

CHAPTER NINE

INVESTMENT

Section A - Definitions

Article 9.01: Definitions

For purposes of this Chapter:

confidential information means confidential business information or information that is privileged or otherwise protected from disclosure;

covered investment means, with respect to a Party, an investment in its territory of an investor of the other Party existing on the date of entry into force of this Chapter, or investments made or acquired thereafter;

disputing investor means an investor that makes a claim under Section C;

disputing Party means a Party against which a claim is made under Section C;

disputing party means the disputing investor or the disputing Party;

enterprise means an enterprise as defined in Article 1.01 (Initial Provisions and General Definitions – Definitions of General Application) and a branch of any such entity;

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

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

intellectual property rights means copyright and related rights, trademark rights, rights in geographical indications, rights in industrial designs, patent rights, rights in layout designs of integrated circuits, rights in relation to protection of undisclosed information and plant breeders' rights;

investment means:

- (a) an enterprise;
- (b) a share, stock and other form of equity participation in an enterprise;
- (c) a bond, debenture, and other debt instrument of an enterprise;
- (d) a loan to an enterprise;
- (e) an interest in an enterprise that entitles the owner to a share in income or profits of the enterprise;
- (f) an interest in an enterprise that entitles the owner to a share in the assets of that enterprise on dissolution;
- (g) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in that territory, such as under:
 - (i) a contract involving the presence of an investor's property in the territory of the Party, including a turnkey or construction contract, or a concession, or
 - (ii) a contract where remuneration depends substantially on the production, revenues or profits of an enterprise;

- (h) intellectual property rights; and
- (i) any other tangible or intangible, movable or immovable, property and related property rights acquired in the expectation or used for the purpose of economic benefit or other business purpose;

but **investment** does not mean:

- (j) a claim to money that arises solely from:
 - (i) a commercial contract for the sale of a good or service by a national or enterprise in the territory of a Party to an enterprise in the territory of the other Party, or
 - (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or
- (k) any other claim to money,

that does not involve the kinds of interests set out in subparagraphs (a) to (i);

investment of an investor of a Party means an investment owned or controlled directly or indirectly by an investor of that Party;

investor of a non-Party means an investor other than an investor of a Party, that seeks to make, is making, or has made, an investment; for greater certainty, an investor “seeks to make an investment” only when the investor has taken concrete steps necessary to make the investment, such as when the investor has made an application for a permit or license authorizing the establishment of an investment;

investor of a Party means a Party or state enterprise, or a national or an enterprise of a Party, that seeks to make, is making, or has made, an investment; for greater certainty, an investor “seeks to make an investment” only when the investor has taken concrete steps necessary to make the investment, such as when the investor has made an application for a permit or license authorizing the establishment of an investment;

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

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

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

Section B – Investment

Article 9.02: Scope of Application

1. This Chapter applies to measures adopted or maintained by a Party relating to:
 - (a) an investor of the other Party;
 - (b) a covered investment; and
 - (c) with respect to Articles 9.07, 9.16 and 9.17, an investment in its territory.
2. This Chapter does not apply to an act or fact that took place or a situation that ceased to exist before the date of entry into force of this Agreement.

Article 9.03: Relation to Other Chapters

1. In the event of an inconsistency between this Chapter and another Chapter, the other Chapter prevails.
2. A 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 to its territory does not of itself make this Chapter applicable to that cross-border service. This Chapter applies to that Party's treatment of the posted bond or financial security if the bond or financial security is a covered investment.
3. This Chapter does not apply to a measure adopted or maintained by a Party to the extent that the measure is covered by Chapter Twelve (Financial Services).

4. Articles 10.05 (Cross-Border Trade in Services – Market Access) and 10.08 (Cross-Border Trade in Services – Domestic Regulation) are incorporated into and made a part of this Chapter and apply to a measure adopted or maintained by a Party when that measure affects the supply of a service in its territory by a covered investment.

5. A reservation taken by a Party under Article 10.07 (Cross-Border Trade in Services – Reservations) against Article 10.05 (Cross-Border Trade in Services – Market Access) applies to a measure of that Party covered under paragraph 4.

Article 9.04: National Treatment

1. Each Party shall accord to an investor 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 an investment in its territory.

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

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a sub-national government, treatment no less favourable than the treatment accorded in like circumstances by that sub-national government to investors and to investments of investors of the Party of which it forms a part.

Article 9.05: Most-Favoured-Nation Treatment

1. Each Party shall accord to an investor of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of an investment in its territory.

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

3. For greater certainty, the treatment accorded by a Party under this Article means, with respect to a sub-national government, treatment accorded, in like circumstances, by that sub-national government to investors, and to investments of investors, of a non-Party.

Article 9.06: Minimum Standard of Treatment

1. Each Party shall accord to a covered investment treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.

2. The concepts of “fair and equitable treatment” and “full protection and security” in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

3. 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 9.07: Performance Requirements

1. A Party may not impose or enforce the following requirements, or enforce a commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or a non-Party in its territory:

- (a) to export a given level or percentage of a good or service;
- (b) to achieve a given level or percentage of domestic content;

- (c) to purchase, use or accord a preference to a good produced or service provided in its territory, or to purchase a good or service from a person in its territory;
- (d) to relate the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with that investment;
- (e) to restrict sales of a good or service in its territory that the investment produces or provides by relating those sales in any way to the volume or value of its exports or foreign exchange earnings;
- (f) to transfer 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 a good that such investment produces or a service it provides to a specific regional market or to the world market.

2. A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements is not inconsistent with paragraph 1(f). For greater certainty, Articles 9.04 and 9.05 apply to that measure.

3. A Party may not condition 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 the following requirements:

- (a) to achieve a given level or percentage of domestic content;
- (b) to purchase, use or accord a preference to a good produced in its territory, or to purchase a good from a producer in its territory;
- (c) to relate 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 a good or service in its territory that such investment produces or provides by relating those sales in any way to the volume or value of its exports or foreign exchange earnings.

4. Paragraph 3 does not 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, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

5. Paragraph 1(f) does not apply if the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of domestic competition law.

6. Paragraphs 1 and 3 do not apply to a requirement other than the requirements set out in those paragraphs.

7. This Article does not preclude enforcement of a commitment, undertaking or requirement between private parties.

8. The provisions of:

- (a) paragraphs 1(a), (b) and (c), and 3(a) and (b) do not apply to a qualification requirement for a good or service with respect to export promotion and foreign aid programs;
- (b) paragraphs 1(b), (c), (f) and (g), and 3(a) and (b) do not apply to procurement by a Party or a state enterprise; and
- (c) paragraphs 3(a) and (b) do not apply to a requirement imposed by an importing Party relating to the content of a good necessary to qualify for a preferential tariff or preferential quota.

Article 9.08: Senior Management and Boards of Directors

1. A Party may not require that an enterprise of that Party that is a covered investment appoint individuals of any particular nationality to senior management positions.
2. A Party may require that a majority of the board of directors, or a committee thereof, of an enterprise that is a covered investment be of a particular nationality or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

Article 9.09: Reservations and Exceptions

1. Articles 9.04, 9.05, 9.07 and 9.08 do not apply to:
 - (a) an existing non-conforming measure maintained by:
 - (i) the national government of a Party as set out in its Schedule to Annex I, or
 - (ii) a sub-national government of a Party;
 - (b) the continuation or prompt renewal of a non-conforming measure referred to in subparagraph (a); or
 - (c) an amendment to a non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 9.04, 9.05, 9.07 and 9.08.
2. Articles 9.04, 9.05, 9.07 and 9.08 do not apply to a measure that a Party adopts or maintains with respect to sectors, subsectors or activities, as set out in its Schedule to Annex II.
3. Article 9.05 does not apply to treatment accorded by a Party under an agreement, or regarding a sector, set out in its Schedule to Annex II.

4. Regarding intellectual property rights, a Party may derogate from Articles 9.04, 9.05 and Article 9.07(1)(f) in a manner that is consistent with the TRIPS Agreement and waivers to the TRIPS Agreement adopted under Article IX of the WTO Agreement.

5. Articles 9.04, 9.05 and 9.08 do not apply to:

- (a) procurement by a Party or a state enterprise; or
- (b) a subsidy or grant provided by a Party or a state enterprise, including a government-supported loan, guarantee or insurance.

Article 9.10: Transfers

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

- (a) contributions to capital;
- (b) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance and other fees, returns in kind and other amounts derived from the investment;
- (c) proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;
- (d) payments made under a contract entered into by the investor, or the covered investment, including payments made pursuant to a loan agreement;
- (e) payments made under Articles 9.11 and 9.12; and
- (f) payments arising under Section C.

2. Each Party shall permit transfers relating to a covered investment to be made in the convertible currency in which the capital was originally invested, or in another convertible currency agreed to by the investor and the Party concerned. Unless otherwise agreed by the investor, transfers shall be made at the market rate of exchange in effect on the date of transfer.

3. Notwithstanding paragraphs 1 and 2, a Party may prevent a transfer through the equitable, non-discriminatory and good faith application of its domestic law relating to:

- (a) bankruptcy, insolvency or the protection of the rights of a creditor;
- (b) issuing, trading or dealing in securities, futures, options or derivatives;
- (c) a criminal or penal offence;
- (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or
- (e) ensuring compliance with an order or judgment in judicial or administrative proceedings.

4. A Party may not require one of its investors to transfer, or penalize one of its investors for failure to transfer, the income, earnings, profits or other amounts derived from, or attributable to, an investment in the territory of the other Party.

5. Paragraph 4 does not prevent a Party from imposing a measure through the equitable, non-discriminatory and good faith application of its domestic law relating to the matters in paragraphs 3(a) through (e).

6. Notwithstanding paragraph 1, a Party may restrict transfers of returns in kind in circumstances where it could otherwise restrict transfers under Article XI of the GATT 1994.

Article 9.11: Expropriation

1. A Party may not nationalize or expropriate a covered investment either directly or indirectly through a measure having an effect equivalent to nationalization or expropriation (“expropriation”) except for a public purpose, in accordance with due process of law, in a non-discriminatory manner and on payment of prompt, adequate and effective compensation. For greater certainty, this paragraph shall be interpreted consistent with Annex 9.11.
2. The compensation referred to in paragraph 1 must be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“date of expropriation”), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.
3. Compensation shall be paid without delay and shall be fully realizable and freely transferable. Compensation shall be paid in a freely convertible currency and shall include interest at a commercially reasonable rate for that currency from the date of expropriation until date of payment.
4. The investor affected shall have a right under the law of the expropriating Party to prompt review of its case and of the valuation of its investment by a judicial or other independent authority of that Party under the principles set out in this Article.
5. This Article does not apply to the issuance of a compulsory license granted in relation to intellectual property rights, or to the revocation, limitation or creation of an intellectual property right, to the extent that such issuance, revocation, limitation or creation is consistent with the WTO Agreement.

Article 9.12: Compensation for Losses

Notwithstanding Article 9.09(5)(b), each Party shall accord to an investor of the other Party, and to a covered investment, non-discriminatory treatment with respect to a measure it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

Article 9.13: Transparency

1. Further to Article 20.02 (Transparency – Publication), each Party shall ensure that its laws, regulations, procedures, and administrative rulings of general application respecting a matter covered by this Chapter are promptly published or otherwise made available in such a manner as to enable interested persons and the other Party to become acquainted with them.
2. To the extent possible, each Party shall:
 - (a) publish in advance any such measure that it proposes to adopt; and
 - (b) provide interested persons and the other Party a reasonable opportunity to comment on that proposed measure.
3. Upon request by a Party, the other Party shall provide information on a measure that may have an impact on a covered investment.

Article 9.14: Subrogation

1. If a Party or an agency of a Party makes a payment to one of its investors under a guarantee or a contract of insurance it has entered into in respect of an investment, the other Party shall recognize the validity of the subrogation in favour of that Party or agency to a right or title held by the investor. The subrogated right or claim may not be greater than the original right or claim of the investor.

2. A Party or an agency of a Party that is subrogated to a right of an investor in accordance with paragraph 1 is entitled to the same rights as those of the investor regarding the investment. These rights may be exercised by the Party or an agency of the Party, or by the investor if the Party or its agency so authorizes.

Article 9.15: Denial of Benefits

1. A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of that Party and to investments of that investor if investors of a non-Party own or control the enterprise and the denying Party adopts or maintains a measure with respect to the non-Party that prohibits 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 that Party and to investments of that investor if investors of a non-Party own or control the enterprise and the enterprise has no substantial business activities in the territory of the Party under whose domestic law it is constituted or organized.

Article 9.16: Health, Safety and Environmental Measures

The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures to encourage the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that the other Party has offered such an encouragement, it may request discussions with the other Party and the two Parties shall enter discussions with a view to avoiding any such encouragement.

Article 9.17: Corporate Social Responsibility

Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies, such as those statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption.

Article 9.18: Special Formalities and Information Requirements

1. Article 9.04 does not prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with the establishment of a covered investment, such as a requirement that an agent of an investor be a resident of the Party or that a covered investment be legally constituted under the laws or regulations of the Party, provided that those formalities do not materially impair the protections afforded by a Party to investors of the other Party and covered investments under this Chapter.
2. Notwithstanding Article 9.04 or 9.05, a Party may require an investor of the other Party, or its covered investment, to provide routine information concerning that investment solely for informational or statistical purposes. The Party shall protect any confidential information from disclosure that would prejudice the competitive position of the investor or the covered investment. This paragraph does not prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.

Section C – Settlement of Disputes between an Investor and the Host Party

Article 9.19: Purpose

Without prejudice to the rights and obligations of the Parties under Chapter Twenty-Two (Dispute Settlement), this Section establishes a mechanism for the settlement of investment disputes.

Article 9.20: Claim by an Investor of a Party on Its Own Behalf

An investor of a Party may submit to arbitration under this Section a claim that the other Party has breached:

- (a) an obligation under Section B, other than an obligation under Article 9.03(4), 9.13, 9.16, 9.17 or 9.18,
- (b) an obligation under Article 14.03(3)(a) (Competition Policy, Monopolies and State Enterprises – Designated Monopolies) or Article 14.04(2) (Competition Policy, Monopolies and State Enterprises – State Enterprises), only to the extent that the monopoly or state enterprise has acted in a manner inconsistent with an obligation under Section B, other than an obligation under Article 9.13, 9.16, 9.17 or 9.18, or
- (c) an agreement referred to in Article 23.04(9)(a) (Exceptions – Taxation),

and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

Article 9.21: Claim by an Investor of a Party on Behalf of an Enterprise

1. An investor of a Party, on behalf of an enterprise of the other Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached:

- (a) an obligation under Section B, other than an obligation under Article 9.03(4), 9.13, 9.16, 9.17 or 9.18,
- (b) an obligation under Article 14.03(3)(a) (Competition Policy, Monopolies and State Enterprises – Designated Monopolies), or Article 14.04(2) (Competition Policy, Monopolies and State Enterprises – State Enterprises), only to the extent that the monopoly or state enterprise has acted in a manner inconsistent with an obligation under Section B, other than an obligation under Article 9.13, 9.16, 9.17 or 9.18, or
- (c) an agreement referred to in Article 23.04(9)(b) (Exceptions – Taxation),

and that the enterprise has incurred loss or damage by reason of that breach.

2. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 9.20 arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 9.23, the claims should be heard together by a Tribunal established under Article 9.27, unless the Tribunal finds that the interests of a disputing party would be prejudiced as a result.

3. An investment may not make a claim under this Section.

Article 9.22: Conditions Precedent to Submission of a Claim to Arbitration

1. The disputing parties shall hold consultations and attempt to settle a claim amicably before a disputing investor may submit a claim to arbitration. Consultations shall be held within 30 days of the submission of the notice of intent to submit a claim to arbitration, unless the disputing parties otherwise agree. The place of consultation shall be the capital of the disputing Party, unless the disputing parties otherwise agree.

2. A disputing investor may submit a claim to arbitration under Article 9.20 or Article 9.21 only if:

- (a) the disputing investor and, where a claim is made under Article 9.21, the enterprise consent to arbitration in accordance with the procedures set out in this Chapter;
- (b) at least six months have elapsed since the events giving rise to the claim;
- (c) the disputing investor has delivered to the disputing Party written notice of its intent to submit a claim to arbitration at least 90 days prior to submitting the claim, which notice shall specify:
 - (i) the name and address of the disputing investor and, where a claim is made under Article 9.21, the name and address of the enterprise,
 - (ii) the provisions of this Agreement alleged to have been breached and any other relevant provisions,
 - (iii) the legal and the factual basis for the claim, including the measures at issue, and
 - (iv) the relief sought and the approximate amount of damages claimed;

- (d) the disputing investor has delivered evidence establishing that it is an investor of the other Party with its notice of intent to submit a claim to arbitration under subparagraph (c);
- (e) in the case of a claim submitted under Article 9.20:
 - (i) not more than three years have elapsed from the date on which the disputing investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the disputing investor has incurred loss or damage thereby,
 - (ii) the disputing investor waives its right to initiate or continue before an administrative tribunal or court under the domestic law of a Party, or other dispute settlement procedures, proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 9.20, and
 - (iii) if the claim is for loss or damage to an interest in an enterprise of the other Party that is a juridical person that the disputing investor owns or controls directly or indirectly, the enterprise waives the right referred to in subparagraph (ii); and
- (f) in the case of a claim submitted under Article 9.21:
 - (i) not more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage thereby, and

- (ii) both the disputing investor and the enterprise waive their rights to initiate or continue before an administrative tribunal or court under the domestic law of a Party, or other dispute settlement procedures, a proceeding with respect to the measure of the disputing Party that is alleged to be a breach under Article 9.21.

3. Paragraphs 2(e)(ii) and (iii) and 2(f)(ii):

- (a) do not apply to proceedings before a judicial or administrative tribunal or court under the domestic law of the disputing Party that:
 - (i) are for interim injunctive, declaratory or other extraordinary relief,
 - (ii) do not involve the payment of monetary damages, and
 - (iii) are brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests while the arbitration is pending;
and
- (b) do not require a waiver from an enterprise if a disputing Party has deprived the investor of control of an enterprise.

4. The disputing enterprise or investor shall deliver the consent and waiver required under paragraph 2 to the disputing Party and shall include them in the submission of a claim to arbitration.

5. An investor may submit a claim relating to taxation measures covered by this Agreement to arbitration under this Section only if the taxation authorities of the Parties fail to reach the joint determinations specified in Article 23.04 (Exceptions – Taxation) within six months of being notified in accordance with those provisions.

Article 9.23: Submission of a Claim to Arbitration

1. A disputing investor who meets the conditions precedent in Article 9.22 may submit the claim to arbitration under:

- (a) the ICSID Convention, provided that both Parties are party to the Convention;
- (b) the Additional Facility Rules of ICSID, if only one Party is a party to the ICSID Convention; or
- (c) the UNCITRAL Arbitration Rules.

2. The applicable arbitration rules will govern the arbitration unless they are modified by this Agreement and supplemented by rules adopted by the Commission under this Section.

3. A claim is submitted to arbitration under this Section when:

- (a) the request for arbitration under Article 36(1) of the ICSID Convention is received by the Secretary-General of ICSID;
- (b) the notice of arbitration under Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General of ICSID; or
- (c) the notice of arbitration given under the UNCITRAL Arbitration Rules is received by the disputing Party.

4. Delivery of notice and other documents on a Party shall be made to the place named for that Party below:

For Canada:

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

For Panama:

National Division for the Administration of International Trade Agreements and Trade Defense (DINATRADEC) of the Ministry of Trade and Industry of Panama
Edison Plaza, Second Floor
El Paical Avenue
Panama
Republic of Panama

Article 9.24: Consent to Arbitration

1. Each Party consents to the submission of a claim to arbitration in accordance with the terms of this Agreement. Failure to meet a condition precedent listed in Article 9.22 nullifies that consent.

2. The consent given in paragraph 1 and the submission by a disputing investor of a claim to arbitration satisfies the requirement of:

- (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties; and
- (b) Article II of the New York Convention for an agreement in writing.

Article 9.25: Arbitrators

1. Except in respect of a Tribunal established under Article 9.27, and unless the disputing parties agree otherwise, the Tribunal shall be composed of three arbitrators. One arbitrator shall be appointed by each of the disputing parties and the third, who will be the presiding arbitrator, shall be appointed by agreement of the disputing parties.
2. Arbitrators shall have expertise or experience in public international law, international trade or international investment rules, or the resolution of disputes arising under international trade or international investment agreements. They shall be independent of, and not be affiliated with or take instructions from, either Party or the disputing investor.
3. If the disputing parties do not agree on the remuneration of the arbitrators before the constitution of the Tribunal, the prevailing ICSID rate for arbitrators shall apply.
4. If a Tribunal, other than a Tribunal established under Article 9.27, has not been constituted within 90 days from the date that a claim is submitted to arbitration, the Secretary-General of ICSID, on the request of either disputing party, shall appoint the arbitrator or arbitrators not yet appointed. The Secretary-General shall make the appointment in its discretion and, to the extent practicable, do so in consultation with the disputing parties. The Secretary-General may not appoint as presiding arbitrator a national of either Party.

Article 9.26: Agreement to Appointment of Arbitrators

For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator based on a ground other than citizenship or permanent residence:

- (a) the disputing Party agrees to the appointment of each individual member of a Tribunal established under the ICSID Convention or the ICSID Additional Facility Rules;

- (b) a disputing investor referred to in Article 9.20 may submit a claim to arbitration or continue a claim under the ICSID Convention or the ICSID Additional Facility Rules only if the disputing investor agrees in writing to the appointment of each member of the Tribunal; and
- (c) a disputing investor referred to in Article 9.21 may submit a claim to arbitration, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only if the disputing investor and the enterprise agree in writing to the appointment of each member of the Tribunal.

Article 9.27: Consolidation

1. A Tribunal established under this Article shall be established under the UNCITRAL Arbitration Rules and shall conduct its proceedings in accordance with those Rules, except as modified by this Section.

2. If a Tribunal established under this Article is satisfied that claims submitted to arbitration under Article 9.23 have a question of law or fact in common, the Tribunal may, in the interests 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; or
- (b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others.

3. A disputing party that seeks an order under paragraph 2 shall request that the Secretary-General of ICSID establish a Tribunal and shall specify in the request:

- (a) the name of the disputing Party or disputing investor against which the order is sought;
- (b) the nature of the order sought; and
- (c) the grounds for the order sought.

4. The disputing party shall deliver a copy of the request to the disputing Party or disputing investor against which the order is sought.

5. Within 60 days of receipt of the request, the Secretary-General of ICSID shall establish a Tribunal consisting of three arbitrators. The Secretary-General of ICSID shall appoint one member who is a national of the disputing Party, one member who is a national of the Party of the disputing investors and a presiding arbitrator who is not a national of either Party.

6. Where a Tribunal has been established under this Article, a disputing investor that has submitted a claim to arbitration under Article 9.23 and that has not been named in a request made under paragraph 3 may make a written request to the Tribunal that it be included in an order made under paragraph 2, and shall specify in the request:

- (a) the name and address of the disputing investor;
- (b) the nature of the order sought; and
- (c) the grounds for the order sought.

7. A disputing investor referred to in paragraph 6 shall deliver a copy of its request to the disputing parties named in a request made under paragraph 3.

8. A Tribunal established under Article 9.23 does not have jurisdiction to decide a claim, or a part of a claim, over which a Tribunal established under this Article has assumed jurisdiction.

9. On application of a disputing party, a Tribunal established under this Article may order that the proceedings of a Tribunal established under Article 9.23 be stayed pending its decision under paragraph 2, unless that Tribunal has already adjourned its proceedings.

Article 9.28: Documents to, and Participation of, the Other Party

1. A disputing Party shall deliver to the other Party a copy of the notice of intent to submit a claim to arbitration and other documents within 30 days of the date that those documents have been delivered to the disputing Party. The other Party is entitled, at its cost, to receive from the disputing Party a copy of the evidence that has been tendered to the Tribunal, copies of all pleadings filed in the arbitration and the written argument of the disputing parties. The Party receiving such information shall treat the information as if it were a disputing Party.

2. The other Party to this Agreement has the right to attend a hearing held under Section C of this Chapter. Upon written notice to the disputing parties, the other Party may make submissions to a Tribunal on a question of interpretation of this Agreement.

Article 9.29: Place of Arbitration

The disputing parties may agree on the legal place of arbitration under the arbitral rules applicable under Article 9.23(1). If the disputing parties fail to agree, the Tribunal shall determine the place in accordance with the applicable arbitral rules, provided that the place is in the territory of either Party or of a third State that is a party to the New York Convention.

Article 9.30: Public Access to Hearings and Documents

1. A Tribunal award under this Section shall be publicly available, subject to the redaction of confidential information. All other documents submitted to, or issued by, the Tribunal shall be publicly available unless the disputing parties otherwise agree, subject to the redaction of confidential information.
2. Hearings held under this Section shall be open to the public. The Tribunal may hold portions of hearings *in camera* to the extent necessary to ensure the protection of confidential information, including business confidential information.
3. A disputing party may disclose to other persons in connection with the arbitral proceedings such unredacted documents as it considers necessary for the preparation of its case, but it shall ensure that those persons protect the confidential information in those documents.
4. The Parties may share with officials of their respective national and sub-national governments all relevant unredacted documents in the course of dispute settlement under this Chapter, but they shall ensure that those persons protect confidential information in those documents.
5. To the extent that a Tribunal's confidentiality order designates information as confidential and a Party's domestic law on access to information requires public access to that information, the Party's domestic law on access to information prevails. However, a Party should endeavour to apply its domestic law on access to information so as to protect information designated confidential by the Tribunal.

Article 9.31: Submissions by a Non-Disputing Party

1. A Tribunal has the authority to consider and accept written submissions from a person or entity that is not a disputing party with a significant interest in the arbitration. The Tribunal shall ensure that a non-disputing party submission does not disrupt the proceedings and does not unduly burden or unfairly prejudice either disputing party.

2. An application to the Tribunal for leave to file a non-disputing party submission, and the filing of a submission, if allowed by the Tribunal, must be made in accordance with Annex 9.31.

Article 9.32: Governing Law

1. A Tribunal established under this Section shall decide the issues in dispute consistently with this Agreement and applicable rules of international law. An interpretation by the Commission of this Agreement is binding on a Tribunal established under this Section and an award under this Section must be consistent with that interpretation.

2. Where a disputing Party asserts as a defence that the measure alleged to be a breach is within the scope of a reservation or exception set out in Annex I, Annex II or Annex III, on request of the disputing Party the Tribunal shall request the interpretation of the Commission on the issue. Within 60 days of delivery of the request, the Commission shall submit in writing its interpretation to the Tribunal. The interpretation is binding on the Tribunal. If the Commission fails to submit an interpretation within 60 days, the Tribunal shall decide the issue.

Article 9.33: Expert Reports

1. Subject to paragraph 2, a Tribunal may appoint experts to report to it in writing on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing party, subject to such terms and conditions as the disputing parties may decide.

2. The Tribunal may not exercise the power conferred to it under paragraph 1 if the disputing parties decide that the Tribunal may not do so.

3. Paragraph 1 does not affect the appointment of other kinds of experts where the appointment is authorized by the applicable arbitration rules.

Article 9.34: Interim Measures of Protection and Final Award

1. A Tribunal may order an interim measure of protection to preserve the rights of a disputing party or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Articles 9.20 and 9.21. For purposes of this paragraph, an order includes a recommendation.

2. Where a Tribunal makes a final award against the disputing Party, the Tribunal may award only:

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

The Tribunal may also award costs in accordance with the applicable arbitration rules.

3. Subject to paragraph 2, where a claim is made under Article 9.21:

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

4. A Tribunal may not order a disputing Party to pay punitive damages.

Article 9.35: Finality and Enforcement of an Award

1. An award made by a Tribunal has no binding force except between the disputing parties and in respect of that particular case.
2. Subject to paragraph 3 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.
3. A disputing party may not seek enforcement of a final award until:
 - (a) in the case of a final award made under the ICSID Convention:
 - (i) 120 days have elapsed from the date the award was rendered, provided that a disputing party has not requested that the award be revised or annulled, or
 - (ii) revision or annulment proceedings have been completed; and
 - (b) in the case of a final award under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules:
 - (i) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award, or
 - (ii) a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.
4. Each Party shall provide for the enforcement of an award in its territory.
5. A claim that is submitted to arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention.

Article 9.36: Receipts under Insurance or Guarantee Contracts

In an arbitration under this Section, a disputing Party may not assert as a defence, counterclaim, right of setoff or otherwise that the disputing investor has received or will receive, under an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.

Article 9.37: Exclusions

The dispute settlement provisions of this Section and of Chapter Twenty-Two (Dispute Settlement) do not apply to the matters referred to in Annex 9.37.

Article 9.38: Suspension of Other Agreements

1. The *Treaty between the Government of Canada and the Government of the Republic of Panama for the Promotion and Protection of Investments*, done at Guatemala on 12 September 1996 (the “FIPA”) is suspended from the date of entry into force of this Agreement until such time as this Agreement is no longer in force.
2. Notwithstanding paragraph 1, the FIPA remains operative for a period of 15 years after the entry into force of this Agreement for the purpose of any breach of the obligations of the FIPA that occurred before the entry into force of this Agreement. During this period the right of an investor of a Party to submit a claim to arbitration concerning such a breach shall be governed by the relevant provisions of the FIPA.

Annex 9.11

Expropriation

The Parties confirm their shared understanding that:

- (a) indirect expropriation results from a measure or a series of measures of a Party that has an effect equivalent to direct expropriation without formal transfer of title or outright seizure;
- (b) the determination of whether a measure or series of measures of a Party constitute an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:
 - (i) the economic impact of the measure or a series of measures, although the sole fact that a measure or a series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred,
 - (ii) the extent to which the measure or the series of measures interfere with distinct, reasonable investment-backed expectations, and
 - (iii) the character of the measure or the series of measures;
- (c) except in rare circumstances, such as when a measure or a series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, a non-discriminatory measure of a Party that is designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, does not constitute indirect expropriation.

Annex 9.31

Submissions by a Non-Disputing Party

1. The application for leave to file a non-disputing party submission shall:
 - (a) be made in writing, dated and signed by the person filing the application, and include the address and other contact details of the applicant;
 - (b) be no longer than five typed pages;
 - (c) describe the applicant, including, where relevant, its membership and legal status (for example, company, trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the applicant);
 - (d) disclose whether the applicant has an affiliation, direct or indirect, with a disputing party;
 - (e) identify any government, person or organization that has provided financial or other assistance in preparing the submission;
 - (f) specify the nature of the interest that the applicant has in the arbitration;
 - (g) identify the specific issues of fact or law in the arbitration that the applicant has addressed in its written submission;
 - (h) explain why the Tribunal should accept the submission; and
 - (i) be made in a language of the arbitration.
2. The submission filed by a non-disputing party shall:
 - (a) be dated and signed by the person filing the submission;

- (b) be concise, and not exceed 20 typed pages, including any appendices;
- (c) set out a precise statement supporting the applicant's position on the issues; and
- (d) only address matters within the scope of the dispute.

Annex 9.37

Exclusions

1. A decision by Canada following a review under the *Investment Canada Act* (R.S.C. 1985, c. 28 (1st supp.)), with respect to whether to permit an acquisition that is subject to review, shall not be subject to the dispute settlement provisions of Section C of this Chapter or of Chapter Twenty-Two (Dispute Settlement).
2. A decision by a Party to prohibit or restrict the acquisition of an investment in its territory by an investor of the other Party, or its investment, under Article 23.03 (Exceptions – National Security) shall not be subject to the dispute settlement provisions of Section C of this Chapter or of Chapter Twenty-Two (Dispute Settlement).