

CHAPTER 14
INVESTMENT

Article 14.1
Scope

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

- (a) investors of the other Party;
- (b) covered investments; and
- (c) with respect to Article 14.9, all investments in the Area of the Party adopting or maintaining the measure.

2. With the exception of Article 14.15, in the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of inconsistency.

Article 14.2
Definitions

For the purposes of this Chapter:

- (a) the term "covered investment" means, with respect to a Party, an investment in its Area 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;
- (b) the term "enterprise of a Party" means an enterprise constituted or organised under the law of a Party;
- (c) the term "freely usable currencies" means any currency designated as such by the International Monetary Fund under the Articles of Agreement of the International Monetary Fund, as amended;

- (d) the term "investment activities" means the establishment, acquisition, expansion, management, conduct, operation, maintenance, use, enjoyment and sale or other disposition of investments;
- (e) the term "investment agreement" means a written agreement between a national authority of a Party and a covered investment or an investor of the other Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment, that grants rights to the covered investment or investor:
 - (i) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution or sale;
 - (ii) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications; or
 - (iii) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government;

Note 1: "Written agreement" means an agreement in writing, executed by both parties, whether in a single instrument or in multiple instruments, that creates an exchange of rights and obligations, binding on both parties. For greater certainty:

- (i) a unilateral act of an administrative or judicial authority, such as a permit, licence, or authorisation issued by a Party solely in its regulatory capacity, or a decree, order, or judgment, standing alone; and

- (ii) an administrative or judicial consent decree or order, shall not be considered a written agreement.

Note 2: For the purposes of this definition, "national authority" means an authority at the central level of government.

- (f) the term "investment" means every kind of asset owned or controlled, directly or indirectly, by an investor, 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:
 - (i) an enterprise and a branch of an enterprise;
 - (ii) shares, stocks or other forms of equity participation in an enterprise;
 - (iii) bonds, debentures, loans and other forms of debt;
 - (iv) futures, options and other derivatives;
 - (v) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;
 - (vi) claims to money or to any contractual performance related to a business activity and having an economic value;
 - (vii) intellectual property as defined in Article 16.2 (Intellectual Property - Definitions);
 - (viii) rights conferred pursuant to laws and regulations or contracts such as concessions, licences, authorisations and permits; and

- (ix) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges; and

Note: Investments may also include amounts yielded by investments that are re-invested, in particular, profit, interest, capital gains, dividends, royalties and fees. A change in the form in which assets are invested does not affect their character as investments.

- (g) the term "investor of a Party" means a natural person or an enterprise of a Party, that seeks to make, is making, or has made, an investment in the Area of the other Party.

Article 14.3 National Treatment

Each Party shall accord to investors of the other Party and to covered investments treatment no less favourable than that it accords, in like circumstances, to its own investors and to their investments with respect to investment activities in its Area.

Article 14.4 Most-Favoured-Nation Treatment

Each Party shall accord to investors of the other Party and to covered investments treatment no less favourable than that it accords, in like circumstances, to investors of a non-Party and to their investments with respect to investment activities in its Area.

Note: For greater certainty, this Article does not apply to dispute settlement procedures or mechanisms under any international agreement.

Article 14.5
Minimum Standard of Treatment

Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

Note 1: This Article prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded by a Party to covered investments. 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.

Note 2: 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 14.6
Access to the Courts of Justice

1. Each Party shall with respect to investment activities in its Area accord to investors of the other Party treatment no less favourable than that it accords in like circumstances to its own investors or investors of a non-Party, with respect to access to its courts of justice and administrative tribunals and agencies.

2. Paragraph 1 does not apply to treatment provided to investors of a non-Party pursuant to an international agreement concerning access to courts of justice or administrative tribunals, or judicial cooperation agreements.

Article 14.7

Special Formalities and Information Requirements

1. Nothing in Article 14.3 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with investment activities of investors of the other Party and covered investments, such as compliance with registration requirements, or requirements that investors be residents of the Party or that covered investments be legally constituted under the laws and regulations of the Party provided that such formalities do not materially impair the protections afforded by the Party to investors of the other Party and covered investments pursuant to this Chapter.

2. Notwithstanding Articles 14.3 and 14.4, a Party may require an investor of the other Party, or a covered investment, to provide information concerning that covered investment solely for informational or statistical purposes. The Party shall protect such information that is confidential from any disclosure that would prejudice the competitive position of the investor or 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 14.8

Senior Management and Boards of Directors

1. Neither Party shall require that an enterprise of that Party that is a covered investment appoint to senior management positions nationals of any particular nationality.

2. A Party may require that a majority or less than 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 Area of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

Article 14.9
Prohibition of Performance Requirements

1. Neither Party shall apply in connection with investment activities of an investor of a Party in its Area any measure which is inconsistent with the Agreement on Trade-Related Investment Measures in Annex 1A to the WTO Agreement.

2. Without prejudice to paragraph 1, neither Party shall impose or enforce any of the following requirements, in connection with investment activities of an investor of a Party or of a non-Party in its Area:

- (a) to export a given level or percentage of goods or services;
- (b) to achieve a given level or percentage of domestic content;
- (c) to purchase, use or accord a preference to goods produced in its Area, or to purchase goods from persons in its Area;
- (d) to 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 an investment of the investor;
- (e) to restrict sales of goods or services in its Area that an investment of the investor produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
- (f) to transfer technology, a production process or other proprietary knowledge to a person in its Area, except when the requirement:
 - (i) is imposed or enforced by a court of justice, administrative tribunal or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under its competition laws and regulations; or

- (ii) concerns the disclosure of proprietary information or the use of intellectual property rights which is undertaken in a manner not inconsistent with the TRIPS Agreement; or
- (g) to supply to a specific region or the world market exclusively from its Area, one or more of the goods that an investment of the investor produces or the services that an investment of the investor provides.

3. Without prejudice to paragraph 1, neither Party shall condition the receipt or continued receipt of an advantage, in connection with investment activities of an investor of a Party or of a non-Party in its Area, on compliance with any of the following requirements:

- (a) to achieve a given level or percentage of domestic content;
- (b) to purchase, use or accord a preference to goods produced in its Area, or to purchase goods from persons in its Area;
- (c) to 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 an investment of the investor; or
- (d) to restrict sales of goods or services in its Area that an investment of the investor produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

4. Nothing in paragraph 3 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with investment activities of an investor of a Party or of a non-Party in its Area, 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 Area.

5. Subparagraphs 2(a), 2(b), 2(c), 3(a) and 3(b) shall not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs.

6. Subparagraphs 2(b), 2(c), 2(f), 2(g), 3(a) and 3(b) shall not apply to government procurement.

7. Subparagraphs 3(a) and 3(b) shall not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

8. Paragraphs 2 and 3 shall not apply to any requirement other than the requirements set out in those paragraphs.

Note: For greater certainty, 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 14.10 Non-Conforming Measures and Exceptions

1. Articles 14.3, 14.4, 14.8 and 14.9 shall not apply to:

- (a) any non-conforming measure that is maintained by the following on the date of entry into force of this Agreement, as set out in Schedules in Annex 6 (Non-Conforming Measures Relating to Paragraph 1 of Articles 9.7 and 14.10):
 - (i) the central government of a Party; or
 - (ii) a State or Territory of Australia or a prefecture of Japan;
- (b) any non-conforming measure that is maintained by a local government other than a State or Territory or a prefecture referred to in subparagraph (a)(ii) on the date of entry into force of this Agreement;
- (c) the continuation or prompt renewal of any non-conforming measure referred to in subparagraphs (a) and (b); or

- (d) an amendment or modification to any non-conforming measure referred to in subparagraphs (a) and (b), provided that the amendment or modification does not decrease the conformity of the measure, as it existed immediately before the amendment or modification, with Articles 14.3, 14.4, 14.8 and 14.9.

2. Articles 14.3, 14.4, 14.8 and 14.9 shall not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors and activities set out in its Schedule in Annex 7 (Non-Conforming Measures Relating to Paragraph 2 of Articles 9.7 and 14.10).

3. Neither Party shall, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule in Annex 7 (Non-Conforming Measures Relating to Paragraph 2 of Articles 9.7 and 14.10), require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment that exists at the time the measure becomes effective.

4. In cases where a Party makes an amendment or a modification to any non-conforming measure set out in its Schedule in Annex 6 (Non-Conforming Measures Relating to Paragraph 1 of Articles 9.7 and 14.10) or where a Party adopts any new or more restrictive measure with respect to sectors, sub-sectors or activities set out in its Schedule in Annex 7 (Non-Conforming Measures Relating to Paragraph 2 of Articles 9.7 and 14.10) after the date of the entry into force of this Agreement, the Party shall, prior to the implementation of the amendment or modification or the new or more restrictive measure, or as soon as possible thereafter:

- (a) on request of the other Party, promptly provide information and respond to questions pertaining to any such proposed or actual amendment, modification or measure;
- (b) to the extent possible, provide a reasonable opportunity for comments by the other Party on any such proposed or actual amendment, modification or measure; and

- (c) to the maximum extent possible, notify the other Party of any such amendment, modification or measure that may substantially affect the other Party's interests under this Agreement.

5. Each Party shall endeavour, where appropriate, to reduce or eliminate the non-conforming measures set out in its Schedules in Annexes 6 (Non-Conforming Measures Relating to Paragraph 1 of Articles 9.7 and 14.10) and 7 (Non-Conforming Measures Relating to Paragraph 2 of Articles 9.7 and 14.10) respectively.

6. Articles 14.3 and 14.4 shall not apply to any measure covered by the exceptions to, or derogations from, obligations under Articles 3 and 4 of the TRIPS Agreement.

7. Articles 14.3, 14.4 and 14.8 shall not apply to any measure that a Party adopts or maintains with respect to:

- (a) government procurement; or
- (b) subsidies or grants provided by a Party, including government-supported loans, guarantees and insurance.

Article 14.11 Expropriation and Compensation

1. Neither Party shall expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation (hereinafter referred to in this Chapter as "expropriation") except:

- (a) for a public purpose;
- (b) on a non-discriminatory basis;
- (c) in accordance with due process of law; and
- (d) upon payment of prompt, adequate and effective compensation in accordance with paragraphs 2 through 4.

2. The 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. The fair market value shall not reflect any change in market value occurring because the expropriation had become publicly known earlier.

3. The compensation shall be paid without delay and shall include interest at a commercially reasonable rate accrued from the date of expropriation to the date of payment and shall be effectively realisable and freely transferable in accordance with Article 14.13.

4. If payment is made in a freely usable currency, the compensation paid shall include interest, at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

5. If a Party elects to pay in a currency other than a freely usable currency, the compensation paid, converted into the currency of payment at the market rate of exchange prevailing on the date of payment, shall be no less than the sum of the following:

- (a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date; and
- (b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

6. 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 to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with Chapter 16 (Intellectual Property).

Note: For greater certainty, the reference to the TRIPS Agreement in paragraph 6 includes any waiver in force between the Parties of any provision of that Agreement granted by WTO members in accordance with the WTO Agreement.

Article 14.12
Treatment in Case of Strife

1. Each Party shall, with respect to restitution, indemnification, compensation or any other settlement, accord to investors of the other Party that have suffered loss or damage to their covered investments due to armed conflict or civil strife such as revolution, insurrection, civil disturbance or any other similar event in its Area, treatment that is no less favourable than that it would accord, in like circumstances, to its own investors or to investors of a non-Party.

2. Any payments as a means of settlement referred to in paragraph 1 shall be effectively realisable, freely transferable and freely convertible at the market exchange rate into the currency of the Party of the investors concerned or freely usable currencies.

3. Notwithstanding the provisions of Article 1.10 (General Provisions - Security Exceptions), neither Party shall be relieved of its obligation under paragraph 1 by reason of its measures taken pursuant to that Article.

Article 14.13
Transfers

1. Each Party shall allow all transfers relating to a covered investment to be made freely into and out of its Area without delay. Such transfers shall include those of:

- (a) the initial capital and additional amounts to maintain or increase investments;
- (b) profits, capital gains, dividends, royalties, interest, fees and other current incomes accruing from investments;
- (c) proceeds from the total or partial sale or liquidation of investments;
- (d) payments made under a contract including loan payments in connection with investments;

- (e) earnings and remuneration of personnel from abroad who work in connection with investments in the Area of the Party;
- (f) payments made in accordance with Articles 14.11 and 14.12; and
- (g) payments arising out of a dispute.

2. Each Party shall allow such transfers to be made in freely usable currencies at the market exchange rate prevailing at the time of each transfer.

3. Notwithstanding paragraphs 1 and 2, a Party may delay or prevent such transfers 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 or derivatives;
- (c) criminal or penal offences;
- (d) reporting or record keeping of transfers of currency or other monetary instruments when necessary to assist law enforcement or financial regulatory authorities; or
- (e) ensuring compliance with orders or judgments in judicial or administrative proceedings.

Article 14.14 Subrogation

If a Party or its designated agency makes a payment to an investor of the Party pursuant to an indemnity, guarantee or insurance contract pertaining to an investment of that investor within the Area of the other Party, that other Party shall recognise:

- (a) the assignment, to the Party or its designated agency, of any right or claim of the investor in respect of such investment, that formed the basis of such payment; and
- (b) the right of the Party or its designated agency to exercise by virtue of subrogation such right or claim to the same extent as the original right or claim of the investor.

Article 14.15 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 covered investments or investors of the other Party and other investments or investors, where like conditions prevail, or a disguised restriction on investment, nothing in Articles 14.3, 14.4, and 14.9 shall prevent the adoption or enforcement by either Party of measures:

- (a) necessary to protect public morals or to maintain public order;

Note: 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.

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

Note: This exception includes environmental measures 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; or
 - (iii) safety;
- (d) imposed for the protection of national treasures of artistic, historic or archaeological value; or
- (e) relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

Article 14.16
Temporary Safeguard Measures

1. A Party may adopt or maintain restrictive measures with regard to cross-border capital transactions as well as payments or transfers for transactions related to covered investments:

- (a) in the event of serious balance-of-payments and external financial difficulties or threat thereof; or
- (b) in exceptional cases where movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular monetary and exchange rate policies.

2. Restrictive measures referred to in paragraph 1 shall:

- (a) be applied such that the other Party is treated no less favourably than any non-Party;
- (b) be consistent with the Articles of Agreement of the International Monetary Fund;
- (c) not exceed those necessary to deal with the circumstances set out in paragraph 1;

- (d) be temporary and be phased out progressively as the situation specified in paragraph 1 improves;
- (e) be promptly notified to the other Party; and
- (f) avoid unnecessary damages to the commercial, economic and financial interests of the other Party.

3. The Party which has adopted any measures under paragraph 1 shall, on request, commence consultations with the other Party in order to review the restrictions adopted by it.

Article 14.17 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 its investments, where the denying Party establishes that the enterprise is owned or controlled by an investor of a non-Party 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 prohibit 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. 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 its investments, where the denying Party establishes that the enterprise is owned or controlled by an investor of a non-Party or of the denying Party and the enterprise has no substantial business activities in the Area of the other Party.

Note: For the purposes of this Article, an enterprise is:

- (a) "owned" by an investor if more than 50 per cent of the equity interest in it is beneficially owned by the investor; and

- (b) "controlled" by an investor if the investor has the power to name a majority of its directors or otherwise to legally direct its actions.

Article 14.18
Sub-Committee on Investment

1. For the purposes of the effective implementation and operation of this Chapter, the Parties hereby establish a Sub-Committee on Investment (hereinafter referred to in this Article as "the Sub-Committee").

2. The functions of the Sub-Committee shall be:

- (a) exchanging information on any matters related to this Chapter;
- (b) reviewing and monitoring the implementation and operation of this Chapter and the non-conforming measures set out in each Party's Schedules in Annexes 6 (Non-Conforming Measures Relating to Paragraph 1 of Articles 9.7 and 14.10) and 7 (Non-Conforming Measures Relating to Paragraph 2 of Articles 9.7 and 14.10);
- (c) discussing any issues related to this Chapter;
- (d) considering any issues raised by either Party concerning the imposition or enforcement of performance requirements, including those specified in Article 14.9;
- (e) considering any issues raised by either Party concerning investment agreements between a Party and an investor of the other Party;
- (f) reporting the findings and outcome of discussions of the Sub-Committee to the Joint Committee; and
- (g) carrying out other functions as may be delegated by the Joint Committee.

3. The Sub-Committee shall be composed of and co-chaired by representatives of the Governments of the Parties.

4. The Sub-Committee may invite, by consensus, representatives of relevant entities other than the Governments of the Parties with the necessary expertise relevant to the issues to be discussed.

5. The Sub-Committee shall meet at such venues and times and by such means as may be agreed by the Parties.

Article 14.19 Review

1. Unless the Parties otherwise agree, the Parties shall conduct a review of this Chapter with a view to the possible improvement of the investment environment through, for example, the establishment of a mechanism for the settlement of an investment dispute between a Party and an investor of the other Party. Such review shall commence in the fifth year following the date of entry into force of this Agreement or a year on which the Parties otherwise agree, whichever comes first.

2. The Parties shall also conduct such a review if, following the entry into force of this Agreement, Australia enters into any multilateral or bilateral international agreement providing for a mechanism for the settlement of an investment dispute between Australia and an investor of another or the other party to that agreement, with a view to establishing an equivalent mechanism under this Agreement. The Parties shall commence such review within three months following the date on which that international agreement entered into force and will conduct the review with the aim of concluding it within six months following the same date.

3. At any time after the first year following the entry into force of this Agreement, either Party may request the other Party to agree to commence the review provided for in paragraph 1.