

## CHAPTER TWO

### INVESTMENT PROTECTION

#### *Article 2.1*

##### **Scope**

1. This Chapter shall apply to covered investors and covered investments made in accordance with the applicable law, whether such investments were made before or after the entry into force of this Agreement<sup>1</sup>.
2. Notwithstanding any other provision in this Agreement, Article 2.3 (National Treatment) shall not apply to subsidies or grants provided by a Party, including government-supported loans, guarantees and insurance.
3. Article 2.3 (National Treatment) shall not apply to:
  - (a) the procurement by governmental 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 supply of goods or the supply of services for commercial sale; or
  - (b) audio-visual services;
  - (c) activities performed in the exercise of governmental authority within the respective territories of the Parties. For the purposes of this Agreement, an activity performed in the exercise of governmental authority means any activity, except an activity which is supplied on a commercial basis or in competition with one or more suppliers.

#### *Article 2.2*

##### **Investment and Regulatory Measures**

1. The Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, environment or public morals, social or consumer protection privacy and data protection and the promotion and protection of cultural diversity.
2. For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Chapter.
3. For greater certainty, a Party's decision not to issue, renew or maintain a subsidy or grant:
  - (a) in the absence of any specific commitment under domestic law or contract to issue, renew, or maintain that subsidy or grant; or

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<sup>1</sup> For greater certainty, this Chapter shall not apply to a Party's treatment of covered investors or covered investments before the entry into force of this Agreement.

(b) if the decision is made in accordance with the terms or conditions attached to the issuance, renewal or maintenance of the subsidy or grant, if any,

does not constitute a breach of the provisions of this Chapter.

4. For greater certainty, nothing in this Chapter shall be construed as preventing a Party from discontinuing the granting of a subsidy<sup>2</sup> or requesting its reimbursement where such action has been ordered by a competent court, administrative tribunal or other competent authority<sup>3</sup>, or requiring that Party to compensate the investor therefor.

### *Article 2.3*

#### **National Treatment**

1. Each Party shall accord to covered investors of the other Party and to their covered investments, treatment in its territory no less favourable than the treatment it accords, in like situations, to its own investors and their investments with respect to the operation, management, conduct, maintenance, use, enjoyment and sale or other disposal of their investments.
2. Notwithstanding paragraph 1, each Party may adopt or maintain any measure with respect to the operation, management, conduct, maintenance, use, enjoyment and sale or other disposal of an establishment that is not inconsistent with commitments inscribed in its Schedule of Specific Commitments in Annex 8-A and 8-B of Chapter 8 (Services, Establishment and Electronic Commerce) of the EUSFTA respectively<sup>4</sup>, where such measure is:
  - (a) a measure that is adopted on or before the entry into force of this Agreement;
  - (b) a measure referred to in subparagraph (a) that is being continued, replaced or amended after the entry into force of this Agreement, provided the measure is no less consistent with paragraph 1 after being continued, replaced or amended than the measure as it existed prior to its continuation, replacement or amendment; or
  - (c) a measure not falling within subparagraphs (a) or (b), provided it is not applied in respect of, or in a way that causes loss or damage<sup>5</sup> to, covered investments made in the territory of the Party before the entry into force of such measure.
3. Notwithstanding paragraphs 1 and 2, a Party may adopt or enforce measures that accord to covered investors and investments of the other Party less favourable treatment than that accorded to its own investors and their investments, in like situations, subject to the

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<sup>2</sup> In the case of the EU Party, “subsidy” includes “state aid” as defined in the EU law.

<sup>3</sup> In the case of the EU Party, the competent authorities entitled to order the actions mentioned in Article 2.2 (4) are the European Commission or a court or tribunal of a Member State when applying EU law on state aid.

<sup>4</sup> It is understood that a measure “that is not inconsistent with the commitments inscribed in a Party’s Schedule of Specific Commitments in Annex 8-A and 8-B of Chapter 8 (Services, Establishment and Electronic Commerce) of the EUSFTA, respectively” shall include any measure in respect of any sector that has not been inscribed, and any measure that is not inconsistent with any condition, limitation or reservation that has been inscribed in respect of any sector, in the respective Schedules, regardless of whether such measure affects “establishment” as defined in subparagraph (d) of Article 8.8 (Definitions) of the EUSFTA.

<sup>5</sup> For the purposes of subparagraph (2)(c), it is understood that factors like the fact that a Party has provided for a reasonable phase-in period for the implementation of a measure or that a Party has made any other attempt to address the effects of the measure on covered investments made before its entry into force, shall be taken into account in determining whether the measure causes loss or damage to covered investments made before the entry into force of the measure.

requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the covered investors or investments of the other Party in the territory of a Party, or is a disguised restriction on covered investments, where the measures are:

- (a) necessary to protect public security, public morals or to maintain public order<sup>6</sup>;
- (b) necessary to protect human, animal or plant life or health;
- (c) relating to the conservation of exhaustible natural resources if such measures are applied in conjunction with restrictions on domestic investors or investments;
- (d) necessary for the protection of national treasures of artistic, historic or archaeological value;
- (e) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Chapter including those relating to:
  - (i) the prevention of deceptive or fraudulent practices or to deal with the effects of a default on a contract;
  - (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidential of individual records and accounts;
  - (iii) safety;
- (f) aimed at ensuring the effective or equitable<sup>7</sup> imposition or collection of direct taxes in respect of investors or investments of the other Party.

#### *Article 2.4*

#### **Standard of Treatment**

1. Each Party shall accord in its territory to covered investments of the other Party fair and equitable treatment<sup>8</sup> and full protection and security in accordance with paragraphs 2 to 6.

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<sup>6</sup> The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

<sup>7</sup> Measures that are aimed at ensuring the effective or equitable imposition or collection of direct taxes include measures taken by a Party under its taxation system which:

- (a) apply to non-resident investors or investments in recognition of the fact that the tax obligation of non-residents is determined with respect to taxable items sourced or located in the Party's territory;
- (b) apply to non-residents in order to ensure the imposition or collection of taxes in a Party's territory;
- (c) apply to non-residents or residents in order to prevent the avoidance or evasion of taxes, including compliance measures;
- (d) apply to investments in or from the territory of the other Party in order to ensure the imposition or collection of taxes on such consumers derived from sources in the Party's territory;
- (e) distinguish investors or investments subject to tax on worldwide taxable items from other investors or investments in recognition of the difference in the nature of the tax base between them; or
- (f) determine, allocate or apportion income, profit, gain, loss, deduction or credit of resident persons or branches, or between related persons or branches of the same person, in order to safeguard a Party's tax base.

Tax terms or concepts in paragraph (f) and in this footnote are to be determined according to tax definitions or concepts, or equivalent or similar definitions and concepts, under domestic law of the Party taking the measure.

2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if its measure or series of measures constitute:
  - (a) denial of justice<sup>9</sup> in criminal, civil and administrative proceedings;
  - (b) a fundamental breach of due process;
  - (c) manifestly arbitrary conduct;
  - (d) harassment, coercion, abuse of power or similar bad faith conduct.
3. In determining whether the fair and equitable treatment obligation, as set out in paragraph 2, has been breached, a Tribunal may take into account, where applicable, whether a Party made specific or unambiguous representations<sup>10</sup> to an investor so as to induce the investment, that created legitimate expectations of a covered investor and which were reasonably relied upon by the covered investor, but that the Party subsequently frustrated<sup>11</sup>.
4. The Parties shall, upon request of a Party or recommendations by the Committee, review the content of the obligation to provide fair and equitable treatment, pursuant to the procedure for amendments set out in Article 4.3 (Amendments), in particular, whether treatment other than those listed in paragraph 2 can also constitute a breach of fair and equitable treatment.
5. For greater certainty, “full protection and security” only refers to a Party’s obligation relating to physical security of covered investors and investments.
6. Where a Party, itself or through any entity mentioned in paragraph 7 of Article 1.2 (Definitions), had given a specific and clearly spelt out commitment in a contractual written obligation<sup>12</sup> towards a covered investor of the other Party with respect to the covered investor’s investment or towards such covered investment, that Party shall not frustrate or undermine the said commitment through the exercise of its governmental authority<sup>13</sup> either:
  - (a) deliberately; or
  - (b) in a way which substantially alters the balance of rights and obligation in the contractual written obligation unless the Party provides reasonable compensation

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<sup>8</sup> Treatment in this Article includes treatment of covered investors which directly or indirectly interferes with the covered investors’ operation, management, conduct, maintenance, use, enjoyment and sale or other disposal of their covered investments.

<sup>9</sup> For greater certainty, the sole fact that the covered investor’s claim has been rejected, dismissed or unsuccessful does not in itself constitute a denial of justice.

<sup>10</sup> For greater certainty, representations made so as to induce the investments include the representations made in order to convince the investor to continue with, not to liquidate or to make subsequent investments.

<sup>11</sup> For greater certainty, the frustration of legitimate expectations as described in this paragraph does not, by itself, amount to a breach of paragraph 2, and such frustration of legitimate expectations must arise out of the same events or circumstances that give rise to the breach of paragraph 2.

<sup>12</sup> For the purposes of this paragraph, a “contractual written obligation” means an agreement in writing, entered into by a Party, itself or through any entity mentioned in paragraph 7 of Article 1.2 (Definitions), with a covered investor or a covered investment whether in a single instrument or multiple instruments, that creates an exchange of rights and obligations, binding both parties.

<sup>13</sup> For the purposes of this Article, a Party frustrates or undermines a commitment through the exercise of its governmental authority when it frustrates or undermines the said commitment through the adoption, maintenance or non-adoption of measures mandatory or enforceable under domestic laws.

to restore the covered investor or investment to a position which it would have been in had the frustration or undermining not occurred.

7. A breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

#### *Article 2.5*

#### **Compensation for Losses**

1. Covered investors of one Party whose covered investments suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the other Party shall be accorded by that Party, as regards restitution, indemnification, compensation or other settlement, treatment no less favourable than that accorded by that Party to its own investors or to the investors of any third country, whichever is more favourable to the covered investor concerned.
2. Without prejudice to paragraph 1, covered investors of a Party who, in any of the situations referred to in paragraph 1, suffer losses in the territory of the other Party resulting from:
  - (a) requisitioning of its covered investment or a part thereof by the other Party's armed forces or authorities; or
  - (b) destruction of its covered investment or a part thereof by the other Party's armed forces or authorities, which was not required by the necessity of the situation;shall be accorded by the other Party restitution or compensation.

#### *Article 2.6*

#### **Expropriation<sup>14</sup>**

1. Neither Party shall directly or indirectly nationalise, expropriate or subject to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") the covered investments of covered investors of the other Party except:
  - (a) for a public purpose;
  - (b) in accordance with due process of law;
  - (c) on a non-discriminatory basis; and
  - (d) against payment of prompt, adequate and effective compensation in accordance with paragraph 2.
2. Compensation shall amount to the fair market value of the covered investment immediately before its expropriation or impending expropriation became public knowledge plus interest at a commercially reasonable rate, established on a market basis taking into account the length of time from the time of expropriation until the time of payment. Such compensation shall be effectively realisable, freely transferable in accordance with Article 2.7 (Transfer) and made without delay.

Valuation criteria used to determine fair market value may include going concern value, asset value including the declared tax value of tangible property, and other criteria, as appropriate.

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<sup>14</sup> For greater certainty, this Article shall be interpreted in accordance with Annexes 1 to 3.

3. This Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights, to the extent that such issuance is consistent with the TRIPS Agreement.
4. Any measure of expropriation or valuation shall, at the request of the covered investors affected, be reviewed by a judicial or other independent authority of the Party taking the measure.

#### *Article 2.7*

#### **Transfer**

1. Each Party shall permit all transfers relating to a covered investment to be made in a freely convertible currency without restriction or delay. Such transfers include:
  - (a) contributions to capital such as principal and additional funds to maintain, develop or increase the covered investment;
  - (b) profits, dividends, capital gains and other returns, proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;
  - (c) interest, royalty payments, management fees, and technical assistance and other fees;
  - (d) payments made under a contract entered into by the covered investor, or its covered investment, including payments made pursuant to a loan agreement;
  - (e) earnings and other remuneration of personnel engaged from abroad and working in connection with a covered investment;
  - (f) payments made pursuant to Article 2.6 (Expropriation) and Article 2.5 (Compensation for Losses);
  - (g) payments arising under Article 3.18 (Award).
2. Nothing in this Article shall be construed to prevent a Party from applying in an equitable and non-discriminatory manner its law 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;
  - (f) social security, public retirement or compulsory savings schemes; or
  - (g) taxation.
3. When in exceptional circumstances of serious difficulties, or threat thereof, for the operation of the economic and monetary policy or exchange rate policy in either Party, safeguard measures with regard to transfers may temporarily be taken by the Party concerned. Such measures shall be strictly necessary, shall not exceed in any case a

period of six months<sup>15</sup>, and shall not constitute a means of arbitrary or unjustified discrimination between a Party and a non-Party in like situations.

The Party adopting the safeguard measures shall inform the other Party forthwith and present, as soon as possible, a time schedule for their removal.

4. Where a Party is in serious balance-of-payments and external financial difficulties, or under threat thereof, it may adopt or maintain restrictive measures with regard to transfers related to investments.
5. The Parties shall endeavour to avoid the application of the restrictive measures referred to in paragraph 4. Any restrictive measures adopted or maintained under paragraph 4 shall be non-discriminatory, of a limited duration, and not go beyond what is necessary to remedy the balance-of-payments and external financial situation. They shall be in accordance with the conditions established in the *Marrakesh Agreement Establishing the World Trade Organization done at Marrakesh on 15 April 1994* (hereinafter referred to as “WTO Agreement”) and consistent with the *Articles of Agreement of the International Monetary Fund*, as applicable.
6. Any Party maintaining or having adopted restrictive measures under paragraph 4, or any changes thereto, shall promptly notify the other Party of them.
7. Where restrictions are adopted or maintained under paragraph 4, consultations shall be held promptly in the Committee. Such consultations shall assess the balance-of-payments situation of the Party concerned and the restrictions adopted or maintained under paragraph 4, taking into account, *inter alia*, such factors as:
  - (a) the nature and extent of the balance-of-payments and the external financial difficulties;
  - (b) the external economic and trading environment; or
  - (c) alternative corrective measures which may be available.

The consultations shall address the compliance of any restrictive measures with paragraphs 4 and 5. All findings of statistical and other facts presented by the *International Monetary Fund* (hereinafter referred to as “IMF”) relating to foreign exchange, monetary reserves and balance-of-payments shall be accepted and conclusions shall be based on the assessment by the IMF of the balance-of-payments and the external financial situation of the Party concerned.

#### *Article 2.8*

#### **Subrogation**

If a Party, or an agency acting on behalf of the Party, makes a payment in favour of any of its investors under a guarantee, a contract of insurance or other form of indemnity it has entered into or granted in respect of an investment, the other Party shall recognise the subrogation or transfer of any right or title or the assignment of any claim in respect of such investment. The Party or the agency shall have the right to exercise the subrogated or assigned right or claim to the same extent as the original right or claim of the investor. Such subrogated rights may be exercised by the Party or an agency or by the investor if the Party or the agency so authorises.

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<sup>15</sup> The application of safeguard measures may be extended through their formal reintroduction in case of continuing exceptional circumstances and after having notified the other Party regarding the implementation of any proposed formal reintroduction.