

## CHAPTER 10 INVESTMENT

### Article 10.1 Definitions

For the purposes of this Chapter:

- (a) “**claimant**” means an investor of a Party that is a party to an investment dispute with the other Party;
- (b) “**disputing parties**” means the claimant and the respondent;
- (c) “**disputing party**” means either the claimant or the respondent;
- (e) “**enterprise**” means any entity constituted or organised under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organisation; and a branch of an enterprise;
- (f) “**enterprise of a Party**” means an enterprise constituted or organised under the law of a Party, and a branch<sup>1</sup> located in the territory of a Party and carrying out business activities there;
- (g) “**freely useable currency**” means any currency as determined by the IMF under the *Articles of Agreement of the International Monetary Fund* and any amendments thereto;
- (h) “**government procurement**” means the process by which a government obtains the use of or acquires goods or services, or any combination thereof, for governmental purposes and not with a view to commercial sale or resale, or use in the production or supply of goods or services for commercial sale or resale;
- (i) “**ICLP**” means the Arbitration Centre of the Institute for the Development of Commercial Law and Practice in Sri Lanka;
- (j) “**intellectual property rights**” means:
  - (i) copyright and related rights;
  - (ii) patents;
  - (iii) trademarks;

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<sup>1</sup> For greater certainty, a branch of a legal entity of a non-Party shall not be considered as an enterprise of a Party.

- (iv) designs;
  - (v) layout-designs (topographies) of integrated circuits;
  - (vi) geographical indications; and
  - (vii) protection of undisclosed information;
- (k) “**investment**” means every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment<sup>2</sup>, which includes the commitment of capital or other resources, a certain duration, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include<sup>3, 4</sup>:
- (i) an enterprise;
  - (ii) shares, stock, and other forms of equity participation in an enterprise;
  - (iii) bonds, debentures, loans and other debt instruments<sup>5, 6</sup> of an enterprise;
  - (iv) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
  - (v) claims to money<sup>7</sup> or to other assets, or to any contractual performance having an economic value associated with an investment;
  - (vi) intellectual property rights<sup>8</sup>;
  - (vii) licences, authorisations, permits, and similar rights conferred pursuant to applicable domestic law;

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<sup>2</sup> Where an asset lacks the characteristics of an investment, that asset is not an investment regardless of the form it may take.

<sup>3</sup> For greater certainty, donation does not constitute an investment.

<sup>4</sup> The term “**investment**” does not include an order or judgment entered in a judicial or administrative action.

<sup>5</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 not likely to have such characteristics.

<sup>6</sup> For the purpose of this Chapter, “**loans and other debt instruments**” described in sub-paragraph (k)(iii) of this Article and “**claims to money or to any contractual performance**” described in sub-paragraph (k)(v) of this Article refer to assets which relate to a business activity associated with an investment and do not refer to assets which are of a personal nature, unrelated to any business activity associated with an investment.

<sup>7</sup> For greater certainty, claims to money does not include:

- (a) claims to money that arise solely from commercial contracts for the sale of goods or services by a natural person or enterprise in the territory of a Party to a natural person or enterprise in the territory of the other Party;
- (b) the domestic financing of such contracts; or
- (c) any order, judgment or arbitral award related to sub-paragraph (a) or (b) above.

<sup>8</sup> In accordance with the relevant laws of the Party admitting the investment.

- (viii) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges<sup>9</sup>;
- (l) “**investor of a Party**” means a Party, a natural person or an enterprise of a Party recognised as a legal entity by the laws of the other Party, that has made a covered investment in the territory of the other Party;
- (m) “**investor of a non-Party**” means, with respect to a Party, an investor that has made an investment in the territory of that Party, that is not an investor of either Party;
- (n) “**measures**” means any measure taken by a Party, whether in the form of a law, regulation, rule, procedure, decision or administrative action, and 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;
- (o) “**national**” means”
- (i) with respect to the Republic of Singapore, any person who is a citizen of Singapore within the meaning of its Constitution and its domestic laws; and
  - (ii) with respect to Sri Lanka, any person who is a citizen of Sri Lanka within the meaning of its Constitution and its domestic laws;
- (p) “**New York Convention**” means the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, adopted at the United Nations in New York on 10 June 1958;
- (q) “**respondent**” means the Party that is a party to an investment dispute;
- (r) “**return**” means an amount yielded by or derived from an investment, including profits, dividends, interest, capital gains, royalty payments, payments in connection with intellectual property rights, and all other lawful income. For the purposes of the definition of “investment”, 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;
- (s) “**SIAC**” means the Singapore International Arbitration Centre;
- (t) “**SLNAC**” means the Sri Lanka National Arbitration Centre; and

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<sup>9</sup> For greater certainty, market share, access to market, expected gains, and opportunities for profit making are not, by themselves, investments.

- (u) “**UNCITRAL Arbitration Rules**” means the arbitration rules of the *United Nations Commission on International Trade Law*, as adopted by the *United Nations General Assembly* on 15 December 1976, as revised in 2010.

## **SECTION 10-A INVESTMENT PROTECTION**

### **Article 10.2 Scope and Coverage**

1. This Chapter shall apply to measures adopted or maintained by a Party relating to:
  - (a) investors of the other Party; and
  - (b) all investments made by investors of one Party in the territory of the other Party, whether made before or after the entry into force of this Agreement.
  
2. This Chapter shall not apply to:
  - (a) government procurement by a Party;
  - (b) services supplied in the exercise of governmental authority within the territory of the respective Party. For 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;
  - (c) subsidies or grants provided by a Party, or to any conditions attached to the receipt or continued receipt of such subsidies or grants, whether or not such subsidies or grants are offered exclusively to investors of the Party or investments of investors of the Party, including government-supported loans, guarantees and insurance;
  - (d) any measures adopted or maintained by a Party to the extent that they are covered by Chapter 7 (Trade in Services). Notwithstanding the foregoing, Article 10.3 (Minimum Standard of Treatment), Article 10.6 (Compensation for Losses), Article 10.10 (Expropriation), Article 10.11 (Transfers), Article 10.12 (Subrogation) and Section 10-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 the other Party pursuant to Chapter 7 (Trade in Services), but only to the extent that any such measures relate to an investment and an obligation under this Chapter, regardless of whether such a service sector is scheduled in the Party’s Schedule of Specific Services Commitments in Annex 7-A (Sri Lanka) and Annex 7-B (Singapore); and

- (e) any taxation measure, including measures taken to enforce taxation obligations.
3. Notwithstanding any other provisions of this Chapter, a Party shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of this Chapter, they shall not be used as a means of avoiding the Party's commitments or obligations under this Chapter.
  4. In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail over this Chapter to the extent of the inconsistency. For the avoidance of doubt, this paragraph shall not be deemed to impose additional obligations on a Party other than the obligations set out in this Chapter in respect of any dispute under Section 10-B (Investor-State Dispute Settlement).
  5. The requirement by a Party that a service provider of the other Party post a bond or other form of financial security as a condition of providing a service into its territory does not of itself make this Chapter applicable to the provision of that cross-border service. This Chapter applies to that Party's treatment of the posted bond or financial security, to the extent that such bond or financial security is an investment.
  6. For greater certainty, the provisions of this Chapter do not impose any obligation on either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.
  7. In the event that a Party extends protection to the establishment, acquisition or expansion of investments to any non-Party after the signing of this Agreement, the other Party shall have the right to initiate a review of the commitments under this Chapter, to extend the provisions of this Chapter to the establishment, acquisition and expansion of investments in like circumstances.
  8. Articles 10.4 (National Treatment), 10.5 (Most-Favoured-Nation Treatment), 10.7 (Performance Requirements) and 10.8 (Senior Management and Board of Directors) 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 Annex 10-B (Sri Lanka) and Annex 10-C (Singapore).
  9. Neither Party may, under any measure adopted after the date of entry into force of this Agreement and set out in its Schedule to Annex 10-B (Sri Lanka) and Annex 10-C (Singapore), require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

10. Articles 10.4 (National Treatment) and 10.5 (Most-Favoured-Nation Treatment) do not apply to any measure that is an exception to, or derogation from, a Party's obligations under Chapter 13 (Intellectual Property) and the TRIPS Agreement, as specifically provided for in that Agreement.

### **Article 10.3** **Minimum Standard of Treatment**

1. Each Party shall accord to investments treatment in accordance with customary international law minimum standard of treatment of aliens<sup>10</sup>, including “fair and equitable treatment” and “full protection and security”.
2. For greater certainty, paragraph 1 of this Article prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to 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 obligation to provide:
  - (a) “fair and equitable treatment” requires the Parties not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process; and
  - (b) “full protection and security” requires each Party to provide the level of police protection in relation to the physical security of investors and investments as 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 10.4** **National Treatment**

1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances<sup>11</sup>, to its own investors with respect to the management, conduct, operation, and sale or other disposition of investments in its territory.

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<sup>10</sup> Customary international law results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to this Article, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

<sup>11</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.

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

**Article 10.5**  
**Most-Favoured-Nation Treatment**

1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of any non-Party with respect to the management, conduct, operation, and sale or other disposition of investments in its territory.
2. Each Party shall accord to investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the management, conduct, operation, and sale or other disposition of investments.
3. For greater certainty, paragraphs 1 and 2 of this Article shall not be construed as granting to investors options or procedures for the settlement of disputes other than those set out in Section 10-B (Investor-State Dispute Settlement).
4. The treatment, as set forth in paragraphs 1 and 2 of this Article, shall not include:
  - (a) any preferential treatment accorded to investors or their investments under any existing bilateral, regional, multilateral or international agreements or arrangements or any forms of economic and regional cooperation with any non-Party;
  - (b) in the case of Singapore, any measure that accords preferential treatment to ASEAN member states under any agreements between all ASEAN member states, in force or signed after the date of entry into force of this Agreement. For the avoidance of doubt, such agreements do not include agreements between ASEAN member states and non-ASEAN member states; and
  - (c) in the case of Sri Lanka, any measure that accords preferential treatment to SAARC member states under any agreements between all SAARC member states, in force or signed after the date of entry into force of this Agreement. For the avoidance of doubt, such agreements do not include agreements between SAARC member states and non-SAARC member states.

**Article 10.6**  
**Compensation for Losses**

1. Investors of one Party whose investments in the territory of the other Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, insurrection, riot, or any other similar event in the territory of the latter Party, shall be accorded by the latter Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Party accords to investments of its own investors or investments of investors of any non-Party, whichever is more favourable, to the investment of the investor of the former Party.
2. Notwithstanding paragraph 1 of this Article, if an investor of a Party, in the situations referred to in paragraph 1 of this Article, suffers a loss in the territory of the other Party resulting from:
  - (a) requisitioning of its investment or part thereof by the latter's forces or authorities; or
  - (b) destruction of its 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.

**Article 10.7**  
**Performance Requirements**

The provisions of Annex 1A to the TRIMs Agreement, which are not specifically mentioned in or modified by this Chapter, shall apply, *mutatis mutandis*, to this Chapter.

**Article 10.8**  
**Senior Management and Boards of Directors**

1. A Party shall not require that an enterprise of that Party that is an 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 an 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 of the other Party to exercise control over its investment.
3. For the avoidance of doubt, nothing in this Article shall be construed to limit a Party from exercising its rights as a shareholder.



**Article 10.9**  
**Special Formalities and Treatment of Information**

1. Nothing in Article 12.4 (National Treatment) shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with investments, such as residency requirements for registration or a requirement that investments be legally constituted under its laws or regulations, provided that such formalities do not materially impair the protections afforded by the Party to investors of the other Party and investments pursuant to this Chapter.
2. Notwithstanding Article 12.4 (National Treatment) and Article 12.5 (Most-Favoured-Nation Treatment), a Party may require an investor of the other Party or its investment to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect such business information that is confidential from any disclosure that would prejudice the competitive position of the investor or the 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 10.10**  
**Expropriation<sup>12</sup>**

1. Neither Party shall nationalise, expropriate or subject to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as “**expropriation**”) an investment unless such a measure is taken on a non-discriminatory basis, for a public purpose, in accordance with due process of law and upon payment of compensation in accordance with this Article.
2. The expropriation shall be accompanied by the payment of prompt, adequate and effective compensation. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation or impending expropriation became public knowledge. Such compensation shall be effectively realisable, freely transferable in accordance with Article 10.11 (Transfers) and made without delay. The compensation shall include interest at an appropriate and reasonable rate for that currency, accrued from the date of expropriation until the date of payment.
3. Notwithstanding paragraphs 1 and 2 of this Article, 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 in accordance with the aforesaid legislation.

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<sup>12</sup> Article 10.10 (Expropriation) is to be interpreted in accordance with Annex 12-A (Expropriation).

4. This Article does not apply to the issuance of compulsory licences 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 13 (Intellectual Property) and the TRIPS Agreement<sup>13</sup>.

#### **Article 10.11 Transfers**

1. Each Party shall permit all transfers relating to an investment to be made freely and without delay<sup>14</sup> into and out of its territory. Such transfers include:
  - (a) the initial capital and additional amounts to maintain or increase an investment;
  - (b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;
  - (c) interest, royalty payments, management fees, and technical assistance and other fees;
  - (d) payments made under a contract entered into by the investor, or its investment, including payments made pursuant to a loan agreement;
  - (e) payments made pursuant to Article 10.6 (Compensation for Losses) and Article 10.10 (Expropriation); and
  - (f) payments arising under Section 10-B (Investor-State Dispute Settlement).
2. Each Party shall permit such transfers to be made in a freely convertible currency at the market rate of exchange prevailing at the time of transfer.
3. Each Party shall permit returns in kind relating to an investment to be made as authorised or specified in an investment authorisation or other written agreement between the Party<sup>15</sup> and an investment or an investor of the other Party.
4. Notwithstanding paragraphs 1, 2, and 3 of this Article, a Party may delay or prevent a transfer through the equitable, non-discriminatory, and good faith application of its laws relating to:

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<sup>13</sup> For greater certainty, the Parties recognise 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>14</sup> A transfer shall be deemed to have been made without delay if effected within a reasonable period as is typically required for the completion of the relevant transfer formalities.

<sup>15</sup> In the case of Sri Lanka, the investment authorisation or written agreement may only be granted or entered into, in accordance with its written laws, by the Board of Investment of Sri Lanka or such other entities as may be designated by Sri Lanka.

- (a) bankruptcy, insolvency, or the protection of the rights of creditors;
  - (b) issuing, trading, or dealing in securities, futures, options, or derivatives;
  - (c) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;
  - (d) criminal or penal offences<sup>16</sup>;
  - (e) ensuring compliance with orders or judgments in judicial or administrative proceedings;
  - (f) social security<sup>17</sup>, public retirement or compulsory savings schemes; or
  - (g) labour and severance entitlements of employees.
5. Nothing in this Chapter shall affect the rights and obligations of the members of the IMF under the *Articles of Agreement of the International Monetary Fund*, including the use of exchange actions which are consistent with such *Articles of Agreement*, provided that a Party shall not impose restrictions on any capital transactions inconsistently with its obligations under this Chapter regarding such transactions, except under Article 17.6 (Restrictions to Safeguard the Balance-of-Payments) of Chapter 17 (Institutional, General and Final Provisions) or at the request of the IMF.

#### **Article 10.12 Subrogation**

1. If a Party (or any agency, institution, statutory body or corporation designated by it) makes a payment to any of its investors under a guarantee, a contract of insurance or other form of indemnity it has granted in respect of an investment, against non-commercial risks, the other Party shall recognise the subrogation or transfer of any right or title in respect of such investment. The Party or its designated agency is entitled by virtue of subrogation to exercise the rights and enforce the claims of that investor. 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 any agency, institution, statutory body or corporation designated by it) 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 designated agency of the Party making the payment, pursue those rights and claims against the other Party.

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<sup>16</sup> For greater certainty, the laws relating to criminal and penal offences include laws relating to the recovery of proceeds of crimes.

<sup>17</sup> For greater certainty, social security schemes include compulsory health insurance schemes.

## **SECTION 10-B INVESTOR-STATE DISPUTE SETTLEMENT**

### **Article 10.13 Scope**

1. This Section shall apply to disputes between a Party and an investor of the other Party<sup>18</sup> concerning an alleged breach of Articles 10.3 (Minimum Standard of Treatment), 10.4 (National Treatment), 10.5 (Most-Favoured-Nation Treatment), 10.6 (Compensation for Losses), 10.9 (Special Formalities and Treatment of Information), 10.10 (Expropriation), 10.11 (Transfers), and 10.12 (Subrogation), which causes loss or damage to that investor or its investment.
2. This Section shall apply to losses and damages incurred in respect of activities carried out prior to the establishment of an investment only where such activities result in an investment being established in the Party hosting the investment.
3. This Section shall not apply to any dispute concerning any measure adopted or maintained or any treatment accorded to investors or investments by a Party in respect of tobacco or tobacco-related products<sup>19</sup> that is aimed at protecting or promoting human health.

### **Article 10.14 Institution of Arbitral Proceedings**

1. The disputing parties shall initially seek to resolve the dispute by consultations.
2. In the event of an investment dispute, the claimant may deliver to the respondent a written request for consultations. Such written request shall specify the measure(s) complained of and how such measure(s) has given rise to the dispute.
3. Where the dispute cannot be resolved as provided for under paragraphs 1 and 2 of this Article within six (6) months from the date of receipt of such written request for consultations, the claimant shall exhaust any domestic remedy provided in the respondent State. In the event:
  - (a) the claimant has invoked domestic remedies and such remedies have not been concluded within a period of twenty-four (24) months from the date that notice invoking such domestic remedies was served on the respondent State; or

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<sup>18</sup> For greater certainty, a natural person possessing the nationality or citizenship of a Party shall not pursue a claim against that Party under this Agreement.

<sup>19</sup> For the purpose of this Chapter, “**tobacco products**” means products under HS Chapter 24 (Tobacco and Manufactured Tobacco Substitutes) and tobacco-related products falling outside HS Chapter 24 (Tobacco and Manufactured Tobacco Substitutes).

- (b) the claimant has invoked and exhausted all domestic remedies,
- the claimant may have recourse to the dispute settlement procedures in this Section.
4. Subject to paragraph 3 of this Article, a claimant may submit to arbitration<sup>20</sup>:
- (a) a claim, on its own behalf, that the respondent has breached an obligation under this Agreement and the claimant has incurred loss or damage by reason of, or arising out of, that breach; or
  - (b) a claim, on behalf of an enterprise of the respondent that is an enterprise that the claimant owns or controls<sup>21</sup>, that the respondent has breached an obligation under this Agreement and the enterprise has incurred loss or damage by reason of, or arising out of, that breach.
5. A claimant may submit the claim to arbitration:
- (a) under the SIAC and the SIAC Arbitration Rules;
  - (b) to the ICLP or the SLNAC;
  - (c) under the UNCITRAL Arbitration Rules; or
  - (d) to any other arbitral institutions or under any other arbitration rules, if the disputing parties so agree.
6. Each Party hereby consents to the submission of a dispute to arbitration under sub-paragraphs 5(a), 5(b), 5(c) and 5(d) of this Article in accordance with the provisions of this Section, conditional upon:
- (a) the submission of the dispute to such arbitration taking place within four (4) years from the time at which the claimant became aware, or should reasonably have become aware, of a breach of an obligation under this Agreement causing loss or damage to the claimant or its investment;
  - (b) the claimant not being an enterprise of the respondent until the claimant refers the dispute for arbitration pursuant to paragraph 5 of this Article;

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<sup>20</sup> For greater certainty, a claimant shall not be entitled to bring a claim under both sub-paragraphs (a) and (b) of paragraph 4 of this Article in respect of the same alleged breach of an obligation.

<sup>21</sup> An enterprise is:

- (a) owned by natural persons or enterprises of the other Party if more than fifty (50) percent of the equity interest in it is beneficially owned by natural persons or enterprises of that Party;
- (b) controlled by natural persons or enterprises of the other Party if such natural persons or enterprises have the power to name a majority of its directors or otherwise to legally direct its actions.

- (c) the claimant providing written consent to arbitration in accordance with the provisions set out in this Section; and
  - (d) the claimant providing written notice, which shall be delivered at least ninety (90) days before the claim is submitted, to the respondent of its intent to submit the dispute to such arbitration and which:
    - (i) states whether the claim is made on its own behalf or on behalf of the enterprise;
    - (ii) states the name and address of the claimant and, where a dispute is submitted on behalf of an enterprise, the name, address, and place of constitution of the enterprise;
    - (iii) nominates one of the *fora* referred to in paragraph 5 of this Article as the forum for dispute settlement;
    - (iv) is accompanied:
      - (A) for claims submitted to arbitration under sub-paragraph 4(a) of this Article, by the claimant’s written waiver; and
      - (B) for claims submitted to arbitration under subparagraph 4(b) of this Article, by the claimant’s and the enterprise’s written waivers,  
  
of any right to initiate or continue any proceedings (excluding proceedings for interim measures of protection referred to in paragraph 1 of Article 10.18 (Interim Measures of Protection and Diplomatic Protection)) before any of the other dispute settlement *fora* referred to in paragraph 5 of this Article in relation to the matter under dispute; and
    - (v) briefly summarises the alleged breach of the respondent under this Agreement (including the measures giving rise to the claim and the provisions alleged to have been breached), the legal and factual basis for the dispute, the loss or damage allegedly caused to the claimant or its investment by reason of that breach, the type of relief sought and the approximate amount of damages claimed.
7. The consent under paragraph 6 of this Article and the submission of a claim to arbitration under this Section shall satisfy the requirements of Article II of the New York Convention for an “agreement in writing”.
8. A claim that is submitted for 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.

**Article 10.15**  
**Constitution of Arbitral Tribunal**

1. Unless the disputing parties otherwise agree, the arbitral tribunal shall be composed of three (3) arbitrators. Each disputing party shall appoint one arbitrator and the disputing parties shall agree upon a third arbitrator, who shall be the chairman of the arbitral tribunal. If an arbitral tribunal has not been established within ninety (90) days from the date on which the claim was submitted to arbitration, either because a disputing party failed to appoint an arbitrator or because the disputing parties failed to agree upon the chairman, the President of the Permanent Court of Arbitration (“PCA”), upon request of either disputing party, shall appoint, at his own discretion, the arbitrator or arbitrators not yet appointed.
2. For the purposes of paragraph 1 of this Article, in the event that the President of the PCA is a national or permanent resident of either Party, the Vice-President of the PCA or the officer next in seniority who is not a national or permanent resident of either Party shall be requested to make the necessary appointment or appointments.

**Article 10.16**  
**Place of Arbitration**

1. Unless the disputing parties otherwise agree, the place of arbitration shall be in the territory of either Party.
2. In the event, the disputing parties cannot agree between the territories of the Parties as the place of arbitration, the tribunal shall determine the place of arbitration giving consideration to where the investment has been made, unless tribunal is of the opinion that there are reasons for the place of arbitration to be in the territory of the other Party or a non- Party.

**Article 10.17**  
**Conduct of the Arbitration**

1. A tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and the applicable rules and principles of international law.<sup>22</sup>
2. 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

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<sup>22</sup> The Parties confirm their mutual understanding that when domestic law of the Respondent is relevant to a claim, an arbitral tribunal established under this Section shall take into account the domestic law as a matter of fact.

of law, a claim submitted is not a claim for which an award in favour of the claimant may be made under Article 10.19 (Award).

- (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).
  - (b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings 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 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 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 3 of this Article.
3. In the event that the respondent so requests within forty-five (45) days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 2 of this Article 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 one hundred and fifty (150) days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional thirty (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 thirty (30) days.
4. When it decides a respondent's objection under paragraphs 2 or 3 of this Article, 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.



**Article 10.18**  
**Interim Measures of Protection and Diplomatic Protection**

1. Sub-paragraph 6(d)(iii) of Article 10.14 (Institution of Arbitral Proceedings) shall not prevent the claimant from seeking interim measures of protection, not involving the payment of damages or resolution of the substance of the matter in dispute before the courts or administrative tribunals of the respondent, prior to the institution of proceedings before any of the dispute settlement *fora* referred to in paragraph 3 of Article 10.14 (Institution of Arbitral Proceedings), for the preservation of its rights and interests.
2. Neither Party shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its investors and the other Party shall have consented to submit or have submitted to arbitration under this Section, 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.

**Article 10.19**  
**Award**

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.

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

2. Any arbitral award shall be final and binding upon the disputing parties. Each Party shall ensure the recognition and enforcement of the award in accordance with its relevant laws and regulations.
3. Where a claim is submitted on behalf of an enterprise of the respondent, the arbitral award shall be made to the enterprise.

**Article 10.20**  
**Consolidation**

1. Where two (2) or more claims have been submitted separately to arbitration under this Section, 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 this Article.
2. A disputing party that seeks a consolidation order under this Article shall deliver, in writing, a request to the President of the PCA and to all the disputing parties sought to be covered by the order, specifying the name and address of all the disputing parties sought to be covered by the order; the nature of the order sought; and the grounds on which the order is sought.
3. Unless the President of the PCA finds within thirty (30) days after receiving a request in conformity with paragraph 2 of this Article that the request is manifestly unfounded, a tribunal shall be established under this Article.
4. Unless all the disputing parties sought to be covered by the consolidation order otherwise agree, the tribunal established under this Article shall comprise three (3) arbitrators:
  - (a) one (1) arbitrator appointed by agreement of the disputing investors;
  - (b) one (1) arbitrator appointed by the respondent; and
  - (c) the chairman of the arbitral tribunal appointed by the President of the PCA provided that the chairman shall not be a national of either Party.
5. If, within the sixty (60) days after the President of the PCA receives a request made under paragraph 2 of this Article, the respondent fails or the disputing investors fail to appoint an arbitrator in accordance with paragraph 4 of this Article, the President of the PCA, on request of any disputing party sought to be covered by the order, shall appoint the arbitrator or arbitrators not yet appointed.
6. Where a tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration in accordance to Article 10.14 (Institution of Arbitral Proceedings), have a question of law or fact in common, and arise out of the same events or circumstances, the tribunal may, in the interest of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:
  - (a) assume jurisdiction over, and hear and determine together, all or part of the claims;
  - (b) assume jurisdiction over, and hear and determine one or more claims, whose determination it considers would assist in the resolution of the other claims; or

- (c) instruct a tribunal previously established under Article 10.15 (Constitution of Arbitral Tribunal) to assume jurisdiction over and to hear and determine together, all or part of the claims, provided that:
  - (i) that tribunal, at the request of any disputing investor not previously a disputing party before that tribunal, shall be reconstituted with its original members, except that the arbitrator for the disputing investors shall be appointed pursuant to sub-paragraph 4(a) and paragraph 5 of this Article; and
  - (ii) that tribunal shall decide whether any previous hearing must be repeated.
- 7. Where a tribunal has been established under this Article, a disputing investor that has submitted a claim to arbitration pursuant to Article 10.14 (Institution of Arbitral Proceedings) and that has not been named in a request made under paragraph 2 of this Article, may make a written request to the tribunal that it be included in any order issued under paragraph 6 of this Article, specifying:
  - (a) the name and address of the disputing investor;
  - (b) the nature of the order sought; and
  - (c) the grounds on which the order is sought.

The claimant shall provide the President of the PCA with a copy of his request.

- 8. A tribunal established pursuant to this Article shall conduct the proceedings in accordance with the UNCITRAL Arbitration Rules, except as modified by this Section.
- 9. A tribunal established under Article 10.15 (Constitution of Arbitral Tribunal) shall not have jurisdiction to decide a claim or a part of a claim over which a tribunal established or instructed under this Article has assumed jurisdiction.
- 10. On application of a disputing party, a tribunal established pursuant to this Article may, pending its decision under paragraph 6 of this Article, order that the proceedings of a tribunal established under Article 10.15 (Constitution of Arbitral Tribunal) be stayed, unless the latter tribunal has already adjourned its proceedings.

## SECTION 10-C

## FINAL PROVISIONS

### Article 10.21 Denial of Benefits

1. A Party may deny the benefits of this Chapter to an investor of the other Party and to its investments if the investor is an enterprise owned or controlled by persons of a non-Party or the denying Party, and such enterprise has no substantive business operations in the territory of the other Party.
2. The denying Party shall, to the extent practicable, notify the other Party before denying the benefits. If the denying Party provides such notice, it shall consult with the other Party at the request of the other Party.

### Article 10.22 Publication of International Agreements

1. To the extent possible, each Party shall ensure that international agreements pertaining to or affecting investors or investment activities to which a Party is a signatory shall be promptly published or otherwise made available in such a manner as to enable interested persons or parties to become acquainted with them.
2. To the extent possible, each Party shall make the international agreements of the kind referred to in paragraph 1 of this Article available on the Internet. Each Party shall, upon request by the other Party, respond to specific questions from and provide information to the other Party with respect to the international agreements referred to in paragraph 1 of this Article.

### Article 10.23 General Exceptions<sup>23</sup>

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Party or its investors where like conditions prevail, or a disguised restriction on investments of investors of the other Party in the territory of a Party, nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Party of measures:

- (a) necessary to protect public morals or to maintain public order<sup>24</sup>;

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<sup>23</sup> For greater certainty, the application of the general exception to these provisions shall not be interpreted so as to diminish the ability of governments to take measures where investors are not in like circumstances due to the existence of legitimate regulatory objectives.

<sup>24</sup> The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society. For greater certainty, the Parties understand that the fundamental interests of society include the maintenance of religious harmony.

- (b) necessary to protect human, animal or plant life or health<sup>25</sup>;
- (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
  - (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on a contract;
  - (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
  - (iii) safety; or
- (d) relating to the conservation of exhaustible natural resources<sup>26</sup>.
- (e) necessary to protect national treasures of artistic, historic or archaeological value;

**Article 10.24**  
**Savings Clause**

1. For ten (10) years from the date of termination of this Agreement, the following provisions shall continue to apply to investments in existence at the date of termination, and without prejudice to the application thereafter of the rules of general international law:
  - (a) the provisions of this Chapter; and
  - (b) such other provisions in the Agreement as may be necessary for or consequential to the application or interpretation of this Chapter.

**Article 10.25**  
**Term of Investment Promotion and Protection Agreement**

1. Subject to paragraph 2 of this Article, the Parties hereby agree that the *Agreement between the Government of the Republic of Singapore and the Government of the Socialist Republic of Sri Lanka Concerning the Reciprocal Promotion and Protection of Investments Signed in Singapore on 09<sup>th</sup> May 1980 (“IPPA”)*, as well as all the rights and obligations derived from the said agreement, shall cease to have effect on the date of entry into force of this Agreement.

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<sup>25</sup> The Parties understand that the measures referred in sub-paragraph 1(b) of this Article include environmental measures necessary to protect human, animal or plant life or health.

<sup>26</sup> The Parties understand that the measures referred in sub-paragraph 1(d) of this Article include environmental measures relating to the conservation of living and non-living exhaustible natural resources.

2. Any and all investments made pursuant to the IPPA before the entry into force of this Agreement will be governed by the rules of the said IPPA regarding any matter arising while the IPPA was in force. An investor may only submit an arbitration claim pursuant to the IPPA regarding any matter arising while the IPPA was in force, pursuant to the rules and procedures established in it, and provided that no more than three (3) years have elapsed since the date of entry into force of this Agreement.

**Article 10.26**  
**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 recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party.

## ANNEX 10-A

### 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. Paragraph 1 of Article 10.10 (Expropriation) addresses two situations. The first is direct expropriation, where an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure.
2. The second situation addressed by paragraph 1 of Article 10.10 (Expropriation) 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; and
    - (iii) the character of the government action.
  - (b) Except in rare circumstances, 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.

**ANNEX 10-B**

**SCHEDULE OF SRI LANKA**

Articles 10.4 (National Treatment), 10.5 (Most-Favoured Nation Treatment), 10.7 (Performance Requirements) and 10.8 (Senior Management and Boards of Directors) shall not apply to any measure relating to the following sectors:

- (a) agriculture;
- (b) fisheries;
- (c) forestry;
- (d) mining and quarrying;
- (e) real estate;
- (f) arms and explosives; and
- (g) traditional handicrafts.



**ANNEX 10-C**

**SCHEDULE OF SINGAPORE**

Articles 10.4 (National Treatment), 10.5 (Most-Favoured-Nation Treatment), 10.7 (Performance Requirements) and 10.8 (Senior Management and Board of Directors) do not apply to any measure relating to:

- (a) the collection, purification, treatment, disposal and distribution of water, including waste water, in Singapore;
- (b) real estate, including but not limited to the ownership, purchase, development, maintenance, use, enjoyment, sale or other disposal of real estate in Singapore;
- (c) the arms and explosives sector;
- (d) the retention of a controlling interest by the Singapore Government in Singapore Technologies Engineering (the Company) and/or its successor body, including but not limited to controls over the appointment and termination of members of the Board of Directors, divestment of equity and dissolution of the Company for the purpose of safeguarding the security interest of Singapore; and
- (e) broadcasting.