

## Chapter Eleven

### Cross-Border Trade in Services

#### Article 11.1: Scope and Coverage

1. This Chapter applies to measures adopted or maintained by a Party affecting cross-border trade in services by service suppliers of another Party. Such measures include measures affecting:

- (a) the production, distribution, marketing, sale, and delivery of a service;
- (b) the purchase or use of, or payment for, a service;
- (c) the access to and use of distribution, transport, or telecommunications networks and services in connection with the supply of a service;
- (d) the presence in its territory of a service supplier of another Party; and
- (e) the provision of a bond or other form of financial security as a condition for the supply of a service.

2. For the purposes of this Chapter, “measures adopted or maintained by a Party” means measures adopted or maintained by:

- (a) central, regional, or local governments and authorities; and
- (b) non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities.

3. Articles 11.4, 11.7, and 11.8 also apply to measures by a Party affecting the supply of a service in its territory by a covered investment.<sup>1</sup>

4. This Chapter does not apply to:

- (a) financial services as defined in Article 12.20 (Definitions), except that paragraph 3 applies where the financial service is supplied by a covered investment that is not a covered investment in a financial institution (as defined in Article 12.20) in the Party’s territory;

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<sup>1</sup> The Parties understand that nothing in this Chapter, including this paragraph, is subject to investor-state dispute settlement pursuant to Section B of Chapter Ten (Investment).

- (b) “government procurement” or “procurement”, as defined in Article 1.3 (Definitions of General Application);
- (c) air services, including domestic and international air transportation services, whether scheduled or non-scheduled, and related services in support of air services, other than:
  - (i) aircraft repair and maintenance services during which an aircraft is withdrawn from service, and
  - (ii) specialty air services; or
- (d) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.

Annex 11-A sets forth an understanding of the Parties related to subparagraph (d).

5. This Chapter does not impose any obligation on a Party with respect to a national of another Party seeking access to its employment market, or employed on a permanent basis in its territory, and does not confer any right on that national with respect to that access or employment.

6. This Chapter does not apply to services supplied in the exercise of governmental authority in a Party’s territory. A “service supplied in the exercise of governmental authority” means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.

7. Nothing in this Chapter or any other provision of this Agreement shall be construed to impose any obligation on a Party regarding its immigration measures, including admission or conditions of admission for temporary entry.

## **Article 11.2: National Treatment**

1. Each Party shall accord to service suppliers of another Party treatment no less favorable than that it accords, in like circumstances, to its own service suppliers.

2. The treatment to be accorded by a Party under paragraph 1 means, with respect to a regional level of government, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that regional level of government to service suppliers of the Party of which it forms a part.

### **Article 11.3: Most-Favored-Nation Treatment**

Each Party shall accord to service suppliers of another Party treatment no less favorable than that it accords, in like circumstances, to service suppliers of any other Party or any non-Party.

### **Article 11.4: Market Access**

No Party may adopt or maintain, either on the basis of a regional subdivision or on the basis of its entire territory, measures that:

- (a) impose limitations on:
  - (i) the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers, or the requirement of an economic needs test,
  - (ii) the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test,
  - (iii) the total number of service operations or the total quantity of services output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test,<sup>2</sup> or
  - (iv) the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test; or
- (b) restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service.

### **Article 11.5: Local Presence**

No Party may require a service supplier of another Party to establish or maintain a representative office or any form of enterprise, or to be resident, in its territory as a condition for the cross-border supply of a service.

### **Article 11.6: Non-Conforming Measures**

1. Articles 11.2, 11.3, 11.4, and 11.5 do not apply to:

- (a) any existing non-conforming measure that is maintained by a Party at:

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<sup>2</sup> This clause does not cover measures of a Party that limit inputs for the supply of services.

- (i) the central level of government, as set out by that Party in its Schedule to Annex I,
  - (ii) a regional level of government, as set out by that Party in its Schedule to Annex I, or
  - (iii) a local level of government;
- (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
- (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 11.2, 11.3, 11.4, or 11.5.

2. Articles 11.2, 11.3, 11.4, and 11.5 do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities as set out in its Schedule to Annex II.

#### **Article 11.7: Domestic Regulation**

1. Where a Party requires authorization for the supply of a service, the Party's competent authorities shall, within a reasonable time after the submission of an application considered complete under its laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the Party's competent authorities shall provide, without undue delay, information concerning the status of the application. This obligation shall not apply to authorization requirements that are within the scope of Article 11.6.2.

2. With a view to ensuring that measures relating to qualification requirements and procedures, technical standards, and licensing requirements do not constitute unnecessary barriers to trade in services, each Party shall endeavor to ensure, as appropriate for individual sectors, that such measures are:

- (a) based on objective and transparent criteria, such as competence and the ability to supply the service;
- (b) not more burdensome than necessary to ensure the quality of the service; and
- (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

3. If the results of the negotiations related to Article VI:4 of the GATS (or the results of any similar negotiations undertaken in other multilateral fora in which each of the Parties participate) enter into effect, this Article shall be amended, as appropriate, after consultations between the

Parties, to bring those results into effect under this Agreement. The Parties shall coordinate on such negotiations, as appropriate.

### **Article 11.8: Transparency in Developing and Applying Regulations<sup>3</sup>**

Further to Chapter Nineteen (Transparency):

- (a) each Party shall maintain or establish appropriate mechanisms for responding to inquiries from interested persons regarding its regulations relating to the subject matter of this Chapter;
- (b) if a Party does not provide advance notice and opportunity for comment pursuant to Article 19.2 (Publication), it shall, to the extent possible, address in writing the reasons therefor;
- (c) at the time it adopts final regulations relating to the subject matter of this Chapter, each Party shall, to the extent possible, including upon request, address in writing substantive comments received from interested persons with respect to the proposed regulations; and
- (d) to the extent possible, each Party shall allow reasonable time between publication of final regulations and their effective date.

### **Article 11.9: Recognition**

1. For the purposes of fulfilment, in whole or in part, of its standards or criteria for the authorization, licensing, or certification of services suppliers, and subject to the requirements of paragraph 4, a Party may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.

2. Where a Party recognizes, autonomously or by agreement or arrangement, the education or experience obtained, requirements met, or licenses or certifications granted in the territory of a non-Party, nothing in Article 11.3 shall be construed to require the Party to accord such recognition to the education or experience obtained, requirements met, or licenses or certifications granted in the territory of another Party.

3. A Party that is a party to an agreement or arrangement of the type referred to in paragraph 1, whether existing or future, shall afford adequate opportunity for another Party, if that other Party is interested, to negotiate accession to such an agreement or arrangement or to negotiate

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<sup>3</sup> For greater certainty, “regulations” includes regulations establishing or applying to licensing authorization or criteria.

one comparable with it. Where a Party accords recognition autonomously, it shall afford adequate opportunity for another Party to demonstrate that education, experience, licenses, or certifications obtained or requirements met in that other Party's territory should be recognized.

4. No Party may accord recognition in a manner that would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing, or certification of services suppliers, or a disguised restriction on trade in services.

5. Annex 11-B (Professional Services) applies to measures adopted or maintained by a Party relating to the licensing or certification of professional service suppliers as set out in that Annex.

#### **Article 11.10: Transfers and Payments**

1. Each Party shall permit all transfers and payments relating to the cross-border supply of services to be made freely and without delay into and out of its territory.

2. Each Party shall permit such transfers and payments relating to the cross-border supply of services to be made in a freely usable currency at the market rate of exchange prevailing on the date of transfer.

3. Notwithstanding paragraphs 1 and 2, a Party may prevent or delay a transfer or payment through the equitable, non-discriminatory, and good faith application of its laws relating to:

- (a) bankruptcy, insolvency, or the protection of the rights of creditors;
- (b) issuing, trading, or dealing in securities, futures, options, or derivatives;
- (c) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;
- (d) criminal or penal offences; or
- (e) ensuring compliance with orders or judgments in judicial or administrative proceedings.

#### **Article 11.11: Denial of Benefits**

1. A Party may deny the benefits of this Chapter to a service supplier of another Party if the service supplier is an enterprise owned or controlled by persons of a non-Party, and the denying Party:

- (a) does not maintain diplomatic relations with the non-Party; or

- (b) adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise.

2. Subject to Article 21.4 (Consultations), a Party may deny the benefits of this Chapter to a service supplier of another Party if the service supplier is an enterprise owned or controlled by persons of a non-Party or of the denying Party that has no substantial business activities in the territory of that other Party.

#### **Article 11.12: Specific Commitments**

1. Annex 11-C sets out certain obligations with regard to certain limitations on the employment of specialty personnel and professionals.
2. Annex 11-D sets out obligations with regard to the supply of express delivery services.
3. Annex 11-E will set out other specific commitments that the Parties may agree.

#### **Article 11.13: Implementation**

The Parties shall consult annually, or as otherwise agreed, to review the implementation of this Chapter and consider other matters of mutual interest affecting trade in services.

#### **Article 11.14: Definitions**

For the purposes of this Chapter:

**cross-border trade in services** or **cross-border supply of services** means the supply of a service:

- (a) from the territory of one Party into the territory of another Party;
- (b) in the territory of one Party by a person of that Party to a person of another Party;  
or
- (c) by a national of a Party in the territory of another Party;

but does not include the supply of a service in the territory of a Party by a covered investment;

**enterprise** means an “enterprise” as defined in Article 1.3 (Definitions of General Application), and a branch of an enterprise;

**enterprise of a Party** means an enterprise organized or constituted under the laws of that Party; and a branch located in the territory of that Party and carrying out business activities there;

**professional services** means services, the supply of which requires specialized<sup>4</sup> post-secondary education, or equivalent training or experience, and for which the right to practice is granted or restricted by a Party, but does not include services supplied by trades-persons or vessel and aircraft crew members;

**service supplier of a Party** means a person of that Party that seeks to supply or supplies a service;<sup>5</sup> and

**specialty air services** means any non-transportation air services, such as aerial fire-fighting, sightseeing, spraying, surveying, mapping, photography, parachute jumping, glider towing, and helicopter-lift for logging and construction, and other airborne agricultural, industrial, and inspection services.

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<sup>4</sup> For greater certainty, the term “specialized post-secondary education” includes education beyond the high-school level that is related to a specific area of knowledge.

<sup>5</sup> For the purposes of Articles 11.2 and 11.3, “services suppliers” has the same meaning as “services and service suppliers” as used in Articles II and XVII of the GATS.

## **Annex 11-A**

The Parties understand that if a Party establishes or maintains a fund to promote development of a particular service within its territory, disbursements from such fund would be subject to the same treatment as a measure covered by Article 11.1.4(d), even when a privately owned entity is wholly or partially responsible for the administration of the fund.<sup>6</sup>

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<sup>6</sup> For greater certainty, this annex does not prejudice the position of the Parties in subsidies negotiations in any other forum.

## **Annex 11-B**

### **Professional Services**

#### **Development of Professional Services Standards**

1. Each Party shall encourage the relevant bodies in its territory to develop mutually acceptable standards and criteria for licensing and certification of professional services suppliers and to provide recommendations on mutual recognition to the Commission.
2. The standards and criteria referred to in paragraph 1 may be developed with regard to the following matters:
  - (a) education – accreditation of schools or academic programs;
  - (b) examinations – qualifying examinations for licensing, including alternative methods of assessment such as oral examinations and interviews;
  - (c) experience – length and nature of experience required for licensing;
  - (d) conduct and ethics – standards of professional conduct and the nature of disciplinary action for non-conformity with those standards;
  - (e) professional development and re-certification – continuing education and ongoing requirements to maintain professional certification;
  - (f) scope of practice – extent of, or limitations on, permissible activities;
  - (g) local knowledge – requirements for knowledge of such matters as local laws, regulations, language, geography, or climate; and
  - (h) consumer protection – including alternatives to residency requirements, such as bonding, professional liability insurance, and client restitution funds, to provide for the protection of consumers.
3. On receipt of a recommendation referred to in paragraph 1, the Commission shall review the recommendation within a reasonable time to determine whether it is consistent with this Agreement. Based on the Commission’s review, each Party shall encourage its respective competent authorities, where appropriate, to implement the recommendation within a mutually agreed time.

#### **Temporary Licensing**

4. For mutually agreed individual professional services, each Party shall encourage the relevant bodies in its territory to develop procedures for the temporary licensing of professional service suppliers of the other Parties.

### **Working Group on Professional Services**

5. The Parties shall establish a Working Group on Professional Services (Working Group), comprising representatives of each Party, to facilitate the activities listed in paragraphs 1 and 4.

6. In pursuing this objective, the Working Group shall consider, as appropriate, relevant bilateral, plurilateral, and multilateral agreements relating to professional services.

7. The Working Group shall consider, for professional services generally and, as appropriate, for individual professional services, the following matters:

- (a) procedures for fostering the development of mutual recognition agreements or arrangements among relevant professional bodies;
- (b) the feasibility of developing model procedures for the licensing and certification of professional services providers; and
- (c) other issues of mutual interest relating to the provision of professional services.

8. To facilitate the efforts of the Working Group, each Party shall consult with the relevant bodies in its territory to seek to identify professional services to which the Working Group should give consideration, giving priority to engineering and architecture services.

9. The Working Group shall report to the Commission on its progress, including with respect to any recommendations for initiatives to promote mutual recognition of standards and criteria and for temporary licensing, and on the further direction of its work, no later than 18 months after establishment of the Working Group.

10. The Working Group shall be established no later than one year after the entry into force of the Agreement.

### **Review**

11. The Commission shall review the implementation of this Annex at least once every three years.

### **Temporary Licensing of Engineers**

12. At its first meeting, the Working Group shall consider establishing a work program in conjunction with the relevant professional bodies in the territories of the Parties to develop

procedures for the temporary licensing by the competent authorities in one Party of engineers of other Parties.

13. To this end, each Party shall consult with relevant professional bodies in its territory to obtain their recommendations on:

- (a) the development of procedures for the temporary licensing of engineers of the other Parties to practice their engineering specialties in the territory of the consulting Party;
- (b) the development of model procedures for adoption by the competent authorities throughout its territory to facilitate the temporary licensing of engineers of the other Parties;
- (c) the engineering specialties and, as applicable, the regional jurisdictions with respect to which priority should be given in developing temporary licensing procedures; and
- (d) other matters of mutual interest to the Parties relating to the temporary licensing of engineers identified by the consulting Party in such consultations.

14. Each Party shall request the relevant professional bodies in its territory to present recommendations to the Commission on the matters referred to in paragraph 13 within 18 months after the date of establishment of the Working Group.

15. Each Party shall encourage the relevant professional bodies in its territory to meet at the earliest opportunity with the relevant professional bodies located in the territory of the other Parties, with a view to cooperating in the development of joint recommendations described in paragraph 13 within 18 months of the date of establishment of the Working Group. Each Party shall request an annual report from relevant professional bodies in its territory on the progress achieved in developing those recommendations.

16. The Parties shall promptly review any recommendation under paragraph 14 or 15 to ensure its consistency with this Agreement. Based on the Commission's review, each Party shall encourage its respective competent authorities, where appropriate, to implement the recommendation within a mutually agreed time.

17. For purposes of this Annex, **engineers of the other Parties** means nationals of the other Parties who are licensed to supply engineering services within the territories of the other Parties.

## Annex 11-C

1. Notwithstanding Article 11.1.1 and 11.1.5, this Annex applies to the limitations set forth in paragraphs 2 and 3.

2. The following limitations may be maintained or promptly renewed, except to the extent they restrict the ability of an enterprise to hire, as a dependent employee or as an independent contractor, professionals and specialty personnel of another Party on a temporary basis:

For Colombia:

- (a) *Código Sustantivo del Trabajo*, 1993, Article 74 and 75<sup>7</sup>.
- (b) *Ley 18 de 1976*, Article 7.
- (c) *Ley 51 de 1986*, Article 8.
- (d) *Decreto 2718 de 1984*, Article 31.
- (e) *Ley 685 de 2001, Código de Minas*, Article 253.
- (f) *Ley 9 de 1974*, Articles 9 and 10.
- (g) *Ley 33 de 1989*, Article 7.
- (h) *Decreto 1056 de 1953*, Article 8.
- (i) *Ley 22 de 1984*, Articles 9 and 10.
- (j) *Decreto 2531 de 1986*, Article 30.

3. The following limitations may be maintained or promptly renewed:

For Colombia:

- (a) *Decreto Ley 2324 de 1984*, Articles 99 and 101.
- (b) *Código de Comercio de 1974*, Articles 1803 and 1804.
- (c) *Ley 74 de 1966*, Article 7.

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<sup>7</sup> Training requirements pursuant to Article 75 of the *Código Sustantivo del Trabajo* are not necessarily a restriction on the ability of an enterprise to hire, as a dependent employee or as an independent contractor, professionals and specialty personnel of another Party.

4. Nothing in this Annex shall be construed to limit a Party's obligations under Article 10.10 (Senior Management and Board of Directors) or Article 12.12 (Senior Management and Board of Directors).

5. For greater certainty, the limitations listed in paragraphs 2 and 3 are not inconsistent with Article 10.9 (Performance Requirements).

6. For purposes of this Annex:

**professionals** means natural persons employed to supply professional services;

**specialty personnel** means natural persons who are employed to use their expert or proprietary knowledge of an enterprise's services, equipment, techniques, or management; and may include, but are not limited to, members of licensed professions; and

**temporary** means for a specified period that may be up to three years, depending on the relevant Party's domestic law, which may or may not be renewable.

## Annex 11-D

### Express Delivery Services

1. For the purposes of this Agreement, **express delivery services** means the collection, transport, and delivery, of documents, printed matter, parcels, goods, or other items on an expedited basis while tracking and maintaining control of these items throughout the supply of the service. Express delivery services do not include (i) air transport services, (ii) services supplied in the exercise of governmental authority, or (iii) maritime transport services.<sup>8</sup>
2. The Parties confirm their desire to maintain at least the level of market openness for express delivery services they provide on the date this Agreement is signed. If a Party considers that another Party is not maintaining such level of access, it may request consultations. The other Party shall afford adequate opportunity for consultations and, to the extent possible, shall provide information in response to inquiries regarding the level of access and any related matter.
3. Each Party shall ensure that, where its monopoly supplier of postal services competes, either directly or through an affiliated company, in the supply of express delivery services outside the scope of its monopoly rights, such a supplier does not abuse its monopoly position to act in the Party's territory in a manner inconsistent with the Party's obligations under Articles 10.3 (National Treatment), 10.4 (Most-Favored-Nation Treatment), 11.2, 11.3, or 11.4. Further to Article 1.2 (Relation to Other Agreements), the Parties also reaffirm their rights and obligations under Article VIII of the GATS.<sup>9</sup>
4. Each Party confirms its intention to prevent the direction of revenues derived from monopoly postal services to confer an advantage to its own or any other competitive supplier's express delivery services.
5. Notwithstanding Article 11.1.1 and 11.1.4(d), Colombia shall not use revenues derived from the payments required under Article 24(a) and (b) of *Decreto 229* of 1995 and its amendments or successor legislation to subsidize the supply of express delivery services by the Government or a state enterprise.
6. If Colombia provides for the supply of universal postal services by a government entity or a state enterprise or by concession, it shall also provide for an independent authority to regulate the entity or enterprise and any services supplied by the entity or enterprise in competition with private service suppliers.

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<sup>8</sup> For greater certainty, for the United States, express delivery services do not include delivery of letters subject to the Private Express Statutes (18 U.S.C. 1693 et seq., 39 U.S.C. 601 et seq.), but do include delivery of letters subject to the exceptions to, or suspensions promulgated under, those statutes, which permit private delivery of extremely urgent letters.

<sup>9</sup> For greater certainty, the Parties reaffirm that nothing in this Article is subject to investor-state dispute settlement pursuant to Section B of Chapter Ten (Investment).

## Annex 11-E

1. If a Party maintains a measure at the central level of government:
  - (a) entitling the agent, upon termination of a commercial agency contract, to a payment from the principal equivalent to a portion of the commission, royalty, or profit the agent received pursuant to the contract<sup>10</sup>;
  - (b) requiring that in the event the principal terminates a commercial agency contract without just cause or the agent terminates a contract for just cause arising from actions of the principal, the principal must provide an equitable indemnity to the agent as compensation for the agent's efforts to build the brand, the product line, or the services subject to a commercial agency contract; or
  - (c) providing that a commercial agency contract creates an exclusive agency unless the contract provides otherwise;

that Party shall revise or eliminate the measure in accordance with paragraph 2 within six months after entry into force of this Agreement.

2. A Party shall:
  - (a) revise a measure described in subparagraph 1(a) by making the entitlement to the payment inapplicable to the parties to a commercial agency contract;
  - (b) revise a measure described in subparagraph 1(b) by making the requirement to pay the equitable indemnity inapplicable to parties that enter into a commercial agency contract, and instead, that any indemnity upon termination of the commercial agency contract by the principal without just cause, or upon termination of such a contract by the agent for just cause arising from actions of the principal, shall be determined in accordance with:
    - (i) general principles of contract law (for example, costs that have not been recovered, lost profits, and detrimental reliance);<sup>11</sup> and, in the event that the parties expressly stipulate this,

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<sup>10</sup> This subparagraph does not refer to other measures that may be adopted or maintained in relation to payments associated with the termination of a contract in bad faith or in violation of the terms of the contract.

<sup>11</sup> The provision for damages based on the concepts set out in this clause does not constitute an equitable indemnity for purposes of paragraph 1(b).

- (ii) provisions voluntarily agreed upon by the principal and agent and set out in a commercial agency contract, to the extent consistent with applicable law; and
  - (c) revise a measure described in subparagraph 1(c) by providing that a principal may contract more than one agent in a single geographic area for the same scope of activities or products, unless the commercial agency contract provides otherwise.
- 3. Nothing in this Annex shall prevent the continued application, to the extent required under a Party's Constitution, of a measure described in paragraph 1(a) or (c) to commercial agency contracts entered into before entry into force of legislation adopted to implement this Annex.<sup>12</sup>
- 4. A Party shall not adopt a measure described in paragraph 1.
- 5. For purposes of this Annex, commercial agency contract means,
  - (a) for Colombia, a commercial agency contract within the meaning of Articles 1317 through 1331 of the *Código de Comercio* of Colombia; only when this contract is related to commercial goods<sup>13</sup>; and
  - (b) for the United States, any contract in which a party agrees to distribute commercial goods for another party.

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<sup>12</sup> In the case of Colombia, the relevant provision is Article 58 of the *Constitution Política de Colombia*. For greater certainty, a measure described in paragraph 2(b) will apply as of the entry into force of the legislation adopted to implement that measure, to contracts entered into before that date.

<sup>13</sup> For purposes of this Annex, "commercial goods" includes software. This is without prejudice to the treatment of software in other contexts or in other fora.