

## Model Text for the Indian Bilateral Investment Treaty

### BILATERAL INVESTMENT TREATY

BETWEEN

THE GOVERNMENT OF THE REPUBLIC OF

*INDIA*

AND

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## Preamble

The Government of the Republic of India and the Government of the Republic of -----  
----- (hereinafter referred to as “**theParty**” individually or “**theParties**” collectively);

Desiring to promote bilateral cooperation between the Parties with respect to foreign investments; and

Reaffirming the right of Parties to regulate Investments in their territory in accordance with their Law and policy objectives including the right to change the conditions applicable to such Investments; and

Seeking to align the objectives of Investment with sustainable development and inclusive growth of the Parties;

Have agreed as follows:

## Chapter I – Preliminary

### Article 1: Definitions

For the purposes of this Treaty:

1.1 “**Designated Representative**” means:

- (i) for India, Secretary, Department of Economic Affairs, Ministry of Finance, Government of India.
- (ii) for -----

1.2 “**Enterprise**” means:

- (i) any legal entity constituted, organised and operated in compliance with the Law of the Host State, including any company, corporation, limited liability partnership or a joint venture; and
- (ii) having its management and real and substantial business operations in the territory of the Host State.

1.2.1 For greater certainty, “real and substantial business operations” for the purposes of this definition requires an Enterprise to have, without exception, all the following elements:

- (i) made a substantial and long term commitment of capital in the Host State;
- (ii) engaged a substantial number of employees in the territory of the Host State;
- (iii) assumed entrepreneurial risk;
- (iv) made a substantial contribution to the development of the Host State through its operations alongwith transfer of technological knowhow, where applicable; and
- (v) carried out all its operations in accordance with the Law of the Host State.

1.2.2 “**Real and substantial business operations**” do not include:

- (i) objectives/strategies/arrangements, the main purpose or one of the main purposes of which is to avoid tax liabilities;
- (ii) the passive holding of stock, securities, land, or other property; or
- (iii) the ownership or leasing of real or personal property used in a trade or business.

1.3 “**Government**” means:

- (i) only the Central Government and State Governments in the case of India.
- (ii) ----- in case of -----

1.4 “**Home State**” means the Party of which the Investor is a national or in which the Investor is organised, constituted or incorporated.

1.5 “**Host State**” means the Party where the Investment is located.

1.6 “**Investment**” means an Enterprise in the Host State, constituted, organised and operated in compliance with the Law of the Host State and owned or controlled in good faith by an Investor:

- (i) in accordance with this Treaty; and
- (ii) that is at all times in compliance with the obligations in Articles 9, 10, 11 and 12 of Chapter III of this Treaty.

1.6.1 For the purposes of this Treaty, an Enterprise will be considered as:

- (i) “**Controlled**” by the Investor, if such Investor has the right to appoint a majority of the directors or senior management officials or to control the management or policy decisions of such Enterprise, including by virtue of their shareholding, management, partnership or other legal rights or by virtue of shareholders agreements or voting agreements or partnership agreements or any other agreements of similar nature.
- (ii) “**Owned**”, by the Investor, if more than 50% of the capital or funds or contribution in the Enterprise is directly or beneficially owned by such Investor, or by other companies or entities which are ultimately owned and controlled by the Investor.

1.7 For greater clarity, Investment does not include the following assets of an Enterprise:

- (i) any interest in debt securities issued by a government or government- owned or controlled enterprise, or loans to a government or government owned or controlled enterprise;
- (ii) any pre-operational expenditure relating to admission, establishment, acquisition or expansion of the Enterprise that is incurred before the commencement of substantial and real business operations of the Enterprise in the Host State;
- (iii) portfolio investments;
- (iv) claims to money that arise solely from commercial contracts for the sale of goods or services;
- (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 referred to in (v) above;
- (vii) an order or judgment sought or entered in any judicial, regulatory, administrative, or arbitral proceeding;
- (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 Treaty.

1.8 For the purposes of this Treaty, a holding company or an investment company shall not be considered an Investment nor shall such companies be considered as protected assets of an Investment.

1.9 “**Investor**” means:

- (i) A legal entity constituted, organized and operated in compliance with the Law of the Home State, owned or controlled by a Natural Person or a legal entity of the Home State and conducting real and substantial business operations in the Home State; or
- (ii) A Natural Person in the Home State,

that/who has made and owns or controls an Investment in the Host State.

- 1.10 “**Law**” includes:
- (i) the Constitution, legislation, subordinate/delegated legislation, laws & bylaws, rules & regulations, ordinance, notifications, policies, guidelines, procedures, administrative measures/executive actions 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.
- 1.11 “**Measure**” means any form of legally binding action by the Government that is applied directly to an Investment.
- 1.12 “**Natural Person**” means a national of the Home State in accordance with its Law. A Natural Person who is a dual national shall be deemed to be exclusively a national of the State of her or his dominant and effective nationality, where she/he ordinarily resides.
- 1.13 “**Non-disputing Party**” means the Party to this Treaty which is not a party to an Investment Dispute under Article 14.
- 1.14 The term “**Pre-investment activity**” includes any activities undertaken by the Investor or its Investment prior to the establishment of the Investment in accordance with the Law of the Host State. Any activity undertaken by the Investor or its Investment pursuant to compliance with sectoral limitations on foreign equity, and other limits and conditions applicable under any Law relating to the admission of investments in the Host State in specific sectors falls within the meaning of “**Pre-investment activity**”.
- 1.15 “**Regional Government**” means a State Government or a Union Territory in case of India; and ----- in case of -----
- 1.16 “**State Enterprises**” and “**Public Sector Undertakings**” means companies owned or controlled by the Government.
- 1.17 “**Territory**” means:
- (i) 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 and the 1982 United Nations Convention on the Law of the Sea and international law.
  - (ii) In respect of -----
- 1.18 The Annexures, Provisos and Footnotes in this Treaty constitute an integral part of this Treaty and are to be accorded the same effect as other provisions in this Treaty.
- 1.19 If a term is not defined in this Treaty, it shall have the meaning ascribed to it under the Law of the Host State.

## Article 2: Scope and General Provisions

- 2.1 This Treaty applies to Investments in existence as of the date of entry into force of this Treaty or established, acquired, or expanded thereafter that have been admitted by a

- Party in accordance with its Laws applicable from time to time. Nothing in this Treaty shall apply to either Party in relation to any act or Measure or Law that existed before the date of entry into force of this Treaty or any subsequent modifications thereof.
- 2.2 Subject to the provisions of Chapter III of this Treaty, nothing in this Treaty shall extend to any Pre-investment activity related to establishment, acquisition or expansion of any Enterprise or Investment, or to any Law or Measure related to such Pre-investment activities, including terms and conditions under such Law or Measure which continue to apply post-investment to the management, conduct, operation, sale or other disposition of such Investments.
- 2.3 This Treaty shall not impose any obligations on the Parties other than that which are explicitly set forth herein. For avoidance of doubt, the Parties retain their rights to supplement, modify or amend this Treaty and its operation at any time in accordance with Articles 14.9, 21 and 22.
- 2.4 Nothing in this Treaty shall be interpreted to restrict the rights of either Party to formulate, modify, amend, apply or revoke its Law in good faith. 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.
- 2.5 This Treaty 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 Treaty.
- 2.6 This Treaty shall not apply to:
- (i) government procurement.
  - (ii) subsidies or grants provided by a Party.
  - (iii) services supplied in the exercise of governmental authority by the relevant body or authority of a Party. For the purposes of this Treaty, a service supplied in the exercise of governmental authority means any service which is supplied neither on a commercial basis nor in competition with one or more service suppliers.
  - (iv) any taxation Measure. Where a Host State asserts as a defence that conduct alleged to be a breach of its obligations under this Treaty is a subject matter of taxation which is excluded by this Article from the scope under this Treaty, any decision of the Host State, 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 any such decision.
  - (v) 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 Law of the Host State.
  - (vi) any commercial contract or agreement between a Party and an Investment or an Investor with respect to its Investment. Any dispute arising under such contract or agreement shall only be resolved in accordance with the dispute settlement procedure specified in such contract or agreement and if no such procedure is specified, the



applicable Law of the Host State. Such disputes shall not be brought before a tribunal under Article 14 or Article 15 of this Treaty under any circumstance.

## **Chapter II: Obligations of Parties**

### **Article 3: Standard of Treatment**

- 3.1 Each Party shall not subject Investments of Investors of the other Party to Measures which constitute:
- (i) Denial of justice under customary international law<sup>1</sup>;
  - (ii) Un-remedied and egregious violations of due process; or
  - (iii) Manifestly abusive treatment involving continuous, unjustified and outrageous coercion or harassment.
- 3.2 A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article.

### **Article 4: National Treatment**

- 4.1 Each Party shall not apply to Investments, Measures that accord less favourable treatment than that it accords, in like circumstances,<sup>2</sup> to domestic investments with respect to the management, conduct, operation, sale or other disposition of Investments in its territory.
- 4.2 A breach of Article 4.1 will only occur if the challenged Measure constitutes intentional and unlawful discrimination against the Investment on the basis of nationality.
- 4.3 This Article shall not apply to any Law or Measure of a Regional or local Government.
- 4.4 Exercises of discretion, including decisions regarding whether, when and how to enforce or not enforce a Law shall not constitute a violation of this Article provided such decisions are taken in furtherance of the Law of the Host State.
- 4.5 Extension of financial assistance or Measures taken by a Party in favour of its investors and their investments in pursuit of legitimate public purpose including the protection of public health, safety and the environment shall not be considered as a violation of this Article.

### **Article 5: Expropriation**

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<sup>1</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>2</sup> The requirement of “like circumstances” recognizes that States may have various legitimate reasons for distinguishing between investments including, but not limited to, (a) the goods or services consumed or produced by the Investment; (b) the actual and potential impact of the Investment on third persons, the local community, or the environment, (c) whether the Investment is public, private, or state-owned or controlled, and (d) the practical challenges of regulating the Investment. The factors and determinations used by the Host State to distinguish between Investors and Investments are to be given substantial deference by any tribunal constituted under Article 14.5 or Article 15.2.



- 5.1 Neither Party may nationalize or expropriate an Investment (hereinafter “**expropriate**”), or take Measures having an effect equivalent to expropriation, except for reasons of public purpose<sup>3</sup>, in accordance with the procedure established by Law, and on payment of adequate compensation.
- 5.2 The determination of whether a Measure or a series of Measures have an effect equivalent to expropriation requires a case-by-case, fact-based inquiry, and usually requires evidence that there has been:
- (i) permanent and complete or near complete deprivation of the value of Investment; and
  - (ii) permanent and complete or near complete deprivation of the Investor’s right of management and control over the Investment<sup>4</sup>; and
  - (iii) an appropriation of the Investment by the Host State which results in transfer of the complete or near complete value of the Investment to that Party or to an agency or instrumentality of the Party or a third party;
- 5.3 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.
- 5.4 For the avoidance of doubt, the parties also agree that, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives such as public health, safety and the environment shall not constitute expropriation.
- 5.5 If an Investor alleges that its Investment:- (a) has been expropriated, (b) payment of compensation has not been awarded, or (c) payment of compensation awarded is not adequate in violation of Article 5.1, it may submit a claim for determination of those issues and an award of adequate compensation pursuant to and in accordance with the terms of Article 14. However, a tribunal constituted under Article 14 or 15 shall not have authority to review the Host State’s determination of whether a Measure was taken for a public purpose or in compliance with its Law.
- 5.6 Compensation provided under this Article shall be adequate and reflect the fair market value of the expropriated Investment, as reduced after application of relevant Mitigating Factors. The amount of compensation shall not vary based on whether an expropriation has complied with the criteria of Article 5.1.
- 5.7 Mitigating Factors under Article 5.6 include:- (a) current and past use of the Investment, including the history of its acquisition and purpose; (b) the duration of the Investment and previous profits made by the Investment; (c) compensation or

<sup>3</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>4</sup> This does not prohibit a Party from regulating the management or control of an Investment when done in compliance with the Law of the Party where the Investment is made. This would cover, for example, requirements under the financial laws and regulations or insolvency laws of the Party in question or a law requiring that nationals of a Party hold certain senior management positions in sensitive industries that it considers necessary.

insurance payouts received by the Investor or Investment from other sources; (d) the value of property that remains subject to the Investor or Investment's disposition or control, (e) options available to the Investor or Investment to mitigate its losses, including reasonable efforts made by the Investor or Investor towards such mitigation, if any; (f) conduct of the Investor that contributed to its damage; (g) any obligation the Investor or its Investment is relieved of due to the expropriation, (h) liabilities owed in the Host State to the government as a result of the Investment's activities, (i) any harm or damage that the Investor or its Investment has caused to the environment or local community that have not been remedied by the Investor or the Investment, and (j) any other relevant considerations regarding the need to balance the public interest and the interests of the Investment.

**Explanation I:** 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.

**Explanation II:** The valuation date for computation of compensation shall be the day immediately before the expropriation takes place. In no event the valuation date shall be moved to any future date.

- 5.8 Any payment of compensation shall be made in a freely convertible currency. Interest on payment of compensation, if any, shall be paid in simple interest at the LIBOR rate from the date of expropriation until the date of actual payment. On payment, compensation shall be freely transferable in accordance with Article 6.

#### Article 6: Transfers

- 6.1 Subject to the Law of the Host State, each Party shall permit all funds of an Investor of the other Party related to an Investment in its territory to be freely transferred and on a non-discriminatory basis. Such funds may include:
- (i) contributions to capital;
  - (ii) profits, dividends, capital gains, and proceeds from the sale of all or any part of the Investment or from the partial or complete liquidation of the Investment;
  - (iii) interest, royalty payments, management fees, and technical assistance and other fees;
  - (iv) payments made under a contract, including a loan agreement;
  - (v) payments made pursuant to Article 3 [Standard of Treatment] and Article 5 [Expropriation]; and
  - (vi) payments arising out of a dispute.
- 6.2 Unless otherwise agreed to between the Parties, currency transfer under Article 6.1 shall be permitted in the currency of the original Investment or any other convertible currency. Such transfer shall be made at the prevailing market rate of exchange on the date of transfer.
- 6.3 Nothing in this Treaty shall prevent a Party from conditioning or preventing a transfer through a good faith application of its Law, including actions relating to:
- i. bankruptcy, insolvency or the protection of the rights of the creditors;

- ii. compliance with judicial, arbitral or administrative decisions and awards;
  - iii. compliance with labour obligations;
  - iv. financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;
  - v. issuing, trading or dealing in securities, futures, options, or derivatives;
  - vi. compliance with Laws on taxation;
  - vii. criminal or penal offences and the recovery of the proceeds of crime;
  - viii. social security, public retirement, or compulsory savings schemes, including provident funds, retirement gratuity programmes and employees insurance programmes;
  - ix. severance entitlements of employees;
  - x. requirement to register and satisfy other formalities imposed by the Central Bank and other relevant authorities of a Party; and
  - xi. 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.
- 6.4 The Parties share the understanding that, notwithstanding anything in Article 6.1 and 6.2 to the contrary, the Parties 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 7: Entry and Sojourn of Personnel**

- 7.1 Each Party shall, subject to its Law relating to the entry and sojourn of non-citizens and on the basis of reciprocity, permit natural persons of the other Party and personnel employed by the Investor or Investment to enter and remain in its territory for the purpose of engaging in activities connected with Investments.

## **Chapter III – Investor, Investment and Home State Obligations**

### **Article 8: Scope of this Chapter**

- 8.1 The objective of this Chapter is to ensure that the conduct, management and operations of Investors and their Investments are consistent with the Law of the Host State, and enhance the contribution of Investments to inclusive growth and sustainable development of the Host State.
- 8.2 The Parties agree that this Chapter prescribes the minimum obligations for Investors and their Investments for responsible business conduct.
- 8.3 The Parties further agree that compliance with Articles 9, 10, 11 and 12 of this Chapter is compulsory and is fundamental to the operation of this Treaty. Investors and their Investments must comply with the obligations in Articles 9, 10, 11, and 12 to benefit from the provisions of this Treaty.

- 8.4 A breach by Investors and their Investments of the obligations set forth in Articles 9, 10, 11 and 12 shall entitle the Party, at its sole discretion and in accordance with its Law and Article 14 to seek suitable enforcement, regulatory or other legal action in response to that breach.

#### **Article 9: Obligation against Corruption**

- 9.1 Investors and their Investments in the Host State shall not, either prior to or after the establishment of an Investment, offer, promise, or give any undue pecuniary advantage, gratification or gift whatsoever, whether directly or indirectly, to a public servant or official of the Host State as an inducement or reward for doing or forbearing to do any official act or obtain or maintain other improper advantage.
- 9.2 Except as otherwise allowed under the Law of the Host State, Investors and their Investments shall not engage any individual or firm to intercede, facilitate or in any way recommend to any public servant or official of the Host State, whether officially or unofficially, the award of a contract or a particular right under the Law of the Host State to such Investors and their Investments by mechanisms such as payment of any amount or promise of payment of any amount to any such individual or firm in respect of any such intercession, facilitation or recommendation.
- 9.3 Investors and their Investments shall not make illegal contributions to candidates for public office or to political parties or to other political organisations. Any political contributions and disclosures of those contributions must fully comply with the Host State's Law.
- 9.4 Investors and their Investments shall not be complicit in any act described in this Article, including inciting, aiding, abetting, conspiring to commit, or authorizing such acts.

#### **Article 10: Disclosures**

- 10.1 Investors and Investments must timely comply with the requirements of the Law of the Host State to disclose true and complete information regarding their activities, structure, financial situation, performance, relationships with affiliates, ownership, governance, or other matters.
- 10.2 Where required, Investors must also disclose the source and channel of their funds in the Home State or Host State by submitting appropriate documentary evidence establishing the legitimacy of such funds. This disclosure, if requested, shall include any changes in the form or ownership of the enterprise or other entity located in the Home State and the Host State.
- 10.3 The Investment shall maintain true and complete copies of the records, books of account and current financial statements for the Investment that may be necessary to compute and substantiate compensation for any alleged breach of this Treaty or Host and Home State Laws, including:
- (i) Governance structures;
  - (ii) records documenting the Investment, its shareholders, directors and employees;

- (iii) remuneration of directors and key managerial personnel;
  - (iv) annual balance sheets;
  - (v) annual statements of income, retained earnings, cash flow, changes in financial position, and related footnotes; and
  - (vi) pro-forma financial statements.
- 10.4 Accounting records shall be maintained and financial statements prepared in currency of the Host State in accordance with principles of accounting generally accepted in the Host State.
- 10.5 The Investment shall retain accounting records for 10 years; provided that, if an Investment Dispute arises, it must retain those records for 3 years after the termination of any arbitration under Article 14.
- 10.6 Without prejudice to any other disclosures required by Law of the Host State, the disclosures required under this Article shall be made to the Designated Representative of each Party on demand until otherwise notified by a Party. Even where not required to do so by Law of the Host State, Investors and Investments should develop and comply with policies to ensure timely and accurate disclosure of material information relating, but not limited to, the following matters:
- (i) the financial and operating results of the Investment;
  - (ii) objectives of the Investment;
  - (iii) major share ownership and voting rights, including the structure of a group of Enterprises and intra-group relations, as well as control enhancing mechanisms;
  - (iv) governance structures and policies, in particular, the content of any corporate governance code or policy and its implementation process;
  - (v) remuneration policy for members of the board and key executives, and information about board members, including qualifications, the selection process, other corporate directorships and whether each board member is regarded as independent by the board;
  - (vi) related party transactions;
  - (vii) foreseeable risk factors;
  - (viii) issues regarding employees and other stakeholders;
  - (ix) environmental impacts and management systems;
  - (x) policies and other codes of conduct to which the Investment subscribes, their date of adoption and the countries and entities to which such statements apply;
  - (xi) its performance in relation to these statements and codes; and
  - (xii) information on internal audit, risk management and legal compliance systems.

#### **Article 11: Taxation**

- 11.1 Investors and their Investments must comply with the provisions of Host State's Law on taxation including timely payment of their tax liabilities in accordance with the Law of the Host State.



### **Article 12: Compliance with Law of Host State**

- 12.1 Investors and their Investments shall be subject to and comply with the Law of the Host State. This includes, but is not limited to, the following:
- (i) Law concerning payment of wages and minimum wages, employment of contract labour, prohibition on child labour, special conditions of work, social security and benefit and insurance schemes applicable to employees;
  - (ii) information sharing requirements of the Host State concerning the Investment in question and the corporate history and practices of the Investment or Investor, for purposes of decision making in relation to that Investment or for other purposes;
  - (iii) environmental Law applicable to the Investment and its business operations;
  - (iv) Law relating to conservation of natural resources;
  - (v) Law relating to human rights;
  - (vi) Law of consumer protection and fair competition; and
  - (vii) relevant national and internationally accepted standards of corporate governance and accounting practices.
- 12.2 Investors and their Investments shall strive, through their management policies and practices, to contribute to the development objectives of the Host State. In particular, Investors and their Investments should recognise the rights, traditions and customs of local communities and indigenous peoples of the Host State and carry out their operations with respect and regard for such rights, traditions and customs.

### **Article 13: Home State Obligations**

- 13.1 Without prejudice to the jurisdiction of the Courts located in the Host State, Investors and its Investments shall be subject to civil actions for liability in the judicial process of their Home State for the acts, decisions or omissions made in the Home State in relation to the Investment where such acts, decisions or omissions lead to significant damage, personal injuries or loss of life in the Host State.
- 13.2 The Home State shall ensure that their legal systems and rules allow for, or do not prevent or unduly restrict, the bringing of court actions on their merits before their domestic courts relating to the civil liability of Investors and Investments for damages resulting from alleged acts, decisions or omissions made by Investments or Investors in relation to their Investments in the territory of the Host State.

## Chapter IV - Dispute Settlement

### Article 14: Settlement of Disputes between an Investor and a Party

#### 14.1 Purpose

Without prejudice to the rights and obligations of the Parties under Article 15, this Article establishes a mechanism for the settlement of Investment Disputes. An Investor shall not use or threaten to use this Article in order to obtain money, property, or any other thing of value from the Host State, or otherwise compel the Host State to act or refrain from acting.

#### 14.2 Scope

- (i) This Article shall only apply to:
  - a. a dispute arising between a Party and an Investor of the other Party arising out of an alleged breach of an obligation of a Party under Chapter II of this Treaty with respect to an Investment made by an Investor in the territory of the Host State (an “**InvestmentDispute**”); and
  - b. a counterclaim brought by a Party against an Investor or the Investment in an Investment Dispute pursuant to Article 14.11.
- (ii) In addition to other limits on its jurisdiction, a tribunal constituted under this Article shall not have the jurisdiction to:
  - a. re-examine any legal issue which has been finally settled by any judicial authority of the Host State between the Investor party to the Investment Dispute (the “**Disputing Investor**”) and the Party to the Investment Dispute (“**Respondent Party**”), or between the Disputing Investor, Investment or any other natural/legal person having a common right or interest in the Investment and a Respondent Party or a third party;
  - b. review the merits of a decision made by a judicial authority of the Host State;
  - c. accept jurisdiction over any claim that is or has been subject of an arbitration under Article 15; or
  - d. review the applicability of the exceptions under Article 16.1 (ii) and (iii) or Article 17 of this Treaty.
- (iii) A dispute between an Investor and a Party shall proceed sequentially in accordance with this Article.

#### 14.3 Exhaustion of Local Remedies, Notice and Consultation

- (i) The Investor or Investment must first submit its claim before the relevant domestic courts or administrative bodies of the Host State for the purpose of pursuing domestic remedies. Such claim must be submitted within one (1) year from the date on which the Investor or Investment first acquired, or should have first acquired, knowledge of the Measure in question and knowledge that the Investment, or the Investor with respect to its Investment, had incurred loss or damage as a result.
- (ii) If
  - a. after exhausting all judicial and administrative remedies relating to the Measure underlying the claim, no resolution has been reached satisfactory to the Investor or Investment; or



- b. having diligently pursued domestic remedies, the Investor or Investment has determined and can establish that continued pursuit of domestic relief would be futile because (1) there are no reasonably available domestic legal remedies capable of providing any relief for the dispute concerning the underlying Measure, or (2) that the process for obtaining legal relief provides no reasonable possibility of such relief in a reasonable period of time,

the Investor may commence a proceeding under this Article by transmitting a Notice of Dispute (“**Notice of Dispute**”) to the Respondent Party.

(iii) The Notice of Dispute shall:

- a. contain a self-certified statement (1) providing the name and address of the Investor and the Investment; (2) setting forth the legal and factual bases of the claim and the provisions of the Treaty alleged to have been violated; (3) demonstrating compliance with Article 14.3(i) and (ii); (4) demonstrating compliance with Articles 9, 10, 11 and 12 of this Treaty; (5) stating the relief sought and amount of damages claimed; and (6) providing information in a self-certified form that is sufficient to establish that it is, and at all relevant times has been, an Investor with an Investment entitled to protection under the Treaty; and
- b. be transmitted to the Designated Representative of the Respondent Party.
- (iv) For no less than one year after receipt of the Notice of Dispute, the Disputing Investor and Respondent Party shall, consistent with the Law of the Host State, use their best efforts to try to resolve the dispute amicably through meaningful consultation, negotiation or continued pursuit of any available domestic remedies or solutions.
- (v) The Parties agree that the requirements under this Article regarding exhaustion of domestic remedies, providing a proper Notice of Dispute, and the use of best efforts to resolve the dispute amicably are mandatory and conditions precedent to the submission of the dispute to arbitration. Non-compliance with any subparagraph of Article 14.3 bars the Disputing Investor from taking subsequent steps to pursue arbitration under Article 14.

#### **14.4 Additional Conditions Precedent for Submission of Dispute to Arbitration**

- (i) In the event that the Investment Dispute cannot be settled amicably pursuant to Article 14.3 (iv), a Disputing Investor may submit a claim to arbitration pursuant to this Treaty, but only if the following conditions are satisfied:
- A. No more than
- a. three (3) years have elapsed from the date on which the Investor or Investment first acquired, or should have first acquired, knowledge of the Measure in question and knowledge that the Investment, or the Investor with respect to its Investment, had incurred loss or damage as a result; or
- b. Eighteen (18) months have elapsed from the conclusion of domestic proceedings pursuant to Article 14.3(ii)(a); or abandonment of proceedings pursuant to Article 14.3(ii)(b),
- whichever is later.

- B. At least 90 days before submitting any claim to arbitration, the Disputing Investor has transmitted to the Designated Representative of the Respondent Party a written notice of its intention to submit the claim to arbitration (“**Notice of Arbitration**”). The Notice of Arbitration shall:
- a. attach the Notice of Dispute and record of its transmission to the Disputing Party;
  - b. demonstrate compliance with Article 14.3(iv) and 14.4(i)(A);
  - c. identify, for each claim, the provision of the Treaty alleged to have been breached, the legal and factual basis of the claim, and the relief sought;
  - d. indicate the amount of damages claimed and the basis for calculation of such amount;
  - e. provide the Investor’s and the Investment’s consent to arbitration in accordance with this Treaty; and
  - f. include the Investor’s and the Investment’s written waivers of any right to initiate or continue before any administrative tribunal or court under the Law of the Host State, or other applicable dispute settlement procedures with respect to any Measure alleged to constitute a breach of the obligations under this Treaty. Provided, however, that the Investment’s written waiver is not required if the Investor can establish that the Investment’s failure or refusal to provide such waiver is due to the Host State’s expropriation of or interference with the management or control of the Investment.
- (ii) In the event the Investment Dispute cannot be settled amicably, and provided there has been full compliance with the conditions set forth in Article 14.3 and 14.4 (i), including written consent for the submission of the claim to arbitration by the Parties, the Investor, on behalf of an Investment that the Investor directly owns or controls, may submit to arbitration under this Article a claim (“**Claim**”):
- a. that the Respondent Party has breached an obligation under Chapter II of this Treaty; and
  - b. that the Investment, or Investor, with respect to its Investment, has suffered actual and non-speculative damages as a direct and foreseeable result of such breach by the Respondent Party.

#### 14.5 Appointment of Arbitrators

- (i) The arbitral tribunal shall consist of three arbitrators with relevant expertise or experience in public international law, international trade and international investment law, or the resolution of disputes arising under international trade or international investment agreements. One arbitrator shall be appointed by each of the disputing parties and the third arbitrator (“**Presiding Arbitrator**”) shall be appointed by agreement of the co-arbitrators and the Parties.
- (ii) If a tribunal has not been constituted within one hundred twenty days (120) days from the date that a Claim is submitted to arbitration under this Article, the appointing authority under this Article shall be in the following order: the President, the Vice-President or the next most senior Judge of the International

- Court of Justice, such that the appointing authority remains a non-national of either Party or is otherwise not prevented from making the appointments.
- (iii) The appointing authority shall appoint in her/his discretion and after consultation with the parties to the Investment Dispute, the arbitrator or arbitrators not yet appointed.

#### **14.6 Prevention of Conflict of Interest of Arbitrators and Challenges**

- (i) Every arbitrator appointed to resolve disputes under this Treaty shall during the entire arbitration proceedings be impartial, independent and free of any actual or potential conflict of interest.
- (ii) Upon nomination and, if appointed, every arbitrator shall, on an ongoing basis, disclose in writing any circumstances that may, in the eyes of the Parties, give rise to doubts as to her/his independence, impartiality, or freedom from conflicts of interest. This includes any items listed in Article 14.6 (x) and any other relevant circumstances pertaining to the subject matter of the dispute, and to existing or past, direct or indirect, financial, personal, business, or professional relationships with any of the parties, legal counsel, representatives, witnesses, or co-arbitrators. Such disclosure shall be made immediately upon the arbitrator acquiring knowledge of such circumstances, and shall be made to the co-arbitrators, the parties to the arbitration and the appointing authority, if any, making an appointment. Neither the ability of those individuals or entities to access this information independently, nor the availability of that information in the public domain, will relieve any arbitrator of his or her affirmative duty to make these disclosures. Doubts regarding whether disclosure is required shall be resolved in favor of such disclosure.
- (iii) A party to the Investment Dispute may challenge an arbitrator appointed under this Treaty:
- if facts or circumstances exist that may, in the eyes of the parties, give rise to justifiable doubts as to the arbitrator's independence, impartiality or freedom from conflicts of interest; or
  - in the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of the arbitrator performing his or her functions,
- provided that no such challenge may be initiated after fifteen days of that party: (i) becoming aware of the constitution of the arbitral tribunal, (ii) learning of the relevant facts or circumstances through a disclosure made under Article 14.6 (ii) by the arbitrator, or (iii) otherwise becoming aware of the relevant facts or circumstances relevant to a challenge under Article 14.6 (iii) (a) or (b), whichever is later.
- (iv) The notice of challenge shall be communicated to the other party to the Investment Dispute, to the arbitrator who is challenged, to the other arbitrators and to the

- appointing authority under Article 14.5 (ii), if any. The notice of challenge shall state the reasons for the challenge.
- (v) When an arbitrator has been challenged by a party, all parties may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge.
  - (vi) If, within 15 days from the date of the notice of challenge, all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue it. In that case, within 30 days from the date of the notice of challenge, it shall seek a decision on the challenge by the appointing authority.
  - (vii) The appointing authority shall accept the challenge made under Article 14.6 (iii) if, even in the absence of actual bias, there are circumstances that would give rise to justifiable doubts as to the arbitrator's lack of independence, impartiality, freedom from conflicts of interest, or ability to perform his or her role, in the eyes of an objective third party.
  - (viii) In any event where an arbitrator has to be replaced during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in the Treaty and the arbitration rules that were applicable to the appointment or choice of the arbitrator being replaced. This procedure shall apply even if during the process of appointing the arbitrator to be replaced, a party to the arbitration had failed to exercise its right to appoint or to participate in the appointment.
  - (ix) If an arbitrator is replaced, the proceedings may resume at the stage where the arbitrator who was replaced ceased to perform his or her functions unless otherwise agreed by the disputing parties.
  - (x) A justifiable doubt as to an arbitrator's independence or impartiality or freedom from conflicts of interest shall be deemed to exist if:
    - a. The arbitrator or her/his associates or relatives have an interest in the outcome of the particular arbitration;
    - b. The arbitrator is or has been a legal representative/advisor of the appointing party or an affiliate of the appointing party in the preceding three (3) years prior to the commencement of arbitration;
    - c. The arbitrator is a lawyer in the same law firm as the counsel to one of the parties;
    - d. The arbitrator is acting concurrently with the lawyer or law firm of one of the parties in another dispute;
    - e. The arbitrator's law firm is currently rendering or has rendered services to one of the parties or to an affiliate of one of the parties out of which such law firm derives significant financial interest;

- f. The arbitrator has received a full briefing of the merits or procedural aspects of the dispute from the appointing party or her/his counsel prior to her/his appointment;
- g. The arbitrator is a manager, director or member of the governing body, or has a similar controlling influence by virtue of shareholding or otherwise in one of the parties;
- h. The arbitrator has publicly advocated a fixed position regarding an issue on the case that is being arbitrated.

#### **14.7 Conduct of Arbitral Proceedings**

##### Applicable rules

- (i) The arbitration shall be conducted under the Arbitration Rules of the United Nations Commission on International Trade Law in force at the time of the commencement of the dispute or any other rules agreed to between the parties in writing prior to the commencement of arbitration, and as modified by this Treaty.

##### Seat and Location

- (ii) The parties to the arbitration may agree on the seat and location of arbitration under the arbitral rules applicable, provided that if the parties do not agree on the seat and location of arbitration, the tribunal must give special consideration to a seat and location within the Host State including, in particular, the capital city of the Host State.

##### Preliminary Objections

- (iii) Without prejudice to a tribunal's authority to address other objections, a tribunal shall address and decide as a preliminary question any objection by the Respondent Party that a Claim submitted by the Investor is (a) not within the scope of the tribunal's jurisdiction, or (b) without any basis in law.
- (iv) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the Respondent Party to submit its counter-memorial. On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and decide on an expedited basis an objection under Article 14.7 that the dispute is not within the tribunal's competence under the Treaty or is without any basis in law.
- (v) The Respondent Party does not waive any objection as to competence or any argument on the merits merely because the Respondent Party did or did not raise an objection or make use of the expedited procedure set out Article 14.7 (iii).
- (vi) When it decides on a Respondent Party's preliminary objection under Article 14.7 (iii) and (iv), the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorneys' fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the Disputing Investor's Claim or the Respondent Party's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

##### Production of documents and evidence



- (vii) When considering matters of evidence or production of documents, the tribunal shall not have any powers to compel production of documents which the Respondent Party claims are protected from disclosure under the rules on confidentiality or privilege under the Law of the Host State.

#### **14.8 Transparency in arbitral proceedings**

- (i) Subject to applicable Law regarding protection of confidential information, the Respondent Party shall make available to the public the following documents relating to Investment Disputes:
- The Notice of Arbitration;
  - Pleadings and other written submissions on jurisdiction and the merits submitted to the tribunal, including submissions by a Non-disputing Party to the dispute under Article 14.8 (iv);
  - Transcripts of hearings, if available; and
  - Decisions, orders and awards issued by the tribunal;
- (ii) Hearings for the presentation of evidence or for oral argument (“**hearings**”) shall be made public in accordance with the following provisions:
- Where there is a need to protect confidential information or protect the safety of participants in the proceedings, the arbitral tribunal shall make arrangements to hold in private that part of the hearing requiring such protection.
  - The arbitral tribunal shall make logistical arrangements to facilitate public access to hearings, including by organizing attendance through video links or such other means as it deems appropriate. However, the arbitral tribunal may, after consultation with the disputing parties, decide to hold all or part of the hearings in private where this becomes necessary for logistical reasons, such as when the circumstances render any original arrangement for public access to a hearing infeasible.
- (iii) An award of a Tribunal rendered under this Article shall be publicly available, subject to the redaction of confidential information. Where a disputing Contracting Party determines that it is in the public interest to do so and notifies the Tribunal of that determination, all other documents submitted to, or issued by, the Tribunal shall also be publicly available, subject to the redaction of confidential information.
- (iv) The Non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Treaty.

#### **14.9 Burden of Proof and Governing Law**

- (i) This Treaty shall be interpreted in the context of the high level of deference that international law accords to States with regard to their development and implementation of domestic policies.
- (ii) The Investor at all times bears the burden of establishing: (a) jurisdiction, (b) the existence of an obligation under Chapter II of this Treaty, (c) a breach of that obligation, (d) that the Investment, or the Investor with respect to the Investment, has suffered actual and non-speculative losses as a result of the breach, and (e) that those losses were foreseeable and directly caused by the breach.

- (iii) The governing law for interpretation of this Treaty by a tribunal constituted under this Article shall be: (a) this Treaty, (b) the general principles of public international law relating to the interpretation of treaties, including the presumption of consistency between international treaties to which the Parties are party, and (c) for matters relating to domestic law, the Law of the Host State.
- (iv) Interpretations of specific provisions and decisions on application of this Treaty issued subsequently by the Parties in accordance with this Treaty shall be binding on tribunals established under this Article upon issuance of such interpretations or decisions.
- (v) In accordance with the Vienna Convention of the Law of Treaties, 1969 and customary international law, other evidence of the Parties subsequent agreement and practice regarding interpretation or application of this Treaty shall constitute authoritative interpretations of this Treaty and must be taken into account by tribunals under Article 14.

#### 14.10 Award

- (i) The arbitral tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both parties to the arbitration. Any award shall state the legal basis and the reasons for its decisions.
- (ii) Subject to Article 14.11, a tribunal can only award monetary compensation for a breach of the obligations under Chapter II of the Treaty. In awarding any compensation under this Treaty, a tribunal constituted under this Article shall take into account any breach of the obligations contained in Articles 9, 10, 11 and 12 of Chapter III of this Treaty by the Investor and its Investment.
- (iii) A tribunal may not award punitive or moral damages or any injunctive relief against either of the Parties under any circumstance.
- (iv) An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case and the tribunal must clearly state those limitations in the text of the award.
- (v) The enforcement of an award shall be in accordance with the Law of the Party where the award is sought to be enforced.

#### 14.11 Counterclaims by Parties

- (i) A Party may initiate a counterclaim against the Investor or Investment for a breach of the obligations set out under Articles 9, 10, 11 and 12 of Chapter III of this Treaty before a tribunal established under this Article and seek as a remedy suitable declaratory relief, enforcement action or monetary compensation.
- (ii) In assessing the monetary compensation to be paid to a Party under this Article, the tribunal can take into consideration the following:
- whether the breach justifies an award of damages; and
  - whether that Party has taken steps to mitigate its losses.
- (iii) The Parties agree that a counterclaim made in accordance with this Article 14.11 shall not preclude or operate as a *res judicata* against applicable legal, enforcement or regulatory action in accordance with the Law of the Host State or in any other proceedings before judicial bodies or institutions of the Host State.



- (iv) An initiation of a counterclaim by a Party shall not be deemed to be a waiver of that Respondent Party's objection to the tribunal's jurisdiction over an Investment Dispute.

#### **14.12 Costs**

- (i) Subject to Article 14.12 (ii), the parties to the arbitration shall share the costs of the arbitration, with arbitrator fees, expenses, allowances and other administrative costs. Each party shall bear the cost of its representation in the arbitral proceedings. The tribunal may, however, in its discretion direct that the entire costs or a higher proportion of costs shall be borne by one of the two disputing parties and this determination shall be binding on both disputing parties.
- (ii) Notwithstanding Article 14.12 (i), the tribunal shall award all costs and may award damages in favour of the Respondent Party if it finds that the Investor brought the action in violation of Article 14.1.

#### **14.13 Diplomatic Exchange between Parties**

- (i) If a Disputing Investor has commenced an Investment Dispute against a Respondent Host State under this Article, the non-disputing Party shall not give diplomatic protection, or bring an international claim, in respect of that Investment Dispute between one of its Investors and the Respondent Host State, unless the Respondent Party has failed to abide by and comply with an award or the decisions of its courts, as the case may be, in accordance with Article 14 and other applicable law regarding recognition and enforcement of foreign judgments and arbitral awards.
- (ii) Nothing in Article 14 precludes a Respondent Party from requesting consultations or seeking agreement with the other Party on issues of interpretation or application of the Treaty. In response to such a request, the other Party shall engage in good faith consultations on the matters requested.

### **Article 15: Disputes between Parties**

#### **15.1 Disputes between the Parties concerning:**

- (i) the interpretation or application of this Treaty, or
- (ii) whether there has been compliance with obligations to consult in good faith under Articles 14.13 or 21,

should, as far as possible, be settled through consultation or negotiation, which may include the use of non binding third-party mediation or other mechanisms.

If a dispute between the Parties cannot be settled within six months from the time the dispute arose, it shall upon the request of either Party be submitted to an arbitral tribunal.

15.2 Such an arbitral tribunal shall be constituted for each individual case in the following way: Within two months of the receipt of the request for arbitration, each Party shall appoint one member of the tribunal. Those two members shall then select a national of a third State who, on approval by the two Parties, shall be appointed Chairman of the tribunal. The Chairman shall be appointed within two months from the date of appointment of the other two members.

15.3 If within the periods specified in Article 15.2 the necessary appointment(s) have not been made, either Party may, in the absence of any other agreement, invite the

- President of the International Court of Justice to make any necessary appointment(s). If the President is a national of either Party or if he or she is otherwise prevented from discharging the said function, the Vice President shall be invited to make the necessary appointment(s). If the Vice President is a national of either Party or if he or she too 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 Party shall be invited to make the necessary appointment(s).
- 15.4 The arbitral tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both Parties.
- 15.5 The Parties to the arbitration shall share the costs of the arbitration, including the arbitrator fees, expenses, allowances and other administrative costs. Each Party shall bear the cost of its representation in the arbitral proceedings. The tribunal may, however, in its discretion direct that the entire costs or a higher proportion of costs shall be borne by one of the two disputing Parties and this determination shall be binding on both disputing Parties.
- 15.6 A tribunal constituted under this Article shall have the power to determine its own procedures.

## Chapter V – Exceptions

### Article 16: General Exceptions

- 16.1 Nothing in this Treaty precludes the Host State from taking actions or measures of general applicability which it considers necessary with respect to the following, including:
- (i) protecting public morals or maintaining public order;
  - (ii) ensuring the integrity and stability of its financial system, banks and financial institutions;
  - (iii) remedying serious balance-of-payments problems, exchange rate difficulties and external financial difficulties or threat thereof;
  - (iv) ensuring public health and safety;
  - (v) protecting and conserving the environment including all living and non-living natural resources;
  - (vi) improving working conditions;
  - (vii) securing compliance with the Law for the prevention of deceptive and fraudulent practices or to deal with the effects of a default on a contract;
  - (viii) protecting privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; or
  - (ix) protecting national treasures or monuments of artistic, cultural, historic or archaeological value.
- 16.2 Nothing in this Treaty shall bind either Party to protect Investments made with capital or assets derived from illegal activities.

- 16.3 Nothing in this Treaty shall apply to any Measure taken by a local body or authority at the district, block or village level in the case of India. For avoidance of doubt, a local body or authority shall include the Municipal Corporation, district level officers, *gram panchayats* and *GramSabha*.

### **Article 17: Security Exceptions**

- 17.1 Nothing in this Treaty shall be construed:
- (i) to require a Party to furnish any information, the disclosure of which it considers contrary to its essential security interests;
  - (ii) to prevent a Party from taking any action which it considers necessary for the protection of its essential security interests including but not limited to:
    - (a) action relating to fissionable and fusionable materials or the materials from which they are derived;
    - (b) action taken in time of war or other emergency in domestic or international relations;
    - (c) action relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
    - (d) action taken so as to protect critical public infrastructure including communication, power and water infrastructures from deliberate attempts intended to disable or degrade such infrastructure; or
  - (iii) to prevent a Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.
- 17.2 Each Party shall inform the other Party to the fullest extent possible of Measures taken under Article 17.1 (i) and (iii) and of their termination.
- 17.3 Nothing in this Chapter shall be construed to require a Party to accord the benefits of this Treaty to an Investor that is a legal entity of the Home State where a Party adopts or maintains Measures in any legislation or regulations which it considers necessary for the protection of its essential security interests with respect to a non-Party or an investor of a non-Party that would be violated or circumvented if the benefits of this Chapter were accorded to such legal entities or to its Investments.
- 17.4 This Article shall be interpreted in accordance with the understanding of the Parties on security exceptions as set out in Annex 1, which shall form an integral part of this Treaty.

### **Article 18**

#### **Preliminary Determinations on General Exceptions**

- 18.1 Subject to Article 14.2 (ii) (d), where an Investor submits a Claim to arbitration under Article 14, and the Respondent Party invokes any of the sub-paragraphs of Article 16 as a defense, the following provisions shall apply:
- (i) The Respondent Party shall, within 120 days of the receipt of Notice of Arbitration under Article 14 this Treaty, submit in writing to the Designated

- Representative of the other Party, a request for a joint determination of whether and to what extent Article 16 is a valid defense to the Claim because a Treaty exception applies. The Respondent Party shall also promptly provide the tribunal, if constituted, a copy of such request. The arbitration may proceed with respect to the Claim only as provided in subparagraph (iv) of this Article.
- (ii) The Designated Representative of each Party or competent authorities appointed by them shall make themselves available for consultations with each other and shall attempt in good faith to make a determination as described in subparagraph (i) of this Article. Any such determination shall be transmitted promptly to the disputing parties and, if constituted, to the tribunal. The determination shall be binding on the tribunal and any award of the tribunal must be consistent with the Parties' joint determination.
- (iii) If the representatives of both Parties, within 120 days of the date by which they have both received the Respondent Party's written request for a joint determination under subparagraph (i) of this Article, have not made a determination as described in that subparagraph, the tribunal shall decide the issue or issues left unresolved. The provisions of Article 14 shall apply, except as modified by Article 18 (iii):
- (a) The tribunal shall draw no inference regarding the application of Articles 16 from the fact that no determination as described in subparagraph (i) of this Article has been made.
- (b) The non-disputing Party may make oral and written submissions to the tribunal regarding whether and to what extent Article 16 is a valid defense to the claim. Unless it makes such a submission, the non-disputing Party shall be presumed, for purposes of the arbitration, to take a position on Article 16 not inconsistent with that of the Respondent Party.
- (iv) The arbitration referred to in subparagraph (i) of this Article may proceed with respect to the Claim:
- (a) 10 days after the date any joint determination has been received by both the disputing parties and, if constituted, the tribunal; or
- (b) 10 days after the expiration of the 120-day period provided to the competent authorities in subparagraph (iii) of this Article.
- (v) On the request of the Respondent Party made within 30 days after the expiration of the 120-day period for a joint determination referred to in subparagraph (iii) of this Article, or, if the tribunal has not been constituted as of the expiration of the 120-day period, within 30 days after the tribunal is constituted, the tribunal shall address and decide the issue or issues left unresolved as referred to in subparagraph (iii) of this Article prior to deciding the merits of the claim for which Article 16 has been invoked by the Respondent Party as a defense. Failure of the Respondent Party to make such a request is without prejudice to its right to invoke Article 16 as a defense at any appropriate phase of the arbitration.

## Chapter V - Final Provisions

### Article 19: Relationship with other Treaties

- 19.1 This Treaty or any action taken hereunder shall not affect the rights and obligations of the Parties under existing Agreements to which they are parties.
- 19.2 Nothing in this Treaty shall affect the rights of the Parties to enter into other treaties or international agreements not contrary to the principles, objectives and terms of this Treaty.
- 19.3 Any inconsistency, or question regarding the relationship between this Treaty and another bilateral agreement between the Parties, or a multilateral agreement to which both Parties are a Party, shall be resolved in accordance with the Vienna Convention on the Law of Treaties.

### Article 20: Denial of Benefits

- 20.1 For greater certainty, the Host State may at any time, including after the institution of arbitration proceedings in accordance with Chapter IV of this Treaty, deny the benefits of this Treaty to:-
  - (i) an Investment or Investor owned or controlled, directly or indirectly, by persons of a non-Party or of the Host State; or
  - (ii) an Investment or Investor that has been established or restructured with the primary purpose of gaining access to the dispute resolution mechanisms provided in this Treaty.

### Article 21: Consultations and Periodic Review

- 21.1 Either Party may request, and the other Party shall promptly agree to, consultations in good faith on any issue regarding the interpretation, application, implementation, execution or any other matter including, but not limited to:
  - (i) reviewing the implementation of this Treaty ;
  - (ii) reviewing the interpretation or application of this Treaty ;
  - (iii) exchanging legal information; and
  - (iv) subject to Article 14.13, addressing Investment Disputes or other disputes arising out of investment.
- 21.2 Further to consultations under this Article, the Parties may take any action as they may jointly decide, including making and adopting rules supplementing the applicable arbitral rules under Articles 14 or 15 of this Treaty, issuing binding interpretations of this Treaty, and adopting joint measures in order to improve the effectiveness of this Treaty .
- 21.3 The Parties shall meet every five years after the entry into force of this Treaty to consult and review the operation and effectiveness of this Treaty.

### Article 22: Amendments

- 22.1 This Treaty may be amended at any time at the request of either Party. The requesting Party must submit its request in written form explaining the grounds on which the amendment shall be made. The other Party shall consult with the requesting Party regarding the proposed amendment and must also respond to the request in writing. This Treaty will stand automatically amended at all times to the extent that the Parties agree. Any agreement to amend the treaty pursuant to this Article must be expressed in writing, whether in a single written instrument or through an exchange of diplomatic notes. These amendments shall be binding on the tribunals constituted under Articles 14 and 15 of this Treaty and a tribunal award must be consistent with all amendments to this Treaty.

### Article 23: Entry into Force

- 23.1 This Treaty shall be subject to ratification and shall enter into force on the date of exchange of Instruments of ratification.

### Article 24: Duration and Termination

- 24.1 This Treaty shall remain in force for a period of ten years and shall lapse thereafter unless the Parties expressly agree in writing that it shall be renewed. This Treaty may be terminated anytime after its entry into force if either Party gives to the other Party a prior notice in writing six (6) months in advance stating its intention to terminate the Treaty. The Treaty shall stand terminated after sixty (60) days from the date of receipt of such written notice.
- 24.2 In respect of investments made prior to the date when the termination of this Treaty becomes effective, the provisions of this Treaty shall remain in force for a period of five years.

In witness whereof the undersigned, duly authorised thereto by their respective Governments, have signed this Treaty.

Done at \_\_\_\_\_ on this \_\_\_\_\_ day of \_\_\_\_\_ in two originals each in the Hindi, English and (languages), all texts being equally authoritative.

In case of any divergence in interpretation, the English text shall prevail.

For the Government of the Republic of  
India

For the Government of the



### Annex 1: Security Exceptions

The Parties confirm the following understanding with respect to interpretation and/or implementation of Article 17 of this Treaty:

- (i) the measures referred to in Article 17.3 are measures where the intention and objective of the Host State imposing the measures is for the protection of its essential security interests. These measures shall be imposed on a non-discriminatory basis and may be found in any of its legislation or regulations:
  - a. In the case of India, the applicable measures referred to in Article 17.3 are currently set out in the regulations framed under the Foreign Exchange Management Act, 1999 and the rules and regulations made thereunder. India shall, upon request by the other Party, provide information on the measures concerned;
  - b. In the case of other Party -----
- (ii) Where the Party asserts as a defence that conduct alleged to be a breach of its obligations under this Treaty is for the protection of its essential security interests protected by Article 17, any decision of such Party taken on such security considerations and its decision to invoke Article 17 at any time, whether before or after the commencement of arbitral proceedings shall be non-justiciable. It shall not be open to any arbitral tribunal constituted under Article 14 of 15 of this Treaty to review any such decision, even where the arbitral proceedings concern an assessment of any claim for damages and/or compensation, or an adjudication of any other issues referred to the tribunal.