

Chapter 8
Investment

Article 83
Scope

1. This Chapter shall apply to measures adopted or maintained by a Party relating to investors of the other Party and to their investments in the Area of the former Party.

Note: For greater certainty, this Chapter shall also apply to measures adopted or maintained by a Party relating to investments made by investors of the other Party in the Area of the former Party prior to the entry into force of this Agreement.

2. An investor of a Party whose investments are not made in compliance with the laws and regulations of the other Party which are consistent with this Agreement shall not be entitled to submit an investment dispute to conciliations or arbitrations referred to in paragraph 4 of Article 96.

3. In the event of any inconsistency between this Chapter and Chapter 6:

- (a) with respect to matters covered by Articles 85, 86 and 89, Chapter 6 shall prevail to the extent of the inconsistency; and
- (b) with respect to matters not falling under subparagraph (a), this Chapter shall prevail to the extent of the inconsistency.

4. Nothing in this Chapter shall impose any obligation on either Party regarding measures pursuant to immigration laws and regulations.

Article 84
Definitions

For the purposes of this Chapter:

- (a) the term "financial services" shall have the same meaning as in subparagraph 5(a) of the Annex on Financial Services of the GATS;
- (b) the term "freely usable currencies" means freely usable currencies as defined under the Articles of Agreement of the International Monetary Fund;
- (c) the term "measure adopted or maintained by a Party" means any measure adopted or maintained by:
 - (i) central, regional or local governments or authorities of a Party; and
 - (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities of a Party;
- (d) the term "natural person of a Party" means a natural person who under the law of the Party:
 - (i) in respect of India, is a citizen of India; and
 - (ii) in respect of Japan, is a national of Japan;
- (e) the term "New York Convention" means the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958; and
- (f) the term "transfers" means transfers and international payments.

Article 85 National Treatment

1. Each Party shall accord to investors of the other Party and to their 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.

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

Article 86 Most-Favoured-Nation Treatment

Each Party shall accord to investors of the other Party and to their investments treatment no less favourable than that it accords, in like circumstances, to investors of any non-Party and to their investments with respect to the management, conduct, operation, maintenance, use, enjoyment and sale or other disposition of investments in its Area.

Article 87 General Treatment

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

Note: This paragraph prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of the other Party. 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. 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 paragraph.

2. Each Party shall observe any obligation it may have entered into with regard to investment activities in its Area of investors of the other Party.

Article 88
Access to the Courts of Justice

Each Party shall 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 in all degrees of jurisdiction, both in pursuit and in defence of such investors' rights.

Article 89
Prohibition of Performance Requirements

1. Neither Party shall impose or enforce any of the following requirements, in connection with investment activities in its Area of an investor of the other Party:

- (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 or services provided in its Area, or to purchase goods or services from natural or legal persons or any other entity 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 investments of the investor;
- (e) to restrict sales of goods or services in its Area that investments of the investor produce or provide by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
- (f) to restrict the exportation or sale for export;
- (g) to appoint, as executives, managers or members of board of directors, individuals of any particular nationality;

- (h) to transfer technology, a production process or other proprietary knowledge to natural or legal persons or any other entity in its Area, except when the requirement:
 - (i) is imposed or enforced by a court of justice, administrative tribunal or competition authority to remedy an alleged violation of competition laws and regulations; or
 - (ii) concerns the transfer of intellectual property which is undertaken in a manner not inconsistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights in Annex 1C to the WTO Agreement (hereinafter referred to as "the TRIPS Agreement"); or
- (i) to supply to a specific region or the world market exclusively from its Area, one or more of the goods that the investor produces or the services that the investor provides.

2. Paragraph 1 does not preclude either Party from conditioning the receipt or continued receipt of an advantage, in connection with investment activities in its Area of an investor of the other Party, on compliance with any of the requirements set forth in subparagraphs 1 (h) and (i).

Article 90 Reservations and Exceptions

1. Articles 85, 86 and 89 shall not apply to:
 - (a) any existing non-conforming measure that is maintained by the following, as set out in Schedules in Annex 8:
 - (i) the central government of a Party; or
 - (ii) a prefecture of Japan or a state or an Union territory of India;

- (b) any existing non-conforming measure that is maintained by a local government other than a prefecture and a state or an Union territory referred to in subparagraph (a) (ii);
- (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 85, 86 and 89.

2. Articles 85, 86 and 89 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 9.

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 9, 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 existing non-conforming measure set out in its Schedule in Annex 8 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 9 after 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 in exceptional circumstances, as soon as possible thereafter:

- (a) notify the other Party of detailed information on such amendment, modification or measure; and
- (b) hold, upon request by the other Party, consultations in good faith with that other Party with a view to achieving mutual satisfaction.

5. Each Party shall endeavour, where appropriate, to reduce or eliminate the exceptions specified in its Schedules in Annexes 8 and 9 respectively.

6. Articles 85 and 86 shall not apply to any measure covered by the exceptions to, or derogations from, obligations under Articles 3 and 4 of the TRIPS Agreement, as specifically provided in Articles 3 through 5 of the TRIPS Agreement.

7. Articles 85, 86 and 89 shall not apply to any measure that a Party adopts or maintains with respect to government procurement.

Note: For greater certainty, the term "existing" in this Article means being in effect on the date of entry into force of this Agreement.

Article 91

Special Formalities and Information Requirements

1. Nothing in Article 85 shall be construed to prevent a Party from prescribing special formalities in connection with investment activities of investors of the other Party and their investments in the Area of the former Party, provided that such special formalities do not materially impair the protections afforded by the former Party to investors of the other Party and their investments pursuant to this Chapter.

2. Notwithstanding Articles 85 and 86, a Party may require an investor of the other Party or its investments in the Area of the former Party, to provide business information concerning those investments, to be used solely for informational or statistical purposes. The former Party shall protect such business information that is confidential from disclosure that would prejudice the competitive position of the investor or the investments. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its laws and regulations.

Article 92
Expropriation and Compensation

1. Neither Party shall take any measure of expropriation or nationalisation against investments in its Area of investors of the other Party or take any measure tantamount 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 pursuant to paragraphs 2 through 4.

2. The compensation shall be equivalent to the fair market value of the expropriated investments 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 an appropriate commercial rate, taking into account the length of time from the time of expropriation to the time of payment. Such compensation shall be effectively realisable and freely transferable and shall be freely convertible, at the market exchange rate prevailing on the date of expropriation, into the currency of the Party of the investors concerned and freely usable currencies.

4. Without prejudice to Article 96, the investors affected by expropriation shall have a right of access to the courts of justice or the administrative tribunals or agencies of the Party making the expropriation to seek prompt review of the investors' case and the amount of compensation in accordance with the principles set out in this Article.

5. This Article shall not apply with respect to the grant of compulsory licences concerning intellectual property in accordance with the TRIPS Agreement.

6. This Article shall be interpreted in accordance with Annex 10.

Article 93 Protection from Strife

1. Each Party shall accord to investors of the other Party that have suffered loss or damage relating to their investments in the Area of the former Party due to armed conflict or state of emergency such as revolution, insurrection, civil disturbance or any other similar event in the Area of that former Party, treatment, as regards restitution, indemnification, compensation or any other settlement, that is no less favourable than that it accords 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 and freely usable currencies.

3. Notwithstanding the provisions of Article 11, neither Party shall be relieved of its obligation under paragraph 1 by reason of its measures taken pursuant to that Article.

Article 94 Transfers

1. Each Party shall ensure that all transfers relating to investments in its Area of an investor of the other Party may be made freely into and out of its Area without delay. Such transfers shall include, though not limited to, those of:

- (a) the initial capital and additional amounts to maintain or increase investments;
- (b) profits, capital gains, dividends, royalties, interests, 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 payments made pursuant to loan agreements;
- (e) earnings and remuneration of personnel from the other Party who work in connection with investments in the Area of the former Party;
- (f) payments made in accordance with Articles 92 and 93; and
- (g) payments arising out of the settlement of a dispute under Article 96.

2. Each Party shall further ensure that such transfers may be made in freely usable currencies at the market exchange rate prevailing on the date 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 including futures and options;
- (c) criminal or penal offenses;
- (d) ensuring compliance with orders or judgments in judicial proceedings or administrative rulings; or
- (e) obligations of investors arising from social security, and public retirement or compulsory savings scheme.

Note: With respect to India, obligations of investors referred to in this subparagraph include, *inter alia*, those arising from provident funds, and retirement gratuity/allowance and employees' state insurance programmes under the laws and regulations of India.

Article 95
Subrogation

1. If a Party or its designated agency makes a payment to any of its investors 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:

- (a) recognise the assignment, to the former Party or its designated agency, of any right or claim of the investor that formed the basis of such payment; and
- (b) recognise the right of the former 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.

2. Articles 92, 93 and 94, shall apply *mutatis mutandis* as regards payment to be made to the Party or its designated agency mentioned in paragraph 1 by virtue of such assignment of right or claim, and the transfer of such payment.

3. An investor shall not be entitled to seek any relief in an investment dispute under Article 96, to the extent of indemnification or other compensation received by that investor under paragraph 1.

Article 96
Settlement of Investment Disputes between a Party
and an Investor of the Other Party

1. For the purposes of this Chapter, an "investment dispute" is a dispute between a Party and an investor of the other Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of any obligation under this Chapter and other provisions of this Agreement as applicable with respect to the investor and its investments.

2. Nothing in this Article shall be construed so as to prevent an investor who is a party to an investment dispute (hereinafter referred to in this Article as "disputing investor") from seeking settlement by domestic administrative or judicial fora of the Party that is the other party to the investment dispute (hereinafter referred to in this Article as "disputing Party"). However, in the event that the disputing investor has submitted the investment dispute for resolution under one of the international conciliations or arbitrations referred to in paragraph 4, no proceedings may be initiated by the disputing investor for the resolution of the investment dispute before courts of justice or administrative tribunals or agencies.

3. An investment dispute shall, as far as possible, be settled amicably through consultations or negotiations between the disputing investor and the disputing Party (hereinafter referred to in this Article as "the disputing parties").

4. If the investment dispute cannot be settled through such consultation or negotiation within six months from the date on which the disputing investor requested for the consultation or negotiation in writing, the disputing investor may submit the investment dispute to one of the following international conciliations or arbitrations:

- (a) conciliation or arbitration in accordance with the Convention on the Settlement of Investment Dispute between States and Nationals of Other States (hereinafter referred to as "the ICSID Convention"), so long as the ICSID Convention is in force between the Parties;
- (b) conciliation or arbitration under the Additional Facility Rules of the International Centre for Settlement of Investment Disputes, so long as the ICSID Convention is not in force between the Parties;
- (c) conciliation under the Conciliation Rules of the United Nations Commission on International Trade Law or arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law; or

- (d) any arbitration in accordance with other arbitration rules if agreed with the disputing Party.

5. The applicable conciliation or arbitration rules shall govern the conciliation or arbitration set forth in paragraph 4 except to the extent modified in this Article.

6. No investment dispute may be submitted to international conciliation or arbitration referred to in paragraph 4 if the disputing investor has initiated any proceedings for the resolution of the investment dispute before courts of justice or administrative tribunals or agencies. However, in the event that those proceedings are withdrawn within 30 days from the date of filing the case, the disputing investor may submit the investment dispute to such international conciliations or arbitrations.

7. The disputing investor who intends to submit the investment dispute to conciliation or arbitration pursuant to paragraph 4 shall give to the disputing Party written notice of intent to do so at least 90 days before the investment dispute is submitted. The notice of intent shall specify:

- (a) the name and address of the disputing investor;
- (b) the specific measures of the disputing Party at issue and a brief summary of the factual and legal basis of the investment dispute sufficient to present the problem clearly, including the obligations under this Agreement alleged to have been breached;
- (c) conciliation or arbitration set forth in paragraph 4 which the disputing investor chooses to invoke; and
- (d) the relief sought and the approximate amount of damages claimed.

8. (a) Each Party hereby consents to the submission of investment disputes by a disputing investor to conciliation or arbitration set forth in paragraph 4 chosen by the disputing investor.

- (b) The consent given under subparagraph (a) and the submission by a disputing investor of an investment dispute to conciliation or arbitration shall satisfy the requirements of:
 - (i) Chapter II of the ICSID Convention or the Additional Facility Rules of the International Centre for Settlement of Investment Disputes, for written consent of the parties to a dispute; and
 - (ii) Article II of the New York Convention for an agreement in writing.

9. Notwithstanding paragraph 8, no investment dispute may be submitted to conciliation or arbitration set forth in paragraph 4, if more than three years have elapsed since the date on which the disputing investor acquired or should have first acquired, whichever is the earlier, the knowledge that the disputing investor had incurred loss or damage referred to in paragraph 1.

10. Notwithstanding paragraph 6, the disputing investor may initiate or continue an action that seeks interim injunctive relief not involving the payment of damages or resolution in substance of the dispute before an administrative tribunal or agency or a court of justice under the law of the disputing Party.

11. Unless the disputing parties agree otherwise, an arbitral tribunal established under paragraph 4 shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties. If the disputing investor or the disputing Party fails to appoint an arbitrator or arbitrators within 60 days from the date on which the investment dispute was submitted to arbitration, the Secretary-General of the International Centre for Settlement of Investment Disputes in the case of arbitration referred to in subparagraph 4 (a) or (b), or the Secretary-General of the Permanent Court of Arbitration, at The Hague in the case of arbitration referred to in subparagraph 4 (c) or (d), may be requested by either of the disputing parties, to appoint the arbitrator or arbitrators not yet appointed, subject to the requirements of paragraph 12.

12. Unless the disputing parties agree otherwise, the third arbitrator shall not be a national of Japan nor citizen of India, nor have his or her usual place of residence in either Party, nor be employed by either of the disputing parties, nor have dealt with the investment dispute in any capacity.

13. Unless the disputing parties agree otherwise, the arbitration shall be held in a country that is a party to the New York Convention.

14. An arbitral tribunal established under paragraph 4 shall decide the issues in dispute in accordance with this Chapter and other provisions of this Agreement as applicable and applicable rules of international law.

15. The disputing Party shall deliver to the other Party:

- (a) written notice of the investment dispute submitted to the arbitration no later than 30 days after the date on which the investment dispute was submitted; and
- (b) copies of all pleadings filed in the arbitration.

16. On written notice to the disputing parties, the Party which is not the disputing Party may make submission to the arbitral tribunal on a question of interpretation of this Chapter and other provisions of this Agreement as applicable.

17. The arbitral tribunal may order an interim measure of protection to preserve the rights of the disputing investor, or to facilitate the conduct of arbitral proceedings, including an order to preserve evidence in the possession or control of either of the disputing parties. The arbitral tribunal shall not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in paragraph 1.

18. The award rendered by the arbitral tribunal shall include:

- (a) a decision whether or not there has been a breach by the disputing Party of any obligation under this Chapter and other provisions of this Agreement as applicable with respect to the disputing investor and its investments, together with the basis and the reasons for such decision; and
- (b) a remedy if there has been such breach. The remedy shall be limited to one or both of the following:
 - (i) payment of monetary damages and applicable interest; and
 - (ii) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution. Costs may also be awarded in accordance with the applicable arbitration rules.

Note: For the purposes of this paragraph, it is understood that where the disputing Party asserts as a defence that the measure alleged to constitute a breach referred to in paragraph 1 is within the scope of a security exception as set out in Article 11, the arbitral tribunal shall not review the merits of any such measure in its award. However, the arbitral tribunal shall not be prevented from assessing the remedy referred to in subparagraph (b) in the light of the treatment as set out in paragraph 1 of Article 93 for any loss or damage relating to the investments caused by the measure in question.

19. The award rendered in accordance with paragraph 18 shall be final and binding upon the disputing parties. The disputing Party shall carry out without delay the provisions of the award and provide in its Area for the enforcement of the award in accordance with its relevant laws and regulations.

20. Neither Party shall give diplomatic protection, or bring an international claim, in respect of an investment dispute which the other Party and an investor of the former Party have consented to submit or submitted to arbitration set forth in paragraph 4, unless the other Party has failed to abide by and comply with the award rendered in such investment 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 investment dispute.

21. An arbitral tribunal shall address and decide as a preliminary question any objection by the disputing Party that the investment dispute is not within the competence of the arbitral tribunal, provided that the disputing Party so requests immediately after the establishment of the arbitral tribunal.

Article 97 Temporary Safeguard Measures

1. A Party may adopt or maintain measures not conforming with its obligations under Article 85 relating to cross-border capital transactions and Article 94:

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

2. Measures referred to in paragraph 1 shall:

- (a) be consistent with the Articles of Agreement of the International Monetary Fund;
- (b) not exceed those necessary to deal with the circumstances set out in paragraph 1;
- (c) be temporary and eliminated as soon as conditions permit;

- (d) be promptly notified to the other Party; and
- (e) avoid unnecessary damages to the commercial, economic and financial interests of the other Party.

3. The Party adopting any measures under paragraph 1 shall, on request by the other Party, commence consultations in order to examine the possibility of reviewing the measures adopted by the former Party.

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

Article 98 Prudential Measures

Where a Party takes measures relating to financial services for prudential reasons, the provisions of paragraph 1 of Section 2 in Annex 4 shall apply accordingly.

Article 99 Environmental Measures

Each Party recognises that it is inappropriate to encourage investment activities in its Area of investors of the other Party by relaxing its environmental measures. To this effect each Party should not waive or otherwise derogate from such environmental measures as an encouragement for establishment, acquisition or expansion of investments in its Area.

Article 100 Relation to Other Obligations

Nothing in this Agreement shall be construed so as to derogate from laws and regulations of each Party or any other international agreements that entitle investors of the other Party and to their investments treatment more favourable than that accorded by this Agreement.

Article 101
Duration and Termination

In respect of investments made prior to the date of termination of this Agreement, the provisions of this Chapter, as well as provisions of this Agreement which are directly related to this Chapter, shall continue to be effective for a period of ten years from the date of termination of this Agreement.