

CHAPTER 11

INVESTMENT

Section 1: Investment

Article 135 Definitions

For the purposes of this Chapter:

Enterprise means any entity constituted or otherwise organized under applicable law, whether or not for profit, and whether privately owned or governmentally owned or controlled, including any corporation, trust, partnership, sole proprietorship, joint venture, association or similar organization;

Enterprise of a Party means an enterprise constituted or organized under the law of a Party, and a subsidiary located in the territory of a Party and engaged in substantive business operations there;

investment means every kind of asset invested, directly or indirectly, by the investors of a Party in the territory of the other Party including, but not limited to, the following:

- (a) movable and immovable property and other property rights such as mortgages and pledges;
- (b) shares, debentures, stock and any other kind of participation in companies;
- (c) claims to money or to any other contractual performance having an economic value associated with an investment;
- (d) intellectual property rights, in particular, copyrights, patents and industrial designs, trade-marks, trade-names, technical processes, trade and business secrets, know-how and good-will;
- (e) concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources;
- (f) bonds, including government issued bonds, debentures, loans and other forms of debt⁸, and rights derived therefrom;

⁸ Loans and other forms of debt, which have been registered to the competent authority of a Party, do not mean trade debts where the debts would be non-interest earning if paid on time without penalty.

- (g) any right conferred by law or under contract and any licences and permits pursuant to law;

Any change in the form in which assets are invested does not affect their character as investments;

investments includes investments of legal persons of a third country which are owned or controlled by investors of one Party and which have been made in the territory of the other Party. The relevant provisions of this Agreement shall apply to such investments only when such third country has no right or abandons the right to claim compensation after the investments have been expropriated by the other Party;

investor of a Party means a natural person or enterprise of a Party who seeks to make, is making, or has made an investment in the territory of the other Party;⁹

natural person of a Party means a national or a permanent resident of a Party under its laws. Until such time as China enacts its domestic law on the treatment of permanent residents of foreign countries, this Chapter does not impose obligations on a Party with respect to the permanent residents of the other Party except for the obligations in Articles 142, 143, 144, 145 and 148.

Article 136 Objectives

The objectives of this Chapter are to:

- (a) encourage and promote the flow of investment between the Parties and cooperation between the Parties on investment-related matters on a mutually beneficial basis;
- (b) establish a framework of rules conducive to increasing investment flows between the Parties and to ensure the protection and security of investments of the other Party within each Party's territory; and
- (c) promote cooperation between a Party and investors of the other Party who have investments in the territory of the former Party, on a mutually beneficial basis.

Article 137 Scope

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

⁹ For greater certainty, the elements of the definition of investor of a Party that relate to the establishment of investment are only applicable to Article 139 and Article 142.

- (a) investors of the other Party;
- (b) investments of investors of the other Party.

2. This Chapter shall not apply to measures adopted or maintained by a Party affecting trade in services.

3. Notwithstanding paragraph 2, for the purpose of protection of investment with respect to the commercial presence mode of service supply, Articles 142,¹⁰ 143, 144, 145 and 148 shall apply to any measure affecting the supply of a service by a service supplier of a Party through commercial presence in the territory of the other Party. Section 2 shall apply to Articles 142, 143, 144, 145 and 148 with respect to the supply of a service through commercial presence.

4. For greater certainty, the provisions of this Chapter do not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.

5. This Chapter shall not apply to:

- (a) subsidies or grants provided by a Party; or
- (b) laws, regulations, policies or procedures of general application governing the procurement by government 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.

6. This Chapter shall apply to all investments made by investors of a Party in the territory of the other Party, whether made before or after the entry into force of this Agreement, but Section 2 shall not apply to any dispute or any claim concerning an investment which was already under judicial or arbitral process before the entry into force of this Agreement.

Article 138 National Treatment

Each Party shall accord to investments and activities associated with such investments, with respect to management, conduct, operation, maintenance, use, enjoyment or disposal, by the investors of the other Party treatment no less favourable than that accorded, in like circumstances, to the investments and associated activities by its own investors.

¹⁰ The Parties understand that the reference to amounts necessary for establishing or expanding the investment under subparagraph (a) of Article 142.1 applies to the commercial presence mode of service supply only to the extent that there is a services market access commitment with regard to the sector.

Article 139 Most-favoured-nation Treatment

1. Each Party shall accord to investors, investments and activities associated with such investments by investors of the other Party treatment no less favourable than that accorded, in like circumstances, to the investments and associated activities by the investors of any third country with respect to admission, expansion, management, conduct, operation, maintenance, use, enjoyment and disposal.

2. For greater certainty, the obligation in this Article does not encompass a requirement to extend to investors of the other Party dispute resolution procedures other than those set out in this Chapter.

3. Notwithstanding paragraph 1, the Parties reserve the right to adopt or maintain any measure that accords differential treatment to third countries under any free trade agreement or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement.

4. For greater certainty, paragraph 3 includes, in respect of agreements on the liberalisation of trade in goods or services or investment, any measures taken as part of a wider process of economic integration or trade liberalisation between the parties to such agreements.

5. The Parties reserve the right to adopt or maintain any measure that accords differential treatment to third countries under any international agreement in force or signed after the date of entry into force of this Agreement involving:

- (a) fisheries; and
- (b) maritime matters.

Article 140 Performance Requirements

The Parties agree that the provisions of the *WTO Agreement on Trade-Related Investment Measures* are incorporated *mutatis mutandis* into this Agreement and shall apply with respect to all investments falling within the scope of this Chapter.

Article 141 Non-Conforming Measures

1. Article 138 does not apply to:

- (a) any existing non-conforming measures maintained within its territory;

- (b) the continuation of any non-conforming measure referred to in subparagraph (a);
 - (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not increase the non-conformity of the measure, as it existed immediately before the amendment, with those obligations.
2. The Parties will endeavour to progressively remove the non-conforming measures.
3. Notwithstanding anything in paragraph 1, Article 138 shall not apply to any measure, which with respect to each Party, would not be within the scope of the national treatment obligations in any of that Party's existing bilateral investment treaties.

Article 142 Transfers

1. Except in the circumstances envisaged in Article 202, each Party shall grant to investors of the other Party the free transfer of all payments relating to an investment, including more particularly:
- (a) amounts necessary for establishing, maintaining or expanding the investment;¹¹
 - (b) returns from investments, including profits, dividends, interests and other income;
 - (c) royalty payments, management fees, technical assistance and other fees;
 - (d) proceeds obtained from the total or partial sale or liquidation of investments, or amounts obtained from the reduction in investment capital;
 - (e) payments made pursuant to a loan agreement in connection with investments;
 - (f) amounts necessary for payments under a contract, including amounts necessary for repayment of loans, royalties and other payments resulting from licences, franchises, concessions and other similar rights;

¹¹ The Parties understand that the reference to amounts necessary for establishing or expanding the investment only applies following the successful completion of the approval procedures for inward investment.

- (g) earnings and other remuneration of personnel engaged from abroad in connection with that investment;
- (h) payments made pursuant to Articles 144 and 145; and
- (i) payments arising out of the settlement of a dispute.

2. The transfers referred to in paragraph 1 shall be made without delay in a freely convertible currency and at the prevailing market rate of exchange applicable within the Party accepting the investments on the date of transfer. In the event that the market rate of exchange does not exist, the rate of exchange shall correspond to the cross rate obtained from those rates which would be applied by the International Monetary Fund on the date of payment for conversions of the currencies concerned into Special Drawing Rights.

3. In the case of China, the obligations in paragraph 1 shall apply provided that the transfer shall comply with the relevant formalities stipulated by the present laws and regulations of China relating to exchange control provided that:

- (a) these formalities shall not be used as a means of avoiding China's commitments or obligations under this Agreement;
- (b) in this respect, China shall accord to investors of New Zealand treatment no less favourable than it accords to investors of any third country;
- (c) the formalities shall be effected within such period as is normally required for the completion of transfer formalities. The said period shall commence on the day on which the relevant request has been submitted to the relevant foreign exchange administration with full and authentic documentation and information and may on no account exceed 60 days;
- (d) transfer formalities relating to an investment shall in no case be made more restrictive than formalities required at the time when the original investment was made; and
- (e) to the extent that these formalities are no longer required according to the relevant laws of China, Article 142 shall apply without restrictions.

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

5. Nothing in paragraph 3 shall affect the free transfer of compensation paid under Articles 144 and 145.

6. Neither Party may require its investors to transfer or penalize its investors that fail to transfer the income, earnings, profits or other amounts derived from or attributable to investments in the territory of the other Party.

7. In the case of China, the obligations in paragraph 6 apply only to the extent allowed by the relevant laws and regulations of China relating to exchange control, provided that paragraph 6 shall apply without restrictions to the extent that these laws and regulations no longer apply under China's law.

Article 143 Fair and Equitable Treatment

1. Investments of investors of each Party shall at all times be accorded fair and equitable treatment and shall enjoy the full protection and security in the territory of the other Party in accordance with commonly accepted rules of international law.

2. Fair and equitable treatment includes the obligation to ensure that, having regard to general principles of law, investors are not denied justice or treated unfairly or inequitably in any legal or administrative proceeding affecting the investments of the investor.

3. Full protection and security requires each Party to take such measures as may be reasonably necessary in the exercise of its authority to ensure the protection and security of the investment.

4. Neither Party shall take any unreasonable or discriminatory measures against the management, maintenance, use, enjoyment and disposal of the investments by the investors of the other Party.

5. A violation of any other article of this Chapter does not establish that there has been a violation of this Article.

Article 144 Compensation for Losses

Investors of a Party whose investments in the territory of the other Party suffer losses owing to war or other armed conflict, a state of national emergency, insurrection, riot or other similar events in the territory of the latter Party shall be accorded by the latter Party treatment, as regards restitution, indemnification, compensation or other settlements no less favourable than that accorded to the investors of its own or any third country, whichever is more favourable to the investors concerned.

Article 145 Expropriation

1. Neither Party shall expropriate, nationalize or take other equivalent measures (“expropriation”) against investments of investors of the other Party in its territory, unless the expropriation is:

- (a) for a public purpose;
- (b) in accordance with applicable domestic law;
- (c) carried out in a non-discriminatory manner;
- (d) not contrary to any undertaking which the Party may have given; and
- (e) on payment of compensation in accordance with paragraphs 2, 3 and 4;

2. The compensation referred to above shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation measures were taken. The fair market value shall not reflect any change in value due to the expropriation becoming publicly known earlier. The compensation shall include interest at the prevailing commercial rate from the date the expropriation was done until the date of payment. It shall be paid without delay and shall be effectively realizable and freely transferable. It shall be paid in the currency of the country of the affected investor, or in any freely convertible currency accepted by the affected investor.

3. If the fair market value is denominated in a freely usable currency, the compensation paid shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

4. If the fair market value is denominated in a currency that is not freely usable, 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:

- (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, plus
- (b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

5. This Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights in accordance with the TRIPS Agreement.

Article 146 Transparency

Each Party shall publish international agreements pertaining to investment to which it is a party.

Article 147 Contact Points

Each Party shall designate one or more contact points to facilitate communications between the Parties on any matter covered by this Chapter, and shall provide details of such contact points to the other Party. The Parties shall notify each other promptly of any amendments to the details of their contact points.

Article 148 Subrogation

1. If a Party or its designated agency makes a payment to an investor under an indemnity, a guarantee or a contract of insurance for a non-commercial risk granted or accorded in respect of an investment, the other Party shall recognise the assignment of any rights or claims by the investor to the Party or its designated agency and that Party's or its designated agency's entitlement by virtue of subrogation to exercise the obligations related to the investment to the same extent as the investor.

2. Where a Party (or any agency, institution, statutory body or corporation designated by it) 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 authorized 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 149 Denial of Benefits

Subject to prior notification and consultation, a Party may deny the benefits of this Chapter to:

- (a) investors of the other Party where the investment is being made by an enterprise that is owned or controlled by persons of a non-Party and the enterprise has no substantive business operations in the territory of the other Party; or
- (b) investors of the other Party where the investment is being made by an enterprise that is owned or controlled by persons of the denying Party and the enterprise has no substantive business operations in the territory of the other Party.

Article 150 Committee on Investment

1. The Parties hereby establish a Committee on Investment that shall meet on the request of either Party or the FTA Joint Commission to consider any matter arising under this Chapter.

2. The Committee's functions shall include:

- (a) reviewing the implementation of this Chapter;
- (b) identification and recommendation of measures to promote and increase investment flows between the Parties; and
- (c) consideration of the development of procedures that could contribute to greater transparency of measures described in Article 141.

Article 151 Promotion and Facilitation of Investment

The Parties affirm their desire to facilitate bilateral investment through, *inter alia*:

- (a) cooperating and exchanging information aimed at improving the climate for two-way investment;
- (b) building linkages between New Zealand and China's agencies with a view to promoting bilateral investment.

Section 2: Investor – State Dispute Settlement

Article 152 Consultation and Negotiation

Any legal dispute arising under this Chapter between an investor of one Party and the other Party, directly concerning an investment by that investor in the territory of that other Party, shall, as far as possible, be settled amicably through consultations and negotiations between the investor and that other Party, which may include the use of non-binding third-party procedures, where this is acceptable to both parties to the dispute. A request for consultations and negotiations shall be made in writing and shall state the nature of the dispute.

Article 153 Consent to Submission of a Claim

1. If the dispute cannot be settled as provided for in Article 152 within 6 months from the date of request for consultations and negotiations then, unless the parties to the dispute agree otherwise, it shall, by the choice of the investor, be submitted to:

- (a) conciliation or arbitration by the International Centre for the Settlement of Investment Disputes (“ICSID”) under the *Convention on the Settlement of Disputes between States and Nationals of Other States*, done at Washington on March 18, 1965; or
- (b) arbitration under the rules of the United Nations Commission on International Trade Law (“UNCITRAL”);

provided that the investor shall give the state party 3 months’ notice prior to submitting the claim to arbitration under paragraph 1(a) or 1(b).

2. Upon the receipt of a notice referred to in paragraph 1, the state party may require the investor concerned to go through any applicable domestic administrative review procedures specified by the laws and regulations of the state party, which may not exceed 3 months, before the submission of the claim to arbitration under paragraph 1(a) or 1(b).

3. In case a dispute has been submitted to a competent domestic court, it may be submitted to international dispute settlement, on the condition that the investor concerned has withdrawn its case from the domestic courts before a final judgment has been reached in the case.

4. The arbitration rules applicable under paragraph 1, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Section.

5. The arbitration award shall be final and binding upon both parties to the dispute. Each party shall commit itself to the enforcement of the award.

Article 154 Admissibility of Claims and Preliminary Objections

1. No claim may be submitted to arbitration under this Chapter if more than 3 years have elapsed between the time at which the disputing investor became aware, or should reasonably have become aware, of a breach of obligation under this Chapter causing loss or damage to the investor or its investments and the date of submission of the request for consultations and negotiations referred to in Article 152.

2. A state party may, no later than 30 days after the constitution of the tribunal, file an objection that a claim is manifestly without merit or is otherwise outside the jurisdiction or competence of the tribunal. The state party shall specify as precisely as possible the basis for the objection.

3. The tribunal shall address any such objection as a preliminary question apart from the merits of the claim. The parties shall be given a reasonable opportunity to present their views and observations to the tribunal. If the tribunal decides that the claim is manifestly without merit, or is otherwise not within the jurisdiction or competence of the tribunal, it shall render a decision to that effect.

4. The tribunal may, if warranted, award the prevailing party reasonable costs and fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claim or the objection was frivolous or manifestly without merit, and shall provide the parties a reasonable opportunity to comment.

Article 155 Interpretation of Agreement

1. The tribunal shall, on request of the state party, request a joint interpretation of the Parties of any provision of this Agreement that is in issue in a dispute. The Parties shall submit in writing any joint decision declaring their interpretation to the tribunal within 60 days of delivery of the request.

2. A joint decision issued under paragraph 1 by the Parties shall be binding on the tribunal, and any award must be consistent with that joint decision. If the Parties fail to issue such a decision within 60 days, the tribunal shall decide the issue on its own account.

Article 156 Consolidation of Claims

Where two or more investors notify an intention to submit claims to arbitration which have a question of law or fact in common and arise out of the

same events or circumstances, the disputing parties shall consult with a view to harmonising the procedures to apply, where all disputing parties agree to the consolidation of the claims, including with respect to the forum chosen to hear the dispute.

**Article 157 Publication of Information and Documents Relating to
Arbitral Proceedings**

1. Subject to paragraph 2, the state party may, as it considers appropriate, ensure public availability of all tribunal documents.
2. Any information that is submitted to the tribunal and that is specifically designated as confidential information shall be protected from disclosure.

Article 158 Awards

1. Where a tribunal makes a final award against a state party, the tribunal may award, separately or in combination, only:
 - (a) monetary damages and any applicable interest;
 - (b) restitution of property, in which case the award shall provide that the state party may pay monetary damages and any applicable interest in lieu of restitution.
2. A tribunal may also award costs and fees in accordance with this Chapter and the applicable arbitration rules.
3. A tribunal may not award punitive damages.
4. An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.
5. A disputing party may not seek enforcement of a final award until all applicable review procedures have been completed.
6. Subject to paragraph 5, a disputing party shall abide by and comply with an award without delay.