

MOCK TEXT OF THE TRANS-PACIFIC PARTNERSHIP AGREEMENT ON FINANCIAL SERVICES, INVESTMENT & CAPITAL MOVEMENTS

The global financial crisis has highlighted the critical importance of the TPPA negotiations on financial services, investment and capital movements.

It is essential that all parties and all their diverse constituencies are fully aware of the implications of these negotiations. To date, that has not been possible because the draft text the parties are working on has not been released to enable independent analysis and informed debate to occur.

Such analysis cannot wait for the release of the text at the conclusion of the negotiations when it is effectively impossible to change what has been agreed. It is therefore essential that all the negotiating parties agree in Chile to release the draft texts at the end of each round, starting with the February round in Santiago, Chile.

Pending the release of the official text, the attached mock text on financial services and investment and capital movements has been developed to provide the basis for independent expert analysis.

The mock text is based on the existing free trade agreements between the United States and Australia, Chile, Peru and Singapore. It is necessarily selective in the articles it has extracted from the relevant chapters and includes the relevant substantive annexes, but not the parties' schedules. In some places minor variations have not been recorded. In one place a comparison with the Australia New Zealand ASEAN FTA is made.

This document is intended as an indicative and interim reference point. It demonstrates the importance that external stakeholders place on public availability of the text to enable informed and timely analysis and debate, and to hasten the decision to release the official text.

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Key:

{ }	name of chapter
{ } ()	title of Article in chapter
[]fn	text of country indicated in footnote
Article 1	article in this composite text
Annex	Annexes referred to by name

PART A: FINANCIAL SERVICES

ARTICLE 1: SCOPE AND COVERAGE

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

- (a) financial institutions of another Party;
- (b) investors of another Party, and investments of such investors, in financial institutions in the Party's territory; and
- (c) cross-border trade in financial services.

2.¹ Chapters {Investment} and {Cross-Border Services} apply to measures described in paragraph 1 only to the extent that these Chapters or Articles of these Chapters are incorporated into this Chapter.

(a) Articles 24 {Investment} (Expropriation), [Fn]² 25 {Investment} (Transfers), [{Investment} (Investment and Environment),]³ {Investment} (Denial of Benefits), {Investment} (Special Formalities and Information Requirements), [and {Cross-Border Services} (Denial of Benefits)]⁴ are hereby incorporated into and made part of this Chapter.

[Fn For greater certainty, the letters referred to in Article {Investment} (Status of Letter Exchanges), to the extent relevant, are applicable to Article {Investment} (Expropriation) as incorporated into this chapter]⁵

[(b) Section B (Investor-State Dispute Settlement) of Chapter {Investment} is hereby incorporated into and made part of this Chapter solely for claims that a Party has breached Articles 24 (Expropriation), 25 (Transfers), {Investment} (Denial of benefits), and (Special Formalities and Information Requirements) as incorporated into this Chapter.]⁶

¹ SUSFTA, AUSFTA, PUSFTA, ChUSFTA expressed differently

² SUSFTA

³ AUSFTA, SUSFTA, PUSFTA

⁴ AUSFTA, CUSFTA, PUSFTA

⁵ SUSFTA

⁶ SUSFTA, ChUSFTA, PUSFTA

(c) Article 26 {Cross-Border Services} (Payments and Transfers) is incorporated into and made part of this Chapter to the extent that cross-border trade in financial services is subject to obligations under Article 5 (Cross-border Trade).

3. This Chapter does not apply to measures adopted or maintained by a Party relating to:

(a) activities or services forming part of a public retirement plan or statutory system of social security; or

(b) activities or services conducted for the account or with the guarantee or using the financial resources of the Party, including its public entities,

except that this Chapter shall apply [if]⁷ [to the extent that]⁸ a Party allows any of the activities or services referred to in subparagraph (a) or (b) to be conducted by its financial institutions in competition with a public entity or a financial institution.

[4. This Chapter does not apply to laws, regulations, or requirements governing the procurement by government agencies of financial services purchased for governmental purposes and not with a view to commercial resale or use in the supply of services for commercial sale.]⁹

[5. Annex Understanding Concerning Article 1.3(a) sets out the Parties' understanding with respect to certain activities or services described in subparagraph 3(a).

Annex: Understanding Concerning Article 1.3(a)

1. The Parties understand that this Chapter applies to measures adopted or maintained by a Party relating to activities and services described in Article 12.1.3(a) only to the extent that a Party allows its financial institutions to supply such activities and services in competition with a public entity or a financial institution. The Parties further understand that this Chapter does not apply to such measures: (a) to the extent that a Party reserves such activities and services to the government, a public entity, or a financial institution and they are not supplied in competition with another financial institution, or (b) relating to those contributions with respect to which the supply of such activities or services is so reserved.

2. For greater certainty, with respect to the activities or services referred to in Article 1.3(a), the Parties recognize that the taking of any of the following actions is not inconsistent with this Chapter.

A Party may:

(a) designate, formally or in effect, a monopoly, including a financial institution, to supply some or all activities or services;

⁷ AUSFTA, ChUSFTA, PUSFTA

⁸ SUSFTA

⁹ SUSFTA,

- (b) permit or require participants to place all or part of their relevant contributions under the management of an entity other than the government, a public entity, or a designated monopoly;
- (c) preclude, whether permanently or temporarily, some or all participants from choosing to have certain activities or services supplied by an entity other than the government, a public entity, or a designated monopoly; and
- (d) require that some or all activities or services be supplied by financial institutions located within the Party's territory. Such activities or services may include the management of some or all contributions or the provision of annuities or other withdrawal (distribution) options using certain contributions.

3. For the purposes of this Annex, "contribution" means an amount paid by or on behalf of an individual with respect to, or otherwise subject to, a plan or system described in Article 1.3(a).]¹⁰

ARTICLE 2: NATIONAL TREATMENT

1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords to its own investors, in like circumstances, with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of financial institutions and investments in financial institutions in its territory.

2. Each Party shall accord to financial institutions of another Party and to investments of investors of another Party in financial institutions treatment no less favourable than that it accords to its own financial institutions, and to investments of its own investors in financial institutions, in like circumstances, with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of financial institutions and investments.

[3. For purposes of the national treatment obligations in Article 5 (Cross-Border Trade), a Party shall accord to cross-border financial service suppliers of the other Party treatment no less favourable than that it accords to its own financial service suppliers, in like circumstances, with respect to the supply of the relevant service.]¹¹

ARTICLE 3: MOST-FAVOURED-NATION TREATMENT

Each Party shall accord to investors of another Party, financial institutions of another Party, investments of investors in financial institutions, and cross-border financial service suppliers of another Party treatment no less favourable than that it accords to the investors, financial institutions, investments of investors in financial institutions, and cross-border financial service suppliers of a non-Party, in like circumstances.

[2. A Party may recognize prudential measures of [another Party or of]¹² a non-Party in the application of measures covered by this Chapter. Such recognition may be:

¹⁰ PUSFTA

¹¹ SUSFTA, ChUSFTA, PUSFTA; same appears in AUSFTA under Article 5.1.

¹² PUSFTA

- (a) accorded [autonomously]¹³ [unilaterally]¹⁴;
- (b) achieved through harmonization or other means; or
- (c) based upon an agreement or arrangement with [another Party or]¹⁵ a non-Party.

3. A Party according recognition of prudential measures under paragraph 2 shall provide adequate opportunity to the other Party to demonstrate that circumstances exist in which there are or would be equivalent regulation, oversight, implementation of regulation, and, if appropriate, procedures concerning the sharing of information between the [relevant]¹⁶ Parties.

4. Where a Party accords recognition of prudential measures under paragraph 2(c) and the circumstances set out in paragraph 3 exist, the Party shall provide adequate opportunity to another Party to negotiate accession to the agreement or arrangement, or to negotiate a comparable agreement or arrangement.]¹⁷

ARTICLE 4: MARKET ACCESS FOR FINANCIAL INSTITUTIONS

[A Party shall not]¹⁸ [No Party may]¹⁹ adopt or maintain, with respect to [financial institutions of another Party or]²⁰[Fn]²¹ [investors of another Party]²² [investors of another Party seeking to establish such institutions,]²³ either on the basis of a regional subdivision or on the basis of its entire territory, measures that

(a) impose limitations on:

- (i) the number of financial institutions whether in the form of numerical quotas, monopolies, exclusive service suppliers, or the requirement of an economic needs test;
- (ii) the total value of financial service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
- (iii) the total number of financial service operations or on the total quantity of financial services output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;[Fn]²⁴ or

¹³ PUSFTA

¹⁴ ChUSFTA, SUSFTA,

¹⁵ PUSFTA, SUSFTA

¹⁶ PUSFTA

¹⁷ ChUSFTA, PUSFTA, SUSFTA

¹⁸ AUSFTA, SUSFTA

¹⁹ ChUSFTA, PUSFTA

²⁰ ChUSFTA, PUSFTA, SUSFTA

²¹ SUSFTA

²² AUSFTA

²³ PUSFTA

²⁴ AUSFTA, PUSFTA

[Fn This clause does not cover measures of a Party that limit inputs for the supply of financial services.]²⁵

(iv) the total number of natural persons that may be employed in a particular financial service sector or that a financial institution may employ and who are necessary for, and directly related to, the supply of a specific financial service in the form of numerical quotas or the requirement of an economic needs test; or

(b) restrict or require specific types of legal entity or joint venture through which a financial institution may supply a service.

[Fn. For the purposes of this Article, the term “financial institutions of the other Party” includes financial institutions that are located within the territory of the other Party and controlled by persons of the other Party that seek to establish financial institutions within the territory of the Party.]²⁶

ARTICLE 5: CROSS-BORDER TRADE IN FINANCIAL SERVICES

1. Each Party shall permit, under terms and conditions that accord national treatment, cross-border financial service suppliers of another Party to supply the services specified in Annex A {Cross-Border Services}. [National treatment requires that a Party shall accord to cross-border financial service suppliers of the other Party treatment no less favourable than that which it accords to its own financial service suppliers, in like circumstances, with respect to the supply of the relevant service.]²⁷

2. Each Party shall permit persons located in its territory, and its nationals wherever located, to purchase financial services from cross-border financial service suppliers of the other Party located in the territory of the other Party. This obligation does not require a Party to permit such suppliers to do business or solicit in its territory. Each Party may define “doing business” and “solicitation” for purposes of this obligation, provided that those definitions are not inconsistent with paragraph 1.

[3. Without prejudice to other means of prudential regulation of cross-border trade in financial services, a Party may require the registration of cross-border financial service suppliers of the other Party and of financial instruments.]²⁸

ARTICLE 6: NEW FINANCIAL SERVICES (Fn)

1. Each Party shall permit a financial institution of another Party [on request or notification to the relevant regulator, where required]²⁹ [established in its territory]³⁰ to supply any new financial service that the Party would permit its own financial institutions, in like circumstances, to supply [without additional legislative action by the Party]³¹ [under its domestic law, provided that the introduction of the financial

²⁵ AUSFTA, PUSFTA

²⁶ SUSFTA

²⁷ AUSFTA, correlates to Article 2.3

²⁸ AUSFTA, ChUSFTA, PUSFTA

²⁹ ChUSFTA

³⁰ PUSFTA

³¹ AUSFTA, PUSFTA, SUSFTA

service does not require the Party to adopt a new law or modify an existing law]³².

2. [Notwithstanding Article 4 (Market Access) subparagraph (b),]³³ A Party may determine the institutional and juridical form through which the new financial service may be supplied and may require authorization for the supply of the service. [Where a Party requires such authorization to supply a new financial service]³⁴ [Where a Party would permit the new financial service and authorization is required]³⁵, a decision shall be made within a reasonable time and the authorization may be refused only for prudential reasons.

^{Fn} The Parties understand that nothing in this Article prevents a financial institution of a Party from applying to another Party to [request that it authorize]³⁶ [consider authorizing]³⁷ the supply of a financial service that is not supplied [within]³⁸ [in]³⁹ the territory of any Party. Such application shall be subject to the [domestic]⁴⁰ law of the Party to which the application is made and, for greater certainty, shall not be subject to the obligations of Article 6.

ARTICLE 7: TREATMENT OF CERTAIN INFORMATION

Nothing in this Chapter requires a Party to furnish or allow access to:

(a) information related to the financial affairs and accounts of individual customers of financial institutions or cross-border financial service suppliers; or

[(b) any confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or prejudice legitimate commercial interests of particular enterprises.]⁴¹

ARTICLE 8: SENIOR MANAGEMENT AND BOARDS OF DIRECTORS

1. A Party may not require financial institutions of another Party [^{Fn}]⁴² to engage individuals of any particular nationality as senior managerial or other essential personnel.

[^{Fn} For purposes of this Article, the term “financial institutions of the other Party” includes financial institutions that are located within the territory of the other Party and controlled by persons of the other Party that seek to establish financial institutions within the territory of the Party.]⁴³

2. A Party may not require that more than a minority of the board of directors of a financial institution of another Party be composed of nationals of the Party, persons residing in the territory of the Party, or a combination thereof.

³² ChUSFTA

³³ AUSFTA, PUSFTA, SUSFTA

³⁴ SUSFTA

³⁵ ChUSFTA

³⁶ PUSFTA

³⁷ AUSFTA, ChUSFTA, SUSFTA,

³⁸ ChUSFTA

³⁹ AUSFTA, PUSFTA, SUSFTA

⁴⁰ CUSFTA

⁴¹ SUSFTA, ChUSFTA, PUSFTA

⁴² SUSFTA

⁴³ SUSFTA

ARTICLE 9: NON-CONFORMING MEASURES

1. Articles 2 to 5 (National Treatment, MFN, Market Access, Cross-Border Services) and Article 8 (Senior Management) [and Annex on Specific Commitments]⁴⁴ do not apply to:

- (a) any existing non-conforming measure that is maintained by a Party at
 - (i) the central level of government, as set out by that Party in its Schedule to Annex {Non-Conforming Measures},
 - (ii) a regional level of government, as set out by that Party in its Schedule to Annex {Non-Conforming Measures}, or
 - (iii) a local level of government;
- (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
- (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 2 to 5 (National Treatment, MFN, Market Access, Cross-Border Services) and Article 8 (Senior Management) [(fn)]⁴⁵ [or on the date of entry into force of the Agreement, with Article 5 (Cross Border Trade)]⁴⁶ [and Annex {Non-conforming measures}]⁴⁷.

[(fn) For greater certainty, Article {Financial Services} (Cross-border Trade) does not apply to 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 on the date of entry into force of the Agreement, with Article (Cross-border Trade).⁴⁸]

[2. Articles 2 to 5 (National Treatment, MFN, Market Access, Cross-Border Services) and Article 8 (Senior Management) [and Section A of Annex {Non-conforming measures}]⁴⁹ do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out by that Party in Section B of its Schedule to Annex {Non-conforming Measures}.]⁵⁰

[3. Annex (Specific Commitments) sets out certain specific commitments by each Party.]⁵¹

⁴⁴ ChUSFTA

⁴⁵ PUSFTA

⁴⁶ AUSFTA

⁴⁷ ChUSFTA

⁴⁸ PUSFTA

⁴⁹ ChUSFTA

⁵⁰ AUSFTA, ChUSFTA, PUSFTA

⁵¹ AUSFTA, ChUSFTA, SUSFTA

[4. A non-conforming measure set out in an entry in a Party's schedule to Annex {Non-Conforming Measures} as not subject to {Investment} (National Treatment), {Investment} Most-Favoured Nation Treatment), [{Investment} (Market Access),]⁵² {Cross-Border Services} (National Treatment) or {Cross-Border Services} (Most-Favoured-Nation Treatment), shall be treated as a non-conforming measure [not subject to Articles 2 or 3 (National Treatment or MFN) [(5 Cross-Border Trade paragraph 1 or 8 Senior Management paragraph 2)]⁵³, as the case may be, to the extent that the measure, sector, sub-sector, or activity set out in the entry is covered by this Chapter]⁵⁴ [described in paragraph 1(a) to which Article 2, 3 or 4 (National Treatment, MFN or Market Access), as the case may be, does not apply, to the extent that the measure, sector, sub-sector or activity set out in the schedule of non-conforming measures is covered by this Chapter]⁵⁵.]⁵⁶

[4. Where a Party has set out in its Schedule to Annexes {Exclusions} a measure that does not conform to Articles {Investment} (National treatment) and (Most-favoured-Nation) and {Cross-Border Services} (National Treatment), (Most-Favoured Nation), or (Market Access) pursuant to paragraphs 1 and 2 of Articles {Investment} (Non-conforming Measures) and {Cross-Border Services} (Non-conforming Measures), that measure shall be deemed to constitute a non-conforming measure, pursuant to paragraphs 1 and 2 of this Article, with respect to Article 2, Article 3, or Article 4, or Section A of Annex {Non-conforming measures}, as the case may be, to the extent that the measure, sector, sub-sector, or activity set out in the Schedule of non-conforming measures is covered by this Chapter.]⁵⁷

ARTICLE 10: EXCEPTIONS

1. Notwithstanding any other provision of this Chapter or Chapters {Investment}, [{Cross-Border Services},]⁵⁸ [Article {Cross-Border Services} (Scope and Coverage) with respect to the supply of financial services in the territory of a Party by [an investor of the other Party or]⁵⁹ a covered investment,]⁶⁰ {Telecommunications}, or {Electronic Commerce}, including specifically Article {Telecommunications} (Relationship to Other Chapters), [and {Competition}]⁶¹ a Party shall not be prevented from adopting or maintaining measures for prudential reasons,[fn]⁶² including for the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial institution or cross-border financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform to the provisions of this Agreement referred to in this paragraph, they shall not be used as a means of avoiding the Party's

⁵² SUSFTA

⁵³ AUSFTA, PUSFTA

⁵⁴ AUSFTA, PUSFTA

⁵⁵ SUSFTA

⁵⁶ AUSFTA, PUSFTA, SUSFTA

⁵⁷ ChUSFTA

⁵⁸ ChUSFTA

⁵⁹ AUSFTA, SUSFTA,

⁶⁰ AUSFTA, PUSFTA, SUSFTA

⁶¹ ChUSFTA

⁶² ChUSFTA, PUSFTA, SUSFTA

commitments or obligations under such provisions.[FN]⁶³

[fn It is understood that the term “prudential reasons” includes the maintenance of the safety, soundness, integrity, or financial responsibility of individual financial institutions or cross-border financial service suppliers.]⁶⁴

[FN The Parties understand that a Party may take measures for prudential reasons through regulatory or administrative authorities, in addition to those who have regulatory responsibilities with respect to financial institutions, such as ministries or departments of labor.]⁶⁵

2. Nothing in this Chapter or Chapters {Investment}, [{Cross-Border Services}]⁶⁶, [Article {Cross-border Trade in Services} (Scope and Coverage) with respect to the supply of financial services in the territory of a Party by [[an investor of the other Party or]⁶⁷ a covered investment,]⁶⁸{Telecommunications}, including specifically {Telecommunications} (Relation to Other Chapters), or {Electronic Commerce}, applies to non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies. This paragraph shall not affect a Party’s obligations under Article {Investment} (Performance Requirements) with respect to measures covered by Chapter {Investment}, or under Articles 25 {Investment} (Transfers) [or 26 {Cross-Border Supply} (Payments and Transfers)]⁶⁹.

3. Notwithstanding Articles 25 {Investment} (Transfers) [or 26 {Cross-Border Services} (Payments and Transfers)]⁷⁰, as incorporated into this Chapter, a Party may prevent or limit transfers by a financial institution or cross-border financial service supplier to, or for the benefit of, an affiliate of or person related to such institution or supplier, 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 or cross-border financial service suppliers. This paragraph does not prejudice any other provision of this Agreement that permits a Party to restrict transfers.

4. For greater certainty, nothing in this Chapter shall be construed to prevent the adoption or enforcement by a Party of measures necessary to secure compliance with laws or regulations that are not inconsistent with this Chapter, including those relating to the prevention of deceptive and fraudulent practices or to deal with the effects of a default on financial services contracts, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on investment in financial institutions or cross-border trade in financial services [as covered by this Chapter]⁷¹.

⁶³ ChUSFTA

⁶⁴ ChUSFTA, PUSFTA

⁶⁵ ChUSFTA

⁶⁶ ChUSFTA,

⁶⁷ AUSFTA, SUSFTA

⁶⁸ AUSFTA, PUSFTA, SUSFTA

⁶⁹ AUSFTA, PUSFTA

⁷⁰ AUSFTA, PUSFTA, SUSFTA

⁷¹ ChUSFTA

ARTICLE 11: [REGULATORY]⁷² TRANSPARENCY [AND ADMINISTRATION OF CERTAIN MEASURES]⁷³

1. The Parties recognize that transparent regulations and policies [and reasonable, objective and impartial administration]⁷⁴ governing the activities of financial institutions and [cross-border]⁷⁵ financial service suppliers are important in facilitating [their ability to gain access to and operate in each other's market]⁷⁶ [the ability of financial institutions located outside the territory of the Party, financial institutions of the other Party, and cross-border financial service suppliers to gain access to and operate in each other's markets]⁷⁷ [both access of financial institutions and financial service suppliers to, and their operations in, each other's markets]⁷⁸. [Each Party commits to promote regulatory transparency in financial services.]⁷⁹ [Accordingly, the Financial Services Committee established under Article 17 shall consult with the goal of promoting objective and transparent regulatory processes in each Party, taking into account (1) the work undertaken by the Parties in the General Agreement on Trade in Services and the Parties' work in other fora relating to trade in financial services and (2) the importance for regulatory transparency of identifiable policy objectives and clear and consistently applied regulatory processes that are communicated or otherwise made available to the public.]⁸⁰

[Except with respect to non-conforming measures listed in its schedule to Annex {Introductory note to the Schedule, each Party shall ensure that all measures of general application to which this Chapter applies are administered in a reasonable, objective and impartial manner.}]⁸¹

[2. Each Party shall ensure that all measures of general application to which this Chapter applies are administered in a reasonable, objective, and impartial manner.]⁸²

3. In lieu of Article {Transparency} (Publication), each Party shall, to the extent practicable,

(a) publish in advance any regulations of general application relating to the subject matter of this Chapter that it proposes to adopt [and the purpose of the regulation]⁸³; and

(b) provide interested persons and the other Party a reasonable opportunity to comment on such proposed regulations.

4. At the time it adopts final regulations, a Party should, to the extent practicable, address in writing substantive comments received from interested persons with respect to the proposed regulations. [fn

⁷² AUSFTA

⁷³ PUSFTA

⁷⁴ ChUSFTA

⁷⁵ AUSFTA, PUSFTA, SUSFTA

⁷⁶ AUSFTA, PUSFTA, SUSFTA

⁷⁷ SUSFTA

⁷⁸ ChUSFTA

⁷⁹ AUSFTA, PUSFTA, SUSFTA

⁸⁰ SUSFTA

⁸¹ SUSFTA, Article 10.14

⁸² AUSFTA, PUSFTA; ChUSFTA see para 1; SUSFTA Article 10.14 Domestic Regulation

⁸³ AUSFTA, PUSFTA

fn For greater certainty, a Party may consolidate its responses to the comments received from interested persons and publish them in a separate document from that setting forth the final regulations.]⁸⁴

5. To the extent practicable, each Party should [[allow reasonable time between publication of final regulations and]⁸⁵ [provide notice of the requirements of final regulations a reasonable time prior to]⁸⁶ their effective date.

6. Each Party shall ensure that the rules of general application adopted or maintained by self-regulatory organisations of the Party are promptly published or otherwise made available in such a manner as to enable interested persons to become acquainted with them.

7. Each Party shall maintain or establish appropriate mechanisms [for responding]⁸⁷ [that will respond]⁸⁸ to inquiries from interested persons regarding measures of general application covered by this Chapter.

8. Each Party's regulatory authorities shall make [publicly]⁸⁹ available [to interested persons]⁹⁰ their requirements, including any documentation required, for completing applications relating to the supply of financial services.

9. On the request of an applicant, a Party's regulatory authority shall inform the applicant of the status of its application. If the authority requires additional information from the applicant, it shall notify the applicant without undue delay.

10. A Party's regulatory authority shall make an administrative decision on a completed application of an investor in a financial institution, a financial institution, or a cross-border financial service supplier of the another Party relating to the supply of a financial service within 120 days, and shall promptly notify the applicant of the decision. An application shall not be considered complete until all relevant hearings are held and all necessary information is received. Where it is not practicable for a decision to be made within 120 days, the regulatory authority shall notify the applicant without undue delay and shall endeavour to make the decision within a reasonable time thereafter.

[11. On the request of an unsuccessful applicant, a regulatory authority that has denied an application shall, to the extent practicable, inform the applicant of the reasons for denial of the application.]⁹¹

[12. Annex (Transparency) sets out the Parties' understanding with regard to certain provisions of this Article.]⁹²

⁸⁴ PUSFTA

⁸⁵ ChUSFTA, PUSFTA, SUSFTA

⁸⁶ AUSFTA

⁸⁷ AUSFTA, PUSFTA

⁸⁸ ChUSFTA, SUSFTA

⁸⁹ AUSFTA, PUSFTA

⁹⁰ ChUSFTA, SUSFTA

⁹¹ AUSFTA, PUSFTA

⁹² PUSFTA

ARTICLE 12: SELF-REGULATORY ORGANISATIONS

Where a Party requires a financial institution or a cross-border financial service supplier of another Party to be a member of, participate in, or have access to, a self-regulatory organisation to provide a financial service in or into its territory, the Party shall ensure observance of the obligations of Articles 2 (National Treatment) and 3 (Most-Favoured Nation Treatment) by such self-regulatory organisation.

ARTICLE 13: PAYMENT AND CLEARING SYSTEMS

Under terms and conditions that accord national treatment, each Party shall grant financial institutions of another Party [established in its territory]⁹³ access to payment and clearing systems operated by public entities, and to official funding and refinancing facilities available in the normal course of ordinary business. This paragraph is not intended to confer access to the Party's lender of last resort facilities.

ARTICLE 14: EXPEDITED AVAILABILITY OF INSURANCE SERVICES

The Parties recognise the importance of maintaining and developing regulatory procedures to expedite the offering of insurance services by licensed suppliers.

[The Parties recognize the importance of consulting, as necessary, regarding any such initiatives.]⁹⁴

[Annex (Expedited Availability of Insurance Services) sets out certain commitments of the Parties with regard to the expedited availability of insurance services.]⁹⁵

[ARTICLE 15: RECOGNITION

1. A Party may recognise prudential measures of a non-Party in the application of measures covered by this Chapter. Such recognition may be:

- (a) accorded autonomously;
- (b) achieved through harmonisation or other means; or
- (c) based upon an agreement or arrangement with the non-Party.

2. A Party according recognition of prudential measures under paragraph 1 shall provide adequate opportunity to another Party to demonstrate that circumstances exist in which there are or would be equivalent regulation, oversight, implementation of regulation, and, if appropriate, procedures concerning the sharing of information between the Parties.

3. Where a Party accords recognition of prudential measures under paragraph 1(c) and the circumstances set out in paragraph 2 exist, the Party shall provide adequate opportunity to the other Party to negotiate accession to the agreement or arrangement, or to negotiate a comparable agreement or arrangement.]⁹⁶

⁹³ ChUSFTA, PUSFTA, SUSFTA

⁹⁴ SUSFTA

⁹⁵ PUSFTA

⁹⁶ AUSFTA; ChUSFTA, PUSFTA and SUSFTA in MFN provision

[ARTICLE 16. SPECIFIC COMMITMENTS

Annex (Certain Specific Commitments) sets out certain specific commitments by each Party.]⁹⁷

ARTICLE 17: FINANCIAL SERVICES COMMITTEE

1. The Parties hereby establish a Financial Services Committee. The principal representative of each Party shall be an official of the Party's authority responsible for financial services set out in Annex {Authorities Responsible for Financial Services}.

2. [In accordance with Article {The Free Trade Commission}]⁹⁸ The Committee shall:

(a) supervise the implementation of this Chapter and its further elaboration;

(b) consider issues regarding financial services that are referred to it by a Party, [including ways to further integrate financial services sectors between the Parties]⁹⁹ [and

(c) participate in the dispute settlement procedures in accordance with Article {Investment} (Investment Disputes).]¹⁰⁰

3. The Committee shall meet annually, or as otherwise agreed, to assess the functioning of this Agreement as it applies to financial services. The Committee shall inform the [Commission]¹⁰¹ [Joint Committee [established under Article {Administration and Dispute Settlement}]¹⁰² of the results of each meeting.

ARTICLE 18: CONSULTATIONS

1. A Party may request [in writing]¹⁰³ consultations with another Party regarding any matter arising under this Agreement that affects financial services. The other Party shall give sympathetic consideration to the request. The consulting Parties shall report the results of their consultations to the Committee.

2. [Consultations under this Article shall include officials of the authorities specified in Annex {Authorities Responsible for Financial Services}.]¹⁰⁴ [Officials from the authorities specified in Annex {Authorities Responsible for Financial Services} shall participate in the consultations under this Article.]¹⁰⁵

[3. Nothing in this Article shall be construed to require regulatory authorities participating in consultations under paragraph 1 to disclose information or take any action that would interfere with specific regulatory, supervisory, administrative, or enforcement matters.]¹⁰⁶

⁹⁷ PUSFTA - equivalent of Article 9.3

⁹⁸ ChUSFTA

⁹⁹ AUSFTA

¹⁰⁰ SUSFTA, ChUSFTA, PUSFTA

¹⁰¹ ChUSFTA, PUSFTA

¹⁰² AUSFTA, SUSFTA

¹⁰³ ChUSFTA

¹⁰⁴ AUSFTA, PUSFTA, SUSFTA

¹⁰⁵ ChUSFTA

¹⁰⁶ ChUSFTA, PUSFTA

[4. Nothing in this Article shall be construed to require a Party to derogate from its relevant law regarding sharing of information among financial regulators or the requirements of an agreement or arrangement between financial authorities of two or more Parties.]¹⁰⁷

ARTICLE 19: DISPUTE SETTLEMENT

1. Chapter {Dispute Settlement} applies as modified by this Article to the settlement of disputes arising under this Chapter.

[2. When a Party claims that a dispute arises under this Chapter, Article {Dispute Settlement} (Establishment of Panel) shall apply, except that:

(a) where the disputing Parties so agree, the panel shall be composed entirely of panelists meeting the qualifications in paragraph 5; and

(b) in any other case,

(i) each Party may select panellists meeting the qualifications set out in paragraph 3 or in Article {Institutional Provisions and Dispute Settlement} (Establishment of Panel) paragraph 3, and

(ii) if the Party complained against invokes Article 10 (Exceptions), the chair of the panel shall meet the qualifications set out in paragraph 3, unless the Parties agree otherwise.]¹⁰⁸

[3. For purposes of Article {Dispute Settlement} (Consultations), consultations held under Article 18 (Consultations) with respect to a measure or matter shall be deemed to constitute consultations under Article {Dispute Settlement} (Consultations) (1), unless the Parties otherwise agree. Upon initiation of consultations, the Parties shall provide information and give confidential treatment under Article {Dispute Settlement} (Consultations) (b) to the information exchanged. If the matter has not been resolved within 45 days after commencing consultations under Article 18 (Consultations) or 90 days after the delivery of the request for consultations under Article 18 (Consultations), whichever is earlier, the complaining Party may request in writing the establishment of an arbitral panel. The Parties shall report the results of their consultations to the Commission.]¹⁰⁹

[4. The Parties shall establish by January 1, 2005, and maintain a roster of up to 10 individuals who are willing and able to serve as financial services panelists, up to four of whom shall be non-Party nationals. The roster members shall be appointed by mutual agreement of the Parties, and may be reappointed. Once established, a roster shall remain in effect for a minimum of three years, and shall remain in effect thereafter until the Parties constitute a new roster.]¹¹⁰

5. Financial services [panelists]¹¹¹ [roster members]¹¹² shall:

¹⁰⁷ ChUSFTA, PUSFTA

¹⁰⁸ AUSFTA, PUSFTA, SUSFTA

¹⁰⁹ ChUSFTA

¹¹⁰ ChUSFTA

¹¹¹ AUSFTA, PUSFTA, SUSFTA

¹¹² ChUSFTA

(a) have expertise or experience in financial services law or practice, which may include the regulation of financial institutions;

(b) be chosen strictly on the basis of objectivity, reliability, and sound judgment;

[(c) be independent of, and not be affiliated with or take instructions from, either Party; [and not have a conflict of interest or appearance thereof, as set forth in a code of conduct to be established by the Joint Committee;]¹¹³ and]¹¹⁴

(d) [comply with the code of conduct [to be established by the Commission]¹¹⁵]¹¹⁶ [meet the qualifications set out in Articles {Dispute Settlement }]¹¹⁷

[6. Where a Party claims that a dispute arises under this Chapter, Article {Dispute settlement} (Panel Selection) shall apply, except that, unless the Parties otherwise agree, the panel shall be composed entirely of panelists meeting the qualifications in paragraph 5.]¹¹⁸

7. [[Further to]¹¹⁹ [Notwithstanding]¹²⁰ Article (Non-implementation),]¹²¹ [In any disputes]¹²² where a panel finds a measure to be inconsistent with this Agreement and the measure under dispute affects:

(a) only a sector other than the financial services sector, the complaining Party may not suspend benefits in the financial services sector; or

(b) the financial services sector and any other sector, the complaining Party may suspend benefits in the financial services sector that have an effect equivalent to the effect of the measure in the Party's financial services sector.

[(c) only the financial services sector, the complaining Party may suspend benefits only in the financial services sector;]¹²³

[ARTICLE 20: INVESTMENT DISPUTES IN FINANCIAL SERVICES

[1. Where an investor of a Party submits a claim to arbitration under Section B (Investor-State Dispute Settlement) of Chapter {Investment}, and the respondent invokes Article 10 (Exception) as a defense, the following provisions shall apply:

(a) The respondent shall, within 120 days of the date the claim is submitted to arbitration under Section B of Chapter {Investment} (Investor-State Dispute Settlement) submit in writing to the authorities responsible for financial services for the respondent and for the Party of the claimant, as set out in Annex {Authority Responsible for Financial Services}, a request for a joint

¹¹³ AUSFTA

¹¹⁴ AUSFTA, ChUSFTA, PUSFTA

¹¹⁵ ChUSFTA, PUSFTA

¹¹⁶ AUSFTA, ChUSFTA, PUSFTA

¹¹⁷ SUSFTA

¹¹⁸ ChUSFTA

¹¹⁹ AUSFTA

¹²⁰ PUSFTA, SUSFTA

¹²¹ AUSFTA, PUSFTA, SUSFTA

¹²² ChUSFTA

¹²³ ChUSFTA, SUSFTA

determination on the issue of whether and to what extent Article 10 (Exception) is a valid defense to the claim. The respondent shall 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 (d).

(b) If a non-disputing Party other than the Party of the claimant considers that it has a substantial interest in the joint determination, such non-disputing Party may request that its authorities responsible for financial services, as set out in Annex {Authority Responsible for Financial Services}, be included in any consultations held with a view to making that determination. They shall be included in such consultations if the respondent and the Party of the claimant agree that the claim of substantial interest is well founded. Where the substantial interest of the non-disputing Party is based on ownership or control of the claimant by a person of the non-disputing Party, the substantial interest shall be deemed to be well founded.

(c) The authorities referred to in subparagraph (a) shall attempt in good faith to make a joint determination as described in that subparagraph. Any such joint determination shall be transmitted promptly to the disputing parties, the Financial Services Committee, and, if constituted, to the tribunal. The joint determination shall be binding on the tribunal.

(d) If the authorities referred to in subparagraph (a), within 60 days of the date by which they have received the respondent's written request for a joint determination under that subparagraph, have not made a joint determination as described in that subparagraph, the tribunal shall decide the issue left unresolved by the authorities. The provisions of Section B of Chapter {Investment} (Investor-State Dispute Settlement) shall apply, except as modified by this subparagraph.

(i) In the appointment of all arbitrators not yet appointed to the tribunal, each disputing party shall take appropriate steps to ensure that the tribunal has expertise or experience as described in Article 18 (Dispute Settlement) paragraph 3(a). The expertise or experience of particular candidates with respect to financial services shall be taken into account to the greatest extent possible in the appointment of the presiding arbitrator.

(ii) If, prior to the submission of the request for a joint determination in conformance with subparagraph (a), the presiding arbitrator has been appointed pursuant to Article {Investment}19.2, such arbitrator shall be replaced upon the request of either disputing party and the tribunal shall be reconstituted consistent with subparagraph (d)(i). If, within 30 days of the date the arbitration proceedings are resumed under subparagraph (e), the disputing parties have not agreed on the appointment of a new presiding arbitrator, the Secretary-General, on the request of a disputing party, shall appoint the presiding arbitrator consistent with subparagraph (d)(i).

(iii) The Party of the claimant may make oral and written submissions to the tribunal regarding the issue of whether and to what extent Article 10 (Exception) is a valid defense to the claim. Unless it makes such a

submission, the Party of the claimant shall be presumed, for purposes of the arbitration, to take a position on Article 10 (Exception) not inconsistent with that of the respondent.

(e) The arbitration referred to in subparagraph (a) may proceed with respect to the claim:

(i) 10 days after the date the joint determination has been received, in accordance with subparagraph (c), by the disputing parties, the Committee, and, if constituted, the tribunal, or

(ii) 10 days after the expiration of the 60-day period extended to the authorities in subparagraph (d).

2. For the purposes of this Article, the definitions of the following terms set out in Article 22 {Investment} (Definitions) are incorporated, *mutatis mutandis*: disputing parties, disputing party, respondent, and Secretary-General.]¹²⁴

[1. Where an investor of a Party submits a claim under Section {Investment} (Investor-State Dispute Settlement) against the other Party and the respondent invokes Article 10 (Exception), on request of the respondent, the tribunal shall refer the matter in writing to the Financial Services Committee for a decision. The tribunal may not proceed pending receipt of a decision or report under this Article.

2. In a referral pursuant to paragraph 1, the Financial Services Committee shall decide the issue of whether and to what extent Article 10 (Exception) is a valid defense to the claim of the investor. The Committee shall transmit a copy of its decision to the tribunal and to the [Joint Committee]¹²⁵ [Commission]¹²⁶. The decision shall be binding on the tribunal.

3. Where the Financial Services Committee has not decided the issue within 60 days of the receipt of the referral under paragraph 1, the respondent or the Party of the claimant may request the establishment of a panel under Article {Dispute Settlement} (Request for Arbitral Panel). The panel shall be constituted in accordance with Article 19 (Dispute Settlement). [Further to Article {Dispute Settlement} (Final Report)]¹²⁷ The panel shall transmit its final report to the Committee and to the tribunal. The report shall be binding on the tribunal.

4. Where no request for the establishment of a panel pursuant to paragraph 3 has been made within 10 days of the expiration of the 60-day period referred to in paragraph 3, a tribunal may proceed to decide the matter.]¹²⁸

[5. For purposes of this Article, **tribunal** means a tribunal established pursuant to Section C of Chapter (Investor-State Dispute Settlement).]¹²⁹

¹²⁴ PUSFTA

¹²⁵ SUSFTA

¹²⁶ ChUSFTA

¹²⁷ ChUSFTA

¹²⁸ ChUSFTA, SUSFTA

¹²⁹ SUSFTA

ARTICLE 21: DEFINITIONS

For the purposes of this Chapter:

[**central level** means

(a) for the United States, the federal level, and

(b) for Singapore, the national level;]¹³⁰

[**claimant** means an investor of a Party that is a party to an investment dispute with another Party;]¹³¹

cross-border financial service supplier of a Party means a person of a Party that is engaged in the business of supplying a financial service within the territory of the Party and that seeks to supply or supplies a financial service through the cross-border supply of such services;

cross-border trade in financial services or cross-border supply of financial services means the supply of a financial service:

(a) from the territory of one Party into the territory of the other Party,

(b) in the territory of one Party by a person of that Party to a person of the other Party, or

(c) by a national of one Party in the territory of the other Party,

but does not include the supply of a financial service in the territory of [a Party by an investment in that territory]¹³² [one Party by an investor of the other Party, or investments of such investors, in financial institutions in the Party's territory]¹³³;

financial institution means any financial intermediary or other [enterprise]¹³⁴ [institution]¹³⁵ that is authorised to do business and regulated or supervised as a financial institution under the law of the Party in whose territory it is located;

financial institution of the other Party means a financial institution, including a branch, located in the territory of a Party that is controlled by persons of the other Party;

financial service means any service of a financial nature. Financial services include all insurance and insurance-related services, and all banking and other financial services (excluding insurance), as well as services incidental or auxiliary to a service of a financial nature. Financial services include the following activities:

insurance and insurance-related services

(a) Direct insurance (including co-insurance):

(i) life; and

¹³⁰ SUSFTA

¹³¹ PUSFTA

¹³² AUSFTA, ChUSFTA, PUSFTA

¹³³ SUSFTA

¹³⁴ AUSFTA, ChUSFTA, PUSFTA

¹³⁵ SUSFTA

- (ii) non-life;
- (b) Reinsurance and retrocession;
- (c) Insurance intermediation, such as brokerage and agency; and
- (d) Services auxiliary to insurance, such as consultancy, actuarial, risk assessment, and claim settlement services.

banking and other financial services (excluding insurance)

- (e) Acceptance of deposits and other repayable funds from the public;
- (f) Lending of all types, including consumer credit, mortgage credit, factoring, and financing of commercial transactions;
- (g) Financial leasing;
- (h) All payment and money transmission services, including credit, charge, and debit cards, travellers checks, and bankers drafts;
- (i) Guarantees and commitments;
- (j) Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market, or otherwise, the following:
 - (i) money market instruments (including checks, bills, certificates of deposits);
 - (ii) foreign exchange;
 - (iii) derivative products including, but not limited to, futures and options;
 - (iv) exchange rate and interest rate instruments, including products such as swaps, forward rate agreements;
 - (v) transferable securities; and
 - (vi) other negotiable instruments and financial assets, including bullion;
- (k) Participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues;
- (l) Money broking;
- (m) Asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository, and trust services;
- (n) Settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments;
- (o) Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services; and
- (p) Advisory, intermediation, and other auxiliary financial services on all the activities listed in clauses (e) through (o), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions

and on corporate restructuring and strategy;

investment means “investment” as defined in Article {Investment} (Definitions), except that, with respect to “loans” and “debt instruments” referred to in that Article:

(a) a loan to or debt instrument issued by a financial institution is an investment only where it is treated as regulatory capital by the Party in whose territory the financial institution is located; and

(b) a loan granted by or debt instrument owned by a financial institution, other than a loan to or debt instrument of a financial institution referred to in subparagraph (a), is not an investment.

For greater certainty, a loan granted by or debt instrument owned by a cross-border financial service supplier, other than a loan to or debt instrument issued by a financial institution, is an investment for the purposes of Chapter {Investment}, if such loan or debt instrument meets the criteria for investments set out in Article (Definitions);

investor of a Party means a Party [or state enterprise thereof]¹³⁶, or a person of a Party, that [seeks]¹³⁷ [attempts]¹³⁸ to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a [citizen of both Parties or a Party and a non-Party]¹³⁹ [a dual national]¹⁴⁰ [dual citizen]¹⁴¹ shall be deemed to be exclusively a [citizen of the State]¹⁴² [national]¹⁴³ of his or her dominant and effective nationality;

new financial service means [for the purposes of Article (New Financial Services)]¹⁴⁴ a financial service not supplied in the Party’s territory that is supplied within the territory of another Party, and includes any new form of delivery of a financial service or the sale of a financial product that is not sold in the Party’s territory;

person of a Party means “person of a Party” as defined in Article (General Definitions) and, for greater certainty, does not include a branch of an enterprise of a non-Party;

public entity means a central bank or monetary authority of a Party, or any financial institution owned or controlled by a Party [that is principally engaged in carrying out governmental functions or activities for governmental purposes, not including an entity principally engaged in supplying financial services on commercial terms]¹⁴⁵; [[for greater certainty, a public entity]¹⁴⁶ shall not be considered a designated monopoly or a state enterprise for the purposes of Chapter {Competition};]¹⁴⁷

¹³⁶ ChUSFTA, PUSFTA, SUSFTA

¹³⁷ AUSFTA

¹³⁸ ChUSFTA, PUSFTA, SUSFTA

¹³⁹ AUSFTA

¹⁴⁰ ChUSFTA, SUSFTA

¹⁴¹ PUSFTA

¹⁴² AUSFTA, PUSFTA

¹⁴³ ChUSFTA, SUSFTA

¹⁴⁴ SUSFTA

¹⁴⁵ SUSFTA

¹⁴⁶ AUSFTA, PUSFTA

¹⁴⁷ AUSFTA, PUSFTA, SUSFTA

[**regional level** means

(a) for the United States, the 50 states, the District of Columbia and Puerto Rico, and

(b) Singapore has no government at the regional level; for Singapore, “local government level” means entities with sub-national legislative or executive powers under domestic law, including Town Councils and Community Development Councils.]¹⁴⁸

self-regulatory organisation means any non-governmental body, including any securities or futures exchange or market, clearing agency, or other organisation or association, that exercises [its own or delegated]¹⁴⁹ regulatory or supervisory authority over financial service suppliers or financial institutions [by statute or delegation from central, regional, or local governments or authorities]¹⁵⁰; [for greater certainty, a self-regulatory organisation shall not be considered a designated monopoly for the purposes of Chapter {Competition}].]¹⁵¹

[**tribunal** means an arbitration tribunal established under Article {Investment} (Selection of Arbitrators).]¹⁵²

PART B: INVESTMENT

ARTICLE 22: DEFINITIONS

investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment [Fn1]¹⁵³ [,including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk]¹⁵⁴. Forms that an investment may take include:

- (a) an enterprise;
- (b) shares, stock, and other forms of equity participation in an enterprise;
- (c) bonds, debentures, other debt instruments, and loans;Fn2 [Fn3]¹⁵⁵
- (d) futures, options, and other derivatives;
- (e) [rights under contract, including]¹⁵⁶ turnkey, construction, management, production, concession, revenue-sharing, [and other similar contracts]¹⁵⁷;
- (f) intellectual property rights;
- (g) [rights conferred pursuant to domestic law, such as concessions, licenses, authorizations and permits Fn4]¹⁵⁸ [licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; Fn5]¹⁵⁹ [Fn6]¹⁶⁰; and

¹⁴⁸ SUSFTA

¹⁴⁹ AUSFTA, ChUSFTA, PUSFTA

¹⁵⁰ SUSFTA

¹⁵¹ AUSFTA

¹⁵² ChUSFTA

¹⁵³ SUSFTA

¹⁵⁴ AUSFTA, ChUSFTA, PUSFTA

¹⁵⁵ PUSFTA

¹⁵⁶ ChUSFTA

¹⁵⁷ AUSFTA, PUSFTA, SUSFTA

¹⁵⁸ ChUSFTA

¹⁵⁹ AUSFTA, PUSFTA, SUSFTA

¹⁶⁰ AUSFTA, PUSFTA, SUSFTA

- (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.

[but investment does not mean an order or judgment entered in a judicial or administrative action]¹⁶¹

[Fn1 Where an asset lacks the characteristics of an investment, that asset is not an investment regardless of the form it may take. The characteristics of an investment include the commitment of capital, the expectation of gain or profit, or the assumption of risk.]¹⁶²

Fn2 Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.

[Fn3 Loans issued by one Party to another Party are not investments.]¹⁶³

[Fn 4 Whether a particular right conferred pursuant to domestic law, as referred to in paragraph (g), has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the domestic law of the Party. Among such rights that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with such right has the characteristics of an investment.]¹⁶⁴

[Fn5 Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the domestic law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment.]¹⁶⁵

[Fn6 The term “investment” does not include an order or judgment entered in a judicial or administrative action.]¹⁶⁶

ARTICLE 22A: MOST-FAVoured-NATION TREATMENT

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

¹⁶¹ ChUSFTA

¹⁶² SUSFTA

¹⁶³ PUSFTA

¹⁶⁴ ChUSFTA

¹⁶⁵ AUSFTA, SUSFTA

¹⁶⁶ AUSFTA, PUSFTA, SUSFTA

ARTICLE 23: MINIMUM STANDARD OF TREATMENT^{Fn FN}

[Fn This Article shall be interpreted in accordance with Annex 10-A]¹⁶⁷

[FN Article 22 is to be interpreted in accordance with the letter exchange on customary international law.]¹⁶⁸

1. Each Party shall accord to covered investments treatment in accordance with [the customary international law minimum standard of treatment of aliens]¹⁶⁹ [customary international law]¹⁷⁰, including fair and equitable treatment and full protection and security.

2. For greater certainty, [paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments.]¹⁷¹ the concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

(b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

[4. [Without prejudice to paragraph 1 and]¹⁷² Notwithstanding Article {Non-conforming Measures}, each Party shall accord to investors of the other Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.]¹⁷³

[5. Notwithstanding paragraph 4, if an investor of a Party, in the situations referred to in that paragraph, suffers a loss in the territory of the other Party resulting from:

(a) requisitioning of its covered investment or part thereof by the latter’s forces or authorities; or

¹⁶⁷ AUSFTA, ChUSFTA, PUSFTA

¹⁶⁸ SUSFTA

¹⁶⁹ AUSFTA

¹⁷⁰ ChUSFTA, PUSFTA, SUSFTA

¹⁷¹ ChUSFTA, PUSFTA, SUSFTA

¹⁷² SUSFTA

¹⁷³ ChUSFTA, SUSFTA

(b) destruction of its covered investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation,

the latter Party shall provide the investor restitution or compensation, which in either case shall be prompt, adequate, and effective, and, with respect to compensation, shall be in accordance with Article 24 (Expropriation) paragraphs (2) to (4).]¹⁷⁴

[6. Paragraph 4 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article {Investment} (National Treatment) but for Article {Investment} (Non-conforming Measures).]¹⁷⁵

ARTICLE 24: EXPROPRIATION AND COMPENSATION Fn

Fn Article (Expropriation and Compensation) shall be interpreted in accordance with [Annex {Investment Expropriation}]¹⁷⁶ [Annex {Investment: Customary International Law} and {Investment Expropriation}]¹⁷⁷ [is to be interpreted in accordance with the letter exchange on customary international law and the letter exchange on expropriation, and is subject to the letter exchange on land expropriation.]¹⁷⁸

1. No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (“expropriation”), except:

- (a) for a public purpose[FN]¹⁷⁹;
- (b) in a non-discriminatory manner;
- (c) on payment of prompt, adequate, and effective compensation [in accordance with paragraphs 2, 3 and 4]¹⁸⁰; and
- (d) in accordance with due process of law [and Article 23 (Minimum standard of treatment)]¹⁸¹ [and paragraphs 1, 2 and 3 of Article 23 on Minimum Standard of Treatment]¹⁸²

[FN For greater certainty, for purposes of this article, the term “public purpose” refers to a concept in customary international law. Domestic law may express this or a similar concept using different terms, such as “public necessity”, “public interest” or “public use”.]¹⁸³

2. The compensation [referred to in paragraph 1(c)]¹⁸⁴ shall:

- (a) be paid without delay;

¹⁷⁴ CHUSFTA

¹⁷⁵ ChUSFTA, SUSFTA

¹⁷⁶ PUSFTA

¹⁷⁷ AUSFTA, ChUSFTA

¹⁷⁸ SUSFTA

¹⁷⁹ PUSFTA

¹⁸⁰ CHUSFTA, SUSFTA

¹⁸¹ PUSFTA

¹⁸² ChUSFTA, SUSFTA

¹⁸³ PUSFTA

¹⁸⁴ AUSFTA, PUSFTA

(b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“the date of expropriation”);

(c) not reflect any change in value occurring because the [intended expropriation had become known earlier]¹⁸⁵ [expropriatory action had become known before the date of expropriation]¹⁸⁶; and

(d) be fully realizable and freely transferable.

3. If the fair market value is denominated in a freely usable currency [or the Australian dollar]¹⁸⁷, the compensation [referred to in paragraph 1(c)]¹⁸⁸ shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

4. [However]¹⁸⁹ If the fair market value is denominated in [the Australian dollar and the Australian dollar is not transferable on the date of payment at the market rate of exchange or]¹⁹⁰ a currency that is not freely usable the compensation [referred to in paragraph 1(c)]¹⁹¹ – converted into the currency of payment at the market rate of exchange prevailing on the date of payment – shall be no less than:

(a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus

(b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such [issuance,]¹⁹² revocation, limitation, or creation is consistent with Chapter {Intellectual Property Rights}. [Fn

Fn For greater certainty, the reference to the “TRIPS Agreement” in paragraph 5 includes any waiver in force between the Parties of any provision of that Agreement granted by WTO Members in accordance with the WTO Agreement.]¹⁹³

INVESTMENT ANNEX 1: EXPROPRIATION ¹⁹⁴

¹⁸⁵ AUSFTA, ChUSFTA, PUSFTA

¹⁸⁶ SUSFTA

¹⁸⁷ AUSFTA

¹⁸⁸ AUSFTA, PUSFTA

¹⁸⁹ AUSFTA

¹⁹⁰ AUSFTA

¹⁹¹ AUSFTA, PUSFTA

¹⁹² AUSFTA, PUSFTA, SUSFTA

¹⁹³ AUSFTA

¹⁹⁴ In SUSFTA, this is in an exchange of letters

(Note: the [] text in this Annex includes the equivalent in the Australia New Zealand ASEAN FTA)

The Parties confirm their shared understanding that:

[1. Article 24 (Expropriation) paragraph 1 is intended to reflect customary international law concerning the obligation of States with respect to expropriation.]¹⁹⁵

2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an [covered]¹⁹⁶ investment.

3. Article 24 (Expropriation) paragraph 1 addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

4. The second situation addressed by Article 24 (Expropriation) paragraph 1 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

- (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
- (ii) [the extent to which the government action interferes with distinct, reasonable investment-backed expectations]¹⁹⁷; [whether the government action breaches the government's prior binding written commitment to the investor whether by contract, licence or other legal document];¹⁹⁸ and
- (iii) the character of the government action [, including its objective and whether the action is disproportionate to the public purpose Fn].

Fn 'Public purpose' shall be read with reference to Article (Expropriation and Compensation of Chapter {Investment})¹⁹⁹

(b) [Except in rare circumstances,]²⁰⁰ nondiscriminatory regulatory actions²⁰¹ by a Party that are designed and applied to [protect]²⁰¹ [achieve]²⁰² legitimate public

¹⁹⁵ AUSFTA, ChUSFTA, SUSFTA; in PUSFTA see Investment Annex 2.

¹⁹⁶ AANZFTA

¹⁹⁷ USFTAs

¹⁹⁸ AANZFTA

¹⁹⁹ AANZFTA

²⁰⁰ USFTAs

²⁰¹ ChUSFTA, PUSFTA, SUSFTA

²⁰² AANZFTA, AUSFTA

welfare objectives, such as [the protection of]²⁰³ public health, safety, and the environment, do not constitute indirect expropriations.[Fn]²⁰⁴

[Fn For greater certainty, the list of “legitimate public welfare objectives” in this subparagraph is not exhaustive.]²⁰⁵

[INVESTMENT ANNEX 2: CUSTOMARY INTERNATIONAL LAW

The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Article 23 (Minimum Standard of Treatment) and Investment Annex 1 (Expropriation) results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 23 (Minimum Standard of Treatment), the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.]²⁰⁶

[INVESTMENT ANNEX 3: PUBLIC DEBT

1. The Parties recognize that the purchase of debt issued by a Party entails commercial risk. For greater certainty, no award may be made in favour of a claimant for a claim under Article {Investment} (Submission of Claim to Arbitration) subparagraph (a)(i)(A) or (b)(i)(A) with respect to default or non-payment of debt issued by a Party unless the claimant meets its burden of proving that such default or non-payment constitutes an uncompensated expropriation for purposes of Article 24 (Expropriation) paragraph 1 or a breach of any other obligation under {Investment} Section A.

2. No claim that a restructuring of debt issued by a Party other than the United States breaches an obligation under {Investment} Section A may be submitted to, or if already submitted continue in, arbitration under {Investment} Section B (Investor-State Dispute Settlement) if the restructuring is a negotiated restructuring at the time of submission, or becomes a negotiated restructuring after such submission, except for a claim that the restructuring violates Article {Investment} (National Treatment or Most-favoured-Nation).

3. Notwithstanding Article {Investment} (Submission of claims to Arbitration) paragraph 3, and subject to paragraph 2 of this Annex, an investor of another Party may not submit a claim under {Investment} Section B (Investor-State Dispute Settlement) that a restructuring of debt issued by a Party other than the United States breaches an obligation under {Investment} Section A (other than Article {Investment} (most-favoured-nation) and (national treatment)) unless 270 days have elapsed from the date of the events giving rise to the claim.]²⁰⁷

²⁰³ AANZFTA

²⁰⁴ PUSFTA

²⁰⁵ PUSFTA

²⁰⁶ AUSFTA, ChUSFTA

²⁰⁷ PUSFTA

[The rescheduling of the debts of Chile, or of its appropriate institutions owned or controlled through ownership interests by Chile, owed to the United States and the rescheduling of its debts owed to creditors in general are not subject to any provision of Section {Investment} other than Articles {Investment} (National Treatment) and (Most-favoured-Nation Treatment.)]²⁰⁸

PART C: CAPITAL MOVEMENTS

ARTICLE 25. TRANSFERS RELATING TO INVESTMENT [Fn

FN subject to Transfers Annex .]²⁰⁹

1. Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include:
 - (a) contributions to capital [including the initial contribution]²¹⁰;
 - (b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;
 - (c) interest, royalty payments, management fees, and technical assistance and other fees;²¹¹
 - (d) payments made under a contract [entered into by the investor, or the covered investment, including payments made pursuant to a loan agreement]²¹² [including a loan agreement]²¹³;
 - [(e) payments made pursuant to Article {Investment} (Treatment in case of Strife) and Article 24 (Expropriation);]²¹⁴ and
 - (f) payments arising [under {Investor State Dispute Settlement}]²¹⁵ [arising out of a dispute]²¹⁶.

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

3. Each Party shall permit returns in kind relating to a covered investment to be made as authorized or specified in a [investment authorization or other]²¹⁷ written agreement between the Party and a covered investment or an investor of the other Party [that takes effect on or after the date of entry into force of this Agreement].²¹⁸

²⁰⁸ ChUSFTA

²⁰⁹ ChUSFTA, SUSFTA

²¹⁰ AUSFTA

²¹¹ CHUSFTA has a different combination of elements in (b) and (c)

²¹² ChUSFTA, SUSFTA

²¹³ AUSFTA, PUSFTA

²¹⁴ AUSFTA, ChUSFTA, SUSFTA,

²¹⁵ ChUSFTA, SUSFTA

²¹⁶ AUSFTA, PUSFTA

²¹⁷ ChUSFTA, SUSFTA

²¹⁸ AUSFTA

4. Notwithstanding paragraphs 1, 2, and 3, a Party may prevent a transfer through the equitable, non-discriminatory, and good faith application of its law relating to:

- (a) bankruptcy, insolvency, or the protection of the rights of creditors;
- (b) issuing, trading, or dealing in securities, futures, [options,]²¹⁹ or derivatives;
- (c) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;
- (d) criminal or penal offenses; or
- (e) ensuring compliance with orders or judgments in judicial or administrative proceedings.

[5. Neither Party may require its investors to transfer, or penalise 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 Party.]²²⁰

[6. Notwithstanding paragraph 2, a Party may restrict transfers of returns in kind in circumstances where it could otherwise restrict such transfers under this Agreement, including as set out in paragraph 4.]²²¹

ARTICLE 26: TRANSFERS AND PAYMENTS RELATING TO CROSS-BORDER FINANCIAL SERVICES²²²

1. Each Party shall permit all transfers and payments relating to the cross-border supply of services to be made freely and without delay into and out of its territory. [Fn.]²²³ [Such transfers and payments include:

- (a) payments for services;
- (b) funds taken abroad to consume a service;
- (c) interest, royalty payments, management fees, licensing fees, and technical assistance and other fees;
- (d) payments made under a contract; and
- (e) inflows of funds necessary to perform a service.]²²⁴

[Fn The Parties understand that this Article does not extend to Singapore's requirements in relation to the Central Provident Fund regarding the withdrawal of monies from individual accounts.]²²⁵

2. Each Party shall permit such transfers and payments relating to the cross-border supply of services to be made in a freely usable currency at the market rate of exchange prevailing on the date of transfer.

²¹⁹ AUSFTA, SUSFTA, PUSFTA

²²⁰ ChUSFTA

²²¹ ChUSFTA

²²² From the Cross-border Services Chapters. The Chile US FTA has no specific Article on Transfers & Payments for Cross-border services.

²²³ SUSFTA

²²⁴ SUSFTA

²²⁵ SUSFTA

3. Notwithstanding paragraphs 1 and 2, a Party may prevent [or delay]²²⁶ a transfer or payment through the equitable, non-discriminatory and good faith application of its laws relating to:

- (a) bankruptcy, insolvency or the protection of the rights of creditors;
- (b) issuing, trading or dealing in securities, futures, options, or derivatives;
- (c) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;
- (d) criminal or penal offenses; or
- (e) ensuring compliance with orders or judgments in judicial or administrative proceedings.

[TRANSFERS ANNEX: SPECIAL DISPUTE SETTLEMENT PROVISIONS²²⁷

1. Where a claimant submits a claim to arbitration alleging that [a Party other than the United States]²²⁸ [Chile]²²⁹ [Singapore]²³⁰ has breached an obligation under Section {Investment}, other than Article {Investment} (Most-favoured-Nation) [and (national treatment)],²³¹ through the imposition of a restrictive measure with regard to payments and transfers, Section {Investor-State Dispute Settlement} shall apply, except as modified below:

(a) The claimant may not submit any such claim to arbitration until one year after the events that give rise to the claim.

[(b) If the claim is submitted under Article (Submission of Claim to Arbitration) paragraph (1)(b), the claimant may, on behalf of the enterprise, only seek damages with respect to the shares of the enterprise for which the claimant has a beneficial interest;]²³²

[(c) Loss or damages arising from the restrictive measure on capital inflows shall be limited to the reduction in value of the transfers and shall exclude loss of profits or business and any similar consequential or incidental damages.]²³³

[(d) Subparagraph (a) shall not apply to a claim that arises from restrictions on:

(i) payments or transfers on current transactions [including the transfer of profits and dividends of foreign direct investment by investors of the United States]²³⁴],²³⁵

(ii) payments or transfers associated with equity investments, or]²³⁶

²²⁶ AUSFTA, PUSFTA

²²⁷ SUSFTA Annex 15-A, ChUSFTA Annex 10-C, PUSFTA Annex 10-E

²²⁸ PUSFTA

²²⁹ ChUSFTA

²³⁰ SUSFTA

²³¹ PUSFTA

²³² ChUSFTA, SUSFTA

²³³ ChUSFTA, PUSFTA

²³⁴ SUSFTA

²³⁵ PUSFTA, SUSFTA

²³⁶ PUSFTA

- [(ii) transfers of proceeds of foreign direct investment by investors of the United States, excluding external debt financing [covered in subparagraph (d)(iii), and]²³⁷ excluding investments designed with the purpose of gaining direct or indirect access to the financial market; or]²³⁸
- (iii) payments pursuant to a loan or bond,^{[Fn]239} [issued in a foreign market, including inter- and intra-company debt financing between affiliated enterprises made exclusively for the conduct, operation, management, or expansion of such affiliated enterprises,]²⁴⁰, provided that such payments are made in accordance with the terms and conditions of the loan or bond agreement.]²⁴¹

[Fn: For greater certainty, the term “payments pursuant to a loan or bond” as used in this subparagraph does not include capital account transactions relating to inter-bank loans, including loans to or from [financial institutions established in the territory of the Party subject to the claim]²⁴² [Singapore licensed banks, merchant banks or finance companies]²⁴³.]²⁴⁴

[(e) If the measure restricts outward payments or transfers:

- (i) it shall not prevent investors from earning a market rate of return in the territory of the Party imposing the measure on any restricted assets;
- (ii) the Party imposing the measure shall afford investors a reasonable opportunity to mitigate any losses arising from such measure; and
- (iii) so long as the Party imposing the measure has complied with its obligations under this paragraph, the claimant may not recover any alleged opportunity costs or any similar consequential or incidental damages from forgoing alternative investments that were incurred during the first year after the events that give rise to the claim.]²⁴⁵

[(g) Excluding restrictive measures referred to in paragraph 1(d), [Chile]²⁴⁶ [Singapore]²⁴⁷ shall incur no liability, and shall not be subject to claims, for damages arising from its imposition of restrictive measures with regard to payments and transfers that were incurred within one year from the date on which the restrictions were imposed, provided that such restrictive measures do not substantially impede transfers;]²⁴⁸

²³⁷ ChUSFTA

²³⁸ ChUSFTA, SUSFTA

²³⁹ PUSFTA, SUSFTA

²⁴⁰ ChUSFTA, SUSFTA

²⁴¹ PUSFTA

²⁴² PUSFTA

²⁴³ SUSFTA

²⁴⁴ PUSFTA, SUSFTA

²⁴⁵ PUSFTA

²⁴⁶ ChUSFTA

²⁴⁷ SUSFTA

²⁴⁸ ChUSFTA, SUSFTA

[(h) A restrictive measure of Chile with regard to payments and transfers that is consistent with this Annex shall be deemed not to contravene Article {national treatment} provided that, as required under existing Chilean law, it does not discriminate among investors that enter into transactions of the same nature;]²⁴⁹

(g) Claims arising from [Chile's]²⁵⁰ [Singapore's]²⁵¹ imposition of restrictive measures with regard to payments and transfers shall not be subject to Article {Consolidation of Claims} unless [Chile]²⁵² [Singapore]²⁵³ consents.

2. [A Party]²⁵⁴ [The United States]²⁵⁵ may not request the establishment of a panel under Chapter {Dispute Settlement} relating to [the]²⁵⁶ [Chile's]²⁵⁷ [Singapore's]²⁵⁸ imposition of a restrictive measure with regard to payments and transfers [by a Party other than the United States]²⁵⁹ until one year after the imposition of such measure. [In determining whether compensation is owed or benefits should be suspended, or the level of such compensation of suspensions, pursuant to Article (Non-implementation), the aggrieved Party and the panel shall consider whether the restrictive measures were implemented at the request of the International Monetary Fund (IMF)]²⁶⁰

[3. Restrictive measures on payments and transfers related to claims under this Annex shall otherwise be subject to applicable domestic law.]²⁶¹

PART D: EXCEPTIONS

ARTICLE 27: ESSENTIAL SECURITY

Nothing in this Agreement shall be construed:

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

(b) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.²⁶²Fn

Fn For greater certainty, if a Party invokes Article {Taxation} paragraphs 2 in an arbitral

²⁴⁹ ChUSFTA

²⁵⁰ ChUSFTA

²⁵¹ SUSFTA

²⁵² ChUSFTA

²⁵³ SUSFTA

²⁵⁴ PUSFTA

²⁵⁵ ChUSFTA

²⁵⁶ PUSFTA

²⁵⁷ ChUSFTA

²⁵⁸ SUSFTA

²⁵⁹ PUSFTA

²⁶⁰ SUSFTA

²⁶¹ ChUSFTA

²⁶² PUSFTA

proceeding initiated under Chapter (Investment) or Chapter (Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies.

ARTICLE 28: TAXATION

1. Except as set out in this Article, nothing in this Agreement shall apply to taxation measures.
2. Nothing in this Agreement shall affect the rights and obligations of either Party under any tax convention. In the event of any inconsistency between this Agreement and any such convention, that convention shall prevail to the extent of the inconsistency. In the case of a tax convention between the Parties, the competent authorities under that convention shall have sole responsibility for determining whether any inconsistency exists between this Agreement and that convention.
3. Notwithstanding paragraph 2:
 - (a) Article {Goods} (National Treatment) and such other provisions of this Agreement as are necessary to give effect to that Article shall apply to taxation measures to the same extent as does GATT 1994 Article III; and
 - (b) Article {Goods} (Export Tax) shall apply to taxation measures.
4. Subject to paragraph 2:
 - (a) Article {Cross-Border Trade in Services} (National Treatment) and Article 2 (National Treatment) shall apply to taxation measures on income, capital gains or on the taxable capital of corporations that relate to the purchase or consumption of particular services, except that nothing in this subparagraph shall prevent a Party from conditioning the receipt or continued receipt of an advantage relating to the purchase or consumption of particular services on requirements to provide the service in its territory, and
 - (b) Article {Investment} (National and Most-Favored-Nation Treatment), Articles {Cross-Border Trade in Services} (National Treatment) and 8.4 (Most-Favored-Nation Treatment) and Articles {Financial Services} (National Treatment) and 3 (Most-Favoured-Nation Treatment) shall apply to all taxation measures, other than those on income, capital gains, or on the taxable capital of corporations, taxes on estates, inheritances, gifts and generationskipping transfers, except that nothing in those Articles shall apply:
 - (c) to any most-favoured-nation obligation with respect to an advantage accorded by a Party pursuant to a tax convention;
 - (d) to a non-conforming provision of any existing taxation measure;
 - (e) to the continuation or prompt renewal of a non-conforming provision of any existing taxation measure;
 - (f) to an amendment to a non-conforming provision of any existing taxation

measure to the extent that the amendment does not decrease its conformity, at the time of the amendment, with any of those Articles;

(g) to the adoption or enforcement of any taxation measure aimed at ensuring the equitable or effective imposition or collection of taxes (as permitted by GATS Article XIV(d)); or

(h) to a provision that conditions the receipt, or continued receipt of an advantage relating to the contributions to, or income of, a pension trust, fund, or other arrangement to provide pension or similar benefits on a requirement that the Party maintain continuous jurisdiction over such trust, fund, or other arrangement.

[(i) to any excise tax on insurance premiums adopted by Chile to the extent that such tax would, if levied by the United States, be covered by Subparagraphs (d), (e) or (f).]²⁶³

5. Subject to paragraph 2 and without prejudice to the rights and obligations of the Parties under paragraph 3, paragraphs 2, 3, and 4 of Article {Investment} (Performance Requirements) shall apply to taxation measures.

[6. [Article 23 (Expropriation) and]²⁶⁴ Article {Investment} (Submission of a Claim to Arbitration) shall apply to a taxation measure alleged to be a breach of an investment agreement or an investment authorization. [Article 23 (Expropriation) and (Submission of a Claim to Arbitration) shall apply to a taxation measure alleged to be an expropriation.]²⁶⁵ However, no investor may invoke Article 23 (Expropriation) as the basis for a claim where it has been determined pursuant to this paragraph that the measure is not an expropriation. An investor that seeks to invoke Article 23 (Expropriation) with respect to a taxation measure must first refer to the competent authorities described in [Annexes²⁶⁶], at the time that it gives notice under Article Submission of a Claim to Arbitration) paragraphs 2, the issue of whether that taxation measure involves an expropriation. If the competent authorities do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation within a period of six months of such referral, the investor may submit its claim to arbitration under Article (Submission of a Claim to Arbitration) paragraph 4.]²⁶⁷

[6. (a) Article 23 (Expropriation) shall apply to taxation measures.

(b) Where a Party alleges in writing that a taxation measure of the other Party is an expropriation, that other Party's designated authority may request in writing consultations between the designated authorities regarding whether a determination that the taxation measure is an expropriation under this Agreement would give rise to an inconsistency with any tax convention between the Parties. Unless the designated authorities agree within sixty days

²⁶³ ChUSFTA

²⁶⁴ ChUSFTA, PUSFTA

²⁶⁵ SUSFTA

²⁶⁶ Annexes identify their respective Finance or Taxation Agencies

²⁶⁷ ChUSFTA, PUSFTA, SUSFTA

after receipt of the request for consultations (which period may be extended by mutual agreement of such designated authorities) that an inconsistency would arise in case of such determination, the Party alleging an expropriation may pursue the matter under Section B of Chapter {Dispute Settlement Procedures}. The designated authorities shall have sole responsibility with respect to this issue of whether a determination that a taxation measure alleged by a Party to be an expropriation under this Agreement would give rise to an inconsistency with any tax convention between the Parties.]²⁶⁸

²⁶⁸ AUSFTA