

CHAPTER 13

STATE-OWNED ENTERPRISES, ENTERPRISES GRANTED SPECIAL RIGHTS OR PRIVILEGES AND DESIGNATED MONOPOLIES

ARTICLE 13.1

Definitions

For the purposes of this Chapter:

- (a) 'Arrangement' means the Arrangement on Officially Supported Export Credits, developed within the framework of the Organisation for Economic Co-operation and Development (hereinafter referred to as 'OECD') or a successor undertaking, whether developed within or outside of the OECD framework, that has been adopted by at least 12 original WTO Members that were Participants to the Arrangement as of 1 January 1979;
- (b) 'commercial activities' means activities which an enterprise undertakes with an orientation towards profit-making ⁽¹⁾ and which result in the production of a good or the supply of a service, which will be sold to a consumer in the relevant market in quantities and at prices determined by the enterprise;
- (c) 'commercial considerations' means considerations of price, quality, availability, marketability, transportation and other terms and conditions of purchase or sale, or other factors that would normally be taken into account in the commercial decisions of a privately owned enterprise operating according to market economy principles in the relevant business or industry;
- (d) 'designate a monopoly' means to establish or authorise a monopoly, or to expand the scope of a monopoly to cover an additional good or service;
- (e) 'designated monopoly' means an entity, including a consortium or a government agency, that in a relevant market in the territory of a Party is designated as the sole supplier 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;
- (f) 'enterprise granted special rights or privileges' means an enterprise, public or private, including its subsidiaries, to which a Party has granted special rights or privileges; special rights or privileges are granted by a Party where it designates a limited number of enterprises authorised to supply a good or service, other than according to objective, proportional and non-discriminatory criteria, substantially affecting the ability of any other enterprise to supply the same good or service in the same geographical area under substantially equivalent conditions;
- (g) 'service supplied in the exercise of governmental authority' means a service supplied in the exercise of governmental authority as defined in GATS and, if applicable, in the Annex on Financial Services to GATS; and
- (h) 'state-owned enterprise' means an enterprise that is engaged in commercial activities in which a Party:
 - (i) directly owns more than 50 per cent of the share capital;
 - (ii) controls, directly or indirectly through ownership interests, the exercise of more than 50 per cent of the voting rights;
 - (iii) holds the power to appoint a majority of members of the board of directors or any other equivalent management body; or
 - (iv) has the power to legally direct the actions of the enterprise or otherwise exercises an equivalent degree of control in accordance with its laws and regulations.

ARTICLE 13.2

Scope

1. This Chapter applies to state-owned enterprises, enterprises granted special rights or privileges and designated monopolies, engaged in commercial activities. Where they engage both in commercial and non-commercial activities, only the commercial activities are covered by this Chapter.

⁽¹⁾ For greater certainty, activities undertaken by an enterprise which operates on a non-profit basis or a cost-recovery basis are not activities undertaken with an orientation towards profit-making.

2. This Chapter applies to state-owned enterprises, enterprises granted special rights or privileges and designated monopolies at all levels of government.
3. This Chapter does not apply to situations where state-owned enterprises, enterprises granted special rights or privileges or designated monopolies act as procuring entities covered either under each Party's annexes to Appendix I to the GPA or under Part 2 of Annex 10 conducting procurement for governmental purposes and not with a view to commercial resale or with a view to use in the production of a good or in the supply of a service for commercial sale.
4. This Chapter does not apply to any service supplied in the exercise of governmental authority.
5. This Chapter does not apply to a state-owned enterprise, an enterprise granted special rights or privileges or a designated monopoly, if in any one of the three previous consecutive fiscal years the annual revenue derived from the commercial activities of the enterprise or monopoly concerned was less than 200 million SDR.
6. Article 13.5 does not apply with respect to the supply of financial services by a state-owned enterprise pursuant to a government mandate, if that supply of financial services:
 - (a) supports exports or imports, provided that those services are:
 - (i) not intended to displace commercial financing; or
 - (ii) offered on terms no more favourable than those that could be obtained for comparable financial services in the commercial market;
 - (b) supports private investment outside the territory of the Party, provided that these services are:
 - (i) not intended to displace commercial financing; or
 - (ii) offered on terms no more favourable than those that could be obtained for comparable financial services in the commercial market; or
 - (c) is offered on terms consistent with the Arrangement, provided that it falls within the scope of the Arrangement.
7. Article 13.5 does not apply to the sectors set out in paragraph 2 of Article 8.6.
8. Article 13.5 does not apply to the extent that a state-owned enterprise, an enterprise granted special rights or privileges or a designate monopoly of a Party makes purchases and sales of a good or a service pursuant to:
 - (a) any existing non-conforming measure in accordance with paragraph 1 of Article 8.12 and paragraph 1 of Article 8.18 that the Party maintains, continues, renews, amends or modifies as set out in its Schedule in Annex I to Annex 8-B; or
 - (b) any non-conforming measure by a Party in accordance with paragraph 2 of Article 8.12 and paragraph 2 of Article 8.18 with respect to sectors, subsectors, or activities as set out in its Schedule in Annex II to Annex 8-B.

ARTICLE 13.3

Relation to the WTO Agreement

The Parties affirm their rights and obligations under paragraphs 1 to 3 of Article XVII of GATT 1994, the Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994, as well as under paragraphs 1, 2 and 5 of Article VIII of GATS.

ARTICLE 13.4

General provisions

1. Without prejudice to the rights and obligations of each Party under this Chapter, nothing in this Chapter prevents a Party from establishing or maintaining a state-owned enterprise, granting an enterprise special rights or privileges or designating a monopoly.
2. Neither Party shall require or encourage a state-owned enterprise, an enterprise granted special rights or privileges or a designated monopoly to act in a manner inconsistent with this Chapter.

ARTICLE 13.5

Non-discriminatory treatment and commercial considerations

1. Each Party shall ensure that each of its state-owned enterprises, enterprises granted special rights or privileges and designated monopolies, when engaging in commercial activities:
 - (a) acts in accordance with commercial considerations in its purchase or sale of a good or service, except to fulfil any terms of its public service mandate that are not inconsistent with subparagraph (b) or (c);
 - (b) in its purchase of a good or service:
 - (i) accords to a good or service supplied by an enterprise of the other Party treatment no less favourable than it accords to a like good or a like service supplied by enterprises of the Party; and
 - (ii) accords to a good or service supplied by a covered enterprise as defined in subparagraph (c) of Article 8.2 treatment no less favourable than it accords to a like good or a like service supplied by enterprises of entrepreneurs of the Party in the relevant market in the Party; and
 - (c) in its sale of a good or service:
 - (i) accords to an enterprise of the other Party treatment no less favourable than it accords to enterprises of the Party; and
 - (ii) accords to a covered enterprise as defined in subparagraph (c) of Article 8.2 treatment no less favourable than it accords to enterprises of entrepreneurs of the Party in the relevant market in the Party. ⁽¹⁾
2. Subparagraphs 1(b) and (c) do not preclude a state-owned enterprise, an enterprise granted special rights or privileges or a designated monopoly from:
 - (a) purchasing or selling goods or services on different terms or conditions, including those relating to price, provided that such different terms or conditions are made in accordance with commercial considerations; or
 - (b) refusing to purchase or sell goods or services, provided that such refusal is made in accordance with commercial considerations.

ARTICLE 13.6

Regulatory framework

1. The Parties respect and make best use of relevant international standards including, *inter alia*, the OECD Guidelines on Corporate Governance of State-Owned Enterprises.
2. Each Party shall ensure that any regulatory body or any other body exercising a regulatory function that the Party establishes or maintains is independent from, and not accountable to, any of the enterprises regulated by that body, and acts impartially ⁽²⁾ in like circumstances with respect to all enterprises regulated by that body, including state-owned enterprises, enterprises granted special rights or privileges and designated monopolies. ⁽³⁾
3. Each Party shall apply its laws and regulations to state-owned enterprises, enterprises granted special rights or privileges and designated monopolies in a consistent and non-discriminatory manner.

⁽¹⁾ For greater certainty, this paragraph shall not apply with respect to the purchase or sale of shares, stock or other forms of equity by a state-owned enterprise, an enterprise granted special rights or privileges or a designated monopoly as a means of its equity participation in another enterprise.

⁽²⁾ For greater certainty, the impartiality with which the body exercises its regulatory functions is to be assessed by reference to a general pattern or practice of that body.

⁽³⁾ For greater certainty, for those sectors in which the Parties have agreed to specific obligations relating to such a body in Chapter 8, the relevant provisions of Chapter 8 shall prevail.

ARTICLE 13.7

Information exchange

1. A Party which has reason to believe that its interests under this Chapter are being adversely affected by the commercial activities of a state-owned enterprise, an enterprise granted special rights or privileges or a designated monopoly (hereinafter referred to in this Article as 'the entity') of the other Party may request the other Party in writing to provide information on the commercial activities of the entity related to the carrying out of the provisions of this Chapter in accordance with paragraph 2.
2. The requested Party shall provide the following information, provided that the request includes an explanation of how the activities of the entity may be affecting the interests of the requesting Party under this Chapter and indicates which of the following information shall be provided:
 - (a) the organisational structure of the entity and its composition of the board of directors or of any other equivalent management body;
 - (b) the percentage of shares that the requested Party, its state-owned enterprises, enterprises granted special rights or privileges or designated monopolies cumulatively own, and the percentage of voting rights that they cumulatively hold, in the entity;
 - (c) a description of any special shares or special voting or other rights that the requested Party, its state-owned enterprises, enterprises granted special rights or privileges or designated monopolies hold, where such rights are different from those attached to the general common shares of the entity;
 - (d) a description of the government departments or public bodies which regulate the entity, a description of the reporting requirements imposed on it by those departments or public bodies, and the rights and practices, where possible, of those departments or public bodies with respect to the appointment, dismissal or remuneration of senior executives and members of its board of directors or any other equivalent management body;
 - (e) annual revenue and total assets of the entity over the most recent three-year period for which information is available;
 - (f) any exemptions, immunities and related measures from which the entity benefits under the laws and regulations of the requested Party; and
 - (g) any additional information regarding the entity that is publicly available, including annual financial reports and third party audits.

ARTICLE 13.8

General exceptions

For the purposes of this Chapter, Article XX of GATT 1994 and Article XIV of GATS are hereby incorporated into and made part of this Agreement, *mutatis mutandis*.

CHAPTER 14

INTELLECTUAL PROPERTY

SECTION A

General provisions

ARTICLE 14.1

Initial provisions

1. In order to facilitate the production and commercialisation of innovative and creative products and the provision of services between the Parties and to increase the benefits from trade and investment, the Parties shall grant and ensure adequate, effective and non-discriminatory protection of intellectual property and provide for measures for the enforcement of intellectual property rights against infringement thereof, including counterfeiting and piracy, in accordance with the provisions of this Chapter and of the international agreements to which both Parties are party.