

## RCEP DRAFT INVESTMENT TEXT INDIA

(based on Draft Investment Text October 2015)

### Article XX SCOPE

1. This Chapter applies/shall apply to measures adopted or maintained by a Party relating to:

(a) investors of another Party;

(b) covered investments;

2. This Chapter/Section A [shall apply to/means] measures [adopted or maintained] by:

(a) the central government

3. This Chapter shall not apply to:

- i. any measure by a State government or a local government of a Party;
- ii. government procurement by a Party;
- iii. subsidies or grants provided by a Party
- iv. financial assistance or measures taken by the Host State in favour of its investors and their investments in pursuit of legitimate public purpose including the protection of health, safety, the environment;
- v. services supplied in the exercise of governmental authority by the relevant body or authority of a Party. For the purposes of this Chapter/Agreement, a service supplied in the exercise of governmental authority means any service, which is supplied not on a commercial basis nor in competition with one or more service suppliers; and
- vi. any law or measure regarding taxation including measures taken to enforce taxation obligations, except under Article 15 (Transfers). For greater certainty, it is clarified that where a Party, in which the investment is made, decides that conduct alleged to be a breach of its obligations under this Agreement is a subject matter of taxation, such decision of that Party, whether before or after the commencement of arbitral proceedings shall be non-justiciable and it shall not be open to any arbitration tribunal to review such decision.
- vii. the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the international obligations of Parties under the WTO Agreement.<sup>1</sup>

This Chapter do/does not bind any/either/a Party in relation to any act or fact or any measure that existed before the date of entry into force of this Agreement or subsequent modifications thereto.

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<sup>1</sup> WGI 10: Some RPCs have concerns on In's broad carve-out under the sub-para (i) and asked In to reconsider. JP asked some RPCs to reconsider the broad carve-out of GP under the Scope Article and to consider carving-out in the NCMs instead.

- 2.1.3 Nothing in this Chapter shall be interpreted to restrict the rights of a Party to formulate, modify, amend, apply or revoke its laws, regulations and policies. Each Party retains the right to exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters, including discretion regarding allocation of resources and establishment of penalties.
- 2.1.4 This Chapter shall not apply to claims arising out of events which occurred, or claims which have been raised prior to the entry into force of this Agreement.
- 2.1.6 This Chapter does not impose any obligations on a Party other than that which are explicitly set forth herein. For avoidance of doubt, a Party retain its rights to supplement, modify or amend this Chapter and its operation at any time in accordance with Articles 30 (Consultations and Periodic Review).
- 2.1.7 For the purpose of liberalisation and subject to Articles 6 and 19, this Chapter shall apply to the following sectors:
- i. manufacturing;
  - ii. agriculture;
  - iii. fishery;
  - iv. forestry; and
  - v. mining and quarrying.

This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by the RCEP Trade in Services Chapter. Notwithstanding [Article 2.2.1] for the purpose of protection, Article XX (Treatment of Investment), Article XX (Expropriation and Compensation), Article XX (Compensation for Losses/in cases of Strife), Article XX (Subrogation), Article XX (Transfers), and XX (Investment Disputes Between a Party and an Investor)/(Settlement of Disputes between and Investor and a Party) shall apply, *mutatis mutandis*, to any measure affecting the supply of service by a service supplier of a Party through commercial presence in the territory of any other Party pursuant to the RCEP Trade in Services Chapter but only to the extent that they relate to a covered investment and an obligation regardless of whether such a service sector is scheduled in a/the Parties'/Party's schedule of specific services commitments made under the RCEP Trade in Services Chapter.<sup>23</sup>

### 2.3 Relation to other Agreements:

- 2.3.1 Any inconsistency, or question regarding the relationship between this Chapter and another bilateral agreement between the Parties, or a regional/multilateral agreement to which both Parties are members, shall be resolved in accordance with the Vienna Convention on the Law of Treaties.<sup>4</sup>

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<sup>2</sup> For greater certainty, paragraph 2.2.2. does not preclude a Party from applying Article 8 (Pre-establishment Denial of Benefits) and Article 18 (Post-establishment Denial of Benefits) to such service supplier in its territory.

<sup>3</sup> WGI 10: Other RPCs are considering a similar text and are still reviewing what protection elements and obligations should be covered.

<sup>4</sup> WGI 10: to consider placing under the General Provisions of the Agreement.

## **Article XX DEFINITIONS**

For purposes of this Chapter:

**covered investment** means, with respect to a Party, an investment in [its] [the] territory of an investor of another Party, which is in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter, and has been admitted, according to its laws, regulations and national policies, at that time.

**Enterprise** means any legal entity constituted, organised and operated in compliance with the law of a Party whether for profit, and whether privately {?}, including any company, corporation, limited liability partnership, or a joint venture, association or similar organisation, a branch of any such entity established in the territory of a Party in accordance with its law and carrying out business activities there.

**Juridical person:** For the purposes of this definition, a “juridical person” means:

- a legal entity that is constituted, organised and operated under the law of that Party and that has substantial business activities in the territory of that Party; or
- a legal entity that is constituted, organised and operated under the laws of that Party and that is directly or indirectly owned or controlled by a natural person of that Party or by a legal entity mentioned under sub-clause (a) herein;<sup>5</sup>

**Host State:** ‘Host State’ means the Party where the investment is located.

**Home State:** ‘Home State’ means the Party of which the Investor is a national or a juridical person.

**Investment** means an enterprise constituted, organised and operated in good faith by an investor in accordance with the law of a Party in whose territory the investment is made, taken together with the assets of the enterprise {?} has the characteristics of an investment, such {?} the commitment of capital or other resources, certain duration, the expectation of gain/s or profit/s, or the assumption of risk and a significance for the development of the Host State. An enterprise may possess the following assets:

(ii) shares, stocks, and/or other forms of equity instruments of the juridical person/an enterprise

ii. a debt instrument or security of another enterprise;

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<sup>5</sup> IN to reconsider “legal”, “under applicable”, “trust”, “limited liability”, sole proprietorship.

iii. a loan to another enterprise

- where the enterprise is an affiliate of the investor, or
- where the original maturity of the loan is at least three years;

(d) turnkey, construction, management, production, revenue-sharing contracts;

Copyrights, know-how and intellectual property rights, such as patents, trademarks, industrial designs and trade names, to the extent they are recognized under the law of the Host State; and<sup>6</sup>

iv. claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the Host State to an enterprise in the territory of another Party;

(vi) rights conferred by contract, such as those to cultivate, extract or exploit natural resources in accordance with the law of the Host State, or

(g) rights conferred in accordance with the law<sup>14</sup> of the Host State and<sup>7</sup> movable and/or immovable property, and related/other rights.

viii. any other interests of the enterprise which involve substantial economic activity and out of which the enterprise derives significant financial value;<sup>8</sup>

[but] [The term] investment does not [mean] [include] an order or judgment sought or entered in any judicial or administrative or arbitral proceeding.

For greater clarity, investment does not include the following assets of an enterprise:

i. portfolio investments of the enterprise or in another enterprise;

ii. future, options and other derivatives;

iii. debt securities issued by a government or government-owned or controlled enterprise, or loans to a government or government-owned or controlled enterprise;

iv. claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the Host State to an enterprise in the territory of another Party;<sup>9</sup>

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<sup>6</sup> WGI 10: *IN will revert on whether “copyrights, know-how” is included in IPR*

<sup>7</sup> Whether a particular type of licence, authorisation, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among instrument[s] that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with instrument [s] has the characteristics of an investment.

<sup>8</sup> In to consider “any”.

<sup>9</sup> Sub-para (iv) to be considered together with the footnote under “claims to money”.

- v. goodwill, brand value, market share or similar intangible rights;
- vi. claims to money that arise solely from the extension of credit in connection with any commercial transaction;
- vii. an order or judgment sought or entered in any judicial, administrative or arbitral proceeding;<sup>10</sup>
- viii. any other claims to money that do not involve the kind of interests or operations set out in the definition of investment in this Agreement.

**“investor”** means a natural person of a Party or a juridical person of a Party, other than a branch or representative office, that seeks to make, is making, or has made an investment in the territory of any other Party.<sup>11</sup>

**investor of a Party** means a [national/natural person of a Party] or [a juridical person/an enterprise] of a Party that is making, or has made an investment in the territory of another Party;

**“local government”** includes:

- i. An urban local body, municipal corporation or village level government; or
- ii. an enterprise owned or controlled by an urban local body, a municipal corporation or a village level government.<sup>12</sup>

**measure/s** includes a law, regulation, rule, procedure, requirement or practice, decision, administrative action.

**“law”** includes:

- i. the Constitution, legislation, subordinate/delegated legislation, laws & bylaws, rules & regulations, ordinance, notifications, policies, guidelines, procedures, administrative/executive actions, decisions at all levels of government, as amended, interpreted or modified from time to time;
- ii. decisions, judgments, orders and decrees by Courts, regulatory authorities, judicial and administrative institutions having the force of law within the territory of a Party.<sup>13</sup>

**‘Natural person’** means a person possessing the nationality or citizenship of the Party in accordance with its laws, regulations and national policies. A natural person who is a dual national or citizen shall be deemed to be exclusively a national or

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<sup>10</sup>Sub-para (vi) to be considered placed together with similar text above.

<sup>11</sup> WGI 10 In to consider definitions for “investor of a Party” and “non-Party” subject to inclusion of the term “juridical person”.

<sup>12</sup> WGI 10: In prefers to define, but can reconsider placement.

<sup>13</sup> WGI 10: In to reconsider “requirement”. In to reconsider to drop the definition of “law”.

citizen of the country of her or his dominant and effective nationality/citizenship, where she/he ordinarily or permanently resides.<sup>14</sup>

**Parties** means the ASEAN Member States, Australia, China, India, Japan, Korea and New Zealand, collectively;

**Party** means an ASEAN Member State, Australia, China, India, Japan, Korea or New Zealand;

**“Regional Government”** means a State Government or Union territory in case of India; and ----- in case of .<sup>15</sup>

**returns** mean amounts yielded by or derived from an investment particularly, though not exclusively, any profits, interests, capital gains, dividends, royalties or fees;<sup>16</sup>

**“territory”** means:

(a) with/in respect to/of,[].

(b) In respect of India: the territory of the Republic of India in accordance with the Constitution of India, including its territorial waters and the airspace above it and other maritime zones including the Exclusive Economic Zone and continental shelf over which the Republic of India has sovereignty, sovereign rights, or exclusive jurisdiction in accordance with its Law the 1982 United Nations Convention on the Law of the Sea and international law.

In respect of -----

The Annexure, Provisios, Explanatory Statements and Footnotes in this Chapter constitute an integral part of this Agreement and are to be accorded the same effect as other provisions in this Agreement.

If a term is not defined in this Chapter, it shall have the meaning ascribed to it under the Law of the Host State.<sup>17</sup>

## **Article XX NATIONAL TREATMENT<sup>18</sup>**

Each Party shall accord to investors of another/the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, and acquisition of investments in its territory.<sup>19</sup>

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<sup>14</sup> *In to consider the Au formulation regarding dual citizenship/PR.*

<sup>15</sup> *WGI 10: Ch and In informed that it is necessary for them to define provincial/regional level of government.*

<sup>16</sup> *WGI 10: Other RPCs will consider including a definition of “returns” if it would be used in other parts of the Chapter.*

<sup>17</sup> *WGI: In further consider on placement.*

<sup>18</sup> *WGI 10: In submitted pre-establishment. WGI 9: India’s NT text is for post-establishment only.*

5.3 A determination of whether investments or investors are in “like circumstances” should be made, based upon an objective assessment of all circumstances on a case-by-case basis, including, *inter alia*:

- i. the sector the investor is in;
  - ii. the location of the investment;
  - iii. the aim of the measure concerned; and
  - iv. the regulatory process generally applied in relation to the measure concerned.
- The examination shall not be limited to or biased towards any one factor.

2. Subject to its laws and regulations, Each Party shall accord to covered investments and investor of the other Party treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the management, conduct, operation, and sale or other disposition of covered investments.<sup>20</sup>

3. A determination of whether Covered Investments or investors are in “like circumstances” should be made, based upon an objective assessment of all circumstances on a case-by-case basis, including, *inter alia*:

- i. the sector the investor is in;
- ii. the location of the Covered Investment;
- iii. whether the Covered Investment is public, private, or state-owned or controlled;
- iv. the aim of the measure concerned;
- v. the actual and potential impact of the Covered Investment on third persons, the local community, or the environment;
- vi. the goods or services consumed or produced by the Covered Investment;
- vii. the practical challenges of regulating the Covered Investment.

The examination shall not be limited to or biased towards any one factor.

For greater certainty, whether treatment is accorded in “like circumstances” depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or Covered Investments on the basis of legitimate regulatory objectives.

The treatment to be accorded by a Party under Article 5.1 means, with respect to a regional level, treatment no less favourable than the most favourable/favoured treatment accorded, in like circumstances, to investors, and to investments of the investors, of the Party of which it forms a part.

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<sup>19</sup> WGI 10: IN prefers to have 1 paragraph for investors and another paragraph for covered investments to address the issue of pre- and post- establishment. NZ propose for ASEAN to consider having 2 paragraphs. Au can be flexible with either approach. WGI 9: ASEAN to consider the approach by most AFPs to have separate paragraphs for investors and covered investment.

<sup>20</sup> WGI 10: IN can consider “expansion” in pre-establishment. WGI 9: IN to revert on the possible inclusion of “expansion” .

11.2 Subject to its laws and regulations, the treatment to be accorded by a Party under Article 11.1 means, with respect to a regional level, treatment no less favourable than the treatment accorded at that regional level, in like circumstances, to Covered Investments, of the Party to which it forms a part.

**Article XX**  
**MOST FAVOURED NATION TREATMENT**

India does not have a proposal for this Article.

From IN text Article 7 (Review of Reservations):

7.1 Where, after the entry into force of this Agreement, a Party enters into any agreement on investment with a non-Party, that Party may give consideration to a request by another Party for the incorporation herein of treatment no less favourable than that provided under the aforesaid agreement. Any such incorporation will be subject to mutual agreement and should maintain the overall balance of commitments undertaken by each Party under this Agreement.

**Article XX**  
**TREATMENT OF INVESTMENT /**  
**MINIMUM STANDARD OF TREATMENT <sup>21</sup>**

12.1 No Party shall subject Covered Investments made by investors of the other Party to measures which constitute a violation of customary international law<sup>22</sup> through:

- i. Denial of justice in any judicial or administrative proceedings; or
- ii. fundamental breach of due process; or
- iii. targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or
- iv. manifestly abusive treatment, such as coercion, duress and harassment.<sup>23</sup>

Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their investments full protection and security.

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 {?} customary international law.

12.5 Parties understand that each Party has different forms of administrative, legislative and judicial systems and that each Party at different levels of development may not achieve the same standards at the same time. Paragraph 1 of this Article does not establish a single international standard in this context.

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<sup>21</sup> WGI 10: IN submitted MST Article. WGI 9: IN would submit a revised MST Article.

<sup>22</sup> For greater certainty, it is clarified that “customary international law” only results from a general and consistent practice of States that they follow from a sense of legal obligation.

<sup>23</sup> WGI 10: In to further consider paragraph 12.5 on CIL.

{3.?} A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, [does/shall] not establish that there has been a breach of this Article.

12.4 In considering an alleged breach of this Article, a Tribunal shall take account of whether the investor that has made a Covered Investment or, as appropriate, the locally-established enterprise, pursued action for remedies before domestic courts or tribunals prior to initiating a claim under this Agreement.

**Article XX**  
**PROHIBITION OF PERFORMANCE REQUIREMENTS**

*In prefers not to include this Article.*

**Article XX**  
**SENIOR MANAGEMENT AND BOARD OF DIRECTORS**

*In does not have a proposal for this Article.*

**Article XX**  
**RESERVATIONS / NON-CONFORMING MEASURES**

*In does not yet have a proposal for this Article*

1. Pre-establishment (National Treatment) shall not apply to:<sup>24</sup>

(a) any existing non-conforming measure that is maintained by a Party at:<sup>25</sup>

(i) the central level of government as set out by that Party in its Schedule of Reservations in [Annex 1/List 1/3];

(ii) the [regional/provincial] level of government; or

(iii) the local level of government.<sup>26</sup>

(b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a)/(i); or

(c) an amendment to any non-conforming measure referred to in subparagraph (a)/(i)<sup>27</sup>

2. Article/s (National Treatment), (Most-Favoured-Nation Treatment), and (Senior Management and Boards of Directors), shall not apply to any reservation for measures that a Party adopts or maintains with respect to sectors, sub-sectors or activities, as set out in [its Schedule to Annex II/List 2].

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<sup>24</sup> *In prefers not to include MFN and PPR*

<sup>25</sup> *WGI 9: In can only take commitments at the central level*

<sup>26</sup> *To revisit levels of government to be covered in the Scope of the Chapter*

<sup>27</sup> *WGI 9: ASEAN and India prefer no ratchet. In to revert on standstill.*

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

6.2 Article 5 (Pre-establishment National Treatment), shall not apply to any measure that a Party adopts or maintains with respect to existing or new and emerging sectors, sub-sectors and activities set out in its Schedule in Annex 4.

6.3 Neither Party shall, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule in Annex 4, require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment that exists at the time the measure becomes effective.

6.4. In cases where a Party makes an amendment or a modification to any existing non-conforming measure set out in its Schedule in Annex 3 or where a Party adopts any new or more restrictive measure with respect to sectors, sub-sectors or activities set out in its Schedule in Annex 4 after the entry into force of this Agreement, the Party shall, prior to the implementation of the amendment or modification or the new or more restrictive measure, or in exceptional circumstances, as soon as possible thereafter:

notify the other Party of detailed information on such amendment, modification or measure; and

hold, upon request by the other Party, consultations in good faith with that other Party with a view to achieving mutual satisfaction.

6.5 Each Party shall endeavour, where appropriate, to reduce or eliminate the exceptions specified in its Schedules in Annexes 3 and 4, respectively.

## **Article XX TRANSFERS AND ANNEX ON TRANSFERS**

1. Subject to the laws and regulations of the Host State, Each Party/Member State shall [allow/permit] all transfers/funds of an investor of the other Member State relating to a covered investment in its territory to be freely transferred and on a non-discriminatory basis. Such transfers/funds include:

(a) contributions to capital,

(b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;

(c) ...

(d) payments made under a contract, including a loan agreement;

(e) payments made [in accordance/pursuant] to [Article (Compensation for Losses)] and Article (Expropriation)]{?};

(f) payments arising out of the settlement of a dispute;

2. Each Party shall [allow/permit] such transfers relating to a/the covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer.

3. Notwithstanding Paragraphs 1 [and 2/through 3], a Party/Host State may prevent or delay a transfer through the equitable, non-discriminatory, and good faith application of its laws relating to:

(a) bankruptcy, insolvency, or the protection of the rights of creditors;

(b) issuing, trading, or dealing in securities, futures, options, or derivatives;

(c) criminal or penal offences and the recovery of the proceeds of crime;

(d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;

(e) ensuring compliance with orders or judgments in judicial or administrative proceedings;

(f) taxation;

(g) social security, public retirement, or compulsory savings schemes; including provident funds, retirement gratuity programmes and employees insurance programmes;

(h) severance entitlements of employees; and

(i) requirement to register and satisfy other formalities imposed by the Central Bank and other relevant authorities of a Party.

(j) in the case of India, requirements to lock-in initial capital investments, as provided in India's Foreign Direct Investment (FDI) Policy, where applicable, provided that any new measure which would require a lock-in period for investments should not apply to existing investments.

5. Notwithstanding paragraph 1 and 2 of this Article, a Party/Host State may restrict transfers of returns in kind in circumstances where it could otherwise restrict such transfers under this Agreement, including as set out in paragraph 3/4.

5. Notwithstanding paragraphs 1 and 2 of this Article, a Host State may temporarily restrict transfers in the event of serious balance-of-payments difficulties or threat thereof; or 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.

**Article XX**  
**SPECIAL FORMALITIES AND DISCLOSURE OF INFORMATION**

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

Notwithstanding Article (National Treatment) a Party/Host State may require an investor of another Party/Member State, or [a/its] covered investment, to provide information concerning that investment solely for informational or statistical purposes. The Party/Host State shall protect to the extent possible [such/any] confidential information from any disclosure that would prejudice legitimate commercial interests of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Party/Host State from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law/s.

**Article XX**  
**COMPENSATION IN CASES OF STRIFE/TREATMENT IN CASE OF ARMED  
CONFLICT OR CIVIL STRIFE**

Investors of a Party whose covered investments in the territory of the Host State suffer losses owing to war or other armed conflict, a state of national emergency or civil disturbances in the territory of the latter Party, shall be accorded by the latter Party treatment, as regards restitution, indemnification, compensation or other settlement, if any, no less favourable than that which the host State accords to its own investors and their investments or to investors of any other Party or non-Party and their covered investments.

2. For the purposes of this Article, state of emergency excludes natural disaster.

**Article XX**  
**SUBROGATION**

1. If a Party/Member State makes a payment to an investor/s of that Party/Member State under a guarantee, a contract of insurance or other form of indemnity it has granted on non-commercial risk/s in respect of an investment the other Party/Member State shall recognise the subrogation or transfer of any right/s 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/Member State or an/the agency has made a payment to an investor of that Party/Member State 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 a Member State making the payment, pursue those rights and claims against the other Party/Member State.

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

In the exercise of subrogated rights or claims, a Party/Member State or the agency of the Party/Member State exercising such rights or claims shall disclose the coverage of the claims arrangement with its investors to the relevant Party/Member State.

## **Article XX EXPROPRIATION AND COMPENSATION**

1. A Party shall not expropriate or nationalise covered investment/s in its territory or adopt any other measures having an effect equivalent to expropriation,<sup>28</sup> except:

- a. in the public interest;
- b. in/on a non-discriminatory basis;
- c. On payment of prompt, adequate compensation and
- d. in accordance with due process of law.

2. Such compensation shall be adequate and be at least equivalent to the fair market value of the expropriated investment immediately on the day before the expropriation takes place (“date of expropriation”), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value. The compensation referred to in Article 13.1 (iv) shall be paid without delay.<sup>29</sup>

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<sup>28</sup> For the avoidance of doubt, where India is the expropriating Party any measure of expropriation relating to land shall be for the purposes as set out in its Law relating to land acquisition and any questions as to “public purpose” and compensation shall be determined in accordance with the procedure specified in such Law.

<sup>29</sup> The Parties understand that there may be legal and administrative processes that need to be observed before payment can be made.

ii. The computation of the fair market value of the property shall exclude any consequential or exemplary losses or speculative or windfall profits claimed by the investor, including those relating to moral damages or loss of goodwill,

3. Payment of compensation shall be made in a freely convertible currency. Interest on payment of compensation, where applicable, shall be paid in simple interest at a commercially reasonable rate from the date of expropriation until the date of actual payment. On payment, compensation shall be freely transferable in accordance with Article 15 (Transfers).

5. This Article {?} not apply to the issuance of compulsory licences granted in relation to intellectual property rights, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with {?}.

Notwithstanding Article 13.1 and 13.2, any measure of expropriation relating to land shall be as defined in the existing domestic laws, and regulations and any amendments thereto and shall be, for the purposes of and upon payment of compensation, in accordance with the aforesaid laws and regulations.

13.4 For the avoidance of doubt, the Parties agree that an action taken by a Party in its commercial capacity shall not constitute expropriation or any other measure having similar effect.

13.6 In considering an alleged breach of this Article, a Tribunal shall take account of whether the investor or, as appropriate, the locally-established enterprise, pursued action for remedies before domestic courts or tribunals prior to initiating a claim under this Agreement.

### **Annex on Expropriation**

*Note: India's text is part of their proposed Expropriation Article.*

The Parties confirm their shared understanding that:

Expropriation may be direct or indirect:

direct expropriation occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure.

indirect expropriation {?} an effect equivalent to direct expropriation if a measure or series of measures of a Party has an effect equivalent to direct expropriation, in that it substantially or permanently deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.

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iii. The valuation date for computation of compensation shall be the day immediately before the expropriation takes place.

The determination of whether a Measure or series of Measures have an effect equivalent to expropriation requires a case-by-case, fact-based inquiry that takes into consideration:

(i) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(b) whether the government measure breaches the government's prior binding written commitment to the investor whether by contract, licence or other legal document; and

the character of the measure or series of measures, notably their object, context and intent;

the duration of the measure or series of measures of a Party; and

non-discriminatory regulatory measures by a Party or measures or awards by judicial bodies of a Party that are designed and applied interest or public welfare objectives, such as public health, safety, and the environment, shall not constitute expropriation/s under this Article.