

CHAPTER 2

INVESTMENT PROTECTION

ARTICLE 2.1

Scope

1. This Chapter applies to:
 - (a) covered investment, and
 - (b) investors of a Party with respect to the operation of their covered investment.

2. Articles 2.3 (National Treatment) and 2.4 (Most-Favoured-Nation Treatment) do not apply to:
- (a) audio-visual services;
 - (b) mining, manufacturing and processing¹ of nuclear materials;
 - (c) production of or trade in arms, munitions and war material;
 - (d) national maritime cabotage;²
 - (e) domestic and international air transport services, whether scheduled or non-scheduled, and services directly related to the exercise of traffic rights, other than:
 - (i) aircraft repair and maintenance services during which an aircraft is withdrawn from service;

¹ For greater certainty, processing of nuclear materials includes all the activities contained in the *International Standard Industrial Classification of all Economic Activities* as set out in Statistical Office of the United Nations, Statistical Papers, Series M, N 4, ISIC REV 3.1, 2002 code 2330.

² Without prejudice to the scope of activities which constitute cabotage under domestic laws and regulations, national maritime cabotage under this Sub-Section covers transportation of passengers or goods between a port or point located in Member State of the Union or Viet Nam and another port or point located in that same Member State of the Union or Viet Nam, including on its continental shelf, as provided for in UNCLOS, and traffic originating and terminating in the same port or point located in a Member State of the Union or Viet Nam.

(ii) the selling and marketing of air transport services;

(iii) computer reservation system services;

(iv) ground handling services; and

(v) airport operation services;

and

(f) services supplied and activities performed in the exercise of governmental authority.

3. Articles 2.3 (National Treatment) and 2.4 (Most-Favoured-Nation Treatment) do not apply to subsidies granted by the Parties.¹

4. This Chapter does not apply to the Parties' respective social security systems or to activities in the territory of each Party, which are connected, even occasionally, with the exercise of official authority.

¹ In the case of the EU Party "subsidy" includes "state aid" as defined in Union law. For Viet Nam, "subsidy" includes investment incentives, and investment assistance such as production site assistance, human resources training and competitiveness strengthening activities, such as assistance for technology, research and development, legal aids, market information and promotion.

5. This Chapter does not apply to measures affecting natural persons seeking access to the employment market of a Party, nor does it apply to measures regarding citizenship, residence or employment on a permanent basis.

6. With the exception of Articles 2.1 (Scope), 2.2 (Investment and Regulatory Measures and Objectives) and 2.5 (Treatment of Investment) to 2.9 (Subrogation), nothing in this Agreement shall be construed as limiting the obligations of the Parties under Chapter 9 (Government Procurement) of the Free Trade Agreement or to impose any additional obligation with respect to government procurement. For greater certainty, measures with respect to government procurement that are in compliance with Chapter 9 (Government Procurement) of the Free Trade Agreement shall not be considered a breach of Articles 2.1 (Scope), 2.2 (Investment and Regulatory Measures and Objectives) and 2.5 (Treatment of Investment) to 2.9 (Subrogation).

ARTICLE 2.2

Investment and Regulatory Measures and Objectives

1. The Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection, or promotion and protection of cultural diversity.

2. For greater certainty, this Chapter shall not be interpreted as a commitment from a Party that it will not change its legal and regulatory framework, including in a manner that may negatively affect the operation of investments or the investor's expectations of profits.

3. For greater certainty and subject to paragraph 4, a Party's decision not to issue, renew or maintain a subsidy or a grant shall not constitute a breach of this Chapter in the following circumstances:

- (a) in the absence of any specific commitment to an investor of the other Party or to a covered investment under law or contract to issue, renew, or maintain that subsidy or grant; or
- (b) in accordance with any terms or conditions attached to the issuance, renewal or maintenance of the subsidy or grant.

4. For greater certainty, nothing in this Chapter shall be construed as preventing a Party from discontinuing the granting of a subsidy¹ or requesting its reimbursement, or as requiring that Party to compensate the investor therefor, where such action has been ordered by one of its competent authorities listed in Annex 1 (Competent Authorities).

¹ In the case of the EU Party, "subsidy" includes "state aid" as defined in the Union's law. For Viet Nam, "subsidy" includes investment incentives, and investment assistance such as production site assistance, human resources training and competitiveness strengthening activities, such as assistance for technology, research and development, legal aids, market information and promotion.

ARTICLE 2.3

National Treatment

1. Each Party shall accord to investors of the other Party and to covered investments, with respect to the operation of the covered investments, treatment no less favourable than that it accords, in like situations, to its own investors and to their investments.

2. Notwithstanding paragraph 1 and, in the case of Viet Nam subject to Annex 2 (Exemption for Viet Nam on National Treatment), a Party may adopt or maintain any measure with respect to the operation of a covered investment provided that such measure is not inconsistent with the commitments set out in Annex 8-A (The Union's Schedule of Specific Commitments) or Annex 8-B (Viet Nam's Schedule of Specific Commitments) of the Free Trade Agreement, respectively, where such measure is:
 - (a) a measure that is adopted on or before the date of entry into force of this Agreement;

 - (b) a measure referred to in subparagraph (a) that is being continued, replaced or amended after the date of entry into force of this Agreement, provided the measure is no less consistent with paragraph 1 after it is continued, replaced or amended than the measure as it existed prior to its continuation, replacement or amendment; or

- (c) a measure not falling within subparagraph (a) or (b), provided it is not applied in respect of, or in a way that causes loss or damage¹ to, investments made in the territory of the Party before the date of entry into force of such measure.

ARTICLE 2.4

Most-Favoured-Nation Treatment

1. Each Party shall accord to investors of the other Party and to covered investments, with respect to the operation of the covered investments, treatment no less favourable than the treatment it accords, in like situations, to investors of a third country and their investments.
2. Paragraph 1 does not apply to the following sectors:
 - (a) communication services, except for postal services and telecommunication services;
 - (b) recreational, cultural and sporting services;

¹ For the purposes of this subparagraph, the Parties understand that if a Party has provided for a reasonable phase-in period for the implementation of a measure or if that Party has made any other attempt to address the effects of the measure on investments made before the date of entry into force of the measure, those factors shall be taken into account in determining whether the measure causes loss or damage to investments made before the date of entry into force of the measure.

- (c) fishery and aquaculture;
- (d) forestry and hunting; and
- (e) mining, including oil and gas.

3. Paragraph 1 shall not be construed as obliging a Party to extend to investors of the other Party or covered investments the benefit of any treatment granted pursuant to any bilateral, regional or international agreement that entered into force before the date of entry into force of this Agreement.

4. Paragraph 1 shall not be construed as obliging a Party to extend to investors of the other Party or covered investments the benefit of:

- (a) any treatment granted pursuant to any bilateral, regional or multilateral agreement which includes commitments to abolish substantially all barriers to investment among the parties or requires the approximation of legislation of the parties in one or more economic sectors;¹
- (b) any treatment resulting from any international agreement for the avoidance of double taxation or other international agreement or arrangement relating wholly or mainly to taxation; or

¹ For greater certainty, the ASEAN Economic Community falls within the concept of regional agreement under this subparagraph.

(c) any treatment resulting from measures providing for the recognition of qualifications, licences or prudential measures in accordance with Article VII of the *General Agreement on Trade in Services*¹ or its Annex on Financial Services.

5. For greater certainty, the term "treatment" referred to in paragraph 1 does not include dispute resolution procedures or mechanisms, such as those included in Section B (Resolution of Disputes between Investors and Parties) of Chapter 3 (Dispute Resolution), provided for in any other bilateral, regional or international agreements. Substantive obligations in such agreements do not in themselves constitute "treatment" and thus cannot be taken into account when assessing a breach of this Article. Measures by a Party pursuant to those substantive obligations shall be considered "treatment".

6. This Article shall be interpreted in accordance with the principle of *ejusdem generis*.²

¹ As contained in Annex 1b of the Marrakesh Agreement establishing the World Trade Organization, done at Marrakesh on 15 April 1994.

² For greater certainty, this paragraph shall not be construed as preventing the interpretation of other provisions of this Agreement, where appropriate, in accordance with the principle of *ejusdem generis*.

ARTICLE 2.5

Treatment of Investment

1. Each Party shall accord fair and equitable treatment and full protection and security to investors of the other Party and covered investments in accordance with paragraphs 2 to 7 and Annex 3 (Understanding on the Treatment of Investments).

2. A Party breaches the obligation of fair and equitable treatment referred to in paragraph 1 where a measure or series of measures constitutes:
 - (a) a denial of justice in criminal, civil or administrative proceedings;
 - (b) a fundamental breach of due process in judicial and administrative proceedings;
 - (c) manifest arbitrariness;
 - (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
 - (e) abusive treatment such as coercion, abuse of power or similar bad faith conduct; or
 - (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3.

3. Treatment not listed in paragraph 2 may constitute a breach of fair and equitable treatment where the Parties have so agreed in accordance with the procedures provided for in Article 4.3 (Amendments).

4. When applying paragraphs 1 to 3, a dispute settlement body under Chapter 3 (Dispute Settlement) may take into account whether a Party made a specific representation to an investor of the other Party to induce a covered investment that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain that investment, but that the Party subsequently frustrated.

5. For greater certainty, the term "full protection and security" referred to in paragraph 1 refers to a Party's obligations to act as may be reasonably necessary to protect physical security of the investors and the covered investments.

6. Where a Party has entered into a written agreement with investors of the other Party or covered investments that satisfies all of the following conditions, that Party shall not breach that agreement through the exercise of governmental authority. The conditions are:

- (a) the written agreement is concluded and takes effect after the date of entry into force of this Agreement;¹

¹ For greater certainty, a written agreement that is concluded and takes effect after the date of entry into force of this Agreement does not include the renewal or extension of an agreement in accordance with the provisions of the original agreement, and on the same or substantially the same terms and conditions as the original agreement, which has been concluded and entered into force before the date of entry into force of this Agreement.

- (b) the investor relies on the written agreement in deciding to make or maintain the covered investment other than the written agreement itself and the breach causes actual damages to that investment;
- (c) the written agreement¹ creates an exchange of rights and obligations in connection to the said investment, binding on both parties; and
- (d) the written agreement does not contain a clause on the settlement of disputes between the parties to that agreement by international arbitration.

7. 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 2.6

Compensation for Losses

1. Investors of a Party whose covered investments suffer losses owing to war or other armed conflict, a revolution, a state of national emergency, a revolt, an insurrection or a riot in the territory of the other Party shall be accorded by that other Party, with respect to restitution, indemnification, compensation or other form of settlement, treatment no less favourable than that accorded by that other Party to its own investors or to the investors of any third country.

¹ The term "written agreement" means an agreement in writing, entered into by a Party with an investor of the other Party or their investment and negotiated and executed by both parties, whether in a single instrument or multiple instruments.

2. Without prejudice to paragraph 1, investors of a Party who, in any of the situations referred to in paragraph 1, suffer losses in the territory of the other Party shall be accorded prompt, adequate and effective restitution or compensation by the other Party if those losses result from:

- (a) requisitioning of covered investment or a part thereof by the other Party's armed forces or authorities; or
- (b) destruction of covered investment or a part thereof by the other Party's armed forces or authorities,

which was not required by the necessity of the situation.

ARTICLE 2.7

Expropriation

1. A Party shall not nationalise or expropriate the covered investments of investors of the other Party either directly, or indirectly through measures having an effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation"), except:

- (a) for a public purpose;
- (b) under due process of law;

- (c) on a non-discriminatory basis; and
- (d) against payment of prompt, adequate and effective compensation.

2. The compensation referred to in paragraph 1 shall amount to the fair market value of the covered investment at the time immediately before the expropriation or the impending expropriation became public knowledge, whichever is earlier, plus interest at a reasonable rate established on a commercial basis, from the date of expropriation until the date of payment. Such compensation shall be effectively realisable, freely transferable in accordance with Article 2.8 (Transfer) and made without delay.

3. Notwithstanding paragraphs 1 and 2, in the case that Viet Nam is the expropriating Party, any measure of direct expropriation relating to land shall be:

- (a) for a purpose in accordance with the applicable domestic laws and regulations¹; and
- (b) upon payment of compensation equivalent to the market value, while recognising the applicable domestic laws and regulations.

4. The issuance of compulsory licences in relation to intellectual property rights does not constitute an expropriation within the meaning of paragraph 1, to the extent that such issuance is consistent with the *Agreement on Trade-Related Aspects of Intellectual Property Rights* contained in Annex 1C of the WTO Agreement (hereinafter referred to as "TRIPS Agreement").

¹ The applicable domestic laws and regulations is Viet Nam's Land Law No. 45/2013/QH13 and Decree No. 44/2014/ND-CP Regulating Land Prices, as at the date of entry into force of this Agreement.

5. An investor affected by an expropriation shall have a right, under the law of the expropriating Party, to prompt review of its claim and of the valuation of its investment, by a judicial or other independent authority of that Party.

6. This Article shall be interpreted in accordance with Annex 4 (Understanding on Expropriation).

ARTICLE 2.8

Transfer

Each Party shall permit all transfers relating to covered investments to be made in a freely convertible currency, without restriction or delay and at the market rate of exchange applicable on the date of transfer. Such transfers include:

- (a) contributions to capital, such as principal and additional funds to maintain, develop or increase the investment;
- (b) profits, dividends, capital gains and other returns, proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;
- (c) payments of interest, royalties, management fees, and technical assistance and other fees;

- (d) payments made under a contract entered into by the investor, or the covered investment, including payments made pursuant to a loan agreement;
- (e) earnings and other remuneration of personnel engaged from abroad and working in connection with the investment;
- (f) payments made pursuant to Article 2.6 (Compensation for Losses) and Article 2.7 (Expropriation); and
- (g) payments of damages pursuant to an award issued under Section B (Resolution of Disputes between Investors and Parties) of Chapter 3 (Dispute Settlement).

ARTICLE 2.9

Subrogation

If a Party, or an agency thereof, makes a payment under an indemnity, a guarantee or a contract of insurance it has entered into in respect of an investment made by one of its investors in the territory of the other Party, the other Party shall recognise the subrogation or transfer of any right or title or the assignment of any claim in respect of such investment. The Party or the agency shall have the right to exercise the subrogated or assigned right or claim to the same extent as the original right or claim of the investor. Such rights may be exercised by the Party or an agency thereof, or by the investor only if the Party or an agency thereof so authorises.