

## CHAPTER 9 INVESTMENT

### Article 9.1: Definitions

For the purposes of this Chapter:

1. **enterprise** means any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization; and a branch of an enterprise;
2. **enterprise of a Party** means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party;
3. **freely useable currency** means a currency widely used to make payments for international transactions as classified by the International Monetary Fund;
4. **investment** means every kind of asset, owned or controlled, directly or indirectly, by an investor, that includes characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk, including but not limited to the following<sup>1</sup>:
  - (a) an enterprise;
  - (b) shares, stock, and other forms of equity participation in an enterprise, including rights derived therefrom;
  - (c) bonds, debentures, and loans and other debt instruments of an enterprise<sup>2</sup>, including rights derived therefrom;

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<sup>1</sup> For the purpose of the definition of "investment", returns that are invested shall be treated as investments and any alteration of the form in which assets are invested or reinvested shall not affect their character as investments. "Return" means an amount yielded by or derived from an investment, including profits, dividends, interest, capital gains, royalty payments, payments in connection with intellectual property rights, and all other lawful income.

<sup>2</sup> For the purpose of this Chapter, "loans and other debt instruments" described in paragraph 4(c) and "claims to money or to any contractual performance" described in paragraph 4(f) refers to assets which relate to a business activity and do not refer to assets which are of a personal nature, unrelated to any business activity. The Parties further agree that claims to payment immediately due resulting from the sale of goods and services are not investments. Some forms of debt, such as bonds, debentures and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt are less likely to have such characteristics.

<sup>3</sup> Subject to Panama's non-conforming measure on Panama Canal Authority in Annex II (*Non-Conforming Measures*) and based on the constitutional financial autonomy given to the Panama Canal Authority ("PCA"), the following are excluded from the scope of this Chapter: (i) with respect to paragraph (c) to the definition of "investment", loans and other debt instruments that are issued by the PCA; and (ii) with respect to paragraph (e) to the definition of "investment", construction contracts that are awarded by the PCA.

- (d) futures, options, and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- (f) claims to money or to any contractual performance related to a business and having an economic value;
- (g) intellectual property rights and goodwill ;
- (h) licenses, authorizations, permits, and similar rights conferred pursuant to applicable domestic law<sup>4</sup>, including any concession to search for, cultivate, extract or exploit natural resources; and
- (i) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.

5. **investor** means an enterprise of a Party, or a natural person of a Party, as defined in Article 1.3 (*Definitions of General Application*), that has made, is in the process of making, or is seeking to make an investment;

#### **Article 9.2: Scope and Coverage**

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

- (a) investors of the other Party;
- (b) investments of investors of the other Party, made, in the process of being made, or sought to be made, in the territory of the former Party;
- (c) with respect to Article 9.6, all the investments in the territory of the Party.

2. This Chapter shall not apply to:

- (a) any taxation measure unless otherwise provided;
- (b) government procurement; and

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<sup>4</sup> Whether a particular type of license, authorisation, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) is an investment within the scope of this Chapter depends on such factors as the nature and extent of the rights that the holder has under the domestic law of the Party.

<sup>5</sup> The term "investment" does not include an order or judgment entered in a judicial or administrative action.

(c) services supplied in the exercise of governmental authority within the territory of each respective Party. For the purposes of this Chapter, a service supplied in the exercise of governmental authority means any service that is supplied neither on a commercial basis nor in competition with one or more service suppliers.

3. In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail over this Chapter to the extent of the inconsistency.

4. This Chapter shall not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter 11 (*Financial Services*).

5. The requirement by a Party that a service provider of the other Party post a bond or other form of financial security as a condition of providing a service into its territory does not of itself make this Chapter applicable to the provision of that cross-border service. This Chapter applies to that Party's treatment of the posted bond or financial security.

6. This Chapter does not apply to claims arising out of events which occurred, or claims which had been raised, prior to the entry into force of this Agreement.

### **Article 9.3: National Treatment**

1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to investments of investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

### **Article 9.4: Most-Favoured Nation Treatment**

1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

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

establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

#### **Article 9.5: Minimum Standard of Treatment**

1. Each Party shall accord to investments of investors of the other Party treatment in accordance with customary international law minimum standard of treatment of aliens<sup>6</sup>, including fair and equitable treatment and full protection and security.

2. The concepts of "fair and equitable treatment" and "full protection and security" in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens and do not create additional substantive rights. The obligation to provide:

- (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings; and
- (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

3. 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.

4. Without prejudice to paragraph 1, each Party shall accord to investors of the other Party, and to investments of investors of the other Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

5. Paragraph 4 does not apply to existing measures relating to subsidies or grants, or to any conditions attached to the receipt or continued receipt of such subsidies or grants, whether or not such subsidies or grants are offered exclusively to investors of the Party or investments of investors of the Party, that would be inconsistent with Articles 9.3 and Article 9.4 but for Article 9.10.4.

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<sup>6</sup> Customary international law results from a general and consistent practice of States that they follow from a sense of legal obligation. With regards to this article, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

## **Article 9.6: Performance Requirements**

1. Neither Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory to:

- (a) export a given level or percentage of goods or services;
- (b) achieve a given level or percentage of domestic content;
- (c) purchase, use or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
- (d) 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 such investment;
- (e) restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
- (f) transfer a particular technology, production process or other proprietary knowledge to a person in its territory;
- (g) supply exclusively from the territory of the Party the goods that it produces or the services that it provides to a specific regional market or to the world market.

2. Neither Party may condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of a Party or of a non-Party, 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 territory or to purchase goods from persons in its territory;
- (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 such investment; or
- (d) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

3. (a) Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.
  - (b) The provisions of paragraph 1(f) do not apply:
    - (i) when a party authorizes use of an intellectual property right in accordance with Article 31 of the TRIPS Agreement, or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with Article 39 of the TRIPS Agreement; or
    - (i) when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy a practice determined after judicial or administrative process to be anti-competitive under the Party's competition laws.
  - (c) Paragraphs (1)(a), (b) and (c), and (2)(a) and (b) do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs;
  - (d) The provisions of paragraphs (2)(a) and (b) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.
4. For greater certainty, paragraphs 1 and 2 do not apply to any requirement other than the requirements set out in those paragraphs.
5. Nothing in this Article shall be construed so as to derogate from the rights and obligations of the Parties under the *Agreement on Trade Related Investment Measures* in Annex 1A of the WTO Agreement.
6. This Article does not preclude the application of any commitment, undertaking or requirement between private parties, where a Party did not impose or require the commitment, undertaking or requirement.

#### **Article 9.7: Expropriation and Compensation<sup>7</sup>**

1. Neither Party shall expropriate or take measures having effect equivalent to expropriation ("expropriation") the investments of investors of the

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<sup>7</sup>Article 9.7 is to be interpreted in accordance with Annex 9A (*Expropriation*).

other Party unless such a measure is taken on a non-discriminatory basis, for a public purpose, in accordance with due process of law, and upon payment of compensation in accordance with this Article.

2. The expropriation shall be accompanied by the payment of prompt, adequate and effective compensation. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation or impending expropriation became public knowledge. Compensation shall carry an appropriate interest, taking into account the length of time from the time of expropriation until the time of payment. Such compensation shall be effectively realizable, freely transferable in accordance with Article 9.8 and made without delay.

3. Notwithstanding paragraphs 1 and 2, any measure of expropriation relating to land, which shall be as defined in the existing domestic legislation of the expropriating Party on the date of entry into force of this Agreement, shall be for a purpose and upon payment of compensation made in accordance with the aforesaid legislation. Such compensation shall be subject to any subsequent amendments to the aforesaid legislation relating to the amount of compensation where such amendments follow the general trends in the market value of the land.

4. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the *Agreement on Trade-Related Aspects of Intellectual Property Rights* in Annex 1C to the TRIPS Agreement.

#### **Article 9.8: Transfers**

1. Each Party shall permit all transfers relating to investments in its territory of an investor of the other Party to be made freely and without delay into and out of its territory. Such transfers include:

- (a) contributions to capital;
- (b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;
- (c) interest, royalty payments, management fees, and technical assistance and other fees;
- (d) payments made under a contract entered into by the investor, or its investment, including payments made pursuant to a loan agreement;
- (e) payments made pursuant to Articles 9.7 and 9.5.4; and

- (f) payments arising under Article 9.13.
2. Each Party shall permit such transfers to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer.
3. 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, options, or derivatives;
  - (c) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;
  - (d) criminal or penal offences;
  - (e) ensuring compliance with orders or judgments in judicial or administrative proceedings; or
  - (f) social security, public retirement or compulsory savings schemes.

#### **Article 9.9: Senior Management and Board of Directors**

1. Neither Party may require that an enterprise of that Party that is an investment of an investor of the other Party appoint to senior management positions individuals of any particular nationality.
2. A Party may require that a majority of the board of directors, or any committee thereof, of an enterprise of that Party that is an investment of an investor of the other Party, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor of the other Party to exercise control over its investment.

#### **Article 9.10: Non-Conforming Measures**

1. Articles 9.3, 9.4, 9.6 and 9.9 do not apply to:
- (a) any existing non-conforming measure that is maintained by a Party as set out by that Party in its Schedule to Annex I (*Non-Conforming Measures*);

- (b) the continuation or prompt renewal of any non-conforming measure referred to in sub-paragraph (a); or
  - (c) an amendment to any non-conforming measure referred to in sub-paragraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 9.3, 9.4, 9.6 and 9.9.
2. Articles 9.3, 9.4, 9.6 and 9.9 do not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors, or activities, as set out in its Schedule to Annex II (*Non-Conforming Measures*).
3. Neither Party may, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to Annex II (*Non-Conforming Measures*), require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.
4. Articles 9.3, 9.4, and 9.9 shall not apply to subsidies or grants provided by a Party, or to any conditions attached to the receipt or continued receipt of such subsidies or grants, whether or not such subsidies or grants are offered exclusively to investors of the Party or investments of investors of the Party, including government-supported loans, guarantees and insurance.
5. Articles 9.3 and 9.4 do not apply to any measure that is an exception to, or derogation from, a Party's obligations under the TRIPS Agreement, as specifically provided for in that agreement.

**Article 9.11: Denial of Benefits**

Subject to prior notification and consultation, according to the procedures set out in Article 15.3 (*Consultations*), a Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such Party and to investments of such an investor where the Party establishes that the enterprise is owned or controlled by persons of a non-Party, or of the denying Party, and has no substantive business operations in the territory of the other Party.

**Article 9.12: Subrogation**

1. If a Party or a designated agency of a Party makes a payment to any of its investors under a guarantee, a contract of insurance or other form of indemnity it has granted in respect of an investment of an investor of that Party, the other Party shall recognise the subrogation or transfer of any right or title in respect of such investment. The subrogated or transferred right or claim shall not be greater than the original right or claim of the investor.

2. Where a Party or a designated agency of a Party has made a payment to an investor of that Party and has taken over rights and claims of the investor, that investor shall not, unless authorised to act on behalf of the Party or the designated agency of the Party making the payment, pursue those rights and claims against the other Party.

### **Article 9.13: Investor-State Dispute Settlement**

1. This Article shall apply to disputes between a Party and an investor of the other Party concerning an alleged breach of an obligation of the former under this Chapter, which causes loss or damage to the investor or its investment.

2. The parties to the dispute shall initially seek to resolve the dispute by consultations and negotiations.

3. Where the dispute cannot be resolved as provided for under paragraph 2 within 6 months from the date of a request for consultations and negotiations, then unless the disputing investor and the disputing Party agree otherwise or if the investor concerned has already submitted the dispute for resolution before the courts or administrative tribunals of the disputing Party (excluding proceedings for interim measures of protection referred to in paragraph 5, below), the investor concerned may submit the dispute for settlement to:

- (a) the International Centre for Settlement of Investment Disputes ("ICSID") for conciliation or arbitration pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, if both Contracting Parties are parties to the ICSID Convention; or
- (b) arbitration under the rules of the *United Nations Commission on International Trade Law* ("UNCITRAL").

4. Each Party hereby consents to the submission of a dispute to conciliation or arbitration under paragraphs 3(a) and (b) in accordance with the provisions of this Article, conditional upon:

- (a) the submission of the dispute to such conciliation or arbitration taking place within three years of the time at which the disputing investor became aware, or should reasonably have become aware, of a breach of an obligation under this Chapter causing loss or damage to the disputing investor or its investment;
- (b) the disputing investor not being an enterprise of the disputing Party until the disputing investor refers the dispute for conciliation or arbitration pursuant to paragraph 3; and

- (c) the disputing investor providing written notice, which shall be submitted at least 30 days before the claim is submitted, to the disputing Party of its intent to submit the dispute to such conciliation or arbitration and which:
  - (i) nominates either paragraph 3(a) or (b) as the forum for dispute settlement (and, in the case of ICSID, nominates whether conciliation or arbitration is being sought);
  - (i) waives its right to initiate or continue any proceedings (excluding proceedings for interim measures of protection referred to in paragraph 5) before any of the other dispute settlement *fora* referred to in paragraph 3 in relation to the matter under dispute; and
  - (i i) briefly summarises the alleged breach of the disputing Party under this Chapter (including the articles alleged to have been breached) and the loss or damage allegedly caused to the disputing investor or its investment.

5. Neither Party shall prevent the disputing investor from seeking interim measures of protection, not involving the payment of damages or resolution of the substance of the matter in dispute before the courts or administrative tribunals of the disputing Party, prior to the institution of proceedings before any of the dispute settlement *fora* referred to in paragraph 3, for the preservation of its rights and interests. No claim may be submitted to arbitration if the disputing investor has previously submitted the same alleged breach to an administrative tribunal or court of the disputing Party, or to any other dispute settlement procedures, for adjudication or resolution. That election shall be definitive and the disputing investor may not thereafter submit the claim to arbitration under this Article.

6. Neither Party shall give diplomatic protection, or bring an international claim, in respect of a dispute in which one of its investors and the other Party shall have consented to submit or have submitted to conciliation or arbitration under this Article, unless such other Party has failed to abide by and comply with the award rendered in such 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 dispute.

7. A Tribunal established under this article shall decide the issues in dispute in accordance with this Chapter and customary rules of interpretation of public international law.

8. Without prejudice to the appointment of other kinds of experts where authorised by the applicable arbitration rules, a Tribunal, at the request of the disputing Party or the disputing investor or, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning technical or other scientific matters, provided the disputing parties so agree, and subject to such terms and conditions as the disputing parties may agree.

9. Where a disputing Party asserts as a defence that the measure alleged to be a breach is within the scope of a non-conforming measure as set out in its Annexes I (*Non-Conforming Measures*) and II (*Non-Conforming Measures*), the Tribunal shall, on the request of the disputing Party, request the interpretation of the Administrative Commission of the Agreement established in Article 17.1 (*Administrative Commission of the Agreement*) on the issue. The Administrative Commission shall issue in writing, its interpretation on the issue within 60 days after the date of receipt of the request. An interpretation issued by the Administrative Commission under this paragraph shall be binding on the Tribunal and an award by the Tribunal must be consistent with that interpretation. If the Administrative Commission fails to submit an interpretation within 60 days, the Tribunal shall decide the issue.

## **ANNEX 9A EXPROPRIATION**

The Parties confirm their shared understanding that:

1. Article 9.7.1 is intended to reflect customary international law concerning the obligation of States with respect to expropriation.
2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.
3. Article 9.7.1 addresses 2 situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through the formal transfer of title or outright seizure.
4. The second situation addressed by Article 9.7.1 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
  - (a) The determination of whether an action or series actions by a Party, in a specific fact situation, constitutes a measure equivalent to expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:
    - (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that a measure equivalent to expropriation has occurred;
    - (i ) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
    - (i i) the character of the government action.
  - (b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations.