

Chapter 10: Designated Monopolies and State-Owned Enterprises – Text of the 2023 Canada – Ukraine Free Trade Agreement

Article 10.1: Definitions

For the purposes of this Chapter:

Arrangement means the Arrangement on Officially Supported Export Credits, developed within the framework of the Organization for Economic Co-operation and Development ("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;

commercial activities means activities that an enterprise undertakes with an orientation toward profit-making and that result in the production of a good or supply of a service that will be sold to a consumer in the relevant market in quantities and at prices determined by the enterprise. Activities undertaken by an enterprise

that operates on a not-for-profit basis or on a cost-recovery basis are not activities undertaken with an orientation toward profit-making. Measures of general application to the relevant market shall not be construed as the determination by a Party of pricing, production, or supply decisions of an enterprise;

***designate** means a decision by a Party to establish, name, or authorize a monopoly, or expand the scope of a monopoly to cover an additional good or service;*

***designated monopoly** means a privately owned monopoly that is designated after the date of entry into force of this Agreement or a government monopoly that a Party designates or has designated;*

***government monopoly** means a monopoly owned, or controlled through ownership interests, by the national government of a Party or by another government monopoly;*

***in accordance with commercial considerations** means consistent with normal business practices of a privately held enterprise in the relevant business sector or industry;*

***independent pension fund** means an enterprise that is owned, or controlled through ownership interests, by a Party that:*

- (a) is engaged exclusively in the following activities:*

- (i) administering or providing a plan for pension, retirement, social security, disability, death or employee benefits, or any combination thereof solely for the benefit of natural persons who are contributors to such a plan and their beneficiaries; or
- (ii) investing the assets of these plans;
- (b) has a fiduciary duty to the natural persons referred to in subparagraph (a)(i); and
- (c) is not subject to investment direction from the government of the Party. Investment direction from the government of a Party does not include general guidance with respect to risk management and asset allocation that is not inconsistent with usual investment practice and is not demonstrated solely by the presence of government officials on the enterprise's board of directors or investment panel;

Market means the geographic or commercial market for a good or service;

Monopoly means an entity, designated by a Party, including a consortium or government agency, that in any relevant market in the territory of a Party is 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 that grant; **sovereign wealth fund** means an enterprise owned, or controlled through ownership interests, by a Party that:

- (a) serves solely as a special purpose investment fund or arrangement for asset management, investment, or related activities, using financial assets of a Party. The Parties understand that the word "arrangement" herein as an alternative to "fund" allows for a flexible interpretation of the legal arrangement through which the assets can be invested; and
- (b) is a Member of the International Forum of Sovereign Wealth Funds or endorses the Generally Accepted Principles and Practices ("Santiago Principles") issued by the International Working Group of Sovereign Wealth Funds, October 2008, or other principles and practices as may be agreed to by the Parties;

and includes any special purpose vehicles established solely for the activities described in subparagraph (a) wholly owned by the enterprise, or wholly owned by the Party but managed by the enterprise; and

state-owned enterprise means an enterprise that is principally engaged in commercial activities, and in which a Party:

- (a) directly owns more than 50 per cent of the share capital;
- (b) controls, through ownership interests, the exercise of more than 50 per cent of the voting rights; or
- (c) holds the power to appoint a majority of members of the board of directors or any other equivalent management body.

Article 10.2: Scope

1. This Chapter applies with respect to the activities of state-owned enterprises, state enterprises, or designated monopolies of a Party that affect trade or investment between Parties within the free trade area.

2. This Chapter does not apply to:

- (a) the regulatory or supervisory activities, or monetary and related credit policy and exchange rate policy, of a central bank or monetary authority of a Party;
- (b) the regulatory or supervisory activities of a financial regulatory body of a Party, including a non-governmental body, such as a securities or futures exchange or market, clearing

agency, or other organization or association, that exercises regulatory or supervisory authority over financial services suppliers; or

- (c) activities undertaken by a Party or one of its state enterprises or state-owned enterprises for the purpose of the resolution of a failing or failed financial institution or any other failing or failed enterprise principally engaged in the supply of financial services.

3. This Chapter does not apply to a sovereign wealth fund of a Party.

4. This Chapter does not apply to:

- (a) an independent pension fund of a Party; or
- (b) an enterprise owned or controlled by an independent pension fund of a Party.

5. This Chapter does not apply to government procurement.

6. Articles 10.3, 10.4, and 10.6 do not apply to a service supplied in the exercise of governmental authority. For the purposes of this paragraph, "a service supplied in the exercise of governmental authority" has the same meaning as in the GATS, including the meaning in the Financial Services Annex if applicable.

7. Articles 10.3 and 10.4 do not apply to the extent that a Party's state-owned enterprise or designated monopoly makes purchases and sales of goods or services pursuant to:

- (a) any existing non-conforming measure that the Party maintains, continues, renews, or amends in accordance with Article 17.18(1) (Non-Conforming Measures), Article 18.7(1) (Reservations), or Article 20.10(1) (Non-Conforming Measures), as set out in its Schedule to Annex I or in Section A of its Schedule to Annex III; or
- (b) any non-conforming measure that the Party adopts or maintains with respect to sectors, subsectors, or activities in accordance with Article 17.18(2) (Non-Conforming Measures), Article 18.7(2) (Reservations), or Article 20.10(2) (Non-Conforming Measures), as set out in its Schedule to Annex II or in Section B of its Schedule to Annex III.

Article 10.3: Designated Monopolies

1. This Chapter does not prevent a Party from maintaining or designating a monopoly.

2. Each Party shall promptly notify the other Party or publish on an official website the designation of a monopoly or expansion of the scope of an existing monopoly and the terms of its designation.

3. Each Party shall ensure that a privately owned monopoly that it designates or a government monopoly that it maintains or designates:

- (a) acts in a manner that is consistent with the Party's obligations under this Agreement whenever the monopoly exercises 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 an import or export licence, approve a commercial transaction, or impose a quota, fee, or other charge;
- (b) 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 fulfil any terms of its designation that are not inconsistent with subparagraphs (c), (d), or (e);
- (c) in its purchase of the monopoly 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 or of any non-Party; and
- (ii) accords to a good or service supplied by an enterprise that is a covered investment in the Party's territory treatment no less favourable than it accords to a like good or a like service supplied by enterprises in the relevant market in the Party's territory that are investments of investors of the Party or of any non-Party; and
- (d) in its sale of the monopoly good or service:
 - (i) accords to an enterprise of the other Party treatment no less favourable than it accords to enterprises of the Party or of any non-Party; and
 - (ii) accords to an enterprise that is a covered investment in the Party's territory treatment no less favourable than it accords to enterprises in the relevant market in the Party's territory that are investments of investors of the Party or of any non-Party; and

- (e) does not use its monopoly position to engage in, either directly or indirectly, including through its dealings with its parent, subsidiaries, or other entities the Party or the designated monopoly owns, anticompetitive practices in a non-monopolized market in its territory that negatively affect trade or investment between the Parties.

4. Paragraphs 3(c) and 3(d) do not preclude a designated monopoly from:

- (a) purchasing or selling goods or services on different terms or conditions including those relating to price; or
- (b) refusing to purchase or sell goods or services;

provided that the differential treatment or refusal is undertaken in accordance with commercial considerations. For greater certainty, paragraph 4 does not allow a designated monopoly to violate a Party's domestic laws.

Article 10.4: State-Owned Enterprises

1. This Agreement does not prevent a Party from maintaining or establishing a state enterprise or a state-owned enterprise.

2. Each Party shall ensure that a state enterprise or a state-owned enterprise acts in a manner that is consistent with the Party's obligations whenever the enterprise exercises a regulatory, administrative, or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant a licence, approve a commercial transaction, or impose a quota, fee, or other charge.

3. Each Party shall ensure that each of its state-owned enterprises, when engaging in commercial activities in its sale of a good or service, accords to an enterprise that is a covered investment in the Party's territory treatment no less favourable than it accords to enterprises in the relevant market in the Party's territory that are investments of investors of the Party.

4. Paragraph 3 does not preclude a state-owned enterprise from:

- (a) selling goods or services on different terms or conditions including those relating to price; or
- (b) refusing to sell goods or services;

provided that the differential treatment or refusal is undertaken in accordance with commercial considerations. For greater certainty, paragraph 4 does not allow a state-owned enterprise to violate a Party's domestic laws.

Article 10.5: Courts and Administrative Bodies

1. Each Party shall provide its courts with jurisdiction over civil claims against an enterprise owned or controlled through ownership interests by a foreign government based on a commercial activity carried on in its territory. This paragraph does not preclude a Party from providing its courts with jurisdiction over claims against enterprises owned or controlled through ownership interests by a foreign government other than those claims referred to in this paragraph. This paragraph does not require a Party to provide jurisdiction over those claims if it does not provide jurisdiction over similar claims against enterprises that are not owned or controlled through ownership interests by a foreign government.

2. Each Party shall ensure that any administrative body that the national government of a Party establishes or maintains that regulates a state-owned enterprise exercises its regulatory discretion in an impartial manner with respect to enterprises that it regulates, including enterprises that are not state-owned enterprises. The impartiality with which an administrative body exercises its regulatory discretion is to be assessed by reference to a pattern or practice of that administrative body.

Article 10.6: Transparency

1. On the written request of a Party, the other Party shall provide within a reasonable time the following information in writing concerning a state-owned enterprise or a government monopoly, provided that the request includes an explanation of how the activities of the entity may be affecting trade or investment between the Parties:

- (a) the percentage of shares that the Party, its state-owned enterprises, or designated monopolies cumulatively own, and the percentage of votes that they cumulatively hold, in the entity;
- (b) a description of any special shares or special voting or other rights that the Party, its state-owned enterprises, or designated monopolies hold, to the extent these rights are different than the rights attached to the general common shares of the entity;
- (c) the government titles of any government official serving as an officer or member of the entity's board of directors;
- (d) the entity's annual revenue and total assets over the most recent three year period for which information is available;

- (e) any exemptions and immunities from which the entity benefits under the Party's law; and
- (f) any additional information regarding the entity that is publicly available, including annual financial reports and third-party audits, and is sought in the written request.

2. When a Party provides written information pursuant to a request under this Article and informs the requesting Party that it considers the information to be confidential, the requesting Party shall not disclose the information without the prior consent of the Party providing the information.

Article 10.7: Technical Cooperation

1. The Parties shall, where appropriate and subject to available resources, engage in mutually agreed technical cooperation activities, including:

- (a) exchanging information regarding Parties' experiences in improving the corporate governance and operation of their state-owned enterprises;
- (b) sharing best practices on policy approaches to ensure a level playing field between state-owned and privately owned

*enterprises, including policies related to competitive neutrality;
and*

- (c) organizing international seminars, workshops, or any other appropriate forum for sharing technical information and expertise related to the governance and operations of state-owned enterprises.*

Article 10.8: Contact Points

Each Party shall designate a Contact Point on State-Owned Enterprises and Designated Monopolies and notify the other Party to facilitate communications between the Parties on any matter covered by this Chapter.

Article 10.9: Exceptions

1. Articles 10.3 and 10.4 do not:

- (a) prevent the adoption or enforcement by a Party of measures to respond temporarily to a national or global economic emergency; or*
- (b) apply to a state-owned enterprise with respect to which a Party has adopted or enforced measures on a temporary basis*

in response to a national or global economic emergency, for the duration of that emergency.

2. Article 10.4(3) 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 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. In circumstances in which no comparable financial services are offered in the commercial market:*
 - (A) for the purposes of paragraphs 2(a)(ii) and 2(b)(ii), the state-owned enterprise may rely as necessary on available evidence to establish a benchmark of the terms on which those services would be offered in the commercial market; and*
 - (B) for the purposes of paragraphs 2(a)(i) and 2(b)(i), the supply of the financial services must be*

deemed not to be intended to displace commercial financing;

- (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.*

3. Articles 10.3, 10.4, 10.6, and 10.8 do not apply to a state-owned enterprise or designated monopoly if in any one of the three previous consecutive fiscal years, the revenue derived from the commercial activities of the state-owned enterprise or designated monopoly was less than a threshold amount which must be calculated in accordance with Annex 10-A (Threshold Calculation).

4. If a Party invokes the exception in paragraph 3 during consultations under Article 28.5 (Consultations), the Parties should exchange and discuss available evidence concerning the revenue of the state-owned enterprise or the designated monopoly derived from the commercial

activities during the three previous consecutive fiscal years in an effort to resolve during the consultations any disagreement regarding the application of this exception.

Annex 10-A: Threshold Calculation

1. On the date of entry into force of this Agreement, the threshold referred to in Article 10.9(3) is 200 million Special Drawing Rights (SDRs).

2. The amount of the threshold shall be adjusted at three-year intervals with each adjustment taking effect on 1 January. The first adjustment must take place on the first 1 January following the entry into force of this Agreement, in accordance with the formula set out in this Annex.

3. The threshold shall be adjusted for changes in general price levels using a composite SDR inflation rate, calculated as a weighted sum of cumulative per cent changes in the Gross Domestic Product (GDP) deflators of SDR component currencies over the three-year period ending 30 June of the year prior to the adjustment taking effect, and using the following formula:

where:

= threshold value at base period;

= new (adjusted) threshold value;

= respective (fixed) weights of each currency, , in the SDR (as at 30 June of the year prior to adjustment taking effect); and

= cumulative per cent change in the GDP deflator of each currency, , in the SDR over the three-year period ending 30 June of the year prior to adjustment taking effect.

4. Each Party shall convert the threshold into national currency terms if the conversion rates are the average of monthly values of that Party's national currency in SDR terms over the three-year period to 30 June of the year before the threshold is to take effect. Each Party shall notify the other Party of their applicable threshold in their respective national currencies.

5. For the purposes of this Chapter, all data shall be drawn from the International Monetary Fund's International Financial Statistics database.

6. The Parties shall consult if a major change in a national currency vis-à-vis the SDR were to create a significant problem with regard to the application of this Chapter.