

## CHAPTER 16

### STATE-OWNED ENTERPRISES AND DESIGNATED MONOPOLIES

#### Article 16.1: Definitions

For the purposes of this Chapter:

**Arrangement** means the *Arrangement on Officially Supported Export Credits*, developed within the framework of the Organization for Economic Co-operation and Development (OECD), or a successor undertaking, whether developed within or outside of the OECD framework, that has been adopted by at least 12 original WTO Members that were Participants to the Arrangement as of 1 January 1979;

**commercial activities** means activities which an enterprise undertakes with an orientation toward profit-making<sup>1</sup> and which result in the production of a good or supply of a service that will be sold to a consumer in the relevant market in quantities and at prices determined by the enterprise;<sup>2</sup>

**commercial considerations** means price, quality, availability, marketability, transportation, and other terms and conditions of purchase or sale, or other factors that would normally be taken into account in the commercial decisions of a privately owned enterprise in the relevant business or industry;

**designate** means to establish, designate or authorise 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 and any government monopoly that a Party designates or has designated;

**government monopoly** means a monopoly that is owned, or controlled through ownership interests, by a Party or by another government monopoly;

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

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<sup>1</sup> For greater certainty, activities undertaken by an enterprise which operates on a not-for-profit basis or on a cost-recovery basis are not activities undertaken with an orientation toward profit-making.

<sup>2</sup> For greater certainty, measures of general application to the relevant market shall not be construed as the determination by a Party of pricing, production, or supply decisions of an enterprise.

- (a) is engaged exclusively in the following activities:
  - (i) administering or providing a plan for pension, retirement, social security, disability, death or employee benefits, or any combination thereof solely for the benefit of natural persons who are contributors to such a plan and their beneficiaries; or
  - (ii) investing the assets of these plans;
- (b) has a fiduciary duty to the natural persons referred to in subparagraph (a)(i); and
- (c) is free from investment direction from the government of the Party;<sup>3</sup>

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

**monopoly** means an entity, including a consortium or government agency, that in any relevant market in the territory of a 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 assistance**<sup>4</sup> means assistance to a state-owned enterprise by virtue of that state-owned enterprise's government ownership or control, where:

- (a) "assistance" means:

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<sup>3</sup> Investment direction from the government of a Party:

- (a) does not include general guidance with respect to risk management and asset allocation that is not inconsistent with usual investment practices; and
- (b) is not demonstrated, alone, by the presence of government officials on the enterprise's board of directors or investment panel.

<sup>4</sup> For greater certainty, non-commercial assistance does not include:

- (a) intra-group transactions within a corporate group including state-owned enterprises, for example, between the parent and subsidiaries of the group, or among the group's subsidiaries, when normal business practices require reporting the financial position of the group excluding these intra-group transactions;
- (b) other transactions between state-owned enterprises that are consistent with the usual practices of privately owned enterprises in arm's length transactions; or
- (c) a Party's transfer of funds, 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.

- (i) direct transfers of funds or potential direct transfers of funds or liabilities, such as:
    - (A) grants or debt forgiveness;
    - (B) loans, loan guarantees or other types of financing on terms more favourable than those commercially available to that enterprise; or
    - (C) equity capital inconsistent with the usual investment practice, including for the provision of risk capital, of private investors; or
  - (ii) goods or services other than general infrastructure on terms more favourable than those commercially available to that enterprise;
- (b) “by virtue of that state-owned enterprise’s government ownership or control”<sup>5</sup> means that the Party or any of the Party’s state enterprises or state-owned enterprises:
- (i) explicitly limits access to the assistance to the Party’s state-owned enterprises;
  - (ii) provides assistance which is predominately used by the Party’s state-owned enterprises;
  - (iii) provides a disproportionately large amount of the assistance to the Party’s state-owned enterprises; or
  - (iv) otherwise favours the Party’s state-owned enterprises through the use of its discretion in the provision of assistance;

**public service mandate** means a government mandate pursuant to which a state-owned enterprise makes available a service, directly or indirectly, to the general public in its territory;<sup>6</sup>

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<sup>5</sup> In determining whether the assistance is provided “by virtue of that state-owned enterprise’s government ownership or control”, account shall be taken of the extent of diversification of economic activities within the territory of the Party, as well as of the length of time during which the non-commercial assistance programme has been in operation.

<sup>6</sup> For greater certainty, a service to the general public includes:

- (a) the distribution of goods; and
- (b) the supply of general infrastructure services.

**sovereign wealth fund** means an enterprise owned, or controlled through ownership interests, by a Party that:

- (a) serves solely as a special purpose investment fund or arrangement<sup>7</sup> for asset management, investment, and related activities, using financial assets of a Party; and
- (b) is a Member of the International Forum of Sovereign Wealth Funds or endorses the *Generally Accepted Principles and Practices* (“Santiago Principles”) issued by the International Working Group of Sovereign Wealth Funds, October 2008, or such other principles and practices as may be agreed to by the Parties,

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

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

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

## **Article 16.2: Scope**<sup>8</sup>

1. This Chapter shall apply with respect to the activities of state-owned enterprises and designated monopolies of a Party that affect trade or investment between Parties within the free trade area.<sup>9</sup>

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<sup>7</sup> For greater certainty, the Parties understand that the word “arrangement” as an alternative to “fund” allows for a flexible interpretation of the legal arrangement through which the assets can be invested.

<sup>8</sup> For the purposes of this Chapter, the terms “financial service supplier”, “financial institution” and “financial services” have the same meaning as in Article 10.1 (Definitions).

<sup>9</sup> This Chapter also applies with respect to the activities of state-owned enterprises of a Party that cause adverse effects in the market of a non-Party as provided in Article 16.7.

2. Nothing in this Chapter shall prevent a central bank or monetary authority of a Party from performing regulatory or supervisory activities or conducting monetary and related credit policy and exchange rate policy.
  3. Nothing in this Chapter shall prevent 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 organisation or association, from exercising regulatory or supervisory authority over financial services suppliers.
  4. Nothing in this Chapter shall prevent a Party, or one of its state enterprises or state-owned enterprises from undertaking activities 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.
  5. This Chapter shall not apply with respect to a sovereign wealth fund of a Party, except:
    - (a) Article 16.6.1 and Article 16.6.3 shall apply with respect to a Party's indirect provision of non-commercial assistance through a sovereign wealth fund; and
    - (b) Article 16.6.2 shall apply with respect to a sovereign wealth fund's provision of non-commercial assistance.
  6. This Chapter shall not apply with respect to:
    - (a) an independent pension fund of a Party; or
    - (b) an enterprise owned or controlled by an independent pension fund of a Party, except:
      - (i) Article 16.6.1 and Article 16.6.3 shall apply with respect 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 16.6.1 and Article 16.6.3 shall apply with respect to a Party's indirect provision of non-commercial assistance through an enterprise owned or controlled by an independent pension fund.
  7. This Chapter shall not apply to government procurement.
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8. Nothing in this Chapter shall prevent a state-owned enterprise of a Party from providing goods or services exclusively to that Party for the purposes of carrying out that Party's governmental functions.

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

- (a) establishing or maintaining a state enterprise or a state-owned enterprise; or
- (b) designating a monopoly.

10. Article 16.4, Article 16.6 and Article 16.10 shall not apply to any service supplied in the exercise of governmental authority.<sup>10</sup>

11. Article 16.4.1(b), Article 16.4.1(c), Article 16.4.2(b) and Article 16.4.2(c) shall not apply to the extent that a Party's state-owned enterprise or designated monopoly makes purchases and sales of goods or services pursuant to:

- (a) any existing non-conforming measure that the Party maintains, continues, renews or amends in accordance with Article 8.12.1 (Non-Conforming Measures), Article 9.7.1 (Non-Conforming Measures) or Article 10.10.1 (Non-Conforming Measures), as set out in its Schedule to Annex I or in Section A of its Schedule to Annex III; or
- (b) any non-conforming measure that the Party adopts or maintains with respect to sectors, subsectors, or activities in accordance with Article 8.12.2 (Non-Conforming Measures), Article 9.7.2 (Non-Conforming Measures) or Article 10.10.2 (Non-Conforming Measures), as set out in its Schedule to Annex II or in Section B of its Schedule to Annex III.

### **Article 16.3: Delegated Authority**

Each Party shall ensure that when its state-owned enterprises, state enterprises and designated monopolies exercise any regulatory, administrative or other governmental authority that the Party has directed or delegated to such entities to carry out, those entities act in a manner that is not inconsistent with that Party's obligations under this Agreement.<sup>11</sup>

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<sup>10</sup> For the purposes of this paragraph, "a service supplied in the exercise of governmental authority" has the same meaning as in GATS, including the meaning in the Annex on Financial Services where applicable.

<sup>11</sup> Examples of regulatory, administrative or other governmental authority include the power to expropriate, grant licences, approve commercial transactions, or impose quotas, fees or other charges.

#### **Article 16.4: Non-discriminatory Treatment and Commercial Considerations**

1. Each Party shall ensure that each of its state-owned enterprises, 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 subparagraph (c)(ii);
- (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, of the other Party or of any non-Party; and
  - (ii) accords to a good or service supplied by an enterprise that is a covered investment in the Party's territory treatment no less favourable than it accords to a like good or a like service supplied by enterprises in the relevant market in the Party's territory that are investments of investors of the Party, of the other Party or of any non-Party; 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, of the other Party or of any non-Party; and
  - (ii) accords to an enterprise that is a covered investment in the Party's territory treatment no less favourable than it accords to enterprises in the relevant market in the Party's territory that are investments of investors of the Party, of the other Party or of any non-Party.<sup>12</sup>

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 subparagraph (b), (c) or (d);
- (b) in its purchase of the monopoly good or service:

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<sup>12</sup> Article 16.4.1 shall not apply with respect to the purchase or sale of shares, stock or other forms of equity by a state-owned enterprise as a means of its equity participation in another enterprise.

- (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, of the other Party or of any non-Party; and
  - (ii) accords to a good or service supplied by an enterprise that is a covered investment in the Party's territory treatment no less favourable than it accords to a like good or a like service supplied by enterprises in the relevant market in the Party's territory that are investments of investors of the Party, of the other Party or of any 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 favourable than it accords to enterprises of the Party, of the other Party or of any non-Party; and
  - (ii) accords to an enterprise that is a covered investment in the Party's territory treatment no less favourable than it accords to enterprises in the relevant market in the Party's territory that are investments of investors of the Party, of the other Party or of any 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-monopolised market in its territory that negatively affect trade or investment between the Parties.<sup>13</sup>

3. Paragraphs 1(b) and 1(c) and paragraphs 2(b) and 2(c) do not preclude a state-owned enterprise or designated monopoly from:

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

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

## **Article 16.5: Courts and Administrative Bodies**

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<sup>13</sup> For greater certainty, a Party may comply with the requirements of this subparagraph through the enforcement or implementation of its generally applicable national competition laws and regulations, its economic regulatory laws and regulations, or other appropriate measures.



1. Each Party shall provide its courts with jurisdiction over civil claims against an enterprise owned or controlled through ownership interests by a foreign government based on a commercial activity carried on in its territory.<sup>14</sup> This shall not be construed to require a Party to provide jurisdiction over such claims if it does not provide jurisdiction over similar claims against enterprises that are not owned or controlled through ownership interests by a foreign government.

2. Each Party shall ensure that any administrative body that the Party establishes or maintains that regulates a state-owned enterprise exercises its regulatory discretion in an impartial manner with respect to enterprises that it regulates, including enterprises that are not state-owned enterprises.<sup>15</sup>

#### **Article 16.6: Non-commercial Assistance**

1. No Party shall cause<sup>16</sup> adverse effects to the interests of the other Party through the use of non-commercial assistance that it provides, either directly or indirectly<sup>17</sup>, to any of its state-owned enterprises with respect to:

- (a) the production and sale of a good by the state-owned enterprise;
- (b) the supply of a service by the state-owned enterprise from the territory of the Party into the territory of the other Party; or
- (c) the supply of a service in the territory of the other Party through an enterprise that is a covered investment in the territory of the other Party.

2. Each Party shall ensure that its state enterprises and state-owned enterprises do not cause adverse effects to the interests of the other Party through the use of non-commercial assistance that the state enterprise or state-owned enterprise provides to any of its state-owned enterprises with respect to:

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<sup>14</sup> This paragraph shall not be construed to preclude a Party from providing its courts with jurisdiction over claims against enterprises owned or controlled through ownership interests by a foreign government other than those claims referred to in this paragraph.

<sup>15</sup> For greater certainty, the impartiality with which an administrative body exercises its regulatory discretion is to be assessed by reference to a pattern or practice of that administrative body.

<sup>16</sup> For the purposes of paragraphs 1 and 2, it must be demonstrated that the adverse effects claimed 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.

<sup>17</sup> For greater certainty, indirect provision includes the situation in which a Party entrusts or directs an enterprise that is not a state-owned enterprise to provide non-commercial assistance.

- (a) the production and sale of a good by the state-owned enterprise;
- (b) the supply of a service by the state-owned enterprise from the territory of the Party into the territory of the other Party; or
- (c) the supply of a service in the territory of the other Party through an enterprise that is a covered investment in the territory of the other Party.

3. No Party shall cause injury to a domestic industry<sup>18</sup> of the other Party through the use of non-commercial assistance that it provides, either directly or indirectly, to any of its state-owned enterprises that is a covered investment in the territory of the other Party in circumstances where:

- (a) the non-commercial assistance is provided with respect to the production and sale of a good by the state-owned enterprise in the territory of the other Party; and
- (b) a like good is produced and sold in the territory of the other Party by the domestic industry of the other Party.<sup>19</sup>

4. A service supplied by a state-owned enterprise of a Party within the Party's territory shall be deemed not to cause adverse effects.<sup>20</sup>

#### **Article 16.7: Adverse Effects**

1. For the purposes of Article 16.6.1 and Article 16.6.2, 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 state-owned 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 in the territory of the Party;

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<sup>18</sup> 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 state-owned enterprise that is a covered investment that has received the non-commercial assistance referred to in this paragraph.

<sup>19</sup> In situations of material retardation of the establishment of a domestic industry, it is understood that a domestic industry may not yet produce and sell the like good. However, in these situations, there must be evidence that a prospective domestic producer has made a substantial commitment to commence production and sales of the like good.

<sup>20</sup> For greater certainty, this paragraph shall not be construed to apply to a service that itself is a form of non-commercial assistance.

- (b) that the production and sale of a good by a Party's state-owned enterprise that has received the non-commercial assistance displaces or impedes from:
  - (i) the market of the other Party sales of a like good produced by an enterprise that is a covered investment in the territory 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 state-owned enterprise that has received the non-commercial assistance and sold by the enterprise in:
  - (i) the market of a 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 in the territory of the Party, or significant price suppression, price depression or lost sales in the same market; or
  - (ii) the market of a non-Party as compared with the price in the same market of imports of a like good of the other Party, or significant price suppression, price depression or lost sales in the same market;
- (d) that services supplied by a Party's state-owned enterprise that has received the non-commercial assistance displace or impede from the market of the other Party a like service supplied by a service supplier of the other Party; or
- (e) a significant price undercutting by a service supplied in the market of the other Party by a Party's state-owned 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.<sup>21</sup>

2. For the purposes of paragraphs 1(a), 1(b) and 1(d), the displacing or impeding of a good or service includes any 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" shall include any of the following situations:

- (a) there is a significant increase in the market share of the good or service of the Party's state-owned enterprise;

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<sup>21</sup> The purchase or sale of shares, stock or other forms of equity by a state-owned enterprise that has received non-commercial assistance as a means of its equity participation in another enterprise shall not be construed to give rise to adverse effects as provided for in Article 16.7.1.

- (b) the market share of the good or service of the Party's state-owned enterprise remains constant in circumstances in which, in the absence of the non-commercial assistance, it would have declined significantly; or
- (c) the market share of the good or service of the Party's state-owned 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, shall be at least one year.

3. For the purposes of paragraphs 1(c) and 1(e), price undercutting shall include any case in which such price undercutting has been demonstrated through a comparison of the prices of the good or service of the state-owned enterprise with the prices of the like good or service.

4. Comparisons of the prices in paragraph 3 shall be made at the same level of trade and at comparable times, and due account shall 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 a Party provides:

- (a) before the signing of this Agreement; or
- (b) within three years after the signing of this Agreement, pursuant to a law that is enacted, or contractual obligation undertaken, prior to the signing of this Agreement,

shall be deemed not to cause adverse effects.

6. For the purposes of Article 16.6.1(b) and Article 16.6.2(b), the initial capitalisation of a state-owned enterprise, or the acquisition by a Party of a controlling interest in an enterprise, that is principally engaged in the supply of services within the territory of the Party, shall be deemed not to cause adverse effects.

### **Article 16.8: Injury**

1. For the purposes of Article 16.6.3, the term "injury" shall be taken to mean 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 such production on prices for like goods produced and sold by the domestic industry, and the effect of such production on the domestic industry producing like goods.<sup>22</sup>

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 shall 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 utilisation 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 programmes. 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<sup>23</sup> of the non-commercial assistance, 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 shall 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. Factors which may be relevant in this respect include, among other things, the volumes and prices of other like goods in the market in question, contraction in demand or changes in the patterns of consumption,

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<sup>22</sup> The periods for examination of the non-commercial assistance and injury shall be reasonably established and shall end as closely as practical to the date of initiation of the proceeding before the panel.

<sup>23</sup> As set out in paragraphs 2 and 3.

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 which 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 factors<sup>24</sup> 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.

#### **Article 16.9: Party-Specific Annexes**

1. Article 16.4 and Article 16.6 shall not apply with respect to the non-conforming activities of state-owned enterprises or designated monopolies that a Party lists in its Schedule to Annex IV in accordance with the terms of the Party's Schedule.

2. Article 16.4, Article 16.5, Article 16.6 and Article 16.10 shall not apply with respect to a Party's state-owned enterprises or designated monopolies as set out in Annex 16-D.

#### **Article 16.10: Transparency**

1. Each Party shall provide to the other Party or otherwise make publicly available on an official website a list of its state-owned enterprises no later than six months after

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<sup>24</sup> In making a determination regarding the existence of a threat of material injury, a panel pursuant to Chapter 27 (Dispute Settlement) should consider, among other things, such factors as:

- (a) the nature of the non-commercial assistance in question and the trade effects likely to arise therefrom;
- (b) a significant rate of increase in sales in the domestic market by the covered investment, indicating a likelihood of substantially increased sales;
- (c) 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;
- (d) whether prices of goods sold by the covered investment will have a significant depressing or suppressing effect on the price of like goods; and
- (e) inventories of like goods.

the date of entry into force of this Agreement, and thereafter shall update the list annually.

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

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

- (a) the percentage of shares that the Party, its state-owned enterprises or designated monopolies cumulatively own, and the percentage of votes that they cumulatively hold, in the entity;
- (b) a description of any special shares or special voting or other rights that the Party, its state-owned enterprises or designated monopolies hold, to the extent these rights are different than the rights attached to the general common shares of the entity;
- (c) the government titles of any government official serving as an officer or member of the entity's board of directors;
- (d) the entity's annual revenue and total assets over the most recent three year period for which information is available;
- (e) any exemptions and immunities from which the entity benefits under the Party's laws and regulations; and
- (f) any additional information regarding the entity that is publicly available, including annual financial reports and third-party audits, and that is sought in the written request.

4. On the written request of the other Party, a Party shall promptly provide, in writing, information regarding any policy or programme it has adopted or maintains that provides for non-commercial assistance, provided that the request includes an explanation of how the policy or programme affects or could affect trade or investment between the Parties.

5. When a Party provides a response pursuant to paragraph 4, the information it provides shall be sufficiently specific to enable the requesting Party to understand the operation of and evaluate the policy or programme and its effects or potential effects on trade or investment between the Parties. The Party responding to a request shall ensure that the response it provides contains the following information:

- (a) the form of the non-commercial assistance provided under the policy or programme, for example, grant or loan;
- (b) the names of the government agencies, state-owned enterprises, or state enterprises providing the non-commercial assistance and the names of the state-owned enterprises that have received or are eligible to receive the non-commercial assistance;
- (c) the legal basis and policy objective of the policy or programme providing for the non-commercial assistance;
- (d) with respect to goods, the amount per unit of the non-commercial assistance or, in cases where this is not possible, the total amount 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 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 programmes 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 programmes providing for non-commercial assistance in the form of the provision of goods or services, the prices charged, if any;
- (h) with respect to policies or programmes providing for non-commercial assistance in the form of equity capital, the amount invested, the number and a description of the shares received, and any assessments that were conducted with respect to the underlying investment decision;
- (i) duration of the policy or programme 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.

6. If a Party considers that it has not adopted or does not maintain any policies or programmes referred to in paragraph 4, it shall so inform the requesting Party in writing.

7. If any relevant points in paragraph 5 have not been addressed in the written response, an explanation shall be provided in the written response itself.



8. The Parties recognise that the provision of information under paragraphs 5 and 7 does not prejudice the legal status of the assistance that was the subject of the request under paragraph 4 or the effects of that assistance under this Agreement.

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

#### **Article 16.11: Technical Cooperation**

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

- (a) exchanging information regarding Parties' experiences in improving the corporate governance and operation of their state-owned enterprises;
- (b) sharing best practices on policy approaches to ensure a level playing field between state-owned and privately owned enterprises, including policies related to competitive neutrality; and
- (c) organising international seminars, workshops or any other appropriate forum for sharing technical information and expertise related to the governance and operations of state-owned enterprises.

#### **Article 16.12: Contact Points**

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

#### **Article 16.13: Exceptions**

1. Nothing in Article 16.4 or Article 16.6 shall be construed to:
  - (a) prevent the adoption or enforcement by any Party of measures to respond temporarily to a national or global economic emergency; or
  - (b) apply to a state-owned enterprise with respect to which a Party has adopted or enforced measures on a temporary basis in response to a national or global economic emergency, for the duration of that emergency.

2. Article 16.4.1 shall not apply with respect to the supply of financial services by a state-owned enterprise pursuant to a government mandate if that supply of financial services:

- (a) supports exports or imports, provided that these services are:
  - (i) not intended to displace commercial financing; or
  - (ii) offered on terms no more favourable than those that could be obtained for comparable financial services in the commercial market;<sup>25</sup>
- (b) supports private investment outside the territory of the Party, provided that these services are:
  - (i) not intended to displace commercial financing, or
  - (ii) offered on terms no more favourable than those that could be obtained for comparable financial services in the commercial market; or
- (c) is offered on terms consistent with the Arrangement, provided that it falls within the scope of the Arrangement.

3. The supply of financial services by a state-owned enterprise pursuant to a government mandate shall be deemed not to give rise to adverse effects under Article 16.6.1(b) or Article 16.6.2(b), or under Article 16.6.1(c) or Article 16.6.2(c) where 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:<sup>26</sup>

- (a) supports exports and imports, provided that these services are:
  - (i) not intended to displace commercial financing; or

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<sup>25</sup> In circumstances where no comparable financial services are offered in the commercial market:

- (a) for the purposes of paragraphs 2(a)(ii), 2(b)(ii), 3(a)(ii) and 3(b)(ii), the state-owned 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
- (b) for the purposes of paragraphs 2(a)(i), 2(b)(i), 3(a)(i) and 3(b)(i), the supply of the financial services shall be deemed not to be intended to displace commercial financing.

<sup>26</sup> 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.

- (ii) offered on terms no more favourable 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 favourable than those that could be obtained for comparable financial services in the commercial market; or
- (c) is offered on terms consistent with the Arrangement, provided that it falls within the scope of the Arrangement.

4. Article 16.6 shall not apply with respect to an enterprise located outside the territory of a Party over which a state-owned enterprise of that 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 state-owned enterprise, associated with the supply of the financial services referred to in paragraphs 2 and 3, provided that any support the Party, a state enterprise or state-owned enterprise of the Party, provides to the enterprise during the period of temporary ownership is provided in order to recoup the state-owned enterprise's investment in accordance with a restructuring or liquidation plan that will result in the ultimate divestiture from the enterprise.

5. Article 16.4, Article 16.6 and Article 16.10 shall not apply with respect to a state-owned enterprise or designated monopoly if in any one of the three previous consecutive fiscal years, the annual revenue derived from the commercial activities of the state-owned enterprise or designated monopoly was less than a threshold amount which shall be calculated in accordance with Annex 16-A.<sup>27</sup>

#### **Article 16.14: Further Negotiations**

Within five years of the date of entry into force of this Agreement, the Parties shall conduct further negotiations on extending the application of the disciplines in this Chapter in accordance with Annex 16-C.

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<sup>27</sup> When a Party invokes this exception during consultations under Article 27.5 (Consultations), the consulting Parties should exchange and discuss available evidence concerning the annual revenue of the state-owned enterprise or the designated monopoly derived from the commercial activities during the three previous consecutive fiscal years in an effort to resolve during the consultations period any disagreement regarding the application of this exception.

**Article 16.15: Process for Developing Information**

Annex 16-B shall apply in any dispute under Chapter 27 (Dispute Settlement) regarding a Party's conformity with Article 16.4 or Article 16.6.

## ANNEX 16-A

### THRESHOLD CALCULATION

1. On the date of entry into force of this Agreement, the threshold referred to in Article 16.13.5 shall be 300 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 shall 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:

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

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   |
| $\Pi_i^{SDR}$ | = | 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 shall be the average of monthly values of that Party's national currency in SDR terms over the three-year period to 30 June of the year before the threshold is to take effect. Each Party shall notify the other Party of their applicable threshold in their respective national currencies.
5. For the purposes of this Chapter, all data shall be drawn from the International Monetary Fund's *International Financial Statistics* database.

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

## **ANNEX 16-B**

### **PROCESS FOR DEVELOPING INFORMATION CONCERNING STATE-OWNED ENTERPRISES AND DESIGNATED MONOPOLIES**

1. If a panel has been established pursuant to Chapter 27 (Dispute Settlement) to examine a complaint arising under Article 16.4 or Article 16.6, the Parties may exchange written questions and responses, as set forth in paragraphs 2, 3 and 4, to obtain information relevant to the complaint that is not otherwise readily available.
2. A Party (questioning Party) may provide written questions to the other Party (answering Party) within 15 days of the date the panel is established. The answering Party shall provide its responses to the questions to the questioning Party within 30 days of the date it receives the questions.
3. The questioning Party may provide any follow-up written questions to the answering Party within 15 days of the date it receives the responses to the initial questions. The answering Party shall provide its responses to the follow-up questions to the questioning Party within 30 days of the date it receives the follow-up questions.
4. If the questioning Party considers that the answering Party has failed to cooperate in the information-gathering process under this Annex, the questioning Party shall inform the panel and the answering Party in writing within 30 days of the date the responses to the questioning Party's final questions are due, and provide the basis for its view. The panel shall afford the answering Party an opportunity to reply in writing.
5. A Party that provides written questions or responses to the other Party pursuant to these procedures shall, on the same day, provide the questions or answers to the panel. In the event that a panel has not yet been composed, each Party shall, upon the composition of the panel, promptly provide the panel with any questions or responses it has provided to the other Party.
6. The answering Party may designate information in its responses as confidential information in accordance with the procedures set out in the Rules of Procedure established under Article 26.2.1(f) (Functions of the Joint Commission) or other rules of procedure agreed to by the disputing Parties.
7. The time periods in paragraphs 2, 3 and 4 may be modified upon agreement of the Parties or approval by the panel.
8. In determining whether a Party has failed to cooperate in the information-gathering process, the panel shall take into account the reasonableness of the questions

and the efforts the answering Party has made to respond to the questions in a cooperative and timely manner.

9. In making findings of fact and its initial report, the panel should draw adverse inferences from instances of non-cooperation by a disputing Party in the information-gathering process.

10. The panel may deviate from the time period set out in Chapter 27 (Dispute Settlement) for the issuance of the initial report if necessary to accommodate the information-gathering process.

11. The panel may seek additional information from a disputing Party that was not provided to the panel through the information-gathering process where the panel considers the information necessary to resolve the dispute. However, the panel shall not request additional information to complete the record where the information would support a Party's position and the absence of that information in the record is the result of that Party's non-cooperation in the information-gathering process.



## **ANNEX 16-C**

### **FURTHER NEGOTIATIONS**

Within five years of the date of entry into force of this Agreement, the Parties shall conduct further negotiations on extending the application of:

- (a) the disciplines in this Chapter to the activities of state-owned enterprises that are owned or controlled by a sub-central level of government, and designated monopolies designated by a sub-central level of government, where such activities have been listed in Annex 16-D; and
- (b) the disciplines in Article 16.6 and Article 16.7 to address effects caused, in a market of a non-Party, by the supply of services by a state-owned enterprise.

## ANNEX 16-D

### APPLICATION TO SUB-CENTRAL STATE-OWNED ENTERPRISES AND DESIGNATED MONOPOLIES

Pursuant to Article 16.9.2, the following obligations shall not apply with respect to a state-owned enterprise owned or controlled by a sub-central level of government and a designated monopoly designated by a sub-central level of government:<sup>28</sup>

- (a) for Australia:
  - (i) Article 16.4.1(a) and (b);
  - (ii) Article 16.4.2;
  - (iii) Article 16.6.1(a) and Article 16.6.2(a), with respect to the production and sale of a good in competition with a like good produced and sold by a covered investment in the territory of Australia;
  - (iv) Article 16.6.1(b) and (c), and Article 16.6.2(b) and (c); and
  - (v) Article 16.10.1.
  
- (b) for Peru:
  - (i) Article 16.4.1(a) and (b);
  - (ii) Article 16.4.1(c)(i);
  - (iii) Article 16.4.2;
  - (iv) Article 16.6.1(a) and Article 16.6.2(a), with respect to the production and sale of a good in competition with a like good produced and sold by a covered investment in the territory of Peru;
  - (v) Article 16.6.1(b) and (c), and Article 16.6.2(b) and (c); and
  - (vi) Article 16.10.1.

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<sup>28</sup> For the purposes of this Annex, “sub-central level of government” means the regional level of government and the local level of government of a Party.