

RCEP DRAFT INVESTMENT TEXT: KOREA
(based on Draft Investment Text October 2015)

Article XX

SCOPE

1. This Chapter applies/shall apply to measures adopted or maintained by a Party relating to:
 - (a) investors of another Party;
 - (b) covered investments; and
 - (c) with respect to Articles (Performance Requirements) and (Investment and Environment), all investments in the territory of the Party.

{Not numbered} For greater certainty, the provisions of this Chapter do/does not bind any/either/a Party in relation to 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 XX

DEFINITIONS

For purposes of this Chapter:

covered investment means, with respect to a Party, an investment in [its] [the] territory of an investor of another Party, in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter.

Enterprise means any entity constituted or organised under applicable law whether or not for profit, and whether privately or governmentally-owned or controlled, including any corporation trust, partnership, joint venture, sole proprietorship, association or similar organisation and a branch of an enterprise.

enterprise of a Party means an enterprise constituted or organised under the law of a Party and a branch and business;

freely usable currency means freely usable currency as determined by the International Monetary Fund (IMF) under its Articles of Agreement and [any] amendments thereto;

Investment means every kind of asset that an investor owns or controls directly or indirectly that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain/s or profit/s, or the assumption of risk. Forms that an investment may take include but are not limited to, the following:

- (a) an enterprise; {Paragraph numbering inconsistent}
- (ii) shares, stocks, and/or other forms of equity participation in a juridical person/an enterprise and rights derived therefrom;
- (c) bonds, including government issued bonds, debentures, other forms of debt, loans and rights derived therefrom¹; ²
- (d) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;
{No sub-paragraph number} intellectual property rights and goodwill
- (iv) claims to money or to any contractual performance related to a business and having economic value³;
- (g) rights conferred pursuant to law⁴ or contract such as concessions, licences, authorisations, and permits; and

¹ Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.

² * *If bonds include government issued bonds, NZ may consider dropping reference to "government issued".*

³ For greater certainty, investment does not mean claims to money that arise solely from:

- i. commercial contracts for sale of goods or services; or
- ii. the extension of credit in connection with such commercial contracts. **AFPs to consider the footnote.*

⁴ Whether a particular type of licence, authorisation, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among instrument[s] that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with instrument [s] has the characteristics of an investment.

{no number} other tangible or intangible, movable and/or immovable property, and related/other property rights, such as leases, mortgages, liens, and/or pledges

but investment does not mean an order or judgment entered in a judicial or administrative action.

investor of a non-Party means, with respect to a Party, an investor that attempts to make, is making, or has made an investment in the territory of that Party, that is not an investor of another Party;

investor of a Party means a Party [./or] [a] [national/natural person of a Party] or [a juridical person/an enterprise] of a Party that attempts to make⁵, is making, or has made an investment in the territory of another Party;

measure/s means any measure whether in the form of a law, regulation, rule, procedure, decision, administrative action, or in any other form.

measure adopted or maintained by a Party includes measures taken by:

- (i) central, regional, or local governments and authorities; and
- (ii) non-governmental bodies in the exercise of powers delegated by central, regional, or local governments and authorities.

natural person of a Party means a national or a permanent resident of a Party under its laws.

Article XX

NATIONAL TREATMENT

1. Each Party shall accord to investors of another/the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with

⁵ For greater certainty, the Parties understand that an investor that, for the purposes of the definitions of “investor of a non-Party” and “Investor of a Party” “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 permits and licences.

respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.⁶

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

Article XX
MOST FAVOURED NATION TREATMENT

1. Each Party shall accord to investors of [another/any 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 territory.

2. Each Party shall accord to covered investments 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 territory.

5. For greater certainty, the treatment referred to in this Article does not encompass international dispute resolution procedures or mechanisms such as those included in Section B.

Article XX
TREATMENT OF INVESTMENT /
MINIMUM STANDARD OF TREATMENT

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

⁶ *WGI 10. NZ propose for ASEAN to consider having 2 paragraphs.

2. 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 the customary international law minimum standard of treatment and do not create additional substantive rights.⁷ The obligation in paragraph 1 to provide:

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

(b) full protection and security requires each/a Party to take such measures as may be reasonably necessary to ensure the physical protection and security of the covered investment/s.

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

Article XX

PROHIBITION OF PERFORMANCE REQUIREMENTS

1. No Party shall in connection with the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory of an investor of [any other/another/a] Party or of a non-Party, impose or enforce any requirement or enforce any commitment or undertaking:⁸

(a) to export a given level or percentage of goods or services;

(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 person/s 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 investment;

⁷ * *WGI 10 NZ to consider “under”*.

⁸ For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 2 does not constitute a “commitment or undertaking” for the purposes of paragraph 1.

(e) to restrict sales of goods or services in its territory 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) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory; or

(g) to supply exclusively from the territory of the Party the goods that such investment produces or the services that it supplies to a specific regional market or to the world market.

2. [No/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 an investment in its territory of an investor of a Party or of a non-Party, on compliance with any of the following requirement/s:

(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 persons in its territory;

(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 investment; or

(d) to restrict sales of goods or services in its territory 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. (a) Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, 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.

(b) Paragraph 1(f) shall not apply:

(i) when a Party authorises use of an intellectual property right in accordance with Article 31 of 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

(ii) when 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 the Party's competition laws.⁹

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

(d) Paragraphs 2(a) and 2(b) [shall/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.

5. 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 XX

SENIOR MANAGEMENT AND BOARD OF DIRECTORS

1. No Party may require that an enterprise of that Party that is a covered investment appoint to senior management positions natural persons of any particular nationality.

⁹ FN 2 The Parties recognise that a patent does not necessarily confer market power.

2. [A Party] may require that a majority of the board of directors, or any committee thereof, of [a juridical person/an enterprise] of that Party that is a covered investment, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.¹⁰

Article XX

RESERVATIONS / NON-CONFORMING MEASURES

1. Article/s (National Treatment), (Most-Favoured-Nation Treatment), (Performance Requirements) and (Senior Management and Boards of Directors), shall not apply to:

(a) any existing non-conforming measure that is maintained by a Party at:

(i) the central level or regional of government as set out by that Party in its Schedule of Reservations in [Annex 1/List 1/3];

or

(ii) the local level of government.

(b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a)/(i); or

(c) an amendment to any non-conforming measure referred to in subparagraph (a)/(i) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles (National Treatment), (Most-Favoured-Nation Treatment), Performance Requirements and (Senior Management and Boards of Directors).

2. Articles (National Treatment), (Most-Favoured-Nation Treatment), (Performance Requirements), and (Senior Management and Boards of Directors), shall not apply to any reservation for measures that a Party adopts or maintains with

¹⁰ * NZ to confirm change in approach.

respect to sectors, sub-sectors or activities, as set out in [its Schedule to Annex II/List 2].¹¹

3. Articles (National Treatment) and (Most Favoured Nation Treatment) do not apply to any measure that is an exception to, or derogation from, [a Party's/the] obligations under the TRIPS Agreement.

4. Articles (National Treatment), (Most Favoured Nation Treatment) and (Senior Management and Board of Directors) do not apply to: subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.

Article XX

TRANSFERS AND ANNEX ON TRANSFERS

Each Party/Member State shall [allow/permit] all transfers/funds into and out of its territory relating to a covered investment to be made freely and without delay in a freely usable currency at the market rate of exchange at the time of transfer. Such transfers/funds include:

- (a) contributions to capital, including the initial contribution;
- (b) profits, capital gains, dividends, interest, [royalties/royalty payments], technical assistance management fees, and other fees.
- (c) proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of any covered investment;
- (c) {numbering inconsistent and relationship to (b) unclear} interest, royalty payments, management fees, and technical assistance and other fees;

¹¹ *WGI 9: NZ will provide text later on [A, Au, C, J, K: 3. No Party [C, J, K: may,] [A: Au: shall] under any measure adopted [Au, C, J, K: after the date of entry into force of this Agreement] and covered by its Schedule [to/in] Annex II, require an investor of [any/the other/another] Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.]

(d) payments made under a contract, including payments made pursuant to a loan agreement;

(e) payments made [in accordance/pursuant] to Article (Treatment in Case of Armed Conflict or Civil Strife), [Article (Compensation for Losses)] and Article (Expropriation)] and payments arising out of the settlement of a dispute;

(g) earnings and other remuneration of personnel engaged from abroad in connection with that investment.

2. Each Party shall [allow/permit] such transfers relating to a/the 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/through 3], a Party/Host State may prevent or delay 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 offences;

(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; and

(g) social security, public retirement, or compulsory savings schemes;

Article XX

SPECIAL FORMALITIES AND DISCLOSURE OF INFORMATION

Nothing in Article (National Treatment) shall be construed to prevent a Party/Host State from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, [including a/such as a] residency requirements for registration or a requirement that covered investments be legally constituted under its laws or regulations, provided that such formalities do not substantially/materially impair the protections afforded by a Party/Host State to investors of another Party/Member State and [their] covered investments [pursuant to/in accordance with] this Chapter/Agreement.

Notwithstanding Article (National Treatment) and/or (Most Favoured Nation Treatment), a Party/Host State may require an investor of another Party/Member State, or [a/its] covered investment, to provide information concerning that investment solely for informational or statistical purposes. The Party/Host State shall protect 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/Host State from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law/s.

Article XX

COMPENSATION IN CASES OF STRIFE/TREATMENT IN CASE OF ARMED CONFLICT OR CIVIL STRIFE

1. 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 or civil strife, treatment no less favourable than that it accords, in like circumstances, to:

(a) its own investors and their investments; and

(b) investors of any non-Party and their investments.

2. Notwithstanding paragraph 1, if an investor of a Party suffers a loss in the territory of [the other/any other/another] 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 with restitution, compensation, or both as appropriate, for such loss.

Any compensation, shall be made in accordance with Article [Expropriation and Compensation] paragraphs 2 through 4, mutatis mutandis.

Article XX SUBROGATION

1. If a Party/Member State or a/an/any agency or institution, statutory body or corporation designated by it makes a payment to an investor of that Party/Member State under a guarantee, a contract of insurance or other form of indemnity against non-commercial risk/s in respect of an investment the other Party/Member State shall recognise the subrogation or transfer of any right/s 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/Member State or an/the agency, institution, statutory body or corporation designated by it has made a payment to an investor of that Party/Member State and has taken over rights and claims of the investor, that investor shall not, unless authorised to act on behalf of the Party (or any agency, institution, statutory body or corporation designated by it) making the payment, pursue those rights and claims against the other Party/Member State.

Article XX EXPROPRIATION AND COMPENSATION¹²

¹² FN 1 This Article [Expropriation and Compensation] shall be interpreted in accordance with Annex [X] (Expropriation).

1. No Party shall expropriate or nationalise or subject to measures equivalent to nationalisation or expropriation a covered investment/s, except:

- a. for a public purpose;
- b. in/on a non-discriminatory manner;
- c. On payment of prompt, adequate and effective compensation accordance with paragraphs 2 through 4 and
- d. in accordance with due process of law.

2. Compensation shall:

- a. be paid without delay;¹³
- b. be equivalent to the fair market value of the expropriated [investment immediately before the expropriation took place (“the date of expropriation”);, or when the expropriation occurred, whichever is applicable;]
- c. not reflect any change in value occurring because the intended expropriation had become known earlier; and
- d. be fully realisable and freely transferable.

3. If the fair market value is denominated in a freely usable currency, the compensation paid shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

4. If the fair market value is denominated in a currency that is not freely usable, the compensation paid – converted into the currency of payment at the market rate of exchange prevailing on the date of payment – shall be no less than:

¹³ FN 5 The Parties understand that there may be legal and administrative processes that need to be observed before payment can be made.

(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 licences granted in relation to intellectual property rights, in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with Chapter XX (Intellectual Property Rights)

Annex on Expropriation

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 an investment.

Expropriation may be direct or indirect:

direct expropriation occurs when a Party takes an investor's property outright, by nationalisation or other direct expropriation through formal transfer of title or outright seizure.

indirect expropriation occurs when a Party takes an investor's property through an action or a series of actions which have an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

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:

(i) the economic impact of the government action, although the fact that an action or a 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 to the investor whether by contract, licence or other legal document; and

(c) the character of the government action including its objectives.

4. In order to constitute indirect expropriation, the state's deprivation of the investor's property must be so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith.

Non-discriminatory regulatory actions by a Party do not constitute indirect expropriation/s of the type referred to in paragraph 2(b).