

## CHAPTER 9

### INVESTMENT

#### Section A: Investment

##### Article 92: Scope and Coverage

1. This Chapter applies to measures adopted or maintained by a Party relating to:
  - (a) investors of the other Party; and
  - (b) covered investments.
2. A Party's obligations under this Section shall apply:
  - (a) to all levels of government of that Party; and
  - (b) to any non-governmental body when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party<sup>9</sup>.
3. This Chapter shall not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter 8 (Trade in Services).
4. Notwithstanding paragraph 3, for the purpose of protection of investments with respect to the commercial presence mode of service supply, Articles 95 through 98, 102 and 103 shall apply to any measure affecting the supply of a service by a service supplier of a Party through commercial presence in the territory of the other Party. Section B shall apply to Articles 95 through 98, 102 and 103 with respect to the supply of a service through commercial presence.
5. For greater certainty, this Chapter does not bind a Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.

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<sup>9</sup> For greater certainty, governmental authority is delegated under the law of a Party, including through a legislative grant, and a government order, directive or other action transferring to the person, or authorizing the exercise by the person of, governmental authority. For greater certainty, "governmental authority" refers to the power that is vested in the government of a Party, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges.

### **Article 93: National Treatment<sup>10</sup>**

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

### **Article 94: Most-Favored-Nation Treatment<sup>11</sup>**

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of 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 covered investments treatment no less favorable 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. Paragraphs 1 and 2 shall not be construed to oblige a Party to extend to the investors of the other Party or covered investment any treatment, preference or privilege by virtue of any bilateral or multilateral agreement relating to investment in force or signed prior to the date of entry into force of this Agreement.
4. For greater certainty, the treatment referred to in this Article does not encompass dispute resolution mechanisms or procedures, such as those included in Section B, that are provided for in international investment or trade agreements.

### **Article 95: Minimum Standard of Treatment<sup>12</sup>**

1. Each Party shall accord to covered investments fair and equitable treatment and

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<sup>10</sup> For greater certainty, whether treatment is accorded in “like circumstances” under Article 93 or 94 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.

<sup>11</sup> For the purposes of this Article, the term “non-Party” shall not include the following WTO members within the meaning of the WTO Agreement: (1) Hong Kong, China; (2) Macao, China; and (3) Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei).

<sup>12</sup> Article 95 shall be interpreted in accordance with Annex 6.

full protection and security in accordance with customary international law.

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 which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with due process of law; 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.

4. For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor’s expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.

5. For greater certainty, the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.

#### **Article 96: Compensation for Losses**

1. Notwithstanding Article 100.3, each Party shall accord to investors of the other Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

2. Notwithstanding paragraph 1, if an investor of a Party, in the situations referred to in paragraph 1, suffers a loss in the territory of 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. Any compensation shall be in accordance with Article 97.2 through 97.4, *mutatis mutandis*.

3. Paragraph 1 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 93 but for Article 100.3.

### **Article 97: Expropriation and Compensation<sup>13</sup>**

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

- (a) for a public purpose;
- (b) in a non-discriminatory manner;
- (c) on payment of compensation in accordance with this Article; and
- (d) in accordance with due process of law.

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

- (a) be paid without delay;
- (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“the date of expropriation”);
- (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and
- (d) be fully realizable and freely transferable.

3. If the fair market value is denominated in a freely usable currency, the compensation referred to in paragraph 1(c) shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency accrued from the date of expropriation until the date of payment.

4. If the fair market value is denominated in a currency that is not freely usable, the

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<sup>13</sup> Article 97 shall be interpreted in accordance with Annexes 6 and 7.

compensation referred to in paragraph 1(c) – converted into the currency of payment at the market rate of exchange prevailing on the date of payment – shall be no less than:

- (a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus
- (b) interest at a commercially reasonable rate for that freely usable currency accrued from the date of expropriation until the date of payment.

5. Any measure of expropriation or the amount of compensation may, at the request of the investors affected, be reviewed by a judicial or other independent authority of the Party taking the measure as prescribed by the Party's laws.

6. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with the TRIPS Agreement.

7. For greater certainty, the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.

#### **Article 98: Transfers<sup>14</sup>**

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

- (a) contributions to capital;
- (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, including a loan agreement;

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<sup>14</sup> Article 98 does not affect each Party's ability to administer its capital account for the maintenance of the stability and soundness of its financial system, such as the foreign exchange market, stock market, bond market and financial derivatives market.

- (e) payments made pursuant to Articles 96 and 97;
  - (f) payments arising out of a dispute; and
  - (g) earnings and remuneration of a national of a Party who works in a covered investment in the territory of the other Party.
2. Each Party shall permit transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer.
3. Each Party shall permit returns in kind relating to a covered investment to be made as authorized or specified in a written agreement between the Party and a covered investment or an investor of the other Party.
4. Notwithstanding paragraphs 1 through 3, a Party may prevent a transfer through the equitable, non-discriminatory, and good faith application of its laws and regulations relating to:
- (a) bankruptcy, insolvency, or the protection of the rights of creditors;
  - (b) issuing, trading, or dealing in securities, futures, options, or derivatives;
  - (c) criminal or penal offenses;
  - (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or
  - (e) ensuring compliance with orders or judgments in judicial or administrative proceedings.
5. In case of a serious balance of payments difficulty or of a threat thereof, a Party may temporarily restrict transfers, provided that such a Party implements measures in accordance with the Articles *of Agreement of the International Monetary Fund*. These restrictions shall be imposed on an equitable, non-discriminatory and good faith basis, and shall not exceed what is necessary to deal with such circumstances.
6. For greater certainty, provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investment, paragraphs 1 through 3 shall not be construed to prevent a Party from adopting or maintaining measures that are necessary to secure compliance with its laws and regulations, including those relating to the prevention of deceptive and fraudulent practices, that are not inconsistent with this Agreement.

## **Article 99: Performance Requirements**

The Parties agree that the provisions of the WTO *Agreement on Trade-Related Investment Measures* are incorporated *mutatis mutandis* into this Agreement and shall apply with respect to all investments falling within the scope of this Chapter.

## **Article 100: Non-Conforming Measures**

1. Articles 93 and 94 do not apply to:
  - (a) any existing non-conforming measures maintained within the territory of a Party;
  - (b) the continuation of any non-conforming measure referred to in subparagraph (a);
  - (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not increase the non-conformity of the measure, as it existed immediately before the amendment, with those obligations.
2. Articles 93 and 94 do not apply to any measure covered by an exception to, or derogation from, the obligations under Article 3 or 4 of the TRIPS Agreement, as specifically provided in those Articles and in Article 5 of the TRIPS Agreement.
3. Articles 93 and 94 do not apply to subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.
4. Articles 93 and 94 do not apply to government procurement.
5. The Parties will endeavor to progressively remove the non-conforming measures.

## **Article 101: Special Formalities and Information Requirements**

1. Nothing in Article 93 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as a requirement that investors be residents of the Party or that covered investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not materially impair the protections afforded by a Party to investors of the other Party and covered investments pursuant to this Chapter.

2. Notwithstanding Articles 93 and 94, 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 any confidential business information from any disclosure that would prejudice the competitive position of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.

### **Article 102: Subrogation**

If a Party (or any statutory body, governmental agency or institution, or corporation designated by the Party) makes a payment to an investor of the Party under a guarantee, a contract of insurance or other form of indemnity that it has entered into with respect to a covered investment, the other Party, in whose territory the covered investment was made, shall recognize the subrogation or transfer of any rights the investor would have possessed in this Chapter with respect to the covered investment but for the subrogation, including any rights under Section B, and the investor shall be precluded from pursuing such rights to the extent of the subrogation.

### **Article 103: Denial of Benefits**

1. A Party may deny the benefits<sup>15</sup> of this Chapter to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if a non-Party or persons of a non-Party own or control the enterprise and the denying Party:

- (a) does not maintain diplomatic relations with the non-Party; or
- (b) adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.

2. A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and a non-Party, or persons of a non-Party or the denying Party, own or control the enterprise.

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<sup>15</sup> For greater certainty, a Party may deny benefits of this Chapter under paragraphs 1 and 2, including access to dispute settlement under Section B, at any appropriate time. Such denial may be made during proceedings under Section B, subject to the applicable arbitral rules.



#### **Article 104: Essential Security**

Nothing in this Chapter shall be construed:

- (a) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or
- (b) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

#### **Article 105: Protection of Confidential Information**

Nothing in this Chapter shall be construed to require a Party to furnish or allow access to protected information or other confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest, or which would prejudice the legitimate commercial interests of particular enterprises, public or private.

#### **Article 106: Measures to Safeguard the Balance of Payments**

1. In case of a serious balance of payments difficulty or of a threat thereof, a Party may restrict transfers, provided that such a Party implements measures in accordance with the *Articles of Agreement of the International Monetary Fund*. These restrictions shall be imposed on an equitable, non-discriminatory and temporary basis that shall be phased out progressively as such situation improves, and shall not exceed what is necessary to deal with such circumstances.
2. Any restrictions adopted or maintained under paragraph 1, or any changes therein, shall be promptly notified to the other Party.

#### **Article 107: Prudential Measures**

1. Notwithstanding any other provision of this Chapter, a Party shall not be prevented from adopting or maintaining measures relating to financial services for prudential reasons, including for the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial services supplier, or to

ensure the integrity and stability of the financial system.<sup>16</sup>

2. Nothing in this Chapter applies to non-discriminatory measures of general application in pursuit of monetary and related credit policies or exchange rate policies.<sup>17</sup>This paragraph shall not affect a Party's obligations under Article 98.

3. Where an investor submits a claim to arbitration under Section B, and the disputing Party invokes paragraphs 1 and 2, the investor-State tribunal established pursuant to Section B may not decide whether and to what extent it is a valid defence to the claim of the investor. It shall seek a report in writing from the Parties on this issue. The investor-State tribunal may not proceed pending receipt of such a report or of a decision of a State-State arbitral tribunal, should such a State-State arbitral tribunal be established.

4. Pursuant to a request for a report received in accordance with the above paragraph, the financial services authorities of the Parties shall engage in consultations. If the financial services authorities of the Parties reach a joint decision on the issue of whether and to what extent the relevant paragraphs of this Article is a valid defence to the claim of the investor, they shall prepare a written report describing their joint decision. The report shall be transmitted to the investor-State tribunal, and shall be binding on the investor-State tribunal.

5. If, after 60 days, the financial services authorities of the Parties are unable to reach a joint decision on the issue of whether and to what extent the relevant paragraphs of this Article is a valid defence to the claim of the investor, the issue shall, within 30 days, be referred by either of the Parties to a State-State arbitral tribunal established pursuant to Chapter 13 (Dispute Settlement). In such a case, the provisions requiring consultations between the Parties in Article 146 shall not apply. The decision of the State-State arbitral tribunal shall be transmitted to the investor-State tribunal, and shall be binding on the investor-State tribunal. All of the members of any such State-State arbitral tribunal shall have expertise or experience in financial services law or practice, which may include the regulation of financial institutions.

## **Article 108: Taxation**

1. Except as provided in this Article, nothing in this Section shall impose obligations with respect to taxation measures.

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<sup>16</sup> It is understood that the term "prudential reasons" includes the maintenance of the safety, soundness, integrity, or financial responsibility of individual financial institutions or the financial system, as well as the maintenance of the safety and financial and operational integrity of payment and clearing systems.

<sup>17</sup> For greater certainty, measures of general application taken in pursuit of monetary and related credit policies or exchange rate policies do not include measures that expressly nullify or amend contractual provisions that specify the currency of denomination or the rate of exchange of currencies.

2. Article 97 shall apply to all taxation measures<sup>18</sup>, except that a claimant that asserts that a taxation measure involves an expropriation may submit a claim to arbitration under Section B only if:

- (a) the claimant has first referred to the competent tax authorities<sup>19</sup> of the Parties in writing the issue of whether that taxation measure involves an expropriation; and
- (b) within 180 days after the date of such referral, the competent tax authorities of the Parties fail to agree that the taxation measure is not an expropriation.

3. Nothing in this Chapter shall affect the rights and obligations of a Party under any tax convention. In the event of any inconsistency between this Chapter and any such convention, that convention shall prevail to the extent of the inconsistency. In the case of a tax convention between the Parties, the competent authorities under that convention shall have sole responsibility for determining whether any inconsistency exists between this Chapter and that convention.

#### **Article 109: Promotion of Investment**

The Parties shall cooperate in promoting investment through, amongst others:

- (a) increasing investments between the Parties;
- (b) organizing investment promotion activities;
- (c) promoting business matching events;
- (d) organizing and supporting the organization of various briefings and seminars on investment opportunities and on investment laws, regulations and policies; and
- (e) conducting information exchanges on other issues of mutual concern relating to investment promotion and facilitation.

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<sup>18</sup> For greater certainty, measures regarding tax preservation or punishment against illegal activities that are non-discriminatory and adopted or implemented for the purpose of levying or collecting taxes in a fair and effective manner, do not constitute expropriations as provided in Article 97.

<sup>19</sup> For the purposes of this Article, the “competent tax authorities” mean:

- (a) for China, the Ministry of Finance and State Administration of Taxation or an authorized representative of the Ministry of Finance and State Administration of Taxation; and
- (b) for Maldives, the Maldives Inland Revenue Authority.

### **Article 110: Facilitation of Investment**

Subject to their laws and regulations, the Parties shall cooperate to facilitate investment between the Parties through, amongst others:

- (a) creating the necessary environment for all forms of investment;
- (b) simplifying procedures for investment applications and approvals;
- (c) promoting dissemination of investment information, including investment laws, regulations, policies and procedures; and
- (d) establishing one-stop investment centers in the respective host Parties to provide assistance and advisory services to the business sectors including facilitation of operating licenses and permits.

### **Article 111: Committee on Investment**

1. The Parties hereby establish a Committee on Investment that shall meet on the request of a Party or the FTA Joint Commission to consider any matter arising under this Chapter.

2. The Committee's functions shall include:

- (a) reviewing the implementation of this Chapter;
- (b) identifying and recommending measures or initiatives to promote and increase investment flows between the Parties; and
- (c) may, pursuant to Article 117.3, adopt a joint decision of the Parties, declaring their interpretation of a provision of this Chapter and Annexes 6 through 8; and
- (d) may propose amendments to this Chapter in the light of experience of its operation.

## **Section B: Investor-State Dispute Settlement**

### **Article 112: Consultations**

1. In the event of an investment dispute, if the claimant intends to submit the dispute to arbitration, it shall deliver a request for consultations to the respondent at least 90 days prior to submission of the dispute to arbitration. The request shall:

- (a) specify the name and address of the claimant and, where a claim is submitted on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, the name, address, and place of incorporation of the enterprise;
- (b) for each claim, identify the provision of this Agreement or the investment agreement alleged to have been breached and any other relevant provisions;
- (c) for each claim, identify the measures or events giving rise to the claim;
- (d) for each claim, provide a brief summary of the legal and factual basis; and
- (e) specify the relief sought and the approximate amount of damages claimed.

2. After a request for consultations is made pursuant to this Section, the claimant and the respondent shall enter into consultations with a view to reaching a mutually satisfactory solution.

### **Article 113: Submission of a Claim to Arbitration**

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultations pursuant to Article 112 and 90 days have elapsed since the date of the request for consultations:

- (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim:
  - (i) that the respondent has breached
    - (A) an obligation under Articles 93 through 98; or
    - (B) an investment agreement; and
  - (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and
- (b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim:

- (i) that the respondent has breached
  - (A) an obligation under Articles 93 through 98; or
  - (B) an investment agreement; and
- (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach<sup>20</sup>,

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

2. An investor of a Party may not initiate or continue a claim under this Section if a claim involving the same measure or measures alleged to constitute a breach under this Article and arising from the same events or circumstances is initiated or continued pursuant to an agreement between the respondent and a non-Party by:

- (a) an enterprise of a non-Party that owns or controls, directly or indirectly, the investor of a Party, or
- (b) an enterprise of a non-Party that is owned or controlled, directly or indirectly, by the investor of a Party.

Notwithstanding the previous paragraph, the claim may proceed if the respondent agrees that the claim may proceed, or if the investor of a Party and the enterprise of a non-Party agree to consolidate the claims under the respective agreements before a tribunal constituted under this Section.

3. Provided that 6 months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:

- (a) under the ICSID Convention and the *ICSID Rules of Procedure for Arbitration Proceedings*, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention;
- (b) under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention;

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<sup>20</sup> For greater certainty, a minority non-controlling shareholder of an enterprise may not submit a claim on behalf of that enterprise.

- (c) under the UNCITRAL Arbitration Rules<sup>21</sup>; or
- (d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules.

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

- (a) referred to in paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General;
- (b) referred to in Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General;
- (c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 20 of the UNCITRAL Arbitration Rules, are received by the respondent; or
- (d) referred to under any arbitral institution or arbitral rules selected under paragraph 3(d) is received by the respondent.

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

5. In addition to any other information required by the applicable arbitral rules, the notice of arbitration shall also include information addressing each of the categories in Article 112.1(a) through 112.1(e). The claimant shall provide with the notice of arbitration:

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

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

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<sup>21</sup> In the case of arbitration under this Section pursuant to the UNCITRAL Arbitration Rules, the *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* shall not be applicable unless the disputing parties otherwise agree.

#### **Article 114: Consent of Each Party to Arbitration**

1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Chapter.
2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall satisfy the requirements of:
  - (a) Chapter II (Jurisdiction of the Centre) of the ICSID Convention 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.”

#### **Article 115: Conditions and Limitations on Consent of Each Party**

1. No claim may be submitted to arbitration under this Section if more than 3 years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 113.1 and knowledge that the claimant (for claims brought under Article 113.1(a)) or the enterprise (for claims brought under Article 113.1(b)) has incurred loss or damage.
2. No claim may be submitted to arbitration under this Section unless:
  - (a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement;
  - (b) the claim arises from measures included in the request for consultations submitted by the claimant in accordance with Article 112; and
  - (c) the notice of arbitration is accompanied:
    - (i) for claims submitted to arbitration under Article 113.1(a), by the claimant’s written waiver, and
    - (ii) for claims submitted to arbitration under Article 113.1(b), by the claimant’s and the enterprise’s written waivers,

of any right to initiate or continue before any administrative tribunal or court under the law of a Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 113.



3. Notwithstanding paragraph 2(c), the claimant (for claims brought under Article 113.1(a)) and the claimant or the enterprise (for claims brought under Article 113.1(b)) may initiate or continue an action that seeks interim injunctive relief under the law of the respondent and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.
4. Notwithstanding paragraph 2(c)(ii), a waiver from the enterprise shall not be required if the respondent has deprived the claimant of its ownership or control of the enterprise.

#### **Article 116: Constitution of the Tribunal**

1. Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.
2. The Secretary-General shall serve as appointing authority for an arbitration under this Section.
3. If a tribunal has not been constituted within 90 days from the date that a claim is submitted to arbitration under this Section, the appointing authority, on the request of a disputing party, shall appoint, in his or her discretion and after consulting with the disputing parties, the arbitrator or arbitrators not yet appointed.
4. Unless a disputing party disagrees, the appointing authority may appoint a presiding arbitrator who is a national of a Party.
5. For the purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator on a ground other than nationality:
  - (a) the respondent agrees to the appointment of each individual member of a tribunal established under the ICSID Convention or the ICSID Additional Facility Rules;
  - (b) a claimant referred to in Article 113.1(a) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant agrees in writing to the appointment of each individual member of the tribunal; and
  - (c) a claimant referred to in Article 113.1(b) may submit a claim to arbitration

under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant and the enterprise agree in writing to the appointment of each individual member of the tribunal.

#### **Article 117: Governing Law**

1. Subject to paragraph 3, when a claim is submitted under Article 113.1(a)(i)(A), or Article 113.1(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Agreement and the applicable rules of international law<sup>22</sup>.

2. Subject to paragraph 3 and the other terms of this Section, when a claim is submitted under Article 113.1(a)(i)(B), or Article 113.1(b)(i)(B), the tribunal shall apply:

(a) the rules of law specified in the pertinent investment agreement, or as the disputing parties may otherwise agree; or

(b) if the rules of law have not been specified or otherwise agreed:

(i) the law of the respondent, including its rules on the conflict of laws;<sup>23</sup>  
and

(ii) such rules of customary international law as may be applicable.

3. A joint decision of the Parties, acting through the Committee on Investment, declaring their interpretation of a provision of this Agreement shall be binding on a tribunal of any ongoing or subsequent dispute, and any decision or award issued by such a tribunal must be consistent with that joint decision.

#### **Article 118: Awards**

1. Where a tribunal makes an 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.

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<sup>22</sup> For greater certainty, this provision is without prejudice to any consideration of the domestic law of the respondent where it is relevant to the claim as a matter of fact.

<sup>23</sup> The “law of the respondent” means the law that a domestic court or tribunal of proper jurisdiction would apply in the same case.

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

2. Subject to paragraph 1, where a claim is submitted to arbitration under Article 113.1(b):

(a) an award of restitution of property shall provide that restitution be made to the enterprise;

(b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and

(c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic laws.

3. A tribunal may not award punitive damages.

4. The award shall be made available to the public promptly.<sup>24</sup>

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

#### **Article 119: Service of Documents**

Delivery of notice and other documents on a Party shall be made to the place named for that Party in Annex 8.

### **Section C: Definitions**

#### **Article 120: Definitions**

For the purposes of this Chapter:

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

**claimant** means an investor of a Party that is a party to an investment dispute with the other Party. If that investor is a natural person, who is a permanent resident of a Party

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<sup>24</sup> For greater certainty, nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 104 or 105.

and a national of the other Party, that natural person may not submit a claim to arbitration against that latter Party;

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

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

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

**enterprise** means any entity constituted or organized 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 organization; and a branch of an enterprise;

**enterprise of a Party** means an enterprise constituted or organized under the law of a Party and a branch located in the territory of a Party and carrying out business activities there;

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

**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;

**ICSID Additional Facility Rules** mean the *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Dispute*;

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

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

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

- (c) bonds, debentures, loans, and other debt instruments, including debt instruments issued by a Party or an enterprise;<sup>25</sup>
- (d) futures, options and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- (f) intellectual property rights;
- (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law;<sup>26,27</sup> and
- (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges;

**investment agreement** means a written agreement<sup>28</sup> between a national authority<sup>29</sup> of a Party and a covered investment or an investor of the other Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor:

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

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<sup>25</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>26</sup> Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment also depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment.

<sup>27</sup> The term “investment” does not include an order or judgment entered in a judicial or administrative action.

<sup>28</sup> “Written agreement” refers to an agreement in writing, executed by both parties, whether in a single instrument or in multiple instruments, that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 118.2. For greater certainty, (a) a unilateral act of an administrative or judicial authority, such as a permit, license, or authorization issued by a Party solely in its regulatory capacity, or a decree, order, or judgment, standing alone; and (b) an administrative or judicial consent decree or order, shall not be considered a written agreement.

<sup>29</sup> For purposes of this definition, “national authority” means: (a) for China, an agency of the central government; and (b) for Maldives, an agency of the government.

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

**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 a Party;

**investor of a Party** means a Party, 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;

**national** means:

- (a) for China, a natural person who is a national of the People's Republic of China as defined in the *Nationality Law of the People's Republic of China*; and
- (b) for Maldives, a natural person who is a national of the Republic of Maldives as defined in the Constitution of Maldives.

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

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

**person** means a natural person or an enterprise;

**person of a Party** means a national or an enterprise of a Party;

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

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

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

**TRIPS Agreement** means the *Agreement on Trade-Related Aspects of Intellectual Property Rights*, which is part of the WTO Agreement; and

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