

CHAPTER 12 INVESTMENT

Article 12.1 Scope

1. This Chapter applies to measures adopted or maintained by a Party relating to:
 - (a) investors of the other Party; and
 - (b) covered investments.
2. This Chapter shall not apply to:
 - (a) subsidies or grants provided by a Party;
 - (b) taxation, subject to Article 18.3 (Taxation) of Chapter 18 (General Provisions and Exceptions); and
 - (c) services supplied in the exercise of governmental authority by the relevant body or authority of a Party. For the purposes of this Chapter, a service supplied in the exercise of governmental authority means any service, which is supplied neither on a commercial basis nor in competition with one or more service suppliers.

Article 12.2 Definitions

For the purposes of this Chapter:

- (a) **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, where applicable, has been admitted by the host Party, subject to its relevant laws, regulations and policies;
- (b) **freely usable currency** means a currency determined by the International Monetary Fund under the IMF Articles of Agreement to be a currency that is, in fact, widely used to make payments for international transactions and is widely traded in the principal exchange markets;
- (c) **investments** means every kind of asset owned or controlled, directly or indirectly, by an investor of a Party in the territory of the other Party, and in particular, though not exclusively, includes:
 - (i) shares, stocks and debentures of a juridical person or interests in the property of a juridical person;

- (ii) a claim to money or a claim to any performance having financial value;
- (iii) rights under contract, including turnkey, construction, management, production or revenue-sharing contracts;
- (iv) intellectual and industrial property rights, including rights with respect to copyrights, patents and utility models, industrial designs, trade marks and service marks, geographical indications, layout designs of integrated circuits, trade names, trade secrets, technical processes, know-how which are recognised pursuant to the laws and regulations of each Party and goodwill;
- (v) rights conferred pursuant to laws and regulations or contracts such as concessions, licences, authorisations, and permits; and
- (vi) movable and immovable property and any other property rights such as mortgages, liens or pledges.

The term **investment** also includes amounts yielded by investments, in particular, profits, interests, capital gains, dividends, royalties and fees.

Any alteration of the form in which assets are invested shall not affect their classification as investments; and

- (d) **investor of a Party** means a Party, or a natural person of a Party or a juridical person of a Party, that seeks to make¹⁷, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a citizen of a Party and a non-Party shall be deemed to be exclusively a citizen of the State of his or her dominant and effective nationality.

Article 12.3 Relation to other Chapters

1. This Chapter does not apply to measures adopted or maintained by a Party to the extent they are covered by Chapter 8 (Trade in Services) or Chapter 10 (Movement of Natural Persons).

2. Notwithstanding paragraph 1, Article 12.7 (Minimum Standard of Treatment), Article 12.8 (Expropriation and Compensation), Article 12.9 (Transfers), Article 12.10 (Treatment in the Case of Strife) and Article 12.11 (Subrogation) shall apply, *mutatis mutandis*, to any measure affecting the supply of service by a service supplier of a Party through commercial presence in the territory of the other Party pursuant to Chapter 8 (Trade in Services), but only to the extent that any such measure relates to

¹⁷ For greater certainty, the Parties understand that an investor that “seeks to make” an investment refers to an investor of the other Party that has taken active steps to make an investment. Where a notification or approval process is required for making an investment, an investor that “seeks to make” an investment refers to an investor of the other Party that has initiated such notification or approval process.

a covered investment and an obligation under this Chapter, regardless of whether such a service sector is scheduled in a Party's Schedule of Specific Services Commitments in Annex 3 (Schedules of Specific Services Commitments).

Article 12.4
National Treatment¹⁸

Each Party shall accord to investors of the other Party, and covered investments, in relation to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory, treatment that is no less favourable than that it accords, in like circumstances, to its own investors and investments.

Article 12.5
Most-Favoured-Nation Treatment¹⁹

Each Party shall accord to investors of the other Party, and covered investments, in relation to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory, treatment no less favourable than that it accords, in like circumstances, to investors and investments in its territory of investors of any non-Party²⁰.

Article 12.6
Performance Requirements

Neither Party shall apply in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of the other Party in its territory any measure which is inconsistent with the *Agreement on Trade-Related Investment Measures*, in Annex 1A to the WTO Agreement.

Article 12.7
Minimum Standard of Treatment

1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment for aliens, including fair and equitable treatment and full protection and security.
2. For greater certainty:
 - (a) "fair and equitable treatment" requires each Party not to deny justice in any legal or administrative proceedings;
 - (b) "full protection and security" requires each Party to take such measures as may be reasonably necessary to ensure the physical protection and security of the covered investment; and

¹⁸ The application of this Article is subject to Article 12.16 (Work Programme).

¹⁹ The application of this Article is subject to Article 12.16 (Work Programme).

²⁰ For greater certainty, this Article does not apply to dispute settlement procedures.

- (c) the concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required under customary international law, and do not create additional substantive rights.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

Article 12.8 **Expropriation and Compensation**²¹

1. Neither Party may expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation (expropriation), except:

- (a) for a public purpose²²;
- (b) in a non-discriminatory manner;
- (c) on payment of prompt, adequate, and effective compensation; and
- (d) in accordance with due process of law.

2. The compensation referred to in subparagraph 1(c) shall:

- (a) be paid without delay²³;
- (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (the date of expropriation);
- (c) not reflect any change in value occurring because the intended expropriation had become public knowledge or known earlier; and
- (d) be fully realisable and freely transferable in freely usable currencies.

3. The compensation referred to in subparagraph 1(c) shall include interest at a commercially reasonable rate, accrued from the date of expropriation until the date of payment, unless such rate is prescribed by law²⁴. The compensation, including any accrued interest, shall be payable either in the currency in which the investment was originally made or, if requested by the investor, in a freely usable currency.

²¹ For greater certainty, this Article should be read in conjunction with the Annex on Expropriation.

²² For greater certainty, where Malaysia is the expropriating Party, any measure of expropriation relating to land shall be for the purposes as set out in *Land Acquisitions Act 1960*, *Land Acquisition Ordinance 1950* of the State of Sabah and the *Land Code 1958* of the State of Sarawak.

²³ The Parties understand that there may be legal and administrative processes that need to be observed before payments can be made.

²⁴ In the case of Malaysia, the interest rates prescribed by law are as set out in the *Land Acquisitions Act 1960*, *Land Acquisition Ordinance 1950* of the State of Sabah and the *Land Code 1958* of the State of Sarawak.

4. If the investor requests compensation to be paid in a freely usable currency, the compensation referred to in subparagraph 1(c), including any accrued interest, shall be converted into the currency of payment at the market rate of exchange prevailing on the date of payment and shall be no less than:

- (a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date; plus
- (b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement.

Article 12.9 Transfers

1. Each Party shall allow all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include:

- (a) contributions to capital, including the initial contribution;
- (b) profits, capital gains, dividends, royalties, licence fees, technical assistance and technical and management fees, interest and other current income accruing from any covered investment;
- (c) proceeds from the total or partial sale or liquidation of any covered investment;
- (d) payments made under a contract, including a loan agreement;
- (e) payments made pursuant to Article 12.8 (Expropriation and Compensation) and Article 12.10 (Treatment in the Case of Strife);
- (f) payments arising out of the settlement of a dispute by any means including adjudication, arbitration or the agreement of the parties to the dispute; and
- (g) earnings and other remuneration of personnel engaged from abroad in connection with that investment.

2. Each Party shall allow such transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer.

3. Notwithstanding paragraphs 1 and 2, a Party may prevent or delay a transfer through the equitable, non-discriminatory, and good faith application of its laws and regulations relating to:

- (a) bankruptcy, insolvency, or the protection of the rights of creditors;
- (b) issuing, trading, or dealing in securities, futures, options, or derivatives;
- (c) criminal or penal offences and the recovery of the proceeds of crime;
- (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;
- (e) ensuring compliance with orders or judgments in judicial or administrative proceedings;
- (f) taxation;
- (g) social security, public retirement, or compulsory savings schemes; and
- (h) severance entitlements of employees.

4. Nothing in this Chapter shall affect the rights and obligations of each Party as a member of the International Monetary Fund (IMF) under the IMF Articles of Agreement, including the use of exchange actions which are in conformity with the IMF Articles of Agreement, provided that a Party shall not impose restrictions on any capital transactions inconsistently with its specific commitments under this Chapter regarding such transactions, except under Article 18.4 (Measures to Safeguard the Balance-of-Payments) of Chapter 18 (General Provisions and Exceptions) or at the request of the IMF.

Article 12.10
Treatment in the Case of Strife

Each Party shall accord to investors of the other Party, and to covered investments, with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict, civil strife or state of emergency, treatment no less favourable than that it accords, in like circumstances, to:

- (a) its own investors and their investments; and
- (b) investors of a non-Party and their investments.

Article 12.11
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 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 making the payment, pursue those rights and claims against the other Party.

3. Notwithstanding the provisions of paragraphs 1 and 2, the Party claiming the subrogation shall, if the other Party requests it, consult with the other Party for the purpose of satisfying it as to the subrogation.

Article 12.12 Denial of Benefits

Subject to prior notification or consultation, a Party may deny the benefits of this Chapter to an investor of the other Party that is a juridical person of such other Party and to investments of that investor if the juridical person has no substantive business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the juridical person.

Article 12.13 Promotion and Facilitation of Investment

The Parties shall seek to strengthen and build on existing cooperative arrangements in the promotion and facilitation of investment where this is of mutual benefit, including through:

- (a) supporting joint investment promotion activities;
- (b) facilitating the provision and exchange of investment information including laws, regulations and policies to increase awareness of investment opportunities; and
- (c) fostering technical cooperation in mutually agreed sectors.

Article 12.14 Non-Conforming Measures²⁵

1. Articles 12.4 (National Treatment) and 12.5 (Most-Favoured-Nation Treatment) do not apply to:

- (a) any existing non-conforming measure that is maintained by a Party at:
 - (i) the central level of government, as set out by that Party in its Schedules of Non-Conforming Measures;
 - (ii) a regional level of government, as set out by that Party in its Schedules of Non-Conforming Measures; or
 - (iii) a local level of government;

²⁵ The application of this Article is subject to Article 12.16 (Work Programme).

- (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph 1(a); or
- (c) an amendment to any measure referred to in subparagraph 1(a) to the extent that the amendment does not decrease the conformity of the measure as it existed at the date of entry into force of the Party's Schedules of Non-Conforming Measures, with Articles 12.4 (National Treatment) and 12.5 (Most-Favoured-Nation Treatment).

2. Articles 12.4 (National Treatment) and 12.5 (Most-Favoured-Nation Treatment) do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedules of Non-Conforming Measures.

3. Neither Party may, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedules of Non-Conforming Measures, require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

4. Articles 12.4 (National Treatment) and 12.5 (Most-Favoured-Nation Treatment) do not apply to government procurement.

Article 12.15 Special Formalities

1. Nothing in Article 12.4 (National Treatment) shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as a requirement that covered investments be legally constituted under the laws and regulations of the Party, provided that such formalities do not materially impair the protections afforded by a Party to investors of the other Party and covered investments pursuant to this Chapter.

2. Notwithstanding Articles 12.4 (National Treatment) and 12.5 (Most-Favoured-Nation Treatment), a Party may require an investor of the other Party, or a covered investment, to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect any confidential information from any disclosure that would prejudice the competitive position of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.

Article 12.16 Work Programme

1. The Parties shall enter into discussions on Schedules of Non-Conforming Measures within three years from the date of entry into force of this Agreement, unless the Parties otherwise agree. Such discussions shall include, if mutually agreed by the Parties, negotiation of Schedules of Non-Conforming Measures.
2. The Parties shall conclude the discussions, and where relevant the negotiations, referred to in paragraph 1, no later than five years from the date of entry into force of this Agreement, unless the Parties otherwise agree. These discussions shall be overseen by the FTA Joint Commission established under Article 19.1 (Free Trade Agreement Joint Commission) in Chapter 19 (Institutional Provisions).
3. Schedules of Non-Conforming Measures referred to in paragraph 1 shall enter into force by exchange of notes on a date agreed to by the Parties subject to each Party's internal procedures²⁶.
4. Notwithstanding anything to the contrary in this Chapter, Article 12.4 (National Treatment), Article 12.5 (Most-Favoured-Nation Treatment) and Article 12.14 (Non-Conforming Measures) shall not apply until the Parties' Schedules of Non-Conforming Measures have entered into force in accordance with paragraph 3.

Article 12.17 Institutional Arrangements for Investment

For the purposes of effective implementation and operation of this Chapter, the Parties agree to assign the following functions, among others, to the FTA Joint Commission established under Article 19.1 (Free Trade Agreement Joint Commission) of Chapter 19 (Institutional Provisions) or subsidiary bodies established by the FTA Joint Commission:

- (a) exchange information on and discuss issues related to this Chapter;
- (b) review and monitor the implementation and operation of this Chapter; and
- (c) oversee the negotiations referred to in Article 12.16 (Work Programme).

Article 12.18 General Exceptions

1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Parties where like conditions prevail, or a disguised restriction on investment flows, nothing in this Chapter shall be construed to prevent the adoption or enforcement by any Party of measures:

²⁶ Any Schedules negotiated between the Parties in accordance with this Article will, upon entry into force, constitute an integral part of this Agreement

- (a) necessary to protect national security and public morals;
- (b) necessary to protect human, animal or plant life or health;
- (c) aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of investments or investors of the Parties; or
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Chapter including those relating to:
 - (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on investment agreements;
 - (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and protection of confidentiality of individual records and accounts; or
 - (iii) safety;
- (e) imposed for the protection of national treasures of artistic, historic, or archaeological value; or
- (f) to conserve exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

2. In cases where a Party takes any measures pursuant to paragraph 1 that do not conform to the obligations of the provisions of this Chapter other than the provisions of Article 12.10 (Treatment in the Case of Strife), that Party shall promptly notify the other Party on the measures.

ANNEX ON EXPROPRIATION

1. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in a covered investment.
2. Article 12.8 (Expropriation and Compensation) addresses two situations:
 - (a) the first is direct expropriation, where a covered investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure;
 - (b) the second is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
3. The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
 - (a) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
 - (b) whether the government action breaches the government's prior binding written commitment, where applicable, to the investor whether by contract, licence or other legal document; and
 - (c) the character of the government action, including, its objective and whether the action is disproportionate to the public purpose²⁷.
4. Non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment, do not constitute indirect expropriations.

²⁷ "Public purpose" shall be read with reference to subparagraph (1)(a) of Article 12.8 (Expropriation and Compensation).