

# AGREEMENT BETWEEN AUSTRALIA AND THE ORIENTAL REPUBLIC OF URUGUAY ON THE PROMOTION AND PROTECTION OF INVESTMENTS

Australia and the Oriental Republic of Uruguay, hereinafter "the Parties"

RECOGNISING the importance of promoting the flow of capital for economic activity and development and aware of its role in expanding economic relations and technical co-operation between them, particularly with respect to investment by investors of one Party in the territory of the other Party;

CONSIDERING that investment relations should be promoted and economic co-operation strengthened in accordance with the internationally accepted principles of mutual respect for sovereignty, equality, mutual benefit, non-discrimination and mutual confidence;

ACKNOWLEDGING that investments of investors of one Party in the territory of the other Party would be made within the framework of the laws of that other Party;

RECOGNISING that pursuit of these objectives would be facilitated by a clear statement of principles relating to the protection of investments, combined with rules designed to render more effective the application of these principles within the territories of the Parties, and

RECOGNISING their inherent right to regulate and resolving to preserve the flexibility of the Parties to set legislative and regulatory priorities, safeguard public welfare, and protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals,

HAVE AGREED as follows:

## Article 1. Definitions

1. For the purposes of this Agreement:

(a) "investment" means every kind of asset, owned or controlled by an investor of one Party, made in the territory of the other Party, subject to its laws and regulations, and investment policies applicable from time to time, 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. Forms that an investment may take include:

(i) Tangible and intangible property, including rights such as mortgages, liens and other pledges,

(ii) Shares, stocks, bonds and debentures and any other form of participation in a company but does not include a sovereign debt, regardless of original maturity, of a Party or a debt of a state enterprise,

(iii) A loan or other claim to money or a claim to performance having economic value,

(iv) Intellectual property rights, including rights with respect to copyright, patents, trademarks, trade names, industrial designs, trade secrets, know-how and goodwill, and

(v) Business concessions and any other rights required to conduct economic activity and having economic value conferred by law or under a contract, including rights to engage in agriculture, forestry, fisheries and animal husbandry, to search for, extract or exploit natural resources and to manufacture, use and sell products,

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

(b) "return" means an amount yielded by or derived from an investment, including profits, dividends, interest, capital gains, royalty payments, management or technical assistance fees, payments in connection with intellectual property rights, and all other lawful income;

(c) "investor of a Party" means a natural person of a Party or a company of a Party who has made an investment in the territory of the other Party;

(d) "company of a Party" means any corporation, association, partnership, trust or other legally recognised entity that is duly incorporated, constituted, set up, or otherwise duly organised under the law of a Party, regardless of whether or not it is organised for pecuniary gain, privately or otherwise owned, or organised with limited or unlimited liability, and carrying out substantial business activities in the territory of that Party;

(e) For the purposes of this Agreement, a company is:

(i) "owned" by an investor if more than fifty percent of the equity interest in it is beneficially owned by the investor; and

(ii) "controlled" by an investor if the investor has the power to name a majority of its directors or otherwise to legally direct its actions;

(f) "natural person of a Party" means a citizen or a person enjoying the status of permanent resident under the law of that Party;

(g) "freely convertible currency" means a convertible currency as classified by the International Monetary Fund or any currency that is widely traded in international foreign exchange markets;

(h) "territory" means:

(i) With respect to Australia, the territory of Australia:

(1) Excluding all external territories other than the Territory of Norfolk Island, the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands, the Territory of Ashmore and Cartier Islands, the Territory of Heard Island and McDonald Islands, and the Coral Sea Islands Territory; and

(2) Including Australia's air space, territorial sea, contiguous zone, exclusive economic zone and continental shelf over which Australia exercises sovereign rights or jurisdiction in accordance with international law;

(ii) With respect to the Oriental Republic of Uruguay, the territory of the Oriental Republic of Uruguay, including land territory, internal waters, territorial sea including their seabed and subsoil and air space over them under its sovereignty, and the exclusive economic zone and the continental shelf with respect to which the Oriental Republic of Uruguay exercises sovereign rights or jurisdiction, in accordance with international law and its domestic laws and regulations.

2. For the purposes of paragraph 1(a) of this Article, returns that are invested shall be treated as investments and any alteration of the form in which assets are invested or reinvested shall not affect their character as investments.

## **Article 2. Application of Agreement**

1. This Agreement shall apply to investments whenever made but shall not apply to disputes which have arisen prior to the entry into force of this Agreement.

2. A natural person who is a citizen of both Parties shall be deemed to be exclusively a national of the Party of his or her dominant and effective nationality.

3. This Agreement shall not apply to a permanent resident of one Party where:

(a) The provisions of an investment protection agreement between the other Party and a non-Party of which that person is a citizen have already been invoked in respect of the same matter; or

(b) The permanent resident is a citizen of the other Party.

## **Article 3. Promotion of Investments**

1. Each Party shall encourage and promote investments in its territory by investors of the other Party.

2. This Agreement shall not prevent an investor of one Party from taking advantage of the provisions of any law or policy of the other Party which are more favourable than the provisions of this Agreement.

## **Article 4. 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 of aliens, 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 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 obligation 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 investment as a result.
5. For greater certainty, the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute a breach of this Article, even if there is loss or damage to the investment as a result.

## **Article 5. Most Favoured Nation Treatment**

1. Each Party shall at all times treat investments in its own territory on a basis no less favourable than that accorded, in like circumstances (1), to investments of investors of any non-Party, provided that a Party shall not be obliged to extend to investments any treatment, preference or privilege resulting from:
  - (a) Any customs union, economic union, free trade area or regional economic integration agreement to which the Party belongs;
  - (b) The provisions of a double taxation agreement with a non-Party;
  - (c) Any measure that a Party adopts or maintains with respect to government procurement; or
  - (d) Subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.
2. For greater certainty, the treatment referred to in this Article does not encompass international dispute resolution procedures or mechanisms, such as those included in Article 14.
  - (1) For greater certainty, whether treatment is accorded in "like circumstances" under Article 5 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 6. Transparency of Laws**

Each Party shall, with a view to promoting the understanding of its laws, regulations and investment policies that pertain to or affect investments in its territory by investors of the other Party, make such laws public and readily accessible.

## **Article 7. Expropriation**

1. Neither Party shall nationalise, expropriate or subject to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") the investments of investors of the other Party unless the following conditions are complied with:
  - (a) The expropriation is for a public purpose;
  - (b) Under due process of law;
  - (c) The expropriation is non-discriminatory; and

(d) The expropriation is accompanied by the payment of prompt, adequate and effective compensation.

2. The compensation referred to in paragraph 1(d) of this Article shall be computed on the basis of the market value of the investment immediately before the expropriation or impending expropriation became public knowledge. Where that value cannot be readily ascertained, the compensation shall be determined in accordance with generally recognised principles of valuation and equitable principles taking into account the capital invested, depreciation, capital already repatriated, replacement value, currency exchange rate movements and other relevant factors.

3. The compensation shall be paid without undue delay, shall include interest at a commercially reasonable rate from the date the measures were taken to the date of payment and shall be freely transferable between the territories of the Parties.

4. For greater certainty, the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute a breach of this Article, even if there is loss or damage to the investment as a result.

5. This Article shall not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the Agreement on Trade-Related Aspects of Intellectual Property Rights, in Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, done at Marrakesh on April 15, 1994 ("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 the TRIPS Agreement. (3)

Footnote (2) This Article shall be interpreted in accordance with Annex B (Expropriation).

Footnote (3) For greater certainty, the Parties recognise that, for the purposes of this Article, the term "revocation" of intellectual property rights includes the cancellation or nullification of those rights, and the term "limitation" of intellectual property rights includes exceptions to those rights.

## **Article 8. Compensation for Losses**

When a Party adopts any measures relating to losses in respect of investments in its territory by investors of any non-Party owing to war or other armed conflict, revolution, a state of national emergency, civil disturbance or other similar events, the treatment accorded to investors of the other Party as regards restitution, indemnification, compensation or other settlement shall be no less favourable than that which the first Party accords to investors of any non-Party.

## **Article 9. Transfers**

1. Each Party shall, when requested by an investor of the other Party permit all funds of that investor related to an investment in its territory to be transferred freely and without unreasonable delay. Such funds include the following:

- (a) The initial capital plus any additional capital used to maintain or expand the investment;
- (b) Returns;
- (c) Proceeds from the sale or partial sale or liquidation of the investment;
- (d) Payments made pursuant to a loan agreement or for the losses referred to in Article 8; and
- (e) Unspent earnings and other remuneration of personnel engaged from abroad in connection with that investment.

2. Transfers shall be permitted in freely convertible currency. Unless otherwise agreed by the investor and the Party concerned, transfers shall be made at the market rate of exchange prevailing at the time of transfer.

3. Notwithstanding paragraphs 1 and 2, a Party may prevent or delay a transfer through the equitable, non-discriminatory and good faith application of its laws and regulations applicable from time to time 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) Criminal or penal offences;
- (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.

4. A Party may adopt or maintain measures inconsistent with paragraphs 1 and 2:

(a) In the event of serious balance-of-payments and external financial difficulties or threat thereof; or

(b) In cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies.

5. Any measures adopted or maintained under paragraph 4 shall:

(a) Be applied such that the other Party is treated no less favourably than any non-Party;

(b) Be consistent with the Articles of Agreement of the International Monetary Fund;

(c) Not exceed those necessary to deal with the circumstances set out in paragraph 4;

(d) Be temporary and be phased out progressively as the situation specified in paragraph 4 improves;

(e) Be promptly notified to the other Party; and

(f) Avoid unnecessary damage to the commercial, economic and financial interests of the other Party.

6. The Party which has adopted any measures under paragraph 4 shall promptly respond to any questions from the other Party in relation to those measures.

## **Article 10. Subrogation**

1. If a Party or an agency of a Party makes a payment to an investor of that Party under a guarantee, a contract of insurance or other form of indemnity it has granted in respect of an investment, the other Party shall recognise the subrogation or transfer of any right or title in respect of such investment. The subrogated or transferred right or claim shall not be greater than the original right or claim of the investor.

2. Where a Party or an agency of a Party has made a payment to an investor of that Party and has taken over rights and claims of the investor, that investor shall not, unless authorised to act on behalf of the Party or the agency of the Party making the payment, pursue those rights and claims against the other Party.

## **Article 11. Denial of Benefits**

1. (a) A Party may at any time deny the benefits of this Agreement to an investor of the other Party that is a company of that other Party and to investments of that investor if the company:

(i) Is owned or controlled by a natural person or company of a non-Party or of the denying Party; and

(ii) Has no substantial business activities in the territory of the other Party.

(b) A Party may at any time deny the benefits of this Agreement to an investor of the other Party that is a company of that other Party and to investments of that investor if natural persons or companies of a non-Party own or control the company and the denying Party adopts or maintains measures with respect to the non-Party or a natural person or company of the non-Party that prohibit transactions with the company or that would be violated or circumvented if the benefits of this Agreement were accorded to the company or to its investments.

## **Article 12. Consultations between the Parties**

The Parties shall consult at the request of either of them on matters concerning the interpretation or application of this Agreement.

## **Article 13. Settlement of Disputes between the Parties**

1. The Parties shall endeavour to resolve any dispute between them connected with this Agreement by prompt and friendly consultations and negotiations.

2. If a dispute is not resolved by such means within six months of one Party seeking in writing such negotiations or consultations, it shall be submitted at the request of either Party to an Arbitral Tribunal established in accordance with the provisions of Annex A of this Agreement or, by agreement, to any other international tribunal.

## **Article 14. Settlement of Disputes between a Party and an Investor of the other Party**

1. For the purposes of this Article:

- (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 the claimant or the respondent;
- (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 the 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, March 18, 1965;
- (f) "New York Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958;
- (g) "respondent" means the Party that is a party to an investment dispute;
- (h) "UNCITRAL Arbitration Rules" means the arbitration rules of the United Nations Commission on International Trade Law.

2. This Article shall apply to disputes between a respondent and a claimant concerning an alleged breach of an obligation of the former under this Agreement which causes loss or damage to the claimant or its investment (referred to hereafter as an "investment dispute").

3. In the event of an investment dispute, the disputing parties shall initially seek to resolve the dispute by consultations and negotiations.

4. If the investment dispute in question has not been resolved within six months of the request for consultations and negotiations, the claimant may submit a claim, where alleged:

- (a) That the respondent has breached an obligation under this Agreement; and
- (b) That the claimant has incurred loss or damage by reason of, or arising out of, that breach.

5. A claimant may submit a claim referred to in paragraph 2 under one of the following alternatives:

- (a) To a competent court of the Party in whose territory the investment is made, provided such a court has jurisdiction over such claims under the law of that Party; or
- (b) The ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both Parties are parties to the ICSID Convention; or
- (c) The ICSID Additional Facility Rules, provided that either Party is a party to the ICSID Convention; or
- (d) The UNCITRAL Arbitration Rules; or
- (e) By agreement, to any other arbitral institution or any other arbitration rules.

Once the claimant has submitted an investment dispute to one of the forums referred to in paragraph 5, the election of the forum shall be definitive and the claimant may not submit thereafter the same claim to any other forum.

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

7. The disputing parties may agree on the legal place of any arbitration under the arbitration rules applicable under paragraph 5. 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 party to the New York Convention.

8. A claimant may not submit a claim alleging a breach of, or otherwise invoking, Article 5 (Most favoured nation treatment) on the basis that another international agreement contains more favourable rights or obligations. For greater certainty, this shall not prevent a claim challenging measures of a Party, including measures taken pursuant to another international agreement, on the basis that those measures breach Article 5 and have resulted in loss or damage to the claimant.

9. At least 90 days before submitting any claim to arbitration under this Article, the claimant shall deliver to the respondent a written notice of its intention to submit a claim to arbitration. This notice of arbitration shall specify:

- (a) The name and address of the claimant and, if relevant, place of incorporation of the claimant;
- (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.

10. No claim shall be submitted to arbitration under this Article if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the alleged breach.

11. No claim shall be submitted to arbitration under this Article unless:

- (a) The claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and
- (b) The claimant has provided a written waiver of any right to initiate or continue before any court or administrative tribunal under the law of a Party, or any other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach of this Agreement.

12. Once an action referred to in paragraph 5 of this Article has been taken, neither Party shall pursue the dispute through diplomatic channels unless:

- (a) The relevant judicial or administrative body, the Secretary-General of ICSID ("Secretary-General"), the arbitral authority or tribunal or the conciliation commission, as the case may be, has decided that it has no jurisdiction in relation to the dispute in question; or
- (b) The respondent has failed to abide by or comply with any judgment, award, order or other determination made by the body in question.

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

14. 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.

15. The Secretary-General shall serve as appointing authority for an arbitration under this Agreement. If a tribunal has not been constituted within a period of 75 days after the date that a claim is submitted to arbitration, the Secretary-General, on the request of a disputing party, shall appoint, in his or her discretion, after consulting with the disputing parties, 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 agree otherwise.

16. All arbitrators appointed pursuant to this Article 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 C (Code of Conduct).

17. In case any arbitrator appointed as provided in this Article shall resign or become unable to act, a successor arbitrator shall be appointed in the same manner as prescribed for the appointment of the original arbitrator and the successor shall have all the powers and duties of the original arbitrator.

18. In the event that the respondent requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an 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.

19. Any dispute referred to arbitration under this Article shall be conducted in accordance with the UNCITRAL Rules on

Transparency in Treaty-based Investor-State Arbitration of 1 April 2014.

20. Subject to paragraph 22, when a claim is submitted under this Article, the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

21. An award shall be final and binding and shall be enforced in the territory of each Party in accordance with its law.

22. A decision of the Parties on the interpretation of a provision of this Agreement shall be binding on a tribunal established under this Article, and any decision or award issued by a tribunal must be consistent with that decision.

23. 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.

For greater certainty, a tribunal shall not award punitive damages.

## **Article 15. General and Security Exceptions**

1. Subject to the requirement that such measures are not applied by a Party in a manner which would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international investment, nothing in this Agreement shall be construed so as to prevent a Party from adopting or enforcing measures:

(a) Necessary to protect human, animal or plant life or health;

(b) Necessary to protect public morals or to maintain public order;

(c) Necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement;

(d) Imposed for the protection of national treasures of artistic, historic or archaeological value; or

(e) Relating to the conservation of living or non-living exhaustible natural resources.

2. Nothing in this Agreement shall be construed to:

(a) Require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or

(b) Preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

## **Article 16. Taxation Exception**

1. Except as provided in this Article, nothing in this Agreement shall apply to taxation measures.

2. Article 7 (Expropriation) shall apply to taxation measures. However, no investor may invoke Article 7 as the basis for a claim if it has been determined pursuant to this paragraph that the measure is not an expropriation. An investor that seeks to invoke Article 7 with respect to a taxation measure must first refer to the competent authorities of the Party of the investor and the respondent Party, at the time that it gives its notice of arbitration under Article 14.9, the issue of whether that taxation measure is not an expropriation. If the competent authorities do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation within a period of six months of the referral, the investor may submit its claim to arbitration under Article 14.

## **Article 17. Entry Into Force, Duration and Termination**

1. This Agreement shall enter into force thirty days after the date of the latter notification through diplomatic channels by which either Party notifies the other Party that its domestic requirements for the entry into force of this Agreement have been fulfilled. It shall remain in force for a period of fifteen years and thereafter shall remain in force indefinitely, unless terminated in accordance with paragraph 3 of this Article.

2. This Agreement may be amended by written agreement between the Parties. Any amendments shall enter into force



thirty days after the date of the latter notification through diplomatic channels that each Party has fulfilled its domestic requirements for the entry into force, or such other date as the Parties may agree.

3. Either Party may terminate this Agreement at any time after it has been in force for fifteen years by giving one year's written notice to the other Party.

4. Notwithstanding termination of this Agreement pursuant to paragraph 3 of this Article, the Agreement shall continue to be effective for a further period of fifteen years from the date of its termination in respect of investments made before the date of termination of this Agreement.

5. The Parties agree that the "Agreement between Australia and Uruguay on the Promotion and Protection of Investments", signed at Punta del Este on 3 September 2001 (hereafter the "IPPA"), will terminate on the date of entry into force of this Agreement.

6. For greater certainty, the agreement of the Parties to terminate the IPPA in paragraph 5 shall, on the date of entry into force of this Agreement, supersede the provisions for termination contained in Article 15 (Entry into force, duration and termination) of the IPPA.

IN WITNESS WHEREOF the undersigned, being duly authorised, have signed this Agreement.

DONE in duplicate at Canberra on this 5th day of April two thousand and nineteen, in the English and Spanish languages, both texts being equally authentic.

FOR AUSTRALIA

FOR THE ORIENTAL REPUBLIC OF URUGUAY

1. The Arbitral Tribunal referred to in paragraph 2 of Article 13 shall consist of three persons appointed as follows:

(a) Each Party shall appoint one arbitrator;

(b) The arbitrators appointed by the Parties shall, within thirty days of the appointment of the second of them, by agreement, select a third arbitrator who shall be a citizen or permanent resident of a non-Party which has diplomatic relations with both Parties;

(c) The Parties shall, within thirty days of the selection of the third arbitrator, approve the selection of that arbitrator who shall act as Chair of the Tribunal.

2. Arbitration proceedings shall be instituted upon notice of arbitration being given through diplomatic channels by the Party instituting such proceedings to the other Party. Such notice of arbitration shall:

(a) Specify for each claim, the provision of this Agreement alleged to have been breached and any other relevant provisions;

(b) Specify the legal and factual basis for each claim;

(c) Specify the relief sought; and

(d) Contain the name of the arbitrator appointed by the Party instituting such proceedings.

Within sixty days after the giving of such notice of arbitration the respondent Party shall notify the Party instituting proceedings of the name of the arbitrator appointed by the respondent Party.

3. If, within the time limits provided for in paragraph 1(b), paragraph 1(c) and paragraph 2 of this Annex, the required appointment has not been made or the required approval has not been given, either Party may request the President of the International Court of Justice to make the necessary appointment. If the President is a citizen or permanent resident of either Party or is otherwise unable to act, the Vice-President shall be invited to make the appointment. If the Vice-President is a citizen or permanent resident of either Party or is unable to act, the Member of the International Court of Justice next in seniority who is not a citizen or permanent resident of either Party shall be invited to make the appointment.

4. In case any arbitrator appointed as provided for in this Annex shall resign or become unable to act, a successor arbitrator shall be appointed in the same manner as prescribed for the appointment of the original arbitrator and the successor shall

have all the powers and duties of the original arbitrator.

5. The Arbitral Tribunal shall convene at such time and place as shall be fixed by the Chair of the Tribunal. Thereafter, the Arbitral Tribunal shall determine where and when it shall sit. The Arbitration shall be held in a party to the New York Convention.

6. The Arbitral Tribunal shall decide all questions relating to its competence and shall, subject to any agreement between the Parties, determine its own procedure.

7. Before the Arbitral Tribunal makes a decision, it may at any stage of the proceedings propose to the Parties that the dispute be settled amicably. The Arbitral Tribunal shall reach its award by majority vote taking into account the provisions of this Agreement, the international agreements both Parties have concluded and the generally recognised principles of international law.

8. Each Party shall bear the costs of its appointed arbitrator. The costs of the Chair of the Tribunal and other expenses associated with the conduct of the arbitration shall be borne in equal parts by both Parties. The Arbitral Tribunal may decide, however, that a higher proportion of costs shall be borne by one of the Parties.

9. The Arbitral Tribunal shall afford to the Parties a fair hearing. It may render an award on the default of a Party. Any award shall be rendered in writing and shall state its legal basis. A signed counterpart of the award shall be transmitted to each Party.

10. An award shall be final and binding on the Parties.

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 or property interest in an investment.

2. Article 7 addresses two situations. The first is direct expropriation, in which an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure.

3. The second situation addressed by Article 7 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; and

(iii) The character of the government action.

(b) Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, (4) safety and the environment, do not constitute indirect expropriations.

(4) For greater certainty and without limiting the scope of this subparagraph, regulatory actions to protect public health include, among others, such measures with respect to the regulation, pricing and supply of, and reimbursement for, pharmaceuticals (including biological products), diagnostics, vaccines, medical devices, gene therapies and technologies, health-related aids and appliances and blood and blood-related products.

#### 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 17, 18, 19 and 20.

#### 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 for their consideration. 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 Agreement 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 render 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 of this Annex unless the communication is to both disputing parties or is necessary to ascertain whether an 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 law.

## 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 Article 14 of this Agreement;

"proceeding", unless otherwise specified, means the proceeding of an arbitral tribunal under Article 14 of this Agreement; and

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