

## CHAPTER 12

### ESTABLISHMENT AND RELATED PROVISIONS<sup>1</sup>

#### Article 12.1: Definitions

For the purposes of this Chapter:

**investor of a non-Party** means, with respect to a Party, an investor that attempts to make,<sup>2</sup> is making, or has made an investment in the Area of that Party, that is not an investor of a Party;

**investor of a Party** means a Party, a natural person of a Party or an enterprise of a Party, that attempts to make, is making, or has made an investment in the Area of the other Party; and

**natural person of a Party** means a natural person who under the law of the Party:

- (a) for Australia, is an Australian citizen or a permanent resident of Australia; and
- (b) for Hong Kong, China, is a permanent resident of the Hong Kong Special Administrative Region of the People's Republic of China.

A natural person that is both a permanent resident of the Hong Kong Special Administrative Region of the People's Republic of China and a citizen or permanent resident of Australia shall be deemed to be exclusively a natural person of the Party with which he or she has a predominant link, taking into account factors including the natural person's permanent home, centre of vital interests (i.e. where the natural person's personal and economic interests are closer) and habitual residence.

#### Article 12.2: Scope

1. This Chapter shall apply to measures adopted or maintained by a Party relating to:

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<sup>1</sup> A decision under Australia's foreign investment framework, which consists of the *Foreign Acquisitions and Takeovers Act 1975* (Cth), *Foreign Acquisitions and Takeovers Regulation 2015* (Cth), *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (Cth), *Foreign Acquisitions and Takeovers Fees Imposition Regulation 2015* (Cth), *Financial Sector (Shareholdings) Act 1998* (Cth), the Foreign Investment Policy, and associated Ministerial Statements, on whether or not to approve a foreign investment proposal, shall not be subject to the dispute settlement provisions under Chapter 18 (Consultations and Dispute Settlement).

<sup>2</sup> For greater certainty, the Parties understand that, for the purposes of the definitions of "investor of a non-Party" and "investor of a Party", an investor "attempts to make" an investment when that investor has taken concrete action or actions to make an investment, such as channelling resources or capital in order to set up a business, or applying for a permit or licence.

(a) investors of the other Party; and

(b) covered investments.

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

3. 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 investments 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**

1. 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.

2. A requirement of a Party that a service supplier of the other Party post a bond or other form of financial security as a condition for the cross-border supply of a service does not of itself make this Chapter applicable to measures adopted or maintained by the Party relating to such cross-border supply of the service. This Chapter shall apply to measures adopted or maintained by the Party relating to the posted bond or financial security, to the extent that the bond or financial security is a covered investment.

3. This Chapter shall not apply to measures adopted or maintained by a Party to the extent that such measures are covered by Chapter 8 (Financial Services).

#### **Article 12.4: National Treatment<sup>3</sup>**

1. 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 establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its Area.

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

#### **Article 12.5: Most-Favoured-Nation Treatment**

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

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

3. For greater certainty, the treatment referred to in this Article does not encompass dispute resolution procedures or mechanisms provided under any bilateral or multilateral agreements or arrangements.

#### **Article 12.6: Performance Requirements**

1. Neither Party shall, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of a covered investment in its Area, impose or enforce any requirement, or enforce any commitment or undertaking, to<sup>4</sup>:

- (a) export a given level or percentage of goods or services;
- (b) achieve a given level or percentage of domestic content;

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<sup>3</sup> For greater certainty, whether treatment is accorded in “like circumstances” under Articles 12.4 or 12.5 depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.

<sup>4</sup> 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 purposes of paragraph 1.

- (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 investment;
- (e) restrict sales of goods or services in its Area that such investment 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 investment produces or the services that such investment supplies to a specific regional market or to the world market.

2. Neither Party shall condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of a covered investment, 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 investment; or
- (d) restrict sales of goods or services in its Area that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

3. Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with a covered investment, 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 Area.

4. 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 a Party's competition laws and regulations.<sup>5</sup>

5. Paragraph 1(a), paragraph 1(b), paragraph 1(c), paragraph 2(a) and paragraph 2(b) shall not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs.

6. Paragraph 2(a) and paragraph 2(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.

7. For greater certainty, nothing in paragraph 1 shall be construed to prevent a Party, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of a covered investment, 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.

8. For greater certainty, paragraph 1 and paragraph 2 do not apply to any commitment, undertaking or requirement other than those set out in those paragraphs.

9. 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 require the commitment, undertaking, or requirement.

## **Article 12.7: Senior Management and Boards of Directors**

1. A Party shall not require that an enterprise of that Party that is a covered investment appoint to a senior management position a natural person of any particular nationality.

2. A Party may require that a majority of the board of directors, or any committee thereof, of an enterprise of that Party that is a covered investment, be of a particular nationality or resident in the Area of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

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<sup>5</sup> The Parties recognise that a patent does not necessarily confer market power.

## **Article 12.8: Non-Conforming Measures**

1. Articles 12.4, 12.5, 12.6 and 12.7 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, 12.5, 12.6 or 12.7.
2. Articles 12.4, 12.5, 12.6 and 12.7 shall not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors 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:
  - (a) Article 14.6 (National Treatment) of Chapter 14 (Intellectual Property); or
  - (b) Article 3 of the TRIPS Agreement, if the exception or derogation relates to matters not addressed by Chapter 14 (Intellectual Property).
4. Article 12.5 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:
  - (a) Article 14.6 (National Treatment) of Chapter 14 (Intellectual Property); or
  - (b) Article 4 of the TRIPS Agreement.

## **Article 12.9: 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 a covered investment, such as a residency requirement for registration or a requirement that a covered investment 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 covered investments in accordance with this Chapter.

2. Notwithstanding Articles 12.4 and 12.5, a Party may require an investor of the other Party or its covered investment to provide information concerning that investment 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 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 12.10: 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 and to investments of that investor 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 or to its investments.

## **Article 12.11: Investment 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 investment activity in its Area is undertaken in a manner sensitive to environmental, health or other regulatory objectives.

## **Article 12.12: Exceptions**

1. 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 investments 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>6</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:
  - (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.

2. The Parties understand that the measures referred to in paragraph 1(b) include environmental measures necessary to protect human, animal or plant life or health.

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<sup>6</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.