

08 INVESTMENT

ARTICLE 1

Definitions

1. For the purposes of this Chapter:
 - (a) “enterprise” means any corporation, company, association, partnership, trust, joint venture, sole-proprietorship or other legally recognised entity that is duly incorporated, constituted, set up, or otherwise duly organised under the law of a Party, including branches, regardless of whether or not the entity is organised for pecuniary gain, privately or otherwise owned, or organised with limited or unlimited liability;
 - (b) “freely useable currency” means a currency widely used to make payments for international transactions as classified by the International Monetary Fund;
 - (c) “investment” means every kind of asset, owned or controlled, directly or indirectly, by an investor, including but not limited to the following:
 - (i) movable and immovable property and other property rights such as mortgages, liens or pledges;
 - (ii) shares, stocks, bonds and debentures of an enterprise;
 - (iii) claims to money or to any contractual performance related to a business and having an economic value;
 - (iv) intellectual property rights and goodwill; and
 - (v) business concessions or similar rights required to conduct economic activity and having economic value conferred by law or under a contract, including any concession to search for, cultivate, extract or exploit natural resources;
 - (d) “investor” means:
 - (i) an enterprise of a Party; or
 - (ii) a natural person who resides in the territory of a Party or elsewhere and who under the law of that Party:
 - (A) is a citizen of that Party; or
 - (B) has the right of permanent residence in that Party;

that has made, is in the process of making, or is seeking to make an investment;

(e) “measure” means any measure by a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form, and includes measures taken by:

(i) central, regional or local governments and authorities; and

(ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities; and

(f) “return” means an amount yielded by or derived from an investment, including profits, dividends, interest, capital gains, royalty payments, payments in connection with intellectual property rights, and all other lawful income.

2. For the purposes of Article 1.1(c), returns that are invested shall be treated as investments and any alteration of the form in which assets are invested or reinvested shall not affect their character as investments.

3. An investment may be owned or controlled by an investor of a Party, notwithstanding the fact that the investment was made through an enterprise duly incorporated, constituted, set up or otherwise duly organised under the law of a non-Party.

ARTICLE 2

Scope of Application

1. This Chapter shall apply to:

(a) investments made, in the process of being made, or sought to be made, by an investor of a Party in the territory of the other Party; and

(b) with respect to Article 5 (Prohibition of Performance Requirements), all investments in the territory of the Parties.

2. This Chapter shall not apply to:

(a) subsidies or grants provided by a Party or to any conditions attached to the receipt or continued receipt of such subsidies or grants, whether or not such subsidies or grants are offered exclusively to domestic investors and investments; or

(b) a natural person who is a permanent resident but not a citizen of a Party where:

(i) the provisions of an investment protection agreement between the other Party and the country of which the person is a citizen have already been invoked in respect of the same matter; or

(ii) the person is a citizen of the other Party.

3. Unless otherwise provided, this Chapter shall not apply to any taxation measure.

4. An enterprise of a Party shall not be treated as an investor of the other Party, but any investments in that enterprise by investors of that other Party shall be protected by this Chapter.

5. Nothing in this Chapter shall be construed to impose an obligation on a Party to privatise.

ARTICLE 3

National Treatment

Each Party shall accord to investors of the other Party, and investments of investors of the other Party, in relation to the establishment, acquisition, expansion, management, conduct, operation, liquidation, sale, transfer (or other disposition) and expropriation (including any compensation) of investments in its territory, treatment that is no less favourable than that which it accords in like circumstances to its own investors and investments.

ARTICLE 4

Minimum Standard of Treatment

1. Each Party shall accord to investments of investors of the other Party treatment in accordance with the customary international law minimum standard of treatment of aliens¹, including fair and equitable treatment and full protection and security.

2. For greater certainty, 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 referred to in paragraph 1 and do not create additional substantive rights. The obligation in paragraph 1 to provide:

¹ The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Article 4 results from a general and consistent practice of States that they follow from a sense of legal obligation. With regards to this article, 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.

- (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.

ARTICLE 5

Prohibition of Performance Requirements²

1. Neither Party may, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement, or enforce any commitment or undertaking, to:
- (a) export a given level or percentage of goods or services;
 - (b) achieve a given level or percentage of domestic content;
 - (c) purchase, use or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
 - (d) relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
 - (e) restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
 - (f) transfer a particular technology, a production process or other proprietary knowledge to a person in its territory; or
 - (g) supply exclusively from the territory of the Party the goods that such investment produces or the services that such investment supplies to a specific regional market or to the world market.
2. Neither Party may condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct,

² This Article does not apply to financial services.

operation, or sale or other disposition of an investment in its territory of an investor of a Party or of a non-Party, on compliance with any requirement to:

- (a) achieve a given level or percentage of domestic content;
 - (b) purchase, use or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
 - (c) relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or
 - (d) restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.
3. (a) Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

(b) Paragraph 1(f) does not apply:

(i) when a Party authorises use of an intellectual property right in accordance with Article 31³ of the TRIPS Agreement, or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or

(ii) when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under a Party's laws relating to the prevention of anti-competitive behaviour.⁴

(c) Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on investment or international trade, paragraphs 1(b), (c), and (f), and 2(a) and (b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:

(i) necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement;

³ The reference to Article 31 includes footnote 7 to Article 31.

⁴ The Parties recognise that a patent does not necessarily confer market power.

(ii) necessary to protect human, animal, or plant life or health; or

(iii) related to the conservation of living or non-living exhaustible natural resources.

(d) Paragraphs 1(a), (b), and (c), and 2(a) and (b), do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs.

(e) Paragraphs 1(b), (c), (f), and (g), and 2(a) and (b), do not apply to government procurement.

(f) Paragraphs 2(a) and (b) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

4. For greater certainty, paragraphs 1 and 2 do not apply to any requirement other than the requirements set out in those paragraphs.

5. This Article does not preclude enforcement of any commitment, undertaking, or requirement between private parties, where a Party did not impose or require the commitment, undertaking, or requirement.

ARTICLE 6

Transparency

Each Party shall promptly make public its laws, regulations and investment policies, and any amendments thereto, of general application that pertain to or affect investments in its territory by investors of the other Party.

ARTICLE 7

Reservations

1. Article 3 (National Treatment) and Article 5 (Prohibition of Performance Requirements) shall not apply to:

(a) any existing non-conforming measure that is maintained by a Party at:

(i) the central or regional level, as set out in Annex 4-I; or

(ii) the local level; or

(b) the continuation or prompt renewal of any non-conforming measure referred to in Article 7.1(a)

2. Article 3 (National Treatment) and Article 5 (Prohibition of Performance Requirements) shall not apply to any existing or new measure that a Party adopts or maintains with respect to sectors, subsectors or activities as set out in Annex 4-II.
3. Each Party shall set out its reservation through a description of:
 - (a) with respect to Annex 4-I, the non-conforming measure to which the reservation applies; and
 - (b) with respect to Annex 4-II, the sectors, subsectors or activities to which the reservation applies.
4. If a Party undertakes any privatisation measure, that Party shall include in Annex 4-I or Annex 4-II any non-conforming measure relating to that privatisation. For the purpose of this paragraph, “privatisation measure” means the divestment by either Party of its equity interests in an enterprise where it has a controlling ownership interest. Article 16 (Settlement of Disputes between a Party and an Investor of the other Party) shall not apply to this paragraph.

ARTICLE 8

Transitional Provision on Regional Government Measures

1. Articles 3 (National Treatment) shall not apply to measures maintained by a Party at the regional level until the first review of this Agreement under Article 3 (Review) of Chapter 17 (Final Provisions), when modifications or additions may be incorporated into the reservations in Annex 4-I and Annex 4-II to extend the coverage of Article 3 (National Treatment) to these measures. Following the first review, Article 3 (National Treatment) shall apply, at the regional level, unless the non-conforming measures maintained at the regional level are covered by the reservations in Annexes 4-I and 4-II by a Party.
2. A Party shall enter into consultations at the request of the other Party with a view to ensuring that modifications or additions incorporated into the reservations in accordance with Article 8.1 are consistent with the overall balance of benefits under the Agreement, and deciding whether any necessary adjustment in the commitments of the Parties is required to preserve this balance. Article 9 (Modification or Addition of Reservations) and Chapter 16 (Dispute Settlement) shall not apply to any such adjustments. The Parties shall not apply any measure affecting investment at the regional level in such a manner as would improve their negotiating position and leverage.

ARTICLE 9

Modification or Addition of Reservations

1. By giving three months written notification to the other Party, a Party may modify or add to its non-conforming measures as set out in Annex 4-I and add new

sectors, subsectors or activities to its reservations set out in Annex 4-II. At the request of the other Party, it shall hold consultations with a view to reaching agreement on any necessary adjustment required to maintain the overall balance of commitments undertaken by each Party under this Agreement. If agreement is not reached between the Parties on any necessary adjustment, the matter may be referred to arbitration in accordance with Chapter 16 (Dispute Settlement).

2. Article 9.1 shall not be construed to prejudice the right of both Parties to maintain any existing measures or adopt any new measures consistent with the reservations set out in Annexes 4-I and 4-II.

ARTICLE 10

Additional Commitments

1. The Parties shall set out their respective additional commitments in Annex 4-III of this Agreement with respect to investment matters not covered by Article 3 (National Treatment).

2. Article 16 (Settlement of Disputes between a Party and an Investor of the other Party) shall not apply to these additional commitments.

ARTICLE 11

Expropriation and Nationalisation

1. Neither Party shall nationalise, expropriate or subject to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as “expropriation”) the investments of investors of the other Party unless such a measure is taken on a non-discriminatory basis, for a public purpose, in accordance with due process of law, and upon payment of compensation in accordance with this Article.

2. The expropriation shall be accompanied by the payment of prompt, adequate and effective compensation. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation or impending expropriation became public knowledge. Compensation shall carry an appropriate interest, taking into account the length of time from the time of expropriation until the time of payment. Such compensation shall be effectively realisable, freely transferable in accordance with Article 13 (Transfers) and made without delay.

3. Notwithstanding Articles 11.1 and 11.2, any measure of expropriation relating to land, which shall be as defined in the existing domestic legislation of the expropriating Party on the date of entry into force of this Agreement, shall be for a purpose and upon payment of compensation in accordance with the aforesaid legislation and any subsequent amendments thereto relating to the amount of compensation where such amendments follow the general trends in the market value of the land.

4. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights and Chapter 13 (Intellectual Property).

ARTICLE 12

Compensation for Losses

A Party shall accord to investors of the other Party whose investments in the territory of the former Party have suffered losses owing to war or other armed conflict or civil strife in that territory, treatment, as regards restitution, indemnification, compensation, or other settlement or measures it adopts or maintains relating to such losses, no less favourable than that which it accords to its own investors and investors of any non-Party.

ARTICLE 13

Transfers

1. Each Party shall permit, on a non-discriminatory basis, all funds of an investor of the other Party related to an investment in its territory to be transferred freely and without undue delay. Such funds include the following:

- (a) the initial capital plus any additional capital used to maintain or expand the investment;
- (b) returns;
- (c) proceeds from the sale or partial sale or liquidation of the investment;
- (d) loan payments in connection with the investment;
- (e) unspent earnings and other remuneration of personnel engaged from abroad in connection with that investment; and
- (f) compensation paid pursuant to Article 12 (Compensation for Losses).

2. Each Party shall permit such transfers to be made in the currency of the other Party or any freely useable currency at the prevailing rate of exchange on the date of transfer.

3. Notwithstanding Article 13.1, a Party may prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:

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

- (b) issuing, trading or dealing in securities, futures, options, or derivatives;
- (c) criminal or penal offences, and the recovery of proceeds of crime;
- (d) ensuring the satisfaction of judgements, orders or awards in adjudicatory proceedings; or
- (e) social security, public retirement or compulsory savings schemes.

4. Nothing in this Chapter shall affect the rights and obligations of the members of the International Monetary Fund under the Articles of Agreement of the Fund, including the use of exchange actions which are in conformity with the Articles of Agreement, provided that a Party shall not impose restrictions on any capital transactions inconsistently with its obligations under this Chapter regarding such transactions, except under Article 14 (Restrictions to Safeguard the Balance of Payments) or at the request of the Fund.

ARTICLE 14

Restrictions to Safeguard the Balance of Payments

1. In the event of serious balance of payments and external financial difficulties or threat thereof, a Party may adopt or maintain restrictions on payments or transfers related to investments. It is recognized that particular pressures on the balance of payments of a Party in the process of economic development may necessitate the use of restrictions to ensure, inter alia, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development.

2. The restrictions referred to in Article 14.1 shall:

- (a) be consistent with the Articles of Agreement of the International Monetary Fund;
- (b) avoid unnecessary damage to the commercial, economic and financial interests of the other Party;
- (c) not exceed those necessary to deal with the circumstances described in Article 14.1;
- (d) be temporary and be phased out progressively as the situation specified in Article 14.1 improves;
- (e) be applied on a national treatment basis and such that the other Party is treated no less favourably than any non-Party.

3. Any restrictions adopted or maintained under Article 14.1, or any changes therein, shall be promptly notified to the other Party.

4. The Party adopting any restrictions under Article 14.1 shall commence consultations with the other Party in order to review the restrictions adopted by it.

ARTICLE 15

Subrogation

1. If a Party or a designated agency of a Party makes a payment to any of its investors under a guarantee, a contract of insurance or other form of indemnity it has granted in respect of an investment of an investor of that Party, 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 a designated 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 designated agency of the Party making the payment, pursue those rights and claims against the other Party.

ARTICLE 16

Settlement of Disputes between a Party and an Investor of the other Party

1. This Article shall apply to disputes between a Party and an investor of the other Party concerning an alleged breach of an obligation of the former under this Chapter which causes loss or damage to the investor or its investment.

2. The parties to the dispute shall initially seek to resolve the dispute by consultations and negotiations.

3. Where the dispute cannot be resolved as provided for under Article 16.2 within 6 months from the date of a request for consultations and negotiations, then unless the disputing investor and the disputing Party agree otherwise or either of them has already submitted the dispute to the courts or administrative tribunals of the disputing Party (excluding proceedings for interim measures of protection referred to in Article 16.5), the dispute may be submitted by either party to the dispute to:

- (a) the courts or administrative tribunals of the disputing Party;
- (b) the International Centre for Settlement of Investment Disputes (ICSID) for conciliation or arbitration pursuant to Articles 28 or 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington on 18 March 1965; or
- (c) arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL).

4. Each Party hereby consents to the submission of a dispute to conciliation or arbitration under Articles 16.3(b) and 16.3(c) in accordance with the provisions of this Article, conditional upon:

(a) the submission of the dispute to such conciliation or arbitration taking place within three years of the time at which the disputing investor became aware, or should reasonably have become aware, of a breach of an obligation under this Chapter causing loss or damage to the investor or its investment; and

(b) the disputing investor providing written notice, which shall be submitted at least 30 days before the claim is submitted, to the disputing Party of his or her intent to submit the dispute to such conciliation or arbitration and which:

- (i) nominates either Article 16.3(b) or Article 16.3(c) as the forum for dispute settlement (and, in the case of Article 16.3(b), nominates whether conciliation or arbitration is being sought);
- (ii) waives its right to initiate or continue any proceedings (excluding proceedings for interim measures of protection referred to in Article 16.5) before any of the other dispute settlement fora referred to in Article 16.3 in relation to the matter under dispute; and
- (iii) briefly summarises the alleged breach of the disputing Party under this Chapter (including the articles alleged to have been breached) and the loss or damage allegedly caused to the investor or its investment.

5. Neither Party shall prevent the disputing investor from seeking interim measures of protection, not involving the payment of damages or resolution of the substance of the matter in dispute before the courts or administrative tribunals of the disputing Party, prior to the institution of proceedings before any of the dispute settlement fora referred to in Article 16.3, for the preservation of its rights and interests.

6. Neither Party shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its investors and the other Party shall have consented to submit or have submitted to conciliation or arbitration under this Article, unless such other Party has failed to abide by and comply with the award rendered 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 17

Review of Commitments

1. If, after this Agreement enters into force, a Party enters into any agreement on investment with a non-Party, it shall give positive consideration to a request by the other Party for the incorporation herein of treatment no less favourable than that provided under the aforesaid agreement. Any such incorporation should maintain the overall balance of commitments undertaken by each Party under this Agreement.

2. If, after this Agreement enters into force, a Party further liberalises any of its non-conforming measures in Annex 4-I or sectors, subsectors or activities in Annex 4-II unilaterally, it shall give positive consideration to a request by the other Party for the incorporation herein of the unilateral liberalisation. Any such incorporation should maintain the overall balance of commitments undertaken by each Party under this Agreement.

ARTICLE 18

Review of Subsidies

1. The Parties shall review the treatment of subsidies in the context of developments at international fora to which both Parties are Members.

2. The Parties shall consult on appropriate steps in regard to subsidies related to investments or investors where any subsidies issues arise under this Chapter.

ARTICLE 19

Government Procurement

Article 3 (National Treatment) shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of goods and services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods or the supply of services for commercial sale.

ARTICLE 20

Denial of Benefits

Subject to prior notification and consultation, a Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such Party and to investments of such an investor where the Party establishes that the enterprise is owned or controlled by persons of a non-Party and has no substantive business operations in the territory of the other Party.

ARTICLE 21

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on investments in the territory of a Party by investors of the other Party, nothing in this Chapter shall be construed to prevent the adoption or enforcement by a Party of measures:

- (a) necessary to protect public morals or to maintain public order;⁵
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Chapter including those relating to:
 - (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on a contract;
 - (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
 - (iii) safety;
- (d) imposed for the protection of national treasures of artistic, historic or archaeological value;
- (e) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

ARTICLE 22

Security Exceptions

Nothing in this Chapter shall be construed:

- (a) to require a Party to furnish any information, the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent a Party from taking any action which it considers necessary for the protection of its essential security interests:

⁵ The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

- (i) relating to fissionable and fusionable materials or the materials from which they are derived;
 - (ii) taken in time of war or other emergency in international relations;
 - (iii) relating to the production or supply of arms and ammunition;
or
- (c) to prevent a Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

ARTICLE 23

Disclosure of Confidential Information

Nothing in this Chapter shall require any Party to provide confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private.