

CHAPTER 17

STATE-OWNED ENTERPRISES

ARTICLE 17.1

Scope

1. This Chapter applies to state-owned enterprises, enterprises granted special rights or privileges and designated monopolies, engaged in a commercial activity that may potentially affect trade or investment between the Parties.¹ Where such state-owned enterprises, enterprises granted special rights or privileges and designated monopolies engage both in commercial and non-commercial activities, only their commercial activities are covered by this Chapter.
2. This Chapter applies to state-owned enterprises, enterprises granted special rights or privileges and designated monopolies at all levels of government.²

¹ Entities created or regulated under the New Zealand Kiwifruit Export Regulations 1999 or the New Zealand Kiwifruit Industry Restructuring Act 1999 are excluded from the application of this Chapter, with the exception of Articles 17.3 (Relation to the WTO Agreement) and 17.7 (Information exchange). Article 17.7 (Information exchange) specifies the application of Article 17.3 (Relation to the WTO Agreement) for the purposes of this Chapter.

² The following do not fall within the scope of this Chapter:

- (a) local councils and entities covered by Chapter 14 (Public procurement) and Annex 14 (Public procurement market access commitments); and
- (b) enterprises to which special rights and privileges have been granted, and designated monopolies that are designated by the local councils referred to in point (a).

3. This Chapter does not apply to state-owned enterprises, enterprises granted special rights or privileges and designated monopolies if in one of the three previous consecutive fiscal years the annual revenue derived from the commercial activities of a state-owned enterprise, an enterprise granted special rights or privileges or a designated monopoly was less than SDR 100 million. During the first three years after the date of entry into force of this Agreement, that threshold shall be SDR 200 million.

4. This Chapter does not apply to situations where state-owned enterprises, enterprises granted special rights or privileges or designated monopolies act as procuring entities conducting procurement for governmental purposes and not with a view to commercial resale or with a view to use in the production of a good or in the supply of a service for commercial sale.³

5. Article 17.5 (Non-discriminatory treatment and commercial considerations) and Article 17.7 (Information exchange) do not apply to an activity performed in the exercise of governmental authority.

6. Article 17.5 (Non-discriminatory treatment and commercial considerations) does 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 those financial services are:
 - (i) not intended to displace commercial financing; or

³ This is without prejudice to the commitments made by the Parties in Chapter 14 (Public procurement), including, in particular, in Annex 14 (Public procurement market access commitments).

- (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 financial 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 defined in point (b) of Article 17.2 (Definitions), provided that it falls within the scope of that Arrangement.

7. Article 17.5 (Non-discriminatory treatment and commercial considerations) does not apply to the services in sectors that are outside the scope of Chapter 10 (Trade in services and investment) in accordance with Article 10.2(3) (Scope).

8. Article 17.5 (Non-discriminatory treatment and commercial considerations) does not apply to the extent that a state-owned enterprise, an enterprise granted special rights or privileges or a designated monopoly of a Party makes a purchase or sale of a good or a service pursuant to:

- (a) any existing non-conforming measure in accordance with Article 10.10 (Non-conforming measures) that the Party maintains, continues, renews or amends as set out in its respective Schedule in Annex 10-A (Existing measures); or

- (b) any non-conforming measure that the Party adopts or maintains with respect to sectors, sub-sectors, or activities in accordance with Article 10.10 (Non-conforming measures) as set out in its respective Schedule in Annex 10-B (Future measures).

ARTICLE 17.2

Definitions

For the purposes of this Chapter, the following definitions apply:

- (a) "activity performed in the exercise of governmental authority" means any activity which is performed, including any service that is supplied, neither on a commercial basis nor in competition with one or more economic operators;
- (b) "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;
- (c) "commercial activity" means an activity which an enterprise undertakes, 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 that enterprise, and which is undertaken with an orientation towards profit-making⁴;

⁴ For greater certainty, an activity undertaken by an enterprise that operates on a non-profit basis or a cost-recovery basis is not a commercial activity.

- (d) "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 operating according to market economy principles in the relevant business or industry;
- (e) "designate a monopoly" means to establish or authorise a monopoly, or to expand the scope of a monopoly to cover an additional good or service;
- (f) "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 it does not include an entity that has been granted an exclusive intellectual property right solely by reason of such grant;
- (g) "enterprise granted special rights or privileges" means an enterprise, public or private, to which a Party has granted, in law or in fact, special rights or privileges⁵; special rights or privileges are granted by a Party when it designates or limits to two or more the number of enterprises authorised to provide a good or a 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 under substantially equivalent conditions;

⁵ For greater certainty, the granting of a quota allocation, licence or permit in relation to either a scarce resource or the distribution of export products to markets where tariff quotas, country-specific preferences or other measures are in force shall not, in and of itself, constitute a special right or privilege.

- (h) "state-owned enterprise" means an enterprise in which a Party:
- (i) directly owns more than 50 % of the share capital;
 - (ii) controls 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;
 - (iv) holds the power to control the decisions of the enterprise through any other ownership interest, including minority ownership; or
 - (v) has the power to direct the actions of the enterprise or otherwise exercise an equivalent level of control in accordance with the law of that Party.

ARTICLE 17.3

Relation to the WTO Agreement

Article XVII of GATT 1994, the Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994, Article VIII of GATS, and paragraphs 18 to 21 of the WTO Ministerial Decision of 19 December 2015 on Export Competition (WT/MIN(15)/45 – WT/L/980) are incorporated into and made part of this Agreement, *mutatis mutandis*.⁶

ARTICLE 17.4

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 state-owned enterprises, granting special rights or privileges to enterprises or designating or maintaining monopolies.
2. A Party shall not require or encourage a state-owned enterprise, an enterprise granted special rights or privileges or a designated monopoly to act in a manner inconsistent with this Chapter.

⁶ Article 17.7 (Information exchange) specifies, between the Parties and solely for the purposes of this Agreement, the Parties' understanding of how the obligations under Article XVII:4 of GATT 1994 are to be met for the purposes of this paragraph.

ARTICLE 17.5

Non-discriminatory treatment and commercial considerations

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

- (a) acts in accordance with commercial considerations in its purchase or sale of a good or a 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 a service:
 - (i) accords to a good or a service supplied by an enterprise of the other Party treatment no less favourable than that which 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 enterprise defined in point (d) of Article 10.3 (Definitions) treatment no less favourable than that which it accords to a like good or a like service supplied by enterprises of that Party's own investors in the relevant market in the Party; and
- (c) in its sale of a good or a service:
 - (i) accords to an enterprise of the other Party treatment no less favourable than that which it accords to enterprises of the Party; and

- (ii) accords to a covered enterprise as defined in point (d) of Article 10.3 (Definitions) treatment no less favourable than that which it accords to enterprises of that Party's own investors in the relevant market in the Party.

2. Provided that such different terms or conditions or refusal are made in accordance with commercial considerations, points (b) and (c) of paragraph 1 do not preclude a state-owned enterprise, an enterprise granted special rights or privileges or a designated monopoly 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.

ARTICLE 17.6

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 or any other body exercising a regulatory function that the Party establishes or maintains:

- (a) is independent from, and not accountable to, any of the enterprises regulated by such body; and

(b) acts impartially⁷ in like circumstances with respect to all enterprises regulated by such body, including state-owned enterprises, enterprises granted special rights or privileges and designated monopolies.⁸

3. Each Party shall ensure the enforcement of its law on state-owned enterprises, enterprises granted special rights or privileges and designated monopolies in a consistent and non-discriminatory manner.

ARTICLE 17.7

Information exchange

1. A Party which has a 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 (hereinafter referred to as "the entity" in this Article) of the other Party may request the other Party in writing to provide information on the commercial activities of the entity related to the carrying out of obligations under this Chapter in accordance with paragraph 2.

⁷ For greater certainty, the impartiality with which the regulatory body or any other body exercising a regulatory function that the Party establishes or maintains exercises its regulatory functions is to be assessed by reference to a general pattern or practice of such regulatory body.

⁸ For greater certainty, for those sectors in which the Parties have agreed in other Chapters to specific obligations relating to a regulatory body or any other body exercising a regulatory function that the Party establishes or maintains, the relevant provisions of those Chapters shall prevail.

2. The Party responding to a request shall provide the following information to the requesting Party, provided that the request includes an explanation of how the activities of the entity may be affecting the interests of the requesting Party under this Chapter and that the request indicates which of the following information shall be provided:

- (a) the ownership and the voting structure of the entity, indicating the percentage of shares that the responding Party, its state-owned enterprises, enterprises granted special rights or privileges or designated monopolies cumulatively own, and the percentage of voting rights that they cumulatively hold, in the entity;
- (b) a description of any special shares or special voting or other rights that the responding Party, its state-owned enterprises, enterprises granted special rights or privileges or designated monopolies hold, where 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 its composition of the board of directors or of any other equivalent management body;
- (d) a description of which government departments or public bodies regulate or monitor the entity, a description of the reporting requirements imposed on it by those government departments or public bodies, and the rights and practices of those government departments or public bodies with respect to the appointment, dismissal or remuneration of senior executives and members of the board of directors or any other equivalent management body of the entity;

- (e) 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 law of the responding Party;
- (g) in respect of entities covered by the New Zealand Local Government Act 2002 or any successor legislation, any information that such entities are obliged to provide under that Act or any successor legislation; and
- (h) any additional information regarding the entity that is publicly available, including annual financial reports and third-party audits.

3. Without prejudice to Article 25.7 (Disclosure of information), paragraphs 1 and 2 of this Article shall not require a Party to disclose confidential information the disclosure of which would be inconsistent with its law.

4. If the requested information is not available to the responding Party, the responding Party shall provide the reasons for this in writing to the requesting Party.