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CHAPTER 9

SERVICES AND INVESTMENT

SECTION B

INVESTMENT LIBERALISATION

ARTICLE 9.4

Scope

1. This Chapter shall apply to measures of a Party affecting establishment or operation to perform economic activities by:
 - (a) investors of the other Party;
 - (b) covered enterprises; and
 - (c) for the purposes of Article 2.6 [Performance requirements], any enterprise in the territory of that Party.

Article 9.5

MARKET ACCESS

1. A Party shall not adopt or maintain, with regard to establishment of an enterprise by an investor of the other Party or a covered enterprise, or operation of a covered enterprise, either on the basis of its entire territory or on the basis of the territory of a national, territorial, regional or local level of government, measures that:
 - (a) impose limitations on:

- (i) the number of enterprises that may carry out an economic activity, whether in the form of numerical quotas, monopolies, exclusive suppliers or the requirements of an economic needs test;
 - (ii) the total value of transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
 - (iii) 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;
 - (iv) the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment; or
 - (v) 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 an economic activity, in the form of numerical quotas or the requirement of an economic needs test; or
- (b) restrict or require specific types of legal entity or joint venture through which an investor of the other Party may perform an economic activity.

Article 9.6

NATIONAL TREATMENT

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

Article 9.7

MOST FAVOURED NATION TREATMENT

1. Each Party shall accord to investors of the other Party and to covered enterprises treatment no less favourable than that it accords, in like situations, to investors of a third country and to their enterprises, with respect to establishment and operation in its territory.
2. Paragraph 1 shall not be construed as obliging a Party to extend to investors of the other Party or to covered enterprises the benefit of any treatment resulting from 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 as referred to in paragraph 3 of the GATS Annex on Financial Services or Article 5.XX (Financial Services – Recognition).
3. For greater certainty, the “treatment” referred to in paragraphs 1 and 2 does not include international dispute resolution procedures or mechanisms, including investor-State dispute settlement, provided for in other international agreements.
4. Substantive obligations in other international agreements concluded by a Party with a third country do not in themselves constitute treatment under this Article. Measures of a Party in relation to those obligations can constitute treatment¹ and thus can give rise to a breach of this Article.²

Article 9.8

SENIOR MANAGEMENT AND BOARDS OF DIRECTORS

A Party shall not require a covered enterprise to appoint natural persons of any particular nationality as senior managers or members of boards of directors.

Article 9.9

PERFORMANCE REQUIREMENTS

1. A Party shall not impose or enforce any requirement, or enforce any commitment or undertaking, in connection with the establishment or operation of any enterprise in its territory,³:
 - (a) to export a given level or percentage of goods or services;

¹ For greater certainty, investors of the other Party or their covered enterprises would be entitled to receive that treatment even in the absence of enterprises established by investors of the third country at the time when the comparison is made.

² For greater certainty, the process of implementing those obligations into domestic law, to the extent that it is necessary in order to incorporate them into the domestic legal order, does not in itself qualify as a measure.

³ For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 2 does not constitute a requirement or a commitment or undertaking for the purpose of paragraph 1.

- (b) to achieve a given level or percentage of domestic content;
- (c) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from natural or juridical persons or any other entities in its territory;
- (d) 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;
- (e) to restrict sales of goods or services in its territory that such enterprise produces or supplies, by relating those sales in any way to the volume or value of its exports or foreign exchange earnings;
- (f) to transfer a particular technology, a production process or other proprietary knowledge to a natural or juridical person or any other entity in its territory;
- (g) to supply exclusively from the territory of that Party a good produced or a service supplied by the enterprise to a specific regional or world market;
- (h) to locate the headquarters for a specific region or the world market in its territory;
- (i) to achieve a given level or value of research and development in its territory;
- (j) to adopt:
 - (i) a rate or amount of royalty below a certain level; or
 - (ii) a given duration of the term of a licence contract⁴

with regard to any licence contract in existence at the time the requirement is imposed or enforced, or any commitment or undertaking is enforced, or with regard to any future licence contract freely entered into between the enterprise and a natural or juridical person or any other entity in its territory, if the requirement is imposed or enforced 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.⁵

2. A Party shall not condition the receipt, or continued receipt of an advantage, in connection with the establishment or operation of an enterprise in its territory, on compliance with any of the following requirements:

- (a) to achieve a given level or percentage of domestic content;
- (b) [to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from natural or juridical persons or any other entity in its territory;]

⁴ A "licence contract" referred to in this subparagraph means any contract concerning the licensing of technology, a production process, or other proprietary knowledge.

⁵ For greater certainty, subparagraph (l) does not apply when the licence contract is concluded between the enterprise and the Party.

- (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 supplies by relating those sales in any way to the volume or value of its exports or foreign exchange inflows; or

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 operation of any enterprise in its territory, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

4. Subparagraphs 1 (f) and (j) do not apply when:

- (a) the requirement is imposed or enforced, 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 competition law;
- (b) a Party authorises the use of an intellectual property right in accordance with Article 31 or Article 31bis of the TRIPS Agreement or adopts or maintains measures requiring the disclosure of data or proprietary information that fall within the scope of, and are consistent with paragraph 3 of Article 39 of the TRIPS Agreement.

5. Subparagraphs 1 (a), 1 (b) and 1(c), and 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. Subparagraphs 2 (a) and (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. Subparagraph 1 (j) does not apply if the requirement is imposed or enforced, or the commitment or undertaking is enforced, by a tribunal as equitable remuneration under the Party's copyright laws.

8. The Parties shall work towards further liberalisation and transparency under Article 2.6 (Performance Requirements) as regards prohibitions, in connection with the establishment or operation of an enterprise in its territory, on the imposition or enforcement of any requirements, or the enforcement of any commitments or undertakings by a Party:

- (a) to purchase, use or accord a preference to services provided in its territory, or to purchase services from natural or juridical persons or any other entities in its territory;
- (b) to restrict the exportation or sale for export of products or services;

- (c) to purchase, use or accord a preference to, in its territory, technology of the Party or of a person of the Party⁶; or
- (d) that prevent the purchase or use of, or the according of a preference to, in its territory, a particular technology.

9. The Parties shall also work towards further liberalisation and transparency under Article 2.6 (Performance Requirements) as regards prohibitions, in connection with the establishment or operation of an enterprise in its territory, on the conditioning of the receipt, or continued receipt of an advantage, on compliance with a requirement:

- (a) to purchase, use or accord a preference to services supplied in its territory, or to purchase services from natural or juridical persons or any other entity in its territory; or
- (b) to restrict the exportation or sale for export of products or services

10. To that end, each Party shall conduct consultations, as necessary, with a view to including the performance requirements set out in paragraphs 8 and 9 in Article 2.6 (Performance Requirements), and identifying possible existing measures to be included in their Schedules of Non-Conforming Measures for Services and Investment.⁷

11. The Parties shall endeavour to conclude their respective consultations within two years after the date of entry into force of this Agreement, and at the latest, within three years thereafter.

12. Following the conclusion of these consultations, the Parties shall promptly notify each other of the outcome of such consultations, and the Trade Committee shall adopt a decision on any relevant amendments⁸ to Article 2.6 (Performance Requirements) and to the Parties' Schedules of Non-Conforming Measures for Services and Investment, taking into account the outcome of the Parties' respective consultations.

Article 9.10

NON-CONFORMING MEASURES AND EXCEPTIONS

1. Articles 2.2 [Market Access], 2.3 [National Treatment], 2.4 [Most Favoured Nation Treatment], 2.5 [Senior management and boards of directors] or 2.6 [Performance Requirements] shall not apply to:

- (a) any existing non-conforming measure that is maintained by a Party at the level of:
 - (i) for the European Union:

⁶ For the purposes of this Article, the term "technology of the Party or of a person of the Party" includes technology that is owned by the Party or a person of the Party, and technology for which the Party or a person of the Party holds an exclusive licence.

⁷ For Australia, consultations shall be conducted at the federal and regional levels of government.

⁸ For greater certainty, such decision shall enter into force in accordance with Article 24.1(3) (Final Provisions) either on the date indicated in such decision or, where required by a Party's internal system, after completion of any outstanding applicable legal requirements and procedures of the Parties.

- (A) the European Union, as set out in its Schedule to Annex I;
 - (B) the central government of a Member State of the European Union, as set out in its Schedule to Annex I;
 - (C) a regional government of a Member State of the European Union, as set out in its Schedule to Annex I; or
 - (D) a local government, other than that referred to in subparagraph (C); and
- (i) for Australia:
- (A) the central government, as set out in its Schedule to Annex I;
 - (B) a regional government, as set out in its Schedule to Annex I; or
 - (C) a local 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 subparagraphs (a) and (b), to the extent that the modification does not decrease the conformity of the measure, as it existed immediately before the modification, with Articles 2.2 (Market Access), Article 2.3 (National Treatment), 2.4 (Most Favoured Nation Treatment), 2.5 (Senior management and boards of directors), or 2.6 (Performance Requirements).

2. Articles 2.2 (Market Access), 2.3 (National Treatment), 2.4 (Most Favoured Nation Treatment), 2.5 (Senior management and boards of directors) or 2.6 (Performance Requirements) shall not apply to a measure of a Party with respect to sectors, subsectors or activities, as set out in its Schedule to Annex II.

3. Neither Party shall, under any measure adopted after the date of entry into force of this Agreement for that Party 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 an enterprise existing at the time the measure becomes effective.

4. Article 2.3 (National Treatment) and Article 2.4 (Most Favoured Nation Treatment) shall not apply to any measure that falls within Article 5 of the TRIPS Agreement, and any measure that is covered by an exception to, or derogation from, the obligations imposed by Article X.4 (National Treatment) of Chapter XX (Intellectual Property), or by Article 3 or Article 4 of the TRIPS Agreement.

5. Notwithstanding Articles 2.3 (National Treatment) and 2.4 (Most-Favoured-Nation Treatment), a Party may require an investor of the other Party or its covered enterprise to provide information concerning that enterprise including for statistical purposes, provided that those requests are reasonable and not unduly burdensome.

6. The Party shall protect such information that is confidential from any disclosure that would prejudice the competitive position of the investor or the covered enterprise. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in accordance with its law. Such laws shall not be applied in a manner which would otherwise constitute a disguised restriction on the establishment or operation of an enterprise.

Article 9.11

FORMAL REQUIREMENTS

Article 2.3 (National treatment) does not prevent a Party from adopting or maintaining formal requirements such as that investments be legally constituted under the laws or regulations of the Party in connection with a covered enterprise, provided that those formalities or requirements do not constitute a means to circumvent that Party's obligations pursuant to that Article.