

Preliminary note on financial crisis and trade and investment treaties

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A. Executive summary

North-South free trade agreements (FTAs), bilateral investment treaties (BITs) and World Trade Organization (WTO) commitments often contain a number of provisions that can increase the likelihood of a financial crisis and make it more difficult to take the necessary measures to deal with one once it occurs. This note briefly highlights the main provisions in these agreements that can hamper the effective implementation of recommendations to deal with the current crisis.

In particular, it examines the effect of these provisions on the ability to effectively:

- Regulate the operation of financial institutions/instruments
- Regulate capital flows
- Carry out bailouts
- Implement stimulus packages

It finds that a variety of chapters in these agreements can make it difficult to effectively carry out the measures above. Whilst most barriers are likely to come from the services and investment chapters, the competition, goods and government procurement chapters in North-South FTAs can also have an effect.

B. Introduction

North-South free trade agreements (FTAs), bilateral investment treaties (BITs) and World Trade Organization (WTO) commitments often contain a number of provisions that can increase the likelihood of a financial crisis¹ and make it more difficult to take the necessary measures to deal with one once it occurs. This note briefly highlights the main provisions in these agreements that can hamper the effective implementation of recommendations to deal with the current crisis. However, more detailed examination of this interaction is required.

There are thousands of BITs² and as of October 2003, all 146 WTO Members, with the exception of Mongolia, were participating in or are actively negotiating FTAs³ (although not all of these are North-South FTAs).

Of course these provisions are particularly onerous for the more than 30 countries, including least developed countries, who are not yet members of the World Trade Organization (WTO). As they are not subject to WTO disciplines yet,⁴ these countries can still impose local content requirements on investors, not have to pay royalties for intellectual property use and impose restrictions on international transfers and payments for current transactions relating to services etc.

The provisions listed below are not always absolute prohibitions, (for example exceptions may be allowed on a negative list basis, i.e. all exceptions for all time must be listed at the time of negotiating the treaty), however for the sake of brevity and simplicity, they have been listed in summary form below. Furthermore, while there are often some slight prudential or other safeguards, these are generally not strong enough or long enough to be sufficient in a financial crisis and often require the situation to be severe before they can be used (and even then compensation may be required).

¹ Given the limited space, these have only been briefly listed in Annex 1.

² See for example <http://www.unctad.org/Templates/Webflyer.asp?intItemID=1397&docID=10129>.

³ The changing landscape of RTAs, Regional Trade Agreements Section, Trade Policies Review Division, WTO Secretariat, prepared for the, SEMINAR ON, REGIONAL TRADE AGREEMENTS AND THE WTO, WTO Secretariat, Geneva, 14 November 2003

⁴ Subject to their obligations under other international treaties or international financial institution requirements.

Failure to comply with the provision of an FTA, BIT or WTO commitment can result in serious economic consequences, see 'enforcement' below until it complies.

Amendments to an FTA or BIT usually require the consent of both parties.

Withdrawal from an FTA or BIT is usually possible with some notice in writing (often six months). However, the protection available under the BIT often continues for an additional period (often 10 years) even after withdrawal from the treaty.

Given the variation in wording between each treaty and that these are the legal documents, the exact restrictions on each country cannot be known without careful study of the relevant treaty by lawyers, economists and finance experts.

Given the limited time, this note does not examine the flow on effects of the financial crisis on the real economy and how these can be exacerbated and made more difficult to deal with by the FTA/BIT. For example, if as a result of the crisis:

- the country lacks foreign exchange, then increased imports due to an FTA can exacerbate this. The FTA's restrictions on the ability to raise tariffs in the event of this kind of problem makes it more difficult for a developing country to deal with the situation.
- the country needs to nationalize some services such as banking, this can require compensation if the sector has been liberalised at the WTO or under an FTA/BIT.
- there is an increase in unemployment and so the government wants to:
 - Increase processing/value-added industries to boost employment. This cannot be achieved by restrictions on exports of raw materials according to European Union FTAs.
 - Encourage the startup of small and medium enterprises by increasing the provision of credit to them, this can be more difficult according to past experience if the banking sector is dominated by foreign banks due to services and investment liberalisation.
 - Reduce the cost of access to medicines, this can be prevented by stronger intellectual property protection in an FTA/BIT.

C. How FTAs/BITs/WTO can hamper the possible measures needed for recovery from this financial crisis

The provisions in the table below are only those that are likely to have a directly relevant effect. Of course there may be indirect effects from a number of FTA provisions.

Many of the investor protections can apply to existing investments in the country.

If the definition of 'investor' is loose, in practice investors from almost any country can obtain the protection of this treaty.

1. Regulation of capital controls

If this Commission wishes to recommend the regulation of capital flows at the national, regional or international level this may be difficult for a number of countries to currently implement due to their FTA/BIT obligations.

1. Free movement of capital/transfers

North-South FTAs and BITs often have provisions requiring all transfers relating to the investment from the other party⁵ to be allowed without delay into and out of its territory. These transfers include: contributions to capital, profits, dividends, capital gains, interest, loan repayments etc. This would prevent regulation of capital flows and the imposition of capital controls unless there are safeguards that are strong enough, broad enough and long enough.

⁵ This can also include investments from other countries if 'investor' is not defined carefully, see above.

1. Enforcement

If the host government does not comply with its obligations above, there are usually a number of ways it can be sued.

- Firstly, it can often be sued by the investor directly at an international tribunal (known as ‘investor-to-state dispute settlement’). If the host government loses and does not comply with the tribunal’s award,
 - in an FTA it can usually be enforced by a state-to-state dispute settlement at an international tribunal which ultimately allows the imposition of tariffs on the host government’s exports.
 - In a BIT it can often be enforced by seizing the host government’s assets in the home government’s country.⁶
- Secondly, (this can be an alternative to or in addition to investor-to-state dispute settlement), the home government can sue the host government at an international tribunal for failure to comply with the obligations of the treaty. If this is part of an FTA, the tribunal’s decision can usually be enforced by raising tariffs on the losing party’s exports.
- Thirdly, some treaties such as the European Union-Uzbekistan Partnership and Cooperation Agreement⁷ allow for immediate retaliation by raising tariffs on exports for perceived failure to comply with the treaty (which includes requirements for free movement of capital) without needing to resort to dispute settlement first.

2. Liberalisation of financial services and investment

At the heart of most North-South FTAs and BITs are strong chapters or provisions leading to liberalisation of financial services and deregulating the entry and operations of financial institutions and instruments. This facilitates the flows of speculative money and instruments via various mechanisms.

Firstly, BITs and the services/financial services/investment chapter facilitates the entry of foreign financial institutions and instruments to differing degrees.

1. The strongest degree is providing market access (via modes one, two or three) without exceptions.
2. The next most drastic is providing market access on a negative list basis. This has been common in U.S. FTAs. This means that everything is liberalized unless the countries list the exceptions to market access at the time of signing the FTA. This list of exceptions usually cannot be added to without agreement of the other country and perhaps compensation. This has two particular problems in the context of the current crisis:
 - a. At the time of listing exceptions, the government may not know that these financial instruments exist and can be dangerous.
 - b. Even if the government is aware of all current financial instruments, because the list of exceptions is decided once and for all at the time of signing the FTA, the government cannot list as an exception financial instruments that come into existence in the future.
 - c. There are also difficulties with safe services liberalisation even in non-crisis times because for example:
 - i. There are multiple, conflicting, complicated services classification systems which was one of the causes for the U.S. mistake in the Antigua gambling case, see below.
 - ii. Services are notoriously difficult to measure. Even developed countries and the United Nations Conference on Trade and Development have had difficulty in

⁶ http://www.unctad.org/en/docs/iteiit4v6n3_en.pdf.

⁷ Article 95.2.

measuring them. Without accurate data, it is difficult for developing countries to know what they can safely liberalise, even when it is not a time of financial crisis.

3. The third level is providing market access on a positive list basis. This means that market access is only provided to financial institutions and their instruments if it is listed for liberalisation. However, even this has proved problematic to do accurately, even for developed countries, as the United States-Antigua case at the WTO showed.⁸ So even this method has a number of problems:
 - a. As under the negative list system above, the positive list liberalisation is done at the time of signing the treaty and amendments usually require the consent of the other party and/or compensation. For many of the trade agreements that were signed prior to the current crisis, positive list liberalisation commitments in financial services that may have seemed safe at the time, may no longer be seen the same way. See below for recommendations.
 - b. There are multiple, conflicting, complicated services classification systems which was one of the causes for the U.S. mistake in the Antigua gambling case.
 - c. Services are notoriously difficult to measure. Even developed countries and the United Nations Conference on Trade and Development have had difficulty in measuring them. Without accurate data, it is difficult for developing countries to know what they can safely liberalise, even when it is not a time of financial crisis.

Secondly, some free trade agreements such as the CARIFORUM-EU economic partnership agreement actively require market access for **new financial services**.⁹ If the developing country has committed to liberalise a particular financial service and its law allows its own financial service supplier to provide a financial service, then it must also allow the other party's financial institutions to provide that new service. For example, if Jamaica allows Jamaican hedge funds and it agrees to liberalise that sector, it must also allow the much larger European hedge funds to operate in Jamaica which have greater potential to disrupt the Jamaican economy. ('Financial Service' is defined very broadly to include insurance and insurance related services (including reinsurance) and banking and other financial services (which includes trading of: money market instruments, foreign exchange, derivatives, exchange rate instruments including swaps; issuance of securities, asset management and settlement and clearing for financial assets including securities, derivative products and other negotiable instruments).

Failure to comply with these obligations in a treaty can be enforced by the methods described in 'enforcement' above.

3. WTO:

1. *Financial services negotiations in the Doha Round*

The current Doha Round includes plurilateral-type services sectoral negotiations which includes financial services. In the financial services group, developed countries and their financial institutions are pressing a group of developing countries to open up their financial services markets, i.e. by allowing the establishment of foreign financial institutions (Mode 3), and by allowing freedom of cross-border financial flows, instruments and services (Modes 1 and 2).

If the negotiations conclude along the proposed lines, the developing countries would have to be subjected to the type of financial liberalisation that makes them more susceptible to financial vulnerability.

It would also mean that countries that may wish to abide by proposed policies (eg by this Commission) to regulate financial flows and institutions and instruments may be violating their new WTO commitments.

⁸ The United States insisted that it did not make market access commitments for internet gambling. The WTO's Dispute Settlement Panel and Appellate Body rejected this and found that it had made commitments. The United States had to withdraw its gambling commitment from GATS and provide compensation.

⁹ It is likely that the EU has been asking other countries to also agree to this.

2. Existing commitments

Some developing countries have made Uruguay Round and post Uruguay Round commitments in financial services in the WTO and also in the WTO accession process. Some have made additional provisional offers in the Doha Round.

3. Enforcement

WTO commitments are enforced via state-to-state dispute settlement at an international tribunal. If the losing party fails to comply with the tribunal's decision, the complaining party can ultimately impose tariffs on the losing party's exports until it complies.

Further information on the likely impact of current WTO commitments and those being negotiated in the Doha Round on the ability to effectively implement measures to deal with the current crisis can be found at

http://www.policyalternatives.ca/documents/National_Office_Pubs/2008/Financial_Instability_and_GATS.pdf.

2. Bailouts

1. National treatment requirements

If a government wants to be able to bail out its companies that are in trouble due to the current crisis, provisions commonly found in FTAs or BITs would require that it also help foreign companies in their country. This is because of national treatment provisions which require investors from the other party to be treated the same as domestic investors. For developing countries with limited budgets, having to bail out large foreign companies will restrict the amount they have left to assist local companies.

Failure to comply with such a national treatment requirement in a treaty can be enforced by the methods described in 'enforcement' above.

2. Aid to state enterprises

The extent to which aid can be provided to state enterprises is also often limited in North-South FTAs. For example, the CARIFORUM-EU EPA stipulates that with respect to public enterprises and enterprises to which special or exclusive rights have been granted, the Parties must ensure that there is no measure distorting trade in goods or services between the Parties to an extent contrary to the Parties interest. This may mean that once a bank or automaker has been bailed out and becomes a state enterprise, then the government can no longer assist it any more. This would mean that bailouts have to be once and for all if they involve turning it into a state enterprise as defined in the FTA. It appears to be difficult for even industrialized countries to know how much and how often they will need to bail out a given enterprise, given the swiftly changing and unpredictable nature of the current crisis. So this is likely to be even more difficult for developing countries to predict.

Failure to comply with the FTA's restrictions on aid to state enterprises in a treaty can be enforced by the methods described in 'enforcement' above (except that the investor-to-state dispute settlement is unlikely to be available).

3. Stimulus packages

Depending on the content of the stimulus package, there are a number of provisions commonly found in FTAs/BITs which could reduce its ability to achieve its desired objectives.

1. Less government revenue available

If the FTA involves a WTO member, in order for it to be an allowed exception to the most-favoured-nation treatment requirement of the WTO, substantially all trade in goods must be liberalised in the FTA.¹⁰ There is no agreement at the WTO as to what constitutes 'substantially all trade'. However, the European Union has interpreted it as requiring 80% to 90% of tariffs to be removed. USFTAs

¹⁰ This is a requirement of Article XXIV of the General Agreement on Tariffs and Trade (GATT).

often require the developing country to remove all of its tariffs on U.S. products. Given such broad liberalisation interpretations under the current WTO provision, this can mean substantial loss of tariff revenue for developing country governments.

Many developing countries are heavily reliant on tariffs for government revenue as it is the easiest tax to collect. For example, Kiribati and Vanuatu raise over 80% of their revenue from tariffs.¹¹ Generally, International Monetary Fund economists note that middle income countries are only likely to recover 45-60% of lost tariff revenue from other taxation sources and low-income countries are at best likely to recover 30% or less of lost tariff revenue from other taxation sources.¹² They note that a value-added tax is not proven to make up for the lost revenue from lowering tariffs.

For example, according to the Minister of Commerce of Senegal, 'the removal of tariffs would lead to a drop by 7-10% of governmental revenue and those losses can rise even higher, for as far as 15-20% in the case of some African countries.'¹³

Given this, an FTA which involves such substantial loss of government revenue is likely to, all else being equal, mean that there is less government revenue available for stimulus packages and much-needed social safety nets.

Furthermore, recessions can also mean that government revenue falls and so there is less available for social safety nets and stimulus packages.

Failure to comply with the tariff reductions required by the FTA can lead to the retaliation outlined under 'enforcement' above (except that the investor-to-state dispute settlement is unlikely to be available).

2. National treatment requirements

As explained above, FTAs and BITs often have national treatment provisions which require investors from the other party to be treated the same as domestic investors. This may also include the treatment provided to local companies in stimulus packages. For developing countries with limited budgets, having to provide the same stimulus to large foreign companies will restrict the amount they have left to assist local companies.

Failure to comply with such a national treatment requirement in a treaty can be enforced by the methods described in 'enforcement' above.

3. Government procurement

A number of North-South FTAs require national treatment in government procurement.¹⁴ This can mean that procurement of goods or services by national or regional/state governments or state enterprises must also be opened to companies from the other party to the FTA. Companies from industrialised countries generally have more supply capacity than those from developing countries. This is one reason why developing countries have traditionally resisted the inclusion of government procurement at the WTO and very few developing countries have joined the optional government procurement agreement at the WTO.

¹¹ http://www.adb.org/Documents/Books/Pursuing_Economic_Reform_Pacific/default.asp#contents. South Asia depends on tariffs for 37% of its government revenue (The WTO negotiations on non agricultural market access: a development perspective, Martin Khor and Goh Chien Yen, Third World Network, 2006) and customs duties accounted for more than 50% of U.S. government revenue when it was developing in the 1870s (Interpreting the tariff growth correlation of the late 19th century, Douglas Irwin, NBER working paper 8739, 2002).

¹² 'Tax Revenue and (or?) Trade Liberalization', Baunsgaard and Keen, June 2005, IMF Working Paper, WP/05/112.

¹³ Mamadou Diop, High-Level Conference, on EU-ACP Trade Relations, South Centre, Brussels, 12 October, 2006.

¹⁴ This is usually in the government procurement chapter, but in the CARIFORUM-EU EPA it was also in the competition chapter.

It may be argued that a North-South FTA gives developing country companies access to the government procurement of the industrialized country, but in reality there appears to be little or no effective market access for developing country companies due to other barriers. For example, according to U.S. government statistics:¹⁵

- 94% of U.S. procurement goes to companies based in the U.S.
- Chile and Australia did not see significant increases in their access to the U.S. government procurement market after signing USFTAs which opened the government procurement of both countries.¹⁶

Having to allow foreign companies to tender for government procurement increases leakage and makes stimulus packages less effective domestically. This is particularly problematic for developing countries which have more limited budgets.

Failure to comply with the government procurement obligations in the FTA can lead to the retaliation outlined under 'enforcement' above (except that the investor-to-state dispute settlement is unlikely to be available).

4. Aid to state enterprises

The extent to which aid can be provided to state enterprises is also often limited in North-South FTAs. For example, the CARIFORUM-EU EPA stipulates that with respect to public enterprises and enterprises to which special or exclusive rights have been granted, the Parties must ensure that there is no measure distorting trade in goods or services between the Parties to an extent contrary to the Parties interest.

Failure to comply with the FTA's restrictions on aid to state enterprises in a treaty can be enforced by the methods described in 'enforcement' above (except that the investor-to-state dispute settlement is unlikely to be available).

4. Regulation of operation of financial institutions/instruments

1. Expropriation

'Investment' is usually broadly defined in free trade agreements or bilateral investment treaties. It often includes any property whether it is tangible or intangible (eg a patent) and any related property rights (eg a mortgage) as long as it has the characteristics of an investment (eg commitment of capital, expectation of gain/profit or assumption of risk). It often explicitly includes shares, bonds, debentures, loans, contract rights, debt, concessions, licences, profits, capital gains, royalties, interest, fees, dividends, market share, profits etc.

There is often also an expropriation provision which provides to differing degrees that the government must provide compensation if it does anything which reduces the value of the investment, broadly defined. It could be interpreted therefore that many types of government regulation which reduce the profit of an investment by a company of the other country would amount to expropriation and so require the host government to pay compensation to the investor.

This compensation is usually the fair market value before the expropriation took place or was known about, is fully realizable and freely transferable and includes interest at a commercially reasonable rate.

Failure to comply with expropriation requirements in a treaty can be enforced by the methods described in 'enforcement' above.

¹⁵ <https://www.fpds.gov/>.

¹⁶ Chile had access to worth of U.S. government contracts in the year before its USFTA began. Two years after its USFTA started, it accessed US\$233,570 worth of U.S. government contracts. In the year before Australia's USFTA began, it accessed US\$10,311,944 worth of U.S. government contracts. In the first year of its USFTA, it won U.S. government contracts of US\$34,095,229.

2. WTO:

1. *Current Doha negotiations*

The current Doha Round includes plurilateral-type services sectoral negotiations which includes financial services. In the financial services group, developed countries and their financial institutions are pressing a group of developing countries to open up their financial services markets, i.e. by allowing the establishment of foreign financial institutions (Mode 3), and by allowing freedom of cross-border financial flows, instruments and services (Modes 1 and 2).

If the negotiations conclude along the proposed lines, the developing countries would have to be subjected to the type of financial liberalisation that makes them more susceptible to financial vulnerability.

It would also mean that countries that may wish to abide by proposed policies (eg by this Commission) to regulate financial flows and institutions and instruments may be violating their new WTO commitments.

2. *Existing commitments*

Some developing countries have made Uruguay Round and post Uruguay Round commitments in financial services in the WTO and also in the WTO accession process. Some have made additional provisional offers in the Doha Round.

3. *Enforcement*

WTO commitments are enforced via state-to-state dispute settlement at an international tribunal. If the losing party fails to comply with the tribunal's decision, the complaining party can ultimately impose tariffs on the losing party's exports until it complies.

Further information on the likely impact of current WTO commitments and those being negotiated in the Doha Round on the ability to effectively implement measures to deal with the current crisis can be found at

http://www.policyalternatives.ca/documents/National_Office_Pubs/2008/Financial_Instability_and_GATS.pdf.

D. Recommendations

There should be a blanket review of relevant **existing** FTAs, BITs and WTO provisions to see which provisions of these rules are now inappropriate given the new understanding we now have on financial liberalisation. In such a review, recommendations should be made to adjust these existing agreements to make them in line with the new understanding and realities.

During this review process, the implementation of the parts of the **existing** FTAs that are linked to the new understanding about the downside of financial liberalisation should be suspended until the review and possible revisions are completed.

All current FTA **negotiations** including economic partnership agreements (EPAs) should be frozen until a review is completed about their appropriateness in light of the current crisis conditions.

With respect to the WTO, our suggestion is that the financial services plurilateral **negotiations** at the WTO be discontinued for the duration of the Doha Round.

Furthermore, reviews should be made as to the appropriateness of **existing** financial services commitments and offers by developing countries at the WTO, since they were made when the knowledge and awareness of the nature of financial markets was inadequate, and with the new understanding of these markets, they should be allowed to revise their commitments and offers without compensation. Developed countries wishing to revise their commitments should have to provide compensation though

Given the constraints imposed by Article XXIV of the WTO’s General Agreement on Tariffs and Trade (GATT) dealing with regional trade agreements, this may also need to be reviewed in order to ensure developing country governments have sufficient tariff revenue to pay for stimulus and bail-out packages and social safety nets.

This Commission should list the barriers in trade and investment agreements to implementation of each of their recommendations and then recommend the elimination of these barriers (for example by reviewing and amending the relevant trade/investment agreement) in order for the Commission’s recommendations to be effective.

E. Annex 1: How FTAs/BITs can contribute to causing financial crises in developing countries

The provisions in the table below are only examples of those that are likely to have a directly relevant effect. Of course there may be indirect effects from a number of FTA provisions.

Many of the investor protections can also apply to existing investments in the country.

Furthermore, if the definition of ‘investor’ is loose, in practice, investors from almost any country can obtain the protection of the treaty.

FTA/ BIT provision	Increased goods liberalisation	Pre-establishment investment rights*	Prevent regulation and control of capital flows*	Increased services liberalisation*	Increased financial services liberalisation*	Stronger intellectual property protection
Likely effect if agreed to	Increased trade deficit	Increased inflow of hot money	Increased inflow and outflow of capital. In combination with increased inflows of investment, increased repatriation of profits	Increased current account deficit	If new financial services must be allowed, increased exposure to new financial instruments and the unpredictability and increased potential for large scale disruption they bring	Increased current account deficit as more royalties have to be paid overseas

* = also present in BITs

F. Annex 2: Sample provisions

1. National treatment

Central America-Dominican Republic-United States Free Trade Agreement:

‘Article 10.3: National Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable 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 territory.

2. Each Party shall accord to covered investments treatment no less favorable 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.

3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that regional level of government to investors, and to investments of investors, of the Party of which it forms a part.'

2. New financial services

CARIFORUM- European Union Economic Partnership Agreement

'Article 106: New financial services'¹⁷

The EC Party and the Signatory CARIFORUM States shall permit a financial service supplier of the other Party to provide any new financial service of a type similar to those services that the EC Party and the Signatory CARIFORUM States permit their own financial service suppliers to provide under their domestic law in like circumstances. The EC Party and the Signatory CARIFORUM States may determine the juridical form through which the service may be provided and may require authorisation for the provision of the service. Where such authorisation is required, a decision shall be made within a reasonable time and the authorisation may only be refused for prudential reasons.'

3. Expropriation

Georgia-US BIT

'ARTICLE III

1. Neither Party shall expropriate or nationalize a covered investment either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II (3).

2. Compensation shall be paid without delay; be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken ("the date of expropriation"); and be fully realizable and freely transferable. The fair market value shall not reflect any change in value occurring because the expropriatory action had become known before the date of expropriation.

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:

(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.'

4. Free movement of capital

Japan-Malaysia Economic Partnership Agreement

'Article 83: Transfers

¹⁷ This Article applies only to financial services activities covered by Article 103 and liberalised according to this Title.

1. Each Country shall allow all transfers to be made into and out of that Country freely and without delay in any freely usable currency. Such transfers shall include:
 - (a) the initial capital and additional amounts to maintain or increase investments;
 - (b) profits, capital gains, dividends, royalties, interest, fees and other current incomes accruing from investments of the investors of the other Country;
 - (c) proceeds from the total or partial sale or liquidation of investments of investors of the other Country;
 - (d) payments made under a contract including loan payments in connection with investments;
 - (e) earnings, remuneration and other compensation of personnel from the other Country who work in connection with investments in the former Country;
 - (f) payments made in accordance with Articles 81 and 82; and
 - (g) payments arising out of the settlement of a dispute under Article 85.
2. Each Country shall allow transfers referred to in paragraph 1 of this Article to be made in a freely usable currency at the market rate of exchange prevailing on the date of the transfer.
3. Subject to paragraphs 1 and 2 of this Article, each Country shall accord to the transfer referred to in paragraph 1 of this Article treatment no less favourable than that accorded to the transfer originating from investments made by investors of any third State.
4. Notwithstanding paragraphs 1 and 2 of this Article, a Country may delay or prevent a transfer referred to in paragraph 1 of this Article 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;
 - (c) criminal or penal offences;
 - (d) ensuring compliance with orders or judgments in adjudicatory proceedings; or
 - (e) obligations of investors arising from social security and public retirement plans.’