

## Chapter 11 Investment

### Article 11.1: Definitions

For purposes of this Chapter:

**enterprise** means any legal entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned, 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 laws of a Party and a branch located in the territory of a Party and carrying out business operations there;

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

**investment** means every kind of asset, owned or controlled, directly or indirectly, by an investor, that includes characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk, including but not limited to the following:

- (a) an enterprise;
- (b) shares, stock, and other forms of equity participation in an enterprise;
- (c) bonds, debentures, and loans and other debt instruments<sup>16</sup>;
- (d) futures, options, and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- (f) claims to money or to any contractual performance related to a business and having an economic value;

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<sup>16</sup> For purposes of this Chapter, “loans and other debt instruments” described in (c) and “claims to money or to any contractual performance” described in (f) of this Article refer to assets which relate to a business activity and do not refer to assets which are of a personal nature, unrelated to any business activity.

- (g) intellectual property rights, including goodwill;
- (h) licenses, authorizations, permits, and similar rights conferred pursuant to applicable domestic law, including any concession to search for, cultivate, extract or exploit natural resources<sup>17 18</sup>; and
- (i) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges;

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

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

**national** means a natural person who has the nationality of a Party according to Article 1.5 (Country-Specific Definitions) of Chapter 1 (Initial Provisions and General Definitions)<sup>19</sup>.

## **Article 11.2: Scope and Coverage**

1. This Chapter applies to measures adopted or maintained by a Party relating to:

- (a) investors of the other Party;
- (b) investments of investors of the other Party in the territory of the former Party;
- (c) with respect to Article 11.8 (Performance Requirements), all the investments in the territory of the Party.

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<sup>17</sup> The term “investment” does not include an order or judgment entered in a judicial or administrative action.

<sup>18</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 depends on such factors as the nature and extent of the rights that the holder has under the domestic law of the Party. 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>19</sup> If any future international agreement that contains provisions for investment protection, and to which Costa Rica is a party, includes provisions to cover permanent residents, the provisions of this Chapter shall also cover the permanent residents of both Parties.

2. This Chapter shall not apply to:
  - (a) any taxation measure unless otherwise provided; and
  - (b) services supplied in the exercise of governmental authority within the territory of the respective Party. For purposes of this Chapter, a service supplied in the exercise of governmental authority means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.
3. In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail over this Chapter to the extent of the inconsistency.
4. The rights and obligations of the Parties with respect to investors and investments in telecommunications services shall be governed by this Chapter and Annex 10.1 (Telecommunications Services).
5. The requirement by a Party that a service supplier of the other Party post a bond or other form of financial security as a condition of the cross-border supply of a service into its territory does not of itself make this Chapter applicable to that cross-border supply of a service. This Chapter applies to that Party's treatment of the posted bond or financial security, to the extent that such bond or financial security is an investment of an investor of the other Party.
6. This Chapter does not apply to disputes arising out of events which occurred, or disputes which had been raised, prior to the entry into force of this Agreement.

### **Article 11.3: Financial Services<sup>20</sup>**

1. This Chapter shall not apply to measures adopted or maintained by a Party in respect of investors of the other Party and investments of such investors in the financial institutions<sup>21</sup> in the other Party, except for the following provisions:
  - (a) Article 11.7 (Compensation for Losses);
  - (b) Article 11.9 (Special Formalities and Information Requirements);

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<sup>20</sup> For purposes of this Article, "financial services" is as defined in subparagraph 5 (a) of the Annex on Financial Services in GATS.

<sup>21</sup> "Financial institution" means any financial intermediary or other enterprise that is authorized to do business and regulated or supervised as a financial institution under the law of the Party in whose territory it is located.

- (c) Article 11.10 (Expropriation and Nationalization);
- (d) Article 11.11 (Transfers);
- (e) Article 11.12 (Senior Management and Board of Directors);
- (f) Article 11.14 (Denial of Benefits); and
- (g) Article 11.16 (Investor-State Dispute Settlement).

The Parties reaffirm their commitments under GATS with respect to financial services.

2. For purposes of paragraph 1, Article 11.16 (Investor-State Dispute Settlement) shall apply solely for claims that a Party has breached Articles 11.10 (Expropriation and Nationalization), 11.11 (Transfers), and 11.14 (Denial of Benefits).

3. This Chapter shall not apply to measures adopted or maintained by a Party relating to:

- (a) activities or services forming part of a public retirement plan or statutory system of social security;
- (b) activities or services conducted for the account or with the guarantee or using the financial resources of the Party, including its public entities; or
- (c) activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies;

except that the provisions referred to in paragraph 1 shall apply if a Party allows any of the activities or services referred to in subparagraph (a) or (b) to be conducted by its financial institutions in competition with a public entity or a financial institution.

4. Notwithstanding any other provisions of this Chapter, each Party may adopt or maintain measures for prudential reasons, such as: the protection of investors, depositors, policy-holders or persons to whom a fiduciary duty is owed by a financial institution or financial services supplier; the maintenance of the safety, soundness, integrity or financial responsibility of financial services suppliers; and ensuring the integrity and stability of a Party's financial system. Such measures shall not be used as a means of avoiding a Party's obligations under the provisions referred to in paragraph 1.

5. Notwithstanding Article 11.11 (Transfers), a Party may prevent or limit transfers by a financial institution or financial services supplier to, or for the benefit of, an affiliate of or person related to such institution or supplier, through the equitable, non-discriminatory, and good faith application of

measures relating to maintenance of the safety, soundness, integrity, or financial responsibility of financial institutions or financial services suppliers. This paragraph does not prejudice any other provision of this Agreement that permits a Party to restrict transfers.

6. Nothing in this Chapter shall be construed to prevent the adoption or enforcement by any Party of measures necessary to secure compliance with laws or regulations that are not inconsistent with this Chapter, including those relating to the prevention of deceptive and fraudulent practices or to deal with the effects of a default on financial services contracts, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on investment in financial institutions.

7. Nothing in this Chapter shall be construed to require a Party to disclose information relating to the affairs and accounts of individual consumers or any confidential or proprietary information in the possession of public entities.

#### **Article 11.4: National Treatment**

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

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

#### **Article 11.5: Most-Favoured-Nation Treatment**

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

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

3. For greater certainty, paragraphs 1 and 2 of this Article shall not be construed as granting to investors mechanisms or procedures for the

settlement of disputes other than those set out in Article 11.16 (Investor-State Dispute Settlement).

### **Article 11.6: Minimum Standard of Treatment**

1. Each Party shall accord to investments of investors of the other Party treatment in accordance with customary international law minimum standard of treatment of aliens<sup>22</sup>, 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 and do not create additional substantive rights.

(a) The obligation to provide “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.

(b) The obligation to provide “full protection and security” requires each Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

### **Article 11.7: Compensation for Losses**

1. Investors of one Party whose investments in the territory of the other Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, insurrection, riot or any other similar event, shall be accorded by the latter Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Party accords to investments of its own investors or investments of investors of any non-Party, whichever is more favourable, to the investment of the investor of the former Party. All payments that may result shall be deemed freely transferable.

2. Paragraph 1 does not apply to existing measures relating to subsidies or grants provided by a Party, or to any conditions attached to the receipt or continued receipt of such subsidies or grants, whether or not such subsidies

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<sup>22</sup> Customary international law results from a general and consistent practice of States that they follow from a sense of legal obligation. With regards to this Article, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

or grants are offered exclusively to investors of the Party or investments of investors of the Party, including government-supported loans, guarantees and insurance, that would be inconsistent with Article 11.4 (National Treatment) and Article 11.5 (Most-Favoured-Nation Treatment) but for Article 11.13.4 (Non-Conforming Measures).

### **Article 11.8: Performance Requirements**

1. Neither Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory:

- (a) to export a given level or percentage of goods or services;
- (b) to achieve a given level or percentage of domestic content;
- (c) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
- (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
- (e) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
- (f) to transfer a particular technology, production process or other proprietary knowledge to a person in its territory; or
- (g) to supply exclusively from the territory of the Party the goods that it produces or the services that it provides to a specific regional market or to the world market.

2. Neither Party may condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of a Party or of a non-Party, on compliance with any of the following requirements:

- (a) to achieve a given level or percentage of domestic content;
- (b) to purchase, use or accord a preference to goods produced in its territory or to purchase goods from persons in its territory;

- (c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or
  - (d) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.
3. (a) Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.
- (b) The provisions of subparagraph 1(f) do not apply:
- i. when a Party authorizes use of an intellectual property right in accordance with Article 31 of the TRIPS Agreement, and to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with Article 39 of the TRIPS Agreement<sup>23</sup>; or
  - ii. when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy a practice determined after judicial or administrative process to be anti-competitive under the Party's competition laws<sup>24</sup>.
- (c) 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, subparagraphs 1(b), (c), and (f), and 2(a) and (b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:
- i. necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement;
  - ii. necessary to protect human, animal, or plant life or health; or

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<sup>23</sup> For greater certainty, the references to the TRIPS Agreement in subparagraph 3(b)(i) include any waiver in force between the Parties of any provision of that Agreement granted by WTO Members in accordance with the WTO Agreement.

<sup>24</sup> The Parties recognize that a patent does not necessarily confer market power.



- iii. related to the conservation of living or non-living exhaustible natural resources.
- (d) Subparagraphs (1)(a), (b) and (c), and (2)(a) and (b) do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programmes.
- (e) The provisions of subparagraphs (2)(a) and (b) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.
- (f) Subparagraphs 1(b), (c), (f) and (g), and 2(a) and (b), do not apply to government procurement.

4. For greater certainty, paragraphs 1 and 2 do not apply to any requirement other than the requirements set out in those paragraphs.

5. This Article does not preclude the application of any commitment, undertaking or requirement between private parties, where a Party did not impose or require the commitment, undertaking or requirement.

#### **Article 11.9: Special Formalities and Information Requirements**

1. Nothing in Article 11.4 (National Treatment) shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with investments of investors of the other Party, such as a requirement that investors be residents of the Party or that investments of investors of the other Party 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 investments of investors of the other Party pursuant to this Chapter. The Parties shall endeavour to exchange information on any existing or future special formalities.

2. Notwithstanding Article 11.4 (National Treatment) and Article 11.5 (Most-Favoured-Nation Treatment), a Party may require an investor of the other Party or investment of investor of the other Party, 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 investment of investor of the other Party. 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 11.10: Expropriation and Nationalization<sup>25</sup>**

1. Neither Party shall expropriate or nationalize the investments of investors of the other Party either directly or indirectly through measures equivalent to expropriation or nationalization (hereinafter referred to as “expropriation”), unless such a measure is taken on a non-discriminatory basis, for a public purpose, in accordance with due process of law and Article 11.6 (Minimum Standard of Treatment), and upon payment of compensation in accordance with this Article<sup>26</sup>.

2. The expropriation shall be accompanied by the payment of prompt, adequate and effective compensation. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation or impending expropriation became public knowledge. Compensation shall carry an appropriate interest, taking into account the date of expropriation until the date of payment. Such compensation shall be effectively realizable, freely transferable in accordance with Article 11.11 (Transfers) and made without delay.

3. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, 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<sup>27</sup>.

## **Article 11.11: Transfers**

1. Each Party shall permit all transfers relating to investments of an investor of the other Party 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 investment or from the partial or complete liquidation of the investment;
- (c) interest, royalty payments, management fees, and technical assistance and other fees;

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<sup>25</sup> This Article shall be interpreted in accordance with Annex 11.1 (Expropriation and Nationalization).

<sup>26</sup> For Singapore, any measure of expropriation relating to land, which shall be as defined in the existing domestic legislation on the date of entry into force of this Agreement, shall be for a purpose and upon payment of compensation in accordance with the aforesaid legislation and any subsequent amendments thereto relating to the amount of compensation where such amendments follow the general trends in the market value of the land.

<sup>27</sup> For greater certainty, the reference to the TRIPS Agreement in paragraph 3 includes any waiver in force between the Parties of any provision of that Agreement granted by WTO Members in accordance with the WTO Agreement.

- (d) payments made under a contract entered into by the investor, or its investment, including payments made pursuant to a loan agreement;
- (e) payments made pursuant to Article 11.7 (Compensation for Losses) and Article 11.10 (Expropriation and Nationalization); and
- (f) payments arising under Article 11.16 (Investor-State Dispute Settlement).

2. Each Party shall permit such transfers to be made in a freely usable currency at the market rate of exchange prevailing on the date of transfer.

3. Each Party shall permit returns in kind relating to an investment of investors of the other Party to be made as authorized or specified in a written agreement between the Party and an investment by an investor of the other Party, or an investor of the other Party.

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

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

5. Nothing in this Chapter shall affect the rights and obligations of the members of the International Monetary Fund under the Articles of Agreement of the Fund, including the use of exchange actions which are in conformity with the Articles of Agreement, provided that a Party shall not impose restrictions on any capital transactions inconsistently with its obligations under this Chapter regarding such transactions, except under Article 18.5 (Restrictions to Safeguard the Balance of Payments) or at the request of the Fund.

### **Article 11.12: Senior Management and Board of Directors**

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

### **Article 11.13: Non-Conforming Measures**

1. Articles 11.4 (National Treatment), 11.5 (Most-Favoured-Nation Treatment), 11.8 (Performance Requirements) and 11.12 (Senior Management and Board of Directors) do not apply to:

- (a) any existing non-conforming measure that is maintained by a Party at:
  - i. the central level of government, as set out by that Party in its Schedule to Annex I (Non-Conforming Measures); or
  - ii. a local level of government;
- (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
- (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 11.4 (National Treatment), 11.5 (Most-Favoured-Nation Treatment), 11.8 (Performance Requirements) and 11.12 (Senior Management and Board of Directors).

2. Articles 11.4 (National Treatment), 11.5 (Most-Favoured-Nation Treatment), 11.8 (Performance Requirements) and 11.12 (Senior Management and Board of Directors) do not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors, or activities, as set out in its Schedule to Annex II (Non-Conforming Measures).

3. Neither Party may, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to Annex II (Non-Conforming Measures), require an investor of the other Party, by reason of its

nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

4. Articles 11.4 (National Treatment), 11.5 (Most-Favoured-Nation Treatment) and 11.12 (Senior Management and Board of Directors) shall not apply to subsidies or grants provided by a Party, or to any conditions attached to the receipt or continued receipt of such subsidies or grants, whether or not such subsidies or grants are offered exclusively to investors of the Party or investments of investors of the Party, including government supported loans, guarantees and insurance.

5. Articles 11.4 (National Treatment), 11.5 (Most-Favoured-Nation Treatment) and 11.12 (Senior Management and Board of Directors) shall not apply to government procurement as defined in Article 8.2 (Definitions) of Chapter 8 (Government Procurement).

6. Articles 11.4 (National Treatment) and 11.5 (Most-Favoured-Nation Treatment) do not apply to any measure that is an exception to, or derogation from, a Party's obligations under the TRIPS Agreement, as specifically provided for in that Agreement.

#### **Article 11.14: Denial of Benefits**

Subject to prior notification and consultation, a Party may deny the benefits of this Chapter to:

- (a) an investor of the other Party and to its investments if the investor is an enterprise owned or controlled by persons of a non-Party and such enterprise has no substantive business operations in the territory of the other Party; or
- (b) an investor of the other Party and to its investments if the investor is an enterprise owned or controlled by persons of the denying Party and such enterprise has no substantive business operations in the territory of the other Party.

#### **Article 11.15: Subrogation**

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

2. Where a Party or a designated agency of a Party has made a payment to an investor of that Party and has taken over rights and claims of the investor, that investor shall not, unless authorized to act on behalf of the Party

or the designated agency of the Party making the payment, pursue those rights and claims against the other Party.

### **Article 11.16: Investor-State Dispute Settlement**

1. This Article shall apply to disputes between a Party and an investor of the other Party concerning an alleged breach of an obligation of a Party under this Chapter which results in loss or damage to the investor or its investment by reason of that breach.

2. The parties to the dispute shall initially seek to resolve the dispute by consultations and negotiations.

3. Where the dispute cannot be resolved as provided for under paragraph 2 within 6 months from the date of a request for consultations and negotiations, then, and unless the disputing investor and the disputing Party agree otherwise or if the disputing investor has already submitted the dispute for resolution before the courts or administrative tribunals of the disputing Party (excluding proceedings for interim measures of protection referred to in paragraph 5 of this Article) or to any other dispute settlement procedures, the disputing investor may submit the dispute for settlement to<sup>28</sup>:

- (a) the International Centre for Settlement of Investment Disputes (ICSID) for conciliation or arbitration pursuant to the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID Convention), if both Parties are parties to the ICSID Convention;
- (b) the *Additional Facility Rules* of ICSID for conciliation or arbitration, provided that one of the Parties, but not both, is a party to the ICSID Convention; or
- (c) arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL).

The conciliation or arbitration rules applicable under subparagraphs (a), (b) and (c), and in effect on the date the dispute is submitted to conciliation or arbitration under this Article, shall govern the conciliation or arbitration except to the extent modified by this Article.

4. Each Party hereby consents to the submission of a dispute to conciliation or arbitration under subparagraphs 3 (a), (b) and (c) in accordance with the provisions of this Article, conditional upon:

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<sup>28</sup> For greater certainty, if a disputing investor elects to submit a dispute of the type described in paragraph 1 of this Article to the courts or administrative tribunals of the disputing Party or to any other dispute settlement procedures, that election shall be definitive, and the disputing investor may not thereafter submit the dispute to conciliation or arbitration under this Article.

- (a) the submission of the dispute to such conciliation or arbitration taking place within 3 years of the time at which the disputing investor became aware, or should reasonably have become aware, of a breach of an obligation under this Chapter resulting in loss or damage to the disputing investor or its investment by reason of that breach; and
- (b) the disputing investor providing written notice to the disputing Party of its intent to submit the dispute to such conciliation or arbitration, at least 30 days before the dispute is submitted, and which:
  - i. states the name and address of the disputing investor and, where a dispute is submitted on behalf of an enterprise, the name, address, and place of constitution of the enterprise;
  - ii. nominates either subparagraphs 3(a), (b) or (c) of this Article as the procedure for dispute settlement (and, in the case of ICSID, nominates whether conciliation or arbitration is being sought);
  - iii. waives its right to initiate or continue any proceedings before the courts or administrative tribunals of the disputing Party (excluding proceedings for interim measures of protection referred to in paragraph 5 of this Article) or to any other dispute settlement procedures or other dispute settlement *fora* referred to in paragraph 3 in relation to the matter under dispute; and
  - iv. briefly summarizes the alleged breach of the disputing Party under this Chapter (including the Articles alleged to have been breached), the legal and factual basis for the dispute, and the loss or damage allegedly caused to the disputing investor or its investment by reason of that breach.

5. Neither Party shall prevent the disputing investor from seeking interim measures of protection under the laws of the disputing Party, not involving the payment of damages or resolution of the substance of the matter in dispute before the courts or administrative tribunals of the disputing Party for the preservation of its rights and interests.

6. Neither Party shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its investors and the other Party shall have consented to submit or have submitted to conciliation or arbitration under this Article, unless such other Party has failed to abide by and comply with the award rendered in such dispute. Diplomatic protection, for purposes of this paragraph, shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

7. The arbitral awards shall be based on the provisions of this Agreement, the laws of the disputing Party, including its rules on the conflict of laws, and the applicable rules of international law. The arbitral award shall be final and binding and each Party shall ensure the recognition and enforcement of the arbitral award in accordance with its laws.