

## CHAPTER 9

### INVESTMENT

#### Article 1: Definitions

For the purposes of this Chapter, the term:

**covered investment** means with respect to a Party, an investment in its territory of an investor of another Party, in existence as of the date of entry into force of this Agreement, or established, acquired or expanded thereafter, which has been admitted by the host Party subject to its relevant laws, regulations and policies;

**freely usable currency** means freely usable currency as determined under the IMF Articles of Agreement and amendments thereafter, or any currency that is used to make international payments and is widely traded in international principal exchange markets;

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

- (a) an enterprise;
- (b) tangible or intangible, movable or immovable property and related property rights such as mortgages, liens or pledges;<sup>1</sup>
- (c) shares, stock and other forms of equity participation in an enterprise;
- (d) bonds, debentures, other debt instruments, and loans;<sup>2</sup>
- (e) futures, options, and other derivatives;
- (f) intellectual property rights;
- (g) turnkey, construction, management, production and revenue sharing contracts, concessions and other similar contracts; and
- (h) licences, authorisations, permits and similar rights conferred pursuant to a Party's domestic law.<sup>3</sup>

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<sup>1</sup> For greater certainty, market share, market access, expected gains and opportunities for profit-making are not, by themselves, investments.

<sup>2</sup> 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 are less likely to have such characteristics. Loans issued by one Party to another Party are not investments.

<sup>3</sup> Whether a particular type of licence, authorisation, 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 factors

An investment does not, however, include:

- (a) claims to payment resulting solely from the commercial sale of goods and services unless it is a loan that has the characteristics of an investment;
- (b) a bank letter of credit; or
- (c) the extension of credit in connection with a commercial transaction, such as trade financing.

For the purposes of the definition of investment in this chapter, 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;

**investor** of a Party means a Party, or a natural person or an enterprise of a Party that has made or seeks to make an investment in the territory of another Party;<sup>4</sup>

**measures adopted or maintained** by a Party means any measure taken by:

- (a) central, state, regional or local Government or authorities; or
- (b) non-governmental bodies in the exercise of powers delegated by central, state, regional or local Governments or authorities;

**permanent resident** of a Party means a natural person who has permanent residence status in a Party in accordance with its laws and regulations;

**TRIMS Agreement** means the *Agreement on Trade-Related Investment Measures*, in Annex 1A to the WTO Agreement; and

**TRIPS Agreement** means the *Agreement on Trade-Related Aspects of Intellectual Property*, in Annex 1C to the WTO Agreement.

## Article 2: Objectives

This Chapter is intended to encourage a stable and predictable environment to attract and promote the flow of investment between the Parties with due respect to national policy objectives and to the right of each Party to regulate.

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such as the nature and extent of the rights that the holder has under the law of the Party that granted such rights. Among the licences, authorisations, 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 licence, authorisation, permit or similar instrument has the characteristics of an investment.

<sup>4</sup> For greater certainty, the Parties understand that, for the purposes of the definition of “investor” of a Party, an investor “seeks to make” an investment when that investor has taken concrete action or actions to make an investment, such as channeling resources or capital in order to set up a business, or obtained a permit or licence.

### **Article 3: Scope**

1. This Chapter shall apply to measures adopted or maintained by a Party relating to:
  - (a) investors of other Parties;
  - (b) covered investments; and
  - (c) with respect to Article 11 all investments in the territory of the Party.
2. This Chapter shall not apply to:
  - (a) procurement by a Party; and
  - (b) subsidies or grants provided by a Party, except subsidies provided in connection with measures prohibited under Article 11.

### **Article 4: Relation to Other Chapters**

1. This Chapter shall not apply to measures adopted or maintained by a Party affecting trade in services.<sup>5</sup>
2. Notwithstanding paragraph 1, Article 9, Article 10, Article 12, Article 13, Article 14, and Article 17 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 any other Party pursuant to Chapter 7 (Trade in Services), but only to the extent that any such measures relate to a covered investment and an obligation under this Chapter, regardless of whether such a service sector is scheduled in a Party's Schedules of Specific Commitments in Annex 7-A (Schedule of Specific Services Commitments).

### **Article 5: Obligation to Comply with Domestic Law and Corporate Social Responsibility**

1. The Parties acknowledge that investors of a Party and their investments are subject to the laws, regulations and standards of the host state Party.
2. The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party.

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<sup>5</sup> For the purposes of this Chapter, the definition of Trade in Services in Article 1 of Chapter 7 (Trade in Services) shall apply.

## **Article 6: National Treatment**

1. In the sectors specified in Annex 9-A of this Agreement, and subject to any conditions and qualifications set out therein, each Party shall accord to investors and covered investments of investors of any other Party treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the acquisition, establishment, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
2. In respect of intellectual property rights, a Party may derogate from the obligations set out in this Article provided this is not inconsistent with the TRIPS Agreement.

## **Article 7: Most-Favoured-Nation Treatment**

1. Each Party shall accord to investors and covered investments of investors of any other Party treatment no less favourable than that it accords, in like circumstances, to investors of a non-party or to their investments with respect to the acquisition, establishment, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
2. A Party may maintain a measure inconsistent with paragraph 1 provided that such a measure falls within the scope of exemptions lists in Annex I (Schedule of Most-Favoured-Nation Exemptions on Services and Investment).
3. In respect of intellectual property rights, a Party may derogate from the obligations set out in this Article provided this is not inconsistent with the TRIPS Agreement.

## **Article 8: Scheduling of Commitments**

1. Each Party shall set out in Annex 9-A the sectors where it undertakes specific commitments with respect to Article 6. With respect to sectors where such commitments are undertaken, each Schedule shall specify any conditions or qualifications on national treatment.
2. Schedules of specific commitments are annexed to this Agreement and shall form an integral part thereof.

## **Article 9: Minimum Standard of Treatment**

1. Each Party shall accord to covered investments of investors of any other Party the customary international law minimum standard of treatment of aliens including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law<sup>6</sup> minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” shall not require treatment in addition to or beyond that which is required by that standard, and shall 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.

#### **Article 10: Senior Management and Boards of Directors**

1. No Party may require that an enterprise of that Party that is a covered investment appoint to Senior Management positions natural persons of any particular nationality.

2. No Party may require that a majority of the board of directors, or any committee thereof, of an enterprise of that Party that is a covered investment, be of a particular nationality, or resident in the Party.

3. A Party may maintain a measure inconsistent with this Article provided that such a measure falls within the scope of any exemptions listed in Annex 9-B.

#### **Article 11: Prohibition of Performance Requirements**

1. If a Party is a WTO Member, it shall, in connection with the establishment, acquisition, expansion, management, conduct, operation, sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, ensure that any measure taken is consistent with the TRIMS Agreement.

2. (a) If a Party is not a WTO Member, it shall, to the extent of its capacity, strive to ensure that, in connection with the establishment, acquisition, expansion, management, conduct, operation, sale or other disposition of an investment of an

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<sup>6</sup>The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Article 9 results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 9, 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.

investor of a Party or of a non-Party in its territory, any measure taken is consistent with the TRIMS Agreement.

- (b) For greater certainty, if a Party is not a WTO Member, a list of that Party's measures that do not comply with the TRIMS Agreement shall be listed in Annex 9-D within two years of the date of entry into force of this Agreement. After the expiry of this date, new measures that are inconsistent with the TRIMS Agreement may not be introduced.

### **Article 12: Compensation for Losses**

1. Each Party shall accord to investors of any other Party and to their covered investments, with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict, civil strife or state of emergency, treatment no less favourable than that it accords, in like circumstances, to:

- (a) its own investors and their investments; and
- (b) investors of any other Party or non-Party and their investments.

2. Notwithstanding paragraph 1, if an investor of a Party, in the situations referred to in paragraph 1, suffers a loss in the territory of another Party resulting from:

- (a) requisitioning of its covered investment or part thereof by the latter's forces or authorities; or
- (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 with restitution, compensation, or both as appropriate, for such loss.<sup>7</sup> Any compensation shall be made in accordance with Articles 13.2, 13.3 and 13.4 which shall apply *mutatis mutandis*.

### **Article 13: Expropriation and Compensation**

1. A Party shall not expropriate or nationalise a covered investment of an investor from another Party, either directly or indirectly through measures equivalent to expropriation or nationalisation, except:

- (a) for a public purpose;
- (b) in a non-discriminatory manner;

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<sup>7</sup> For greater certainty, in the event of providing both restitution and compensation, their combined value shall not exceed the loss suffered.

- (c) in accordance with due process of law; and
- (d) upon payment of prompt, adequate and effective compensation pursuant to paragraphs 2, 3 and 4.

2. Compensation shall be equivalent to the fair market value of the expropriated investment at the time when the expropriation was publicly announced or when the expropriation occurred, whichever is the earlier. Compensation shall be determined in accordance with the generally recognised principles of valuation and equitable principles, taking into account, *inter alia*, the capital invested, depreciation, capital already repatriated, replacement value and other relevant factors. Compensation shall not reflect any change in value occurring because the expropriation had become publicly known earlier.

3. The compensation shall be paid without undue delay. Such compensation shall be in a freely usable currency and include interest at a commercially reasonable rate, taking into account the length of time before payment occurs. It shall be effectively realisable and freely transferable.

4. An investor of a Party affected by a direct expropriation may seek, under the law of the host state making the expropriation, a review, by a judicial or other independent authority of the host country, of the decision to expropriate and of the valuation of its investment in accordance with the principles set out in this Article.

5. For those Parties that are WTO Members, this Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights in accordance with the TRIPS Agreement or the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the TRIPS Agreement.

6. For those Parties that are not currently WTO Members, this Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights in accordance with relevant international agreements or the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is in accordance with relevant international agreements on intellectual property rights.

#### **Article 14: Free Transfer of Funds**

1. Each Party shall allow 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;
- (b) profits, capital gains, dividends, royalties, licence fees, technical assistance and technical and management fees, interest and other current income accruing from any covered investment;
- (c) proceeds from the total or partial sale or liquidation of any covered investment;

- (d) payments made under a contract, including a loan agreement;
  - (e) payments made pursuant to Article 12 and Article 13;
  - (f) payments arising out of the settlement of a dispute or an agreement between the disputing parties; and
  - (g) earnings and other remuneration of personnel engaged from abroad in connection with that investment.
2. Each Party shall allow such 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. 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;
  - (f) taxation;
  - (g) social security, public retirement, or compulsory savings schemes; and
  - (h) severance entitlements of employees.

### **Article 15: Transparency**

1. On request by a Party, information shall be exchanged relating to measures of another Party that may have a material impact on any covered investment under this Chapter.
2. A Party may request, in writing, consultations with another Party regarding any actual or proposed measure or any other matter that it considers might materially affect the operation of this Chapter. The other Party shall engage in consultations in accordance with Article 5 of Chapter 14 (Consultations and Dispute Settlement).



## **Article 16: Special Formalities and Disclosure of Information**

1. Nothing in Article 6 or Article 7 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, including a requirement that covered investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not substantially impair the protections afforded by a Party to investors of any other Party and covered investments pursuant to this Chapter.
2. Notwithstanding Article 6, a Party may require an investor of another Party to provide information concerning an investment solely for informational or statistical purposes. The Party shall protect, to the extent possible, any confidential information which has been provided from any disclosure that would prejudice legitimate commercial interests of the investor or the covered 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 law.

## **Article 17: 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, other Parties shall recognise the subrogation or transfer of any right or claim 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. If a Party or an agency of a Party has made a payment to an investor of that Party and has taken over the investor's rights and claims, 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 any other Party.
3. In any proceedings 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 covered 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 18: Denial of Benefits**

1. Following notification through the contact point of a Party, a Party may deny the benefits of this Chapter:
  - (a) to an investor of another Party where the covered investment is being made by an enterprise that is owned or controlled by persons of a non-party and the enterprise has no substantive business operations in the territory of any other Party; or

- (b) to an investor of another Party where the covered investment is being made by an enterprise that is owned or controlled by persons of the denying Party and the enterprise has no substantive business operation in the territory of any other Party.

### **Article 19: Investment and Environment, Health and Other Regulatory Objectives**

1 Parties recognise that it is inappropriate to encourage investment by investors of another Party and of non-Parties by not enforcing their own environmental, health, labour, safety or other regulatory standards.

2 Nothing in this Chapter shall be construed to prevent a Party from adopting or maintaining any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to its environmental, health, or other regulatory objectives.

### **Article 20: Promotion and Facilitation of Investment**

Taking into account the different levels of economic development of the Parties, the developed country Parties shall aim to assist the developing country Parties in the promotion and facilitation of foreign investment to their countries. In that regard, the Parties shall aim to explore through Chapter 10 (Development and Economic Cooperation) and the *Implementing Arrangement for Development And Economic Cooperation under the Pacific Agreement on Closer Economic Relations Plus* how the developing country Parties may be assisted to attract investment into their territories.

### **Article 21: Competent Authorities and Contact Points**

1. Each Party shall provide all other Parties with a description of its competent authorities and their division of responsibilities.
2. Each Party shall provide all other Parties with a Contact Point to facilitate distribution of requests and notifications made in accordance with this Chapter.
3. Each Party shall ensure that the information provided under paragraphs 1 and 2 is kept up to date.

### **Article 22: Technical Discussions**

1. A Party may, through Contact Points, request technical discussions with another Party on any measure affecting investment between them. The Party to which the request was made shall respond promptly to any such request. The Parties shall seek to clarify any measure at issue and, where there is any remaining difference of view, they shall endeavour to find a mutually acceptable solution, taking into account the objectives of this Chapter. In the case of

measures affecting the investment interests of a developing country Party, the Parties shall endeavour to resolve any concerns in a timely manner.

2. A Party may, through Contact Points, arrange to undertake technical discussions with other Parties on investment matters of mutual interest. Technical discussions should be conducted using electronic means. If this is not possible, they may be conducted in person or by any other means, as mutually determined by the Parties.

3. The Parties participating in technical discussions pursuant to this Chapter may mutually agree to invite another Party or a relevant international or regional organisation in the field of investment to participate for the purpose of providing technical advice.

### **Article 23: Review of Commitments**

1. The Parties shall review commitments on investment, with the first review to be undertaken within three years of the date of entry into force of this Agreement and periodically thereafter as determined by the Joint Committee, with the aim of improving the overall commitments undertaken by the Parties under this Chapter.

2. The Parties recognise the limited capacities of developing country Parties which will be taken into account in the review process.

## ANNEX 9-C

### EXPROPRIATION AND COMPENSATION

1. An action or a series of related actions by a Party cannot constitute an expropriation, unless it interferes with a tangible or intangible property right or property interest in a covered investment.
2. Article 13 of Chapter 9 (Investment) addresses two situations:
  - (a) direct expropriation, where a covered investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and
  - (b) where an action or series of related actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
3. The determination of whether an action or series of related actions by a Party, in a specific fact situation, constitutes an expropriation of the type referred to in paragraph 2(b), requires a case-by-case, fact-based inquiry that considers, among other factors:
  - (a) the economic impact of the government action, although the sole fact that an action or series of related actions by a Party has an adverse effect on the economic value of an investment does not establish that such an expropriation has occurred;
  - (b) whether the government action breaches the government's prior binding written commitment to the investor whether by contract or licence; and
  - (c) the character of the government action, including its objective and rationale.
4. Non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety and the environment do not constitute expropriation of the type referred to in paragraph 2(b).

## ANNEX 9-D: LIST OF MEASURES NOT COMPLIANT WITH TRIMS AGREEMENT

1. In accordance with the obligation in Article 11.2(b) of Chapter 9 (Investment), a list of measures of [name of Party] that do not comply with the TRIMS Agreement are included in the template below.<sup>1</sup>

<p><b>(i) Description of the measures and of their main features</b></p> <p>[The notification should clearly identify the measures. Any more general information about the programme of which the measures form a part and which the notifying Party wishes to communicate should be provided under point (ii) below.</p> <p>The measures and their main features should be described in sufficient detail to enable the nature and scope of the measures to be clearly defined. In particular, along with each measure, the following principal features should be described whenever relevant:</p> <ol style="list-style-type: none"><li>1. The category in the illustrative list under which the measure falls.</li><li>2. Whether the TRIM is applied by the government of the Party under discretionary authority or mandatory legislation. In the former case, each specific application shall be notified and enterprises subject to the measure identified.</li><li>3. Where the TRIM is general in nature, the criteria for determining to which enterprises it applies in sufficient detail to enable those enterprises to be identified.</li></ol>	
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<sup>1</sup> This template accords with the guidance in the WTO *Technical Cooperation Handbook On Notification Requirements* WT/TC/NOTIF/TRIMS/1 (15 October 1996).

<p>4. Where the TRIM is applied pursuant to mandatory legislation, whether the legislation requires the measure to be applied to new enterprises or new investments of existing enterprises.</p> <p>5. Whether compliance with the measure by the enterprise is (a) mandatory or enforceable under domestic law or administrative rulings or (b) necessary to obtain an advantage. In the latter case, the nature of the advantage should be described.<sup>2</sup></p> <p>6. When the TRIM relates to specific products, sufficient detail on these products to define the scope of the measure.</p> <p>7. The date of implementation of the TRIM.</p> <p>8. Whether the TRIM, as applied under domestic law, includes provision for its phasing-down and/or elimination. If so, details should be given.</p> <p>9. The domestic law, regulation or administrative guideline under which the TRIM is applied.</p> <p>10. The level of government applying the TRIM, the name of the implementing agency and any information on the procedures.]</p>	
<p><b>(ii) General information on the programme in question</b></p> <p>[Where appropriate, Parties should provide more general information about the programme of which the notified TRIM forms a part.]</p>	

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<sup>2</sup> Information that would prejudice the legitimate commercial interests of particular enterprises need not be notified.