

CHAPTER 9 INVESTMENT

Section A: Investment

ARTICLE 9.1: DEFINITIONS

For the purposes of this Chapter:

- (a) **covered investment** means, with respect to a Party, an investment in its territory of an investor of the other Party in existence at the date of entry into force of this Agreement or established, acquired, or expanded thereafter and which, where applicable, has been admitted by the host Party, subject to its relevant laws, regulations and policies;
- (b) **enterprise** means any entity constituted or organised under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organisation; and a branch of an enterprise;
- (c) **enterprise of a Party** means an enterprise constituted or organised in accordance with the laws of a Party, and a branch located in the territory of a Party and carrying out business activities there;
- (d) **investment** means every kind of asset that an investor owns or controls, directly or indirectly, which has the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that investments may take include:
 - (i) an enterprise and a branch of an enterprise;
 - (ii) shares, stocks or other forms of equity participation in an enterprise, including rights derived therefrom;
 - (iii) bonds, debentures, loans and other forms of debt, including rights derived therefrom;
 - (iv) rights under contracts, including turnkey, construction, management, production or revenue sharing contracts;
 - (v) claims to money and claims to any performance under a contract associated with an investment and having a financial value;

- (vi) intellectual property rights;
- (vii) rights conferred pursuant to laws and regulations or contracts such as concessions, licenses, authorisations and permits; and
- (viii) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges;

Note: Investments also include the amounts yielded by investments that are reinvested, in particular, profit, interest, capital gains, dividends, royalties and fees. A change in the form in which assets are invested does not affect their character as investments.

- (e) **investor of a Party** means a Party, a natural person of a Party, or an enterprise of a Party, that seeks to make, is making or has made a covered investment;

ARTICLE 9.2: SCOPE

1. This Chapter shall apply to measures adopted or maintained by a Party relating to:
 - (a) investors of the other Party; and
 - (b) covered investments.
2. This Chapter shall not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter 8 (Trade in Services) or Chapter 10 (Movement of Natural Persons).
3. This Chapter shall not apply to:
 - (a) government procurement; or
 - (b) subsidies or grants provided by a Party, including government-supported loans, guarantees and insurance.
4. For greater certainty, this Chapter shall not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.

ARTICLE 9.3: NATIONAL TREATMENT

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

ARTICLE 9.4: MOST-FAVOURED-NATION TREATMENT²

1. Each Party shall accord to investors of the other Party, and covered investments, in relation to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory, treatment no less favourable than that it accords, in like circumstances, to investors and investments in its territory of investors of any non-Party.
2. For greater certainty, the treatment referred to in this Article does not encompass Investor-State Dispute Settlement procedures or mechanisms.
3. Notwithstanding paragraph 1, each Party reserves the right to adopt or maintain any measure that accords more favourable treatment to investors of non-parties in accordance with any bilateral or multilateral international agreement in force prior to the date of entry into force of this Agreement.³

¹ For greater certainty, the concept of 'expansion' in Article 3 means the expansion of an existing investment and does not include the establishment or acquisition of a new, separate investment.

² For the purposes of this Article, the term "non-party" shall not include the following WTO members within the meaning of the General Agreement on Tariffs and Trade and the WTO Agreement: 1) Hong Kong, China; 2) Macao, China; and 3) Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei).

³ For greater certainty, this right extends to any differential treatment accorded pursuant to a subsequent review or amendment of the relevant bilateral or multilateral international agreement.

4. Notwithstanding paragraph 1, each Party reserves the right to adopt or maintain any measure that accords more favourable treatment to investors of non-parties in accordance with any bilateral or multilateral international agreement in force on, or signed after, the date of entry into force of this Agreement involving:

- (a) aviation;
- (b) fisheries; or
- (c) maritime matters, including salvage.

ARTICLE 9.5: NON-CONFORMING MEASURES⁴

1. For Australia, Article 9.3 and Article 9.4 shall not apply to:

- (a) any existing non-conforming measure that is maintained on the date of entry into force of this Agreement:
 - (i) at the central level of government, as set out by Australia in Section A of its Schedule of Non-Conforming Measures in Annex III;
 - (ii) by a State or Territory of Australia, as set out by Australia in Section A of its Schedule of Non-Conforming Measures in Annex III; or
 - (iii) at a local level of Australian government;
- (b) the continuation of any non-conforming measure referred to in subparagraph (a); or
- (c) an amendment or modification to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment or modification does not decrease the conformity of the measure, as it existed immediately before the amendment, with Article 9.3 and Article 9.4.

2. For China, Article 9.3 and Article 9.4 shall not apply to:

⁴ Until the entry into force of China's investment commitments in the comprehensive Investment Chapter negotiated pursuant to Article 9.9, China's commitments under Article 9.4 shall apply subject to any non-conforming measures scheduled by China against the most-favoured-nation (MFN) obligation in any negative list investment agreement with a non-party, *mutatis mutandis*. Until the entry into force of the comprehensive Investment Chapter negotiated pursuant to Article 9.9, and subject to the scope of this Chapter, if China concludes more than one such agreement with a non-party, the schedule of non-conforming measures against MFN most favourable to Australian investors and investments shall apply *mutatis mutandis*.

- (a) any existing non-conforming measures maintained within its territory;
- (b) the continuation 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 increase the non-conformity of the measure, as it existed immediately before the amendment, with Article 9.3 and Article 9.4.

3. Article 9.3 and Article 9.4 shall not apply to any measure that Australia adopts or maintains with respect to sectors, sub-sectors, or activities, as set out in Section B of its Schedule of Non-Conforming Measures in Annex III.

4. The Parties shall endeavour to progressively remove the non-conforming measures.

ARTICLE 9.6: DENIAL OF BENEFITS

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

- (a) owned or controlled either by persons of a non-party or of the denying Party; and
- (b) that has no substantive business operations in the territory of the other Party.

2. A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of the 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 its investments.

ARTICLE 9.7: COMMITTEE ON INVESTMENT

1. The Parties hereby establish a Committee on Investment that shall meet on the request of either Party or the FTA Joint Commission to consider any matter arising under this Chapter.

2. The Committee's functions shall include:

- (a) reviewing the implementation of this Chapter;

- (b) identifying and recommending measures or initiatives to promote and increase investment flows between the Parties; and
 - (c) unless the Parties otherwise agree, conducting the review referred to in Article 9.9.
3. The Committee:
- (a) shall establish and maintain a list of arbitrators pursuant to Article 9.15.5 and Article 9.15.6;
 - (b) may, pursuant to Article 9.18.2 or Article 9.19, adopt a joint decision of the Parties, declaring their interpretation of a provision of this Chapter and Annex 9-A;
 - (c) may propose amendments to Section B in the light of experience of its operation.

ARTICLE 9.8: GENERAL EXCEPTIONS

1. For the purposes of this Chapter and subject to the requirement that such measures are not applied in a manner which would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures:

- (a) necessary to protect human, animal or plant life or health;
- (b) necessary to ensure compliance with laws and regulations that are not inconsistent with this Agreement;
- (c) imposed for the protection of national treasures of artistic, historic or archaeological value; or
- (d) relating to the conservation of living or non-living exhaustible natural resources.

2. The Parties understand that the measures referred to in subparagraph 1(a) include environmental measures to protect human, animal or plant life or health, and that the measures referred to in subparagraph 1(d) include environmental measures relating to the conservation of living or non-living exhaustible natural resources.

ARTICLE 9.9: FUTURE WORK PROGRAM

1. Unless the Parties otherwise agree, the Parties shall conduct a review of the investment legal framework between them no later than three years after the date of entry into force of this Agreement.

2. The review shall include consideration of this Chapter and the *Agreement between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments*.

3. Unless the Parties otherwise agree, the Parties shall commence negotiations on a comprehensive Investment Chapter, reflecting outcomes of the review referred to in paragraphs 1 and 2, immediately after such review is completed. The negotiations shall include, but are not limited to, the following:

- (a) amendments to Articles included in this Chapter;
- (b) the inclusion of additional Articles in this Chapter, including Articles addressing:
 - (i) Minimum Standard of Treatment;
 - (ii) Expropriation;
 - (iii) Transfers;
 - (iv) Performance Requirements;
 - (v) Senior Management and Board of Directors;
 - (vi) Investment-specific State to State Dispute Settlement; and
 - (vii) The application of investment protections and ISDS to services supplied through commercial presence; and
- (c) scheduling of investment commitments by China on a negative list basis.

4. Unless the Parties otherwise agree, the negotiations referred to in paragraph 3 shall be concluded and then incorporated into this Agreement in accordance with Article 17.3 (Amendments) of Chapter 17 (Final Provisions).

Section B: Investor-State Dispute Settlement

ARTICLE 9.10: DEFINITIONS

For the purposes of this Chapter:

- (a) **claimant** means an investor of a Party that is a party to an investment dispute with the other Party;
- (b) **disputing parties** means the claimant and the respondent;
- (c) **disputing Party** means a Party against which a claim is made under Section B (Investor-State Dispute Settlement);
- (d) **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*;
- (e) **ICSID Convention** means the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington, 18 March 1965*;
- (f) **non-disputing Party** means the Party that is not a party to an investment dispute;
- (g) **protected information** means confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law;
- (h) **respondent** means the Party that is a party to an investment dispute;
- (i) **Secretary-General** means the Secretary-General of ICSID; and
- (j) **UNCITRAL Arbitration Rules** means the arbitration rules of the United Nations Commission on International Trade Law.

ARTICLE 9.11: CONSULTATIONS

1. In the event of an investment dispute, after two months since the occurrence of the measure or event giving rise to the dispute, the claimant may deliver to the respondent a written request for consultations. The request shall:

- (a) specify the name and address of the claimant and, where a claim is submitted on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, the name, address, and place of incorporation of the enterprise;

- (b) for each claim, identify the provision of this Chapter alleged to have been breached and any other relevant provisions;
- (c) for each claim, identify the measures or events giving rise to the claim;
- (d) for each claim, indicate whether the claim is made on its own behalf or on behalf of the enterprise;
- (e) for each claim, provide a brief summary of the legal and factual basis sufficient to present the problem clearly; and
- (f) specify the relief sought, the approximate amount of damages claimed and its standard or basis for calculation.

2. After a request for consultations is made in accordance with this Section, the claimant and the respondent shall initially seek to resolve the dispute through consultations.

3. If the disputing parties reach a mutually agreed solution to a dispute, or certain claims thereof, formally raised under this Section, they shall abide by and comply with the mutually agreed solution reached under this Article without delay.

4. Measures of a Party that are non-discriminatory and for the legitimate public welfare objectives of public health, safety, the environment, public morals or public order shall not be the subject of a claim under this Section.

5. The respondent may, within 30 days of the date on which it receives a request for consultations (as provided for in paragraph 1), state that it considers that a measure alleged to be in breach of an obligation under Section A is of the kind described in paragraph 4, by delivering to the claimant and to the non-disputing Party a notice specifying the basis for its position (a 'public welfare notice').

6. The issuance of a public welfare notice shall trigger a 90 day period during which the respondent and the non-disputing Party shall consult. The dispute resolution procedure contemplated by this Section shall be automatically suspended for this 90 day period.

7. The issuance of a public welfare notice is without prejudice to the respondent's

right to invoke the procedures described in Article 9.16.5 or Article 9.16.6. The respondent shall promptly inform the claimant, and make available to the public, the outcome of any consultations.

8. In any proceeding brought pursuant to this Section, the tribunal shall not draw any adverse inference from the non-issuance of a public welfare notice by the respondent, or from the absence of any decision between the respondent and the non-disputing Party as to whether a measure is of a kind described in paragraph 4.

ARTICLE 9.12: SUBMISSION OF A CLAIM TO ARBITRATION

1. This Section applies where there is a dispute between a Party and an investor of the other Party relating to a covered investment made in accordance with the Party's laws, regulations and investment policies.⁵

2. In the event that an investment dispute cannot be settled by consultations under Article 9.11 within 120 days after the date of receipt of the request for consultations,

(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim:

- (i) that the respondent has breached an obligation in Article 9.3; and
- (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach;⁶ or

(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 Section a claim:

- (i) that the respondent has breached an obligation under Article 9.3; and
- (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

3. A claimant cannot submit or continue to pursue a claim under this Section where the investment of the claimant in the territory of the respondent is owned or controlled indirectly by an investor of a non-party, and the investor of the non-party submits or has

⁵ For greater certainty, the State to State Dispute Settlement mechanism in Chapter 15 (Dispute Settlement) of this Agreement applies to this Chapter including pre-establishment obligations under Article 9.3.

⁶ For greater certainty, the loss or damage incurred by the claimant that forms the subject matter of a claim under sub-paragraph (a) shall not include loss or damage suffered by the claimant which is a result of loss or damage caused to an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly by reason of, or arising out of, the alleged breach by the respondent.

submitted a claim with respect to the same measure or event under any agreement between the respondent and that non-party.

4. A claimant may submit a claim referred to in paragraph 2:

- (a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention;
- (b) under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention;
- (c) under the UNCITRAL Arbitration Rules, except as modified by this Agreement and the Side Letter on Transparency Rules Applicable to ISDS; or
- (d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules.

5. Where a claim is submitted to arbitration under paragraph 4(b), (c) and (d) (except where a claim is submitted to any other arbitration institution under paragraph 4(d)), the disputing parties and the tribunal constituted thereunder shall request ICSID to provide administrative services for the arbitration proceedings. Both Parties shall endeavour to make proper institutional arrangements with ICSID to accommodate such requests following the entry into force of this Agreement.

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

- (a) referred to in paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General;
- (b) referred to in Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General;
- (c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 20 of the UNCITRAL Arbitration Rules, are received by the respondent; or
- (d) referred to under any arbitral institution or arbitral rules selected under paragraph 4(d) is received by the respondent,

provided that no claim shall be deemed submitted under this Section if that claim is asserted by the claimant for the first time after such notice of arbitration is submitted.

7. A notice of arbitration shall:

- (a) specify the name and address of the claimant and, where a claim is submitted on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, the name, address, and place of incorporation of the enterprise;
- (b) for each claim, identify the provision of this Chapter alleged to have been breached and any other relevant provisions;
- (c) for each claim, identify the measure or event giving rise to the claim;
- (d) for each claim, indicate whether the claim is made on the claimant's own behalf or on behalf of an enterprise;
- (e) for each claim, provide a brief summary of the legal and factual basis sufficient to present the problem clearly; and
- (f) specify the relief sought, the approximate amount of damages claimed and its standard or basis for calculation.

8. 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.

9. The arbitration rules applicable under paragraph 4, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Agreement and the Side Letter on Transparency Rules Applicable to ISDS.

ARTICLE 9.13: CONSENT OF EACH PARTY TO ARBITRATION

1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement. Failure to meet any of the conditions and limitations provided for in Article 9.12.4 shall nullify that consent.

2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall satisfy the requirements of 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.

ARTICLE 9.14: CONDITIONS AND LIMITATIONS ON CONSENT OF EACH PARTY

1. No claim may be submitted to arbitration under this Section if 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 Article 9.12.2 and knowledge that the claimant (for claims brought under Article 9.12.2(a)) or the enterprise (for claims brought under Article 9.12.2(b)) has incurred loss or damage. In no event may a claim be submitted to arbitration under this Section after four years since the occurrence of the measures and/or events giving rise to the breach alleged under Article 9.12.2.

2. No claim may be submitted to arbitration under this Section unless:

- (a) the claimant has complied with the rules and procedures set forth in Articles 9.12.1 and 9.12.2;
- (b) the claim has been explicitly included in the request for consultations submitted by the claimant in accordance with Article 9.11.1;
- (c) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and,
- (d) the notice of arbitration is accompanied,
 - (i) for claims submitted to arbitration under Article 9.12.2(a), by the claimant's written waiver, and
 - (ii) for claims submitted to arbitration under Article 9.12.2(b), by the claimant's and the enterprise's written waivers, and written waiver by all persons through which the claimant owns or controls the enterprise,

of any right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceeding with respect to any measure or event alleged to constitute a breach referred to in Article 9.12.2.

3. Notwithstanding paragraph 2(d)(ii), a waiver from the enterprise shall not be required only if the respondent has deprived the claimant of its control of the enterprise and the claimant is unable to provide such a waiver as a result.

4. Notwithstanding paragraph 2(d), the claimant (for claims brought under Article 9.12.2(a)) and the claimant or the enterprise (for claims brought under Article 9.12.2(b)) may, in accordance with the laws of the respondent, 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.

ARTICLE 9.15: CONSTITUTION OF THE TRIBUNAL

1. Unless the disputing parties have agreed to appoint a sole arbitrator, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the chairperson, appointed by agreement of the disputing parties.

2. The Secretary-General shall serve as appointing authority for an arbitration under this Section.

3. If the disputing parties agree to appoint a sole arbitrator, the disputing parties shall seek to agree on the sole arbitrator. If they fail to do so within 90 days of the day on which the respondent gave its agreement to submit the dispute to a sole arbitrator, the sole arbitrator shall be drawn by the appointing authority on the request of a disputing party from the list of chairpersons established pursuant to paragraph 5 below.

4. If a tribunal has not been constituted within 90 days from the date that a claim is submitted to arbitration under this Section, the appointing authority, on the request of a disputing party, shall appoint, in his or her discretion, the remaining arbitrators from the list established pursuant to paragraph 5 below.

5. The Committee on Investment shall, no later than 2 years after the entry into force of this Agreement, establish a list of individuals who are willing and able to serve as arbitrators. The Committee on Investment shall ensure that at all times the list includes at least 20 individuals.

6. For purpose of the list referred to in paragraph 5, each Party shall select at least five individuals to serve as arbitrators. The Parties shall also jointly select at least 10 individuals who are not nationals of either Party to act as chairperson of the tribunals.

7. In the event that the Secretary-General is required to appoint an arbitrator or arbitrators under paragraph 3 or 4, and the list referred to in paragraph 5 has not been established, the Secretary-General shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed. The Secretary-General shall not appoint a national of either Party as the presiding arbitrator unless the disputing parties otherwise agree.

8. All arbitrators appointed pursuant to this Section shall have expertise or experience in public international law, international trade or international investment rules, or the resolution of disputes arising under international trade or international investment agreements. They shall be independent, serve in their individual capacities and not take instructions from any organisation or government with regard to matters related to the dispute, or be affiliated with the government of either Party or any disputing party, and shall comply with Annex 9-A. Arbitrators who serve on the list established pursuant to paragraph 5 shall not, for that reason alone, be deemed to be affiliated with the

government of either Party.

9. For 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 9.12.2(a) may submit a claim to arbitration under this Section, 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 9.12.2(b) may submit a claim to arbitration under this Section, 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.

ARTICLE 9.16: CONDUCT OF THE ARBITRATION

1. The disputing parties may agree on the legal place of any arbitration under the arbitral rules applicable under Article 9.12.4. If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with the applicable arbitral rules.

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

3. With the written agreement of the disputing parties, the tribunal may allow a party or entity that is not a disputing party to file a written *amicus curiae* submission with the tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the tribunal shall consider, among other things, the extent to which:

- (a) the *amicus curiae* submission would assist the tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge, or insight that is different from that of the disputing parties;
- (b) the *amicus curiae* submission would address a matter within the scope of the dispute; and
- (c) the *amicus curiae* has a significant interest in the proceeding.

4. Each submission in accordance with paragraph 3 of this Article 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 ensure that the *amicus curiae* submission does not disrupt the proceeding or unduly burden or unfairly prejudice either disputing party, and that the disputing parties are given an opportunity to present their observations on the *amicus curiae* submission.

5. Without prejudice to a tribunal's authority to address other objections as a preliminary question, 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 favour of the claimant may be made under Article 9.12.

- (a) Such objection 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.
- (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, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 20 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 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 6.

6. 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 5 and any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), 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.

7. When it decides a respondent's objection under paragraph 5 or 6, the tribunal 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.

8. A respondent may not assert as a defence, counterclaim, right of set-off, or for any other reason that the claimant or the enterprise referred to in Article 9.12.2(b) has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an indemnity, guarantee or insurance contract.

ARTICLE 9.17: TRANSPARENCY OF ARBITRAL PROCEEDINGS

1. Subject to paragraphs 3, 4 and 5, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Party:

- (a) the request for consultations;
- (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 9.21;
- (d) minutes or transcripts of hearings of the tribunal, where available; and
- (e) orders, awards, and decisions of the tribunal.

2. Subject to paragraphs 3, 4 and 5, the respondent:

- (a) shall make the documents referred to in paragraph 1 (a), (b) and (e) available to the public;
- (b) may make the documents referred to in paragraph 1(c) and (d) available to the public;
- (c) may make any written submissions submitted pursuant to Article 9.16.2 available to the public provided that prior consent is obtained from the non-disputing Party.

3. With the agreement of the respondent, the tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal

shall make appropriate arrangements to protect the information from disclosure.

4. Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 16.1 (Disclosure and Confidentiality of Information) or Article 16.3 (Security Exceptions) of Chapter 16 (General Provisions and Exceptions).

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

- (a) Neither the disputing parties nor the tribunal shall disclose to the non-disputing Party or to the public any protected information where 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 at the time it is submitted to the tribunal;
- (c) A disputing party shall, within 7 days after it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version may be provided to the non-disputing Party and made public in accordance with paragraphs 1 and 2.

ARTICLE 9.18: GOVERNING LAW

1. Subject to paragraphs 2 and 3, when a claim is submitted under Article 9.12, the tribunal shall decide the issues in dispute in accordance with this Agreement as interpreted in accordance with customary rules of treaty interpretation of public international law, as codified in the *Vienna Convention on the Law of Treaties* done at Vienna on 23 May 1969. Where relevant and appropriate, the tribunal shall also take into consideration the law of the respondent.

2. A joint decision of the Parties, acting through the Committee on Investment, declaring their interpretation of a provision of this Agreement shall be binding on a tribunal of any ongoing or subsequent dispute, and any decision or award issued by such a tribunal must be consistent with that joint decision.

3. A decision between the respondent and the non-disputing Party that a measure is of the kind described in Article 9.11.4 shall be binding on a tribunal and any decision or award issued by a tribunal must be consistent with that decision.

ARTICLE 9.19: INTERPRETATION OF ANNEXES

1. Where a respondent asserts as a defence that the measure alleged to be a breach is within the scope of an entry set out in Section A or B of its Schedule of Non-Conforming Measures in Annex III, the tribunal shall, on request of the respondent, request the interpretation of the Parties on the issue. The Parties shall submit in writing any joint decision declaring their interpretation to the tribunal within 90 days of delivery of the tribunal's request.

2. A joint decision issued under paragraph 1 by the Parties, acting through the Committee on Investment, shall be binding on the tribunal, and any decision or award issued by the tribunal must be consistent with that joint decision. If the Parties fail to issue such a decision within 90 days, the tribunal shall decide the issue. In such a case, the tribunal shall draw no inference from the fact that the Parties fail to issue such a decision.

3. A joint decision issued under paragraph 1 by the Parties shall also be binding on the tribunal of any dispute subsequent to the date of the joint decision to the extent applicable and not modified by another joint decision issued pursuant to paragraph 1 subsequent to the first said joint decision.

ARTICLE 9.20: EXPERT REPORTS

Without prejudice to the appointment of other kinds of experts where authorised by the applicable arbitration rules, a tribunal, at the 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 environmental, health, safety, or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

ARTICLE 9.21: CONSOLIDATION

1. Where two or more claims have been submitted separately to arbitration under Article 9.12.2 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 11.

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 30 days after 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 otherwise agree, 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 from the list of chairpersons established pursuant to Article 9.15.5.

5. If, within 60 days after 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 the request of any disputing party sought to be covered by the order, shall appoint the arbitrator or arbitrators not yet appointed from the list of arbitrations established pursuant to Article 9.15.5.

6. In the event that the Secretary-General is required to appoint an arbitrator or arbitrators under paragraph 4 or 5, and the list referred to in Article 9.15.5 has not been established, the Secretary-General shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed. The Secretary-General shall not appoint a national of either Party as the presiding arbitrator unless the disputing parties otherwise agree.

7. Where a tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration under Article 9.12.2 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 9.15 to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that

- (i) that tribunal, at the request of any claimant 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), 5 and 6; and
- (ii) that tribunal shall decide whether any prior hearing shall be repeated.

8. Where a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration under Article 9.12.2 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 7, and shall specify in the request:

- (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.

9. A tribunal established under this Article shall conduct its proceedings in accordance with the UNCITRAL Arbitration Rules, except as modified by this Agreement and the Side Letter on Transparency Rules Applicable to ISDS.

10. A tribunal established under Article 9.15 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.

11. On application of a disputing party, a tribunal established under this Article, pending its decision under paragraph 7, may order that the proceedings of a tribunal established under Article 9.15 be stayed, unless the latter tribunal has already adjourned its proceedings.

ARTICLE 9.22: AWARDS

1. Where a tribunal makes an award against a respondent, 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.

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

3. Subject to paragraph 1, where a claim is submitted to arbitration under Article 9.12.2(b):

- (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 in the relief under applicable laws and regulations provided that such relief does not grant or result in duplicated remedies to any person in light of the award rendered.

4. A tribunal may not award punitive damages.

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

6. Subject to paragraph 7, a disputing party shall abide by and comply with an award without delay.

7. A disputing party may not seek enforcement of an 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 an award made under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or the rules selected pursuant to Article 9.12.4(d),
 - (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.

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

ARTICLE 9.23: APPELLATE REVIEW

Within three years after the date of entry into force of this Agreement, the Parties shall commence negotiations with a view to establishing an appellate mechanism to review awards rendered under Article 9.22 in arbitrations commenced after any such appellate mechanism is established. Any such appellate mechanism would hear appeals on questions of law.

ARTICLE 9.24: ANNEXES AND FOOTNOTES

The Annexes and footnotes shall form an integral part of this Agreement.

ARTICLE 9.25: SERVICE OF DOCUMENTS

Delivery of notice and other documents on a Party shall be made to the place named for that Party in Annex 9-B.

ANNEX 9-A
CODE OF CONDUCT

Responsibilities to the Process

1. Every arbitrator shall avoid impropriety and the appearance of impropriety, shall be independent and impartial, shall avoid direct and indirect conflicts of interests and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement process are preserved. Former arbitrators shall comply with the obligations established in paragraphs 16, 17, 18 and 19.

Disclosure Obligations

2. Prior to confirmation of his or her selection as an arbitrator under this Agreement, a candidate shall disclose any interest, relationship or matter that is likely to affect his or her independence or impartiality or that might reasonably create an appearance of impropriety or bias in the proceeding. To this end, a candidate shall make all reasonable efforts to become aware of any such interests, relationships and matters.

3. Once selected, an arbitrator shall continue to make all reasonable efforts to become aware of any interests, relationships and matters referred to in paragraph 2 and shall disclose them by communicating them in writing to the disputing parties. The obligation to disclose is a continuing duty, which requires an arbitrator to disclose any such interests, relationships and matters that may arise during any stage of the proceeding.

Performance of Duties by Arbitrators

4. An arbitrator shall comply with the provisions of this Chapter and the applicable rules of procedure.

5. On selection, an arbitrator shall perform his or her duties thoroughly and expeditiously throughout the course of the proceeding with fairness and diligence.

6. An arbitrator shall not deny other arbitrators the opportunity to participate in all aspects of the proceeding.

7. An arbitrator shall consider only those issues raised in the proceeding and necessary to rendering a decision and shall not delegate the duty to decide to any other person.

8. An arbitrator shall take all appropriate steps to ensure that the arbitrator's assistant and staff are aware of, and comply with, paragraphs 1, 2, 3, 18, 19 and 20.

9. An arbitrator shall not engage in *ex parte* contacts concerning the proceeding.

10. An arbitrator shall not communicate matters concerning actual or potential violations by another arbitrator unless the communication is to both disputing parties or is necessary

to ascertain whether that arbitrator has violated or may violate this Annex.

Independence and Impartiality of Arbitrators

11. An arbitrator shall be independent and impartial. An arbitrator shall act in a fair manner and shall avoid creating an appearance of impropriety or bias.

12. An arbitrator shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a Party or a disputing party or fear of criticism.

13. An arbitrator shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere, or appear to interfere, with the proper performance of the arbitrator's duties.

14. An arbitrator shall not use his or her position on the arbitral tribunal to advance any personal or private interests. An arbitrator shall avoid actions that may create the impression that others are in a special position to influence the arbitrator. An arbitrator shall make every effort to prevent or discourage others from representing themselves as being in such a position.

15. An arbitrator shall not allow past or existing financial, business, professional, family or social relationships or responsibilities to influence the arbitrator's conduct or judgment.

16. An arbitrator shall avoid entering into any relationship, or acquiring any financial interest, that is likely to affect the arbitrator's impartiality or that might reasonably create an appearance of impropriety or bias.

Duties in Certain Situations

17. An arbitrator or former arbitrator shall avoid actions that may create the appearance that the arbitrator was biased in carrying out the arbitrator's duties or would benefit from the decision or award of the arbitral tribunal.

Maintenance of Confidentiality

18. An arbitrator or former arbitrator shall not at any time disclose or use any non-public information concerning the proceeding or acquired during the proceeding except for the purposes of the proceeding and shall not, in any case, disclose or use any such information to gain personal advantage or advantage for others or to affect adversely the interest of others.

19. An arbitrator shall not disclose an arbitral tribunal award or parts thereof prior to its publication.

20. An arbitrator or former arbitrator shall not at any time disclose the deliberations of an arbitral tribunal, or any arbitrator's view, except as required by legal or constitutional

requirements.

Definitions

21. For the purposes of this Annex:

assistant means a person who, under the terms of appointment of an arbitrator, conducts research or provides support for the arbitrator;

arbitrator means a member of an arbitral tribunal established under Section B of this Chapter;

proceeding, unless otherwise specified, means the proceeding of an arbitral tribunal under Section B of this Chapter; and

staff, in respect of an arbitrator, means persons under the direction and control of the arbitrator, other than assistants.

ANNEX 9-B
SERVICE OF DOCUMENTS ON A PARTY UNDER SECTION B

Australia

Notices and other documents in disputes under Section B shall be served on Australia by delivery to:

Department of Foreign Affairs and Trade
RG Casey Building
John McEwen Crescent
Barton ACT 0221 Australia

China

Notices and other documents in disputes under Section B shall be served on China by delivery to:

Ministry of Commerce
NO.2 Dongchangan Street, Dongcheng District
Beijing, China, 100731