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CHAPTER 2

INVESTMENT PROTECTION

Article 2.1

Scope

1. This Agreement applies to:

   (a) covered investments;

   (b) investors of a Party in respect of a covered investment

   as regards any measure adopted or maintained by a Party and affecting the operation of such investment.

2. This Agreement applies to measures adopted or maintained by[1]:

   (a) central, regional or local governments and authorities; and

   (a) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.

3. Articles 2.3 (National Treatment) and 2.4 (Most-Favoured-Nation Treatment) do not apply to:

   (a) audio-visual services;

   (b) national maritime cabotage[2]; and

   (c) domestic and international air transport services, whether scheduled or non-scheduled, and services directly related to the exercise of traffic rights, other than:

      (i) aircraft repair and maintenance services;

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[1] For greater certainty, the entities listed under subparagraphs 1 (a) and 1 (b) can adopt or maintain a measure by instructing or directing other entities with regard to the measure.

[2] Without prejudice to the scope of activities which may be considered as cabotage under the relevant national legislation, national maritime cabotage under this Chapter covers transportation of passengers or goods between a port or point located in Indonesia or in a Member State of the European Union and another port or point located also in Indonesia including its continental shelf, archipelagic waters and EEZ or also in that same Member State of the European Union, including on its continental shelf, as provided in the UN Convention on the Law of the Sea, and traffic originating and terminating in the same port or point located in Indonesia or in a Member State of the European Union.

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(ii) the selling and marketing of air transport services;

(iii) computer reservation system (CRS) services;

(iv) groundhandling services

5. For greater certainty and subject to paragraph 6, a Party's decision not to issue, renew or maintain a subsidy

   (a) in the absence of any specific commitment under law or contract to issue, renew, or maintain that subsidy; or

   (b) in accordance with any terms or conditions attached to the issuance, renewal or maintenance of the subsidy,

   shall not constitute a breach of the provisions of this Agreement.

6. For greater certainty, nothing in this Agreement shall be construed as preventing a Party from discontinuing the granting of a subsidy or requesting its reimbursement, where such action has been ordered by one of its competent authorities listed in Annex 2-B, or as requiring that Party to compensate the investor therefor.

7. Articles 2.3 (National Treatment) and 2.4 (Most-Favoured-Nation Treatment) do not apply to subsidies granted by the Parties[3] and to government procurement.

8. For greater certainty, this Agreement shall not apply to any dispute between the contracting parties to a government procurement contract arising from a breach of a provision thereto.

Article 2.2

Investment and Regulatory Measures

1. The Parties reaffirm the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, environment including climate change, public morals, social or consumer protection, privacy and data protection, sustainable development or promotion and protection of cultural diversity.

[3] In the case of the EU Party "subsidy" includes "state aid" as defined in Union law. For Indonesia subsidy include investment incentive as regulated by Indonesia domestic law.

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2. For greater certainty, the provisions of this Agreement shall not be interpreted as a commitment from a Party that it will not change the legal and regulatory framework, including in a manner that may negatively affect the operation of covered investments or the investor's expectations of profits.

Article 2.3

National Treatment

1. Each Party shall accord to investors of the other Party and to covered investments, as regards their operation in its territory, treatment no less favourable than the treatment it accords, in like situations, to its own investors and their investments.

2. The treatment to be accorded by a Party under paragraph 1 means, with respect to a government of a subnational region of Indonesia, treatment no less favourable than the most favourable treatment accorded in like situations, by that government to investors, and to investments of investors, of that subnational region.

3. The treatment to be accorded by a Party under paragraph 1 means, with respect to a government of or in a Member State of the European Union, treatment no less favourable than the most favourable treatment accorded in like situations, by that government to investors of that Member State and to their investment in its territory.

Article 2.4

Most Favoured Nation Treatment

1. Each Party shall accord to investors of the other Party and to covered investments, as regards their operation in its territory, treatment no less favourable than the treatment it accords, in like situations, to investors and investments of any third country.

2. Notwithstanding paragraph 1, a Party shall not be obliged to extend to investors of the other Party or to their covered investments the benefits of any treatment accorded to investors and investments of any third country pursuant to any international investment treaty or other trade agreement in force or signed prior to the date of entry into force of this Agreement.

3. Paragraph 1 shall not be construed to oblige a Party to extend to the investors of the other Party the benefit of any treatment resulting from:

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(a) an international agreement for the avoidance of double taxation or other international agreements or arrangements relating wholy or mainly to taxation.

(b) measures providing for the recognition of qualifications, licences or prudential measures as provided for in Article VII of the General Agreement on Trade in Services or its Annex on Financial Services.

4. For greater certainty the "treatment" referred to in paragraph 1 does not include investor-to-state dispute settlement procedures provided for in other international investment treaties and other trade agreements.

5. The substantive provisions in other international investment or trade agreements do not in themselves constitute "treatment" as referred to in paragraph 1 and thus cannot give rise to a breach of this Article. However, measures applied pursuant to such provisions can constitute "treatment" as referred to in paragraph 1 and thus give rise to a breach of this Article.

Article 2.5

Treatment of Investors and of Covered Investments

1. Each Party shall accord to covered investments and to investors of the other Party with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 to 5.

2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 through measures or series of measures that constitute:

(a) denial of justice in criminal, civil or administrative proceedings;[4]

(b) fundamental disregard of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;

(c) manifest arbitrariness[5];

[4] For greater certainty, the mere fact that an investor's claim was rejected or unsuccessful in domestic proceedings does not amount to a denial of justice. In determining whether a measure amounts to a breach of sub paragraph (a), a Tribunal should take into account other relevant facts such as whether the measure involves gross misconduct by that Party.

[5] A measure is manifestly arbitrary when it is evident that the measure is not rationally connected to a legitimate policy objective, or when a measure is based on prejudice or bias rather than on reason or fact.

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(d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or

(e) harassment, coercion, abuse of power or corruptive practices.

3. When applying the above fair and equitable treatment obligations a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated. For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.

4. For greater certainty, "full protection and security" refers to the Party's obligations to take such measures as may be reasonably necessary to ensure the physical protection and security of covered investments and of investors with respect to their covered investments.

5. For greater certainty, a determination that there has been a breach of another provision of this Agreement, or of any other international agreement, does not in itself establish that there has been a breach of this Article.

Article 2.6

Compensation for Losses

1. Investor of a 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, with respect to restitution, indemnification, compensation or other form of settlement, treatment no less favourable than that accorded by that Party to its own investor or to the investor of any third country, whichever is more favourable to the investor.

2. Without prejudice to paragraph 1 of this Article, investor of a Party who, in any of the situations referred to in that paragraph, suffer losses in the territory of the other Party shall be accorded adequate restitution or compensation by the other Party[6], if these losses result from:

(a) requisitioning of their covered investment or a part thereof by the latter's armed forces or authorities; or

[6] For greater certainty, when a Party provides restitution or compensation under this paragraph, the value shall not exceed the loss suffered by the investor as a result of the intervention by the armed forces or authorities of that Party.

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(b) destruction of their covered investment or a part thereof by the latter's armed forces or authorities, which was not required by the necessity of the situation.

Article 2.7

Expropriation

1. Neither Party shall nationalise or expropriate a covered investment either directly or indirectly through measures having an effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") except:

   (a) for a public purpose;[7]

   (b) under due process of law;

   (c) in a non-discriminatory manner; and

   (d) against payment of prompt, adequate and effective compensation.[8]

   For greater certainty, this paragraph shall be interpreted in accordance with Annex 2-A (Expropriation).

2. The compensation referred to in paragraph 1 shall amount to the fair market value of the investment at the time immediately before the expropriation, or the impending expropriation, became known, whichever is earlier.

   The determination of the fair market value shall be based on the principles and criteria recognised in international financial standards, as appropriate.

3. The compensation shall also include interest at a normal commercial rate from the date of expropriation until the date of payment and shall, in order to be effective for the investor, be paid and made transferable, without delay in a freely convertible currency in accordance with the Article 2.8 (Transfers).

4. Notwithstanding paragraphs 1, 2, and 3, in the case that Indonesia is the expropriating Party, any measure of direct expropriation relating to land shall be:

[7] The Parties acknowledge that the public purpose concept may be referred to in domestic law through terms such as "public necessity", "public interest" or "public use".

[8] The Parties understand that there may be legal and administrative processes that need to be observed before payment can be made.

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(a) for a public purpose in accordance with the applicable domestic laws and regulations[9]; and

(b) upon payment of compensation equivalent to the market value in accordance with the applicable domestic laws and regulations.

5. The investor affected shall have a right, under the law of the expropriating Party, to prompt review of its claim and of the valuation of its investment, by a judicial or other independent authority of that Party, in accordance with the principles set out in this Article.

6. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the Agreement on Trade-Related Aspects of Intellectual Property Rights in Annex 1C to the WTO Agreements ("TRIPS Agreement"), or to the revocation[10], limitation or creation of intellectual property rights to the extent that such revocation, limitation or creation is consistent with [Chapter XX Intellectual Property and] the TRIPS Agreement.

Article 2.8

Transfers

1. Each Party shall permit all transfers relating to a covered investment to be made in a freely convertible currency, without restriction or delay and at the market rate of exchange prevailing on the date of transfer with regard to the currency to be transferred. Such transfers include:

(a) contributions to capital, such as principal and additional funds to maintain, develop or increase the investment;

(b) profits, dividends, capital gains and other returns, 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;

[9] The applicable domestic laws and regulations are among others *Indonesia's Law No. 2 of 2012 on Land Acquisition for Development for the Public Interest* and *Government Regulation No. 19 of 2021 Regulating Implementation of Land Acquisition for Development for the Public Interest*, as at the date of entry into force of this Agreement.

[10] For greater certainty, the term "revocation" of intellectual property rights includes the cancellation or nullification of those rights, and the term "limitation" of intellectual property rights includes exceptions to those rights.

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(e) earnings and other remuneration of personnel engaged from abroad and working in connection with an investment;

(f) payments made pursuant to Articles 2.6 (Compensation for Losses) and 2.7 (Expropriation);

(g) payments of damages pursuant to an award issued by a tribunal.

2. Neither Party may require its investors to transfer, or penalise its investors for failing to transfer, the income, earnings, profits or other amounts derived from, or attributable to, investments in the territory of the other Party.

3. For greater certainty, this Article shall not be construed as preventing a Party from making returns in kind relating to a covered investment, which are subject to a written agreement between that Party and a covered investment or an investor of the other Party, as authorised or specified in that agreement, or from restricting transfers of returns in kind in circumstances where it could otherwise restrict such transfers under this Agreement.

Article 2.10

Subrogation

1. If a Party, or an agency thereof, makes a payment to an investor of that Party under a guarantee or contract of insurance or other form of indemnity it has granted on non-commercial risk in respect of a covered investment, the other Party shall recognise the subrogation or transfer of any rights or assignment of any claim of the investor under this Agreement in respect of the covered investment. The investor shall not, unless authorised by the Party or the agency making the payment, pursue those rights against the other Party.

2. The subrogated or transferred right or assigned claim shall not be greater than the original right or claim of the investor. For greater certainty, the recognition of the subrogation referred to in paragraph (1) shall not be construed as implying recognition of the merits of any claim or the amount of damages arising therefrom.