

CHAPTER 4

STATE-OWNED ENTERPRISES, ENTERPRISES GRANTED SPECIAL RIGHTS OR PRIVILEGES AND DESIGNATED MONOPOLIES

ARTICLE 376

Definitions

1. For the purposes of this Chapter, the following definitions apply:
 - (a) "Arrangement" means the Arrangement on Officially Supported Export Credits, developed within the framework of the OECD or a successor undertaking, whether developed within or outside of the OECD framework, that has been adopted by at least 12 original WTO Members that were Participants to the Arrangement as of 1 January 1979;
 - (b) "commercial activities" means activities, the end result of which is the production of a good or the supply of a service to be sold in the relevant market in quantities and at prices determined by an enterprise on the basis of the conditions of supply and demand, and which are undertaken with an orientation towards profit-making; activities undertaken by an enterprise which operates on a non-profit basis or a cost-recovery basis are not activities undertaken with an orientation towards profit-making;

- (c) "commercial considerations" means considerations of price, quality, availability, marketability, transportation and other terms and conditions of purchase or sale, or other factors that would normally be taken into account in the commercial decisions of a privately owned enterprise operating according to market economy principles in the relevant business or industry;
- (d) "covered entity" means:
 - (i) a designated monopoly;
 - (ii) an enterprise granted special rights or privileges; or
 - (iii) a State-owned enterprise;
- (e) "designated monopoly" means an entity, including a consortium or a government agency, that, in a relevant market in the territory of a Party, is designated as the sole supplier or purchaser of a good or service, but does not include an entity that has been granted an exclusive intellectual property right solely by reason of such grant; in this context, designate means to establish or authorise a monopoly, or to expand the scope of a monopoly to cover an additional good or service;
- (f) "enterprise" means enterprise as defined in point (g) of Article 124;

- (g) "enterprise granted special rights or privileges" means any enterprise, public or private, to which a Party has granted special rights or privileges, in law or in fact;
- (h) "service supplied in the exercise of governmental authority" means a service supplied in the exercise of governmental authority as defined in GATS;
- (i) "special rights or privileges" means rights or privileges by which a Party designates or limits to two or more the number of enterprises authorised to supply a good or service, other than according to objective, proportional and non-discriminatory criteria, substantially affecting the ability of any other enterprise to supply the same good or service in the same geographical area or product market under substantially equivalent conditions;
- (j) "State-owned enterprise" means an enterprise in which a Party:
 - (i) directly owns more than 50 % of the share capital;
 - (ii) controls, directly or indirectly, the exercise of more than 50 % of the voting rights;
 - (iii) holds the power to appoint a majority of the members of the board of directors or any other equivalent management body; or
 - (iv) has the power to exercise control over the enterprise. For the establishment of control, all relevant legal and factual elements shall be taken into account on a case-by-case basis.

ARTICLE 377

Scope

1. This Chapter applies to covered entities, at all levels of government, engaged in commercial activities. If a covered entity engages in both commercial and non-commercial activities, only the commercial activities are covered by this Chapter.
2. This Chapter does not apply to:
 - (a) covered entities when acting as procuring entities, as defined in each Party's Annexes 1 to 3 to Appendix I to the GPA and paragraph 1 of each Party's respective subsections of Section B of Annex 25, conducting covered procurement as defined in Article 277(2);
 - (b) any service supplied in the exercise of governmental authority.
3. This Chapter does not apply to a covered entity, if in any one of the three previous consecutive fiscal years the annual revenue derived from the commercial activities of the enterprise or monopoly concerned was less than 100 million Special Drawing Rights.

4. Article 380 does not apply to the supply of financial services by a covered entity pursuant to a government mandate, if that supply of financial services:

(a) supports exports or imports, provided that those services are:

(i) not intended to displace commercial financing; or

(ii) offered on terms no more favourable than those that could be obtained for comparable financial services in the commercial market; or

(b) supports private investment outside the territory of the Party, provided that those services are:

(i) not intended to displace commercial financing; or

(ii) offered on terms no more favourable than those that could be obtained for comparable financial services in the commercial market; or

(c) is offered on terms consistent with the Arrangement, if the supply of those services falls within the scope of the Arrangement.

5. Without prejudice to paragraph 3 of this Article, Article 380 does not apply to the following sectors: audio-visual services; national maritime cabotage¹; and inland waterways transport, as set out in Article 123(5).

6. Article 380 does not apply to the extent that a covered entity of a Party makes purchases or sales of goods or services pursuant to:

- (a) any existing non-conforming measure that the Party maintains, continues, renews or amends in accordance with Article 133(1) or 139(1) as set out in its Schedules to Annexes 19 and 20, as applicable; or
- (b) any non-conforming measure that the Party adopts or maintains with respect to sectors, subsectors, or activities in accordance with Article 133(2) or 139(2) as set out in its Schedules to Annexes 19 and 20, as applicable.

¹ National maritime cabotage covers: for the Union, without prejudice to the scope of activities which may be considered as cabotage under the relevant national legislation, transportation of passengers or goods between a port or point located in a Member State of the Union and another port or point located in that same Member State of the Union, including on its continental shelf, as provided for in the United Nations Convention on the Law of the Sea, and traffic originating and terminating in the same port or point located in a Member State of the Union; for the United Kingdom, transportation of passengers or goods between a port or point located in the United Kingdom and another port or point located in the United Kingdom, including on its continental shelf, as provided for in the United Nations Convention on the Law of the Sea, and traffic originating and terminating in the same port or point located in the United Kingdom.

ARTICLE 378|

Relationship with the WTO Agreement

The Parties affirm their rights and obligations under paragraphs 1 to 3 of Article XVII of GATT 1994, the Understanding on the Interpretation of Article XVII of the GATT 1994, as well as under paragraphs 1, 2 and 5 of Article VIII of GATS.

ARTICLE 379

General provisions

1. Without prejudice to the rights and obligations of each Party under this Chapter, nothing in this Chapter prevents a Party from establishing or maintaining a covered entity.
2. Neither Party shall require or encourage a covered entity to act in a manner inconsistent with this Chapter.

ARTICLE 380

Non-discriminatory treatment and commercial considerations

1. Each Party shall ensure that each of its covered entities, when engaging in commercial activities:
 - (a) acts in accordance with commercial considerations in its purchase or sale of a good or service, except to fulfil any terms of its public service mandate that are not inconsistent with point (b) or (c);
 - (b) in its purchase of a good or service:
 - (i) accords to a good or service supplied by an enterprise of the other Party treatment no less favourable than it accords to a like good or a like service supplied by enterprises of the Party; and
 - (ii) accords to a good or service supplied by a covered entity in the Party's territory treatment no less favourable than it accords to a like good or a like service supplied by enterprises of the Party in the relevant market in the Party's territory; and

- (c) in its sale of a good or service:
 - (i) accords to an enterprise of the other Party treatment no less favourable than it accords to enterprises of the Party; and
 - (ii) accords to a covered entity in the Party's territory, treatment no less favourable than it accords to enterprises of the Party in the relevant market in the Party's territory.¹
- 2. Points (b) and (c) of paragraph 1 do not preclude a covered entity from:
 - (a) purchasing or supplying goods or services on different terms or conditions, including terms or conditions relating to price, provided that those different terms or conditions are in accordance with commercial considerations; or
 - (b) refusing to purchase or supply goods or services, provided that such refusal is made in accordance with commercial considerations.

¹ For greater certainty, this paragraph shall not apply with respect to the purchase or sale of shares, stock or other forms of equity by a covered entity as a means of its equity participation in another enterprise.

ARTICLE 381

Regulatory framework

1. Each Party shall respect and make best use of relevant international standards including the OECD Guidelines on Corporate Governance of State-Owned Enterprises.
2. Each Party shall ensure that any regulatory body, and any other body exercising a regulatory function, that that Party establishes or maintains:
 - (a) is independent from, and not accountable to, any of the enterprises regulated by that body; and
 - (b) in like circumstances, acts impartially with respect to all enterprises regulated by that body, including covered entities; the impartiality with which the body exercises its regulatory functions is to be assessed by reference to a general pattern or practice of that body.

For those sectors in which the Parties have agreed to specific obligations relating to such a body in this Agreement, the relevant provisions of this Agreement shall prevail.

3. Each Party shall apply its laws and regulations to covered entities in a consistent and non-discriminatory manner.

ARTICLE 382

Information exchange

1. A Party which has reason to believe that its interests under this Chapter are being adversely affected by the commercial activities of an entity of the other Party may request the other Party in writing to provide information on the commercial activities of that entity related to the carrying out of the provisions of this Chapter in accordance with paragraph 2.

2. Provided that the request referred to in paragraph 1 includes an explanation of how the activities of the entity may be affecting the interests of the requesting Party under this Chapter and indicates which of the following categories of information is or are to be provided, the requested Party shall provide the information so requested:
 - (a) the ownership and the voting structure of the entity, indicating the cumulative percentage of shares and the percentage of voting rights that the requested Party and its covered entities cumulatively have in the entity;

 - (b) a description of any special shares or special voting or other rights that the requested Party or its covered entities hold, to the extent that such rights are different from those attached to the general common shares of the entity;

 - (c) a description of the organisational structure of the entity and the composition of its board of directors or of any equivalent body;

- (d) a description of the government departments or public bodies which regulate or monitor the entity, a description of the reporting requirements imposed on it by those departments or public bodies, and the rights and practices of those departments or public bodies with respect to the appointment, dismissal or remuneration of senior executives and members of its board of directors or any equivalent body;
- (e) the annual revenue and total assets of the entity over the most recent three-year period for which information is available;
- (f) any exemptions, immunities and related measures from which the entity benefits under the laws and regulations of the requested Party;
- (g) any additional information regarding the entity that is publicly available, including annual financial reports and third-party audits.

3. Paragraphs 1 and 2 do not require a Party to disclose confidential information the disclosure of which would be inconsistent with its laws and regulations, would impede law enforcement, or otherwise would be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises.

4. If the requested information is not available, the requested Party shall provide to the requesting Party, in writing, the reasons why that information is not available.