

## CHAPTER 12

### ESTABLISHMENT AND RELATED PROVISIONS

#### Article 12.1: Definitions

For the purposes of this Chapter:

**enterprise of a Party** means:

- (a) an enterprise constituted or organised under the laws of a Party; or
- (b) a branch of an enterprise of a Party located in the Area of a Party,

which has substantial business activities in the Area of that Party;<sup>1</sup>

**establishment** means any type of business or professional establishment<sup>2</sup> through:

- (a) the constitution, acquisition<sup>3</sup> or maintenance of an enterprise; or
- (b) the creation or maintenance of a branch or representative office,

within the Area of a Party for the purpose of performing an economic activity; and

**investor of a Party** means a Party, a natural person or an enterprise of a Party that seeks, through concrete actions to perform, is performing or has performed an economic activity in the Area of another Party through setting up an establishment.

#### Article 12.2: Scope

1. This Chapter shall apply to measures adopted or maintained by a Party relating to investors of the other Party and establishments of investors of the other Party.
2. This Chapter shall apply to establishments in all sectors with the exception of

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<sup>1</sup> For greater certainty, the inclusion of a “branch” in the definitions of “enterprise” and “enterprise of a Party” is without prejudice to a Party’s ability to treat a branch under its laws as an entity that has no independent legal existence and is not separately organised.

<sup>2</sup> The term “business” or “professional establishment” includes the establishment in any productive economic activity, whether industrial or commercial, relating to the production of goods.

<sup>3</sup> The terms “constitution” and “acquisition” of an enterprise shall be understood as including capital participation in an enterprise with a view to establishing or maintaining lasting economic links.

sectors covered by Chapter 8 (Trade in Services).<sup>4,5</sup>

3. The obligations of a Party under this Chapter shall apply to measures adopted or maintained by any person when it exercises any governmental authority delegated to it by that Party. For greater certainty, governmental authority is delegated under the laws of the Party, including through a legislative grant or a government order, directive or other action transferring or authorising the exercise of governmental authority.

4. This Chapter shall not apply to:

- (a) 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 investors and establishments of the other Party in the Area of that Party, including government-supported loans, guarantees and insurance;
- (b) government procurement; or
- (c) any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.

### **Article 12.3: Relation to Other Chapters**

In the event of any inconsistency between this Chapter and another Chapter of this Agreement, the other Chapter shall prevail to the extent of the inconsistency.

### **Article 12.4: National Treatment<sup>6</sup>**

Subject to the reservations set out in Article 12.6, each Party shall accord to investors of the other Party, and to establishments of such investors, treatment no less favourable than that it accords, in like circumstances, to its own investors and to the establishments of such investors in its Area.

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<sup>4</sup> For greater certainty, services and obligations specifically excluded from the scope of Chapter 8 (Trade in Services) do not fall under the scope of this Chapter.

<sup>5</sup> For greater certainty, nothing in this Chapter shall be construed to impose any obligation in relation to measures in respect of: (a) expropriation; (b) minimum standard of treatment; (c) compensation for losses owing to a war or any other armed conflict, revolution, state of national emergency, revolt, insurrection or riot; (d) subrogation; (e) transfer; or (f) most-favoured nation treatment. Notwithstanding this, the foregoing does not preclude the laws and regulations of either Party from providing measures in respect of any of these matters.

<sup>6</sup> For greater certainty, whether treatment is accorded in “like circumstances” under Article 12.4 depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or establishments on the basis of legitimate public welfare objectives.

## Article 12.5: Performance Requirements

1. Neither Party shall, in connection with the establishment of an investor of the other Party in its Area, impose or enforce any requirement, or enforce any commitment or undertaking, to<sup>7</sup>:

- (a) export a given level or percentage of goods;
- (b) achieve a given level or percentage of domestic content;
- (c) purchase, use or accord a preference to goods produced in its Area, or to purchase goods from persons in its Area;
- (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 establishment;
- (e) restrict sales of goods in its Area that such establishment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
- (f) transfer a particular technology, a production process or other proprietary knowledge to a person in its Area; or
- (g) supply exclusively from its Area the goods that such establishment produces to a specific regional market or to the world market.

2. For greater certainty, a measure that requires an investor of a Party to use technology to meet health, safety or environmental requirements shall not be construed to be inconsistent with paragraph 1(f). For greater certainty, Article 12.4 applies to such a measure.

3. Neither Party shall condition the receipt or continued receipt of an advantage, in connection with the establishment of an investor of the other Party, on compliance with any requirement to:

- (a) achieve a given level or percentage of domestic content;
- (b) purchase, use or accord a preference to goods produced in its Area, or to purchase goods from persons in its Area;
- (c) 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

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<sup>7</sup> For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 3 does not constitute a “requirement” or a “commitment or undertaking” for the purposes of paragraph 1.

establishment; or

- (d) restrict sales of goods in its Area that such establishment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

4. Nothing in paragraph 3 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with the establishment of investors of the other Party, on compliance with a requirement to locate production, train or employ workers, construct or expand particular facilities, or carry out research and development, in its Area.

5. Paragraph 1(f) shall not apply:

- (a) if a Party authorises use of an intellectual property right in accordance with the TRIPS Agreement, or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, 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 anticompetitive under competition laws and regulations of a Party.<sup>8</sup>

6. Paragraph 1(a), paragraph 1(b), paragraph 1(c), paragraph 3(a) and paragraph 3(b) shall not apply to qualification requirements for goods with respect to export promotion and foreign aid programs.

7. Paragraph 3(a) and paragraph 3(b) shall not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

8. For greater certainty, nothing in paragraph 1 shall be construed to prevent a Party, in connection with the establishment of an investor of the other Party, from imposing or enforcing a requirement, or enforcing a commitment or undertaking, to employ or train workers in its Area provided that the employment or training does not require the transfer of a particular technology, production process or other proprietary knowledge to a person in its Area.

9. For greater certainty, paragraph 1 and paragraph 3 do not apply to any commitment, undertaking or requirement other than those set out in those paragraphs.

10. For greater certainty, this Article does not preclude enforcement of any commitment, undertaking or requirement between private parties, where a Party did not impose or

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<sup>8</sup> The Parties recognise that a patent does not necessarily confer market power.

require the commitment, undertaking, or requirement.

#### **Article 12.6: Non-Conforming Measures**

1. Articles 12.4 and 12.5 shall 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 Schedule to Annex I;
    - (ii) the regional level of government, as set out by that Party in its Schedule to Annex I; or
    - (iii) the local level of government;
  - (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
  - (c) an amendment 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 amendment, with Articles 12.4 or 12.5.
2. Articles 12.4 and 12.5 shall not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors or activities as set out in its Schedule to Annex II.
3. Article 12.4 shall not apply to any measure that falls within Article 5 of the TRIPS Agreement, or an exception to, or derogation from, the obligations which are imposed by Article 3 of the TRIPS Agreement.

#### **Article 12.7: Special Formalities and Information Requirements**

1. Nothing in Article 12.4 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with an establishment, such as a residency requirement for registration or a requirement that an enterprise of a Party be legally constituted or organised under the laws or regulations of the Party, provided that these formalities do not materially impair the protections afforded by the Party to investors of the other Party and establishments in accordance with this Chapter.
2. Notwithstanding Article 12.4, a Party may require an investor of the other Party to provide information concerning that establishment solely for informational or statistical

purposes. The Party shall protect such information that is confidential from any disclosure that would prejudice the competitive position of the investor or establishment of such investor. 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 laws.

#### **Article 12.8: Denial of Benefits**

A Party may, at any time, deny the benefits of this Chapter to an investor of the other Party that is an enterprise of that other Party if:

- (a) persons of a non-party own or control the enterprise; and
- (b) the denying Party adopts or maintains measures with respect to the non-party or a person of 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.

#### **Article 12.9: Establishment and Environmental, Health and Other Regulatory Objectives**

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that the establishment in its Area is undertaken in a manner sensitive to environmental, health or other regulatory objectives.

#### **Article 12.10: Exceptions**

For the purposes of this Chapter and subject to the requirement that such measures are not applied in a manner which would constitute arbitrary or unjustifiable discrimination between establishments or between investors, or a disguised restriction on international trade or investment, nothing in this Chapter shall be construed to prevent a Party from adopting or maintaining measures:

- (a) necessary to protect public morals or to maintain public order<sup>9</sup>;
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Chapter including those relating to:

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<sup>9</sup> The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

- (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on a contract;
  - (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; or
  - (iii) safety;
- (d) imposed for the protection of national treasures of artistic, historic or archaeological value; or
- (e) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.