ANNEX 9

EXPROPRIATION

1.   An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.

2.   Expropriation may be either direct or indirect:

   (a)   direct expropriation occurs when a state takes an investor's property outright, including by nationalisation, compulsion of law or seizure;

   (b)   indirect expropriation occurs when a state takes an action or series of action that have an effect equivalent to direct expropriation, in that it deprives the investor in substance of the use of the investor's property, although the means used fall short of those specified in subparagraph (a) above.

3.   In order to constitute indirect expropriation, the action or series of actions must be:

   (a)   either severe or for an indefinite period; and

   (b)   disproportionate to the public interest.

4.   In addition to paragraph 3, the determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred.

5.   A deprivation of property shall be particularly likely to constitute indirect expropriation where it is either:

   (a)   discriminatory in its effect, either as against the particular investor or against a class of which the investor forms part; or

   (b)   in breach of the state's prior binding written commitment to the investor, whether by contract, license, or other legal document.

6.   Except in rare circumstances to which paragraph 5 applies, such measures taken in the exercise of a state's regulatory powers as may be reasonably justified in the protection of the public welfare, including public health, safety and the environment, shall not constitute an indirect expropriation.