Thailand-New Zealand Closer Economic Partnership Agreement

Chapter 9. Investment

Article 9.1. Objectives

The objectives of this Chapter are to:
(a) encourage and promote the open flow of investment between the Parties;
(b) ensure transparent rules conducive to increased investment flows between the Parties;
(c) accord protection and security to investments of the other Party within each Party's territory; and
(d) enhance cooperation in investment between the Parties in order to improve the efficiency, competitiveness and diversity of investment.

Article 9.2. Definitions

For the purposes of this Chapter:
(a) "investment" means every kind of asset, owned or controlled, directly or indirectly, by an investor, including but not limited to the following:
(i) movable and immovable property and other property rights such as mortgages, liens or pledges;
(ii) shares, stocks, bonds and debentures or any other form of participation in a juridical person including government issued bonds;
(iii) a claim to money or a claim to performance having economic value;
(iv) intellectual property rights, including rights with respect to copyright, patents, trade marks, trade names, industrial designs, trade secrets; know-how; and goodwill;
(v) business concessions and any other rights required to conduct economic activity and having economic value conferred by law or under a contract, including any concession to search for, cultivate, extract or exploit natural resources; and
(vi) returns that are invested. For the purposes of this Chapter, any alteration to the form in which assets are invested or reinvested shall not affect their character as investments, provided that such altered investment is approved by the relevant Party if so required by its laws, regulations or policies;
(b) "covered investment" means, with respect to a Party, an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter and which has been admitted by the latter Party in accordance with its laws, regulations and policies;
(c) "direct investment" means a direct investment as defined by the International Monetary Fund under its Balance of Payments Manual, fifth edition (BPM5), as amended;
(d) "investor of a Party" means:
(i) a juridical person of a Party; or
(ii) a natural person who is a national or a citizen or permanent resident of a Party; that has made, is in the process of making or is seeking to make an investment in the territory of the other Party. Notwithstanding Sub-paragraph (d)(ii), for the purposes of Article 9.5 of this Chapter "investor of a Party" means a natural person who is a national or a citizen of a Party that has made, is in the process of making or is seeking to make an investment in the territory of the other Party;
(e) "juridical person" means any legal entity duly incorporated, constituted or otherwise organised under applicable law, whether for profit or otherwise, and whether privately-owned or otherwise, including any corporation, company, association, trust, partnership, joint venture or sole proprietorship;
(f) "freely useable currency" means a freely useable currency as determined by the International Monetary Fund under the Articles of Agreement of the International Monetary Fund and amendments thereafter, or any currency that is used to make international payments and is widely traded in the international principal exchange markets;
(g) "measure" means any measure by a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form, and includes measures taken by:
(i) central, regional or local governments and authorities; and
(ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities. In fulfilling its obligations under this Chapter, each Party shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory;

(h) "permanent resident" means a natural person whose residence in a Party is not limited as to time under its law;
(i) "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.

Article 9.3. Scope of Application

1. This Chapter applies to measures adopted or maintained by a Party relating to direct investments of investors of the other Party and investors of the other Party, and to the promotion and protection of such investments and investors. Subject to Article 9.5 of this Chapter, such measures shall not include measures by that Party affecting trade in services.
2. This Chapter shall not apply to disputes arising before entry into force of this Agreement.
3. This Chapter 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 domestic investors and investments.
4. This Chapter shall not apply to laws, regulations or policies governing 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 production of goods or the supply of services for commercial sale.
5. This Chapter shall not prevent an investor of one Party taking advantage of the provisions of any law, regulation or policy of the other Party which are more favourable than the provisions of this Chapter.
6. The application of this Chapter shall be subject to the provisions of Chapters 14, 15 and 18.

Article 9.4. Areas of Cooperation

1. The Parties shall strengthen and develop cooperation efforts in investment including through:
(a) research and development;
(b) networking through information technology;
(c) human resource development;
(d) information exchange; and
(e) capacity building, including for small and medium enterprises.
2. The Parties shall foster the development of cooperation in key industries, including in biotechnology, software, electronic manufacturing and agro-processing.

Article 9.5. Scheduling of Commitments

1. Each Party shall set out in a schedule the specific commitments in non-service sectors it undertakes under this Agreement. With respect to sectors where such commitments are undertaken, each Schedule shall specify:
(a) terms, limitations and conditions on market access;
(b) conditions and qualifications on national treatment;
(c) undertakings relating to additional commitments;
(d) where appropriate, the time frame for implementation of such commitments; and
(e) the date of entry into force of such commitments.
2. Schedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof.

Article 9.6. National Treatment In Respect of the Establishment and Acquisition of Investments

In the sectors inscribed in Annex 4, and/or subject to any conditions and qualifications set out therein, each Party shall accord to investors of the other Party, in relation to the establishment and acquisition of investments in its territory, treatment that is no less favourable than that which it accords in like circumstances to its own investors with respect to their investments.

Article 9.7. National Treatment In Respect of Covered Investments and Investors

1. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the management, conduct, operation, and sale or other disposition of investments, unless otherwise specified in Annex 4.
2. 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 management, conduct, operation, and sale or other disposition of investments, unless otherwise specified in Annex 4.

Article 9.8. Most Favoured Nation Treatment with Respect to the Promotion and Protection of Investments

1. For the purposes of the promotion and protection of investments, with the exception of Article 9.16, each Party shall accord to:
(a) investors of the other Party, treatment no less favourable than that it accords, in like circumstances, to investors of any non-Party; and
(b) all covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party.
2. Each Party shall accord to investors and investments of investors of the other Party treatment no less favourable than it accords, in like circumstances, to investors and investments of investors of any non-Party, with respect to measures for the promotion and protection of investments adopted or maintained by a Party relating to the requirements (if any) that need to be satisfied for investors and investments to receive the benefits of an agreement relating to investments.

Article 9.9. Denial of Benefits

1. Subject to Paragraph 2 of this Article, a Party may, under its applicable laws and/or regulations, deny the benefits of this Chapter to an investor of the other Party that is a juridical person of such Party and to investments of such an investor where the Party establishes that the juridical person is owned or controlled by persons of a non-Party.
2. For the purposes of promotion and protection of investment and subject to prior notification and consultation, a Party may deny the benefits of this Chapter to an investor of the other Party that is a juridical person of such Party and to investments of such an investor where the Party establishes that the juridical person is owned or controlled by persons of a non-Party and has no substantive business operations in the territory of the other Party.

Article 9.10. Promotion and Protection of Investments

1. Each Party shall accord appropriate protection to:
(a) covered investments which, if so required, have been specifically approved in writing by the competent authorities concerned of the other Party as being entitled to the benefits of an agreement relating to investments; and
(b) investors of the other Party, but only in respect of such investors' management, conduct, operation and sale or other disposition of the covered investment related to Sub-paragraph (a).
2. This Article shall not apply to a natural person who is a permanent resident but not a national of a Party where the investment provisions of an agreement between the other Party and the country of which the person is a national have already been invoked in respect of the same matter.
3. A juridical person of a Party shall not be treated as an investor of the other Party, but any investments in that juridical person by investors of that other Party shall be protected by this Article.

Article 9.11. Expropriation

1. Neither Party shall nationalise, expropriate or subject to measures equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") the covered investments of investors of the other Party unless the following conditions are complied with:
(a) the expropriation is for a public purpose related to the internal needs of that Party;
(b) the expropriation is under due process of law;
(c) the expropriation is non-discriminatory; and
(d) the expropriation is accompanied by the payment of prompt, adequate and effective compensation.
2. The compensation referred to in Sub-paragraph 1(d) of this Article shall be computed on the basis of the market value of the investment immediately before the expropriation or impending expropriation becomes public knowledge. Where that value cannot be readily ascertained, the compensation shall be determined in accordance with generally recognised principles of valuation and equitable principles taking into account, where appropriate, the capital invested, depreciation, capital already repatriated, replacement value, currency exchange rate movements and other relevant factors.
3. The compensation shall be paid without undue delay, shall include interest at a commercially reasonable rate and be freely transferable between the territories of the Parties in a freely useable currency.

Article 9.12. Compensation for Losses

When a Party adopts any measures relating to losses in respect of covered investments in its territory by persons of any other country owing to war or other armed conflict, revolution, a state of national emergency, civil disturbance or other

similar events, the treatment accorded to investors of the other Party as regards restitution, indemnification, compensation or other settlement shall be no less favourable than that which the first Party accords to persons of any non-Party.

Article 9.13. Payments and Transfers

1. Subject to Article 15.5, each Party shall, on a non-discriminatory basis, permit all funds of that investor related to an investment in its territory to be transferred freely and without undue delay in a freely useable currency into and out of its territory. Such funds include the following:
(a) the initial capital plus any additional capital used to maintain or expand the investment;
(b) returns;
(c) proceeds from the sale or partial sale or liquidation of the investment;
(d) repayments of a claim to money;
(e) payment for the losses referred to in Article 9.12; and
(f) earnings and other remuneration of personnel engaged from abroad in connection with that investment.
2. Unless otherwise agreed by the investor and the Party concerned, transfers shall be made at the market exchange rate prevailing on the date of transfer.
3. Notwithstanding Paragraphs 1 and 2, a Party may prevent a transfer through the equitable, non-discriminatory and in good faith application of its laws relating to:
(a) bankruptcy, insolvency or the protection of the rights of creditors;
(b) ensuring the satisfaction of judgments, orders or awards in adjudicatory proceedings; or
(c) criminal matters including but not limited to money laundering, and the recovery of proceeds from crime.

Article 9.14. Subrogation

1. If a Party or an agency of a Party makes a payment to an investor of that Party under a guarantee, a contract of insurance against non-commercial risks or other form of indemnity it has granted in respect of an investment, 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 an 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 agency of the Party making the payment, pursue those rights and claims against the other Party.

Article 9.15. Access to Competent Judicial or Administrative Bodies

Each Party shall within its territory accord to investors of the other Party treatment no less favorable than the treatment, which it accords in like circumstances, to its own investors with respect to access to its courts of justice and administrative tribunals and agencies in all degrees of jurisdiction, both in pursuit and in defence of such investors' rights.

Article 9.16. Settlement of Disputes between a Party and an Investor of the other Party

1. In case of a dispute with respect to a covered investment between a Party and an investor of the other Party, consultations shall take place between the parties concerned with a view to solving the case amicably.
2. If these consultations do not result in a solution within three months from the date of request for settlement, the parties concerned may agree to submit the dispute, for settlement to:
(a) the competent courts of the Party in the territory of which the investment has been made; or
(b) an arbitrator or international ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), provided that the other Party does not withhold its consent; or
(c) the International Centre for Settlement of Investment Disputes in case both Contracting Parties are Contracting States to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington DC on March 18, 1965, provided that the other Party does not withhold its consent.
3. Once an action referred to in Paragraph 2 of this Article has been taken, neither Party shall pursue the dispute through diplomatic channels unless:
(a) the relevant dispute settlement body has decided that it has no jurisdiction in relation to the dispute in question; or (b) the other Party has failed to abide by or comply with any judgment, award, order or other determination made by the relevant dispute settlement body.
4. In any proceeding involving a dispute relating to a covered investment, a Party shall not assert, at any stage of proceedings referred to in Sub-paragraph 2 (b) or (c), that the investor concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of any alleged loss.
5. An arbitral tribunal established under this Article shall reach its decision on the basis of national laws and regulations of

the Party which is a party to the dispute, the provisions of the present Agreement, as well as applicable rules of international law.
6. All arbitral awards shall be final and binding on the parties to the dispute and shall be enforced in accordance with the laws of the Party to the dispute.
7. All sums received or payable as a result of a settlement shall be freely transferable in a freely usable currency.
8. This Article shall not be construed to allow an investor of a Party to pursue a claim against the other Party in relation to any decision that any foreign investment authority of that Party makes in relation to, or conditions that any foreign investment authority of that Party may have placed on, the establishment, acquisition or expansion of an investment by that investor, or in relation to the enforcement of any such conditions.

Article 9.17. Modification of Commitments

By giving three months' written notification to the other Party, a Party may modify its commitments under Article 9.5. At the request of the other Party, the modifying Party shall enter into negotiations with a view to reaching agreement on any necessary adjustment required to maintain a general level of mutually advantageous commitments not less favourable to trade than that provided for in schedules of specific commitments prior to such negotiations. If agreement is not reached, the matter may be referred to arbitration in accordance with Chapter 17.

Article 9.18. Review of Commitments

If, after this Agreement enters into force, a Party further liberalises any of its measures applying to investors or investments, it shall give due consideration to a request by the other Party for the incorporation in this Agreement of such unilateral liberalisation.