

- (e) carrying out other functions which may be delegated by the Joint Committee pursuant to Article 165. Such functions may include reporting to the Joint Committee on options for possible modifications or additions to this Chapter.

Article 118 Dispute Settlement

1. Notwithstanding the provisions of Article 152, a Party may not request consultations with the other Party regarding refusal to grant entry and temporary stay under this Chapter unless:

- (a) the matter involves a pattern of practice; and
- (b) the nationals concerned have exhausted the administrative remedies, where available, regarding the particular matter.

2. The remedies referred to in subparagraph 1(b) above shall be deemed to be exhausted if a final determination in the matter has not been issued by the competent authority of a Party within one year after the date of the institution of an administrative remedy, and the failure to issue a determination is not attributable to delay caused by the nationals concerned.

Chapter 11 Government Procurement

Article 119 Scope and Coverage

1. This Chapter shall apply to any measures adopted or maintained by a Party relating to government procurement:

- (a) by entities specified in Annex 11;
- (b) of goods specified in Annex 12, services specified in Annex 13, or construction services specified in Annex 14; and
- (c) where the value of the contracts to be awarded is estimated to be not less than the thresholds specified in Annex 15 at the time of publication of an invitation to participate for procurement.

2. Paragraph 1 above is subject to the General Notes set out in Annex 16.

3. This Chapter shall apply to government procurement by any contractual means, including through such methods as purchase or as lease, rental or hire purchase, with or without an option to buy, including any combination of goods and services.

4. Subject to paragraph 5 below, where a contract to be awarded by an entity is not covered by this Chapter, this Chapter shall not be construed to cover any good or service component of that contract.

5. Neither Party shall prepare, design or otherwise structure any government procurement contract in order to avoid the obligations of this Chapter.

Article 120 National Treatment

1. With respect to any measures regarding government procurement covered by this Chapter, each Party shall provide immediately and unconditionally to the goods, services and suppliers of the other Party offering goods or services of the other Party, treatment no less favorable than that accorded to domestic goods, services and suppliers.

2. With respect to any measures regarding government procurement covered by this Chapter, each Party shall ensure:

- (a) that its entities shall not treat a locally-established supplier less favorably than another locally-established supplier on the basis of the degree of affiliation to, or ownership by, a person of the other Party; and
- (b) that its entities shall not discriminate against locally-established suppliers on the basis of the country of production of the goods or service being supplied, provided that the country of production is the other Party in accordance with the provisions of Article 121.

3. The provisions of paragraphs 1 and 2 above shall not apply to customs duties and charges of any kind imposed on or in connection with importation, the method of levying such duties and charges, other import regulations and formalities, and measures affecting trade in services other than measures regarding government procurement covered by this Chapter.

Article 121
Rules of Origin

1. A Party shall not apply rules of origin to goods or services imported or supplied for purposes of government procurement covered by this Chapter from the other Party which are different from the rules of origin applied by the former Party in the normal course of trade.

Note: Rules of origin to services applied in the normal course of trade shall be understood in accordance with paragraph (f) "service of another Member" and (g) "service supplier" of Article XXVIII "Definitions" of the GATS.

2. Subject to prior notification and consultation, a Party may deny the benefits of this Chapter to a service supplier of the other Party where the denying Party establishes that the service is being provided by an enterprise that is owned or controlled by persons of a non-Party and that has no substantial business activities in the Area of any Party.

3. A Party may deny to an enterprise of the other Party the benefits of this Chapter if nationals of a non-Party own or control the enterprise and:

- (a) the denying Party does not maintain diplomatic relations with the non-Party; or
- (b) the denying Party adopts or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise.

Article 122
Procurement Procedures and Other Provisions

1. Each Party shall apply the respective rules and procedures set up in accordance with the provisions, as may be amended, specified in Annex 18.

2. Where a Party considers that a modification to rules and procedures of the other Party corresponding to an amendment of the provisions specified in Annex 18 affects access to the other Party's government procurement market considerably, the former Party can request consultations in order to maintain equivalence between the treatments under the rules and procedures of the Parties. If no satisfactory solution can be found, the former Party may have recourse to the dispute settlement procedure under Chapter 15, with a view to maintaining an equivalent level of access to the other Party's government procurement market.

3. The Party concerned shall notify the other Party of any modification to the rules and procedures referred to in paragraph 1 above no later than 30 days prior to the date of entry into force of such modification.

4. If, in tendering procedures, an entity allows tenders to be submitted in several languages, one of those languages shall be English.

5. No entity of either Party shall make it a condition for the qualification of suppliers and for the awarding of a contract that the supplier has previously been awarded one or more contracts by an entity of that Party or that the supplier has prior work experience in the Area of that Party.

Article 123 Offsets

Each Party shall ensure that its entities do not, in the qualification and selection of suppliers, goods or services, in the evaluation of bids or the award of contracts, consider, seek or impose offsets, except as set out in the General Notes of Annex 16. For the purpose of this Article, offsets means conditions considered, sought or imposed by an entity prior to or in the course of its procurement process that encourage local development or improve its Party's balance of payments accounts, by means of requirements of local content, licensing of technology, investment, counter-trade or similar requirements.

Article 124
Provision of Information

1. Each Party shall promptly publish any law, regulation, judicial decision, administrative ruling of general application, and any procedure (including standard contract clauses) regarding government procurement covered by this Chapter, in the appropriate publications listed in Annex 17 and in such a manner as to enable the other Party and suppliers to become acquainted with them.

2. The Party of an unsuccessful tenderer may seek, without prejudice to the provisions under Chapter 15, such additional information on the contract award as may be necessary to ensure that the procurement was made fairly and impartially. To this end, the Party of the procuring entity shall provide information on both the characteristics and relative advantages of the winning tender and the contract price. Normally this latter information may be disclosed by the former Party provided it exercises this right with discretion. In cases where release of this information would prejudice competition in future tenders, this information shall be confidential and not be disclosed except after consultation with and agreement of the latter Party which gave the information to the former Party.

3. Available information concerning procurement by covered entities and their individual contract awards shall be provided, upon request, to the Party requesting the information.

4. Confidential information provided to a Party which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interest of particular enterprises, public or private, or might prejudice fair competition between suppliers shall not be revealed without formal authorization from the other Party.

5. With a view to ensuring effective monitoring of government procurement covered by this Chapter, each Party shall collect statistics and provide to the other Party on a reciprocal basis an annual report which shall contain the following information to the extent that such information is available:

- (a) statistics on the number and total value of contracts above and below the applicable threshold values broken down by entities;

- (b) statistics on the number and total value of contracts above the applicable threshold values, broken down by entities, by categories of goods and services and by the country of origin of the goods and services procured; and
- (c) statistics on the number and total value of contracts awarded under limited tendering procedures, broken down by entities, and by country of origin of the goods and services procured.

Article 125 Challenge Procedures

1. In the event of a complaint by a supplier that there has been a breach of this Chapter in the context of a government procurement, each Party shall encourage the supplier to seek resolution of its complaint in consultation with the procuring entity. In such instances the procuring entity shall accord impartial and timely consideration to any such complaint, in a manner that is not prejudicial to obtaining corrective measures under the challenge system.

2. Each Party shall provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of this Chapter arising in the context of government procurements in which they have, or have had, an interest.

3. Each Party shall provide its challenge procedures in writing and make them generally available.

4. Each Party shall ensure that documentation relating to all aspects of the process concerning government procurements covered by this Chapter shall be retained for 3 years.

5. The interested supplier may be required to initiate a challenge procedure and notify the procuring entity within specified time-limits from the time when the basis of the complaint is known or reasonably should have been known, but in no case within a period of less than 10 days.

6. A Party may require that a challenge procedure be initiated only after the notice of procurement has been published or, where a notice is not published, after tender documentation has been made available. Where a Party imposes such a requirement, the 10 day period described in paragraph 5 above shall begin no earlier than the date that the notice is published or the tender documentation is made available.

7. Challenges shall be heard by an impartial and independent reviewing authority with no interest in the outcome of the government procurement and the members of which are secure from external influence during the term of appointment. A reviewing authority which is not a court shall either be subject to judicial review or shall have procedures which provide that:

- (a) participants can be heard before an opinion is given or a decision is reached;
- (b) participants can be represented and accompanied;
- (c) participants shall have access to all proceedings;
- (d) proceedings can take place in public;
- (e) opinions or decisions are given in writing with a statement describing the basis for the opinions or decisions;
- (f) witnesses can be presented; and
- (g) documents are disclosed to the reviewing authority.

8. Challenge procedures shall provide for:

- (a) rapid interim measures to correct breaches of this Chapter and to preserve commercial opportunities. Such action may result in suspension of the procurement process. However, procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account in deciding whether such measures should be applied. In such circumstances, just cause for not acting shall be provided in writing;
- (b) an assessment and a possibility for a decision on the justification of the challenge; and
- (c) where appropriate, correction of the breach of this Chapter or compensation for the loss or damages suffered, which may be limited to costs for tender preparation or protest.

9. With a view to the preservation of the commercial and other interests involved, the challenge procedure shall normally be completed in a timely fashion.

Article 126
Exceptions

1. Nothing in this Chapter shall be construed to prevent a Party from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes.

2. Provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties where the same conditions prevail, or a disguised restriction on trade between the Parties, nothing in this Chapter shall be construed to prevent a Party from imposing, enforcing or maintaining measures:

- (a) necessary to protect public morals, order or safety;
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary to protect intellectual property; or
- (d) relating to goods or services of handicapped persons, of philanthropic institutions or of prison labor.

Article 127
Sub-Committee on Government Procurement

1. For the purposes of the effective implementation and operation of this Chapter, a Sub-Committee on Government Procurement (hereinafter referred to in this Article as "the Sub-Committee") shall be established pursuant to Article 165.

2. The functions of the Sub-Committee shall be:

- (a) analyzing available information on each Party's government procurement market including the statistical information provided under paragraph 5 of Article 124;
- (b) evaluating the effective access of suppliers of a Party to government procurement market of the other Party covered by this Chapter;

- (c) monitoring the application of the provisions of this Chapter and providing a forum to identify and address any problems or other issues that may arise;
- (d) reporting the findings of the Sub-Committee to the Joint Committee; and
- (e) carrying out other functions which may be delegated by the Joint Committee pursuant to Article 165.

3. The Parties shall cooperate, on mutually agreed terms, to increase understanding of their respective government procurement systems, with a view to maximizing for the suppliers of both Parties the access to their respective government procurement market. For this purpose, each Party shall develop and implement, within one year after the entry into force of this Agreement, concrete measures for the cooperation, which may include training and orientation programs for government personnel or interested suppliers regarding such aspects as how to identify government procurement opportunities and how to participate in the respective government procurement markets. In developing such measures, special attention should be given to small businesses in each Party.

Article 128 Rectifications or Modifications

1. A Party shall notify the other Party of its rectifications, or in exceptional cases, other modifications relating to Annexes 11, 12, 13, 14, 16 and 17 along with the information as to the likely consequences of the change for the mutually agreed coverage provided in this Chapter. If the rectifications or other modifications are of a purely formal or minor nature, notwithstanding paragraph 1 of Article 174, they shall become effective provided that no objection from the other Party has been raised within 30 days. In other cases, both Parties shall consult the proposal and any claim for compensatory adjustments with a view to maintaining a balance of rights and obligations and a comparable level of mutually agreed coverage provided in this Chapter prior to such rectification or other modification. In the event of an agreement between the Parties not being reached, the Party which has received such notification may have recourse to the dispute settlement procedure under Chapter 15.

2. Notwithstanding any other provision of this Chapter, a Party may undertake reorganizations of its entities covered by this Chapter, including programs through which the procurement of such entities is decentralized or the corresponding government functions cease to be performed by any government entity, whether or not subject to this Chapter. In cases of reorganizations, compensation need not be proposed. Neither Party shall undertake such reorganizations or programs to avoid the obligations of this Chapter.

Article 129 Privatization of Entities

When government control at the federal or central government level over an entity specified in Annex 11 has been effectively eliminated, notwithstanding that the government may possess holding thereof or appoint member of the board of directors thereto, this Chapter shall no longer apply to that entity. A Party shall notify the other Party of the name of such entity before elimination of government control or as soon thereafter as possible.

Article 130 Miscellaneous Provisions

1. The Joint Committee may make recommendations to the Parties to adopt appropriate measures to enhance the conditions for effective access to a Party's covered government procurement or, as the case may be, to adjust a Party's coverage so that such conditions for effective access are maintained on an equitable basis.

2. In the event that after the entry into force of this Agreement a Party offers a non-Party specified in paragraph 3 below additional advantages of access to its government procurement market beyond what the other Party has been provided with under this Chapter, the former Party shall consent to enter into negotiations with the other Party with a view to extending these advantages to the other Party on a reciprocal basis.

3. A non-Party referred to in paragraph 2 above shall be, in the case of Japan, a Party to the Agreement on Government Procurement in Annex 4 to the WTO Agreement, as may be amended, (hereinafter referred to as "the GPA") or a party to an existing Economic Partnership Agreement with Japan and in the case of Mexico, a party to the North American Free Trade Agreement, as may be amended, (hereinafter referred to as "the NAFTA") or the European Communities.