

11. Replace Chapter 11 (Investment) with:

CHAPTER 11

INVESTMENT

SECTION A

Article 1 Definitions

For the purposes of this Chapter:

- (a) **covered investment** means, with respect to a Party, an investment in its territory of an investor of another Party, in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter, and which, where applicable, has been admitted¹ by the host Party, subject to its relevant laws, regulations and policies;
- (b) **freely usable currency** means a freely usable currency as determined by the IMF in accordance with the IMF Articles of Agreement and any amendments thereto;
- (c) **investment**² means every kind of asset owned or controlled by an investor, directly or indirectly, and that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of

¹ For greater certainty,

- (a) in the case of Thailand, protection under this Chapter shall be accorded to covered investments which have been specifically approved in writing for protection by its competent authorities;
- (b) in the case of Viet Nam, “has been admitted” means “has been specifically registered or approved in writing, as the case may be”.

² The term “investment” does not include an order or judgment entered in a judicial or administrative action.

gains or profits, or the assumption of risk. Forms that an investment may take include:

- (i) movable and immovable property and other property rights such as mortgages, liens or pledges;³
- (ii) shares, stocks and other forms of equity participation in a juridical person including rights derived therefrom;
- (iii) bonds, debentures, loans⁴ and other debt instruments of a juridical person and rights derived therefrom;
- (iv) intellectual property rights and goodwill which are recognised pursuant to the laws and regulations of the host Party;
- (v) claims to money or to any contractual performance related to a business and having financial value;⁵
- (vi) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts; and
- (vii) business concessions required to conduct economic activity and having financial value conferred by law or under a contract,

³ For greater certainty, market share, market access, expected gains and opportunities for profit-making are not, by themselves, investments.

⁴ A loan issued by a Party to another Party is not an investment.

⁵ For greater certainty, investment does not mean claims to money that arise solely from:

- (a) commercial contracts for the sale of goods or services; or
- (b) the extension of credit in connection with such commercial contracts.

including any concession to search for, cultivate, extract or exploit natural resources.

For the purpose of the definition of investment in this Subparagraph, 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;

- (d) **investor of a Party** means a natural person of a Party or a juridical person of a Party that seeks to make,⁶ is making, or has made an investment in the territory of another Party;
- (e) **juridical person** means any entity duly constituted or otherwise organised under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship, association or similar organisation;
- (f) **juridical person of a Party** means a juridical person constituted or organised under the law of that Party;
- (g) **measure** means any measure by a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action or any other form;
- (h) **measures by a Party** includes measures taken by:

⁶ For greater certainty, the Parties understand that an investor that “seeks to make” an investment refers to an investor of another Party that has taken active steps to make an investment. Where a notification or approval process is required for making an investment, an investor that “seeks to make” an investment refers to an investor of another Party that has initiated such notification or approval process.

- (i) central, regional or local governments and authorities; and
 - (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;
- (i) **natural person of a Party** means any natural person possessing the nationality or citizenship of, or right of permanent residence in, that Party in accordance with its laws and regulations; and
 - (j) **return** means an amount yielded by or derived from an investment, including profits, dividends, interest, capital gains, royalties and all other lawful income.

Article 2

Scope

1. This Chapter shall apply to measures adopted or maintained by a Party relating to:
 - (a) investors of any other Party; and
 - (b) covered investments.
2. This Chapter shall not apply to:
 - (a) government procurement;
 - (b) subsidies or grants provided by a Party;
 - (c) services supplied in the exercise of a governmental authority by the relevant body or authority of a Party. For the 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;

- (d) measures adopted or maintained by a Party to the extent that they are covered by Chapter 8 (Trade in Services); and
- (e) measures adopted or maintained by a Party to the extent that they are covered by Chapter 9 (Movement of Natural Persons).

3. Notwithstanding Paragraph 2(d), Article 5 (Senior Management and Board of Directors),⁷ Article 7 (Treatment of Investment), Article 8 (Compensation for Losses), Article 9 (Transfers), Article 10 (Expropriation and Compensation), Article 11 (Subrogation), and Section B (Investment Disputes between a Party and an Investor), shall apply, *mutatis mutandis*, to any measure affecting the supply of a service by a service supplier of a Party through commercial presence in the territory of any other Party within the meaning of Chapter 8 (Trade in Services), but only to the extent that any such measure relates to a covered investment and an obligation under this Chapter.

Article 3 National Treatment⁸

1. Each Party shall accord to investors of another Party, and to covered investments, in relation to establishment, acquisition, expansion, management, conduct, operation, liquidation, sale, transfer or other disposition of investments,

⁷ Article 5 (Senior Management and Board of Directors) shall apply to measures affecting the supply of a service only for a Party making commitments in accordance with Article 12 (Schedules of Non-Conforming Measures) of Chapter 8 (Trade in Services).

⁸ For greater certainty, whether the treatment is accorded in “like circumstances” under this Article 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.

treatment no less favourable than that it accords, in like circumstances, to its own investors and their investments.⁹

2. For greater certainty, the treatment to be accorded by a Party under Paragraph 1 means, with respect to a government other than at the central level, treatment no less favourable than the most favourable treatment accorded, in like circumstances, by that government to investors, and to the investments of investors, of the Party of which it forms a part.

Article 4 **Most-Favoured-Nation Treatment^{10,11}**

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

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

⁹ Notwithstanding Article 21 (Claim by an Investor of a Party), or anything else to the contrary in this Chapter, a disputing investor under Article 21 (Claim by an Investor of a Party) may not submit to conciliation or arbitration a claim under that Article that a disputing Party has breached an obligation under Article 3 (National Treatment) where the alleged breach arises within 30 months of the date of entry into force of the Second Protocol.

¹⁰ For greater certainty, whether the treatment is accorded in “like circumstances” under this Article 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.

¹¹ This Article shall not apply to Lao PDR, Myanmar and Viet Nam. The treatment under this Article shall not be accorded to investors of Lao PDR, Myanmar and Viet Nam, and to covered investments of such investors.

3. For greater certainty, the treatment referred to in Paragraphs 1 and 2 does not encompass any international dispute resolution procedures or mechanisms under other existing or future international agreements.

Article 5

Senior Management and Board of Directors

1. No Party shall require that a juridical person of that Party that is a covered investment appoint to a senior management position a natural person of any particular nationality.

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

Article 6

Prohibition of Performance Requirements

1. No Party shall impose or enforce, as a condition for establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of any other Party, any of the following requirements:¹²

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

¹² For greater certainty, each Party may maintain existing measures or adopt new or more restrictive measures that do not conform with obligations under this Article, as set out in List A and List B of its Schedule in Annex 3 (Schedules of Reservations and Non-Conforming Measures for Investment and Services).

- (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 the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with investments of that investor;
- (e) to restrict sales of goods in its territory that such investments produce by relating such sales to the volume or value of its exports or foreign exchange earnings;
- (f) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory;
- (g) to supply exclusively from the territory of the Party the goods that such investments produce to a specific regional market or to the world market; or
- (h) to adopt a given rate or amount of royalty under a license contract, in regard to any licence contract in existence at the time the requirement is imposed or enforced, or any future licence contract freely entered into between the investor and a person in its territory, provided that the requirement is imposed or enforced in a manner that constitutes direct interference with that licence contract by an exercise of non-judicial governmental authority of a Party.¹³ For greater certainty, this Subparagraph does not apply when the licence contract is concluded between the investor and a Party.

¹³ For the purposes of this Subparagraph, a “licence contract” means any contract concerning the licensing of technology, a production process, or other proprietary knowledge.

Notwithstanding this Article, Subparagraphs (f) and (h) shall not apply to Cambodia, Lao PDR and Myanmar.

2. No Party shall 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 any other 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 the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with investments of that investor; or
- (d) to restrict sales of goods in its territory that such investments produce by relating such sales 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 any other 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) Paragraph 1(f) and (h) shall not apply:

- (i) if a Party authorises use of an intellectual property right in accordance with Article 31 or Article 31*bis* of the TRIPS Agreement,¹⁴ or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or
 - (ii) if the requirement is imposed or 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 and regulations.¹⁵
- (c) Paragraph 1(h) shall not apply if the requirement is imposed or enforced by a tribunal or competent authority as equitable remuneration under the Party's copyright laws and regulations.
- (d) Paragraphs 1(a) to (c), 2(a) and (b) shall not apply to qualification requirements for goods with respect to export promotion and foreign aid programmes.
- (e) Paragraph 2(a) and (b) shall not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

4. For greater certainty, Paragraphs 1 and 2 shall not apply to any requirement other than those set out in those Paragraphs.

¹⁴ This includes any amendment to the TRIPS Agreement implementing paragraph 6 of the *Doha Declaration on the TRIPS Agreement and Public Health* (WT/MIN(01)/DEC/2) adopted at Doha on 14 November 2001.

¹⁵ The Parties recognise that a patent does not necessarily confer market power.

Article 7
Treatment of Investment¹⁶

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

2. For greater certainty:

- (a) fair and equitable treatment requires each Party not to deny justice in any legal or administrative proceedings;
- (b) full protection and security requires each Party to take such measures as may be reasonably necessary to ensure the physical protection and security of the covered investment; and
- (c) the concepts of fair and equitable treatment and full protection and security do not require treatment to be accorded to covered investments in addition to or beyond that which is required under the customary international law minimum standard of treatment of aliens, and do not create additional substantive rights.

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 8
Compensation for Losses

Each Party shall accord to investors of another Party, and to covered investments, with respect to measures it adopts or

¹⁶ This Article shall be interpreted in accordance with Annex 11A (Customary International Law).

maintains relating to losses suffered by investments in its territory owing to armed conflict, civil strife or state of emergency, treatment no less favourable than that it accords, in like circumstances, to:

- (a) its own investors and their investments; and
- (b) investors of any other Party or non-Party, and their investments.

Article 9 Transfers

1. Each Party shall allow 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, including the initial contribution;
- (b) profits, capital gains, dividends, royalties, licence fees, technical assistance and technical and management fees, interest and other current income accruing from any covered investment;
- (c) proceeds from the total or partial sale or liquidation of any covered investment;
- (d) payments made under a contract, including a loan agreement;
- (e) payments made pursuant to Article 8 (Compensation for Losses) and Article 10 (Expropriation and Compensation);
- (f) payments arising out of the settlement of a dispute by any means including adjudication, arbitration or the agreement of the parties to the dispute; and

- (g) earnings and other remuneration of personnel engaged from abroad in connection with that investment.

2. Each Party shall allow such 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 the transfer.

3. Notwithstanding Paragraphs 1 and 2, a Party may prevent or delay 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 including employees;
- (b) issuing, trading or dealing in securities, futures, options or derivatives;
- (c) criminal or penal offences and the recovery of the proceeds of crime;
- (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;
- (e) ensuring compliance with orders or judgments in judicial or administrative proceedings;
- (f) taxation;¹⁷
- (g) social security, public retirement, superannuation, compulsory savings schemes or other

¹⁷ For greater certainty, this also includes the adoption or enforcement of any taxation measure aimed at ensuring the equitable or effective imposition or collection of taxes including any taxation measure that differentiates between persons based on their place of residence or incorporation.

arrangements to provide pension or similar retirement benefits;

- (h) severance entitlements of employees; and
- (i) requirements to register and satisfy other formalities imposed by the central bank and other relevant authorities of that Party.

4. Nothing in this Chapter shall affect the rights and obligations of each Party as a member of the IMF under the IMF Articles of Agreement as may be amended, including the use of exchange actions which are in conformity with the IMF Articles of Agreement as may be amended, 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 4 (Measures to Safeguard the Balance of Payments) of Chapter 18 (General Provisions and Exceptions) or on request of the IMF.

Article 10 **Expropriation and Compensation¹⁸**

1. A Party shall not expropriate or nationalise a covered investment either directly or through measures equivalent to expropriation or nationalisation (expropriation), except:

- (a) for a public purpose;¹⁹
- (b) in a non-discriminatory manner;
- (c) on payment of prompt, adequate, and effective compensation; and

¹⁸ This Article shall be interpreted in accordance with Annex 11B (Expropriation and Compensation).

¹⁹ For the avoidance of doubt, where Malaysia is the expropriating Party, any measure of expropriation relating to land shall be for the purposes as set out in Malaysia's laws and regulations relating to land acquisition.

- (d) in accordance with due process of law.
2. The compensation referred to in Paragraph 1(c) shall:
- (a) be paid without delay;²⁰
 - (b) be equivalent to the fair market value of the expropriated investment at the time when or immediately before the expropriation was publicly announced,²¹ or when the expropriation occurred, whichever is applicable;
 - (c) not reflect any change in value because the intended expropriation had become known earlier; and
 - (d) be effectively realisable and freely transferable between the territories of the Parties.
3. The compensation referred to in Paragraph 1(c) shall include appropriate interest. The compensation, including any accrued interest, shall be payable either in the currency of the expropriating Party, or if requested by the investor, in a freely usable currency.
4. If an investor requests payment in a freely usable currency, the compensation referred to in Paragraph 1(c), including any accrued interest, shall be converted into the currency of payment at the market rate of exchange prevailing on the date of payment.
5. This Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights in accordance with the TRIPS Agreement.

²⁰ The Parties understand that there may be legal and administrative processes that need to be observed before payment can be made.

²¹ In the case of the Philippines, the time when or immediately before the expropriation was publicly announced refers to the date of filing of the Petition for Expropriation.

6. Notwithstanding Paragraphs 1 to 4, in the case where Singapore or Viet Nam is the expropriating Party, any measure of expropriation relating to land, which shall be as defined in the existing laws and regulations of the expropriating Party on the date of entry into force of this Agreement, shall be for a purpose and upon payment of compensation made in accordance with the aforesaid laws and regulations. Such compensation shall be subject to any subsequent amendments to the aforesaid laws and regulations relating to the amount of compensation where such amendments follow the general trends in the market value of land.

Article 11 Subrogation

1. If a Party, or an agency of a Party, makes a payment to an investor of that Party under a guarantee, a contract of insurance or other form of indemnity it has granted in respect of a covered investment, the other Party shall recognise the subrogation or transfer of any right or claim 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 an agency of a Party has made a payment to an investor of that Party and has taken over any right or claim of the investor, that investor shall not, unless authorised to act on behalf of the Party or the agency making the payment, pursue those rights or claims against the other Party.

3. In any proceeding involving an investment dispute, a Party shall not assert, as a defence, counter-claim, right of set-off or otherwise, that the investor or the covered investment has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of any alleged loss.

4. In the exercise of a subrogated or transferred right or claim, a Party or an agency of a Party exercising such right or claim shall disclose the coverage of the claims arrangement with its investors of the relevant Party.

Article 12 **Denial of Benefits²²**

1. Following notification, a Party may deny the benefits of this Chapter:

- (a) to an investor of another Party that is a juridical person of that other Party and to investments of that investor if an investor of a non-Party owns or controls the juridical person and the juridical person has no substantive business operations in the territory of the other Party;
- (b) to an investor of another Party that is a juridical person of that other Party and to investments of that investor if an investor of the denying Party owns or controls the juridical person and the juridical person has no substantive business operations in the territory of any Party, other than the denying Party.

2. A Party may deny the benefits of this Chapter to an investor of another Party that is a juridical person of that other Party and to investments of that investor if persons of a non-Party own or control the juridical person and the denying Party adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the juridical person or that would be violated or circumvented if the benefits of this Chapter were accorded to the juridical person or to its investments.

²² A Party's right to deny the benefits of this Chapter as provided for in this Article may be exercised at any time.

3. A Party may deny the benefits of this Chapter to an investor of another Party or of a non-Party and to investments of that investor where such an investor has made an investment in breach of the provisions of the denying Party's laws and regulations that implement the Financial Action Task Force Recommendations.

4. A Party may deny the benefits of this Chapter to an investor of another Party that is a juridical person of that other Party and to investments of that investor if persons of a non-Party own or control the juridical person and the denying Party does not maintain diplomatic relations with the non-Party.

5. Notwithstanding Paragraph 1 and subject to prior notification to and consultation with the relevant Party, Thailand may, under its applicable laws and regulations, deny the benefits of this Chapter relating to the admission, establishment, acquisition and expansion of investments to an investor of another Party that is a juridical person of such Party and to investments of such an investor where Thailand establishes that the juridical person is owned or controlled by natural persons or juridical persons of a non-Party or the denying Party.

6. In the case of Thailand, a juridical person is:

- (a) "owned" by natural persons or juridical persons of a Party or a non-Party if more than 50 per cent of the equity interest in it is beneficially owned by such persons; and
- (b) "controlled" by natural persons or juridical persons of a Party or non-Party if such persons have the power to name a majority of its directors or otherwise to legally direct its actions.

7. Following notification, and without prejudice to Paragraph 1, the Philippines may deny the benefits of this Chapter to an investor of another Party and to investments of

that investor where it establishes that such investor has made an investment in breach of the provisions of Commonwealth Act No. 108, entitled “An Act to Punish Acts of Evasion of Laws on the Nationalization of Certain Rights, Franchises or Privileges”, as amended by Presidential Decree No. 715, otherwise known as “The Anti-Dummy Law”, as may be amended.

Article 13

Reservations and Non-Conforming Measures

1. Article 3 (National Treatment), Article 4 (Most-Favoured-Nation Treatment), Article 5 (Senior Management and Board of Directors) and Article 6 (Prohibition of Performance Requirements) shall 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 List A of its Schedule in Annex 3 (Schedules of Reservations and Non-Conforming Measures for Investment and Services);
 - (ii) a regional level of government, as set out by that Party in List A of its Schedule in Annex 3 (Schedules of Reservations and Non-Conforming Measures for Investment and Services); or
 - (iii) 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:

- (i) for Cambodia, Indonesia, Lao PDR, Myanmar and the Philippines, as it existed at the date of entry into force of the Second Protocol; and
- (ii) for Australia, Brunei Darussalam, Malaysia, New Zealand, Singapore, Thailand and Viet Nam, as it existed immediately before the amendment,

with Article 3 (National Treatment), Article 4 (Most-Favoured-Nation Treatment), Article 5 (Senior Management and Board of Directors) and Article 6 (Prohibition of Performance Requirements).

2. Article 3 (National Treatment), Article 4 (Most-Favoured-Nation Treatment), Article 5 (Senior Management and Board of Directors) and Article 6 (Prohibition of Performance Requirements) shall not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors, or activities, as set out by that Party in List B of its Schedule in Annex 3 (Schedules of Reservations and Non-Conforming Measures for Investment and Services).

3. Notwithstanding Paragraph 1(c)(ii), for five years after the date of entry into force of the Second Protocol, Article 3 (National Treatment), Article 4 (Most-Favoured-Nation Treatment), Article 5 (Senior Management and Board of Directors) and Article 6 (Prohibition of Performance Requirements), shall not apply to an amendment to any non-conforming measure referred to in Paragraph 1(a) to the extent that the amendment does not decrease the conformity of the measure as it existed at the date of entry into force of the Second Protocol with Article 3 (National Treatment), Article 4 (Most-Favoured-Nation Treatment), Article 5 (Senior

Management and Board of Directors) and Article 6 (Prohibition of Performance Requirements).

4. No Party shall, under any measure adopted after the date of entry into force of the Second Protocol and covered by List B of its Schedule in Annex 3 (Schedules of Reservations and Non-Conforming Measures for Investment and Services), require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment that exists at the time the measure becomes effective, unless otherwise specified in the initial approval by the relevant authorities.

5. Article 3 (National Treatment) and Article 4 (Most-Favoured-Nation Treatment) shall not apply to any measure that falls within Article 5 of the TRIPS Agreement, and any measure that is covered by an exception to, or derogation from, the obligations imposed by Article 4 (National Treatment) of Chapter 14 (Intellectual Property), or imposed by Article 3 or 4 of the TRIPS Agreement.

Article 14 Transparency

1. Each Party shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application covered by this Chapter. International agreements pertaining to or affecting investors or investment activities to which a Party is a signatory shall also be published.

2. To the extent possible, each Party shall make the measures and international agreements of the kind referred to in Paragraph 1 available on the internet.

3. Where publication referred to in Paragraphs 1 and 2 is not practicable, such information²³ shall be made otherwise publicly available.

4. To the extent provided for under its legal framework, each Party shall endeavour to provide a reasonable opportunity for comments by interested persons on measures referred to in Paragraph 1 before adoption.

5. Each Party shall designate a contact point to facilitate communications among the Parties on any matter covered by this Chapter. Upon the request of another Party, the contact point shall:

- (a) identify the office or official responsible for the relevant matter; and
- (b) assist as necessary in facilitating communications with the requesting Party with respect to that matter.

6. Each Party shall respond within a reasonable period of time to all requests by any other Party for specific information on:

- (a) any measures or international agreements referred to in Paragraph 1; and
- (b) any new, or any changes to existing, measures or administrative guidelines which significantly affect investors or covered investments, whether or not the other Party has been previously notified of the new or changed measures or administrative guidelines.

²³ For greater certainty, such information may be published in each Party's chosen language.

7. Any notification or communication under this Article shall be provided to the other Party through the relevant contact points in the English language.

8. Nothing in this Article shall be construed as requiring a Party to provide confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interest of particular juridical persons, public or private.

9. Each Party shall ensure that in its administrative proceedings relating to the application of measures referred to in Paragraph 1 to particular investors of another Party or their investments in specific cases that:

- (a) to the extent provided under its legal framework and where possible, persons of another Party that are directly affected by a proceeding are provided reasonable notice when a proceeding is initiated;
- (b) to the extent provided under its legal framework, it endeavours to afford such persons with reasonable opportunity to present their positions prior to any final administrative action, when time, the nature of the proceeding, and the public interest permit; and
- (c) its procedures are in accordance with its laws and regulations.

10. Each Party shall maintain judicial or administrative tribunals or procedures for the purposes of the prompt review²⁴ and, where warranted, correction of final administrative actions regarding matters covered by this Chapter. Where such procedures or tribunals are not independent of the agency entrusted with the administrative

²⁴ For avoidance of doubt, the form of "review" shall be as provided for under the Party's law.

action concerned, each Party shall ensure that the tribunals or procedures provide for an objective and impartial review.

11. Each Party shall ensure that in any such tribunals or procedures the parties to the proceedings are provided with the right to:

- (a) a reasonable opportunity to support or defend their respective positions; and
- (b) a decision in accordance with the Party's laws.

12. Each Party shall ensure, subject to appeal or further reviews as provided in its law, that any decision referred to in Paragraph 11(b) shall be implemented in accordance with its laws.

Article 15

Special Formalities and Disclosure of Information

1. Nothing in Article 3 (National Treatment) shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, including a requirement that covered investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not substantially impair the protections afforded by a Party to investors of another Party and covered investments pursuant to this Chapter.

2. Notwithstanding Article 3 (National Treatment), a Party may require an investor of another Party, or a covered investment, to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect to the extent possible any confidential information which has been provided from any disclosure that would prejudice legitimate commercial interests 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 16
Special and Differential Treatment for the Newer
ASEAN Member States

In order to increase the benefits of this Chapter for the newer ASEAN Member States, and in accordance with the objectives of and the preamble to this Agreement and objectives of Chapter 12 (Economic Co-operation), the Parties recognise the importance of according special and differential treatment to the newer ASEAN Member States under this Chapter through:

- (a) technical assistance to strengthen their capacity in relation to investment policies and promotion, including in areas such as human resource development;
- (b) access to information on the investment policies of other Parties, business information, relevant databases and contact points for investment promotion agencies;
- (c) commitments in areas of interest to the newer ASEAN Member States; and
- (d) recognising that commitments by each newer ASEAN Member State may be made in accordance with its individual stage of development.

Article 17
Work Programme

1. The Parties shall, no later than 18 months after the date of entry into force of the Second Protocol, commence a review of Section B (Investment Disputes between a Party and an

Investor). The Parties shall conclude the review within 12 months from the date of commencement of the discussions, unless the Parties agree otherwise.

2. In parallel to the review in Paragraph 1, the Parties shall also enter into discussions on introducing two additional elements to Article 6.1 (Prohibition of Performance Requirements), as follows:

- (a) to purchase, use or accord a preference to, in its territory, technology of the Party or of a person of the Party; and
- (b) to prevent the purchase or use of, or the according of a preference to, in its territory, a particular technology.

Without prejudice to other Least Developed Country Parties, these discussions will consider flexibilities for Lao PDR and Myanmar. The Parties shall conclude these discussions within 36 months from the date of commencement of the discussions, unless the Parties agree otherwise.

3. The discussions in Paragraphs 1 and 2 are without prejudice to the respective positions of the Parties, and the outcomes of the discussions are subject to agreement by all the Parties. These discussions shall be overseen by the Committee on Investment (the “Investment Committee”) established pursuant to Article 18 (Committee on Investment).

Article 18

Committee on Investment

1. The Parties hereby establish an Investment Committee consisting of representatives of the Parties.

2. The Investment Committee shall meet within one year from the date of entry into force of this Agreement and thereafter as mutually determined by the Parties. Meetings

may be conducted in person, or by any other means as mutually determined by the Parties.

3. The Investment Committee's functions shall be:
 - (a) to oversee the discussions referred to in Article 17.1 and 17.2 (Work Programme);
 - (b) to review the implementation of this Chapter;
 - (c) to consider any other matters related to this Chapter identified by the Parties; and
 - (d) to report to the FTA Joint Committee as required.

SECTION B

Investment Disputes between a Party and an Investor

Article 19 Scope and Definitions

1. This Section shall apply to disputes between a Party and an investor of another Party concerning an alleged breach of an obligation of the former under Section A which causes loss or damage to the covered investment of the investor.
2. This Section shall not apply to investment disputes which have occurred prior to the entry into force of this Agreement.
3. A natural person possessing the nationality or citizenship of a Party may not pursue a claim against that Party under this Section.
4. For the purpose of this Section:
 - (a) **Appointing Authority** means:

- (i) in the case of arbitration under Article 22.1(b) or (c) (Submission of a Claim), the Secretary-General of ICSID;
 - (ii) in the case of arbitration under Article 22.1(d) or (e) (Submission of a Claim), the Secretary-General of the Permanent Court of Arbitration; or
 - (iii) any person as agreed between the disputing parties;
- (b) **disputing Party** means a Party against which a claim is made under this Section;
 - (c) **disputing party** means a disputing investor or a disputing Party;
 - (d) **disputing parties** means a disputing investor and a disputing Party;
 - (e) **disputing investor** means an investor of a Party that makes a claim against another Party on its own behalf under this Section, and where relevant includes an investor of a Party that makes a claim on behalf of a juridical person of the disputing Party that the investor owns or controls;
 - (f) **ICSID** means the International Centre for Settlement of Investment Disputes;
 - (g) **ICSID Convention** means the *Convention on the Settlement of Investment Disputes between States and National of other States*, done at Washington on 18 March 1965;
 - (h) **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;

- (i) **non-disputing Party** means the Party of the disputing investor;
- (j) **New York Convention** means the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, done at New York on 10 June 1958; and
- (k) **UNCITRAL Arbitration Rules** means the arbitration rules of the United Nations Commission on International Trade Law, approved by the United Nations General Assembly on 15 December 1976.

Article 20 Consultations

1. In the event of an investment dispute referred to in Article 19.1 (Scope and Definitions), the disputing parties shall as far as possible resolve the dispute through consultations, with a view towards reaching an amicable settlement. Such consultations, which may include the use of non-binding, third party procedures, shall be initiated by a written request for consultations delivered by the disputing investor to the disputing Party.

2. With the objective of resolving an investment dispute through consultations, a disputing investor shall provide the disputing Party, prior to the commencement of consultations, with information regarding the legal and factual basis for the investment dispute.

Article 21

Claim by an Investor of a Party

If an investment dispute has not been resolved within 180 days of the receipt by a disputing Party of a request for consultations, the disputing investor may, subject to this Article, submit to conciliation or arbitration a claim:

- (a) that the disputing Party has breached an obligation arising under Article 3 (National Treatment), Article 7 (Treatment of Investment), Article 8 (Compensation for Losses), Article 9 (Transfers) and Article 10 (Expropriation and Compensation) relating to the management, conduct, operation or sale or other disposition of a covered investment; and
- (b) that the disputing investor or the covered investment has incurred loss or damage by reason of, or arising out of, that breach.

Article 22

Submission of a Claim

1. A disputing investor may submit a claim referred to in Article 21 (Claim by an Investor of a Party) at the choice of the disputing investor:

- (a) where the Philippines or Viet Nam is the disputing Party, to the courts or tribunals of that Party, provided that such courts or tribunals have jurisdiction over such claim; or
- (b) under the ICSID Convention and the *ICSID Rules of Procedure for Arbitration Proceedings*,²⁵

²⁵ In the case of the Philippines, the submission of a claim under the ICSID Convention and the *ICSID Rules of Procedure for Arbitration Proceedings* shall be subject to a written agreement between the disputing parties in the event that an investment dispute arises.

provided that both the disputing Party and the non-disputing Party are parties to the ICSID Convention; or

- (c) under the ICSID Additional Facility Rules, provided that either of the disputing Party or non-disputing Party are a party to the ICSID Convention; or
- (d) under the UNCITRAL Arbitration Rules; or
- (e) if the disputing parties agree, to any other arbitration institution or under any other arbitration rules,

provided that resort to one of the fora under Subparagraphs (a) to (e) shall exclude resort to any other.

2. A claim shall be deemed submitted to arbitration under this Article when the disputing investor's notice of or request for arbitration made in accordance with this Section (notice of arbitration) is received under the applicable arbitration rules.

3. The arbitration rules applicable under Paragraphs 1(b) to (e) as in effect on the date the claim or claims were submitted to arbitration under this Article shall govern the arbitration, except to the extent modified by this Section.

4. In relation to a specific investment dispute or class of disputes, the applicable arbitration rules may be waived, varied or modified by written agreement between the disputing parties. Such rules shall be binding on the relevant tribunal or tribunals established pursuant to this Section, and on individual arbitrators serving on such tribunals.

5. The disputing investor shall provide with the notice of arbitration:

- (a) the name of the arbitrator that the disputing investor appoints; or
- (b) the disputing investor's written consent for the Appointing Authority to appoint that arbitrator.

Article 23

Conditions and Limitations on Submission of a Claim

1. The submission of a dispute as provided for in Article 21 (Claim by an Investor of a Party) to conciliation or arbitration under Article 22.1(b) to (e) (Submission of a Claim) in accordance with this Section, shall be conditional upon:

- (a) the submission of the investment dispute to such conciliation or arbitration taking place within three years of the time at which the disputing investor became aware, or should reasonably have become aware, of a breach of an obligation referred to in Article 21(a) (Claim by an Investor of a Party) causing loss or damage to the disputing investor or a covered investment;
- (b) the disputing investor providing written notice, which shall be submitted at least 90 days before the claim is submitted, to the disputing Party of its intent to submit the investment dispute to such conciliation or arbitration and which briefly summarises the alleged breach of the disputing Party (including the articles or provisions alleged to have been breached) and the loss or damage allegedly caused to the disputing investor or a covered investment;
- (c) the notice of arbitration being accompanied by the disputing investor's written waiver of its right to initiate or continue any proceedings before the courts or administrative tribunals of either Party, or other dispute settlement procedures, of any

proceeding with respect to any measure alleged to constitute a breach referred to in Article 21 (Claim by an Investor of a Party).

2. Notwithstanding Paragraph 1(c), no Party shall prevent the disputing investor from initiating or continuing an action that seeks interim measures of protection for the sole purpose of preserving its rights and interests and does not involve the payment of damages or resolution of the substance of the matter in dispute, before the courts or administrative tribunals of the disputing Party.

3. No Party shall give diplomatic protection, or bring an international claim, in respect of a dispute which has been 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 a dispute. Diplomatic protection, for the purposes of this Paragraph, shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

4. A disputing Party shall not assert, as a defence, counter-claim, right of set off or otherwise, that the disputing investor or the covered investment has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of any alleged loss.

Article 24

Selection of Arbitrators

1. Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators:

- (a) one arbitrator appointed by each of the disputing parties; and
- (b) the third arbitrator, who shall be the presiding arbitrator, appointed by agreement of the

disputing parties, shall be a national of a non-Party which has diplomatic relations with the disputing Party and non-disputing Party, and shall not have permanent residence in either the disputing Party or non-disputing Party.

2. Arbitrators shall have expertise or experience in public international law, international trade or international investment rules, and be independent of, and not be affiliated with or take instructions from the disputing Party, the non-disputing Party or the disputing investor.

3. The Appointing Authority shall serve as appointing authority for arbitration under this Article.

4. If a tribunal has not been constituted within 75 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, the arbitrator or arbitrators not yet appointed.

5. The disputing parties may establish rules relating to expenses incurred by the tribunal, including arbitrator's remuneration.

6. Where any arbitrator appointed as provided for in this Article resigns or becomes unable to act, a successor shall be appointed in the same manner as prescribed for the appointment of the original arbitrator and the successor shall have all the powers and duties of the original arbitrator.

Article 25 Consolidation

Where two or more claims have been submitted separately to arbitration under Article 21 (Claim by an Investor of a Party) and the claims have a question of law or fact in common and arise out of the same or similar events or circumstances, all

concerned disputing parties may agree to consolidate those claims in any manner they deem appropriate.

Article 26

Conduct of the Arbitration

1. Where issues relating to jurisdiction or admissibility are raised as preliminary objections, a tribunal shall decide the matter before proceeding to the merits.

2. A disputing Party may, no later than 30 days after the constitution of the tribunal, file an objection that a claim is manifestly without merit. A disputing Party may also file an objection that a claim is otherwise outside the jurisdiction or competence of the tribunal. The disputing Party shall specify as precisely as possible the basis for the objection.

3. The tribunal shall address any such objection as a preliminary question apart from the merits of the claim. The disputing parties shall be given a reasonable opportunity to present their views and observations to the tribunal. If the tribunal decides that the claim is manifestly without merit, or is otherwise not within the jurisdiction or competence of the tribunal, it shall render an award to that effect.

4. The tribunal may, if warranted, award the prevailing party reasonable costs and fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claim or the objection was frivolous or manifestly without merit, and shall provide the disputing parties a reasonable opportunity to comment.

5. Unless the disputing parties otherwise agree, the tribunal shall determine the place of arbitration in accordance with the applicable arbitration rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.

6. Where an investor claims that the disputing Party has breached Article 10 (Expropriation and Compensation) by the adoption or enforcement of a taxation measure, the disputing Party and the non-disputing Party shall, upon request from the disputing Party, hold consultations with a view to determining whether the taxation measure in question has an effect equivalent to expropriation or nationalisation. Any tribunal that may be established pursuant to this Section shall accord serious consideration to the decision of both Parties under this Paragraph.

7. If both Parties fail either to initiate consultations referred to in Paragraph 6, or to determine whether such taxation measure has an effect equivalent to expropriation or nationalisation within the period of 180 days from the date of the receipt of request for consultations referred to in Article 20 (Consultations), the disputing investor shall not be prevented from submitting its claim to arbitration in accordance with this Section.

Article 27

Transparency of Arbitral Proceedings

1. Subject to Paragraphs 2 and 3, the disputing Party may make publicly available all awards and decisions produced by the tribunal.

2. Any of the disputing parties that intend to use information designated as confidential information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

3. Any information specifically designated as confidential that is submitted to the tribunal or the disputing parties shall be protected from disclosure to the public.

4. A disputing party may disclose to persons directly connected with the arbitral proceedings such confidential

information as it considers necessary for the preparation of its case, but it shall require that such confidential information is protected.

5. The tribunal shall not require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting Cabinet confidences, personal privacy or the financial affairs and accounts of individual customers of financial institutions, or which it determines to be contrary to its essential security.

6. The non-disputing Party shall be entitled, at its cost, to receive from the disputing Party a copy of the notice of arbitration, no later than 30 days after the date that such document has been delivered to the disputing Party. The disputing Party shall notify all other Parties of the receipt of the notice of arbitration within 30 days thereof.

Article 28 Governing Law

1. Subject to Paragraphs 2 and 3, when a claim is submitted under Article 21 (Claim by an Investor of a Party), the tribunal shall decide the issues in dispute in accordance with this Agreement, any other applicable agreements between the Parties, any relevant rules of international law applicable in the relations between the Parties, and, where applicable, any relevant law of the disputing Party.

2. The tribunal shall, on its own account or at the request of a disputing party, request a joint interpretation of any provision of this Agreement that is in issue in a dispute. The Parties shall submit in writing any joint decision declaring their interpretation to the tribunal within 60 days of the delivery of the request. Without prejudice to Paragraph 3, if the Parties fail to issue such a decision within 60 days, any interpretation submitted by a Party shall be forwarded to the disputing

parties and the tribunal, which shall decide the issue on its own account.

3. A joint decision of the Parties, declaring their interpretation of a provision of this Agreement shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.

Article 29 Awards

1. Where a tribunal makes a final award against either of the disputing parties, 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 disputing Party may pay monetary damages and any applicable interest in lieu of restitution.

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

3. A tribunal may not award punitive damages.

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

5. Subject to Paragraph 6 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.²⁶

²⁶ The Parties understand that there may be domestic legal and administrative processes that need to be observed before an award can be complied with.

6. A disputing party may not seek enforcement of a final award until:

(a) In the case of a final award under the ICSID Convention:

(i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award; or

(ii) revision or annulment proceedings have been completed.

(b) In the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or the rules selected pursuant to Article 22.1(e) (Submission of a Claim):

(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.

7. Each Party shall provide for the enforcement of an award in its territory.