

CHAPTER 10 INVESTMENT

Article 10.1 Scope of Application

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

- (a) investors of the other Party; and
- (b) investments of investors of the other Party in the territory of the former Party.

2. This Chapter shall not apply to:

- (a) any taxation measure, except under Article 10.8 (Transfers), unless otherwise provided;
- (b) government procurement;
- (c) subsidies or grants provided by a Party; and
- (d) services supplied in the exercise of governmental authority by the relevant body or authority of a Party. For the purposes of this Chapter, 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.

3. This Chapter shall apply to existing investments as at the date of entry into force of this Agreement, as well as to investments made after the entry into force of this Agreement.

4. This Chapter shall not apply to claims or disputes arising out of events which have occurred prior to its entry into force.

Article 10.2 Definition

For the purposes of this Chapter:

- (a) an enterprise is:
 - (i) **owned** by an investor if more than fifty percent of the equity interests in it is beneficially owned by the investor; and

- (ii) **controlled** by an investor if the investor has the power to name a majority of its directors or otherwise to legally direct its actions;
- (b) **enterprise of a Party** means any entity duly constituted or otherwise organised under applicable laws of the country of a Party, whether for profit or otherwise and whether privately-owned or governmentally-owned, including any corporation, partnership, trust, joint venture, sole proprietorship, organisation or association;
- (c) **freely usable currency** means a freely usable currency as determined by the International Monetary Fund under its Articles of Agreement and any amendments thereto;
- (d) **investments** means every kind of asset owned or controlled, directly or indirectly, by an investor of a Party in the territory of the other Party, and invested in accordance with the latter Party's laws, regulations and national policies, and has the characteristics of an investment, such as the commitment of capital, the expectation of gain or profit, or the assumption of risk, and includes:
 - (i) shares, stocks and other forms of equity participation in an enterprise and rights derived therefrom;
 - (ii) bonds, debentures, loans, and other debt instruments of an enterprise and rights derived therefrom;
 - (iii) a claim to money or to any performance having financial value associated with the investment;
 - (iv) rights under contract, including turnkey, construction, management, production, concessions or revenue-sharing contracts;
 - (v) business concessions required to conduct economic activity and having financial value conferred by law or under a contract including any concession to search for, extract or exploit natural resources;
 - (vi) intellectual property rights recognised pursuant to the laws and regulations of each Party; and
 - (vii) movable and immovable property and any other property rights such as mortgages, liens or pledges.

The term **investment** also includes returns that are invested and any alteration in the form in which assets are invested or reinvested shall not affect their character as investments.

The term **returns** means an amount yielded by or derived from an investment of the investors of the other Party, including profits, dividends, interest, capital gains, technical fees, royalties and all other current income;

- (e) **investor of a Party** means a natural person or an enterprise of a Party, that is making, or has made an investment in the territory of another Party; and
- (f) **natural person of a Party** means any person possessing the citizenship of a Party, or right of permanent residence in that Party and not having the citizenship of the other Party, in accordance with its laws, regulations and national policies.

Article 10.3 **Relation to other Chapters**

1. This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapters 8 (Trade in Services) or 9 (Movement of Natural Persons).
2. Notwithstanding paragraph 1 of this Article, Article 10.5 (Minimum Standard of Treatment), Article 10.6 (Compensation for Losses), Article 10.7 (Expropriation and Compensation), Article 10.8 (Transfers), Article 10.9 (Subrogation) and Article 10.14 (The Settlement of Investment Disputes between a Party and an Investor of the Other Party) of this Chapter shall apply, *mutatis mutandis*, to any measure affecting the supply of service by a service supplier of a Party through commercial presence in the territory of the other Party pursuant to the provisions of Chapter 8 (Trade in Services), but only to the extent that they relate to an investment and an obligation under this Chapter, regardless of whether or not such a service sector is scheduled in a Party's Schedule of Specific Commitments pursuant to Article 8.6 (Schedule of Specific Commitments).

Article 10.4 **National Treatment**

1. Each Party shall accord to investors of the other Party and to their investments in relation to establishment, acquisition, expansion, management, conduct, operation, liquidation, sale, transfer or other disposition, treatment no less favourable than that it accords, in like circumstances, to its own investors and their investments.

2. The treatment to be accorded by a Party under paragraph 1 means, with respect to a regional or local government, treatment no less favourable than the most favoured treatment accorded, in like circumstances, at that regional or local government, to investors and investments of the Party to which it forms a part.

3. The provisions of paragraphs 1 and 2 above shall not be construed so as to oblige one Party to extend to the investors of the other Party the benefits of any treatment, preference or privilege resulting from any arrangement or international agreement relating wholly or mainly to taxation.

Article 10.5

Minimum Standard of Treatment

1. Each Party shall accord to investments fair and equitable treatment and full protection and security.

2. 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 the customary international law minimum standard of treatment of aliens.

3. 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.

Article 10.6

Compensation for Losses

Each Party shall accord to investors of the other Party that have suffered loss or damage relating to their investments in the territory of the former Party due to armed conflict or state of emergency such as revolution, insurrection, civil disturbance or any other similar event in the former Party, treatment, as regards restitution, indemnification, compensation or any other settlement, that is no less favourable than that which it accords to its own investors or to investors of a non-Party, whichever is more favourable to the investors of the other Party.

Article 10.7

Expropriation and Compensation

1. A Party shall not expropriate or nationalise an investment either directly or through measures equivalent to expropriation or nationalisation (expropriation), except:

- (a) for a public purpose;
- (b) in a non-discriminatory manner;
- (c) on payment of prompt, adequate, and effective compensation; and

- (d) in accordance with due process of law.
- 2. The compensation referred to in paragraph 1(c) shall:
 - (a) be paid without delay;
 - (b) be equivalent to the fair market value of the expropriated investment at the time when or immediately before the expropriation was publicly announced, or when the expropriation occurred, whichever is the earlier;
 - (c) not reflect any change in value because the intended expropriation had become known earlier; and
 - (d) be effectively realisable and freely transferable in freely usable currency.
- 3. In the event of delay, the compensation shall include an interest at prevailing commercial rate. The compensation, including any accrued interest, shall be payable either in the currency in which the investment was originally made or, if requested by the investor, in a freely usable currency.
- 4. If an investor requests payment in a freely usable currency, the compensation referred to in paragraph 1(c), including any accrued interest, shall be converted into the currency of payment at the market rate of exchange prevailing on the date of payment.
- 5. In accordance with the laws and regulations of the Party making the expropriation, the investor whose investment is expropriated shall have a right of access to the courts of justice or the administrative tribunals or agencies of the Party making the expropriation to seek review of the expropriation measure or valuation of the compensation that has been assessed.
- 6. This Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights in accordance with the WTO Agreement on Trade Related Aspects of Intellectual Property Rights.
- 7. Notwithstanding paragraphs 1, 2 and 3, any measure of expropriation relating to land shall be as defined in the expropriating Party's existing domestic laws and regulations and any amendments thereto, and shall be for the purposes of and upon payment of compensation in accordance with the aforesaid laws and regulations.
- 8. This Article shall be interpreted in accordance with Annex 10-1 (Indirect Expropriation).

Article 10.8

Transfers

1. Each Party shall allow all transfers relating to an investment to be made freely and without delay. Such transfers include:

- (a) initial capital and additional amounts to maintain or increase investment;
- (b) returns;
- (c) proceeds from the total or partial sale or liquidation of any investment;
- (d) payments made under a contract, including a loan agreement;
- (e) payments made pursuant to Article 10.6 (Compensation for Losses) and Article 10.7 (Expropriation and Compensation);
- (f) payments arising out of the settlement of a dispute under Article 10.14 (The Settlement of Investment Disputes between a Party and an Investor of the Other Party); and
- (g) earnings and other remuneration of personnel from the other Party employed and allowed to work in connection with that investment.

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

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

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

- (g) social security, public retirement or statutory savings schemes, including provident funds, retirement gratuity programmes and employees insurance programmes.

4. Nothing in this Chapter shall be regarded as altering the rights enjoyed and obligations undertaken by a Party as a party to the Articles of Agreement of the International Monetary Fund, as may be amended.

Article 10.9 Subrogation

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

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

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

Article 10.10 Denial of Benefits

1. A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of the other Party and to an investment of such investor if investor of a non-Party own or control the enterprise, and the denying Party:

- (a) does not maintain diplomatic relations with the non-Party; or
- (b) adopts or maintains measures with respect to the non-Party that prohibits transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.

2. Subject to prior notification and consultation with the other Party, a Party may also deny the benefits of this Chapter to an investor of the other Party that is an

enterprise of the other Party and to investments of that enterprise, and where the denying Party establishes that:

- (a) the enterprise has no substantial business activities in the territory of the other Party; or
- (b) the enterprise is owned or controlled by investors of a non-Party or of the denying Party.

Article 10.11 **Special Formalities and Information Requirements**

1. Nothing in Article 10.4 (National Treatment) shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with investments, including a requirement that the investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not substantially impair the benefits of any of the provisions in this Chapter.

2. Notwithstanding Article 10.4 (National Treatment), a Party may require an investor of the other Party, or its investment, to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect to the extent possible such information as confidential from any disclosure that would prejudice legitimate commercial interests of the investor or the investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its laws.

Article 10.12 **Reservations**

- 1. Article 10.4 (National Treatment) shall not apply to:
 - (a) any existing non-conforming measure maintained by a Party at:
 - (i) the central and regional level of government, as set out by that Party in its Schedule to Annex 10-2; or
 - (ii) 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 measures referred to in subparagraph (a), provided that the amendment does not decrease the level of conformity of the measure as it existed at the date of entry into force of the Party's Schedule to Annex 10-2 with Article 10.4 (National

Treatment).

2. Article 10.4 (National Treatment) do not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors, or activities, as set out in its Schedule to Annex 10-3.

3. Neither Party may, under any measure adopted after the date of entry into force of the Schedules referred to in Article 10.17 (Work Programme) and covered by its Schedule to Annex 10-3, require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

4. Each Party reserves the right to make future reservations on measures that do not conform to Article 10.4 (National Treatment) on new and emerging sectors, sub-sectors, industries, products, or activities.

Article 10.13 Review of Reservations

1. If, after the date of entry into force of this Agreement, a Party enters into any agreement on investment with a non-Party, it shall give consideration to a request by the other Party for the incorporation herein of treatment no less favourable than that provided under the aforesaid agreement.

2. As part of review of this Agreement pursuant to Article 16.9 (General Review), the Parties undertake to review their respective Schedule of Reservations in Annexes 10-2 and 10-3 with a view to decreasing its reservations and reducing the terms, limitations, conditions and qualifications on national treatment.

3. In any other case, a Party may, upon reasonable notice, request the other Party for a review of its reservations.

4. Any incorporation or review under this Article should maintain the overall balance of commitments undertaken by each Party under this Agreement.

Article 10.14 The Settlement of Investment Disputes between a Party and an Investor of the Other Party

Scope

1. Any dispute between a Party ("disputing Party") and an investor of the other Party ("disputing investor") that has incurred loss or damage arising out of an alleged breach of any rights conferred by this Agreement with respect to the investment of the disputing investor shall, as far as possible, be settled by the parties to the dispute in an amicable way.

2. A natural person possessing the nationality or citizenship of a Party shall not pursue a claim against that Party under this Article.

3. This Article shall not apply to claims arising out of events which occurred, or claims which have been raised prior to the entry into force of this Agreement.

4. Nothing in this Article shall be construed so as to prevent a disputing investor from seeking administrative or judicial settlement available within the country of a disputing Party.

Consultation and Negotiation

5. In the event of an investment dispute referred to in paragraph 1, the disputing parties shall as far as possible resolve the dispute through consultation and negotiation, with a view towards reaching an amicable settlement. Such consultations and negotiations, which may include the use of non-binding, third party procedures, shall be initiated by a written request for consultations and negotiations by the disputing investor to the disputing Party.

6. With the objective of resolving an investment dispute through consultations and negotiations, a disputing investor shall provide the disputing Party, prior to the commencement of consultations and negotiations, with information regarding the legal and factual basis for the dispute.

Basis of Claim

7. If an investment dispute has not been resolved within 180 days of the receipt by a disputing Party of a request for consultations and negotiations, the disputing investor may submit to conciliation or arbitration a claim:

- (a) that the disputing Party has breached an obligation arising under Article 10.4 (National Treatment), Article 10.5 (Minimum Standard of Treatment), Article 10.6 (Compensation for Losses), Article 10.7 (Expropriation and Compensation) and Article 10.8 (Transfers), relating to the management, conduct, operation or sale or other disposition of an investment; and
- (b) that the disputing investor or the investment has incurred substantial loss or damage arising out of that breach.

Choice of Forum

8. A disputing investor may submit a claim referred to in paragraph 7:

- (a) to arbitration in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States

("ICSID Convention") done at Washington on 18 March, 1965 provided both Parties are party to the ICSID Convention;

- (b) to arbitration under the ICSID Additional Facility Rules, provided that either the disputing Party or the Party of the disputing investor, but not both, is a party to the ICSID Convention;
- (c) to an international *ad hoc* arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL"); or
- (d) any other arbitral institution or in accordance with any other arbitral rules, if the parties to the dispute so agree.

Each Party hereby gives its consent to the submission of disputes to conciliation or arbitration set out in subparagraphs (a), (b), (c) or (d). Such consent is conditional upon the submission of the disputing investor's written waiver of its right to initiate or continue any proceedings before the courts or administrative tribunals of either Party, or other dispute settlement procedures, any proceedings with respect to any measure alleged to constitute a breach of any rights conferred by this Agreement with respect to the investment of the disputing investor.

Conditions and Limitations on Submission of Claim

9. An investor shall not be entitled to make a claim, if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired knowledge of the alleged breach and knowledge that the investor has incurred substantial loss or damage.

10. The disputing investor who intends to submit the dispute pursuant to paragraph 8 shall give to the disputing Party a written notice of intent to do so at least ninety days before the claim is submitted. The notice of intent shall specify:

- (a) the name and address of the disputing investor and its legal representative;
- (b) the specific measures of the disputing Party at issue and a brief summary of the factual and legal basis of the dispute sufficient to present the problem clearly, including the provisions of this Agreement alleged to have been breached;
- (c) the relief sought, and where appropriate, the approximate amount of damages claimed; and

- (d) the dispute settlement procedures set forth in paragraph 8 which the disputing investor will seek.

11. The applicable arbitration rules shall govern the arbitration referred to in this Article except to the extent modified by the Parties in this Article.

Selection of Arbitrators

12. Unless the disputing investor and the disputing Party (“the disputing parties”) agree otherwise, an arbitral tribunal established under subparagraphs 8 (a), (b), (c) and (d) shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by the two arbitrators. If the disputing investor or the disputing Party fails to appoint an arbitrator within sixty (60) days from the date on which the investment dispute was submitted to arbitration, the Secretary-General of International Centre for Settlement of Investment Disputes (“ICSID”) in the case of arbitration referred to in subparagraphs 8(a) or 8(b), or the Secretary-General of the Permanent Court of Arbitration (“PCA”) in the case of arbitration referred to in subparagraphs 8(c) or 8(d), on the request of either of the disputing parties, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed from the ICSID or PCA Panel of Arbitrators respectively subject to the requirements of paragraph 13.

13. Unless the disputing parties agree otherwise, the third arbitrator shall not be of the same nationality as the disputing investor, nor be a national of the disputing Party, nor have his or her usual place of residence in the territory of either Party, nor be employed by either of the disputing parties, nor have dealt with the investment dispute in any capacity.

Conduct of the Arbitration

14. Where issues relating to jurisdiction or admissibility are raised as preliminary objections, the tribunal shall decide the matter without making reference to the merits of the claim.

15. A disputing Party may, no later than three months after the constitution of the tribunal, file an objection that a claim is not admissible. A disputing Party may also file an objection that a claim is otherwise outside the jurisdiction or competence of the tribunal. The disputing Party shall specify as precisely as possible the basis for the objection.

16. The tribunal shall address any such objection as a preliminary question apart from the merits of the claim. The disputing parties shall be given a reasonable opportunity to present their views and observations to the tribunal. If the tribunal decides that the claim is not within the jurisdiction or competence of the tribunal, it shall render an award to that effect.

17. The tribunal may, if warranted, award the prevailing party reasonable costs and fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claim or the objection was frivolous or manifestly without merit, and shall provide the disputing parties a reasonable opportunity to submit their views.

18. The place of arbitration shall be determined in accordance with the applicable arbitration rules, provided that the place shall be in the territory of a State that is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958.

Transparency

19. Subject to paragraph 20, the disputing Party may make publicly available all awards and decisions made by the tribunal.

20. Any information specifically designated as confidential that is submitted to the tribunal or the disputing parties shall be protected from disclosure to the public.

Joint Interpretation

21. The tribunal shall, on its own account or at the request of a disputing party, request a joint interpretation of any provision of this Agreement that is in issue in a dispute. The Parties shall submit in writing any joint decision declaring their interpretation to the tribunal within sixty days of the request. Without prejudice to paragraph 22, if the Parties fail to submit such a decision within sixty days, any interpretation submitted by a Party individually shall be forwarded to the disputing parties and the tribunal, which shall decide the issue on its own account.

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

Awards

23. The award shall include:

- (a) a judgment as to whether or not there has been a breach by the disputing Party of any rights conferred by this Agreement in respect of the disputing investor and its investments; and
- (b) a remedy if there has been such breach. The remedy shall be limited to one or both of the following:
 - (i) payment of monetary damages and applicable interest; and

- (ii) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution.

24. The award rendered in accordance with paragraph 23 shall be final and binding upon the disputing parties. The disputing Party shall execute without delay any such award and provide in the disputing Party for the enforcement of such award in accordance with its relevant laws and regulations.

Costs

25. Costs may also be awarded in accordance with the applicable arbitration rules.

26. Neither Party shall, in respect of a dispute which one of its investors shall have submitted to arbitration in accordance with paragraph 8, give diplomatic protection, or bring an international claim before another forum, unless the other party shall have failed to abide by and comply with the award in such dispute. Diplomatic protection, for the purposes of this paragraph, shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

Article 10.15 Other Obligations

If the legislation of either Party or international obligations existing at present or established hereafter between the Parties in addition to this Agreement, result in a position entitling investments by investors of the other Party to treatment more favourable than is provided for by this Agreement, such position shall not be affected by this Agreement.

Article 10.16 Duration and Termination

In the event that this Agreement is terminated, the provisions of this Chapter, the provisions in Chapter 14 (Dispute Settlement), and other provisions in the Agreement necessary for or consequential to the application of this Chapter, except Articles 10.4 (National Treatment), and 10.12 (Reservations), shall continue in effect with respect to investments made or acquired before the date of termination of this Agreement for a further period of ten years after the date of termination and without prejudice to the application thereafter of the rules of general international law.

Article 10.17 Work Programme

1. The Parties shall enter into negotiations on Schedules of Reservations in Annexes 10-2 and 10-3 within three months of entry into force of this Agreement, unless the Parties otherwise agree.

2. The Parties shall conclude the negotiations referred to in paragraph 1, no later than six months from the date of entry into force of this Agreement, unless the Parties otherwise agree. These discussions shall be overseen by the Sub-Committee on Investment established under Article 15.2 (Sub-Committees).

3. Schedules of Reservations referred to in paragraph 1 shall enter into force by exchange of notes on a date agreed to by the Parties.

4. Articles 10.4 (National Treatment) and 10.12 (Reservations) shall not apply until the Parties' Schedules of Reservations have entered into force in accordance with paragraph 3.

Article 10.18 Implementation

The Sub-Committee on Investment established under Article 15.2 (Sub-Committees) shall consider matters relating to the implementation of this Chapter.

Article 10.19 Access to Courts of Justice

Each Party shall within its territory accord to investors of the other Party treatment no less favourable than the treatment, which it accords in like circumstances to its own investors, with respect to access to its courts of justice and administrative tribunals and agencies in all degrees of jurisdiction both in pursuit and in defence of such investors' rights.

Article 10.20 Measures in Public Interest

Nothing in this Chapter shall be construed to prevent:

- (a) a Party or its regulatory bodies from adopting, maintaining or enforcing any measure, on a non-discriminatory basis; or
- (b) the judicial bodies of a Party from taking any measures,

consistent with this Chapter that is in the public interest, including measures to meet health, safety or environmental concerns.