

Chapter 9 Investment

Article 84 Scope and Coverage

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.
2. It is understood that 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.
3. In the event of any inconsistency between this Chapter and Chapter 6 with regard to measures by a Party affecting trade in services, Chapter 6 shall prevail to the extent of the inconsistency.

Article 85 Definitions

For the purposes of this Chapter:

- (a) "enterprise" means any entity duly constituted or organised under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including any corporation, partnership, sole proprietorship, company, joint venture or other association;
- (b) "freely convertible currency" means any currency which is widely traded in international foreign exchange markets and widely used in international transactions;
- (c) "investment" means any kind of asset, particularly:
 - (i) an enterprise or a branch of an enterprise;
 - (ii) shares, stocks or any other kind of equity participation in an enterprise, including rights derived therefrom;
 - (iii) bonds, debentures, loans and other forms of debt, including rights derived therefrom;

- (iv) claims to money and to any performance associated with an enterprise and having an economic value;
- (v) intangible assets such as intellectual property rights and goodwill;
- (vi) rights conferred pursuant to law or contract such as concessions, licences, authorisations and permits, including those for cultivation, exploration, extraction and exploitation of natural resources;
- (vii) rights under contracts, including turnkey, construction, management, production and revenue-sharing contracts; and
- (viii) any other tangible and intangible, movable and immovable property, and any related property rights, such as mortgages, liens and pledges;

A change in the form of the asset does not affect its character as an investment;

- (d) "investment activities" means establishment, acquisition, expansion, management, conduct, operation, maintenance, use, enjoyment, liquidation, sale or other disposition of investment;
- (e) "investment made" means an investment which an investor of a Party has established, acquired or expanded in the Area of the other Party;
- (f) "investment of an investor of a Party" means an investment that is owned or controlled, either directly or indirectly, by an investor of the Party;
- (g) "investor of a Party" means:
 - (i) a natural person, who under the law of the Party:
 - (A) in respect of Japan, is a national of Japan; or
 - (B) in respect of Switzerland:
 - (aa) is a national of Switzerland; or
 - (bb) has the right of permanent residence; or

- (ii) an enterprise constituted or organised under the applicable law of the Party and carrying out substantial business activities in the Area of that Party,

that is in the process of making an investment or has made an investment in the Area of the other Party; and

- (h) "measure" means any measure by a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action or any other form.

Article 86

General Treatment and Protection

1. Each Party shall accord to investments of investors of the other Party fair and equitable treatment and full protection and security. Neither Party shall impair by unreasonable or arbitrary measures the management, conduct, operation, maintenance, use, enjoyment, liquidation, sale or other disposition of such investments.

2. Each Party shall observe any written obligation it may have entered into with regard to a specific investment by an investor of the other Party, which the investor could have relied on at the time of establishment, acquisition or expansion of such investment.

Article 87

National Treatment

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

Article 88

Most-Favoured-Nation Treatment

1. Each Party shall accord to investors of the other Party and to their investments, in relation to their investment activities, treatment no less favourable than that it accords, in like situations, to investors of a non-Party and to their investments.

2. It is understood that the treatment referred to in paragraph 1 does not include treatment accorded to investors of a non-Party and their investments by provisions concerning the settlement of investment disputes between a Party and the non-Party that are provided for in other international agreements.

3. If a Party accords more favourable treatment to investors of a non-Party and their investments by concluding or amending a free trade agreement, customs union or similar agreement that provides for substantial liberalisation of investment, it shall not be obliged to accord such treatment to investors of the other Party and their investments. Any such treatment accorded by a Party shall be notified to the other Party without delay and the former Party shall endeavour to accord to investors of the latter Party and their investments treatment no less favourable than that accorded under the concluded or amended agreement. The former Party, upon request by the latter Party, shall enter into negotiations with a view to incorporating into this Agreement treatment no less favourable than that accorded under such concluded or amended agreement.

Article 89 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, in particular, those of:

- (a) the initial capital and additional amounts to maintain or increase the investments;
- (b) profits, interests, dividends, capital gains, royalties, fees and other current incomes accruing from the investments;
- (c) payments made under a contract, including a loan agreement;
- (d) proceeds from the total or partial sale or liquidation of the investments;
- (e) earnings and other remuneration of personnel engaged from abroad in connection with the investments;
- (f) payments made in accordance with Articles 91 and 92; and

- (g) payments arising out of the settlement of a dispute under Article 94.

2. Each Party shall further ensure that transfers referred to in paragraph 1 may be made in a freely convertible currency. A transfer shall be able to be made at the market rate of exchange prevailing on the date of the transfer.

3. It is understood that paragraphs 1 and 2 are without prejudice to the equitable, non-discriminatory and good faith application by a Party of its laws relating to:

- (a) bankruptcy, insolvency or the protection of the rights of creditors;
- (b) the issuing, trading or dealing in securities;
- (c) criminal or penal offences and the recovery of proceeds of crimes;
- (d) reports or record keeping of transfers of currency or other monetary instruments; or
- (e) ensuring compliance with judgments or orders in adjudicatory proceedings.

Article 90 Reservations

1. Articles 87, 88 and 96 shall not apply to:

- (a) any existing non-conforming measure by a Party as set out in its List of Reservations in Section 1 of Appendix 1 or Section 1 of Appendix 2 to Annex IX, that is maintained, continued, or renewed at any time;
- (b) an amendment or modification to any non-conforming measure covered by subparagraph (a) to the extent that the amendment or modification does not decrease the conformity of the measure with Articles 87, 88 and 96; and
- (c) any measure adopted or maintained by a Party, in accordance with its List of Reservations in Section 2 of Appendix 1 or Section 2 of Appendix 2 to Annex IX,

to the extent that such measures are inconsistent with Articles 87, 88 and 96.

2. In case of an amendment or modification to any existing non-conforming measure as referred to in subparagraph 1(b) or adoption of a measure as referred to in subparagraph 1(c), a Party shall notify the other Party thereof, providing detailed information, prior to the amendment, modification or adoption, or in exceptional circumstances, as soon as possible thereafter.

3. Neither Party shall, under any measure adopted after the date of entry into force of this Agreement and covered by its List of Reservations set out in Annex IX, 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. As part of the review provided for in Article 102, the Parties undertake to review their Lists of Reservations set out in Annex IX with a view to reducing the scope of the reservations therein or removing them.

5. A Party may, at any time, either upon request of the other Party or unilaterally, remove in whole or in part its reservations set out in Annex IX by a written notification to that other Party.

6. Articles 87 and 88 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 to 5 of the TRIPS Agreement.

7. Articles 87, 88 and 96 shall not apply to any measure that a Party adopts or maintains with respect to government procurement.

Article 91 Expropriation and Compensation

1. Neither Party shall expropriate or nationalise in its Area investments of investors of the other Party or take any measure tantamount to expropriation or nationalisation (hereinafter referred to as "expropriation") except:

- (a) for a purpose which is in the public interest;
- (b) in a non-discriminatory manner;
- (c) in accordance with due process of law; and

- (d) against prompt, adequate and effective compensation pursuant to paragraphs 2 to 4.

2. The amount of compensation shall be equivalent to the fair market value of the expropriated investment at the time when the expropriation was publicly announced or when it 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 commercial rate established on a market basis, taking into account the length of time from the date of expropriation to the date of payment. It shall be effectively realisable, freely transferable and freely convertible at the market exchange rate prevailing on the date of expropriation into freely convertible currencies.

4. Without prejudice to Article 94, the investor affected by the expropriation shall have the right, under the law of the Party making the expropriation, to prompt review, by a court of justice, an administrative tribunal or another independent authority of that Party, of his case and of the valuation of his investment in accordance with the principles set out in this Article.

Article 92 Treatment in Case of Strife

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

2. Any payments made 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 freely convertible currencies.

Article 93
Subrogation

If an investor of a Party receives payment, pursuant to an insurance, guarantee or indemnity contract, from an insurer constituted or organised under the law of that Party, the other Party shall recognise the assignment of any right or claim of the investor to the insurer, and the right of the insurer to exercise such right or claim by virtue of subrogation to the same extent as the predecessor in title.

Article 94
Settlement of Investment Disputes between an Investor
and a Party

1. For the purposes of this Chapter, "investment dispute" means 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 by the former Party of any obligation under this Chapter with respect to the investor or its investment. This Article shall not apply to disputes arising out of events which occurred prior to the entry into force of this Agreement.

2. Any investment dispute shall, as far as possible, be settled amicably through consultations between the investor and the disputing Party (hereinafter collectively referred to in this Article as "the disputing parties") at the request of the investor.

3. If the investment dispute cannot be settled through consultations within six months from the date on which the disputing investor requested such consultations in writing, the disputing investor may submit the investment dispute to international conciliation or arbitration at the following institutions or under the following rules:

- (a) the International Centre for Settlement of Investment Disputes (hereinafter referred to in this Article as "ICSID") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States done at Washington, on 18 March 1965;
- (b) the Additional Facility Rules of ICSID, provided that either Party, but not both, is a party to the ICSID Convention; or

- (c) an *ad hoc* arbitral tribunal which, unless otherwise agreed upon by the disputing parties, shall be established under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) adopted on 28 April 1976.

4. Each Party hereby gives its consent to the submission of an investment dispute by a disputing investor to international conciliation or arbitration referred to in paragraph 3 regarding an investment made.

5. Notwithstanding paragraph 4, no investment dispute may be submitted to conciliation or arbitration under paragraph 3, if more than five years have elapsed since the date on which the disputing investor acquired or should have first acquired, whichever is the earlier, knowledge of the incurred loss or damage referred to in paragraph 1.

6. A disputing investor may submit the investment dispute to international conciliation or arbitration if:

- (a) the disputing investor has not initiated any proceedings for the resolution of the investment dispute before courts of justice or administrative tribunals or agencies of the disputing Party; or
- (b) where the disputing investor has initiated any proceedings for the resolution of the investment dispute before courts of justice or administrative tribunals or agencies of the disputing Party, the disputing investor withdraws the investment dispute from such proceedings. For the purpose of withdrawal, a written waiver shall be included in the written request for conciliation or arbitration by which the disputing investor waives any right to initiate or continue before any courts of justice or administrative tribunals or agencies under the law of either Party, any proceeding with respect to any alleged breach of this Chapter.

It is understood that a disputing investor may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the disputing Party, provided that the action is brought for the sole purpose of preserving the disputing investor's rights and interests while the conciliation or arbitration is pending.

7. Unless the disputing parties agree otherwise, the arbitration shall be held in a country that is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958.

8. The arbitral tribunal shall decide the investment dispute in accordance with this Chapter and applicable rules of international law. Where the investment dispute includes a claim based on paragraph 2 of Article 86, the arbitral tribunal shall decide on that claim in accordance with this Chapter and the following:

- (a) the rules of law specified in the pertinent investment contract, or other rules of law the disputing parties may agree upon; or
- (b) in the absence of rules of law referred to in subparagraph (a):
 - (i) such rules of international law as may be applicable; and
 - (ii) the law of the respondent, including its rules on the conflict of laws.

9. The disputing Party shall notify the other Party in writing of the investment dispute submitted to international conciliation or arbitration no later than 30 days after the date on which it was submitted, and provide that other Party with copies of all pleadings filed in the arbitration.

10. Upon written notice to the disputing parties, the Party which is not the disputing Party may make submissions to the arbitral tribunal on a question of interpretation of this Chapter.

11. The disputing Party may not assert as a defence its immunity or the fact that the disputing investor has received or will receive, by virtue of an insurance contract, guarantee or indemnity, a compensation covering, in whole or in part, the incurred loss or damage.

12. Neither Party shall give diplomatic protection, or bring an international claim, in respect of an investment dispute submitted to international arbitration, unless the disputing Party has failed to abide by and comply with the award rendered. 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.

13. The decision of arbitration shall be final and binding upon the disputing parties and shall be executed without delay in accordance with the law of the disputing Party.

Article 95 General and Security Exceptions

1. In respect of the making of investments, Articles XIV and XIVbis of the GATS, which are hereby incorporated into and made part of this Agreement, *mutatis mutandis*, shall apply.

2. Paragraph 1 of Article XIVbis of the GATS shall also apply, *mutatis mutandis*, to investments made.

3. This Article shall not apply to paragraph 1 of Article 86, and Articles 91 and 92.

4. In exceptional circumstances, where a Party takes a measure pursuant to paragraphs 1 and 2, that Party shall, prior to the entry into force of the measure or as soon as possible thereafter, notify the other Party of the following:

- (a) the sector and sub-sector or activity affected by the measure;
- (b) the obligation or provisions of this Agreement affected by the measure;
- (c) the legal basis of the measure;
- (d) a succinct description of the measure; and
- (e) the purpose of the measure.

Article 96 Prohibition of Performance Requirements

For the purposes of this Chapter, the Annex to the Agreement on Trade-Related Investment Measures in Annex 1A to the WTO Agreement is hereby incorporated into and made part of this Agreement, *mutatis mutandis*.

Article 97 Temporary Safeguard Measures

1. The Parties endeavour to avoid the imposition of restrictions to safeguard the balance of payments.

2. A Party may adopt or maintain restrictive measures with regard to cross-border capital transactions as well as payment and transfers relating to investment:

- (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.

3. Restrictive measures adopted or maintained by a Party under paragraph 2:

- (a) shall ensure that investors of the other Party are treated as favourably as those of any non-Party;
- (b) shall be consistent with the Articles of Agreement of the International Monetary Fund;
- (c) shall not exceed those necessary to deal with the circumstances set out in paragraph 2;
- (d) shall be temporary and eliminated as soon as conditions permit;
- (e) shall be promptly notified to the other Party; and
- (f) shall avoid unnecessary damages to the commercial, economic and financial interests of the other Party.

4. Nothing in this Article shall be so construed as to alter 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

Article VI of Annex VI shall apply to this Chapter, *mutatis mutandis*.

Article 99
Special Formalities

Nothing in Article 87 shall be so construed as to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with the establishment of an investment by investors of the other Party, such as compliance with requirements on registration on residency, provided that such formalities do not materially impair the protection afforded by the former Party to investors of the latter Party and investment of the investors pursuant to this Chapter.

Article 100
Taxation Measures

1. The following provisions shall apply to taxation measures of each Party:

(a) Articles 87 and 88; and

(b) Article 91, to the extent that such taxation measures constitute expropriation as provided for in paragraph 1 of that Article.

2. For the purposes of subparagraph 1(a), subparagraphs (d) and (e) of Article XIV of the GATS are hereby incorporated into and made part of this Agreement, *mutatis mutandis*.

3. A Party may not invoke Article 87 with respect to a measure of the other Party that falls within the scope of an international agreement between the Parties relating to the avoidance of double taxation.

4. For the purposes of subparagraph 1(a), Article 94 shall not apply in respect of taxation measures.

5. For the purposes of subparagraph 1(b), Article 94 shall apply in respect of taxation measures.

Article 101
Health, Safety and Environmental Measures

The Parties recognise that it is inappropriate to encourage investment activities by relaxing domestic health, safety or environmental measures or lowering labour standards. To this effect, each Party should not waive or otherwise derogate from such measures and standards as an encouragement for establishment, acquisition or expansion of investments in its Area.

Article 102
Review

1. With a view to further progressive liberalisation of investments, the Parties shall review the legal framework, the investment climate and the flow of investment between their Areas consistent with their commitments under other international agreements on investment not later than three years after the date of entry into force of this Agreement and in regular intervals thereafter.

2. The review of the legal framework referred to in paragraph 1 shall include the review of measures adopted or maintained by a Party pursuant to subparagraph 1(c) of Article 90.