or nationalisation (expropriation), except:

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

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

- (a) be paid without delay<sup>9</sup>;

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<sup>7</sup> This Article shall be interpreted in accordance with this Chapter's Annex on Expropriation and Compensation.

<sup>8</sup> For the avoidance of doubt, where Malaysia is the expropriating Party, any measure of expropriation relating to land shall be for the purposes as set out in the domestic laws and regulations relating to land acquisition.

<sup>9</sup> The Parties understand that there may be legal and administrative processes that need to be observed before payment can be made.

- (b) be equivalent to the fair market value of the expropriated investment at the time when or immediately before the expropriation was publicly announced<sup>10</sup>, or when the expropriation occurred, whichever is applicable;
- (c) not reflect any change in value because the intended expropriation had become known earlier; and
- (d) be effectively realisable and freely transferable between the territories of the Parties.

3. The compensation referred to in Paragraph 1(c) shall include appropriate interest. The compensation, including any accrued interest, shall be payable either in the currency of the expropriating Party, or if requested by the investor, in a freely usable currency.

4. If an investor requests payment in a freely useable currency, the compensation referred to in Paragraph 1(c), including any accrued interest, shall be converted into the currency of payment at the market rate of exchange prevailing on the date of payment.

5. This Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights in accordance with the TRIPS Agreement.

6. Notwithstanding Paragraphs 1 to 4, in the case where Singapore or Viet Nam is the expropriating Party, any measure of expropriation relating to land, which shall be as defined in the existing domestic legislation of the expropriating Party on the date of entry into force of this Agreement, shall be for a purpose and upon payment of compensation made in accordance with the aforesaid

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<sup>10</sup> In the case of the Philippines, the time when or immediately before the expropriation was publicly announced refers to the date of filing of the Petition for Expropriation.

legislation. Such compensation shall be subject to any subsequent amendments to the aforesaid legislation relating to the amount of compensation where such amendments follow the general trends in the market value of the land.

### **Article 10 Subrogation**

1. If a Party or an agency of a Party makes a payment to an investor of that Party under a guarantee, a contract of insurance or other form of indemnity it has granted on non-commercial risk in respect of an investment, the other Party shall recognise the subrogation or transfer of any right or claim in respect of such investment. The subrogated or transferred right or claim shall not be greater than the original right or claim of the investor.

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

3. In any proceeding involving an investment dispute, a Party shall not assert, as a defence, counter-claim, right of set-off or otherwise, that the investor or the covered investment has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of any alleged loss.

### **Article 11 Denial of Benefits**

1. Following notification, a Party may deny the benefits of this Chapter:

- (a) to an investor of another Party that is a juridical person of such other Party and to investments of

that investor if an investor of a non-Party owns or controls the juridical person and the juridical person has no substantive business operations in the territory of the other Party;

- (b) to an investor of another Party that is a juridical person of such other Party and to investments of that investor if an investor of the denying Party owns or controls the juridical person and the juridical person has no substantive business operations in the territory of any Party, other than the denying Party.

2. Notwithstanding Paragraph 1 and subject to prior notification to and consultation with the relevant Party, Thailand may, under its applicable laws and regulations, deny the benefits of this Chapter relating to the admission, establishment, acquisition and expansion of investments to an investor of another Party that is a juridical person of such Party and to investments of such an investor where Thailand establishes that the juridical person is owned or controlled by natural persons or juridical persons of a non-Party or the denying Party.

3. In the case of Thailand, a juridical person is:

- (a) **owned** by natural persons or juridical persons of a Party or a non-Party if more than 50 per cent of the equity interest in it is beneficially owned by such persons;
- (b) **controlled** by natural persons or juridical persons of a Party or non-Party if such persons have the power to name a majority of its directors or otherwise to legally direct its actions.

4. Following notification, and without prejudice to Paragraph 1, the Philippines may deny the benefits of this Chapter to an investor of another Party and to investments of

that investor, where it establishes that such investor has made an investment in breach of the provisions of Commonwealth Act No. 108, entitled “An Act to Punish Acts of Evasion of Laws on the Nationalization of Certain Rights, Franchises or Privileges”, as amended by Presidential Decree No. 715, otherwise known as “The Anti-Dummy Law”, as may be amended.

## **Article 12 Reservations<sup>11</sup>**

1. Article 4 (National Treatment), and in the case of Lao PDR Article 5 (Prohibition of Performance Requirements), do not apply to:

- (a) any existing measure that does not conform to those Articles maintained by a Party at:
  - (i) the central level of government, as set out by that Party in its Schedule to List I;
  - (ii) a regional level of government, as set out by that Party in its Schedule to List I; or
  - (iii) a local level of government;
- (b) the continuation or prompt renewal of any measure referred to in Subparagraph (a); or
- (c) an amendment to any measure referred to in Subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure as it existed at the date of entry into force of the Party’s Schedule to List I, with Article 4 (National Treatment), and, in the case of Lao PDR Article 5 (Prohibition of Performance Requirements).

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<sup>11</sup> The application of this Article is subject to Article 16 (Work Programme).

2. Article 4 (National Treatment), and in the case of Lao PDR Article 5 (Prohibition of Performance Requirements), do not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors, or activities, as set out in its Schedule to List II.

3. Other than pursuant to any procedures for the modification of schedules of reservations, a Party may not, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to List II, require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

### **Article 13 Transparency**

1. Each Party shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application covered by this Chapter. International agreements pertaining to or affecting investors or investment activities to which a Party is a signatory shall also be published.

2. To the extent possible, each Party shall make the measures and international agreements of the kind referred to in Paragraph 1 available on the internet.

3. Where publication referred to in Paragraphs 1 and 2 is not practicable, such information<sup>12</sup> shall be made otherwise publicly available.

4. To the extent provided for under its domestic legal framework, each Party shall endeavour to provide a

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<sup>12</sup> For greater certainty, the Parties agree that such information may be published in each Party's chosen language.

reasonable opportunity for comments by interested persons on measures referred to in Paragraph 1 before adoption.

5. Each Party shall designate a contact point to facilitate communications among the Parties on any matter covered by this Chapter. Upon the request of another Party, the contact point shall:

- (a) identify the office or official responsible for the relevant matter; and
- (b) assist as necessary in facilitating communications with the requesting Party with respect to that matter.

6. Each Party shall respond within a reasonable period of time to all requests by any other Party for specific information on:

- (a) any measures or international agreements referred to in Paragraph 1;
- (b) any new, or any changes to existing, measures or administrative guidelines which significantly affect investors or covered investments, whether or not the other Party has been previously notified of the new or changed measure or administrative guideline.

7. Any notification or communication under this Article shall be provided to the other Party through the relevant contact points in the English language.

8. Nothing in this Article shall be construed as requiring a Party to provide confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular juridical persons, public or private.

9. Each Party shall ensure that in its administrative proceedings relating to the application of measures referred to in Paragraph 1 to particular investors or investments of the other Party in specific cases that:

- (a) to the extent provided under its domestic legal framework and where possible, persons of another Party that are directly affected by a proceeding are provided reasonable notice, when a proceeding is initiated;
- (b) to the extent provided under its domestic legal framework, that it endeavours to afford such persons with reasonable opportunity to present their positions prior to any final administrative action, when time, the nature of the proceeding, and the public interest permit; and
- (c) its procedures are in accordance with its laws.

10. Each Party shall maintain judicial or administrative tribunals or procedures for the purpose of the prompt review<sup>13</sup> and, where warranted, correction of final administrative actions regarding matters covered by this Chapter. Where such procedures or tribunals are not independent of the agency entrusted with the administrative action concerned, each Party shall ensure that the tribunals or procedures provide for an objective and impartial review.

11. Each Party shall ensure that, in any such tribunals or procedures, the parties to the proceedings are provided with the right to:

- (a) a reasonable opportunity to support or defend their respective positions; and

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<sup>13</sup> For avoidance of doubt, the form of “review” shall be as provided for under the Party’s law.

(b) a decision in accordance with the Party's laws.

12. Each Party shall ensure, subject to appeal or further review as provided in its law, that any decision referred to in Paragraph 11(b) shall be implemented in accordance with its laws.

#### **Article 14**

##### **Special Formalities and Disclosure of Information**

1. Nothing in Article 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, including a requirement that covered investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not substantially impair the protections afforded by a Party to investors of another Party and covered investments pursuant to this Chapter.

2. Notwithstanding Article 4 (National Treatment), a Party may require an investor of another Party, or a covered investment, to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect to the extent possible any confidential information which has been provided from any disclosure that would prejudice legitimate commercial interests 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 15**

##### **Special and Differential Treatment for the Newer ASEAN Member States**

In order to increase the benefits of this Chapter for the newer ASEAN Member States, and in accordance with the objectives of and the Preamble to this Agreement and

objectives of Chapter 12 (Economic Co-operation), the Parties recognise the importance of according special and differential treatment to the newer ASEAN Member States under this Chapter, through:

- (a) technical assistance to strengthen their capacity in relation to investment policies and promotion, including in areas such as human resource development;
- (b) access to information on the investment policies of other Parties, business information, relevant databases and contact points for investment promotion agencies;
- (c) commitments in areas of interest to the newer ASEAN Member States; and
- (d) recognising that commitments by each newer ASEAN Member State may be made in accordance with its individual stage of development.

#### **Article 16 Work Programme**

1. The Parties shall enter into discussions on:
  - (a) schedules of reservations to this Chapter; and
  - (b) treatment of investment in services which does not qualify as commercial presence in Chapter 8 (Trade in Services).
2. The Parties shall also enter into discussions with a view to agreeing on:

- (a) the application of most-favoured-nation treatment to this Chapter, including to those schedules of reservations; and
- (b) procedures for the modification of schedules of reservations.

3. The Parties shall conclude the discussions referred to in Paragraphs 1 and 2 within five years from the date of entry into force of this Agreement unless the Parties otherwise agree. These discussions shall be overseen by the Investment Committee established pursuant to Article 17 (Committee on Investment).

4. Schedules of reservations to this Chapter referred to in Paragraph 1 shall enter into force on a date agreed to by the Parties.

5. Notwithstanding anything to the contrary in this Chapter, Article 4 (National Treatment) and Article 12 (Reservations) shall not apply until the Parties' schedules of reservations to this Chapter have entered into force in accordance with Paragraph 4.

### **Article 17**

#### **Committee on Investment**

1. The Parties hereby establish a Committee on Investment (Investment Committee) consisting of representatives of the Parties.

2. The Investment Committee shall meet within one year from the date of entry into force of this Agreement and thereafter as mutually determined by the Parties. Meetings may be conducted in person, or by any other means as mutually determined by the Parties.

3. The Investment Committee's functions shall be:
  - (a) to oversee the discussions referred to in Article 16.1 and 16.2 (Work Programme);
  - (b) to review the implementation of this Chapter;
  - (c) to consider any other matters related to this Chapter identified by the Parties; and
  - (d) to report to the FTA Joint Committee as required.

## **SECTION B**

### **Investment Disputes between a Party and an Investor**

#### **Article 18 Scope and Definitions**

1. This Section shall apply to disputes between a Party and an investor of another Party concerning an alleged breach of an obligation of the former under Section A which causes loss or damage to the covered investment of the investor.
2. This Section shall not apply to investment disputes which have occurred prior to the entry into force of this Agreement.
3. A natural person possessing the nationality or citizenship of a Party may not pursue a claim against that Party under this Section.
4. For the purpose of this Section:
  - (a) **Appointing Authority** means:

- (i) in the case of arbitration under Article 21.1(b) or (c) (Submission of a Claim), the Secretary-General of ICSID;
  - (ii) in the case of arbitration under Article 21.1(d) or (e) (Submission of a Claim), the Secretary-General of the Permanent Court of Arbitration; or
  - (iii) any person as agreed between the disputing parties;
- (b) **disputing Party** means a Party against which a claim is made under this Section;
  - (c) **disputing party** means a disputing investor or a disputing Party;
  - (d) **disputing parties** means a disputing investor and a disputing Party;
  - (e) **disputing investor** means an investor of a Party that makes a claim against another Party on its own behalf under this Section, and where relevant includes an investor of a Party that makes a claim on behalf of a juridical person of the disputing Party that the investor owns or controls;
  - (f) **ICSID** means the International Centre for Settlement of Investment Disputes;
  - (g) **ICSID Convention** means the *Convention on the Settlement of Investment Disputes between States and National of other States*, done at Washington on 18 March 1965;
  - (h) **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;*

- (i) **non-disputing Party** means the Party of the disputing investor;
- (j) **New York Convention** means the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, done at New York on 10 June 1958; and
- (k) **UNCITRAL Arbitration Rules** means the arbitration rules of the United Nations Commission on International Trade Law, approved by the United Nations General Assembly on 15 December 1976.

### **Article 19 Consultations**

1. In the event of an investment dispute referred to in Article 18.1 (Scope and Definitions), the disputing parties shall as far as possible resolve the dispute through consultation, with a view towards reaching an amicable settlement. Such consultations, which may include the use of non-binding, third party procedures, shall be initiated by a written request for consultations delivered by the disputing investor to the disputing Party.

2. With the objective of resolving an investment dispute through consultations, a disputing investor shall provide the disputing Party, prior to the commencement of consultations, with information regarding the legal and factual basis for the investment dispute.

**Article 20**  
**Claim by an Investor of a Party**

If an investment dispute has not been resolved within 180 days of the receipt by a disputing Party of a request for consultations, the disputing investor may, subject to this Article, submit to conciliation or arbitration a claim:

- (a) that the disputing Party has breached an obligation arising under Article 4 (National Treatment), Article 6 (Treatment of Investment), Article 7 (Compensation for Losses), Article 8 (Transfers), and Article 9 (Expropriation and Compensation) relating to the management, conduct, operation or sale or other disposition of a covered investment; and
- (b) that the disputing investor or the covered investment has incurred loss or damage by reason of, or arising out of, that breach.

**Article 21**  
**Submission of a Claim**

1. A disputing investor may submit a claim referred to in Article 20 (Claim by an Investor of a Party) at the choice of the disputing investor:

- (a) where the Philippines or Viet Nam is the disputing Party, to the courts or tribunals of that Party, provided that such courts or tribunals have jurisdiction over such claim; or

- (b) under the ICSID Convention and the *ICSID Rules of Procedure for Arbitration Proceedings*<sup>14</sup>, provided that both the disputing Party and the non-disputing Party are parties to the ICSID Convention; or
- (c) under the ICSID Additional Facility Rules, provided that either of the disputing Party or non-disputing Party are a party to the ICSID Convention; or
- (d) under the UNCITRAL Arbitration Rules; or
- (e) if the disputing parties agree, to any other arbitration institution or under any other arbitration rules,

provided that resort to one of the fora under Subparagraphs (a) to (e) shall exclude resort to any other.

2. A claim shall be deemed submitted to arbitration under this Article when the disputing investor's notice of or request for arbitration made in accordance with this Section (notice of arbitration) is received under the applicable arbitration rules.

3. The arbitration rules applicable under Paragraph 1(b) to (e) as in effect on the date the claim or claims were submitted to arbitration under this Article, shall govern the arbitration except to the extent modified by this Section.

4. In relation to a specific investment dispute or class of disputes, the applicable arbitration rules may be waived, varied or modified by written agreement between the disputing parties. Such rules shall be binding on the relevant

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<sup>14</sup> In the case of the Philippines, the submission of a claim under the ICSID Convention and the *ICSID Rules of Procedure for Arbitration Proceedings* shall be subject to a written agreement between the disputing parties in the event that an investment dispute arises.

tribunal or tribunals established pursuant to this Section, and on individual arbitrators serving on such tribunals.

5. The disputing investor shall provide with the notice of arbitration:

- (a) the name of the arbitrator that the disputing investor appoints; or
- (b) the disputing investor's written consent for the Appointing Authority to appoint that arbitrator.

## **Article 22**

### **Conditions and Limitations on Submission of a Claim**

1. The submission of a dispute as provided for in Article 20 (Claim by an Investor of a Party) to conciliation or arbitration under Article 21.1(b) to (e) (Submission of a Claim) in accordance with this Section, shall be conditional upon:

- (a) the submission of the investment dispute to such conciliation or arbitration taking place within three years of the time at which the disputing investor became aware, or should reasonably have become aware, of a breach of an obligation referred to in Article 20(a) (Claim by an Investor of a Party) causing loss or damage to the disputing investor or a covered investment;
- (b) the disputing investor providing written notice, which shall be submitted at least 90 days before the claim is submitted, to the disputing Party of its intent to submit the investment dispute to such conciliation or arbitration and which briefly summarises the alleged breach of the disputing Party (including the articles or provisions alleged to have been breached) and the loss or damage

allegedly caused to the disputing investor or a covered investment; and

- (c) the notice of arbitration being accompanied by the disputing investor's written waiver of its right to initiate or continue any proceedings before the courts or administrative tribunals of either Party, or other dispute settlement procedures, of any proceeding with respect to any measure alleged to constitute a breach referred to in Article 20 (Claim by an Investor of a Party).

2. Notwithstanding Paragraph 1(c), no Party shall prevent the disputing investor from initiating or continuing an action that seeks interim measures of protection for the sole purpose of preserving its rights and interests and does not involve the payment of damages or resolution of the substance of the matter in dispute, before the courts or administrative tribunals of the disputing Party.

3. No Party shall give diplomatic protection, or bring an international claim, in respect of a dispute which has been submitted to conciliation or arbitration under this Article, unless such other Party has failed to abide by and comply with the award rendered in such dispute. Diplomatic protection, for the purposes of this Paragraph, shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

4. A disputing Party shall not assert, as a defence, counter-claim, right of set-off or otherwise, that the disputing investor or the covered investment has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of any alleged loss.

**Article 23**  
**Selection of Arbitrators**

1. Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators:

- (a) one arbitrator appointed by each of the disputing parties; and
- (b) the third arbitrator, who shall be the presiding arbitrator, appointed by agreement of the disputing parties, shall be a national of a non-Party which has diplomatic relations with the disputing Party and non-disputing Party, and shall not have permanent residence in either the disputing Party or non-disputing Party.

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

3. The Appointing Authority shall serve as appointing authority for arbitration under this Article.

4. If a tribunal has not been constituted within 75 days from the date that a claim is submitted to arbitration under this Section, the Appointing Authority, on the request of a disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.

5. The disputing parties may establish rules relating to expenses incurred by the tribunal, including arbitrators' remuneration.

6. Where any arbitrator appointed as provided for in this Article resigns or becomes unable to act, a successor shall

be appointed in the same manner as prescribed for the appointment of the original arbitrator and the successor shall have all the powers and duties of the original arbitrator.

#### **Article 24 Consolidation**

Where two or more claims have been submitted separately to arbitration under Article 20 (Claim by an Investor of a Party) and the claims have a question of law or fact in common and arise out of the same or similar events or circumstances, all concerned disputing parties may agree to consolidate those claims in any manner they deem appropriate.

#### **Article 25 Conduct of the Arbitration**

1. Where issues relating to jurisdiction or admissibility are raised as preliminary objections, a tribunal shall decide the matter before proceeding to the merits.
2. A disputing Party may, no later than 30 days after the constitution of the tribunal, file an objection that a claim is manifestly without merit. A disputing Party may also file an objection that a claim is otherwise outside the jurisdiction or competence of the tribunal. The disputing Party shall specify as precisely as possible the basis for the objection.
3. The tribunal shall address any such objection as a preliminary question apart from the merits of the claim. The disputing parties shall be given a reasonable opportunity to present their views and observations to the tribunal. If the tribunal decides that the claim is manifestly without merit, or is otherwise not within the jurisdiction or competence of the tribunal, it shall render an award to that effect.
4. The tribunal may, if warranted, award the prevailing party reasonable costs and fees incurred in submitting or

opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claim or the objection was frivolous or manifestly without merit, and shall provide the disputing parties a reasonable opportunity to comment.

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

6. Where an investor claims that the disputing Party has breached Article 9 (Expropriation and Compensation) by the adoption or enforcement of a taxation measure, the disputing Party and the non-disputing Party shall, upon request from the disputing Party, hold consultations with a view to determining whether the taxation measure in question has an effect equivalent to expropriation or nationalisation. Any tribunal that may be established pursuant to this Section shall accord serious consideration to the decision of both Parties under this Paragraph.

7. If both Parties fail either to initiate consultations referred to in Paragraph 6, or to determine whether such taxation measure has an effect equivalent to expropriation or nationalisation within the period of 180 days from the date of the receipt of request for consultation referred to in Article 19 (Consultations), the disputing investor shall not be prevented from submitting its claim to arbitration in accordance with this Section.

## **Article 26**

### **Transparency of Arbitral Proceedings**

1. Subject to Paragraphs 2 and 3, the disputing Party may make publicly available all awards and decisions produced by the tribunal.

2. Any of the disputing parties that intend to use information designated as confidential information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

3. Any information specifically designated as confidential that is submitted to the tribunal or the disputing parties shall be protected from disclosure to the public.

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

5. The tribunal shall not require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting Cabinet confidences, personal privacy or the financial affairs and accounts of individual customers of financial institutions, or which it determines to be contrary to its essential security.

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

## **Article 27 Governing Law**

1. Subject to Paragraphs 2 and 3, when a claim is submitted under Article 20 (Claim by an Investor of a Party), the tribunal shall decide the issues in dispute in accordance with this Agreement, any other applicable agreements between the Parties, any relevant rules of international law

applicable in the relations between the Parties, and, where applicable, any relevant domestic law of the disputing Party.

2. The tribunal shall, on its own account or at the request of a disputing party, request a joint interpretation of any provision of this Agreement that is in issue in a dispute. The Parties shall submit in writing any joint decision declaring their interpretation to the tribunal within 60 days of the delivery of the request. Without prejudice to Paragraph 3, if the Parties fail to issue such a decision within 60 days, any interpretation submitted by a Party shall be forwarded to the disputing parties and the tribunal, which shall decide the issue on its own account.

3. A joint decision of the Parties, declaring their interpretation of a provision of this Agreement shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.

## **Article 28**

### **Awards**

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

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

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

3. A tribunal may not award punitive damages.

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

5. Subject to Paragraph 6 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.<sup>15</sup>

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

(a) in the case of a final award under the ICSID Convention:

(i) 120 days has 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;

(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 21.1(e) (Submission of a Claim):

(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.

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<sup>15</sup> The Parties understand that there may be domestic legal and administrative processes that need to be observed before an award can be complied with.

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

## **ANNEX ON EXPROPRIATION AND COMPENSATION**

1. An action or a series of related actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in a covered investment.

2. Article 9.1 (Expropriation and Compensation) of Chapter 11 (Investment) addresses two situations:

- (a) the first situation is direct expropriation, where a covered investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and
- (b) the second situation is where an action or series of related actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

3. The determination of whether an action or series of related actions by a Party, in a specific fact situation, constitutes an expropriation of the type referred to in Paragraph 2(b) requires a case-by-case, fact-based inquiry that considers, among other factors:

- (a) the economic impact of the government action, although the fact that an action or series of related actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that such an expropriation has occurred;
- (b) whether the government action breaches the government's prior binding written commitment to the investor whether by contract, licence or other legal document; and

(c) the character of the government action, including, its objective and whether the action is disproportionate to the public purpose.<sup>1</sup>

4. Non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment do not constitute expropriation of the type referred to in Paragraph 2(b).

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<sup>1</sup> “Public purpose” shall be read with reference to Article 9.1(a) and Article 9.6 (Expropriation and Compensation) of Chapter 11 (Investment).