

CHAPTER 12 : ANTICOMPETITIVE BUSINESS CONDUCT, DESIGNATED MONOPOLIES, AND GOVERNMENT ENTERPRISES

ARTICLE 12.1 : OBJECTIVES

Recognizing that the conduct subject to this Chapter has the potential to restrict bilateral trade and investment, the Parties believe proscribing such conduct, implementing economically sound competition policies, and engaging in cooperation will help secure the benefits of this Agreement.

ARTICLE 12.2 : ANTICOMPETITIVE BUSINESS CONDUCT

1. Each Party shall adopt or maintain measures to proscribe anticompetitive business conduct¹²⁻¹ with the objective of promoting economic efficiency and consumer welfare, and shall take appropriate action with respect to such conduct.
2. Each Party shall establish or maintain an authority responsible for the enforcement of its measures to proscribe anticompetitive business conduct. The enforcement policy of the Parties' national authorities responsible for the enforcement of such measures includes not discriminating on the basis of the nationality of the subjects of their proceedings. Each Party shall ensure that a person subject to the imposition of a sanction or remedy for violation of such measures is provided with the opportunity to be heard and to present evidence, and to seek review of such sanction or remedy in a domestic court or independent tribunal.

ARTICLE 12.3 : DESIGNATED MONOPOLIES AND GOVERNMENT ENTERPRISES

1. Designated Monopolies
 - (a) Nothing in this Chapter shall be construed to prevent a Party from designating a monopoly.
 - (b) Where a Party designates a monopoly and the designation may affect the interests of persons of the other Party, the Party shall:
 - (i) at the time of the designation endeavor to introduce such conditions on the operation of the monopoly as will minimize or eliminate any nullification or impairment of benefits in the sense of Article 20.4.1(c) (Additional Dispute Settlement Procedures); and
 - (ii) provide written notification, in advance wherever possible, to the other Party of the designation and any such conditions.

¹²⁻¹ Singapore shall enact general competition legislation by January 2005, and shall not exclude enterprises from that legislation on the basis of their status as government enterprises.

- (c) Each Party shall ensure that any privately-owned monopoly that it designates after the date of entry into force of this Agreement and any government monopoly that it designates or has designated:
- (i) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it in connection with the monopoly good or service, such as the power to grant import or export licenses, approve commercial transactions, or impose quotas, fees or other charges;
 - (ii) acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market, including with regard to price, quality, availability, marketability, transportation, and other terms and conditions of purchase or sale, except to comply with any terms of its designation that are not inconsistent with subparagraph (iii) or (iv);
 - (iii) provides non-discriminatory treatment to covered investments, to goods of the other Party, and to service suppliers of the other Party in its purchase or sale of the monopoly good or service in the relevant market; and
 - (iv) does not use its monopoly position to engage, either directly or indirectly, including through its dealings with its parent, subsidiaries, or other enterprises with common ownership, in anticompetitive practices in a non-monopolized market in its territory that adversely affect covered investments.

2. Government Enterprises

- (a) Nothing in this Agreement shall be construed to prevent a Party from establishing or maintaining a government enterprise.
- (b) Each Party shall ensure that any government enterprise that it establishes or maintains acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such enterprise exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges.
- (c) The United States shall ensure that any government enterprise that it establishes or maintains accords non-discriminatory treatment in the sale of its goods or services to covered investments.

- (d) Singapore shall ensure that any government enterprise:
- (i) acts solely in accordance with commercial considerations in its purchase or sale of goods or services, such as with regard to price, quality, availability, marketability, transportation, and other terms and conditions of purchase or sale, and provides non-discriminatory treatment to covered investments, to goods of the United States, and to service suppliers of the United States, including with respect to its purchases or sales;¹²⁻² and
 - (ii) does not, either directly or indirectly, including through its dealings with its parent, subsidiaries, or other enterprises with common ownership:
 - (A) enter into agreements among competitors that restrain competition on price or output or allocate customers for which there is no plausible efficiency justification, or
 - (B) engage in exclusionary practices that substantially lessen competition in a market in Singapore to the detriment of consumers.
- (e) Singapore shall take no action or attempt in any way, directly or indirectly, to influence or direct decisions of its government enterprises, including through the exercise of any rights or interests conferring effective influence over such enterprises, except in a manner consistent with this Agreement. However, Singapore may exercise its voting rights in government enterprises in a manner that is not inconsistent with this Agreement.
- (f) Singapore shall continue reducing, with a goal of substantially eliminating, its aggregate ownership and other interests that confer effective influence in entities organized under the laws of Singapore, taking into account, in the timing of individual divestments, the state of relevant capital markets.
- (g) Singapore shall:
- (i) at least annually, make public a consolidated report that details for each covered entity:
 - (A) the percentage of shares and the percentage of voting rights that Singapore and its government enterprises cumulatively own;

¹²⁻² The Parties recognize that shareholders do not oversee the day-to-day operations of enterprises. Nothing in this provision is intended to require or encourage action that would be inconsistent with applicable U.S. or Singapore law.

- (B) a description of any special shares or special voting or other rights that Singapore or its government enterprises hold, to the extent different from the rights attached to the general common shares of such entity;
 - (C) the name and government title(s) of any government official serving as an officer or member of the board of directors; and
 - (D) its annual revenue or total assets, or both, depending on the basis on which the enterprise qualifies as a covered entity.
- (ii) on receipt from the United States of a request regarding a specific enterprise, provide to the United States the information listed in clause (i), for any enterprise that is not a covered entity or an enterprise excluded under Article 12.8.1 (d) and 12.8.1(e), with the understanding that the information may be made public.

3. The charging of different prices in different markets, or within the same market, where such differences are based on normal commercial considerations, such as taking account of supply and demand conditions, is not in itself inconsistent with this Article.

4. This Article does not apply to government procurement.

ARTICLE 12.4 : COOPERATION

The Parties recognize the importance of cooperation and coordination to further effective competition law and policy development in the free trade area and agree to cooperate on these matters.

ARTICLE 12.5 : TRANSPARENCY AND INFORMATION REQUESTS

1. The Parties recognize the value of transparency of their competition policies.
2. Each Party, at the request of the other Party, shall make available public information concerning the enforcement of its measures proscribing anticompetitive business conduct.
3. Each Party, at the request of the other Party, shall make available public information concerning government enterprises, and designated monopolies, public or private. Requests for such information shall indicate the entities involved, specify the particular products and markets concerned, and include some indicia that these entities may be engaging in practices that may hinder trade or investment between the Parties.
4. Each Party, at the request of the other Party, shall make available public information concerning exemptions to its measures proscribing anticompetitive business conduct. Requests for such information shall specify the particular products and markets of concern and include some indicia that the exemption might hinder trade or investment between the Parties.

ARTICLE 12.6 : CONSULTATIONS

1. To foster understanding between the Parties, or to address specific matters that arise under this Chapter, each Party shall, at the request of the other Party, enter into consultations regarding representations made by the other Party. In its request, the Party shall indicate, if relevant, how the matter affects trade or investment between the Parties. The Party addressed shall accord full and sympathetic consideration to the concerns of the other Party.

2. Where consultations under paragraph 1 concern conduct covered by Article 12.3.2(d)(ii), Singapore shall inform the United States of the steps it has taken or plans to take to examine the conduct at issue, shall apprise the United States when Singapore's responsible authorities decide to initiate or not to initiate enforcement proceedings regarding the conduct, and shall keep the United States regularly apprised of developments in, and the results of, any enforcement proceedings it initiates.

ARTICLE 12.7 : DISPUTES

A Party shall not have recourse to dispute settlement under this Agreement for any matter arising under Article 12.2, 12.4, or 12.6.

ARTICLE 12.8 : DEFINITIONS

For purposes of this Chapter:

1. **covered entity** means:
 - (a) an enterprise organized under the laws of Singapore in which effective influence exists, or is rebuttably presumed to exist, whose annual revenue is greater than SGD 50 million;
 - (b) an enterprise organized under the laws of Singapore in which effective influence exists, or is rebuttably presumed to exist, whose total assets are greater than SGD 50 million; and
 - (c) any entity organized under the laws of Singapore in which the Government of Singapore owns a special voting share with veto rights relating to such matters as the disposal of the undertaking, the acquisition by any person of a specified percentage of the enterprise's share capital, appointments to the board of directors or of management, winding up or dissolution of the enterprise, or any change to the constituent documents concerning the aforementioned matters;

but excludes:

- (d) government enterprises organized and operating solely for the purpose of:
 - (i) investing the reserves of the Government of Singapore in foreign markets; or
 - (ii) holding investments referred to in clause (i); and
- (e) Temasek Holdings (Pte) Ltd.

The revenue and total asset thresholds above shall be adjusted for inflation (or deflation) every five years. The Parties may otherwise revise the thresholds by mutual agreement;

2. **covered investment** means, with respect to a Party, an investment in its territory of an investor of the other Party. Covered investments shall include those existing at the date of entry into force of this Agreement as well as those established, acquired, or expanded thereafter;
3. **a delegation** includes a legislative grant, and a government order, directive, or other act, transferring to the monopoly or government enterprise, or authorizing the exercise by the monopoly or government enterprise of, government authority;
4. **designate** means to establish, designate, or authorize a monopoly, or to expand the scope of a monopoly, to cover an additional good or service, whether formally or in effect;
5. **effective influence** exists where the government and its government enterprises, alone or in combination:
 - (a) own more than 50 percent of the voting rights of an entity; or
 - (b) have the ability to exercise substantial influence over the composition of the board of directors or any other managing body of an entity, to determine the outcome of decisions on the strategic, financial, or operating policies or plans of an entity, or otherwise to exercise substantial influence over the management or operation of an entity. Where the government and its government enterprises, alone or in combination, own 50 percent or less, but more than 20 percent, of the voting securities of the entity and own the largest block of voting rights of such entity, there is a rebuttable presumption that effective influence exists. Annex 12A provides an illustration of how the analysis of effective influence should proceed;
6. **government enterprise** means:
 - (a) for the United States, an enterprise owned, or controlled through ownership interests, by that Party; and
 - (b) for Singapore, an enterprise in which that Party has effective influence;

7. **government monopoly** means a monopoly that is owned, or controlled through ownership interests, by the national government of a Party or by another such monopoly;
8. **in accordance with commercial considerations** means consistent with normal business practices of privately-held enterprises in the relevant business or industry;
9. **market** means the geographical and commercial market for a good or service;
10. **monopoly** means an entity, including a consortium or government agency, that in any relevant market in the territory of a Party is designated as the sole provider or purchaser of a good or service, but does not include an entity that has been granted an exclusive intellectual property right solely by reason of such grant; and
11. **non-discriminatory treatment** means the better of national treatment and most-favored-nation treatment, as set out in the relevant provisions of this Agreement and subject to the terms and conditions set out in the relevant Annexes thereto.