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CHAPTER 16

STATE-OWNED ENTERPRISES

ARTICLE 16.1

Scope

1. This Chapter applies to state-owned enterprises, designated oligopolies and designated monopolies at central and regional levels of government engaged in a commercial activity. Where such state-owned enterprises, designated monopolies or designated oligopolies engage both in commercial and non-commercial activities, this Chapter only applies with respect to their commercial activities.
2. This Chapter does not apply to:
 - (a) the procurement by a Party of a good or service purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of a good or a supply of service for commercial sale, whether or not that procurement is a covered procurement within the meaning of Chapter 13 (Government procurement);
 - (b) the matters referred to in points (a) to (c) and (e)¹ of Article 9.1(2) (Scope); and
 - (c) a state-owned enterprise or designated monopoly if, in any one of the three previous

¹ For greater certainty, this includes activities performed in the exercise of governmental authority by state-owned enterprises.

consecutive fiscal years, the annual revenue derived from the commercial activities of the state-owned enterprise or designated monopoly was less than 150 000 000 SDR.

3. Article 16.5 (Non-discriminatory treatment and commercial considerations) does not apply 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 financial services are:
 - (i) not intended to displace commercial financing; or
 - (ii) offered on terms no more favourable than terms that could be obtained for comparable financial services in the commercial market;
- (b) supports private investment outside the territory of the Party, provided that those financial services are:
 - (i) not intended to displace commercial financing; or
 - (ii) offered on terms no more favourable than terms that could be obtained for comparable financial services in the commercial market; or
- (c) is offered on terms consistent with the Arrangement defined in point (a) of Article 16.2 (Definitions), provided that it falls within the scope of that Arrangement.

4. Article 16.5 (Non-discriminatory treatment and commercial considerations) does not apply to the extent that a state-owned enterprise, designated monopoly or designated oligopoly of a Party makes a purchase or sale of a good or a service pursuant to:

- (a) any existing non-conforming measure that the Party maintains, continues, renews or amends in accordance with Article 9.10 (Non-conforming measures and exceptions) or Article 9.17 (Non-conforming measures), as set out in its respective Schedule in Annex 9-A (Existing measures); or

(b) any non-conforming measure that the Party adopts or maintains with respect to sectors, subsectors, or activities in accordance with Article 9.10 (Non-conforming measures and exceptions) or Article 9.17 (Non-conforming measures), as set out in its respective Schedule in Annex 9-B (Future measures).

5. Points (a) and (b) of Article 16.5(1) (Non-discriminatory treatment and commercial considerations) do not apply with respect to measures adopted or maintained by a regional government of a Party² to ensure that purchases of goods and services by state-owned enterprises, designated monopolies or designated oligopolies:

(a) support economic development in its territory, including for the benefit of SMEs;

(b) promote social inclusion in its territory; or

(c) support environmentally sustainable business practices.

6. Without prejudice to Article 12.16 (Rebalancing), point (c) of Article 16.5(1) (Non-discriminatory treatment and commercial considerations) does not apply with respect to designated monopolies and designated oligopolies³ that have been designated by a regional government of a Party.

ARTICLE 16.2

Definitions

For the purposes of this Chapter, the following definitions apply:

(a) "Arrangement" means the Arrangement on Officially Supported Export Credits, developed within the framework of the OECD or a successor undertaking, whether developed within or

² For Australia, such measures shall respect the principles of value for money, including the efficient and effective use of resources, to the extent provided for in its laws and regulations, and policies. For the Union, such measures shall respect the principles of efficiency, transparency and non-discrimination in accordance with Union law.

³ This is without prejudice to Article 2.11 (Import and export monopolies).

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 activity" means an activity which an enterprise undertakes, the end result of which is the production of a good or supply of a service, which will be sold in the relevant market in quantities and at prices determined by that enterprise⁴, and which is undertaken with an orientation towards profit-making⁵;
- (c) "commercial considerations" means 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;
- (e) "designate" means to establish, appoint or authorise a monopoly or oligopoly, or to expand the scope of a monopoly or oligopoly to cover an additional good or service;
- (f) "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 it does not include an entity that has been granted an exclusive intellectual property right solely by reason of such grant;
- (g) "designated oligopoly" means two or more public or private enterprises designated by a Party, in law or in fact, as the only suppliers or purchasers of a particular good or service in a relevant market in the territory of that Party, other than enterprises that are designated according to objective, transparent and non-discriminatory criteria;

⁴ For greater certainty, 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.

⁵ For greater certainty, an activity undertaken by an enterprise that operates on a non-profit basis or a cost-recovery basis is not a commercial activity.

- (i) "public service mandate" means a government mandate pursuant to which a state-owned enterprise or designated monopoly makes a service available, directly or indirectly, to the general public in the territory of a Party;⁶ and
- (j) "state-owned enterprise" means an enterprise engaged in commercial activities in which a Party:
 - (i) directly owns more than 50% of the share capital;
 - (ii) is in a position to cast, or control the casting of, more than 50% of the voting rights;
 - (iii) holds the power to appoint a majority of the members of the board of directors or any other equivalent management body; or
 - (iv) has the power to direct the actions of the enterprise or otherwise exercises an equivalent degree of control in accordance with the law of that Party.

ARTICLE 16.3

Relation to the WTO Agreement

The Parties affirm their rights and obligations under Article XVII of GATT 1994, the Understanding on the Interpretation of Article XVII of GATT 1994 and paragraphs 1, 2 and 5 of Article VIII of GATS.

ARTICLE 16.4

General provisions

⁶ For greater certainty, the phrase "making a service available to the general public" includes the distribution of goods and the supply of general infrastructure services.

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 state-owned enterprises, or from designating or maintaining monopolies or oligopolies.

2. A Party shall not require or encourage a state-owned enterprise, designated monopoly or designated oligopoly to act in a manner inconsistent with Article 16.5 (Non-discriminatory treatment and commercial considerations).

3. With respect to the treatment under Article 16.5 (Non-discriminatory treatment and commercial considerations), Australia shall accord to an enterprise of the Union treatment no less favourable than the treatment it accords, in like situations, to an enterprise of any preferential trade agreement partner⁷.

ARTICLE 16.5

Non-discriminatory treatment and commercial considerations

1. Each Party shall ensure that each of its state-owned enterprises, designated monopolies or designated oligopolies, when engaging in commercial activity:

- (a) acts in accordance with commercial considerations in its purchase or sale of a good or a service, except to fulfil any terms of its public service mandate that are not inconsistent with point (b) or (c);
- (b) in its purchase of a good or a service:
 - (i) accords to a good or a 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

⁷ This paragraph does not apply with respect to treatment accorded to an enterprise of New Zealand.

- (ii) accords to a good or service supplied by a covered enterprise treatment no less favourable than it accords to a like good or a like service supplied by enterprises of investors of that Party in the relevant market of the Party; and
 - (c) in its sale of a good or a 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 treatment no less favourable than it accords to enterprises of that Party's own investors in the relevant market in the Party.
2. Provided that such different terms or conditions referred to in point (a) or the refusal referred to in point (b) is undertaken in accordance with commercial considerations, paragraph 1 does not preclude state-owned enterprises, designated monopolies or designated oligopolies from:
- (a) purchasing or supplying goods or services on different terms or conditions, including relating to price; or
 - (b) refusing to purchase or supply goods or services.

ARTICLE 16.6

Regulatory framework

1. The Parties shall make best use of international standards related to state-owned enterprises.⁸
2. Each Party shall ensure that any administrative body that exercises a regulatory function over a state-owned enterprise, designated monopoly or designated oligopoly:
 - (a) is operationally independent from, and not accountable to, any of the enterprises regulated by

⁸ For example, the OECD Guidelines on Corporate Governance of State-Owned Enterprises.

such a body; and

(b) acts impartially⁹, in like circumstances, with respect to all enterprises regulated by such a body, including state-owned enterprises, designated monopolies and designated oligopolies.¹⁰

3. Each Party shall apply its laws and regulations to state-owned enterprises, designated monopolies and designated oligopolies in a consistent and non-discriminatory manner.

ARTICLE 16.7

Information exchange

1. If a Party has reason to believe a state-owned enterprise, designated monopoly or designated oligopoly of the other Party (hereinafter referred to as "the entity" for the purposes of this Article) is not complying with Article 16.5 (Non-discriminatory treatment and commercial considerations), it may request in writing that the other Party provides information regarding the commercial activities of the entity.

2. The request referred to in paragraph 1 shall:

(a) explain how the commercial activities of the entity may be affecting the interests of the requesting Party under this Chapter; and

(b) indicate which of the following information is sought:

(i) the ownership and the voting structure of the entity, indicating the percentage of shares that the requested Party, its state-owned enterprises, designated monopolies or designated oligopolies cumulatively own, and the percentage of voting rights that they cumulatively hold, in the entity;

⁹ For greater certainty, the impartiality with which such a body exercises its regulatory functions is to be assessed by reference to a general pattern of practice of that body.

¹⁰ For greater certainty, for those sectors in which the Parties have agreed to specific obligations relating to such a body exercising regulatory functions in other Chapters of this Agreement, the relevant provisions of those Chapters shall prevail.

- (ii) a description of any special shares or special voting or other rights that the requested Party, its state-owned enterprises designated monopolies or designated oligopolies hold, where such rights are different from those attached to the general common shares of the entity;
- (iii) the organisational chart of the entity and the composition of its board of directors or any other equivalent body;
- (iv) a description of which government departments or public bodies regulate or monitor the entity, a description of the reporting requirements imposed on it by those departments or public bodies, and a description of the rights and general practices of those departments or any 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;
- (v) annual revenue and total assets of the entity over the most recent three-year period for which information is available;
- (vi) any exemptions, immunities and related measures from which the entity benefits under the laws and regulations of the requested Party; and
- (vii) any additional information regarding the entity that is publicly available, including annual financial reports and third-party audits.

3. The requested Party shall provide all the requested information to the requesting Party. If the requested information is not available, the requested Party shall provide the reasons for this in writing to the requesting Party.