

## CHAPTER 12 INVESTMENT

### Article 12.1 Definitions

For the purposes of this Chapter:

“claimant” means an investor of a Party that is a party to an investment dispute with the other Party;

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

“disputing parties” means the claimant and the respondent;

“disputing party” means either the claimant or the respondent;

“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;

“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;

“freely useable currency” means any currency as determined by the *International Monetary Fund* under the *Articles of Agreement of the International Monetary Fund* and any amendments thereto;

“ICSID Additional Facility Rules” means the *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes*;

“ICSID Arbitration Rules” means the *Rules of Procedure for Arbitration Proceedings (Arbitration Rules)* as amended and in effect on 10 April 2006;

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

“investment” means every kind of asset, owned or controlled, by an investor, that has the characteristics of an investment<sup>2</sup>, including such characteristics as the commitment of capital

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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.

or other resources, the expectation of gain or profit, the assumption of risk, or a certain duration. Forms that an investment may take include:<sup>3</sup>

- (a) an enterprise;
- (b) shares, stock, and other forms of equity participation in an enterprise;
- (c) bonds, debentures, loans and other debt instruments<sup>4,5</sup> of an enterprise;
- (d) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- (e) claims to money or to other assets, or to any contractual performance having an economic value associated with an investment<sup>6</sup>;
- (f) intellectual property rights and goodwill;
- (g) licences, authorisations, permits, and similar rights conferred pursuant to applicable domestic law, including any concession to search for, cultivate, extract or exploit natural resources<sup>7</sup>; and
- (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges<sup>8</sup>;

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

<sup>4</sup> Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.

<sup>5</sup> For the purpose of this Agreement, “loans and other debt instruments” described in subparagraph (c) and “claims to money ...or to any contractual performance” described in subparagraph (e) 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>6</sup> For the purpose of this Agreement, a claim to payment that arises solely from the commercial sale of goods and services is not an investment unless it is a loan that has the characteristics of an investment.

<sup>7</sup> Whether a particular type of licence, authorisation, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. For greater certainty, the foregoing is without prejudice to whether any asset associated with the licence, authorisation, permit, or similar instrument has the characteristics of an investment.

<sup>8</sup> For greater certainty, market share, access to market, expected gains, and opportunities for profit-making are not, by themselves, investments.

“investor of a Party” means a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party, provided, however, that a natural person who possesses dual nationality shall be deemed to possess exclusively the nationality of the State of his or her dominant and effective nationality;

“investor of a non-Party” means, with respect to a Party, an investor that attempts to make, is making, or has made an investment in the territory of that Party, that is not an investor of either Party;

“measures” adopted or maintained by a Party includes those taken by:

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

“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;

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

“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; and

“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 12-A INVESTMENT**

### **Article 12.2 Scope and Coverage**

1. This Chapter shall apply to measures adopted or maintained by a Party relating to:
  - (a) investors of the other Party;
  - (b) covered investments; and
  - (c) with respect to Article 12.7 (Performance Requirements), all investments in the territory of the Party.

2. This Chapter shall not apply to:
  - (a) 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;
  - (b) 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; and
  - (c) measures adopted or maintained by a Party to the extent that they are covered by Chapter 10 (Financial Services).
3. 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.
4. 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 a covered investment.
5. 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.

### **Article 12.3 Minimum Standard of Treatment**

1. Each Party shall accord to covered investments treatment in accordance with customary international law minimum standard of treatment of aliens<sup>9</sup>, including “fair and equitable treatment” and “full protection and security”.
2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that

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<sup>9</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.

which is required by that standard, and do not create additional substantive rights. The obligation to provide:

- (a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
  - (b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.
3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

#### **Article 12.4 National Treatment**

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

#### **Article 12.5 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 establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
3. For greater certainty, paragraphs 1 and 2 shall not be construed as granting to investors options or procedures for the settlement of disputes other than those set out in Section 12-B (Investor-State Dispute Settlement).
4. Notwithstanding paragraphs 1 and 2, in the case of supply of services in the territory of a Party by covered investments, each Party shall:

- (a) 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 only to the management, conduct, operation, and sale or other disposition of investments in its territory; and
- (b) accord to covered 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 only to the management, conduct, operation, and sale or other disposition of investments.

### **Article 12.6 Compensation for Losses**

1. Investors of one Party whose covered 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 covered investment of the investor of the former Party. All payments that may result shall be deemed freely transferable.
2. Notwithstanding paragraph 1, if an investor of a Party, in the situations referred to in paragraph 1, suffers a loss in the territory of the other Party resulting from:
  - (a) requisitioning of its covered investment or part thereof by the latter's forces or authorities; or
  - (b) destruction of its covered investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation,

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

### **Article 12.7 Performance Requirements<sup>10</sup>**

1. Neither Party may, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an

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<sup>10</sup> For greater certainty, Article 12.7 (Performance Requirements) shall not apply to subsidies or grants provided by a Party as specified in subparagraph 2(c) of Article 12.2 (Scope and Coverage).

investor of a Party or of a non-Party in its territory, impose or enforce any requirement or enforce any commitment or undertaking<sup>11</sup>:

- (a) to export a given level or percentage of goods or services;
  - (b) to achieve a given level or percentage of domestic content;
  - (c) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
  - (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
  - (e) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
  - (f) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory; or
  - (g) to supply exclusively from the territory of the Party the goods that such investment produces or the services that such investment supplies to a specific regional market or to the world market.
2. Neither Party may condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of a Party or of a non-Party, on compliance with any requirement:
- (a) to achieve a given level or percentage of domestic content;
  - (b) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
  - (c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or
  - (d) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

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<sup>11</sup> For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 2 does not constitute a “requirement” or a “commitment or undertaking” for the purposes of paragraph 1.

3.
  - (a) For greater certainty, nothing in paragraph 1 shall be construed to prevent a Party from, in connection with the establishment, acquisition, expansion, management, conduct, operation or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, imposing or enforcing a requirement or enforcing a commitment or undertaking to employ or train workers in its territory, provided that such employment or training does not require the transfer of a particular technology, production process, or other proprietary knowledge to a person in its territory.
  - (b) For greater certainty, nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, supply a service, employ or train workers, construct or expand particular facilities, or carry out research and development, in its territory.
  - (c) The provisions of subparagraph 1(f) do not apply:
    - (i) when a Party authorises use of an intellectual property right in accordance with Article 31<sup>12</sup> of the TRIPS Agreement, or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or
    - (ii) the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be anti-competitive under the Party's competition laws<sup>13</sup>.
  - (d) Subparagraphs 1(a), 1(b), 1(c), 1(d), 2(a) and 2(b), do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs.
  - (e) Subparagraphs 2(a) and 2(b) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.
4. For greater certainty, paragraphs 1 and 2 do not apply to any commitment, undertaking, or requirement other than those set out in those paragraphs.
5. This Article does not preclude enforcement of any commitment, undertaking, or requirement between private parties, where a Party did not impose or require the commitment, undertaking, or requirement.

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<sup>12</sup> The reference to “Article 31” includes footnote 7 to Article 31.

<sup>13</sup> The Parties note that a patent does not necessarily confer market power.

**Article 12.8**  
**Senior Management and Boards of Directors**

1. Neither Party may require that an enterprise of that Party that is a covered investment appoint to senior management positions natural persons of any particular nationality.
2. A Party may require that a majority of the board of directors, or any committee thereof, of an enterprise of that Party that is a covered investment, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor of the other Party to exercise control over its investment.

**Article 12.9**  
**Non-Conforming Measures**

1. Articles 12.4 (National Treatment), 12.5 (Most-Favoured-Nation Treatment), 12.7 (Performance Requirements) and 12.8 (Senior Management and Board of Directors) do not apply to:
  - (a) any existing non-conforming measure that is maintained by a Party as set out in its Schedule to Annex 7-A.
  - (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
  - (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed at the date of the entry into force of this Agreement, with Articles 12.4 (National Treatment), 12.5 (Most-Favoured-Nation Treatment), 12.7 (Performance Requirements) and 12.8 (Senior Management and Board of Directors).
2. Articles 12.4 (National Treatment), 12.5 (Most-Favoured-Nation Treatment), 12.7 (Performance Requirements) and 12.8 (Senior Management and Board of Directors) do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex 7-B.
3. Neither Party may, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to Annex 7-B, require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.
4. Articles 12.4 (National Treatment) and 12.5 (Most-Favoured-Nation Treatment) do not apply to any measure that is an exception to, or derogation from, a Party's obligations under Chapter 15 (Intellectual Property) and the TRIPS Agreement, as specifically provided for in that Agreement.

5. Articles 12.4 (National Treatment), 12.5 (Most-Favoured-Nation Treatment), 12.7 (Performance Requirements) and 12.8 (Senior Management and Board of Directors) do not apply to government procurement.

**Article 12.10**  
**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 covered investments, such as residency requirements for registration or a requirement that covered 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 covered 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 covered 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 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 12.11**  
**Expropriation<sup>14</sup>**

1. Neither Party shall nationalise, expropriate or subject to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as “expropriation”) a covered investment unless such a measure is taken on a non-discriminatory basis, for a public purpose, in accordance with due process of law and Article 12.3 (Minimum Standard of Treatment), 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 12.12 (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.

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<sup>14</sup> Article 12.11 (Expropriation) is to be interpreted in accordance with Annex 12-A (Expropriation). Paragraph 1 of Article 18.5 (Taxation) shall not apply to this Article and Annex 12-A (Expropriation).

3. Notwithstanding paragraphs 1 and 2, 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.
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 15 (Intellectual Property) and the TRIPS Agreement<sup>15</sup>.

#### **Article 12.12 Transfers**

1. Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include:
  - (a) the initial capital and additional amounts to maintain or increase a covered investment;
  - (b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered 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 covered investment, including payments made pursuant to a loan agreement;
  - (e) payments made pursuant to Article 12.6 (Compensation for Losses) and Article 12.11(Expropriation); and
  - (f) payments arising under Section 12-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 a covered investment to be made as authorised or specified in an investment authorisation or other written agreement between the Party and a covered investment or an investor of the other Party.

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<sup>15</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.

4. Notwithstanding paragraphs 1, 2, and 3, a Party may delay or prevent a transfer through the equitable, non-discriminatory, and good faith application of its laws 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) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;
  - (d) criminal or penal offences;
  - (e) ensuring compliance with orders or judgments in judicial or administrative proceedings; or
  - (f) social security<sup>16</sup>, public retirement or compulsory savings schemes.
5. Nothing in this Chapter shall affect the rights and obligations of the members of the *International Monetary Fund* 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 18.6 (Restrictions to Safeguard the Balance-of-Payments) of Chapter 18 (Institutional, General and Final Provisions) or at the request of the *International Monetary Fund*.

**Article 12.13**  
**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 a covered 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, social security schemes include compulsory health insurance schemes.

**SECTION 12-B**  
**INVESTOR-STATE DISPUTE SETTLEMENT**

**Article 12.14**  
**Scope**

1. This Section shall apply to disputes between a Party and an investor of the other Party<sup>17</sup> concerning an alleged breach of Articles 12.3 (Minimum Standard of Treatment), 12.4 (National Treatment), 12.5 (Most-Favoured-Nation Treatment), 12.6 (Compensation for Losses), paragraph 1 of 12.7 (Performance Requirements), 12.8 (Senior Management and Boards of Directors), paragraph 3 of 12.9 (Non-Conforming Measures), 12.10 (Special Formalities and Treatment of Information), 12.11 (Expropriation), 12.12 (Transfers), and 12.13 (Subrogation), which causes loss or damage to the investor or its covered investment.
2. 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>18</sup>, that is aimed at protecting or promoting human health.

**Article 12.15**  
**Institution of Arbitral Proceedings**

1. The disputing parties shall initially seek to resolve the dispute by consultations and negotiations.
2. Where the dispute cannot be resolved as provided for under paragraph 1 within 6 months from the date of a written request for consultations and negotiations, the claimant may submit to arbitration:
  - (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; and
  - (b) a claim, on behalf of an enterprise of the respondent that is an enterprise that the claimant owns or controls<sup>19</sup>, that the respondent has breached an obligation

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<sup>17</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>18</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).

<sup>19</sup> An enterprise is:

- (a) owned by natural persons or enterprises of the other Party if more than 50 per cent of the equity interest in it is beneficially owned by natural persons or enterprises of that Party;

under this Agreement and the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

3. A claimant may submit the claim to arbitration:
  - (a) under the ICSID Convention and the ICSID Arbitration Rules, provided that both Parties are parties to the ICSID Convention;
  - (b) under the ICSID Additional Facility Rules, provided that one of the Parties, but not both, is a party to the ICSID Convention;
  - (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.
  
4. Each Party hereby consents to the submission of a dispute to arbitration under subparagraphs 3(a), 3(b), 3(c) and 3(d) in accordance with the provisions of this Section, conditional upon:
  - (a) the submission of the dispute to such arbitration taking place within three years of 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 covered investment;
  - (b) the claimant not being an enterprise of the respondent until the claimant refers the dispute for arbitration pursuant to paragraph 3;
  - (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 90 days before the claim is submitted, to the respondent of its intent to submit the dispute to such arbitration and which:
    - (i) 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;
    - (ii) nominates one of the *fora* referred to in paragraph 3 as the forum for dispute settlement;
    - (iii) is accompanied,

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- (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.

- (A) for claims submitted to arbitration under subparagraph 2(a), by the claimant’s written waiver; and
- (B) for claims submitted to arbitration under subparagraph 2(b), 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 12.19 (Interim Measures of Protection and Diplomatic Protection)) before any of the other dispute settlement *fora* referred to in paragraph 3 in relation to the matter under dispute; and

- (iv) briefly summarises the alleged breach of the respondent under this Agreement (including the provisions alleged to have been breached), the legal and factual basis for the dispute, and the loss or damage allegedly caused to the claimant or its covered investment by reason of that breach.
  - (e) In deciding whether an investment dispute is within the jurisdiction of ICSID and competence of the tribunal established under subparagraphs 3(a) and 3(b), that tribunal shall comply with the notification<sup>20</sup> submitted by the Republic of Turkey on March 3, 1989 to ICSID in accordance with Article 25 (4) of ICSID Convention, concerning classes of disputes considered suitable or unsuitable for submission to the jurisdiction of ICSID, as an integral part of this Agreement.
5. The consent under paragraph 4 and the submission of a claim to arbitration under this Section shall satisfy the requirements of:
- (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute; and
  - (b) Article II of the New York Convention for an “agreement in writing”.
6. 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 12.16 Constitution of Arbitral Tribunal**

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<sup>20</sup> In this regard, the phrase “necessary permission” in the said notification refers only to the initial permission or approval required for an investment to be made in Turkey in conformity with the relevant legislation of the Republic of Turkey on foreign capital, and does not include any other permission or approval that may be required under the law of the Republic of Turkey.

1. Unless the disputing parties otherwise agree, the arbitral tribunal shall be composed of three 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 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 Secretary-General of ICSID, 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, in the event that the Secretary-General of ICSID is a national or permanent resident of either Party, the Deputy Secretary-General of ICSID 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 12.17**  
**Place of Arbitration**

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.

**Article 12.18**  
**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>21</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 of law, a claim submitted is not a claim for which an award in favour of the claimant may be made under Article 12.20 (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

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<sup>21</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.

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.
3. In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 2 or any objection that the dispute is not within the tribunal's competence, including an objection that the dispute is not within the tribunal's jurisdiction. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.
4. When it decides a respondent's objection under paragraph 2 or 3, 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 12.19**

##### **Interim Measures of Protection and Diplomatic Protection**

1. Subparagraph 4(d)(iii) of Article 12.15 (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 12.15 (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 12.20**  
**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 12.21**  
**Consolidation**

1. Where two 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 Secretary-General of ICSID 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 Secretary-General of ICSID finds within 30 days after receiving a request in conformity with paragraph 2 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 arbitrators:
  - (a) one arbitrator appointed by agreement of the disputing investors;
  - (b) one arbitrator appointed by the respondent; and
  - (c) the chairman of the arbitral tribunal appointed by the Secretary-General of ICSID provided that the chairman shall not be a national of either Party.
5. If, within the 60 days after the Secretary-General receives a request made under paragraph 2, the respondent fails or the disputing investors fail to appoint an arbitrator in accordance with paragraph 4, the Secretary-General, 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 12.15 (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 12.16 (Constitution of the 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 paragraphs 4(a) and 5; 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 12.15 (Institution of Arbitral Proceedings) and that has not been named in a request made under paragraph 2, may make a written request to the tribunal that it be included in any order issued under paragraph 6, 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 Secretary-General 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 12.16 (Constitution of the 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, order that the proceedings of a tribunal established under Article 12.16 (Constitution of the Arbitral Tribunal) be stayed, unless the latter tribunal has already adjourned its proceedings.

## **SECTION 12-C FINAL PROVISIONS**

### **Article 12.22 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 12.23 Publication of International Agreements**

- 1. 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 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.

**Article 12.24**  
**General Exceptions<sup>22</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>23</sup>;
- (b) necessary to protect human, animal or plant life or health<sup>24</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.

**Article 12.25**  
**Savings Clause**

1. For 10 years from the date of termination of this Agreement, the following provisions (including the relevant Annexes and Appendices) shall continue to apply to covered 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

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<sup>22</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>23</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.

<sup>24</sup> The Parties understand that the measures referred in subparagraph 1(b) include environmental measures necessary to protect human, animal or plant life or health.

- (b) such other provisions in the Agreement as may be necessary for or consequential to the application or interpretation of this Chapter.
2. For the avoidance of doubt, paragraph 1 shall not apply to the establishment, acquisition or expansion of investments after the date of termination.

#### **Article 12.26**

#### **Term of Investment Promotion and Protection Agreement**

1. Subject to paragraph 2, the Parties hereby agree that the *Agreement between the Government of the Republic of Singapore and the Government of the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments* signed in Singapore on 19 February 2008 (“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.
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 years have elapsed since the date of entry into force of this Agreement.

#### **ANNEX 12-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 12.11 (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.
3. The second situation addressed by paragraph 1 of Article 12.11 (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.