

CHAPTER 12 INVESTMENT

Article 12.1: Definitions

For the purposes of this Chapter³¹:

covered investment means, with respect to a Party, an investment in its territory of an investor of the other Party that is in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter;

enterprise of a Party³² means any legal person or any other entity constituted or organized under the applicable laws and regulations of that Party, whether or not for profit, and whether private or government-owned or controlled, and includes a company, corporation, trust, partnership, sole proprietorship, joint venture, association or organization;

freely usable currencies means freely usable currencies as defined under the Articles of the *Agreement of the International Monetary Fund*;

ICSID Additional Facility Rules means the *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes*;

ICSID Convention means the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, done at Washington, March 18, 1965;

investment activities means management, conduct, operation, maintenance, use, enjoyment and sale or other disposition of investments;

investments³³ means every kind of asset that an investor owns or controls, directly or indirectly, which has the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that investments may take include:

- (i) an enterprise and a branch of an enterprise;
- (ii) shares, stocks or other forms of equity participation in an enterprise, including rights derived therefrom;

³¹ It is understood that measures adopted or maintained by local governments are measures adopted or maintained by a Party.

³² For greater certainty, a branch of an enterprise is not, in and by itself, deemed to be an enterprise.

³³ Investments also include the amounts yielded by investments, in particular, profit, interest, capital gains, dividends, royalties and fees. A change in the form in which assets are invested does not affect their character as investments.

- (iii) bonds, debentures, loans and other forms of debt, including rights derived therefrom;
- (iv) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;
- (v) claims to money and claims to any performance under contract having a financial value associated with investment;
- (vi) intellectual property rights, including copyrights and related rights, patent rights and rights relating to utility models, trademarks, industrial designs, layout-designs of integrated circuits, new varieties of plants, trade names, indications of source or geographical indications and undisclosed information;
- (vii) rights conferred pursuant to laws and regulations or contracts such as concessions, licenses, authorizations and permits; and
- (viii) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges;

investor of a Party means a natural person or an enterprise of a Party that makes investments in the territory of the other Party;

natural person of a Party means a natural person that has the nationality of that Party in accordance with its applicable laws and regulations; and

UNCITRAL Arbitration Rules means the arbitration rules of the United Nations Commission on International Trade Law, as revised in 2010 or as subsequently agreed between the Parties.

Article 12.2: Promotion and Protection of Investments

1. Each Party shall encourage and create favorable conditions for investors of the other Party to make investments in its territory.
2. Each Party shall, subject to its rights to exercise powers in accordance with the applicable laws and regulations, including those with regard to foreign ownership and control, admit investment of investors of the other Party.

Article 12.3: National Treatment

1. Each Party shall in its territory accord to investors of the other Party and to covered investment treatment no less favorable than that it accords in like circumstances to its own investors and their investments with respect to investment activities.
2. Paragraph 1 shall not apply to non-conforming measures, if any, existing at the date of entry into force of this Chapter maintained by each Party under its laws and regulations, or

any amendment or modification to such measures, provided that the amendment or modification does not decrease the conformity of the measure as it existed immediately before the amendment or modification. Treatment granted to covered investment once admitted shall in no case be less favorable than that granted at the time when the original investment was made.

3. Each Party shall take, where applicable, all appropriate steps to progressively remove all the non-conforming measures referred to in paragraph 2.

Article 12.4: Most-Favored-Nation Treatment³⁴

1. Each Party shall in its territory accord to investors of the other Party and to covered investments treatment no less favorable than that it accords in like circumstances to investors of any non-Party and to their investments with respect to investment activities and the matters relating to the admission of investment in accordance with paragraph 2 of Article 12.2.

2. Paragraph 1 shall not be construed so as to oblige a Party to extend to investors of the other Party and covered investments any preferential treatment resulting from its membership of:

- (a) any customs union, free trade area, monetary union, similar international agreement leading to such union or free trade area, or other forms of regional economic cooperation;
- (b) any international agreement or arrangement for facilitating small scale trade in border areas; or
- (c) any bilateral and multilateral international agreements involving aviation, fishery and maritime matters including salvage.

3. It is understood that the treatment accorded to investors of any non-Party and to their investments as referred to in paragraph 1 does not include treatment accorded to investors of any non-Party and to their investments by provisions concerning the settlement of investment disputes between a Party and investors of any non-Party that are provided for in other international agreements.

Article 12.5: Minimum Standard of Treatment³⁵

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

³⁴ For the purposes of this Article, the term “non-Party” shall not include any separate customs territory within the meaning of the *General Agreement on Tariffs and Trade* or of the WTO Agreement that is a member of the World Trade Organization as of the date of entry into force of this Agreement.

³⁵ This Article shall be interpreted in accordance with Annex 12-A.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. 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 by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) “fair and equitable treatment”³⁶ includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process of law; and

(b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.

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.

4. Each Party shall accord to investors of the other Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to war or other armed conflict, or revolt, insurrection, riot, or other civil strife.

5. Notwithstanding paragraph 4, if an investor of a Party, in the situations referred to in paragraph 4, suffers a loss in the territory of the other Party resulting from:

(a) requisitioning of its covered investment or part thereof by the latter’s forces or authorities; or

(b) destruction of its covered investment or part thereof by the latter’s forces or authorities, which was not required by the necessity of the situation,

the latter Party shall provide the investor restitution, compensation, or both, as appropriate, for such loss. Any compensation shall be in accordance with Article 12.9, *mutatis mutandis*.

6. Paragraph 4 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 12.3.

Article 12.6: Access to the Courts of Justice

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

³⁶ Determination on fair and equitable treatment shall be based on adequate proof.

Article 12.7: Prohibition of Performance Requirements

1. The provisions of the *Agreement on Trade-Related Investment Measures* in Annex 1A to WTO Agreement are incorporated into and made part of this Chapter, *mutatis mutandis* and shall apply with respect to all covered investments under this Chapter.
2. Neither Party shall, in its territory, impose unreasonable or discriminatory measures on covered investment by investors of the other Party concerning performance requirements on export or transfer of technology.

Article 12.8: Transparency

1. Each Party shall promptly publish, or otherwise make publicly available, its laws, regulations, administrative procedures and administrative rulings and judicial decisions of general application as well as international agreements to which the Party is a party and which pertain to or affect investment activities. The Government of each Party shall make easily available to the public, the names and addresses of the competent authorities responsible for such laws, regulations, administrative procedures and administrative rulings.
2. When a Party introduces or changes its laws or regulations that significantly affect the implementation and operation of this Chapter, the Party shall endeavor to provide a reasonable interval between the time when such laws or regulations are published or made publicly available and the time when they enter into force, except for those laws or regulations involving national security, foreign exchange rates or monetary policies and other laws or regulations the publication of which would impede law enforcement.
3. Each Party shall, on the request by the other Party, within a reasonable period of time and through existing bilateral channels, respond to specific questions from, and provide information to, the latter Party with respect to any actual or proposed measure of the former Party, which might materially affect the interests of the latter Party and its investors under this Chapter.
4. Each Party shall, in accordance with its laws and regulations:
 - (a) make public in advance regulations of general application that affect any matter covered by this Chapter; and
 - (b) provide a reasonable opportunity for comments by the public for those regulations related to investment and give consideration to those comments before adoption of such regulations.
5. The provisions of this Article shall not be construed so as to oblige any Party to disclose confidential information, the disclosure of which:
 - (a) would impede law enforcement;
 - (b) would be contrary to the public interest; or

(c) could prejudice privacy or legitimate commercial interests.

Article 12.9: Expropriation and Compensation³⁷

1. Neither Party shall expropriate or nationalize a covered investment or take any measure equivalent to expropriation or nationalization (hereinafter referred to in this Chapter as “expropriation”) except:

- (a) for a public purpose;
- (b) on a non-discriminatory basis;
- (c) in accordance with its laws and international standard of due process of law; and
- (d) upon compensation pursuant to paragraphs 2 through 4.

2. The compensation shall be equivalent to the fair market value of the expropriated investments at the time when the expropriation was publicly announced or when the expropriation occurred, whichever is the earlier. The fair market value shall not reflect any change in market value occurring because the expropriation had become publicly known earlier.

3. The compensation shall be paid without delay and shall include interest at a commercially reasonable rate, taking into account the length of time from the time of expropriation to the time of payment. It shall be effectively realizable and freely transferable and shall be freely convertible, at the market exchange rate prevailing on the date of expropriation, into the currency of the Party of the investors concerned, and into freely usable currencies.

4. Without prejudice to the provisions of Article 12.12, the investors affected by expropriation shall have a right of access to the courts of justice or the administrative tribunals or agencies of the Party making the expropriation to seek a prompt review of the investors’ case and the amount of compensation in accordance with the principles set out in this Article.

Article 12.10: Transfers³⁸

1. Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory³⁹. Such transfers include:

³⁷ This Article shall be interpreted in accordance with Annexes 12-A and 12-B.

³⁸ For greater certainty, Annex 12-C applies to this Article.

- (a) contributions to capital, including the initial contribution;
- (b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;
- (c) interest, royalty payments, management fees, and technical assistance and other fees;
- (d) payments made under a contract, including a loan agreement;
- (e) payments made pursuant to Articles 12.5.4, 12.5.5 and 12.9;
- (f) payments arising out of a dispute; and
- (g) earnings and remuneration of a national of a Party who works in connection with a covered investment in the territory of the other Party.

2. Each Party shall permit 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. Each Party shall permit returns in kind relating to a covered investment to be made as authorized or specified in a written agreement between the Party and a covered investment or an investor of the other Party.

4. Notwithstanding paragraphs 1 through 3, a Party may prevent a transfer through the equitable, non-discriminatory, and good faith application of its laws 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 offenses;
- (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or
- (e) ensuring compliance with orders or judgments in judicial or administrative proceedings.

Article 12.11: Subrogation

³⁹ For greater certainty, the transfers referred to in this Article shall comply with relevant formalities stipulated by the laws and regulations, if any, of a Party relating to exchange administration.

1. If a Party or its designated agency makes a payment to any of its investors pursuant to an indemnity, guarantee or insurance contract, pertaining to investments of that investor in the territory of the other Party, the latter Party shall:

- (a) recognize the assignment, to the former Party or its designated agency, of any right or claim of the investor that formed the basis of such payment; and
- (b) recognize the right of the former Party or its designated agency to exercise by virtue of subrogation such right or claim to the same extent as the original right or claim of the investor.

2. If a Party or its designated agency has made a payment to its investors and thereby entered into the rights of the investor, the investor may not make a claim based on these rights against the other Party without the consent of the former Party or its designated agency making the payment. For greater certainty, the investor shall continue to be entitled to exercise its rights that have not been subrogated pursuant to paragraph 1.

3. Articles 12.5, 12.9 and 12.10 shall apply *mutatis mutandis* as regards payment to be made to the Party or its designated agency referred to in paragraph 1 by virtue of such assignment of right or claim, and the transfer of such payment.

Article 12.12: Settlement of Investment Disputes between a Party and an Investor of the Other Party

1. For the purposes of this Article, an investment dispute is a dispute between a Party and an investor of the other Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of any obligation of the former Party under this Chapter with respect to the investor or its covered investments in the territory of the former Party.

2. Any investment dispute shall, as far as possible, be settled amicably through consultation between the investor who is a party to the investment dispute (hereinafter referred to in this Article as “disputing investor”) and the Party that is a party to the investment dispute (hereinafter referred to in this Article as “disputing Party”). A written request for consultation shall be submitted to the disputing Party by the disputing investor before the submission of the investment dispute to the arbitration set out in paragraph 3. Such a written request shall specify⁴⁰:

- (a) the name and address of the disputing investor;
- (b) the obligations under this Chapter alleged to have been breached;

⁴⁰ The written consultation request shall be delivered to the following competent authorities of the disputing Party:

- (a) in the case of China, the Treaty and Law Department, Ministry of Commerce; and
- (b) in the case of Korea, International Legal Affairs Division, Ministry of Justice.

- (c) a brief summary of the facts of the investment dispute; and
- (d) the relief sought and the approximate amount of damages.

3. The investment dispute shall on the request of the disputing investor be submitted to either⁴¹:

- (a) a competent court of the disputing Party;
- (b) arbitration in accordance with the ICSID Convention, if the ICSID Convention is available;
- (c) arbitration under the ICSID Additional Facility Rules, if the ICSID Additional Facility Rules are available;
- (d) arbitration under the UNCITRAL Arbitration Rules; or
- (e) if agreed with the disputing Party, any arbitration in accordance with other arbitration rules,

provided that, for the purposes of subparagraphs (b) through (e):

- (i) the investment dispute cannot be settled through the consultation referred to in paragraph 2 within four months from the date of the submission of the written request for consultation to the disputing Party; and
- (ii) the requirement concerning the domestic administrative review procedure set out in paragraph 7, where applicable, is met.

4. Each Party hereby gives its consent to the submission of an investment dispute by a disputing investor to the arbitration set out in paragraph 3 in accordance with the provisions of this Article.

5. Once the disputing investor has submitted an investment dispute to the competent court of the disputing Party or to one of the arbitrations set out in paragraph 3, the choice of the disputing investor shall be final and the disputing investor may not submit thereafter the same dispute to the other arbitrations set out in paragraph 3.

6. Notwithstanding paragraphs 3 and 4, no claim may be submitted to the arbitration set out in paragraph 3 unless the disputing investor gives the disputing Party written waiver of any right to initiate before any competent court of the disputing Party with respect to any measure of the disputing Party alleged to constitute a breach referred to in paragraph 1.

7. When the disputing investor submits a written request for consultation to the disputing Party under paragraph 2, the disputing Party may require, without delay, the investor

⁴¹ For the purposes of subparagraph (a), this paragraph shall not be construed to prevent, where applicable, preliminary trial by administrative tribunals or agencies.

concerned to go through the domestic administrative review procedure specified by the laws and regulations of that Party before the submission to the arbitration set out in paragraph 3.

The domestic administrative review procedure shall not exceed four months from the date on which an application for the review is filed. If the procedure is not completed by the end of the four months, it shall be deemed to be completed and the disputing investor may submit the investment dispute to the arbitration set out in paragraph 3. The investor may file an application for the review unless the four months consultation period as provided in paragraph 3 has elapsed.⁴²

8. The applicable arbitration rules shall govern the arbitration set out in paragraph 3 except to the extent modified in this Article.

9. The award rendered by an arbitral tribunal established under paragraph 3 (hereinafter referred to in this Article as the “Tribunal”) shall include:

- (a) a finding whether or not there has been a breach by the disputing Party of any obligation under this Chapter with respect to the disputing investor and its covered investments; and
- (b) one or both of the following remedies, only if the disputing investor’s loss or damage is attributed to such breach:
 - (i) monetary damages and applicable interest; and
 - (ii) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest, in lieu of restitution.

10. The award which is rendered by the Tribunal shall be final and binding upon both parties to the investment dispute. This award shall be executed in accordance with the applicable laws and regulations concerning the execution of award in force, in the country in whose territory such execution is sought.

11. Notwithstanding paragraph 3, no claim may be submitted to the arbitration set out in that paragraph, if more than three years have elapsed from the date on which the disputing investor first acquired, or should have first acquired, whichever is the earlier, the knowledge that the disputing investor had incurred the loss or damage referred to in paragraph 1.

Article 12.13: Special Formalities and Information Requirements

1. Nothing in Article 12.3 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with investment

⁴² It is understood that any decision made under the domestic administrative review procedure shall not prevent the disputing investor from submitting the investment dispute to the arbitration set out in paragraph 3.

activities by investors of the other Party in its territory, such as the requirement that investments be legally constituted under the laws or regulations of the former Party, provided that such formalities are consistent with this Chapter and do not materially impair the protections afforded by the former Party to investors of the latter Party and their investments pursuant to this Chapter.

2. Notwithstanding Articles 12.3 and 12.4, a Party may require an investor of the other Party, in its territory, to provide information concerning its covered investments solely for informational or statistical purposes. The former Party shall protect such information that is confidential from any disclosure that would prejudice the competitive position of the investor of the latter Party or its covered investments. Nothing in this paragraph shall be construed so as to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.

Article 12.14: Security Exceptions

1. Notwithstanding any other provisions in this Chapter other than the provisions of Article 12.5.4 each Party may take any measure:

- (a) which it considers necessary for the protection of its essential security interests;
 - (i) taken in time of war, or armed conflict, or other emergency in that Party or in international relations; or
 - (ii) relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons;
- (b) in pursuance of its obligations under the *United Nations Charter* for the maintenance of international peace and security.

2. In cases where a Party takes any measure, pursuant to paragraph 1, that does not conform with the obligations of the provisions of this Chapter other than the provisions of Article 12.5.4, that Party shall not use such measure as a means of avoiding its obligations.

Article 12.15: Denial of Benefits⁴³

1. A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of the latter Party and to its investments if the enterprise is owned or controlled by an investor of a non-Party and the denying Party:

- (a) does not maintain normal economic relations with the non-Party; or

⁴³ For the purposes of this Article, the term "non- Party" shall not include any separate customs territory within the meaning of the *General Agreement on Tariffs and Trade* or of the WTO Agreement that is a member of the World Trade Organization as of the date of entry into force of this Agreement.

- (b) adopts or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.

2. A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of the latter Party and to its investments if the enterprise is owned or controlled by an investor of a non-Party or of the denying Party, and the enterprise has no substantial business activities in the territory of the latter Party.

Article 12.16: Environmental Measures

Each Party recognizes that it is inappropriate to encourage investment by investors of the other Party by relaxing its environmental measures. To this effect each Party should not waive or otherwise derogate from such environmental measures as an encouragement for the establishment, acquisition or expansion of investments in its territory.

Article 12.17: Committee on Investment

1. The Parties hereby establish a Committee on Investment (hereinafter referred to in this Article as the “Committee”) with a view to accomplishing the objectives of this Chapter. The functions of the Committee shall be:

- (a) to discuss and review the implementation and operation of this Chapter;
- (b) to discuss other investment-related matters concerning this Chapter, including the scope of the existing non-conforming measures referred to in paragraphs 2 and 3 of Article 12.3; and
- (c) to consult any matter arising under this Agreement that affects establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments from an investor of a Party in the territory of the other Party.

2. The Committee may, as necessary, decide to make appropriate recommendations to the Parties for the more effective functioning or the attainment of the objectives of this Chapter.

3. The Committee shall be composed of representatives of the Governments of the Parties and may decide to invite representatives of relevant entities other than the Governments of the Parties with the necessary expertise relevant to the issues to be discussed. The Committee shall decide on the modalities of its operation as necessary.

4. Any decision of the Committee shall be made by consensus.

5. Unless otherwise decided by the Parties, the Committee shall convene once a year.

Article 12.18: Services-Investment Linkage⁴⁴

1. Articles 12.5 (Minimum Standard of Treatment), 12.9 (Expropriation and Compensation), 12.10 (Transfers), 12.11 (Subrogation), 12.12 (Settlement of Investment Disputes between a Party and an Investor of the other Party) and Annexes 12-A (Customary International Law), 12-B (Expropriation) and 12-C (Transfers) of this Agreement 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 the Chapter 8 (Trade in Services), only to the extent that they relate to a covered investment.

2. Articles 12.5 (Minimum Standard of Treatment), 12.9 (Expropriation and Compensation), 12.10 (Transfers), 12.11 (Subrogation), 12.12 (Settlement of Investment Disputes between a Party and an Investor of the other Party), 12.13 (Special Formalities and Information Requirements), 12.15 (Denial of Benefits) and Annexes 12-A (Customary International Law), 12-B (Expropriation), 12-C (Transfers) of this Agreement shall apply, *mutatis mutandis*, to any measure affecting the supply of financial service by a financial service supplier of a Party through commercial presence in the territory of the other Party pursuant to the Chapter 9 (Financial Services), only to the extent that they relate to a covered investment.

Article 12.19: Contact Points for Improving Investment Environment

1. For the purpose of improving investment environment and promoting investment in its territory, each Party designates contact points respectively, to receive the complaints from investors of the other Party with regard to its administrative action of governments and to provide assistance in resolving difficulties of investors of the other Party. The contact points from the Parties will endeavor to provide advisory services available with regard to establishment, liquidation, investment promotion activities as much as possible.

2. The contact points are:

- (a) for China, the Investment Promotion Agency of Ministry of Commerce or its successors; and
- (b) for Korea, the Ministry of Trade, Industry and Energy/Korea Trade-Investment Promotion Agency (KOTRA) or their successors.

3. Further to the contact points referred to in paragraphs 1 and 2, a Party shall maintain the local contact points at the level of local governments⁴⁵ in its territory in order to promptly respond to the complaints and difficulties of investors of the other Party.

⁴⁴ For greater certainty, Article 12.12 applies to investment disputes, in relation to such covered investments, between a Party and an investor of the other Party concerning an alleged breach of an obligation solely under the Articles referred to in this Article.

⁴⁵ For greater certainty, **local governments of China** in this paragraph means provincial governments directly under the central government.

4. Neither Party shall have recourse to Chapter 20 (Dispute Settlement) and Article 12.12 for any matter arising under this Article.