

Agreement Between Canada and the Czech Republic for the Promotion and Protection of Investments

E105128

CANADA and THE CZECH REPUBLIC, hereinafter referred to as the “Contracting Parties”,

RECOGNIZING that the promotion and the protection of investments of investors of one Contracting Party in the territory of the other Contracting Party will be conducive to the stimulation of business initiative and to the development of economic cooperation between them;

HAVE AGREED as follows:

Article I

Definitions

For the purpose of this Agreement:

1. a juridical person is “affiliated” with another person when it controls, or is controlled by, that other person; or when it and the other person are both controlled by the same person;
2. the term “confidential information” means confidential business information and information that is privileged or otherwise protected from disclosure according to the laws and regulations of either Contracting Party;
3. the term “financial institution” means any financial intermediary or other enterprise that is authorized to do business and regulated or supervised as a financial institution under the law of the Contracting Party in whose territory it is located;
4. the term “investment” means any kind of asset held or invested either directly, or indirectly through an investor of a third state, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws and, in particular, though not exclusively, includes:

1. movable and immovable property and any related property rights, such as mortgages, liens or pledges,
2. shares, stock, bonds and debentures or any other form of participation in a company, business enterprise or joint venture,
3. claims to money, and claims to performance under contract having a financial value,
4. intellectual property rights, including rights with respect to copyrights, patents, trademarks as well as trade names, industrial designs, good will, trade secrets and know-how,
5. rights, conferred by law or under contract, to undertake any economic and commercial activity, including any rights to search for, cultivate, extract or exploit natural resources;

Any change in the form of an investment does not affect its character as an investment;

5. the term “investor” means:
 1. any natural person possessing the citizenship of or permanently residing in a Contracting Party in accordance with its laws, or
 2. any corporation, partnership, trust, joint venture, organization, association or enterprise incorporated or duly constituted in accordance with the applicable laws of that Contracting Party,

provided that such investor has the right, in accordance with the laws of the Contracting Party, to invest in the territory of the other Contracting Party;

6. the term “measure” includes any law, regulation, procedure, requirement, or practice;
7. the term “public entity” means a central bank or monetary authority of a Contracting Party, or of a monetary union of which it is a member, or of any financial institution owned or controlled by a Contracting Party;
8. the term “returns” means all amounts yielded by an investment and in particular, though not exclusively, includes profits, interest, capital gains, dividends, royalties, fees, returns in kind or other current income; and
9. the term “territory” means:
 1. in respect of Canada, the territory of Canada, as well as those maritime areas, including the seabed and subsoil adjacent to the outer limit of the territorial sea, over which Canada exercises, in accordance with international law, sovereign rights for the purpose of exploration and exploitation of the natural resources of such areas,
 2. in respect of the Czech Republic, the territory of the Czech Republic.

Article II

Promotion of Investment

1. Each Contracting Party shall encourage the creation of favourable conditions for investors of the other Contracting Party to make investments in its territory.
2. Subject to its laws and regulations, each Contracting Party shall admit investments of investors of the other Contracting Party.
3. This Agreement shall not preclude either Contracting Party from prescribing laws and regulations in connection with the establishment of a new business enterprise or the acquisition or sale of a business enterprise in its territory, provided that such laws and regulations are applied equally to all foreign investors. Decisions taken in conformity with such laws and regulations shall not be subject to the provisions of Articles X (Settlement of Disputes between an Investor and the Host Contracting Party) or XII (Disputes between the Contracting Parties) of this Agreement.
4. The Contracting Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Contracting Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Contracting Party considers that the other Contracting Party has offered such an encouragement, it may request consultations with the other Contracting Party and the two Contracting Parties shall consult with a view to avoiding any such encouragement.

Article III

Protection of Investment¹

1.
 1. Investments or returns of investors of either Contracting Party shall at all times be accorded 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. The concepts of “fair and equitable treatment” and “full protection and security” in subparagraph (a) do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this paragraph.
2. Each Contracting Party shall grant to investments or returns of investors of the other Contracting Party in its own territory treatment no less favourable than that which it grants, in like circumstances, to investments or returns of investors of any third state.
3. Each Contracting Party shall grant investors of the other Contracting Party, as regards their management, use, enjoyment or disposal of their investments or returns in its territory, treatment no less favourable than that which it grants, in like circumstances, to investors of any third state.
4. Each Contracting Party shall, to the extent possible and in accordance with its laws and regulations, grant to investments or returns of investors of the other Contracting Party a treatment no less favourable than that which it grants, in like circumstances, to investments or returns of its own investors.

Article IV

Exceptions

1. Paragraphs 2 and 3 of Article III (Protection of Investment) do not apply to:
 1. any existing non-conforming measures maintained within the territory of a Contracting Party, and
 2. any measure maintained or adopted after the date of entry into force of this Agreement that, at the time of sale or other disposition of a government's equity interests in, or the assets of, an existing state enterprise or an existing governmental entity, prohibits or imposes limitations on the ownership of equity interests or assets or imposes nationality requirements relating to senior management or members of the board of directors;
 2. the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a);
 3. an amendment to any non-conforming measure referred to in subparagraph (a), to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with paragraphs 2 and 3 of Article III (Protection of Investment).
2. The National Treatment and Most-Favoured-Nation Treatment provisions of this Agreement shall not apply to advantages accorded by a Contracting Party pursuant to its obligations as a member of a customs, economic or monetary union, a common market or a free trade area. In addition, the National Treatment and Most-Favoured-Nation Treatment provisions of this Agreement shall not apply to subsidies or grants provided by a Contracting Party or a state enterprise, including government-supported loans, guarantees and insurance.
3. The Contracting Parties understand the obligations of a Contracting Party as a member of a customs, economic or monetary union, a common market or a free trade area to include obligations arising out of an international agreement or reciprocity arrangement of that customs, economic or monetary union, common market or free trade area.
4. The provisions of this Agreement shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party, or to the investments or returns of such investors, the benefits of any treatment, preference or privilege resulting from participation in:
 1. any multilateral agreement for mutual economic assistance, integration or cooperation to which either of the Contracting Parties is or may become a party;
 2. any bilateral convention, including any customs agreement, in force on the date of entry into

force of this Agreement which contains provisions similar to those contained in subparagraph (a); or

3. any existing or future convention relating to taxation.

Article V

Compensation for Losses

Investors of one Contracting Party who suffer losses because their investments or returns in the territory of the other Contracting Party are affected by an armed conflict, a national emergency or civil disturbance in that territory, shall be accorded by such latter Contracting Party in respect of restitution, indemnification, compensation or other settlement, treatment no less favourable than that which it accords to its own investors or to investors of any third state. Any payment made under this Article shall be adequate, effective and made without delay.

Article VI

Expropriation²

Investments or returns of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party, except for a public purpose, under due process of law, in a non-discriminatory manner and provided that such expropriation is accompanied by prompt, adequate and effective compensation. Such compensation shall be based on the real value of the investment at the time of the expropriation, shall be payable from the date of expropriation at a normal commercial rate of interest, shall be paid without delay and shall be effectively realizable and freely transferable. The investor affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Contracting Party, of its case and of the valuation of its investment in accordance with the principles set out in this Article.

Article VII

Transfer of Funds

1. Each Contracting Party shall guarantee to an investor of the other Contracting Party the unrestricted transfer of investments and returns. Without limiting the generality of the foregoing, each Contracting Party shall also guarantee to the investor the unrestricted transfer of:
 1. funds in repayment of loans related to an investment;
 2. the proceeds of the total or partial liquidation of any investment;
 3. wages and other remuneration accruing to a citizen of the other Contracting Party who was permitted to work in connection with an investment in its territory; and
 4. any compensation owed to an investor by virtue of Articles V (Compensation for Losses) or VI (Expropriation) of this Agreement.
2. Transfers shall be effected without delay in the convertible currency in which the capital was originally invested or in any other convertible currency agreed by the investor and the Contracting Party concerned. Unless otherwise agreed by the investor, transfers shall be made at the rate of the exchange applicable on the date of transfer.
3. Notwithstanding the provisions of paragraph 1, a Contracting Party may prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:

1. bankruptcy, insolvency or the protection of the rights of creditors;
 2. issuing, trading or dealing in securities;
 3. criminal or penal offences;
 4. reports of transfers of currency or other monetary instruments; or
 5. ensuring the satisfaction of judgments in adjudicatory proceedings.
4. Neither Contracting Party may require its investors to transfer, or penalize its investors that fail to transfer, the income, earnings, profits or other amounts derived from, or attributable to investments in the territory of the other Contracting Party.
 5. Paragraph 4 shall not be construed to prevent a Contracting Party from imposing any measure through the equitable, non-discriminatory and good faith application of its laws relating to the matters set out in subparagraphs 3(a) through 3(e).
 6. Notwithstanding the provisions of this Article, without limiting the applicability of paragraph 5, and further to subparagraph 2(b) of Article IX (General Exceptions), a Contracting Party may prevent or limit transfers by a financial institution to, or for the benefit of, an affiliate of or person related to such institution, through the equitable, non-discriminatory and good faith application of measures relating to maintenance of the safety, soundness, integrity or financial responsibility of financial institutions.
 7. Notwithstanding paragraph 1, a Contracting Party may restrict transfers of returns in kind in circumstances where it could otherwise restrict such transfers under the Marrakesh Agreement Establishing the World Trade Organization (hereinafter referred to as the “WTO Agreement”), including as set out in paragraph 3.

Article VIII

Subrogation

1. If a Contracting Party or any agency thereof makes a payment to any of its investors under a guarantee or a contract of insurance it has entered into in respect of an investment, the other Contracting Party shall recognize the validity of the subrogation in favour of such Contracting Party or agency thereof to any right or title held by the investor.
2. A Contracting Party or any agency thereof, which is subrogated to the rights of an investor in accordance with paragraph 1 of this Article, shall be entitled in all circumstances to the same rights as those of the investor in respect of the investment concerned and its related returns. Such rights may be exercised by the Contracting Party or any agency thereof or by the investor if the Contracting Party or any agency thereof so authorizes.

Article IX

General Exceptions

1. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade³ or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or enforcing measures necessary:
 1. to protect human, animal or plant life or health;
 2. to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or
 3. for the conservation of living or non-living exhaustible natural resources.
2. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining reasonable measures for prudential reasons, such as:

1. the protection of investors, depositors, financial market participants, policy-holders, policy-claimants, or persons to whom a fiduciary duty is owed by a financial institution;
 2. the maintenance of the safety, soundness, integrity or financial responsibility of financial institutions; and
 3. ensuring the integrity and stability of a Contracting Party's financial system.
- 3.
1. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures that restrict transfers where the Contracting Party experiences serious balance of payments difficulties, or the threat thereof, and such restrictions are consistent with subparagraph (b).
 2. Measures referred to in subparagraph (a) shall be equitable, neither arbitrary nor unjustifiably discriminatory, in good faith, of limited duration and may not go beyond what is necessary to remedy the balance of payments situation. A Contracting Party that imposes measures under this Article shall inform the other Contracting Party forthwith and present as soon as possible a time schedule for their removal. Such measures shall be taken in accordance with other international obligations of the Contracting Party concerned, including those under the WTO Agreement and the Articles of Agreement of the International Monetary Fund.
4. Nothing in this Agreement shall prejudice measures of general application, that are neither arbitrary nor unjustifiably discriminatory, taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies. This paragraph shall not affect a Contracting Party's obligations under Article VII (Transfer of Funds).
5. Nothing in this Agreement shall be construed:
1. to require any Contracting Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests;
 2. to prevent any Contracting Party from taking any actions that it considers necessary for the protection of its essential security interests:
 1. relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment,
 2. taken in time of war or other emergency in international relations, or
 3. relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices; or
 3. to prevent any Contracting Party from taking action in pursuance of its obligations under the Charter of the United Nations for the maintenance of international peace and security.
6. Nothing in this Agreement shall be construed to require a Contracting Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Contracting Party's law protecting Cabinet confidences, personal privacy or the confidentiality of the financial affairs and accounts of individual customers of financial institutions.
7. Investments in cultural industries are exempt from the provisions of this Agreement. "Cultural industries" means natural persons or enterprises engaged in any of the following activities:
1. the publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing;
 2. the production, distribution, sale or exhibition of film or video recordings;
 3. the production, distribution, sale or exhibition of audio or video music recordings;
 4. the publication, distribution, sale or exhibition of music in print or machine readable form;
- or

5. radiocommunications in which the transmissions are intended for direct reception by the general public, and all radio, television or cable broadcasting undertakings and all satellite programming and broadcast network services.
8. Any measure adopted by a Contracting Party in conformity with a decision adopted, extended or modified by the World Trade Organization pursuant to Articles IX:3 or IX:4 of the WTO Agreement shall be deemed to be also in conformity with this Agreement. An investor purporting to act pursuant to Article X (Settlement of Disputes between an Investor and the Host Contracting Party) of this Agreement may not claim that such a conforming measure is in breach of this Agreement.

Article X

Settlement of Disputes between an Investor and the Host Contracting Party⁴

1. Any dispute between one Contracting Party and an investor of the other Contracting Party relating to the effects of a measure or series of measures taken by the former Contracting Party on the management, use, enjoyment or disposal of an investment made by the investor, and in particular, but not exclusively, relating to expropriation referred to in Article VI (Expropriation) of this Agreement or to the transfer of funds referred to in Article VII (Transfer of Funds) of this Agreement, shall, to the extent possible, be settled amicably between them.
2. If the dispute has not been settled amicably within a period of six months from the date on which the dispute was initiated, it may be submitted by the investor to arbitration.
3. In that case, the dispute shall then be settled in conformity with either:
 1. the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), as adopted in Resolution 31/98 of the United Nations General Assembly on 15 December 1976;
 2. the rules of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington on 18 March 1965 (hereinafter referred to as the "ICSID Convention"), when both Contracting Parties are bound by it; or
 3. the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (hereinafter referred to as the "Additional Facility Rules of ICSID"), provided that either the disputing Contracting Party or the Contracting Party of the investor, but not both, is a party to the ICSID Convention.
4. With respect to:
 1. financial institutions of a Contracting Party; and
 2. investors of a Contracting Party, and investments of such investors, in financial institutions in the other Contracting Party's territory,

this Article applies only in respect of claims that the other Contracting Party has breached an obligation under Article VI (Expropriation), Article VII (Transfer of Funds), or paragraph 1 or 2 of Article XV (Final Provisions).

5.
 1. An investor may submit a claim under this Article to arbitration only if the investor and, where the claim is for loss or damage to an interest in an enterprise that is a juridical person which the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Contracting Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Contracting Party that is alleged to be a breach referred to in

paragraph 1 of this Article, except for procedures for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Contracting Party.

2. If an investment is held indirectly through an investor of a third state by an investor of one Contracting Party in the territory of the other Contracting Party, the investor of a Contracting Party may not initiate or continue a proceeding under this Article if the investor of the third state submits or has submitted a claim with respect to the same measure or series of measures under any agreement between the other Contracting Party and the third state.
3. A disputing investor may submit a claim to arbitration under this Article only if:
 1. not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage thereby, or
 2. where the claim is on behalf of an investment, not more than three years have elapsed from the date on which the investment first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investment has incurred loss or damage thereby.
6. An interpretation of this Agreement agreed between the Contracting Parties shall be binding on a Tribunal established under this Article.
7. Each Contracting Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement. Failure to meet any of the conditions provided for in paragraphs 2 and 5 shall nullify that consent.

Article XI

Consultations and Exchange of Information

1. Upon request by either Contracting Party, the other Contracting Party shall agree promptly to consultations on the interpretation or application of this Agreement. Upon request by either Contracting Party, information shall be exchanged on the impact that the laws, regulations, decisions, administrative practices or procedures, or policies of the other Contracting Party may have on investments covered by this Agreement.
2. The consultations provided for by this Article shall include consultations concerning any steps that a Contracting Party may consider are necessary to ensure compatibility between this Agreement and the Treaty Establishing the European Community.

Article XII

Disputes between the Contracting Parties

1. Any dispute between the Contracting Parties concerning the interpretation or application of this Agreement shall, whenever possible, be settled amicably through consultations.
2. If the dispute cannot be settled through consultations, it shall, at the request of either Contracting Party, be submitted to an arbitral tribunal for decision.
3. An arbitral tribunal shall be constituted for each dispute. Within two months after receipt through diplomatic channels of the request for arbitration, each Contracting Party shall appoint one member to the arbitral tribunal. The two members shall then select a national of a third state who, upon approval by the two Contracting Parties, shall be appointed Chairman of the arbitral tribunal. The Chairman shall be appointed within two months from the date of appointment of the other two members of the arbitral tribunal.
4. If within the periods specified in paragraph 3 of this Article the necessary appointments have not

been made, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make the necessary appointments. If the President is a national of either Contracting Party or is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting Party or is prevented from discharging the said function, the Member of the International Court of Justice next in seniority, who is not a national of either Contracting Party, shall be invited to make the necessary appointments.

5. The arbitral tribunal shall determine its own procedure. The arbitral tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both Contracting Parties. Unless otherwise agreed, the decision of the arbitral tribunal shall be rendered within six months of the appointment of the Chairman in accordance with paragraph 3 or 4 of this Article.
6. Each Contracting Party shall bear the costs of its own member of the arbitral tribunal and its representation in the arbitral proceedings; the costs related to the Chairman and any remaining costs shall be borne equally by the Contracting Parties. The arbitral tribunal may, however, in its decision direct that a higher proportion of costs be borne by one of the two Contracting Parties, and this award shall be binding on both Contracting Parties.

Article XIII

Other International Agreements

When a matter is covered both by the provisions of this Agreement and any other international agreement to which both Contracting Parties are bound, subject to paragraph 8 of Article IX (General Exceptions), nothing in this Agreement shall prevent an investor of one Contracting Party that has investments in the territory of the other Contracting Party from benefiting from the most favourable regime.

Article XIV

Application

This Agreement shall apply to any investment made by an investor of one Contracting Party in the territory of the other Contracting Party on or after January 1, 1955.

Article XV

Final Provisions and Entry into Force

1. A Contracting Party may deny the benefits of this Agreement to an investor of the other Contracting Party that is an enterprise of such Contracting Party and to investments of such investor if investors of a third state own or control the enterprise and the denying Contracting Party adopts or maintains measures with respect to the third state that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Agreement were accorded to the enterprises or to its investments.
2. Subject to prior notification and consultation in accordance with this Agreement, a Contracting Party may deny the benefits of this Agreement to an investor of the other Contracting Party that is an enterprise of such Contracting Party and to investments of such investors if investors of a third state own or control the enterprise and the enterprise has no substantial business activities in the territory of the Contracting Party under whose law it is constituted.
3. All references in this Agreement to measures of a Contracting Party shall include measures applicable in accordance with European Union law in the territory of that Contracting Party

pursuant to its membership in the European Union. References to “serious balance of payments difficulties, or the threat thereof,” shall include serious balance of payments difficulties, or the threat thereof, in the economic or monetary union of which a Contracting Party is a member.

4. A Contracting Party's essential security interests may include interests deriving from its membership in a customs, economic or monetary union, a common market or a free trade area.
5. The Contracting Parties agree that the issue of whether a measure of a Contracting Party is consistent with this Agreement is a matter to be resolved exclusively under the dispute settlement procedures of this Agreement.
6. All annexes and footnotes shall form an integral part of this Agreement.
7. Each Contracting Party shall notify the other in writing of the completion of the procedures required in its territory for the entry into force of this Agreement. This Agreement shall enter into force on the sixtieth day after the latter of the two notifications. Upon the entry into force of this Agreement, the Agreement between the Government of Canada and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investments, done at Prague on 15 November 1990, insofar as it is now an Agreement between Canada and the Czech Republic, shall be terminated except that its provisions shall continue to apply to any dispute between either Contracting Party and an investor of the other Contracting Party that has been submitted to arbitration pursuant to that Agreement by the investor prior to the date that this Agreement enters into force. Apart from any such dispute, this Agreement shall apply retroactively, in particular the procedures outlined in Article X (Settlement of Disputes between an Investor and the Host Contracting Party).
8. This Agreement shall remain in force unless either Contracting Party notifies in writing the other Contracting Party of its intention to terminate it. The termination of this Agreement shall become effective one year after notice of termination has been received by the other Contracting Party. In respect of investments made prior to the date when the termination of this Agreement becomes effective, the provisions of Articles I to XIV inclusive of this Agreement shall remain in force for a period of 15 years.

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

DONE in duplicate at Prague, this 6th day of May 2009, in the English, French and Czech languages, each version being equally authentic.

Stockwell Day
FOR CANADA

Miroslav Kalousek
FOR THE CZECH REPUBLIC

Annex A

Clarification of Indirect Expropriation

Article VI (Expropriation) of this Agreement states that:

Investments or returns of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as “expropriation”) in the territory of the other Contracting Party, except for a public purpose, under due process of law, in a non-discriminatory manner and provided that such expropriation is accompanied

by prompt, adequate and effective compensation. ...

The Contracting Parties confirm their shared understanding that:

1. The concept of “measures having an effect equivalent to nationalization or expropriation” can also be termed “indirect expropriation.” Indirect expropriation results from a measure or series of measures of a Contracting Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure;
2. The determination of whether a measure or series of measures of a Contracting Party constitute an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:
 1. the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Contracting Party have an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred,
 2. the extent to which the measure or series of measures interfere with distinct, reasonable, investment-backed expectations, and
 3. the character of the measure or series of measures; and
3. Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Contracting Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.

Annex B

Settlement of Disputes between an Investor and the Host Contracting Party

1. Public Access to Hearings and Documents
 1. Where, after consulting with a disputing investor, a disputing Contracting Party determines that it is in the public interest to do so and notifies the Tribunal of that determination, hearings held under Article X (Settlement of Disputes between an Investor and the Host Contracting Party) shall be open to the public. In that case, to the extent necessary to ensure the protection of confidential information, the Tribunal shall hold portions of the hearings in camera. The Tribunal shall seek to ensure that public access to the proceedings will not result in undue delay to the proceedings.
 2. The Tribunal shall establish procedures for the protection of confidential information and appropriate logistical arrangements for open hearings, in consultation with the disputing parties.
 3. Any Tribunal award under this Agreement shall be publicly available, subject to the redaction of confidential information. All other documents submitted to, or issued by, the Tribunal shall be publicly available, unless the disputing parties otherwise agree, subject to the redaction of confidential information.
 4. A disputing party may disclose to other persons in connection with the arbitral proceedings such unredacted documents as it considers necessary for the preparation of its case, but it shall ensure that those persons protect the confidential information in such documents.
 5. The Contracting Parties may share with officials of their respective sub-national governments all relevant unredacted documents in the course of dispute settlement under this Agreement, but they shall ensure that those persons protect any confidential information in such documents.

6. To the extent that a Tribunal's confidentiality order designates information as confidential and a Contracting Party's law on access to information requires public access to that information, the Contracting Party's law on access to information shall prevail. However, a Contracting Party should endeavour to apply its law on access to information so as to protect information designated confidential by the Tribunal.

2. Submissions by Non-Disputing Parties

1. Upon the request of the Tribunal or both disputing parties, the non-disputing Contracting Party may make written submissions to the Tribunal, but only on a question of interpretation of this Agreement. All pleadings submitted to the Tribunal shall be made available to the non-disputing Contracting Party provided that it makes such a submission to the Tribunal. The non-disputing Contracting Party receiving information under this paragraph shall treat the information as if it were a disputing Contracting Party.
2. Any non-disputing party that is a person of a Contracting Party that wishes to file a written submission with the Tribunal (the "applicant") shall apply for leave from the Tribunal to file such a submission, in accordance with the applicable Guidelines set out in Part III of this Annex. The applicant shall attach the submission to the application.
3. The applicant shall serve the application for leave to file a non-disputing party submission and the submission on all disputing parties and the Tribunal.
4. The Tribunal shall set an appropriate date for the disputing parties to comment on the application for leave to file a non-disputing party submission.
5. In determining whether to grant leave to file a non-disputing party submission, the Tribunal shall consider, among other things, the extent to which:
 1. the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is substantially different from that of the disputing parties and up to then had not been known by the Tribunal;
 2. the non-disputing party submission would address a matter within the scope of the dispute;
 3. the non-disputing party has a significant interest in the arbitration; and
 4. there is a public interest in the subject-matter of the arbitration.
6. The Tribunal shall ensure that:
 1. any non-disputing party submission avoids disrupting the proceedings; and
 2. neither disputing party is unduly burdened or unfairly prejudiced by such submissions.
7. The Tribunal shall decide whether to grant leave to file a non-disputing party submission. If leave to file a non-disputing party submission is granted, the Tribunal shall set an appropriate date for the disputing parties to respond in writing to the non-disputing party submission. By that date, the non-disputing Contracting Party may, pursuant to the provisions in paragraph 1, address any issues of interpretation of this Agreement presented in the non-disputing party submission.
8. A Tribunal that grants leave to file a non-disputing party submission is not required to address the submission at any point in the arbitration, nor is the non-disputing party that files the submission entitled to make further submissions in the arbitration.
9. Access to hearings and documents by non-disputing parties that file applications under these procedures shall be governed by the provisions of Part I of this Annex (Public Access to Hearings and Documents).

3. Guidelines for Submissions by a Non-Disputing Party

1. The application for leave to file a non-disputing party submission shall:
 1. be made in writing, dated and signed by the person filing the application, and include the address and other contact details of the applicant;
 2. be no longer than five typed pages;

3. describe the applicant, including, where relevant, its membership and legal status (e.g., company, trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the applicant);
 4. disclose whether or not the applicant has any affiliation, direct or indirect, with any disputing party;
 5. identify any government, person or organization that has provided any financial or other assistance in preparing the submission;
 6. specify the nature of the interest that the applicant has in the arbitration;
 7. identify the specific issues of fact or law in the arbitration that the applicant has addressed in its written submission;
 8. explain, by reference to the factors specified in paragraph 5 of Part II of this Annex (Submissions by Non-Disputing Parties), why the Tribunal should accept the submission; and
 9. be made in a language of the arbitration.
2. The submission filed by a non-disputing party shall:
 1. be dated and signed by the person filing the submission;
 2. be concise, and in no case longer than 20 typed pages, including any appendices;
 3. set out a precise statement supporting the applicant's position on the issues; and
 4. only address matters within the scope of the dispute.

¹For greater certainty, the treatment accorded by a Contracting Party under paragraphs 2, 3 and 4 of this Article means, with respect to a sub-national government, treatment accorded, in like circumstances, by that sub-national government to investors, and to investments of investors, of a third state, or of a Contracting Party, as the case may be.

²Annex A (Clarification of Indirect Expropriation) shall apply to this Article.

³For greater clarity the Contracting Parties confirm that insofar as this Agreement is concerned, any exceptions pertain to the investment obligations in this Agreement.

⁴Annex B (Settlement of Disputes between an Investor and the Host Contracting Party) shall apply to proceedings under this Article.