

CHAPTER 9

INVESTMENT

PART I

DEFINITIONS AND SCOPE

ARTICLE 901

Definitions

For the purposes of this Chapter:

- (a) “covered investment” means, with respect to a Party, an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter and which has been admitted by the latter Party in accordance with its laws, regulations and policies;
- (b) “freely useable currency” means a “freely useable currency” as determined by the International Monetary Fund under the Articles of Agreement of the International Monetary Fund and amendments thereafter, or any currency that is used to make international payments and is widely traded in the international principal exchange markets;
- (c) “direct investment” means a direct investment as defined by the International Monetary Fund under its Balance of Payments manual, fifth edition (BMP 5), as amended;
- (d) “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;

in fulfilling its obligations under this Chapter, each Party shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory;

- (e) “permanent resident” means a natural person whose residence in a Party is not limited as to time under its law; 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.

ARTICLE 902

Application of Chapter

1. This Chapter shall not apply to 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.
2. This Chapter shall not apply to laws, regulations or policies 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.
3. This Chapter shall not prevent an investor of one Party from taking advantage of the provisions of any law, regulation or policy of the other Party which is more favourable than the provisions of this Chapter.

PART II

LIBERALISATION OF INVESTMENTS

ARTICLE 903

Scope

1. This Part applies to measures adopted or maintained by a Party relating to:
 - (a) direct investments of investors of the other Party; and
 - (b) investors of the other Party,

unless the measure is a measure by that Party affecting trade in services as set out in Article 803 (1).

ARTICLE 904

Pre-establishment National Treatment

In the sectors inscribed in Annex 8, and subject to any conditions and qualifications set out therein, each Party shall accord to investors of the other Party treatment no less favourable than it accords, in like circumstances, to its own investors, with respect to the establishment and acquisition of investments in its territory.

ARTICLE 905

Denial of Benefits

Subject to prior notification and consultation, a Party may deny the benefits of this Part to an investor of the other Party that is a juridical person of such Party and to investments of such an investor where the Party establishes that the juridical person is owned or controlled by persons of a non-Party.

PART III

POST-ESTABLISHMENT NATIONAL TREATMENT

ARTICLE 906

Scope

This Part applies to measures adopted or maintained by a Party relating to:

- (a) covered investments; and
- (b) investors of the other Party, but only in respect of such investors' management, conduct, operation and sale or other disposition of covered investments,

unless the measure is a measure by that Party affecting trade in services under Article 803 (1).

ARTICLE 907

Post-establishment National Treatment

1. Each Party shall accord to covered investments treatment no less favourable than it accords, in like circumstances, to investments in its territory of its own investors, unless otherwise specified in its specific commitments as set out in Annex 8.
2. Each Party shall accord to investors of the other Party treatment no less favourable than it accords, in like circumstances, to its own investors, unless otherwise specified in its specific commitments as set out in Annex 8.

PART IV

PROMOTION AND PROTECTION OF INVESTMENTS

ARTICLE 908

Scope

1. Except for Paragraph 2 and Article 914, this Part applies to measures adopted or maintained by a Party relating to:

- (a) covered investments which, if so required, have been specifically approved in writing by the competent authorities concerned of the other Party as being entitled to the benefits of an agreement relating to investments; and
- (b) investors of the other Party, but only in respect of such investors' management, conduct, operation and sale or other disposition of the covered investments referred to in Sub-paragraph (a).

2. Each Party shall accord to:

- (a) investors of the other Party treatment no less favourable than it accords, in like circumstances, to investors of any non-Party; and
- (b) investments of investors of the other Party treatment no less favourable than it accords, in like circumstances, to investments of investors of any non-Party

with respect to measures adopted or maintained by a Party relating to the requirements (if any) that need to be satisfied for investors and investments to receive the benefits of an agreement relating to investments, as referred to in Sub-paragraph (1)(a).

3. Where a juridical person of a Party is owned or controlled by a national or a juridical person of any third country, the Parties may decide jointly in consultation not to extend the rights and benefits of this Part to such juridical person.

4. A juridical person duly constituted or otherwise organised under the law of a Party shall not be treated as an investor of the other Party, but any investments in that juridical person by investors of that other Party shall be protected by this Part.

5. This Part shall not apply to a natural person who is a permanent resident but not a national of either Party where the provisions of an investment agreement between the other Party and the country of which the person is a national have already been invoked in respect of the same matter.

ARTICLE 909

Promotion and Protection of Investments

1. Each Party shall encourage and promote investments in its territory by investors of the other Party.
2. Each Party shall ensure fair and equitable treatment in its own territory of investments.
3. Each Party shall accord within its territory protection and security to investments.

ARTICLE 910

Most Favoured Nation Treatment

1. Each Party shall accord to investors of the other Party treatment no less favourable than it accords, in like circumstances, to investors of any non-Party.
2. Each Party shall accord to all covered investments treatment no less favourable than it accords, in like circumstances, to investments in its territory of investors of any non-Party.

ARTICLE 911

Denial of Benefits

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

ARTICLE 912

Expropriation

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 the following conditions are complied with:

- (a) the expropriation is for a public purpose related to the internal needs of that Party and under due process of law;
- (b) the expropriation is non-discriminatory; and
- (c) the expropriation is accompanied by the payment of prompt, adequate and effective compensation.

2. The compensation referred to in Sub-paragraph 1(c) of this Article shall be computed on the basis of the market value of the investment immediately before the expropriation or impending expropriation became public knowledge. Where that value cannot be readily ascertained, the compensation shall be determined in accordance with generally recognised principles of valuation and equitable principles taking into account, where appropriate, the capital invested, depreciation, capital already repatriated, replacement value, currency exchange rate movements and other relevant factors.

3. The compensation shall be paid without undue delay, shall include interest at a commercially reasonable rate and shall be freely transferable between the territories of the Parties in a freely useable currency.

ARTICLE 913

Compensation for Losses

When a Party adopts any measures relating to losses in respect of investments in its territory by persons of any other country owing to war or other armed conflict, revolution, a state of national emergency, civil disturbance or other similar events, the treatment accorded to investors of the other Party as regards restitution, indemnification, compensation or other settlement shall be no less favourable than that which the first Party accords to persons of any third country.

ARTICLE 914

Payments and Transfers

1. Subject to Article 1605, each Party shall, when requested by an investor of the other Party, permit all funds of that investor related to an investment in its territory to be transferred freely and without undue delay in a freely useable currency into and out of its territory.⁵ 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) repayments of a claim to money;
- (e) payment for the losses referred to in Article 913; and
- (f) earnings and other remuneration of personnel engaged from abroad in connection with that investment.

2. Unless otherwise agreed by the investor and the Party concerned, transfers shall be made at the market exchange rate prevailing on the date of transfer in accordance with the laws, regulations and policies of the Party that admitted the investment.

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

- (a) bankruptcy, insolvency or the protection of the rights of creditors; or
- (b) ensuring the satisfaction of judgements in adjudicatory proceedings.

ARTICLE 915

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 against non-commercial risks or other form of indemnity it has granted 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.

⁵ This includes funds of an investor of the other Party that are to be used to establish or acquire an investment in the territory of a Party where such a transfer would be required so as not to nullify or impair a commitment of a Party covered by this Chapter.

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 of the Party making the payment, pursue those rights and claims against the other Party.

ARTICLE 916

Access to Dispute Settlement Mechanisms

1. Each Party shall in accordance with its laws, regulations and policies:
 - (a) provide investors of the other Party who have made investments within its territory and personnel employed by them for activities associated with investments full access to its competent judicial or administrative bodies in order to afford means of asserting claims and enforcing rights in respect of disputes with its own investors;
 - (b) permit its investors to select means of their choice to settle disputes relating to investments with the investors of the other Party, including arbitration conducted in a third country; and
 - (c) ensure the enforcement of any resulting judgments or awards.
2. Nothing in this Article requires a Party to recognise or enforce the judgments or awards of the judicial or administrative bodies of the other Party or of a non-Party.

ARTICLE 917

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

1. In the event of a dispute between a Party and an investor of the other Party relating to a covered investment, consultations shall take place between the parties concerned with a view to resolving the case amicably.
2. If the dispute in question cannot be resolved through consultations and negotiations⁶, the dispute may, at the choice of the investor, be:
 - (a) initiated before the Party's competent judicial or administrative bodies, in accordance with the laws and regulations of the Party; or

⁶ The consultations and negotiations should, in principle, continue for three months.

- (b) resolved by an international ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

3. If, after the entry into force of this Agreement, a Party enters into an international agreement with a non-Party⁷, that:

- (a) grants investors of that non-Party the right to submit to arbitration a claim relating to a dispute between that investor and the Party relating to an investment; and
- (b) provides for a means to resolve the dispute that is not included in Paragraph 2;

then the investor of the other Party referred to in Paragraph 1 may, at its choice, use that means of resolving the dispute.

4. Once an action referred to in Paragraph 2 or 3 of this Article has been taken, neither Party shall pursue the dispute through diplomatic channels unless:

- (a) the relevant dispute settlement body has decided that it has no jurisdiction in relation to the dispute in question; or
- (b) the other Party has failed to abide by or comply with any judgment, award, order or other determination made by the relevant dispute settlement body.

5. In any proceeding involving a dispute relating to a covered investment, a Party shall not assert, at any stage of proceedings referred to in Sub-paragraph 2 (b) or Paragraph 3, that the investor concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of any alleged loss.

6. Any arbitral tribunal established under this Article shall, in the event of a dispute related to an alleged breach of an obligation of this Chapter, reach its decision on the basis of the provisions of the present Agreement, as well as applicable rules of international and domestic law.

7. All arbitral awards shall be final and binding on the parties to the dispute.

8. All sums received or payable as a result of a settlement shall be freely transferable in a freely useable currency.

⁷ Excluding any international agreement with the members of the Association of South-East Asian Nations.

9. This Article shall not be construed to allow an investor of a Party to pursue a claim against the other Party in relation to any decision that any foreign investment authority of that Party makes in relation to, or conditions that any foreign investment authority of that Party may have placed on, the establishment, acquisition or expansion of an investment by that investor, or in relation to the enforcement of any such conditions.

PART V

MODIFICATION AND REVIEW OF COMMITMENTS

ARTICLE 918

Modification of Commitments

By giving three months' written notification to the other Party, a Party may modify its commitments. At the request of the other Party, the modifying Party shall enter into negotiations with a view to reaching agreement on any necessary adjustment required to maintain a general level of mutually advantageous commitments not less favourable to trade than that provided for in schedules of specific commitments prior to such negotiations. If agreement is not reached, the matter may be referred to arbitration in accordance with Chapter 18.

ARTICLE 919

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 consider a request by the other Party for the incorporation in this Agreement of treatment no less favourable than that provided under the former agreement.
2. If, after this Agreement enters into force, a Party further liberalises any of its measures applying to investors or investments, it shall consider a request by the other Party for the incorporation in this Agreement of the unilateral liberalisation.