

## CHAPTER 10

### INVESTMENT LIBERALISATION

#### Article 10.1

#### Definitions

1. For purposes of this Chapter:

“juridical person of a Party” means<sup>1</sup>:

(i) for the European Union:

A a juridical person constituted or organised under the law of the European Union or of at least one of its Member States and engaged in substantive business operations<sup>2</sup> in the territory of the European Union; and

B shipping companies established outside the European Union, and controlled by natural persons of a Member State of the European Union, whose vessels are registered in, and fly the flag of, a Member State of the European Union.

(ii) for Chile:

A a juridical person constituted or organised under the law of Chile and engaged in substantive business operations in the territory of Chile; and

B shipping companies established outside Chile, and controlled by natural persons of Chile, whose vessels are registered in, and fly the flag of, Chile.

“enterprise” means a juridical person, branch or representative office set up through establishment, as defined under this Article;

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<sup>1</sup> For greater certainty, the shipping companies mentioned in this definition are only considered as juridical persons of a Party with respect to their activities relating to the supply of maritime transport services.

<sup>2</sup> In line with its notification of the Treaty establishing the European Community to the WTO (WT/REG39/1), the European Union understands that the concept of “effective and continuous link” with the economy of a Member State of the European Union enshrined in Article 54 of the TFEU is equivalent to the concept of “substantive business operations”.

“establishment” means the setting up, including the acquisition<sup>3</sup> of, an enterprise by an investor of one Party in the territory of the other Party;

“economic activities” means activities of an industrial, commercial or professional character and activities of craftsmen and including the supply of services, except activities performed in the exercise of governmental authority;

“operation” means the conduct, management, maintenance, use, enjoyment, sale or other disposal of an enterprise by an investor of one Party, in the territory of the other Party ;

“service” includes any service in any sector but not services supplied in the exercise of governmental authority;

“activities performed in the exercise of governmental authority” means activities performed, including services supplied neither on a commercial basis nor in competition with one or more economic operators

“cross-border supply of services” means the supply of a service:

- (i) from the territory of a Party into the territory of the other Party
- (ii) in the territory of a Party to the service consumer of the other Party;

“investor of a Party” means a natural person or a juridical person of such Party, that seeks to establish, is establishing or has established an enterprise in accordance with point (X definition of ‘establishment’)

“covered enterprise” means an enterprise which is established in accordance with point (X definition of ‘establishment’) by an investor of a Party in the territory of the other Party, in accordance with applicable law, and which is in existence at the date of entry into force of this Agreement or is established thereafter;

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<sup>3</sup> The term “acquisition” shall be understood as including capital participation in a juridical person with a view to establishing or maintaining lasting economic links.

“aircraft repair and maintenance services during which an aircraft is withdrawn from service” mean such activities when undertaken on an aircraft or a part thereof while it is withdrawn from service and do not include so-called line maintenance.

“selling and marketing of air transport services” mean opportunities for the air carrier concerned to sell and market freely its air transport services including all aspects of marketing such as market research, advertising and distribution. These activities do not include the pricing of air transport services nor the applicable conditions.

“computer reservation system (CRS) services” mean services provided by computerised systems that contain information about air carriers’ schedules, availability, fares and fare rules, through which reservations can be made or tickets may be issued.

“ground handling services” mean the supply at an airport of the following services: airline representation, administration and supervision; passenger handling; baggage handling; ramp services; catering; air cargo and mail handling; fuelling of an aircraft, aircraft servicing and cleaning; surface transport; flight operation, crew administration and flight planning.

Ground handling services do not include security, aircraft repair and maintenance, or management or operation of essential centralised airport infrastructure such as de-icing facilities, fuel distribution systems, baggage handling systems, and fixed intra-airport transport systems

## Article 10.2

### Right to Regulate

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

## Article 10.3

### Scope

1. This Chapter applies to measures adopted or maintained by a Party affecting the establishment of an enterprise or the operation of a covered enterprise in all economic activities by an investor of the other Party in its territory.

2. The provisions of this Chapter shall not apply to:

- (a) audio-visual services;
- (b) national maritime cabotage<sup>4</sup>; and
- (c) domestic and international air services<sup>5</sup>, whether scheduled or non-scheduled, and services directly related to the exercise of traffic rights, other than:
  - (i) aircraft repair and maintenance services during which an aircraft is withdrawn from service;
  - (ii) the selling and marketing of air transport services;
  - (iii) computer reservation system (CRS) services;
  - (iv) groundhandling services.

3. This Chapter shall not apply to measures adopted or maintained by a Party relating to financial institutions of another Party, investors of the other Party and to the investments of such investors, in financial institutions in the territory of the Party, as defined in Article X (Financial Services Chapter - Definitions);

4. The provisions of Articles 10.5 (Market Access), 10.6 (National Treatment), 10.8 (Most-Favoured-Nation Treatment), 10.9 (Performance Requirements) and 10.10 (Senior Management and Boards of Directors) shall not apply with respect to government procurement.

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<sup>4</sup> 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 Chile or a Member State of the European Union and another port or point located in Chile or 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 Chile or a Member State of the European Union.

<sup>5</sup> For greater certainty, Air services or related services in support of air services include, but are not limited to, the following services: air transportation; services provided by using an aircraft whose primary purpose is not the transportation of goods or passengers, such as aerial fire-fighting flight training, sightseeing, spraying, surveying mapping, photography, parachute jumping, glider towing, helicopter-lift for logging and construction, and other airborne agricultural, industrial and inspection services; the rental of aircraft with crew; and airport operation services.

5. The provisions of Articles 10.5 (Market Access), 10.6 (National Treatment), 10.8 (Most-Favoured-Nation Treatment) and 10.10 (Senior Management and Boards of Directors) shall not apply with respect to subsidies granted by the Parties, including government-supported loans, guarantees and insurances.

#### Article 10.4

##### Relation to Other Chapters

1. In the event of inconsistency between this Chapter and the Financial Services Chapter, the latter shall prevail to the extent of the inconsistency.

2. A requirement of a Party that a service supplier of another Party post a bond or other form of financial security as a condition for the cross-border supply of a service in its territory, does not of itself make this Chapter applicable to such cross-border supply of that service. This Chapter applies to measures adopted or maintained by the Party relating to the bond or financial security, when such bond or financial security constitutes a covered enterprise.

#### Article 10.5

##### Market Access

1. In the sectors or subsectors where market access commitments are undertaken, neither Party shall adopt or maintain, with respect to market access through establishment or operation by investors of the other Party or by covered enterprises, either on the basis of its entire territory or on the basis of a territorial sub-division, a measure that:

- (a) limits the number of enterprises that may carry out a specific economic activity, whether in the form of numerical quotas, monopolies, exclusive rights or the requirements of an economic needs test;
- (b) limits the total value of transactions or assets in the form of numerical quotas or the requirement of an economic needs test;

- (c) limits the total number of operations or on the total quantity of output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;<sup>6</sup>
- (d) restricts or requires specific types of legal entity or joint venture through which an investor of the other Party may carry out an economic activity;
- (e) limits the total number of natural persons that may be employed in a particular sector or that an enterprise may employ and who are necessary for, and directly related to, the performance of economic activity in the form of numerical quotas or the requirement of an economic needs test.

## Article 10.6

### National Treatment

1. Each Party shall accord to investors of the other Party and to covered enterprises treatment no less favourable than the treatment it accords, in like situations<sup>7</sup>, to its own investors and to their enterprises with respect to the establishment in its territory.
2. Each Party shall accord to investors of the other Party and to covered enterprises, with respect to operation in its territory, treatment no less favourable than the treatment it accords, in like situations<sup>8</sup>, to its own investors and to their enterprises.
3. The treatment accorded by a Party under paragraphs 1 and 2 means:
  - (a) with respect to a regional or local government of Chile, treatment no less favourable than the most favourable treatment accorded in like situations by that level of government to investors of Chile and to their enterprises in its territory;
  - (b) with respect to a government of or in a Member State of the EU, treatment no less favourable than the most favourable treatment accorded in like situations by that

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<sup>6</sup> Subparagraphs 1 (a), (b), and (c) do not cover measures taken in order to limit the production of an agricultural or fishery product.

<sup>7</sup> For greater certainty, whether treatment is accorded in “like situations” requires a case-by-case, fact-based analysis and depends on the totality of the situations.

<sup>8</sup> For greater certainty, whether treatment is accorded in “like situations” requires a case-by-case, fact-based analysis and depends on the totality of the situations

government to investors of that Member State and to their enterprises of such investors in its territory<sup>9</sup>.

#### Article 10.7

##### Public Procurement

1. Each Party shall ensure that covered enterprises are accorded treatment no less favourable than that accorded, in like situations, to its own enterprises with respect to any measure regarding the purchase of goods or services by a procuring entity for governmental purposes.
  
2. The application of the national treatment obligation provided for in this Article remains subject to security and general exceptions as defined in Article X of the GP Chapter of this Agreement.

#### Article 10.8

##### Most Favoured Nation Treatment

1. Each Party shall accord to investors of the other Party and to covered enterprises, treatment no less favourable than the treatment it accords, in like situations<sup>10</sup>, to investors and their enterprises of any non-Party with respect to the establishment of enterprises in its territory.
  
2. Each Party shall accord to investors of the other Party and to covered enterprises, treatment no less favourable than the treatment it accords, in like situations<sup>11</sup>, to investors and enterprises of any non-Party with respect to the operation of in its territory.
  
3. Paragraphs 1 and 2 shall not be construed to oblige a Party to extend to the investors of the other Party or to covered enterprises the benefit of any treatment resulting from:
  - (a) [reference to double taxation agreements in case not covered by horizontal provisions in the Agreement]

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<sup>9</sup> For greater certainty, the treatment accorded by a government of or in a Member State of the EU includes the regional and local level of government, when applicable.

<sup>10</sup> For greater certainty, whether treatment is accorded in “like situations” requires a case-by-case, fact-based analysis and depends on the totality of the situations

<sup>11</sup> For greater certainty, whether treatment is accorded in “like situations” requires a case-by-case, fact-based analysis and depends on the totality of the situations

- (b) measures providing for recognition, including of the standards or criteria for the authorisation, licencing, or certification of a natural person or enterprise to carry out an economic activity, or of prudential measures.

4. For greater certainty the “treatment” referred to in paragraphs 1 and 2 does not include investment dispute resolution procedures or mechanisms provided for in other international investment treaties and other trade agreements. The substantive provisions in other international investment or trade agreements do not in themselves constitute “treatment” as referred to in paragraphs 1 and 2, and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party. Measures applied pursuant to such substantive provisions may constitute “treatment” under this Article.

## Article 10.9

### Performance Requirements

1. Neither Party may, in connection with the establishment or operation of any enterprise of a Party or of a non-Party in its territory, impose or enforce any requirement, or enforce any commitment or undertaking 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 or services provided in its territory, or to purchase goods or services from natural persons or enterprises 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 enterprise;
- (e) restrict sales of goods or services in its territory that such enterprise produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;



- (f) transfer technology, a production process or other proprietary knowledge to a natural person or an enterprise in its territory;
- (g) supply exclusively from the territory of the Party the goods it produces or the services it supplies to a specific regional or world market;
- (h) locate the headquarters of that investor for a specific region of the world, which is broader than the territory of the Party, or of the world market in its territory;
- (i) hire a given number or percentage of its nationals;
- (j) restrict the exportation or sale for export;
- (k) to adopt:
  - (i) a given rate or amount of royalty below a certain level under a licence contract;
  - or
  - (ii) a given duration of the term of a licence contract,

in regard to any licence contract in existence at the time the requirement is imposed or enforced, or any commitment or undertaking is enforced, or any future licence contract<sup>12</sup> freely entered into between the investor and a natural or juridical person or any other entity in its territory, provided that the requirement is imposed or the commitment or undertaking is enforced in a manner that constitutes a direct interference with that licence contract by an exercise of non-judicial governmental authority of a Party. For greater certainty, paragraph (k) does not apply when the licence contract is concluded between the investor and a Party.

2. Neither Party may condition the receipt or continued receipt of an advantage, in connection with the establishment or the operation of an enterprise in its territory, of a Party or of a non-Party, on compliance with any of the following requirements:

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<sup>12</sup> A licence contract referred to in this paragraph means a contract concerning the licencing of technology, production process, or other proprietary knowledge.

- (a) to achieve a given level or percentage of domestic content;
- (b) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from natural persons or enterprises 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 enterprise;
- (d) to restrict sales of goods or services in its territory that such enterprise produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings or
- (e) to restrict the exportation or sale for export.

3. Paragraph 2 shall not be construed as preventing a Party from conditioning the receipt or continued receipt of an advantage, in connection with the establishment or the operation of an enterprise in its territory by an investor of a Party or 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.

4. Paragraph 1 (f) and (k) does not apply:

(a) if a Party authorises use of an intellectual property right in accordance with Article 31 or article 31 bis of the TRIPS Agreement or adopts or maintains measures requiring the disclosure of data or propriety information that fall within the scope of, and are consistent with, paragraph 3 of Article 39 of the TRIPS Agreement; or

(b) if 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 a violation of the Party's competition laws.

5. Paragraphs 1 (a), 1 (b), 1 (c), 2 (a) and 2 (b) do not apply to qualification requirements for goods or services with respect to participation in export promotion and foreign aid programmes;

6. Paragraphs 2 (a) and 2 (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.

7. For greater certainty, this Article shall not be construed as requiring a Party to permit a particular service to be supplied on a cross-border basis where that Party adopts or maintains restrictions or prohibitions on such provision of services which are consistent with the reservations, conditions or qualifications specified with respect to a sector, subsector or activity listed in Annex XX (annexes with non-conforming measures or MA restrictions).

8. This Article is without prejudice to commitments of a Party made under the WTO Agreement.

#### Article 10.10

##### Senior Management and Boards of Directors

A Party shall not require that a covered enterprise appoint natural persons of a particular nationality as members of boards of directors, or to a senior management position, such as executives or managers.

#### Article 10.11

##### Non-Conforming Measures

1. Articles 10.6 (National Treatment), 10.8 (Most Favoured Nation Treatment), 10.9 (Performance Requirements) and 10.10 (Senior Management and Boards of Directors), do not apply to:

- (a) any existing non-conforming measure that is maintained by:

For the European Union:

- (i) the European Union, as set out in Annex I;

- (ii) a central government of a Member State of the EU, as set out in Annex I;
- (iii) a regional level of government of a Member State of the EU, as set out in Annex I; or
- (iv) a local level of government; and

For Chile:

- (i) the central government or a regional level of government, as set out in Annex I;
  - (ii) a local level of government;
- (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
- (c) a modification to any non-conforming measure referred to in subparagraph (a), to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the modification, with Articles 10.6 (National Treatment), 10.8 (Most Favoured Nation Treatment) or 10.9 (Performance Requirements) and 10.10 (Senior Management and Boards of Directors).

2. Articles 10.6 (National Treatment), 10.8 (Most Favoured Nation Treatment), 10.9 (Performance Requirements) and 10.10 (Senior Management and Board of Directors), do not apply to measures of a Party which are consistent with a reservation listed in Annex II.

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, require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of a covered enterprise existing at the time the measure becomes effective.

4. Article 10.5 (Market Access) does not apply to any measure of a Party which is consistent with a reservation listed in Annex III.

5. Articles 10.6 (National Treatment) and 10.8 (Most-Favoured-Nation Treatment) shall not apply to any measure that constitutes an exception to or derogation from, Articles 3 or 4 of the TRIPS Agreement, as specifically provided in Articles 3 to 5 of the TRIPS Agreement.

6. For greater certainty, articles 10.6 (National Treatment) and 10.8 (Most Favoured Nation Treatment) shall not be construed as preventing a Party from prescribing information requirements including for statistical purposes in connection with the establishment or operation of investors of the other Party or of covered enterprises provided that it does not constitute a means to circumvent that Party's obligations under those articles.

#### Article 10.12

##### Denial of Benefits

A Party may deny the benefits of this Chapter to an investor of the other Party or to a covered enterprise if the denying Party adopts or maintains measures related to the maintenance of international peace and security, including the protection of human rights, which:

- (a) prohibit transactions with that investor or covered enterprise, or
- (b) would be violated or circumvented if the benefits of this Chapter were accorded to that investor or covered enterprise, including where the measures prohibit transactions with a natural or juridical person who owns or controls either of them.