

Public Enterprises and Designated Monopolies

PUBLIC ENTERPRISES AND DESIGNATED MONOPOLIES

Preamble

Recognizing that fair competition requires public enterprises to act in accordance with commercial considerations consistent with this Chapter and requires the judicial or regulatory authorities of the Parties not to treat public enterprises more favorably than other enterprises;

Recognizing that good governance of public enterprises is essential for fair, competitive, and open markets, both domestically and internationally;

Noting that while public enterprises in many economies provide key public services on a non-profit basis, many others engage in commercial activities in competition with privately-owned enterprises, such that the operations of public enterprises can have both an impact on citizens' everyday life as well as the competitiveness of the rest of the economy; and

Recognizing that public enterprises should operate in a sound competitive and regulatory environment and adhere to international best practices, which are important elements of an equitable trade and investment environment,

The Parties hereby agree as follows:

Article X.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 January 1, 1979;

commercial activities means:

- (a) activities that an enterprise that is primarily engaged in the production of goods undertakes that result in the production of a good other than water or electricity for sale to the public;¹ or
- (b) activities that an enterprise that is primarily engaged in the supply of services undertakes that result in the supply of a service or in the production or supply of water or electricity that will be sold to the public and that is undertaken with an orientation toward profit-making;²

commercial considerations means the factors that a privately owned enterprise would normally take into account in its commercial decisions in the relevant business or industry operating under market-oriented conditions. The factors for evaluating whether a public enterprise is acting in accordance with commercial considerations include the price, quality, availability, marketability, transportation, interest, charges, fees, and other terms and conditions of purchase or sale of a good or service. In the case of investment decisions,³ commercial considerations means the factors that a private investor would normally take into account in its usual investment practices⁴ in a market-determined manner, including for the provision of risk capital.⁵ The factors for evaluating whether a public enterprise is acting in accordance with commercial considerations regarding investment decisions include the type or structure of an investment or loan or the price or other terms paid for equity. Factors such as political direction, guidance, instructions, and mandates; industrial policy objectives; state strategic objectives; purchase or sale requirements are not normally consistent with commercial considerations;

¹ For greater certainty, if the goods sold are principally to the authorities of a Party for use by those authorities and not for commercial resale, then that shall not constitute commercial activities.

² For greater certainty, activities undertaken by an enterprise that operates on a not-for-profit basis or on a cost-recovery basis, including an enterprise that undertakes activities that may result in incidental revenue in excess of costs, are not activities undertaken with an orientation toward profit-making.

³ The term “investment decisions” include: the decision to provide new equity capital, new debt, or to maintain existing equity capital in an enterprise or debt of an enterprise, the decision to increase productive capacity, or the decision to invest in the market of the territory of the other Party or a non-Party.

⁴ For greater certainty, it is the usual investment practice of a private investor to evaluate the potential risk versus the expected return, using the most complete and objective criteria and information available to the investor. This evaluation includes an analysis of information sufficient to determine the expected risk-adjusted return and how such a return compares to that of alternative investment opportunities of comparable risk. The usual investment practices of private investors include the provision of a right to a residual profit and an expectation that the enterprise will seek a return, or to pay dividends, or both. The usual investment practice of private investors would, to the extent shares are traded publicly, pay the public market value for equity in an enterprise.

⁵ For greater certainty, the term “provision of risk capital” shall not be construed to any regulatory capital requirement imposed upon the enterprise.

covered investment means, with respect to a Party, an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter;

designate means to establish, name, or authorize a monopoly, or to 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 public monopoly that a Party designates or has designated;

independent pension fund means an enterprise that is owned or controlled 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 or their beneficiaries, or
 - (ii) investing the assets of these plans;
- (b) has a fiduciary duty to the natural persons referred to in paragraph (a)(i); and
- (c) is not subject to investment direction by the Party;⁶

investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. An investment may include:

- (a) an enterprise;
- (b) shares, stock and other forms of equity participation in an enterprise;
- (c) bonds, debentures, other debt instruments, and loans;⁷

⁶ Investment direction from 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 officials of a Party on the enterprise's board of directors or investment committee.

⁷ Some forms of debt, such as bonds, debentures, and long-term notes or loans, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due, are less likely to have these characteristics.

- (d) futures, options, and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- (f) intellectual property rights;
- (g) licenses, authorizations, permits, and similar rights conferred pursuant to the laws of a Party;^{8, 9} and
- (h) other tangible or intangible, movable or immovable property, and related property rights, such as liens, mortgages, pledges, and leases;

investor of a Party means a person of a Party that attempts to make, is making, or has made an investment in the territory of the other Party;

market means the geographical and commercial market for a good or service;

monopoly means an entity, including a consortium or agency of a Party that, in a relevant market in the territory of the Party, is designated as 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 the grant;

non-commercial assistance¹⁰ means assistance that is limited to certain enterprises, and:

- (a) **assistance** means the following forms of assistance:
 - (i) direct transfers of funds or potential direct transfers of funds or liabilities, such as:
 - (A) grants or debt forgiveness;

⁸ The term “investment” does not include an order or judgment entered in a judicial or administrative action.

⁹ Whether a particular type of license, authorization, permit, or similar instrument (including a concession to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the laws of a Party. For greater certainty, among such instruments that do not have the characteristics of an investment are those that do not create any rights protected under the laws of the Party. For greater certainty, the foregoing is without prejudice to whether any asset associated with such instruments has the characteristics of an investment.

¹⁰ For greater certainty, non-commercial assistance does not include a transfer of funds by a Party, collected from contributors to a plan for pension, retirement, social security, disability, death or employee benefits, or any combination thereof, to an independent pension fund for investment on behalf of the contributors and their beneficiaries.

- (B) loans, loan guarantees, or other types of financing on terms more favorable than those commercially available to that enterprise;
- (C) equity capital inconsistent with commercial considerations;
- (ii) the provision of goods or the supply of services other than general infrastructure, on terms more favorable than those commercially available to the enterprise;
- (iii) the purchase of goods or services on terms more favorable than those commercially available to the enterprise; or
- (iv) the foregoing of revenue that is otherwise due to a Party;¹¹
- (b) **certain enterprises** means an enterprise or industry or group of enterprises or industries;
- (c) **limited to certain enterprises** means that a Party or any of the public enterprises of a Party, or a combination thereof:
 - (i) explicitly limits access to the assistance to certain enterprises;
 - (ii) provides assistance to a limited number of certain enterprises;
 - (iii) provides assistance which is predominantly used by certain enterprises;
 - (iv) provides a disproportionately large amount of the assistance to certain enterprises; or
 - (v) otherwise favors certain enterprises through the use of its discretion in the provision of assistance;¹² and
- (d) assistance that falls under Article X.5.1-5 or Article X.5.8 shall be deemed to be “limited to certain enterprises;”

¹¹ For greater certainty, this provision also includes the failure to provide for a right to residual profits, waiving or lowering an otherwise required or expected dividend, or a policy of not requiring public enterprises to seek a rate of return based on the average market dividend or rate of return for private sector enterprises in the sector of the public enterprise.

¹² For greater certainty, assistance that is limited, in law or fact, to public enterprises of a Party is “limited to certain enterprises.”

public enterprise means an enterprise that is principally engaged in commercial activities, and in which a government:¹³

- (a) directly or indirectly¹⁴ owns more than 50 percent of the share capital;
- (b) controls, through direct or indirect ownership interests, the exercise of more than 50 percent of the voting rights;
- (c) holds the power to appoint a majority of members of the board of directors or any other equivalent management body; or
- (d) holds the power to control¹⁵ the enterprise;¹⁶

public monopoly means a monopoly that is owned or controlled by a Party, a public enterprise of a Party, or by another public monopoly;

public service mandate means a mandate by a Party pursuant to which a public enterprise makes available a service, directly or indirectly, to the general public in that territory.¹⁷

Article X.2: Scope

¹³ For greater certainty, a government may include a political party organization, or members thereof assigned by the political party organization to work for or be imbedded in an enterprise, in an economy that maintains a *de jure* or *de facto* one-party state.

¹⁴ For the purposes of this definition, the term “indirectly” refers to situations in which a government owns or controls an enterprise through one or more public enterprises of the government. The term “indirectly” also includes a circumstance where, in aggregate, the government controls an enterprise even if that ownership is through multiple ownership chains or through various subsidiaries.

¹⁵ For greater certainty, a government does not hold the power to control an enterprise by virtue of its regulatory authority over the enterprise.

¹⁶ For the purposes of this paragraph, a government holds the power to control the enterprise if it can determine, direct, or initiate important matters affecting the enterprise, excluding minority shareholder protections. In determining whether a government has this power, all relevant legal and factual elements shall be taken into account on a case-by-case basis. Those elements may include the power to determine, direct, or initiate commercial operations, including major expenditures or investments; issuances of equity or significant debt offerings; or the restructuring, merger, or dissolution of the enterprise. Covenants relating to a loan or a similar financing arrangement by a government to an enterprise, regardless of whether accompanied by the creation of a secured interest over securities or other assets of the enterprise in favor of the government, do not, by themselves, confer control.

¹⁷ For greater certainty, a service to the general public includes the distribution of goods and the supply of general infrastructure services.

1. This Chapter shall apply to the activities of designated monopolies and public enterprises of a Party that affect or could affect trade or investment between the Parties. This Chapter shall also apply to the activities of public enterprises of a Party that cause adverse effects in the market of a non-Party as provided in Article X.6.

2. This Chapter shall 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 the public enterprises of that Party 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 shall not apply to a Party or a public enterprise of a Party that is a financial intermediary, or a central bank or any component thereof, unless the activities of the Party or public enterprise include both:

- (a) directly extending financing¹⁸ to the general public¹⁹ in the normal course of business; and
- (b) setting the terms and conditions, including designating the borrower,²⁰ of the extension of such financing to the general public.

4. This Chapter shall not apply to:

- (a) an independent pension fund; or
- (b) an enterprise owned or controlled by an independent pension fund, except:

¹⁸ For the purposes of this article, “financing” means the extension of funds or credit including (i) loans or loan guarantees; (ii) equity capital; and (iii) insurance.

¹⁹ For greater certainty, “general public” does not include other financial intermediaries or financial institutions.

²⁰ For greater certainty, the issuance of general policy guidance does not constitute designating the borrower.

- (i) Article X.5.1-7 shall apply to a Party's direct or indirect provision of non-commercial assistance to an enterprise owned or controlled by an independent pension fund; and
- (ii) Article X.5.1-7 shall apply to a Party's indirect provision of non-commercial assistance through an enterprise owned or controlled by an independent pension fund.

5. Nothing in this Chapter shall be construed to prevent a Party from:

- (a) establishing or maintaining a public enterprise;²¹ or
- (b) designating a monopoly.

6. Article X.4 (Non-Discriminatory Treatment and Commercial Considerations), Article X.5 (Non-Commercial Assistance), and Article X.12 (Transparency) shall not apply to a service supplied in the exercise of authority.²²

7. This Chapter shall not apply to public enterprises or designated monopolies of a Party owned or controlled below the central level subject to Article X.16 (Applicability to Public Enterprises and Designated Monopolies at the Sub-Central Level).

Article X.3: Delegated Authority

Consistent with Article 1.3 (Delegated Authority), each Party shall ensure that if public enterprises or designated monopolies of a Party exercise regulatory, administrative, or other authority that the Party has directed or delegated to those entities to carry out, those entities act in a manner consistent with that Party's obligations under this Agreement.²³

Article X.4: Commercial Considerations and Non-Discriminatory Treatment

²¹ For greater certainty, non-commercial assistance provided by a Party for the purpose of establishing or maintaining a public enterprise is subject to the disciplines outlined in this Chapter.

²² For the purposes of this paragraph, "a service supplied in the exercise of authority" has the same meaning as "a service supplied in the exercise of governmental authority" in the GATS, including the meaning in its Financial Services Annex if applicable.

²³ Examples of regulatory, administrative, or other authority include the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges.

1. Each Party shall ensure that each of its public enterprises, when engaging in commercial activities:

- (a) acts in accordance with commercial considerations in its purchase or sale of a good or service,²⁴ except to fulfil the terms of its public service mandate that are not inconsistent with subparagraphs (c) or (d)(ii);
- (b) acts in accordance with commercial considerations in its investment decisions;
- (c) 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 favorable than it accords to a like good or a like service supplied by enterprises of the Party or the enterprises of a non-Party; and
 - (ii) accords to a good or service supplied by an enterprise that is a covered investment treatment no less favorable than it accords to a like good or a like service supplied by enterprises in the Party's territory that are investments of investors of the Party or of a non-Party;
- (d) in its sale of a good or service:
 - (i) accords to an enterprise of the other Party treatment no less favorable than it accords to enterprises of the Party or to enterprises of a non-Party, and
 - (ii) accords to an enterprise that is a covered investment treatment no less favorable than it accords to enterprises in the Party's territory that are investments of investors of the Party or of a non-Party; and
- (e) does not use its position as a public enterprise to engage in, either directly or indirectly, including through its dealings with its parent, subsidiaries, or other public enterprises, anticompetitive practices in the territory of the other Party that negatively affect trade or investment between the Parties.

2. Each Party shall ensure that each of its designated monopolies:

- (a) acts in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market, except to fulfil any terms of its designation that are not inconsistent with subparagraphs (b), (c), or (d);

²⁴ For greater certainty, the sale of a service includes the provision of debt or equity to another enterprise or to the Party.

- (b) 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 favorable than it accords to a like good or a like service supplied by enterprises of the Party or of a non-Party; and
 - (ii) accords to a good or service supplied by an enterprise that is a covered investment treatment no less favorable than it accords to a like good or a like service supplied by enterprises in that Party's territory that are investments of investors of the Party or of a non-Party; and
- (c) in its sale of the monopoly good or service:
 - (i) accords to an enterprise of the other Party treatment no less favorable than it accords to enterprises of the Party or of a non-Party, and
 - (ii) accords to an enterprise that is a covered investment treatment no less favorable than it accords to enterprises in the Party's territory that are investments of investors of the Party or of a non-Party; and
- (d) 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.

3. Paragraphs 1(c)-(d) and paragraphs 2(b)-(c) do not preclude a public enterprise or designated monopoly of a Party from:

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

provided that this differential treatment or refusal is undertaken in accordance with commercial considerations.

4. The Parties recognize that public enterprises of the Parties should be profitable on a long-term horizon except for such enterprises that are operating pursuant to a public service mandate.

Article X.5: Non-Commercial Assistance

Non-commercial Assistance to Public Enterprises

1. The following forms of non-commercial assistance provided by a Party to a public enterprise of that Party primarily engaged in the production or sale of goods other than electricity or water are prohibited:²⁵

- (a) loans or loan guarantees to an uncreditworthy public enterprise of that Party;²⁶
- (b) non-commercial assistance to a public enterprise of the Party in circumstances where the recipient is insolvent²⁷ or on the brink of insolvency,²⁸ without a credible restructuring plan designed to return the public enterprise within a reasonable period of time to long-term viability; and
- (c) conversion by the Party of the outstanding debt of a public enterprise of that Party to equity, in circumstances where this conversion would be inconsistent with the usual investment practice of a private investor.

2. Non-commercial assistance other than those described in paragraph 1 is prohibited if it is provided by a Party to a public enterprise of that Party that is primarily engaged in the production of goods other than electricity or water, except in the following circumstances:

- (a) to promote cultural and natural heritage conservation where the non-commercial assistance does not affect conditions of trade or competition between the Parties;
- (b) to respond to a global health emergency;

²⁵ Article X.5.1 and Article X.5.2 shall not apply to public enterprises of a Party that are primarily engaged in the construction of general infrastructure such as bridges, highways, ports, or railways (including intercity or urban railways), if (i) the infrastructure is located, in whole or in part, within the territory of the Party; and (ii) neither access to nor use of the infrastructure is limited to certain enterprises, unless those enterprises access or use the infrastructure primarily to supply a service to the general public within that territory.

²⁶ A public enterprise is “uncreditworthy” if, at the time the terms of the financing were agreed upon, the public enterprise’s financial position would preclude it from obtaining long-term financing from conventional commercial sources (that is, bank loans and non-speculative grade bond issues). To determine whether a public enterprise is creditworthy, all relevant legal and factual elements must be taken into consideration on a case-by-case basis. These elements may include whether a creditor would have reasonable assurance of repayment of contractual debt obligations in a timely manner, for instance, from the cash flow and assets of the business.

²⁷ A public enterprise is “insolvent” if it is unable to meet its debt obligations as they become due. Insolvency exists, for example, if (i) the public enterprise has failed to make required payments due to an inability to service the debt obligations; or (ii) the public enterprise has filed for bankruptcy, has been determined by a court to be bankrupt or insolvent, or is subject to court supervision, for purposes of either reorganization or liquidation of the enterprise.

²⁸ A public enterprise is “on the brink of insolvency” if it will likely be unable to meet its debt obligations at any point over the next 12 months. To determine whether a public enterprise is on the brink of insolvency, primary consideration shall be given to opinions of independent credit rating agencies and independent accounting firms issued in the ordinary course of business, if available. To the extent relevant, additional factual evidence concerning the ability of the public enterprise to meet its debt obligations may also be taken into account.

- (c) for the purpose of reducing greenhouse gas emissions of a production process and in a way that does not impact trade and investment between the Parties, provided that the non-commercial assistance:
- (i) is a one-time non-recurring measure;²⁹
 - (ii) is limited to 20 per cent of the cost of adaptation;
 - (iii) does not cover the cost of replacing and operating the enterprise, which must be fully borne by firms;
 - (iv) is directly linked to and proportionate to a firm's planned reduction and does not cover any manufacturing cost savings which may be achieved;
 - (v) is available to all firms which can adopt the new equipment and/or production processes; and
 - (vi) does not directly contribute to, or enable, increases in overall production output.

3. Non-commercial assistance provided by a Party to a public enterprise of that Party that is a covered investment in the territory of the other Party or is an investment in the territory of a non-Party is prohibited.

4. Non-commercial assistance provided by a Party to a public enterprise of that Party for the purpose of making a covered investment in the territory of the other Party or for the purpose of making an investment in the territory of a non-Party is prohibited.

5. No Party shall, directly or indirectly³⁰ provide non-commercial assistance prohibited by paragraphs 1-4.

6. No Party shall cause³¹ adverse effects to the interests of the other Party through the use of non-commercial assistance that it provides, either directly or indirectly, to its public enterprises with respect to the supply of a service by the public enterprise from the territory of the Party into the territory of the other Party or the territory of a non-Party.

²⁹ For greater certainty, transitions between different technologies may constitute separate one-time measures.

³⁰ For greater certainty, indirect provision includes the situation in which a Party entrusts or directs an enterprise that is not a public enterprise to provide non-commercial assistance.

³¹ For the purposes of paragraph 6, it must be demonstrated that the alleged adverse effects have been caused by the non-commercial assistance. Thus, the non-commercial assistance must be examined within the context of other possible causal factors to ensure an appropriate attribution of causality.

7. No Party shall cause³² adverse effects to the interests of the other Party through the use of non-commercial assistance that it provides, either directly or indirectly, to its public enterprises that are engaged in the production or supply of electricity or water or to its public enterprises that are engaged in the production of goods that are not prohibited under paragraphs 1 or 2.

Non-commercial Assistance Provided by Public Enterprises

8. Each Party shall ensure that its public enterprises do not provide directly or indirectly³³ non-commercial assistance prohibited by paragraphs 1-4.

9. Each Party shall ensure that its public enterprises do not cause³⁴ adverse effects to the interests of the other Party through the provision of non-commercial assistance provided to a public enterprise or a privately owned enterprise of the Party with respect to:

- (a) the production and sale of a good by the enterprise where the non-commercial assistance is not prohibited by paragraphs 1, 2, or 8;
- (b) the supply of a service by the enterprise from the territory of the Party into the territory of the other Party or the territory of a non-Party; or
- (c) the supply of a service in the territory of the other Party or the territory of a non-Party through an enterprise that is a covered investment in the territory of the other Party or that is an investment in the territory of a non-Party where the non-commercial assistance is not prohibited by paragraphs 3, 4, or 8.

10. Each Party shall ensure that its public enterprises do not cause injury to a domestic industry³⁵ of the other Party through the use of non-commercial assistance to a privately owned enterprise that is a covered investment in the territory of the other Party or an investment in the territory of a non-Party where the non-commercial assistance is not prohibited by paragraphs 3, 4, or 8.

³² For the purposes of paragraph 7, it must be demonstrated that the alleged adverse effects have been caused by the non-commercial assistance. Thus, the non-commercial assistance must be examined within the context of other possible causal factors to ensure an appropriate attribution of causality.

³³ For greater certainty, indirect provision includes the situation in which a Party entrusts or directs an enterprise that is not a public enterprise to provide non-commercial assistance.

³⁴ For the purposes of paragraph 9, it must be demonstrated that the alleged adverse effects have been caused by the non-commercial assistance. Thus, the non-commercial assistance must be examined within the context of other possible causal factors to ensure an appropriate attribution of causality.

³⁵ The term “domestic industry” refers to the domestic producers as a whole of the like good, or to those domestic producers whose collective output of the like good constitutes a major proportion of the total domestic production of the like good, excluding the public enterprise that is a covered investment that has received the non-commercial assistance referred to in this paragraph.

11. Each Party shall ensure that the public enterprises of a Party do not cause injury to a domestic industry of the other Party through the provision of non-commercial assistance, either directly or indirectly, to a privately owned enterprise, for the purpose of making a covered investment in the territory of the other Party or for the purpose making an investment in the territory of a non-Party where the non-commercial assistance is not prohibited by paragraphs 3, 4, or 8.

Non-commercial Assistance Within the Territory of a Party

12. A service supplied by a public enterprise of a Party within its territory shall be deemed not to cause adverse effects.³⁶

Use of Trade Remedy or Other Enforcement Mechanisms to Address Non-commercial Assistance

13. Nothing in this Agreement shall prevent a Party from utilizing any trade remedy or other trade enforcement mechanism under its laws that may exist to address prohibited or actionable non-commercial assistance.

Article X.6: Adverse Effects

1. For the purposes of Article X.5.6, X.5.7, or X.5.9, adverse effects arise if the effect of the non-commercial assistance is:

- (a) that the production and sale of a good by a Party's enterprise that has received the non-commercial assistance displaces or impedes from the Party's market imports of a like good of the other Party or sales of a like good produced by an enterprise that is a covered investment;
- (b) that the production and sale of a good by a Party's enterprise that has received the non-commercial assistance displaces or impedes from:
 - (i) the market of the other Party sales of a like good of the other Party, or
 - (ii) the market of a non-Party imports of a like good of the other Party;
- (c) a significant price undercutting by a good produced by a Party's enterprise that has received the non-commercial assistance and sold by the enterprise in:

³⁶ For greater certainty, this paragraph shall not be construed to apply to a service that itself is a form of non-commercial assistance.

- (i) the market of the Party as compared with the price in the same market of imports of a like good of the other Party or a like good that is produced by an enterprise that is a covered investment, or significant price suppression, price depression, or lost sales in the same market, or
- (ii) the market of the other Party or of a non-Party as compared with the price in the same market of a like good of the other Party, or a like good that is produced by an enterprise that is a covered investment, or significant price suppression, price depression, or lost sales in the same market;
- (d) that productive capacity for the production of a good by an enterprise of a Party was created, maintained, or increased through policies and practices of the Party in a manner inconsistent with either changes in capacity by producers operating under market-oriented conditions or international demand for that good;
- (e) that services supplied by a Party's enterprise that has received the non-commercial assistance displace or impede from the market of the other Party or of the territory of a non-Party a like service supplied by a service supplier of the other Party; or
- (f) a significant price undercutting by a service supplied in the market of the other Party or of the territory of a non-Party by a Party's enterprise that has received the non-commercial assistance as compared with the price in the same market of a like service supplied by a service supplier of the other Party, or significant price suppression, price depression, or lost sales in the same market.³⁷

2. For the purposes of paragraphs l(a), l(b), and l(e), the displacing or impeding of a good or service includes a case in which it has been demonstrated that there has been a significant change in relative shares of the market to the disadvantage of the like good or like service. "Significant change in relative shares of the market" includes the following situations:

- (a) there is a significant increase in the market share of the good or service of the Party's enterprise;
- (b) the market share of the good or service of the Party's enterprise remains constant in circumstances in which, in the absence of the non-commercial assistance, it would have declined significantly; or

³⁷ The purchase or sale of shares, stock or other forms of equity by a public enterprise that has received non-commercial assistance as a means of its equity participation in another enterprise shall not, in and of itself, be construed to give rise to adverse effects as provided for in this Article. Consistent with Article X.5, if the public enterprise provides equity capital to another public enterprise or to a privately-owned enterprise, and the equity capital is a form of non-commercial assistance, then, depending on the facts, the production and sale of a good or the supply of a service by the recipient enterprise could give rise to adverse effects.

- (c) the market share of the good or service of the Party's enterprise declines, but at a significantly slower rate than would have been the case in the absence of the non-commercial assistance.

The change must manifest itself over an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the good or service concerned, which, in normal circumstances, is at least one year.

3. For the purposes of paragraphs 1(c) and 1(f), price undercutting includes a case in which such price undercutting has been demonstrated through a comparison of the prices of the good or service of the public enterprise with the prices of the like good or service.

4. Comparisons of the prices in paragraph 3 must be made at the same level of trade and at comparable times, and due account must be taken for factors affecting price comparability. If a direct comparison of transactions is not possible, the existence of price undercutting may be demonstrated on some other reasonable basis, such as, in the case of goods, a comparison of unit values.

5. Non-commercial assistance that was provided before the signing of this Agreement shall be deemed not to cause adverse effects.

Article X.7: Injury

1. For the purposes of Article X.5.10 and Article X.5.11, the term "injury" means material injury to a domestic industry, threat of material injury to a domestic industry, or material retardation of the establishment of such an industry. A determination of material injury shall be based on positive evidence and involve an objective examination of the relevant factors, including the volume of production by the covered investment that has received non-commercial assistance, the effect of that production on prices for like goods produced and sold by the domestic industry, and the effect of that production on the domestic industry producing like goods.

2. With regard to the volume of production by the covered investment that has received non-commercial assistance, consideration shall be given as to whether there has been a significant increase in the volume of production, either in absolute terms or relative to production or consumption in the territory of the Party in which injury is alleged to have occurred. With regard to the effect of the production by the covered investment on prices, consideration shall be given as to whether there has been a significant price undercutting by the goods produced and sold by the covered investment as compared with the price of like goods produced and sold by the domestic industry, or whether the effect of production by the covered investment is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

3. The examination of the impact on the domestic industry of the goods produced and sold by the covered investment that received the non-commercial assistance must include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, such as actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programs. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

4. It must be demonstrated that the goods produced and sold by the covered investment are, through the effects of the non-commercial assistance set out in paragraphs 2 and 3, causing injury within the meaning of this Article. The demonstration of a causal relationship between the goods produced and sold by the covered investment and the injury to the domestic industry shall be based on an examination of all relevant evidence. Any known factors other than the goods produced by the covered investment which at the same time are injuring the domestic industry must be examined, and the injuries caused by these other factors must not be attributed to the goods produced and sold by the covered investment that has received non-commercial assistance.³⁸ Factors that may be relevant in this respect include the volumes and prices of other like goods in the market in question, contraction in demand or changes in the patterns of consumption, and developments in technology and the export performance and productivity of the domestic industry.

5. A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture, or remote possibility and shall be considered with special care. The change in circumstances that would create a situation in which non-commercial assistance to the covered investment would cause injury must be clearly foreseen and imminent. In making a determination regarding the existence of a threat of material injury, there should be consideration of relevant factors³⁹ and of whether the totality of the factors considered lead to the conclusion that further availability of goods produced by the covered investment is imminent and that, unless protective action is taken, material injury would occur.

³⁸ For greater certainty, provided the goods produced and sold by the covered investment are more than a tangential or incidental cause of the injury to the domestic industry, injury through the effects of non-commercial assistance may be found to exist notwithstanding that other known factors may also be contributing to the injury. Injury caused by other known factors need not be isolated nor separated and distinguished from injury caused by the assistance.

³⁹ In making a determination regarding the existence of a threat of material injury, a Party should consider, among other things, such factors as: (i) the nature of the non-commercial assistance in question and the trade effects likely to arise therefrom; (ii) a significant rate of increase in sales in the domestic market by the covered investment indicating a likelihood of substantially increased sales; (iii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the covered investment indicating the likelihood of substantially increased production of the good by that covered investment, taking into account the availability of export markets to absorb additional production; (iv) whether prices of goods sold by the covered investment will have a significant depressing or suppressing effect on the price of like goods; and (v) inventories of like goods.

Article X.8: Courts and Administrative Bodies

1. Each Party shall provide its courts with jurisdiction over civil claims against an enterprise owned or controlled by the other Party or a non-Party based on a commercial activity carried on in its territory.⁴⁰ This shall not be construed to require a Party to provide jurisdiction over those claims if jurisdiction is not provided for over similar claims against enterprises that are not owned or controlled by the other Party or a non-Party.
2. Each Party shall ensure that any administrative body that the Party establishes or maintains that regulates a public enterprise, including any administrative body responsible for competition law enforcement, exercises its regulatory discretion in an impartial manner with respect to enterprises that it regulates, including enterprises that are not public enterprises. No Party shall preclude any administrative body it has established from regulating a public enterprise in an impartial manner.
3. Each Party shall ensure that none of its public enterprises exercises regulatory authority over the public enterprise's own commercial activities, the commercial activities of another public enterprise, or over the activities of producers of a like good or supplier of a like service of the public enterprise.

Article X.9: Anticircumvention

Neither Party shall take any action, while engaging in commercial activities for the production of goods, that would otherwise be disciplined by the terms of this Chapter if conducted by a public enterprise engaging in the same commercial activities.

Article X.10: Treatment of Public Enterprises of a Non-Party

1. Each Party shall accord to a good or service supplied by an enterprise of the other Party or a covered investment treatment no less favorable than it accords to a public enterprise of a non-Party.
2. Each Party shall establish, or shall demonstrate that it has previously established, a process for screening certain investments by public enterprises of a non-Party in the territory of the Party on the basis of its national security interests.⁴¹

⁴⁰ This paragraph shall not be construed to preclude a Party from providing its courts with jurisdiction over claims against enterprises owned or controlled by the other Party or a non-Party other than those claims referred to in this paragraph.

⁴¹ For greater certainty, the method of screening by a Party, and the decision of which investments to screen, shall be subject to each Party's discretion.

Article X.11: Party-Specific Annexes

Article X.4 shall not apply with respect to the non-conforming activities of public enterprises or designated monopolies that a Party lists in Annex X-B.

Article X.12: Transparency

1. Each Party shall provide to the other Party and publish on an official website, a list of the its public enterprises subject to this Chapter no later than six months after the date of entry into force of this Agreement, and thereafter shall update the list annually. This publication shall include the following information:

- (a) the percentage of shares that the Party, its public enterprises, or its designated monopolies cumulatively own either directly or indirectly and the percentage of votes that they cumulatively hold either directly or indirectly, in each listed public enterprise;
- (b) a description of any special shares or special voting or other rights that the Party, its public enterprises, or its designated monopolies, hold, to the extent these rights are different from the rights attached to the general common shares of the listed public enterprise;
- (c) the name and titles of any individual serving on the board of directors of a listed public enterprise and any affiliation they may have with a Party or non-Party;
- (d) the listed public enterprise'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 listed public enterprise benefits under the Party's laws;
- (f) any profit returned by the listed public enterprise to the Party;
- (g) any dividend paid by the listed public enterprise to the Party; and
- (h) the equity owners of more than five percent of the listed public enterprise and their percentage of shares.

2. Each Party shall ensure that all of its public enterprises published or notified pursuant to paragraph 1 publicly publish annual audited financial statements.⁴²

⁴² For greater certainty, such audited financial statements shall be completed by an independent, private auditor established and operating pursuant to market principles and based on international standards.

3. On the written request of the other Party, a Party shall answer questions in writing regarding the commercial activities of a public enterprise of a non-Party, including its subsidiaries, which has established a commercial presence in the Party, to include special economic zones. The responding Party shall respond to such questions, in accordance with its law, within 45 days of receipt of the request.

4. 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.

5. Each Party shall notify the other Party on an annual basis, each equity investment the Party makes into an enterprise of that Party and provide the date, amount, and terms of the equity investment.

6. On the written request of the other Party, a Party shall promptly provide, in writing, information regarding any policy or program that the Party has adopted or maintains that provides for the provision of either non-commercial assistance or any equity capital (regardless of whether the equity infusion also constitutes non-commercial assistance) to its public enterprises. The responding Party shall respond to such questions within 45 days of receipt of the request.

7. When a Party provides a response pursuant to paragraph 6, the information provided must be sufficiently specific to enable the requesting Party to understand the operation of the policy or program and evaluate its effects or potential effects on trade or investment between the Parties. In responding to a request, the Party shall ensure that the response that it provides contains the following information:

- (a) the form of the non-commercial assistance provided under the policy or program, for example, grant or loan;
- (b) the names of the authorities or public enterprises providing the non-commercial assistance or equity capital and the names of the public enterprises that have received or are eligible to receive the non-commercial assistance;
- (c) the legal basis and policy objective of the policy or program providing for the non-commercial assistance or equity infusion;
- (d) with respect to goods, the amount per unit of the non-commercial assistance or, in cases if it is not possible to provide a per unit amount, the total amount of or the annual amount budgeted for the non-commercial assistance, indicating, if possible, the average amount per unit in the previous year;

- (e) with respect to services, the total amount of or the annual amount budgeted for the non-commercial assistance, indicating, if possible, the total amount in the previous year;
- (f) with respect to policies or programs providing for non-commercial assistance in the form of loans or loan guarantees, the amount of the loan or amount of the loan guaranteed, interest rates, and fees charged;
- (g) with respect to policies or programs providing for non-commercial assistance in the form of the provision of goods or the supply of services, the prices charged, if any, for those goods and services;
- (h) with respect to policies or programs for the provision of equity capital, to the extent not previously notified, the amount invested, the number and a description of the shares received, and any assessment of the enterprise's financial health and prospects that is conducted with respect to the underlying investment decision;
- (i) duration of the policy or program or any other time-limits attached to it; and
- (j) statistical data permitting an assessment of the effects of the non-commercial assistance on trade or investment between the Parties.

8. In response to a request made pursuant to paragraph 6, if a Party considers that it has not adopted or does not maintain any policies or programs referred to in paragraph 6, the Party shall promptly provide a written explanation to the requesting Party. If the reason for such a response is that the policies or programs are provided on commercial or market-oriented terms, the Party shall provide sufficient information for demonstrating the market-oriented nature of the terms.

9. The Parties recognize that the provision of information under paragraphs 7 and 8 does not prejudice the legal status of the assistance that was the subject of the request under paragraph 6 or the effects of that assistance under this Agreement.

10. When a Party responds to a request for information under this Article, and informs the requesting Party that it considers certain information to be confidential, the Party shall provide an explanation for its determination. The requesting Party shall not disclose this information without the prior consent of the Party that provided it. The Party should not consider the amount of the financial contribution associated with the non-commercial assistance or equity capital to be confidential, to the maximum extent possible under the law of that territory.

11. If a Party does not provide a response within 60 days to a written request made pursuant to paragraph 6, the requesting Party may submit a second written request for the information. If, after 90 days following the second request for information, the responding Party has not provided a written response, or provided an explanation of the need for additional time and a final date by

which the requested information shall be provided, the policy or program that is the subject of the written request shall be deemed to constitute prohibited non-commercial assistance.

Article X.13: Committee on Public Enterprises and Designated Monopolies

1. The Parties hereby establish a Committee on Public Enterprises and Designated Monopolies (PE Committee), composed of government representatives of each Party.

2. The PE Committee's functions shall include:

- (a) reviewing and considering the operation and implementation of this Chapter;
- (b) at the request of a Party, consulting on a matter arising under this Chapter; and
- (c) undertaking other activities as the PE Committee may decide.

3. The PE Committee shall, if appropriate and subject to available resources, engage in mutually decided upon technical cooperation activities, including:

- (a) exchanging information regarding their experiences in improving the corporate governance and operation of the Parties' public enterprises;
- (b) organizing international seminars, workshops, or any other appropriate forum for sharing technical information and expertise related to the governance and operations of public enterprises.

4. The PE Committee shall create a working group to discuss and address shared concerns regarding the unfair and anti-competitive activities of the public enterprises of relevant non-Parties. The working group's functions shall include:

- (a) sharing best practices on policy approaches to ensure fair competition between public enterprises, including those of non-Parties, and privately owned enterprises of the Parties, including policies related to relevant international standards, such as the OECD Guidelines *on Corporate Governance of State-owned Enterprises*; and
- (b) at the request of a Party and in accordance with its law, consulting on matters related to public enterprises of non-Parties operating in the territory of a Party, including the market, trade, and capacity effects of the public enterprises' activities, acquisitions of distressed assets by these public enterprises, any non-commercial assistance provided, and the extent to which these public enterprises accord non-discriminatory treatment and act in accordance with commercial considerations with respect to the purchase and sale of goods and services;

- (c) consulting on the adverse impact of the commercial activities of public enterprises of non-Parties on domestic and international competition and global trade, including the market share of enterprises, upon request of a Party;
- (d) developing cooperative efforts, as appropriate, to promote the principles underlying the disciplines contained in this Chapter and to contribute to the development of similar disciplines in other regional and multilateral institutions in which the Parties participate, including disciplines on public enterprises of non-Parties; and
- (e) undertaking other activities as the working group may decide.

5. The PE Committee, and the working group referred to in paragraph 4, shall meet within one year after the date of entry into force of this Agreement, and at least annually thereafter, unless the Parties decide otherwise.

Article X.15: Exceptions

1. Nothing in Article X.4 or Article X.5 shall be construed to:

- (a) prevent the adoption or enforcement of measures to respond temporarily to a national or global economic emergency declared by a Party; or
- (b) apply to a public enterprise of a Party with respect to which a Party has adopted or enforced measures on a temporary basis in response to or to prevent a territory-wide or global economic emergency.

2. Article X.4.1 shall not apply to the supply of financial services, or acquisition of equity, by a public enterprise of a Party pursuant to a government mandate if that supply of financial services, or acquisition of equity:

- (a) supports exports or imports, provided that these services are:
 - (i) not intended to displace commercial financing, or
 - (ii) offered on terms no more favorable than those that could be obtained for comparable financial services in the commercial market;⁴³

⁴³ In circumstances in which no comparable financial services are offered in the commercial market: (1) for the purposes of paragraphs 2(a)(ii), 2(b)(ii), 3(a)(ii), and 3(b)(ii), the public enterprise may rely as necessary on available evidence to establish a benchmark of the terms on which such services would be offered in the commercial market; and (2) for the purposes of paragraphs 2(a)(i), 2(b)(i), 3(a)(i), and 3(b)(i), the supply of the financial services is 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 favorable 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. The supply of financial services by a public enterprise pursuant to a government mandate shall be deemed not to give rise to prohibitions under Article X.5.3 or X.5.4 or adverse effects under Article X.5.6 or Article X.5.9 if the Party in which the financial service is supplied requires a local presence in order to supply those services, if that supply of financial services:⁴⁴

- (a) supports exports or imports, provided that these services are:
 - (i) not intended to displace commercial financing, or
 - (ii) offered on terms no more favorable 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 favorable 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.

4. Article X.5 (Non-Commercial Assistance) shall not apply with respect to an enterprise over which a public enterprise of a Party has assumed temporary ownership as a consequence of foreclosure or a similar action in connection with defaulted debt, or payment of an insurance claim by the public enterprise, associated with the supply of the financial services referred to in paragraphs 2 and 3, provided that any support from the Party or public enterprise of the Party provides to the enterprise during the period of temporary ownership is provided in order to recoup

⁴⁴ For the purposes of this paragraph, in cases where the Party in which the financial service is supplied requires a local presence in order to supply those services, the supply of the financial services identified in this paragraph through an enterprise that is a covered investment shall be deemed to not give rise to adverse effects.

the public enterprise's investment in accordance with a restructuring or liquidation plan that will result in the ultimate divestiture from the public enterprise.

5. Article X.4, Article X.5, Article X.12, and Article X.13 shall not apply with respect to a public enterprise or designated monopoly of a Party if in any one of the three previous consecutive fiscal years, the annual revenue derived from the commercial activities of the public enterprise or designated monopoly was less than a threshold amount which shall be calculated in accordance with Annex X-A.

Article X.16: Applicability to Public Enterprises and Designated Monopolies at the Sub-Central Level

Each Party reserves the right to propose the inclusion of provisions in this Agreement addressing the applicability of this Chapter to public enterprises of the Parties owned or controlled at the sub-central level, and designated monopolies designated by a sub-central level, prior to, or subsequent to, entry into force of this Agreement.

ANNEX X-A

THRESHOLD CALCULATION

1. On the date of entry into force of this Agreement, the threshold referred to in Article X.15.5 shall be [X] 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:

$$T_1 = (1 + (\sum w_i^{SDR} \cdot \Pi_i^{SDR}))T_0$$

where:

- T_0 = threshold value at base period;
- T_1 = new (adjusted) threshold value;
- w_i^{SDR} = respective (fixed) weights of each currency, i , in the SDR (as at 30 June of the year prior to adjustment taking effect); and
- Π_i^{SDR} = cumulative per cent change in the GDP deflator of each currency, i , 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 where 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 its applicable threshold in their respective national currencies. For the purposes of the threshold in the same year the agreement enters into force, the three-year period shall be to 30 June of the year the agreement enters into force.
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 the calculation of the threshold were to create a significant problem with regard to the application of this Chapter.

ANNEX X-B

NON-CONFORMING ACTIVITIES

1. This Annex sets out, pursuant to Article X.11 (Party-Specific Annexes), the non-conforming activities of a public enterprise or designated monopoly of a Party.
2. Each entry sets out the following elements:
 - (a) **Obligations Concerned** specifies the obligations referred to in paragraph 1 that, pursuant to Article X.11 (Party-Specific Annexes), shall not apply to the non-conforming activities of the public enterprise or designated monopoly, as set out in paragraph 3;
 - (b) **Entity** identifies the public enterprise or designated monopoly that undertakes the non-conforming activities for which the entry is made;
 - (c) **Scope of Non-conforming Activities** provides a description of the scope of non-conforming activities of the public enterprise or designated monopoly for which the entry is made; and
 - (d) **Measures** identifies, for transparency purposes, a non-exhaustive list of the laws, regulations, or other measures pursuant to which the public enterprise or designated monopoly engages in the non-conforming activities for which the entry is made.
3. In accordance with Article X.11 (Party-Specific Annexes), the articles of this Chapter specified in the **Obligations Concerned** element of an entry shall not apply to the non-conforming activities (identified in the **Scope of Non-conforming Activities** element of that entry) of the public enterprise or designated monopoly (identified in the **Entity** element of that entry).