

CHAPTER 11

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

ARTICLE 11.1

Definitions

For the purposes of this Chapter:

- (a) "commercial activities" means activities the end result of which is the production of a good or supply of a service, which will be sold in the relevant market in quantities and at prices determined by the enterprise, and are undertaken with an orientation towards profit-making;¹
- (b) "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 an enterprise operating according to market economy principles in the relevant business or industry;

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

- (c) "designate" means to establish or authorise a monopoly, or to expand the scope of a monopoly to cover an additional good or service;
- (d) "designated monopoly" means an entity, including a group of entities or a government agency, and any subsidiary thereof, 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;
- (e) "enterprise granted special rights or privileges" means any enterprise, including any subsidiary, public or private, that has been granted by a Party, in law or in fact, special rights or privileges;
- (f) "special rights or privileges" means rights or privileges granted by a Party to a limited number of enterprises, or any subsidiaries thereof, within a given geographical area or product market, the effect of which is to substantially limit the ability of any other enterprise to carry out its activity in the same geographical area or product market in like circumstances. The granting of a license or a permit to a limited number of enterprises in allocating a scarce resource through objective, proportional and non-discriminatory criteria is not in and of itself a special right or privilege; and

- (g) "state-owned enterprise" means an enterprise, including any subsidiary, in which a Party, directly or indirectly:
- (i) owns more than 50 per cent of the enterprise's subscribed capital or controls more than 50 per cent of the votes attached to the shares issued by the enterprise;
 - (ii) can appoint more than half of the members of the enterprise's board of directors or an equivalent body; or
 - (iii) can exercise control over the strategic decisions of the enterprise.

ARTICLE 11.2

Scope of Application

1. 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 General Agreement On Tariffs And Trade 1994* as well as under paragraphs 1, 2 and 5 of Article VIII of GATS which are hereby incorporated into and made part of this Agreement, *mutatis mutandis*.

2. This Chapter applies to all state-owned enterprises, enterprises granted special rights or privileges, and designated monopolies engaged in a commercial activity. If an enterprise combines commercial and non-commercial activities², only the commercial activities of that enterprise are covered by this Chapter.

3. This Chapter does not apply to state-owned enterprises, enterprises granted special rights or privileges, and designated monopolies for which a Party has taken measures on a temporary basis in response to a national or global economic emergency.

4. This Chapter does not apply to state-owned enterprises, enterprises granted special rights or privileges, and designated monopolies if in any one of the three previous consecutive years the annual revenue derived from the commercial activities of that enterprise or that entity was less than 200 million special drawing rights.³ This threshold applies to state-owned enterprises, enterprises granted special rights or privileges, and designated monopolies at sub-central levels of government after five years from the date of entry into force of this Agreement.

5. This Chapter does not apply to covered procurement by a Party or its procuring entities within the meaning of Article 9.2 (Scope and Coverage).

² This includes carrying out a public service obligation.

³ The calculation of the revenue shall include the relevant revenue of all state-owned enterprises, enterprises granted special rights or privileges and designated monopolies, including the revenue of the subsidiaries engaged in commercial activities on the same or related markets.

6. This Chapter does not apply to state-owned enterprises, enterprises granted special rights or privileges, and designated monopolies, owned or controlled by a governmental authority of a Party in charge of national defence, public order or public security, except if these are engaged exclusively in commercial activities unrelated to national defence, public order or public security.

7. This Chapter does not apply to any service supplied by state-owned enterprises, enterprises granted special rights or privileges, and designated monopolies in the exercise of governmental authority.⁴

8. This Chapter does not apply to measures or activities listed in Annex 11-A (Specific Rules for Viet Nam on State-Owned Enterprises).

ARTICLE 11.3

General Provisions

1. Nothing in this Chapter shall affect the laws and regulations of a Party governing its systems of state ownership.

⁴ The term "a service supplied in the exercise of governmental authority" has the same meaning as defined in subparagraph 3(c) of Article I of GATS.

2. Without prejudice to the Parties' rights and obligations under this Chapter, nothing in this Chapter shall prevent a Party from establishing or maintaining state-owned enterprises from granting enterprises special rights or privileges, or from designating or maintaining monopolies.

3. A Party shall not require or encourage its state-owned enterprises, enterprises granted special rights or privileges, and designated monopolies to act in a manner inconsistent with this Chapter.

ARTICLE 11.4

Non-Discrimination and Commercial Considerations

1. Each Party shall ensure that its state-owned enterprises, enterprises granted special rights or privileges, and designated monopolies, when engaging in commercial activities:

- (a) act in accordance with commercial considerations in their purchases or sales of goods or services, except to fulfil the terms of their public mandate that are not inconsistent with subparagraph 1(b);
- (b) in their purchase of a good or service:
 - (i) accord to a good or service supplied by an enterprise of the other Party treatment no less favourable than they accord to a like good or a like service supplied by enterprises of the Party; and

- (ii) accord to a good or service supplied by an enterprise of investors of the other Party in the Party's territory treatment no less favourable than they accord to a like good or a like service supplied by enterprises of investors of the other Party in the relevant market in the Party's territory;
- (c) in their sale of a good or service:
 - (i) accord to an enterprise of the other Party treatment no less favourable than they accord to enterprises of the Party; and
 - (ii) accord to an enterprise of investors of the other Party in the Party's territory treatment no less favourable than they accord to enterprises of investors of the other Party in the relevant market in the Party's territory.

2. Paragraph 1 does not preclude state-owned enterprises, enterprises granted special rights or privileges or designated monopolies from:

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

provided that such different terms or conditions or refusal is undertaken in accordance with commercial considerations.

3. Paragraphs 1 and 2 do not apply to the sectors referred to in Article 8.3 (Scope) and Article 8.9 (Scope).

4. Paragraphs 1 and 2 apply to commercial activities of state-owned enterprises, enterprises granted special rights or privileges, and designated monopolies, if the same activity would affect trade in services and investment with respect to which a Party has undertaken a commitment under Articles 8.5 (National Treatment), 8.6 (Most-Favoured-Nation Treatment), 8.11 (National Treatment), subject to the conditions or qualifications set out in its respective Schedule of Specific Commitments in Annexes 8-A (The Union's Schedule of Specific Commitments) and 8-B (Viet Nam's Schedule of Specific Commitments) pursuant to Articles 8.7 (Schedule of Specific Commitments) and 8.12 (Schedule of Specific Commitments). For greater certainty, in the event of a conflict between paragraph 4 of Article 11.2 (Scope of Application) and the conditions or qualifications set out in its Schedule of Specific Commitments pursuant to Articles 8.7 (Schedule of Specific Commitments) and 8.12 (Schedule of Specific Commitments), those schedules shall prevail.

ARTICLE 11.5

Regulatory Framework

1. The Parties shall endeavour to ensure that state-owned enterprises, enterprises granted special rights or privileges, and designated monopolies observe internationally recognised standards of corporate governance.

2. Each Party shall ensure that its regulatory bodies or functions are not accountable to any enterprises or entities that they regulate in order to ensure the effectiveness of the regulatory bodies or functions, and act impartially⁵ in like circumstances with respect to all enterprises or entities that they regulate, including state-owned enterprises, enterprises granted special rights or privileges, and designated monopolies.⁶

3. Each Party shall ensure the enforcement of laws and regulations in a consistent and non-discriminatory manner, including with regard to state-owned enterprises, enterprises granted special rights or privileges, and designated monopolies.

⁵ For greater certainty, the impartiality with which the regulatory body exercises its regulatory functions is to be assessed by reference to a general pattern or practice of that regulatory body.

⁶ For greater certainty, for those sectors in which the Parties have agreed to specific obligations relating to the regulatory body in other Chapters, the relevant provision in the other Chapters shall prevail.

ARTICLE 11.6

Transparency

1. A Party which has reasonable reason to believe that its interests under this Chapter are being adversely affected by the commercial activities of a state-owned enterprise, an enterprise granted special rights or privileges, or a designated monopoly of the other Party may request the other Party in writing to provide information about the operations of that enterprise or entity. The request shall indicate the enterprise or entity, the products or services and markets concerned, and include indications that the enterprise or entity is engaging in practices that hinder trade or investment between the Parties.

2. The information referred to in paragraph 1 shall include:

- (a) the ownership and the voting structure of the enterprise or entity, indicating the percentage of shares and the percentage of voting rights that a Party or a state-owned enterprise, an enterprise granted special rights or privileges, or a designated monopoly cumulatively own;
- (b) a description of any special shares or special voting or other rights that a Party or a state-owned enterprise, an enterprise granted special rights or privileges, or a designated monopoly hold, where such rights differ from the rights attached to the common shares of such enterprise or entity;

- (c) the organisational structure of the enterprise or entity, the composition of its board of directors or of an equivalent body exercising direct or indirect control in such an enterprise or entity, and cross-holdings and other links with different state-owned enterprises, enterprises granted special rights or privileges, or designated monopolies;
- (d) a description of which government departments or public bodies regulate or monitor the enterprise or entity, a description of the reporting lines⁷, and the rights and practices of the government department or public bodies in the appointment, dismissal or remuneration of managers;
- (e) annual revenue or total assets, or both;
- (f) exemptions, immunities and any other measures, including more favourable treatment, applicable in the territory of the requested Party to any state-owned enterprise, enterprise granted special rights or privileges, or designated monopoly.

3. A Party may request the other Party to provide additional information regarding the calculations of the revenue threshold referred to in paragraph 4 of Article 11.2 (Scope of Application).

⁷ For greater certainty, a Party is not obliged to disclose reports or the contents of any reports.

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

5. In the case of the Union, subparagraphs 2(a) to (e) do not apply to enterprises which qualify as small or medium-sized enterprises as defined in the Union law.

ARTICLE 11.7

Technical Cooperation

Recognising the importance of promoting effective legal and regulatory frameworks for state-owned enterprises, the Parties shall engage in mutually agreed technical cooperation activities with a view to promoting efficiency and transparency of state-owned enterprises, subject to the availability of funding under the Party's cooperation instruments and programmes.