

not impose restrictions on any capital transactions inconsistently with its obligations under this Chapter regarding such transactions, except under Article 9.16, or at request of the Fund.

### *Article 9.16*

#### Balance- Of- Payments Exception

1. Where a Party is in serious balance of payments and external financial difficulties or threat thereof, it may, in accordance with Articles XI and XII of GATS adopt or maintain restrictions on trade in services on which it has obligations, including on payments or transfers for transactions related to such commitments. Articles XI and XII of GATS is hereby incorporated into and made part of this Agreement.
2. The Party introducing a measure under this Article shall promptly notify the other Party.

## **CHAPTER 10: INVESTMENT**

### Section A – Definitions

#### *Article 10.1*

#### Definitions

For the purposes of this Chapter:

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

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

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

**investment** means every kind of asset that an investor owns or controls, directly or indirectly, and that has the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gains or profits or the assumption of risk<sup>10-1</sup>. Forms that an investment may take include, but are not limited to<sup>10-2</sup>:

- (a) an enterprise;

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<sup>10-1</sup> For clarification, **investment** does not mean,

- (a) claims to money that arise solely from:
  - (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of the other Party,
  - (ii) the extension of credit in connection with a commercial transaction, such as trade financing, and
- (b) an order entered in a judicial or administrative action and do not involve the kinds of interests set out in subparagraphs (a) to (h).

<sup>10-2</sup> For the purpose of this Chapter, “loans and other debt instruments” described in paragraph (c) and “claims to money and claims to any performance under contract” described in paragraph (f) of Article 10.1 refer to assets which relate to a business activity and do not refer to assets which are of a personal nature, unrelated to any business activity.

- (b) shares, stocks, and other forms of equity participation in an enterprise, including rights derived therefrom;
- (c) bonds, debentures, loans and other debt instruments of an enterprise, including rights derived therefrom;
- (d) futures, options, and other derivatives;
- (e) rights under contracts, including turnkey, construction, management, production, concession or revenue-sharing contracts;
- (f) claims to money and claims to any performance under contract having an economic value;
- (g) intellectual property rights and goodwill;
- (h) rights conferred pursuant to domestic laws and regulations or contracts such as concessions, licences, authorisations and permits; and
- (i) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens and pledges.

**investment of an investor of a Party** means an investment owned or controlled, directly or indirectly, by an investor of such a Party;

**investor of a Party** means a Party or a national or an enterprise of a Party that is seeking to make, is making, or has made, investments in the territory of the other Party;

**investor of a non-Party** means an investor other than an investor of a Party;

**transfers** means transfers and international payments;

**TRIMs Agreement** means the Agreement on Trade-Related Investment Measures, which is part of the WTO Agreement; and

**UNCITRAL Arbitration Rules** means the arbitration rules of the United Nations Commission on International Trade Law, approved by the United Nations General Assembly on December 15, 1976.

## **Section B - Investment**

### *Article 10.2*

#### **Scope And Coverage**

1. This Chapter applies to measures adopted or maintained by a Party relating to:
  - (a) investors of the other Party;
  - (b) investments of investors of the other Party in the territory of a Party; and

- (c) with respect to Articles 10.7<sup>10-3</sup> and 10.18, all the investments in the territory of the Party.

2. This Chapter applies to the existing investments at the date of the entry into force of this Agreement, as well as to the investments made or acquired after this date.

3. For the purposes of this Chapter, measures adopted or maintained by a Party mean measures adopted or maintained by central or local governments and authorities or by non-governmental bodies in the exercise of any regulatory, administrative or other governmental authority delegated by central or local governments and authorities.

4. This Chapter does not apply to claims arising out of events which occurred, or claims which had been raised, prior to the entry into force of this Agreement.

5. This Chapter does not apply to services supplied in the exercise of governmental authority (such as law enforcement, correctional services, income security or insurance, social security<sup>10-4</sup> or insurance, social welfare, public education, public training, health, and child care), provided that such services are supplied neither on a commercial basis, nor in competition with one or more service suppliers.

### *Article 10.3*

#### Relation To Other Chapters

1. In the event of any inconsistency between this Chapter and another Chapter in this Agreement, the other Chapter shall prevail to the extent of the inconsistency.

2. The requirement by a Party that a service provider of the other Party post a bond or other form of financial security as a condition of providing a service into its territory does not of itself make this Chapter applicable to the provision of that cross-border service. This Chapter applies to that Party's treatment of the posted bond or financial security.

3. This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter 12 (Financial Services) unless specified otherwise therein.

### *Article 10.4*

#### National Treatment

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

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

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<sup>10-3</sup> This provision will be applied only when the investment of the investor of the Party suffers loss through the imposition of performance requirements to an investment of investor of a non-Party.

<sup>10-4</sup> For the purpose of Article 10.11, both Parties agree that social security, public retirement or compulsory savings schemes run by the government, such as the Central Provident Fund of Singapore, fall within the scope of "services supplied in the exercise of governmental authority".

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

#### *Article 10.5*

##### Minimum Standard Of Treatment

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

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

- (a) The obligation to provide "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings.
- (b) The obligation to provide "full protection and security" requires each Party to provide the level of police protection required under customary international law.
- (c) The "customary international law minimum standard of treatment of aliens" refers to all customary international law principles that protect the economic rights and interests of aliens.

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 10.6*

##### Access To The Judicial And Administrative Procedures

Each Party shall within its territory accord to investors of the other Party treatment no less favourable than the treatment which it accords in like circumstances to its own investors, with respect to access to its courts of justice and administrative tribunals and agencies in all degrees of jurisdiction both in pursuit and in defence of such investors' rights.

#### *Article 10.7*

##### Performance Requirements

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

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

- (c) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
- (d) to purchase, use or accord a preference to services provided in its territory, or to purchase services from persons in its territory;
- (e) to relate the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
- (f) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales to the volume or value of its exports or foreign exchange earnings;
- (g) to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition law or to act in a manner not inconsistent with other provisions of this Agreement; or
- (h) to supply exclusively from the territory of the Party the goods that it produces or the services that it supplies to a specific regional market or to the world market.

2. The provisions of paragraph 1 do not preclude either Party from conditioning the receipt or continued receipt of an advantage, in connection with investment and business activities in its territory of an investor of the other Party or of a non-Party, on compliance with any of the requirements set forth in paragraphs 1 (d), (g) and (h).

3. Nothing in paragraph 1 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

4. 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, nothing in paragraphs 1(b), (c) or (d) shall be construed to prevent a Party from adopting or maintaining measures, including environmental measures:

- (a) necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;
- (b) necessary to protect human, animal or plant life or health; or
- (c) necessary for the conservation of living or non-living exhaustible natural resources.

5. Nothing in this Article shall be construed so as to derogate from the rights and obligations of the Parties under the TRIMs Agreement.

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

#### *Article 10.8*

#### Senior Management And Boards Of Directors

1. Neither Party may require that an enterprise of that Party that is an investment of an investor of the other Party appoint to senior management positions individuals of any particular nationality.

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

#### *Article 10.9*

##### Non-Conforming Measures

1. Articles 10.4, 10.7, and 10.8 shall not apply to:

- (a) any existing non-conforming measure that is maintained by a Party as set out in its Schedule to Annex 9A;
- (b) the continuation or prompt renewal of any non-conforming measure referred to in paragraph (a); or
- (c) an amendment to any non-conforming measure referred to in paragraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 10.4, 10.7, and 10.8.

2. Articles 10.4, 10.7 and 10.8 shall not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors or activities, as set out in its Schedule to Annex 9B.

3. Neither Party shall, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to Annex 9B, require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

4. Articles 10.4 and 10.8 shall not apply to:

- (a) government procurement by a Party; or
- (b) subsidies or grants provided by a Party, or to any conditions attached to the receipt or continued receipt of such subsidies or grants, whether or not such subsidies or grants are offered exclusively to investors of the Party or investments of investors of the Party, including government-supported loans, guarantees and insurance.

5. Nothing in this Chapter shall be construed so as to derogate from rights and obligations under international agreements in respect of protection of intellectual property rights to which both Parties are party, including the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights and other treaties concluded under the auspices of the World Intellectual Property Organization.

#### *Article 10.10*

##### Future Liberalisation

1. If a Party makes any further liberalisation of the remaining restrictions scheduled in conformity with Article 10.9 by an agreement with a non-Party, it shall afford adequate opportunity to the other Party to negotiate treatment granted therein on a mutually advantageous basis and with a view to securing an overall balance of rights and obligations.

2. Through the review mechanism pursuant to Article 22.1, the Parties will engage in further liberalisation with a view to reaching the reduction or elimination of the remaining restrictions scheduled in conformity with paragraphs 1 and 2 of Article 10.9 on a mutually advantageous basis and securing an overall balance of rights and obligations.

#### *Article 10.11*

##### Transfers

1. Each Party shall permit all transfers relating to an investment of an investor of the other Party to be made freely and without delay into and out of its territory. Such transfers include:

- (a) the initial capital and additional amounts to maintain or increase an investment;
- (b) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance and other fees, returns in kind and other amounts derived from the investment;
- (c) proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;
- (d) payments made under a contract entered into by the investor, or its investment, including payments made pursuant to a loan agreement;
- (e) payments made pursuant to Articles 10.13 and 10.14; and
- (f) payments arising under Section C.

2. Each Party shall permit transfers prescribed in paragraph 1 to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer.

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

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

#### *Article 10.12*

##### Safeguards

1. A Party may, subject to paragraph 2, adopt or maintain measures inconsistent with its obligation provided for in Article 10.4 relating to cross-border capital transactions or Article 10.11:

- (a) in the event of serious balance of payments or external financial difficulties or threat thereof; or
  - (b) where, in exceptional circumstances, payments and capital movements between the Parties cause or threaten to cause serious difficulties for the operation of monetary policy or exchange rate policy in either Party.
- 2. The measures referred to in paragraph 1:
  - (a) shall be consistent with the Articles of Agreement of the International Monetary Fund;
  - (b) shall not exceed those necessary to deal with the circumstances described in paragraph 1;
  - (c) shall be temporary and phased out progressively as the situation improves;
  - (d) shall promptly be notified to the other Party;
  - (e) shall avoid unnecessary damage to the commercial, economic and financial interests of the other Party;
  - (f) shall be applied on a national treatment basis; and
  - (g) shall ensure that the other Party is treated as favourably as any non-Party.
- 3. Measures adopted or maintained pursuant to paragraph 1(b) shall not exceed a period of six (6) months and may be extended through their formal reintroduction. In addition, a Party adopting such measures or any changes shall commence consultations with the other Party in order to review the restrictions adopted by it.
- 4. Nothing in this Chapter shall be regarded as affecting the rights enjoyed and obligations undertaken by a Party as a party to the Articles of Agreement of the International Monetary Fund.

*Article 10.13*

Expropriation And Compensation

- 1. Neither Party may, directly or indirectly, nationalise or expropriate an investment of an investor of the other Party in its territory, except:
  - (a) for a public purpose;
  - (b) on a non-discriminatory basis;
  - (c) in accordance with due process of law and Article 10.6; and
  - (d) on payment of compensation in accordance with paragraphs 2, 3 and 4.
- 2. Compensation shall:
  - (a) be paid without delay and be fully realisable;

- (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"); and
  - (c) not reflect any change in value occurring because the intended expropriation had become known earlier.
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 – 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. Notwithstanding paragraphs 1, 2, 3 and 4, any measure of expropriation relating to land, which shall be as defined in the existing domestic legislation of the expropriating Party on the date of entry into force of this Agreement, shall be, for a purpose and upon payment of compensation, in accordance with the aforesaid legislation and any subsequent amendments thereto relating to the amount of compensation where such amendments follow the general trends in the market value of the land<sup>10-5</sup>.
6. This Article does not apply to the issuance of compulsory licences 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 such issuance, revocation, limitation, or creation is consistent with Chapter 17 (Intellectual Property Rights).

#### *Article 10.14*

#### Losses And Compensation

1. Investors of a Party whose investments suffer losses owing to war or other armed conflict, a state of national emergency, revolt, insurrection, riot or other similar situations, and such losses as ones resulting from requisition or destruction of property, which was not caused in combat action or was not required by the necessity of the situation, in the territory of the other Party, shall be accorded by the other Party, treatment, as regards restitution, indemnification, compensation or other forms of settlement, no less favourable than that which the other Party accords to its own investors or to investors of any non-Party, whichever is more favourable to the investors concerned.
2. Paragraph 1 does not apply to existing measures relating to subsidies or grants, or to any conditions attached to the receipt or continued receipt of such subsidies or grants, whether or not such subsidies or grants are offered exclusively to investors of the Party or investments of investors of the Party, including government-supported loans, guarantees and insurance, that would be inconsistent with Article 10.4 but for paragraph 4(b) of Article 10.9.

#### *Article 10.15*

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<sup>10-5</sup> Article 10.13 is to be interpreted in accordance with and is subjected to the letter exchange on expropriation.

### Subrogation

1. Where a Party or an agency authorised by that Party has granted a contract of insurance or any form of financial guarantee against non-commercial risks with regard to an investment by one of its investors in the territory of the other Party and when payment has been made under this contract or financial guarantee by the former Party or the agency authorised by it, the latter Party shall recognise the rights of the former Party or the agency authorised by the Party by virtue of the principle of subrogation to the rights of the investor.
2. Where a Party or the agency authorised by the Party has made a payment to its investor and has taken over rights and claims of the investor, that investor shall not, unless authorised to act on behalf of the Party or the agency authorised by the Party, making the payment, pursue those rights and claims against the other Party.
3. Articles 10.11, 10.13 and 10.14 shall apply *mutatis mutandis* as regards payment to be made to the Party or the agency prescribed in paragraphs 1 and 2 by virtue of such recognition of rights and claims, and the transfer of such payment.

### *Article 10.16*

#### Special Formalities And Information Requirements

1. Nothing in Article 10.4 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with the establishment of investments by investors of the other Party, such as the requirement that investments be legally constituted under the laws or regulations of the Party, provided that such formalities are consistent with this Chapter and do not materially impair the protections pursuant to this Chapter afforded by a Party to investors of the other Party and investments of investors of the other Party .
2. Notwithstanding Article 10.4, a Party may require an investor of the other Party, or an investment of the investor in its territory, to provide routine information concerning that investment solely for informational or statistical purposes. The Party shall protect such business information that is confidential from any disclosure that would prejudice the competitive position of the investor or the 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 10.17*

#### Denial Of Benefits

Subject to prior notification and consultation in accordance with Articles 19.3 and 20.4, a Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if investors of a non-Party own or control the enterprise and the enterprise has no substantive business operations in the territory of the other Party under whose law it is constituted or organised.

### *Article 10.18*

#### Environmental Measures

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 concerns.

### **Section C - Settlement Of Disputes Between A Party And An Investor Of The Other Party**

#### *Article 10. 19*

#### **Settlement Of Disputes Between A Party And An Investor Of The Other Party**

1. This Article shall apply to disputes between a Party and an investor of the other Party concerning an alleged breach of an obligation of the former under this Chapter which causes loss or damage to the investor or its investment and establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal.
2. The parties to the dispute shall initially seek to resolve the dispute by consultations and negotiations.
3. If the dispute cannot be resolved as provided for under paragraph 2 within six (6) months from the date of a request for consultations and negotiations, and if the investor concerned has not submitted the investment dispute for resolution (a) before the courts or administrative tribunals of the disputing Party (excluding proceedings for interim measures of protection referred to in paragraph 5), or (b) in accordance with any previously agreed dispute settlement procedures, the investor concerned may submit the dispute for settlement to:
  - (a) the International Centre for Settlement of Investment Disputes (ICSID), if both Parties are parties to the ICSID Convention;
  - (b) arbitration under UNCITRAL Arbitration Rules; or
  - (c) any other arbitral institution or in accordance with any other arbitral rules, if the parties to the dispute so agree.
4. Each Party hereby consents to the submission of a dispute to arbitration under paragraphs 3(a) and 3(b) in accordance with the provisions of this Article, conditional upon:
  - (a) the submission of the dispute to such arbitration taking place within three (3) years of the time at which the disputing investor became aware, or should reasonably have become aware, of a breach of an obligation under this Chapter and, of the loss or damage incurred by the disputing investor or its investment;
  - (b) the disputing investor not being an enterprise of the disputing Party until the disputing investor refers the dispute for arbitration pursuant to paragraph 3; and
  - (c) the disputing investor providing written notice, which shall be delivered at least ninety (90) days before the claim to arbitration is submitted, to the disputing Party of its intent to submit the dispute to such arbitration and which:
    - (i) nominates one (1) of the fora in paragraph 3(a), (b) or (c) as the forum for dispute settlement;

- (ii) briefly summarises the alleged breach of the disputing Party under this Chapter (including the articles alleged to have been breached) and the loss or damage allegedly caused to the investor or its investment.

5. Neither Party shall prevent the disputing investor from seeking interim measures of protection, not involving the payment of damages or resolution of the substance of the matter in dispute before the courts or administrative tribunals of the disputing Party, prior to the institution of proceedings before any of the dispute settlement fora referred to in paragraph 3, for the preservation of its rights and interests.

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

## CHAPTER 11: TELECOMMUNICATIONS

### *Article 11.1*

#### Definitions

For the purposes of this Chapter:

**cost-oriented** means based on cost, and may include a reasonable profit, and may involve different cost methodologies for different facilities or services;

**end-user** means a final consumer of or subscriber to a public telecommunications service, including a service supplier but excluding a supplier of public telecommunications transport network or services;

**essential facilities** means facilities of a public telecommunications transport network or service that:

- (a) are exclusively or predominantly provided by a single or limited number of suppliers; and
- (b) cannot feasibly be economically or technically substituted in order to provide a service;

**facilities-based suppliers** means suppliers of public telecommunications transport networks or services that are:

- (a) for Korea, telecommunications carriers provided for in Article 5 of the Telecommunications Business Act; and
- (b) for Singapore, Facilities-Based Operators;