

## CHAPTER 10 INVESTMENTS

### ARTICLE 10.1: DEFINITIONS

For the purposes of the present Chapter:

**Investments** means any kind of assets, implemented in accordance with the legislation of the Host Party in whose territory the investment is made including, but not limited to:

- (a) movable and immovable property, as well as any other rights *in rem*, in respect of every kind of asset;
- (b) rights derived from stocks, shares, bonds, debentures and from other forms of interest in legal entities;
- (c) claims to money, goodwill and other assets and any claim having an economic value;
- (d) Intellectual Property Rights, including, *inter alia*, patents, trademarks, geographical indications, industrial designs, copyrights and related rights, undisclosed business information, trade secrets, topographies of integrated circuits and plant-breeders rights, and know-how;
- (e) business concessions conferred by legislation or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

For the avoidance of doubt investment does not include:

- (a) public debt operations;
- (b) claims to money arising solely from:
  - (i) Commercial contracts for the sale of goods and services by a national or legal entity in the territory of a Home Party to a national or a legal entity in the territory of the Host Party; or
  - (ii) Credits granted in relation with a commercial transaction.

The provisions of this chapter relating to investments shall apply to the reinvestment of the returns of an investment, which shall be granted the same treatment granted to the original investment, if the reinvestment is effected in accordance with the legislation of the Host Party. A change in the form of the investment or a change in the form of the reinvestment shall not affect their character as investments within the meaning of this Chapter if the change is effected in accordance with the legislation of the Host Party in whose territory the investment is made.

For greater certainty, the minimum characteristics of an investment shall be:

- (a) the commitment of capital or other resources;
- (b) the assumption of risk for the investor;

**Investor of a Party** means

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- (a) With respect to the State of Israel: a natural person who is a national or permanent resident of the State of Israel who is not also a national of the Republic of Colombia;
- (b) With respect to the Republic of Colombia: a natural person who is a national of Colombia who is not also a national or permanent resident of the State of Israel; or

2. A legal entity, including a corporation, a firm, an association or a partnership, which is either:

- (a) constituted or otherwise organized under the legislation of the Home Party, and is engaged in substantive business operations in the territory of:
  - (i) either Party; or
  - (ii) any other Member of the WTO and is owned or controlled by natural persons of that Home Party or by a legal entity that meets the conditions of subparagraph (a)(i);

or

- (b) a subsidiary or a branch in non-Parties, owned or controlled by a legal entity that meets the conditions of subparagraph (a)(i);

**Returns** means the amount yielded by an investment including, but not limited to: dividends, profits, sums received from the total or partial liquidation of an investment, interest, capital gains, royalties or fees;

**Territory** means:

1. With respect to the State of Israel: the territory of the State of Israel including the territorial sea, as well as the continental shelf and the exclusive economic zone over which the State of Israel exercises sovereign rights or jurisdiction in conformity with international law and in accordance with the laws of the State of Israel;

2. With respect to the Republic of Colombia the term “territory” comprises its continental and insular territory, internal waters, the territorial sea and the airspace and maritime areas over which it exercises sovereignty or sovereign rights or jurisdiction in accordance to its domestic law and international law, including applicable international treaties;

**Host Party** means the Party in whose territory the investment is made, and **Home Party** means in relation to that investment, the other Party;

**Freely usable currency** means any currency that the International Monetary Fund determines, from time to time, as a freely usable currency in accordance with the IMF Agreement and amendments thereto;

**Legislation** means the laws and regulations of a Party and the right to exercise the administrative powers conferred by those laws and regulations.

#### ARTICLE 10.2: SCOPE OF APPLICATION

1. The provisions of this Chapter shall apply to investments of investors of the Home Party in the territory of the Host Party existing at the time of the entry into force of this Agreement, as well as to investments made thereafter, in accordance with the legislation of the Host Party.

2. The provisions of this Chapter shall not apply to an investment that is subject to a dispute which has arisen before the entry into force of this Agreement.

3. For greater certainty, the provisions of this Chapter shall not apply to disputes concerning any act or fact that took place or any situation that ceased to exist, prior to the date of entry into force of this Agreement.

#### ARTICLE 10.3: PROMOTION AND PROTECTION OF INVESTMENTS

1. Each Party shall, in its territory, encourage and create favorable conditions for investments by investors of the other Party and, subject to its legislation, shall admit such investments.

2. Investments made by investors of each Party shall be accorded fair and equitable treatment in accordance with the provisions of this Chapter and customary international law, and shall enjoy full protection and security in the territory of the other Party.

3. To avoid any doubt:

(a) “Fair and equitable treatment” includes the prohibition against denial by any unreasonable measures, of the management, maintenance, use, enjoyment or disposal of investments of investors of the Home Party in the Host Party’s territory.

(b) “Fair and equitable treatment” shall not be construed as to prevent a Party from exercising its regulatory powers in a transparent and non-discriminatory manner.

(c) The “Full protection and security” standard does not imply, in any case, a better police protection than that accorded to nationals of the Party where the investment has been made.

- (d) A determination that there has been a breach of another provision of this Agreement or another international agreement does not imply that the fair and equitable treatment has been breached.

4. The Parties announced that they are both members to the OECD Declaration and Decisions on International Investment and Multinational Enterprises, 1976 as revised in 2011.

#### ARTICLE 10.4: NATIONAL TREATMENT

1. Each Party, subject to its legislation at the time of entry into force of this Agreement, shall accord to covered investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the expansion, management, maintenance, use, enjoyment, conduct, or disposal of their investment, operation and sale or other disposition of investments in its territory.

2. Each Party, subject to its legislation at the time of entry into force of this Agreement, shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the expansion, management, maintenance, use, enjoyment, conduct or disposal of their investment, operation and sale or other disposition of investments in its territory.

3. The Parties shall review and update on a regular basis their exceptions under the principle of National Treatment set forth in this Article through a review mechanism established by the two Parties. A Party may present reservations to such an update only provided that its reservation is based on a material and substantial reason which directly relates to the application of the specific proposed update with regard to investments made prior to that update. In such cases, upon the request of either party, the parties shall initiate a discussion with a view to agree on possible adjustments to be applied as agreed between the parties with regard to such investments.

4. An investor shall have no claim against a Host Party concerning exceptions to National Treatment set forth in this Article, which were in place at the time his investment was made or which were updated in accordance with the conditions and mechanism set forth in paragraph 3.

#### ARTICLE 10.5: MOST-FAVORED-NATION

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of a non-Party with respect to the expansion, management, maintenance, use, enjoyment, conduct or disposal of their investment, operation and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments of investors of a non-Party with respect to the expansion, management, maintenance, use, enjoyment, conduct or disposal of their investment, operation and sale or other disposition of investments in its territory.

3. For the sake of avoiding any misunderstanding, it is further clarified that the treatment referred to in paragraphs 1 and 2 shall not apply to definitions, nor to mechanisms for dispute settlement between one Party and an Investor of the other Party, or to any other matter not specifically mentioned in paragraphs 1 and 2.

#### ARTICLE 10.6: FREE TRANSFERS

1. Each Party shall, in respect of investments, guarantee to investors of the other Party the rights of unrestricted transfer of their:

- (a) capital;
- (b) returns;
- (c) payments pursuant to foreign loans;
- (d) payments arising out of the settlement of a dispute under Article 10.12;
- (e) proceeds from the sale of all or any part of the investment, or from the partial or complete liquidation of the investment;
- (f) salaries and remunerations received by the employees hired overseas in connection with an investment;

2. Paragraph 1 shall be applied, in accordance with the following terms:

- (a) Transfers shall be effected in accordance with the legislation of each Party relevant to procedures of transfers without undue delay in the freely usable currency in which the capital was originally invested or in any other freely usable currency agreed by the investor and the Host Party; provided that the investor has complied with all his fiscal and other financial obligations to government or local authorities of the Host Party.
- (b) Unless otherwise agreed by the investor, transfers shall be made at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force in the Host Contacting Party.
- (c) In any case, transfers shall be in terms no less favorable than those accorded by the Host Party to its own investors in like circumstances.

3. Notwithstanding paragraphs 1 and 2:

- (a) When a Party is in or under threat of:
  - (i) serious balance of payments difficulties; or

- (ii) serious difficulties in macroeconomic management relating to the exchange rate policy or monetary policy,

that Party may, in conformity with the principles laid down within Article VIII of the IMF Agreement, adopt restrictive measures which may not go beyond what is necessary to remedy the situation, shall be temporary and shall be eliminated as soon as conditions permit.

- (b) Such measures shall be equitable, non-discriminatory, and in good faith.
- (c) The Host Party shall notify the Home Party, as soon as possible, as to the measures taken.

#### ARTICLE 10.7: EXPROPRIATION

1. Investments of investors of the Home Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter: "expropriation") in the territory of the Host Party, except for a public purpose<sup>1</sup> related to the internal needs of the Host Party, and in accordance with the following terms:<sup>2</sup>

- (a) The expropriation shall be made in accordance with the legislation of the Host Party, on a non-discriminatory basis and against prompt, adequate and effective compensation no less favorable than that accorded to the investors of the Host Party. Resulting payments shall be freely transferable.
- (b) Such compensation shall amount to the market value of the investment expropriated, immediately before the expropriation or before the imminent expropriation became public knowledge, whichever is the earlier, shall include interest at the applicable rate provided by law of the Host Party until the date of payment, shall be made without delay, be effectively realizable and be freely transferable .
- (c) Without prejudice to Article 10.12.8, the investors affected shall have a right, under the law of the Host Party making the expropriation, to prompt review, by a judicial or other independent authority of the Host Party, of the legality of the expropriation and of the valuation of their investment, in accordance with the principles set out in this Article .

2. Notwithstanding the foregoing, with respect to intellectual property rights, a Host Party may permit the use of an intellectual property right, provided such permission is made in conformity with the principles set forth in the TRIPS Agreement.

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<sup>1</sup> With respect to the Republic of Colombia, it is understood that the term "social interest" (interés social) contained in Articles 58 and 336 of the Constitución Política de Colombia (1991) is compatible with the term "public purpose" used in this Article.

<sup>2</sup> For greater certainty, nothing in this Article shall be construed to prevent a Party from maintaining or establishing monopolies provided that it is for a public purpose or social interest and in accordance with the same conditions mentioned in Article 10.7.

3. It is understood that the determination whether a measure or series of measures of a Party constitutes an effect equivalent to nationalization or expropriation requires a case-by-case, fact-based inquiry, considering, *inter alia*:

- (a) The economic impact of the measure or series of measures;<sup>3</sup>
- (b) The level of interference on the reasonable expectations concerning the investment;
- (c) The character of the measure or series of measures in accordance with the legitimate public objectives pursued;
- (d) The objectives of the measure or series of measures including whether such measure is adopted to protect legitimate public purposes<sup>4</sup>.

#### ARTICLE 10.8: COMPENSATION FOR LOSSES

1. Investors of the Home Party whose investments in the territory of the Host Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection, civil disturbances, riot or other such similar activity in the territory of the Host Party, shall be accorded treatment by the Host Party, as regards to restitution, indemnification, compensation or other settlement, no less favorable than that which the Host Party accords to its own investors or to investors of any non-Party. Resulting payments shall be freely transferable.

2. Without prejudice to paragraph 1, investors of the Home Party who suffer losses in the territory of the Host Party, resulting from:

- (a) requisitioning of their property by its forces or authorities; or
- (b) destruction of their property by its forces or authorities, which was not caused in combat action or was not required by the necessity of the situation;

shall be accorded restitution or adequate compensation. Resulting payments shall be freely transferable.

#### ARTICLE 10.9: SUBROGATION

1. If a Home Party or its designated Agency makes a payment under an indemnity or under a guarantee or a contract of insurance against non-commercial risk given in respect of an investment in the territory of the Host Party, the Host Party shall recognize:

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<sup>3</sup> The sole fact of a measure or series of measures having adverse effects on the economic value of an investment does not necessarily imply that an indirect expropriation has occurred.

<sup>4</sup> A measure or a series of measures adopted to protect public purposes including *inter alia*, the protection of public health, safety and the protection of the environment, do not necessarily constitute an effect equivalent to nationalization or expropriation.

- (a) the assignment to the Home Party by legislation or by legal transaction of all the rights and claims of the investor indemnified; and
  - (b) that the Home Party is entitled to exercise such rights and enforce such claims by virtue of subrogation, to the same extent as the investor indemnified, and shall assume the obligations related to the investment.
2. The home Party shall be entitled in all circumstances to:
- (a) the same treatment in respect of rights, claims and obligations acquired by it, by virtue of the assignment; and
  - (b) any payments received pursuant to those rights and claims, as the investor indemnified was entitled to receive by virtue of this Chapter, in respect of the investment concerned and its related returns.

#### ARTICLE 10.10: NON DEROGATION

This Chapter shall not derogate from a treatment more favorable than is provided to investors or investments of investors in accordance with this Chapter, under the legislation of the Host Party or obligations of the Host Party under international law.

#### ARTICLE 10.11: EXCEPTIONS

1. Either Party may take measures necessary for the maintenance or protection of its essential security interests. Such measures shall be taken and implemented in good faith, in a non-discriminatory fashion and so as to minimize the deviation from the provisions of this Chapter.

2. Nothing contained in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing, in accordance with its legislation, reasonable measures with respect to the financial sector for prudential reasons, including those measures aimed at protecting investors, depositors, insurance takers, trustees, or in general financial consumers, or to safeguard the integrity and stability of the financial system. Such measures shall be in good faith and shall not be used as means of avoiding a Party's commitments or obligations under this Chapter.

3. The provisions of this Chapter, relating to the granting of treatment no less favorable than that accorded to the investors and investments of investors of either Party or of any non-Party, shall not be construed so as to oblige one Party to extend to the investors of the other Party the benefit of any treatment, preference or privilege resulting from:

- (a) any international agreement or arrangement relating wholly or mainly to taxation or any legislation relating wholly or mainly to taxation;
- (b) any existing or future customs union, free trade area agreement, common market, economic union or similar international agreement, to which either Party is or will be party, within the meaning of "customs union" or "free trade



area" in accordance with Article XXIV of the GATT 1994 and Article V of the GATS;

- (c) any existing or future bilateral or multilateral agreement concerning intellectual property.
- (d) any agreement for the Reciprocal Promotion and Protection of Investments concluded between either Party and a third state, that was signed before 1 July, 2003.

#### ARTICLE 10.12: SETTLEMENT OF DISPUTES BETWEEN A PARTY AND AN INVESTOR OF THE OTHER PARTY

1. In order to submit a claim to arbitration under this Article, non-judicial local administrative remedies<sup>5</sup> shall be exhausted only if required by the legislation of the Party concerned. If the procedures for the exhaustion of such remedies are not completed within six months from the date of their initiation by the investor, the investor shall not be prevented from submitting a claim to arbitration under this Article. Such procedure shall not prevent the investor from requesting consultations as referred to in paragraph 3. This paragraph does not prevent the investor from voluntarily seeking or pursuing non-judicial local administrative remedies.

2. Any investment dispute between a Party and an investor of the other Party in connection with a claim of a breach of the provisions of this Chapter other than Article 10.3.1, Article 10.14 and Article 10.15 shall be settled by consultations and negotiations.

3. Consultations and negotiations shall begin with the submission of a written Notice (hereinafter referred to as Notice of Dispute) by the investor. This notice shall be accompanied by a brief summary of the factual and legal basis of the investment dispute.

4. If a dispute under paragraph 2 cannot be settled within six months of a written Notice of Dispute in accordance with paragraph 3, it shall be settled as follows, upon the request of the investor:

- (a) by a competent court of the Host Party; or
- (b) by conciliation; or
- (c) by arbitration by the International Center for the Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature at Washington, D.C. on March 18, 1965 (hereinafter referred to as the ICSID Convention), provided that both Parties are contracting parties to the Convention; or

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<sup>5</sup> In the case of Colombia it the non-judicial local administrative remedies are called "vía gubernativa".

- (d) by arbitration under the Additional Facility Rules of ICSID (hereinafter referred to as the ICSID Additional Facility Rules), provided that only one of the Parties is a contracting party to the ICSID Convention; or
- (e) by an *ad hoc* arbitration tribunal, which unless otherwise agreed, is to be established under the Arbitration Rules of the United Nations Commission on International Trade Law, as revised in 2010 Unless otherwise agreed, all submissions shall be made and all hearings shall be completed within six months of the date of selection of the Chairman, and the arbitral panel shall render its written and reasoned decisions within two months of the date of the final submissions or the date of the closing of the hearings, whichever is later;
- (f) Subparagraphs (c), (d) and (e) shall not apply to disputes between a Host Party and any legal entity qualifying as an Investor of a Home Party, that is owned or controlled by a natural person or legal entity of the Host Party;
- (g) an investor shall only submit a dispute to arbitration in accordance with subparagraphs (c), (d) and (e), once 90 days have elapsed from the submission of a written notice (hereinafter referred to as Notice of Intent). The Notice of Intent shall only be submitted if the dispute was not settled within six months from the Notice of Dispute and shall indicate the name and address of the disputing investor, the provisions of this Chapter which he deems to be breached, the facts which the dispute is based on, and the approximate amount of damages.

5. Each Party hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with paragraphs 4(c), 4(d) and 4(e). This consent and the submission by a disputing investor of a claim to arbitration shall satisfy the requirements of:

- (a) Chapter II of the ICSID Convention or the ICSID Additional Facility Rules for written consent of the parties;
- (b) Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (hereinafter referred as to The New York Convention), for an agreement in writing.

6. As long as both Parties are contracting parties to the ICSID Convention, the provisions set forth in Article 27 thereof shall apply to disputes that have been submitted to arbitration under this Article.

7. An investor shall not submit a Notice of Dispute if more than three years have elapsed since the date the investor had knowledge or should have had knowledge of the alleged violation of the provisions of this Chapter, as well as of the alleged losses and damages.

8.

- (a) Once the investor has submitted the dispute to either a competent court of the Host Party or to any of the arbitration mechanisms stated in paragraph 4, the choice of the procedure shall be final;

- (b) Notwithstanding subparagraph (a), an investor shall not be prevented from initiating actions, or interim measures not involving the payment of monetary damages before a competent court of the Host Party, provided that the action is initiated for the purpose of preserving the investor's rights and interests.

9. The award shall be final and binding. Each Party shall carry out without undue delay the provisions of any such award and provide in its territory for the enforcement of such award.

10. A tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law. A tribunal does not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Chapter, under the legislation of the disputing Party.

11. The tribunal shall consider whether either the claim of the claimant or the objection of the respondent is manifestly without legal merit, and shall provide the disputing parties a reasonable opportunity for comments. In the event of a claim found to be manifestly without legal merit, the tribunal shall, if warranted, award costs against the claimant.

12. The Notice of Dispute, the Notice of Intent, and other documents related to the dispute, shall be presented to the authority/agency of the Host Party, designated in Annex 10-A.

13. The arbitrators shall:

- (a) have experience or expertise in international public law, international investment rules, or in dispute settlement derived from international investment agreements;
- (b) be independent and not affiliated with or take instructions from the investor, or either Party;
- (c) be a national of a country with which both Parties maintain diplomatic relations.

14. The disputing parties may agree on the fees to be paid to the arbitrators. If the disputing parties do not reach an agreement on the fees to be paid to the arbitrators before the constitution of the tribunal, the fees established for arbitrators by ICSID shall apply.

#### ARTICLE 10.13: INSURANCE AND GUARANTEE

In any proceeding involving an investment dispute, a Party shall not assert, as a defense, counterclaim, right of set-off or for any other reason, that indemnification or other compensation for all or part of the alleged damages has been received or will be received pursuant to an insurance or guarantee contract.

#### ARTICLE 10.14: INVESTMENT AND ENVIRONMENT

Each Party recognizes that it is inappropriate to encourage investments activities, of investors of the other Party and of a non-Party, by relaxing its domestic environmental legislation.

#### ARTICLE 10.15: RELATION TO OTHER CHAPTERS

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

2. Notwithstanding paragraph 1, it is understood that Article 10.12 will apply solely to disputes in connection with a breach of the provisions of this Chapter as set forth in that Article.

#### ARTICLE 10.16: DURATION AND TERMINATION

In respect of investments made while this Agreement is in force, its provisions shall remain in effect with respect to such investments for a period of 10 years after the date of termination of this Agreement and without prejudice to the application thereafter of the rules of general international law.