

## CHAPTER 14

### INVESTMENT

#### Article 14.1: Definitions

For the purposes of this Chapter:

**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;

**enterprise** means an enterprise as defined in Article 1.5 (General Definitions), and a branch of an enterprise;

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

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

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

- (a) an enterprise;
- (b) shares, stock and other forms of equity participation in an enterprise;
- (c) bonds, debentures, other debt instruments, and loans;<sup>1</sup>
- (d) futures, options, and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- (f) intellectual property rights;

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<sup>1</sup> Some forms of debt, such as bonds, debentures, and long-term notes or loans, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due, are less likely to have these characteristics.

- (g) licenses, authorizations, permits, and similar rights conferred pursuant to a Party's law;<sup>2</sup> and
- (h) other tangible or intangible, movable or immovable property, and related property rights, such as liens, mortgages, pledges, and leases,

but investment does not mean:

- (i) an order or judgment entered in a judicial or administrative action;
- (j) claims to money that arise solely from:
  - (i) commercial contracts for the sale of goods or services by a natural person or enterprise in the territory of a Party to an enterprise in the territory of another Party, or
  - (ii) the extension of credit in connection with a commercial contract referred to in subparagraph (j)(i);

**investor of a non-Party** means, with respect to a Party, an investor that attempts to make,<sup>3</sup> is making, or has made an investment in the territory of that Party, that is not an investor of a Party; and

**investor of a Party** means a Party, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party, provided however that:

- (a) a natural person who is a dual citizen is deemed to be exclusively a national of the State of his or her dominant and effective citizenship; and
- (b) a natural person who is a citizen of a Party and a permanent resident of another Party is deemed to be exclusively a national of the Party of which that natural person is a citizen.

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<sup>2</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 a Party's law. For greater certainty, among such instruments that do not have the characteristics of an investment are those that do not create any rights protected under the Party's law. For greater certainty, the foregoing is without prejudice to whether any asset associated with such instruments has the characteristics of an investment.

<sup>3</sup> For greater certainty, the Parties understand that, for the purposes of the definitions of "investor of a non-Party" and "investor of a Party", an investor "attempts to make" an investment when that investor has taken concrete action or actions to make an investment, such as channelling resources or capital in order to set up a business, or applying for a permit or license.

## **Article 14.2: Scope**

1. This Chapter applies to measures adopted or maintained by a Party relating to:
  - (a) investors of another Party;
  - (b) covered investments; and
  - (c) with respect to Article 14.10 (Performance Requirements) and Article 14.16 (Investment and Environmental, Health, Safety, and other Regulatory Objectives), all investments in the territory of that Party.
2. A Party's obligations under this Chapter apply to measures adopted or maintained by:
  - (a) the central, regional, or local governments or authorities of that Party;<sup>4</sup> and
  - (b) a person, including a state enterprise or another body, when it exercises any governmental authority delegated to it by central, regional, or local governments or authorities of that Party.<sup>5</sup>
3. For greater certainty, this Chapter, except as provided for in Annex 14-C (Legacy Investment Claims and Pending Claims) does not bind a Party in relation to an act or fact that took place or a situation that ceased to exist before the date of entry into force of this Agreement.
4. For greater certainty, an investor may only submit a claim to arbitration under this Chapter as provided under Annex 14-C (Legacy Investment Claims and Pending Claims), Annex 14-D (Mexico-United States Investment Disputes), or Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts).

## **Article 14.3: Relation to Other Chapters**

1. In the event of any inconsistency between this Chapter and another Chapter of this Agreement, the other Chapter shall prevail to the extent of the inconsistency.
2. This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter 17 (Financial Services).

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<sup>4</sup> For greater certainty, the term "governments or authorities" means the organs of a Party, consistent with the principles of attribution under customary international law.

<sup>5</sup> For greater certainty, governmental authority is delegated to any person under the Party's law, including through a legislative grant or a government order, directive, or other act transferring or authorizing the exercise of governmental authority.

3. A requirement of a Party that a service supplier of another Party post a bond or other form of financial security as a condition for the cross-border supply of a service does not of itself make this Chapter applicable to measures adopted or maintained by the Party relating to the cross-border supply of the service. This Chapter applies to measures adopted or maintained by the Party relating to the posted bond or financial security, to the extent that the bond or financial security is a covered investment.

4. For greater certainty, consistent with Article 15.2.2(a) (Scope), Article 15.5 (Market Access), and Article 15.8 (Development and Administration of Measures) apply to measures adopted or maintained by a Party relating to the supply of a service in its territory by a covered investment.

#### **Article 14.4: National Treatment**

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

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a government other than at the central level, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that government to investors, and to investments of investors, of the Party of which it forms a part.

4. For greater certainty, whether 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.

#### **Article 14.5: Most-Favored-Nation Treatment**

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

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a government other than at the central level, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that government to investors in its territory, and to investments of those investors, of any other Party or of any non-Party.

4. For greater certainty, whether 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.

#### **Article 14.6: Minimum Standard of Treatment<sup>6</sup>**

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligations in paragraph 1 to provide:

- (a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
- (b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.

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

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

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<sup>6</sup> This Article shall be interpreted in accordance with Annex 14-A (Customary International Law).

#### **Article 14.7: Treatment in Case of Armed Conflict or Civil Strife**

1. Notwithstanding Article 14.12.5(b) (Non-Conforming Measures), each Party shall accord to investors of another Party and to covered investments non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

2. Notwithstanding paragraph 1, if an investor of a Party, in a situation referred to in paragraph 1, suffers a loss in the territory of another Party resulting from:

- (a) requisitioning of its covered investment or part thereof by the latter's forces or authorities; or
- (b) destruction of its covered investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation,

the latter Party shall provide the investor restitution, compensation, or both, as appropriate, for that loss.

3. Paragraph 1 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 14.4 (National Treatment) but for Article 14.12.5(b) (Non-Conforming Measures).

#### **Article 14.8: Expropriation and Compensation<sup>7</sup>**

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

- (a) for a public purpose;
- (b) in a non-discriminatory manner;
- (c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2, 3, and 4; and
- (d) in accordance with due process of law.

2. Compensation shall:

- (a) be paid without delay;

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<sup>7</sup> This Article shall be interpreted in accordance with Annex 14-B (Expropriation).

- (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (the date of expropriation);
- (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and
- (d) be fully realizable and freely transferable.

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

4. If the fair market value is denominated in a currency that is not freely usable, the compensation paid – converted into the currency of payment at the market rate of exchange prevailing on the date of payment<sup>8</sup> – shall be no less than:

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

5. For greater certainty, whether an action or series of actions by a Party constitutes an expropriation shall be determined in accordance with paragraph 1 of this Article and Annex 14-B (Expropriation).

6. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that the issuance, revocation, limitation, or creation is consistent with Chapter 20 (Intellectual Property) and the TRIPS Agreement.<sup>9</sup>

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<sup>8</sup> For greater certainty, for the purposes of this paragraph, the currency of payment may be the same as the currency in which the fair market value is denominated.

<sup>9</sup> For greater certainty, the Parties recognize that, for the purposes of this Article, the term “revocation” of an intellectual property right includes the cancellation or nullification of that right, and the term “limitation” of an intellectual property right includes exceptions to that right.

## **Article 14.9: Transfers**

1. Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. These transfers include:
  - (a) contributions to capital;<sup>10</sup>
  - (b) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance, and other fees;
  - (c) proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;
  - (d) payments made under a contract entered into by the investor, or the covered investment, including payments made pursuant to a loan agreement or employment contract; and
  - (e) payments made pursuant to Article 14.7 (Treatment in Case of Armed Conflict or Civil Strife) and Article 14.8 (Expropriation and Compensation).
2. Each Party shall permit transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer.
3. A Party shall not require its investors to transfer, or penalize its investors that fail to transfer, the income, earnings, profits, or other amounts derived from, or attributable to, investments in the territory of another Party.
4. Each Party shall permit returns in kind relating to a covered investment to be made as authorized or specified in a written agreement between the Party and a covered investment or an investor of another Party.
5. Notwithstanding paragraphs 1, 2, and 4, a Party may prevent or delay a transfer through the equitable, non-discriminatory, and good faith application of its laws<sup>11</sup> relating to:
  - (a) bankruptcy, insolvency, or the protection of the rights of creditors;
  - (b) issuing, trading, or dealing in securities or derivatives;
  - (c) criminal or penal offenses;

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<sup>10</sup> For greater certainty, contributions to capital include the initial contribution.

<sup>11</sup> For greater certainty, this Article does not preclude the equitable, non-discriminatory, and good faith application of a Party's laws relating to its social security, public retirement, or compulsory savings programs.



- (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or
- (e) ensuring compliance with orders or judgments in judicial or administrative proceedings.

6. Notwithstanding paragraph 4, a Party may restrict transfers of returns in kind in circumstances where it could otherwise restrict those transfers under this Agreement, including as set out in paragraph 5.

#### **Article 14.10: Performance Requirements**

1. No Party shall, 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, impose or enforce any requirement, or enforce any commitment or undertaking:<sup>12</sup>

- (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 a good produced or a service supplied in its territory, or to purchase a good or a service from a person 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 the investment;
- (e) to restrict sales of a good or a service in its territory that the investment produces or supplies by relating those sales in any way to the volume or value of its exports or foreign exchange earnings;
- (f) to transfer a technology, a production process, or other proprietary knowledge to a person in its territory;
- (g) to supply exclusively from the territory of the Party a good that the investment produces or a service that it supplies to a specific regional market or to the world market;

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<sup>12</sup> For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 2 does not constitute a “requirement” or a “commitment or undertaking” for the purposes of paragraph 1.

- (h) (i) to purchase, use, or accord a preference to, in its territory, technology of the Party or of a person of the Party,<sup>13</sup> or
- (ii) that prevents the purchase or use of, or the according of a preference to, in its territory, a technology; or
- (i) to adopt:
  - (i) a given rate or amount of royalty under a license contract, or
  - (ii) a given duration of the term of a license contract,

in regard to any license contract in existence at the time the requirement is imposed or enforced, or any commitment or undertaking is enforced, or any future license contract<sup>14</sup> freely entered into between the investor and a person in its territory, provided that the requirement is imposed or the commitment or undertaking is enforced in a manner that constitutes direct interference with that license contract by an exercise of non-judicial governmental authority of a Party. For greater certainty, paragraph 1(i) does not apply when the license contract is concluded between the investor and a Party.

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 of an investor of a Party or of a non-Party in its territory, on compliance with any requirement:

- (a) to achieve a given level or percentage of domestic content;
- (b) to purchase, use, or accord a preference to a good produced in its territory, or to purchase a good from a person 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 the investment;
- (d) to restrict sales of goods or services in its territory that the investment produces or supplies by relating those sales in any way to the volume or value of its exports or foreign exchange earnings; or

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<sup>13</sup> For the purposes of this Article, the term “technology of the Party or of a person of the Party” includes technology that is owned by the Party or a person of the Party, and technology for which the Party or a person of the Party holds an exclusive license.

<sup>14</sup> A “license contract” referred to in this subparagraph means a contract concerning the licensing of technology, a production process, or other proprietary knowledge.

- (e) (i) to purchase, use or accord a preference to, in its territory, technology of the Party or of a person of the Party, or
- (ii) that prevents the purchase or use of, or the according of a preference to, in its territory, a technology.

3. In relation to paragraphs 1 and 2:

- (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 of an investor of a Party or of a non-Party in its territory, 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) Paragraphs 1(f), 1(h), 1(i), and 2(e) do not apply:
  - (i) if a Party authorizes use of an intellectual property right in accordance with Article 31<sup>15</sup> of the TRIPS Agreement, or to a measure requiring the disclosure of proprietary information that fall within the scope of, and is consistent with, Article 39 of the TRIPS Agreement, or
  - (ii) if the requirement is imposed or the commitment or undertaking<sup>16</sup> is enforced by a court, administrative tribunal, or competition authority, after judicial or administrative process, to remedy an alleged violation of competition laws.<sup>17</sup>
- (c) Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), 1(c), 1(f), 2(a), and 2(b) shall not be construed to prevent a Party from adopting or maintaining 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>15</sup> The reference to “Article 31” includes any waiver or amendment to the TRIPS Agreement implementing paragraph 6 of the *Doha Declaration on the TRIPS Agreement and Public Health* (WT/MIN (01)/DEC/2).

<sup>16</sup> For greater certainty, for the purposes of this subparagraph, a commitment or undertaking includes a consent agreement.

<sup>17</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) Paragraphs 1(a), 1(b), 1(c), 2(a), and 2(b) do not apply to qualification requirements for a good or a service with respect to export promotion and foreign aid programs.
  - (e) Paragraphs 1(b), 1(c), 1(f), 1(g), 1(h), 1(i), 2(a), 2(b), and 2(e) do not apply to government procurement.
  - (f) Paragraphs 2(a) and 2(b) do not apply to requirements imposed by an importing Party relating to the content of a good necessary to qualify for preferential tariffs or preferential quotas.
  - (g) Paragraphs 1(h), 1(i), and 2(e) shall not be construed to prevent a Party from adopting or maintaining measures to protect legitimate public welfare objectives, provided that such measures are not applied in an arbitrary or unjustifiable manner, or in a manner that constitutes a disguised restriction on international trade or investment.
4. For greater certainty, paragraphs 1 and 2 do not apply to any commitment, undertaking, or requirement other than those set out in those paragraphs.
5. This Article does not preclude enforcement of any commitment, undertaking, or requirement between private parties, if a Party did not impose or require the commitment, undertaking, or requirement.

#### **Article 14.11: Senior Management and Boards of Directors**

1. No Party shall require that an enterprise of that Party that is a covered investment appoint to senior management positions a natural person of a 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 a covered investment, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

#### **Article 14.12: Non-Conforming Measures**

1. Article 14.4 (National Treatment), Article 14.5 (Most-Favored-Nation Treatment), Article 14.10 (Performance Requirements), and Article 14.11 (Senior Management and Boards 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,
  - (ii) a regional level of government, as set out by that Party in its Schedule to Annex I, 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, as it existed immediately before the amendment, with Article 14.4 (National Treatment), Article 14.5 (Most-Favored-Nation Treatment), Article 14.10 (Performance Requirements), or Article 14.11 (Senior Management and Boards of Directors).

2. Article 14.4 (National Treatment), Article 14.5 (Most-Favored-Nation Treatment), Article 14.10 (Performance Requirements), and Article 14.11 (Senior Management and Boards 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 by that Party in its Schedule to Annex II.

3. No Party shall, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to Annex II, require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

- 4. (a) Article 14.4 (National Treatment) does not apply to any measure that falls within an exception to, or derogation from, the obligations imposed by:
  - (i) Article 20.8 (National Treatment), or
  - (ii) Article 3 of the TRIPS Agreement, if the exception or derogation relates to matters not addressed by Chapter 20 (Intellectual Property Rights);
- (b) Article 14.5 (Most-Favored-Nation Treatment) does not apply to any measure that falls within Article 5 of the TRIPS Agreement, or an exception to, or derogation from, an obligation imposed by:
  - (i) Article 20.8 (National Treatment), or

(ii) Article 4 of the TRIPS Agreement.

5. Article 14.4 (National Treatment), Article 14.5 (Most-Favored-Nation Treatment), and Article 14.11 (Senior Management and Boards of Directors) do not apply to:

- (a) government procurement; or
- (b) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.

### **Article 14.13: Special Formalities and Information Requirements**

1. Nothing in Article 14.4 (National Treatment) shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as a requirement that investors be residents of the Party or that covered investments be legally constituted under the laws or regulations of the Party, provided that these formalities do not materially impair the protections afforded by the Party to investors of another Party and covered investments pursuant to this Chapter.

2. Notwithstanding Article 14.4 (National Treatment) and Article 14.5 (Most-Favored-Nation Treatment), a Party may require an investor of another Party or its covered investment to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect such information that is confidential from any disclosure that would prejudice the competitive position of the investor or its 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 14.14: Denial of Benefits**

1. A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of that other Party and to investments of that investor if the enterprise:

- (a) is owned or controlled by a person of a non-Party or of the denying Party; and
- (b) has no substantial business activities 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 an enterprise of that other Party and to investments of that investor if persons of a non-Party own or control the enterprise 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 enterprise or that would be

violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.

#### **Article 14.15: Subrogation**

If a Party, or an agency of a Party, makes a payment to an investor of the Party under a guarantee, a contract of insurance, or other form of indemnity that it has entered into with respect to a covered investment, the other Party in whose territory the covered investment was made shall recognize the subrogation or transfer of any right the investor would have possessed with respect to the covered investment but for the subrogation, and the investor shall be precluded from pursuing that right to the extent of the subrogation, unless a Party or an agency of a Party authorizes the investor to act on its behalf.

#### **Article 14.16: Investment and Environmental, Health, Safety, and other Regulatory Objectives**

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, safety, or other regulatory objectives.

#### **Article 14.17: Corporate Social Responsibility**

The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines, and principles of corporate social responsibility that have been endorsed or are supported by that Party, which may include the OECD Guidelines for Multinational Enterprises. These standards, guidelines, and principles may address areas such as labor, environment, gender equality, human rights, indigenous and aboriginal peoples' rights, and corruption.

## **ANNEX 14-A**

### **CUSTOMARY INTERNATIONAL LAW**

The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Article 14.6 (Minimum Standard of Treatment) results from a general and consistent practice of States that they follow from a sense of legal obligation. The customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the investments of aliens.



## ANNEX 14-B

### EXPROPRIATION

The Parties confirm their shared understanding that:

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<sup>18</sup> or property interest in an investment.
2. Article 14.8.1 (Expropriation and Compensation) addresses two situations. The first is direct expropriation, in which an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.
3. The second situation addressed by Article 14.8.1 (Expropriation and Compensation) is indirect expropriation, in which an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
  - (a) 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, among other factors:
    - (i) 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,
    - (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations,<sup>19</sup> and
    - (iii) the character of the government action, including its object, context, and intent.
  - (b) Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances.

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<sup>18</sup> For greater certainty, the existence of a property right is determined with reference to a Party's law.

<sup>19</sup> For greater certainty, whether an investor's investment-backed expectations are reasonable depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector.

## ANNEX 14-C

### LEGACY INVESTMENT CLAIMS AND PENDING CLAIMS

1. Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under:

- (a) Section A of Chapter 11 (Investment) of NAFTA 1994;
- (b) Article 1503(2) (State Enterprises) of NAFTA 1994; and
- (c) Article 1502(3)(a) (Monopolies and State Enterprises) of NAFTA 1994 where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A of Chapter 11 (Investment) of NAFTA 1994.<sup>20, 21</sup>

2. The consent under paragraph 1 and the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex shall satisfy the requirements of:

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

3. A Party's consent under paragraph 1 shall expire three years after the termination of NAFTA 1994.

4. For greater certainty, an arbitration initiated pursuant to the submission of a claim under paragraph 1 may proceed to its conclusion in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994, the Tribunal's jurisdiction with respect to such a claim is not affected by the expiration of consent referenced in paragraph 3, and Article 1136 (Finality and Enforcement of an Award) of NAFTA 1994 (excluding paragraph 5) applies with respect to any award made by the Tribunal.

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<sup>20</sup> For greater certainty, the relevant provisions in Chapter 2 (General Definitions), Chapter 11 (Section A) (Investment), Chapter 14 (Financial Services), Chapter 15 (Competition Policy, Monopolies and State Enterprises), Chapter 17 (Intellectual Property), Chapter 21 (Exceptions), and Annexes I-VII (Reservations and Exceptions to Investment, Cross-Border Trade in Services and Financial Services Chapters) of NAFTA 1994 apply with respect to such a claim.

<sup>21</sup> Mexico and the United States do not consent under paragraph 1 with respect to an investor of the other Party that is eligible to submit claims to arbitration under paragraph 2 of Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts).

5. For greater certainty, an arbitration initiated pursuant to the submission of a claim under Section B of Chapter 11 (Investment) of NAFTA 1994 while NAFTA 1994 is in force may proceed to its conclusion in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994, the Tribunal's jurisdiction with respect to such a claim is not affected by the termination of NAFTA 1994, and Article 1136 of NAFTA 1994 (excluding paragraph 5) applies with respect to any award made by the Tribunal.

6. For the purposes of this Annex:

- (a) "legacy investment" means an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement;
- (b) "investment", "investor", and "Tribunal" have the meanings accorded in Chapter 11 (Investment) of NAFTA 1994; and
- (c) "ICSID Convention", "ICSID Additional Facility Rules", "New York Convention", and "Inter-American Convention" have the meanings accorded in Article 14.D.1 (Definitions).

## ANNEX 14-D

### MEXICO-UNITED STATES INVESTMENT DISPUTES

#### Article 14.D.1: Definitions

For the purposes of this Annex:

**Annex Party** means Mexico or the United States;

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

**claimant** means an investor of an Annex Party that is a party to a qualifying investment dispute, excluding an investor that is owned or controlled by a person of a non-Annex Party that, on the date of signature of this Agreement, the other Annex Party has determined to be a non-market economy for purposes of its trade remedy laws and with which no Party has a free trade agreement;

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

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

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

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

**Inter-American Convention** means the *Inter-American Convention on International Commercial Arbitration*, done at Panama, January 30, 1975;

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

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

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

**qualifying investment dispute** means an investment dispute between an investor of an Annex Party and the other Annex Party;

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

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

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

#### **Article 14.D.2: Consultation and Negotiation**

1. In the event of a qualifying investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third party procedures, such as good offices, conciliation, or mediation.

2. For greater certainty, the initiation of consultations and negotiations shall not be construed as recognition of the jurisdiction of the tribunal.

#### **Article 14.D.3: Submission of a Claim to Arbitration**

1. In the event that a disputing party considers that a qualifying investment dispute cannot be settled by consultation and negotiation:

- (a) the claimant, on its own behalf, may submit to arbitration under this Annex a claim:
  - (i) that the respondent has breached:
    - (A) Article 14.4 (National Treatment) or Article 14.5 (Most-Favored-Nation Treatment),<sup>22</sup> except with respect to the establishment or acquisition of an investment, or
    - (B) Article 14.8 (Expropriation and Compensation), except with respect to indirect expropriation, and
  - (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and
- (b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Annex a claim:

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<sup>22</sup> For the purposes of this paragraph: (i) the “treatment” referred to in Article 14.5 (Most-Favored-Nation Treatment) excludes provisions in other international trade or investment agreements that establish international dispute resolution procedures or impose substantive obligations; and (ii) the “treatment” referred to in Article 14.5 only encompasses measures adopted or maintained by the other Annex Party, which for greater clarity may include measures adopted in connection with the implementation of substantive obligations in other international trade or investment agreements.

- (i) that the respondent has breached:
  - (A) Article 14.4 (National Treatment) or Article 14.5 (Most-Favored-Nation Treatment), except with respect to the establishment or acquisition of an investment, or
  - (B) Article 14.8 (Expropriation and Compensation), except with respect to indirect expropriation, and
- (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.<sup>23</sup>

2. At least 90 days before submitting any claim to arbitration under this Annex, the claimant shall deliver to the respondent a written notice of its intention to submit a claim to arbitration (notice of intent). The notice shall specify:

- (a) the name and address of the claimant and, if a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;
- (b) for each claim, the provision of this Agreement alleged to have been breached and any other relevant provisions;
- (c) the legal and factual basis for each claim; and
- (d) the relief sought and the approximate amount of damages claimed.

3. The claimant may submit a claim referred to in paragraph 1 under one of the following alternatives:

- (a) the ICSID Convention and the ICSID *Rules of Procedure for Arbitration Proceedings*, provided that both the respondent and the Party of the claimant are parties to the ICSID Convention;<sup>24</sup>
- (b) the ICSID Additional Facility Rules, provided that either the respondent or the Party of the claimant is a party to the ICSID Convention;
- (c) the UNCITRAL Arbitration Rules; or
- (d) if the claimant and respondent agree, any other arbitral institution or any other arbitration rules.

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<sup>23</sup> For greater certainty, in order for a claim to be submitted to arbitration under subparagraph (b), an investor of the Party of the claimant must own or control the enterprise on the date of the alleged breach and the date on which the claim is submitted to arbitration.

<sup>24</sup> For greater certainty, if a claimant submits a claim under this subparagraph, any award made by the tribunal under Article 14.D.13 (Awards) constitutes an award under Chapter IV of the ICSID Convention (Arbitration).

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

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

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

5. The arbitration rules applicable under paragraph 3 that are in effect on the date the claim or claims were submitted to arbitration under this Annex shall govern the arbitration except to the extent modified by this Agreement.

6. The claimant shall provide with the notice of arbitration:

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

#### **Article 14.D.4: Consent to Arbitration**

1. Each Annex Party consents to the submission of a claim to arbitration under this Annex in accordance with this Agreement.

2. The consent under paragraph 1 and the submission of a claim to arbitration under this Annex shall be deemed to satisfy the requirements of:

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

## Article 14.D.5: Conditions and Limitations on Consent

1. No claim shall be submitted to arbitration under this Annex unless:
  - (a) the claimant (for claims brought under Article 14.D.3.1(a) (Submission of a Claim to Arbitration)) and the claimant or the enterprise (for claims brought under Article 14.D.3.1(b)) first initiated a proceeding before a competent court or administrative tribunal of the respondent with respect to the measures alleged to constitute a breach referred to in Article 14.D.3;
  - (b) the claimant or the enterprise obtained a final decision from a court of last resort of the respondent or 30 months have elapsed from the date the proceeding in subparagraph (a) was initiated;<sup>25</sup>
  - (c) no more than four years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 14.D.3.1 (Submission of a Claim to Arbitration) and knowledge that the claimant (for claims brought under Article 14.D.3.1(a)) or the enterprise (for claims brought under Article 14.D.3.1(b)) has incurred loss or damage;
  - (d) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and
  - (e) the notice of arbitration is accompanied:
    - (i) for claims submitted to arbitration under Article 14.D.3.1(a) (Submission of a Claim to Arbitration), by the claimant's written waiver, and
    - (ii) for claims submitted to arbitration under Article 14.D.3.1(b) (Submission of a Claim to Arbitration), by the claimant's and the enterprise's written waivers,of any right to initiate or continue before any court or administrative tribunal under the law of an Annex Party, or any other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 14.D.3 (Submission of a Claim to Arbitration).
2. Notwithstanding paragraph 1(e), the claimant (for claims brought under Article 14.D.3.1(a) (Submission of a Claim to Arbitration)) and the claimant or the enterprise (for claims brought under Article 14.D.3.1(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.

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<sup>25</sup> The provisions in subparagraphs (a) and (b) do not apply to the extent recourse to domestic remedies was obviously futile.



#### **Article 14.D.6: Selection of Arbitrators**

1. Unless the disputing parties agree otherwise, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.
2. The Secretary-General shall serve as appointing authority for an arbitration under this Annex.
3. If a tribunal has not been constituted within a period of 75 days after the date that a claim is submitted to arbitration under this Annex, the Secretary-General, on the request of a disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed. The Secretary-General shall not appoint a national of either the respondent or the Party of the claimant as the presiding arbitrator unless the disputing parties agree otherwise.
4. For the purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator on a ground other than nationality:
  - (a) the respondent agrees to the appointment of each individual member of a tribunal established under the ICSID Convention or the ICSID Additional Facility Rules;
  - (b) a claimant referred to in Article 14.D.3.1(a) (Submission of a Claim to Arbitration) may submit a claim to arbitration under this Annex, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant agrees in writing to the appointment of each individual member of the tribunal; and
  - (c) a claimant referred to in Article 14.D.3.1(b) (Submission of a Claim to Arbitration) may submit a claim to arbitration under this Annex, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant and the enterprise agree in writing to the appointment of each individual member of the tribunal.
5. Arbitrators appointed to a tribunal for claims submitted under Article 14.D.3.1 shall:
  - (a) comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration, including guidelines regarding direct or indirect conflicts of interest, or any supplemental guidelines or rules adopted by the Annex Parties;
  - (b) not take instructions from any organization or government regarding the dispute; and

- (c) not, for the duration of the proceedings, act as counsel or as party-appointed expert or witness in any pending arbitration under the annexes to this Chapter.

6. Challenges to arbitrators shall be governed by the procedures in the UNCITRAL Arbitration Rules.

#### **Article 14.D.7: Conduct of the Arbitration**

1. The disputing parties may agree on the legal place of any arbitration under the arbitration rules applicable under Article 14.D.3.3 (Submission of a Claim to Arbitration). If the disputing parties fail to reach agreement, the tribunal shall determine the place 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.

2. The non-disputing Annex Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement.

3. After consultation with the disputing parties, the tribunal may accept and consider written *amicus curiae* submissions regarding a matter of fact or law within the scope of the dispute that may assist the tribunal in evaluating the submissions and arguments of the disputing parties from a person or entity that is not a disputing party but has a significant interest in the arbitral proceedings. Each submission shall identify the author; disclose any affiliation, direct or indirect, with any disputing party; and identify any person, government, or other entity that has provided, or will provide, any financial or other assistance in preparing the submission. Each submission shall be in a language of the arbitration and comply with any page limits and deadlines set by the tribunal. The tribunal shall provide the disputing parties with an opportunity to respond to such submissions. The tribunal shall ensure that the submissions do not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

4. Without prejudice to a tribunal's authority to address other objections as a preliminary question, such as an objection that a dispute is not within the competence of the tribunal, including an objection to the tribunal's jurisdiction, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 14.D.13 (Awards) or that a claim is manifestly without legal merit.

- (a) An objection under this paragraph shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment.
- (b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other

preliminary question, and issue a decision or award on the objection, stating the grounds therefor.

- (c) In deciding an objection under this paragraph that a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 14.D.13 (Awards), the tribunal shall assume to be true the claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in the relevant article of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.
- (d) The respondent does not waive any objection as to competence, including an objection to jurisdiction, or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.

5. In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 or any objection that the dispute is not within the tribunal's competence, including an objection that the dispute is not within the tribunal's jurisdiction. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection, stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

6. When the tribunal decides a respondent's objection under paragraph 4 or 5, it may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

7. For greater certainty, if an investor of an Annex Party submits a claim under this Annex, the investor has the burden of proving all elements of its claims, consistent with general principles of international law applicable to international arbitration.

8. A respondent may not assert as a defense, counterclaim, right of set-off, or for any other reason, that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract.

9. A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 14.D.3 (Submission of a Claim to Arbitration). For the purposes of this paragraph, an order includes a recommendation.

10. The tribunal and the disputing parties shall endeavor to conduct the arbitration in an expeditious and cost-effective manner.

11. Following the submission of a claim to arbitration under this Annex, if the disputing parties fail to take any steps in the proceedings for more than 150 days, or such period as they may agree with the approval of the tribunal, the tribunal shall notify the disputing parties that they shall be deemed to have discontinued the proceedings if the parties fail to take any steps within 30 days after the notice is received. If the parties fail to take any steps within that time period, the tribunal shall take note of the discontinuance in an order. If a tribunal has not yet been constituted, the Secretary-General shall assume these responsibilities.

12. In any arbitration conducted under this Annex, at the request of a disputing party, a tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or award to the disputing parties. Within 60 days after the tribunal transmits its proposed decision or award, the disputing parties may submit written comments to the tribunal concerning any aspect of its proposed decision or award. The tribunal shall consider any comments and issue its decision or award no later than 45 days after the expiration of the 60 day comment period.

#### **Article 14.D.8: Transparency of Arbitral Proceedings**

1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Annex Party and make them available to the public:

- (a) the notice of intent;
- (b) the notice of arbitration;
- (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 14.D.7.2 and 14.D.7.3 (Conduct of the Arbitration), , and Article 14.D.12 (Consolidation);
- (d) minutes or transcripts of hearings of the tribunal, if available; and
- (e) orders, awards, and decisions of the tribunal.

2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. If a disputing party intends to use information in a hearing that is designated as protected information or otherwise subject to paragraph 3 it shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect such information from disclosure which may include closing the hearing for the duration of the discussion of that information.

3. Nothing in this Annex, including paragraph 4(d), requires a respondent to make available to the public or otherwise disclose during or after the arbitral proceedings, including the hearing,

protected information, or to furnish or allow access to information that it may withhold in accordance with Article 32.2 (Essential Security) or Article 32.7 (Disclosure of Information).<sup>26</sup>

4. Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:

- (a) subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to the non-disputing Annex Party or to the public any protected information if the disputing party that provided the information clearly designates it in accordance with subparagraph (b);
- (b) any disputing party claiming that certain information constitutes protected information shall clearly designate the information according to any schedule set by the tribunal;
- (c) a disputing party shall, according to any schedule set by the tribunal, submit a redacted version of the document that does not contain the protected information. Only the redacted version shall be disclosed in accordance with paragraph 1; and
- (d) the tribunal, subject to paragraph 3, shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that the information was not properly designated, the disputing party that submitted the information may:
  - (i) withdraw all or part of its submission containing that information, or
  - (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (c).

In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under subparagraph (d)(i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under subparagraph (d)(ii) of the disputing party that first submitted the information.

5. Nothing in this Annex requires a respondent to withhold from the public information required to be disclosed by its laws. The respondent should endeavor to apply those laws in a manner sensitive to protecting from disclosure information that has been designated as protected information.

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<sup>26</sup> For greater certainty, when a respondent chooses to disclose to the tribunal information that may be withheld in accordance with Article 32.2 (Essential Security) or Article 32.7 (Disclosure of Information), the respondent may still withhold that information from disclosure to the public.

#### **Article 14.D.9: Governing Law**

1. Subject to paragraph 2, when a claim is submitted under Article 14.D.3.1 (Submission of a Claim to Arbitration), the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.
2. A decision of the Commission on the interpretation of a provision of this Agreement under Article 30.2 (Functions of the Commission) shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision.

#### **Article 14.D.10: Interpretation of Annexes**

1. If a respondent asserts as a defense that the measure alleged to be a breach is within the scope of a non-conforming measure set out in Annex I or Annex II, the tribunal shall, on request of the respondent, request the interpretation of the Commission on the issue. The Commission shall submit in writing any decision on its interpretation under Article 30.2 (Functions of the Commission) to the tribunal within 90 days of delivery of the request.
2. A decision issued by the Commission under paragraph 1 shall be binding on the tribunal, and any decision or award issued by the tribunal must be consistent with that decision. If the Commission fails to issue such a decision within 90 days, the tribunal shall decide the issue.

#### **Article 14.D.11: Expert Reports**

Without prejudice to the appointment of other kinds of experts when authorized by the applicable arbitration rules, a tribunal, on request of a disputing party or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning scientific matters raised by a disputing party in a proceeding, subject to any terms and conditions that the disputing parties may agree.

#### **Article 14.D.12: Consolidation**

1. If two or more claims have been submitted separately to arbitration under Article 14.D.3.1 (Submission of a Claim to Arbitration) and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 2 through 10.
2. A disputing party that seeks a consolidation order under this Article shall deliver, in writing, a request to the Secretary-General and to all the disputing parties sought to be covered by the order and shall specify in the request:

- (a) the names and addresses of all the disputing parties sought to be covered by the order;
  - (b) the nature of the order sought; and
  - (c) the grounds on which the order is sought.
3. Unless the Secretary-General finds within a period of 30 days after the date of receiving a request under paragraph 2 that the request is manifestly unfounded, a tribunal shall be established under this Article.
4. Unless all the disputing parties sought to be covered by the order agree otherwise, a tribunal established under this Article shall comprise three arbitrators:
- (a) one arbitrator appointed by agreement of the claimants;
  - (b) one arbitrator appointed by the respondent; and
  - (c) the presiding arbitrator appointed by the Secretary-General, provided that the presiding arbitrator is not a national of the respondent or of the Party of the claimants.
5. If, within a period of 60 days after the date when the Secretary-General receives a request made under paragraph 2, the respondent fails or the claimants fail to appoint an arbitrator in accordance with paragraph 4, the Secretary-General, on request of any disputing party sought to be covered by the order, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.
6. If a tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration under Article 14.D.3.1 (Submission of a Claim to Arbitration) have a question of law or fact in common, and arise out of the same events or circumstances, the tribunal may, in the interest of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:
- (a) assume jurisdiction over, and hear and determine together, all or part of the claims;
  - (b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others; or
  - (c) instruct a tribunal previously established under Article 14.D.6 (Selection of Arbitrators) to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that:
    - (i) that tribunal, on request of a claimant that was not previously a disputing party before that tribunal, shall be reconstituted with its original members,

except that the arbitrator for the claimants shall be appointed pursuant to paragraphs 4(a) and 5, and

- (ii) that tribunal shall decide whether a prior hearing shall be repeated.

7. If a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration under Article 14.D.3.1 (Submission of a Claim to Arbitration) and that has not been named in a request made under paragraph 2 may make a written request to the tribunal that it be included in any order made under paragraph 6. The request shall specify:

- (a) the name and address of the claimant;
- (b) the nature of the order sought; and
- (c) the grounds on which the order is sought.

The claimant shall deliver a copy of its request to the Secretary-General.

8. A tribunal established under this Article shall conduct its proceedings in accordance with the UNCITRAL Arbitration Rules, except as modified by this Annex.

9. A tribunal established under Article 14.D.6 (Selection of Arbitrators) shall not have jurisdiction to decide a claim, or a part of a claim, over which a tribunal established or instructed under this Article has assumed jurisdiction.

10. On the application of a disputing party, a tribunal established under this Article, pending its decision under paragraph 6, may order that the proceedings of a tribunal established under Article 14.D.6 (Selection of Arbitrators) be stayed, unless the latter tribunal has already adjourned its proceedings.

### **Article 14.D.13: Awards**

1. When a tribunal makes a final award, the tribunal may award, separately or in combination, only:

- (a) monetary damages and any applicable interest; and
- (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.<sup>27</sup>

2. For greater certainty, if an investor of an Annex Party submits a claim to arbitration under Article 14.D.3.1 (Submission of a Claim to Arbitration), it may recover only for loss or damage that is established on the basis of satisfactory evidence and that is not inherently speculative.

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<sup>27</sup> For greater certainty, in the final award the tribunal may not order the respondent to take or not to take other actions, including the amendment, repeal, adoption, or implementation of a law or regulation.



3. For greater certainty, if an investor of an Annex Party submits a claim to arbitration under Article 14.D.3.1(a) (Submission of a Claim to Arbitration), it may recover only for loss or damage incurred in its capacity as an investor of an Annex Party.
4. A tribunal may also award costs and attorney's fees incurred by the disputing parties in connection with the arbitral proceedings, and shall determine how and by whom those costs and attorney's fees shall be paid, in accordance with this Annex and the applicable arbitration rules.
5. Subject to paragraph 1, if a claim is submitted to arbitration under Article 14.D.3.1(b) (Submission of a Claim to Arbitration) and an award is made in favor of the enterprise:
  - (a) an award of restitution of property shall provide that restitution be made to the enterprise;
  - (b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and
  - (c) the award shall provide that it is made without prejudice to any right that any person may have under applicable domestic law with respect to the relief provided in the award.
6. A tribunal shall not award punitive damages.
7. An award made by a tribunal has no binding force except between the disputing parties and in respect of the particular case.
8. Subject to paragraph 9 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.
9. A disputing party shall not seek enforcement of a final award until:
  - (a) in the case of a final award made under the ICSID Convention:
    - (i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award, or
    - (ii) revision or annulment proceedings have been completed; and
  - (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 14.D.3.3(d) (Submission of a Claim to Arbitration):
    - (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.

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

11. If the respondent fails to abide by or comply with a final award, on delivery of a request by the Party of the claimant, a panel shall be established under Article 31.6 (Establishment of a Panel). The requesting Party may seek in those proceedings:

- (a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Agreement; and
- (b) in accordance with Article 31.17 (Panel Report), a recommendation that the respondent abide by or comply with the final award.

12. A disputing party may seek enforcement of an arbitration award under the ICSID Convention, the New York Convention, or the Inter-American Convention regardless of whether proceedings have been taken under paragraph 11.

13. A claim that is submitted to arbitration under this Annex shall be considered to arise out of a commercial relationship or transaction for the purposes of Article I of the New York Convention and Article I of the Inter-American Convention.

#### **Article 14.D.14: Service of Documents**

Delivery of notice and other documents to an Annex Party shall be made to the place named for that Annex Party in Appendix 1 (Service of Documents on an Annex Party). An Annex Party shall promptly make publicly available and notify the other Annex Party of any change to the place referred to in that Appendix.

## **APPENDIX 1**

### **SERVICE OF DOCUMENTS ON AN ANNEX PARTY**

#### **Mexico**

Notices and other documents in disputes under this Annex shall be served on Mexico by delivery to:

Dirección General de Consultoría Jurídica de Comercio Internacional  
Secretaría de Economía  
Pachuca #189, piso 19  
Col. Condesa  
Demarcación Territorial Cuauhtémoc  
Ciudad de México  
C.P. 06140

#### **United States**

Notices and other documents in disputes under this Annex shall be served on the United States by delivery to:

Executive Director (L/H-EX)  
Office of the Legal Adviser & Bureau of Legislative Affairs  
U.S. Department of State  
600 19th Street, NW  
Washington, D.C. 20552

## **APPENDIX 2**

### **PUBLIC DEBT**

1. For greater certainty, no award shall be made in favor of a claimant for a claim under Article 14.D.3.1 (Submission of a Claim to Arbitration) with respect to default or non-payment of debt issued by a Party<sup>28</sup> unless the claimant meets its burden of proving that such default or non-payment constitutes a breach of a relevant obligation in the Chapter.

2. No claim that a restructuring of debt issued by a Party, standing alone, breaches an obligation in this Chapter shall be submitted to arbitration under Article 14.D.3.1 (Submission of a Claim to Arbitration), provided that the restructuring is effected as provided for under the debt instrument's terms, including the debt instrument's governing law.

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<sup>28</sup> For purposes of this Annex, "debt issued by a Party" includes, in the case of Mexico, "public debt" of Mexico as defined in Article 1 of the Federal Law on Public Debt (*Ley Federal de Deuda Pública*).

### **APPENDIX 3**

#### **SUBMISSION OF A CLAIM TO ARBITRATION**

An investor of the United States may not submit to arbitration a claim that Mexico has breached an obligation under this Chapter either:

- (a) on its own behalf under Article 14.D.3.1(a) (Submission of a Claim to Arbitration);  
or
- (b) on behalf of an enterprise of Mexico that is a juridical person that the investor owns or controls directly or indirectly under Article 14.D.3.1(b) (Submission of a Claim to Arbitration),

if the investor or the enterprise, respectively, has alleged that breach of an obligation under this Chapter, as distinguished from breach of other obligations under Mexican law, in proceedings before a court or administrative tribunal of Mexico.

## ANNEX 14-E

### MEXICO-UNITED STATES INVESTMENT DISPUTES RELATED TO COVERED GOVERNMENT CONTRACTS

1. Annex 14-D (Mexico-United States Investment Disputes) applies as modified by this Annex to the settlement of a qualifying investment dispute under this Chapter in the circumstances set out in paragraph 2.<sup>29</sup>
2. In the event that a disputing party considers that a qualifying investment dispute cannot be settled by consultation and negotiation:
  - (a) the claimant, on its own behalf, may submit to arbitration under Annex 14-D (Mexico-United States Investment Disputes) a claim:
    - (i) that the respondent has breached any obligation under this Chapter,<sup>30</sup> provided that:
      - (A) the claimant is:
        - (1) a party to a covered government contract, or
        - (2) engaged in activities in the same covered sector in the territory of the respondent as an enterprise of the respondent that the claimant owns or controls directly or indirectly and that is a party to a covered government contract, and
      - (B) the respondent is a party to another international trade or investment agreement that permits investors to initiate dispute settlement procedures to resolve an investment dispute with a government, and
    - (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach;
  - (b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under Annex 14-D (Mexico-United States Investment Disputes) a claim:
    - (i) that the respondent has breached any obligation under this Chapter, provided that:

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<sup>29</sup> For greater certainty, Annex 14-D (Mexico-United States Investment Disputes) includes its appendices.

<sup>30</sup> For the purposes of this paragraph: (i) the “treatment” referred to in Article 14.5 (Most-Favored-Nation Treatment) excludes provisions in other international trade or investment agreements that establish international dispute resolution procedures or impose substantive obligations; (ii) the “treatment” referred to in Article 14.5 only encompasses measures adopted or maintained by the other Annex Party, which for greater clarity may include measures adopted in connection with the implementation of substantive obligations in other international trade or investment agreements.

- (A) the enterprise is:
    - (1) a party to a covered government contract,
    - (2) engaged in activities in the same covered sector in the territory of the respondent as the claimant and the claimant is a party to a covered government contract, or
    - (3) engaged in activities in the same covered sector in the territory of the respondent as another enterprise of the respondent that the claimant owns or controls directly or indirectly and that is a party to a covered government contract, and
  - (B) the respondent is a party to another international trade or investment agreement that permits investors to initiate dispute settlement procedures to resolve an investment dispute with a government, and
- (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.<sup>31</sup>

3. For the purposes of paragraph 2, if a covered government contract is terminated in a manner inconsistent with an obligation under this Chapter, the claimant or enterprise that was previously a party to the contract shall be deemed to remain a party for the duration of the contract, as if it had not been terminated.

4. No claim shall be submitted to arbitration under paragraph 2 if:

- (a) less than six months have elapsed from the events giving rise to the claim; and
- (b) more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under paragraph 2 and knowledge that the claimant (for claims brought under paragraph 2(a)) or the enterprise (for claims brought under paragraph 2(b)) has incurred loss or damage.<sup>32</sup>

5. For greater certainty, the Annex Parties may agree to modify or eliminate this Annex.

6. For the purposes of this Annex:

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<sup>31</sup> For greater certainty, in order for a claim to be submitted to arbitration under subparagraph (b), an investor of the Party of the claimant must own or control the enterprise on the date of the alleged breach and the date on which the claim is submitted to arbitration.

<sup>32</sup> For greater certainty, Article 14.D.5.1(a)-(c) does not apply to claims under paragraph 2.

- (a) “covered government contract” means a written agreement between a national authority of an Annex Party and a covered investment or investor of the other Annex Party, on which the covered investment or investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor in a covered sector;
- (b) “covered sector” means:
  - (i) activities with respect to oil and natural gas that a national authority of an Annex Party controls, such as exploration, extraction, refining, transportation, distribution, or sale,
  - (ii) the supply of power generation services to the public on behalf of an Annex Party,
  - (iii) the supply of telecommunications services to the public on behalf of an Annex Party,
  - (iv) the supply of transportation services to the public on behalf of an Annex Party, or
  - (v) the ownership or management of roads, railways, bridges, or canals that are not for the exclusive or predominant use and benefit of the government of an Annex Party;
- (c) “national authority” means an authority at the central level of government;<sup>33</sup> and
- (d) “written agreement” means an agreement in writing, negotiated, and executed by two or more parties, whether in a single instrument or in multiple instruments.<sup>34</sup>

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<sup>33</sup> For greater certainty, an authority at the central level of government includes any person, including a state enterprise or another body, when it exercises governmental authority delegated to it by an authority at the central level of government.

<sup>34</sup> For greater certainty, (a) a unilateral act of an administrative or judicial authority, such as a permit, license, certificate, approval, or similar instrument issued by an Annex Party in its regulatory capacity, or a subsidy or grant, or a decree, order or judgment, standing alone; and (b) an administrative or judicial consent decree or order, shall not be considered a written agreement.