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The texts are published in view of the public interest in the negotiations for information purposes only and they may undergo further modifications, including as a result of the process of legal revision. These texts are without prejudice to the final outcome of the Agreement between the EU and New Zealand.

The texts will be final upon signature. The Agreement will become binding on the Parties under international law only after completion by each Party of its internal legal procedures necessary for the entry into force of the Agreement.

CHAPTER XX

STATE-OWNED ENTERPRISES

ARTICLE X

Delegated Authority

Unless otherwise specified in this Agreement, each Party shall ensure that any juridical person including a state-owned enterprise, an enterprise granted special rights or privileges or a designated monopoly that has been delegated regulatory, administrative or other governmental authority by a Party acts in accordance with the Party's obligations as set out under this Agreement in the exercise of that authority.

ARTICLE X.1

Definitions

For the purposes of this Chapter:

- (a) "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;

- (b) “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-making¹;
- (c) "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.
- (d) "Designate" means to establish or authorize a monopoly, or to expand the scope of a monopoly to cover an additional good or service.
- (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.
- (f) "Enterprise granted special rights or privileges" means any enterprise, public or private, that has been granted by a Party, in law or in fact, special rights or privileges²; special rights or privileges are granted by a Party when it designates or limits to two or more the number of enterprises authorized 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.
- (g) "Service supplied in the exercise of governmental authority" means a service supplied in the exercise of governmental authority as defined in GATS and, if applicable, in the Annex on Financial Services
- (h) “State-owned enterprise” means an enterprise

¹ For greater certainty, 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

² 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.

- (a) in which a Party:
- (i) directly owns more than 50 per cent of the share capital;
 - (ii) controls the exercise of more than 50 per cent 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) holds the power to control the decisions of the enterprise through any other ownership interest, including minority ownership.
- (b) in which a Party has the power to legally direct the actions or otherwise exercise an equivalent level of control in accordance with its laws and regulations.

ARTICLE X.2

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 parties.³ Where they engage both in commercial and non-commercial activities, only the 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.⁴
3. This Chapter shall not apply to enterprises defined in Article 1 if in any one of the three

³ Entities created under or regulated under the Kiwifruit Export Regulations 1999 and/or the Kiwifruit Industry Restructuring Act 1999 are excluded from the application of this Chapter, with the exception of Article X.3 (Relation the WTO Agreement) and Article X.7 (Information Exchange), which clarifies the application of Article X.3 for the purposes of this Agreement, applies (see footnote 8 below).

⁴ The following are deemed not to be within the scope of this Chapter:

- (i) local councils and entities covered by Chapter XX – Public Procurement and its annexes; and
- (ii) enterprises to which special rights and privileges have been granted, and monopolies designated, by those local councils.

previous consecutive fiscal years the annual revenue derived from the commercial activities of the enterprise was less than SDR100 million. During the first three years from the entry into force of this Agreement, the threshold will be of less than 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 for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods or in the supply of services for commercial sale.⁵

5. Article X.5. (Non-discriminatory Treatment and Commercial Considerations) and Article X.7 (Information exchange) shall not apply to any service supplied in the exercise of governmental authority.^{6 7}

6. Article X.5 (Non-discriminatory treatment and commercial considerations) 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:

(i) are not intended to displace commercial financing, or

(ii) are 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 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

⁵ This is without prejudice to the commitments made by the parties in Chapter XX – Public Procurement and its Annex 2 in particular.

⁶ 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 Financial Services Annex where applicable.

⁷ For greater clarity, this includes Sovereign Welfare Funds and Independent Pension Funds, insofar as the activities satisfy the definition of “services supplied in the exercise of governmental authority as defined in the Financial Services Annex of GATS”

financial services in the commercial market.

- (c) is offered on terms consistent with the Arrangement, provided it falls within the scope of the Arrangement.

7. Article X.5 does not apply to the services sectors which are outside the scope of this Agreement as set out in XXXX

[Drafting note: exact reference to be determined during legal scrub].

8. Article X.5 shall not apply to the extent that a state-owned enterprise, an enterprise granted special rights or privileges or a designate monopoly of a Party makes purchases and sales of goods or services pursuant to:

- (a) any existing non-conforming measure in accordance with *[Article x (Non-Conforming Measures) of Chapter X (Cross-Border Trade in Services)]* or *[Article y (Non-Conforming Measures) of Chapter Y (Investment)]* that the Party maintains, continues, renews or amends in *[Annex x]*; or
- (b) any non-conforming measure that the Party adopts or maintains with respect to sectors, subsectors, or activities in accordance with *[Article y (Non-Conforming Measures) of Chapter X (Cross-Border Trade in Services)]* or *[Article y (Non-Conforming Measures) of Chapter Y (Investment)]* as set out in its Schedule in *[Annex y.]*

[Drafting note: to be verified during legal scrub with Services & Investment Chapters]

ARTICLE X.3

Relation to the WTO Agreement

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.

Article XVII of GATT 1994, the Understanding on the Interpretation of Article XVII of GATT 1994, Article VIII of GATS, and paragraphs 18 to 21 of the WTO Ministerial Decision on Export Competition of 19 December 2015 [WT/MIN(15)/45] are incorporated into and made part of this Agreement, and shall apply *mutatis mutandis*.⁸

ARTICLE X.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, designating or maintaining monopolies or granting enterprises special rights or privileges.
2. Neither Party shall 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.

ARTICLE X.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 their purchases or sales of a good or a service, except to fulfil any terms of its public service mandate that are not inconsistent with subparagraph (b) or (c); and
 - (b) in its purchase of a good or a service: and

⁸ Article X.7 specifies as between the Parties and solely for the purposes of this Agreement, the Parties' understanding of how the obligations under Article XVII.4 GATT are to be met for the purposes of this paragraph

- (i) accords to a good or a 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 enterprise as defined in [*reference to Article on definitions in the Chapter on Trade in Services*] treatment no less favourable than 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 it accords to enterprises of the Party; and
 - (ii) accords to a covered enterprise as defined in [*reference to Article on definitions in the Chapter on Trade in Services*] treatment no less favourable than it accords to enterprises of that Party's own investors in the relevant market in the Party.

2. Paragraph 1 (b) and (c) 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.

ARTICLE X.6

Regulatory framework

1. The Parties respect and make best use of relevant international standards including, *inter alia*,

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 that body, and
 - (b) acts impartially⁹ in like circumstances with respect to all enterprises regulated by that body, including state-owned enterprises, enterprises granted special rights or privileges and designated monopolies.¹⁰
3. Each Party shall ensure the enforcement of its laws and regulations to state-owned enterprises, enterprises granted special rights or privileges and designated monopolies in a consistent and non-discriminatory manner.

ARTICLE X.7

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 a state-owned enterprise, an enterprise granted special rights or privileges or a designated monopoly (hereinafter referred to in this Article as "the entity") 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 the provisions of this Chapter in accordance with paragraph 2.
2. The requested Party shall provide the following information, 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 indicates which of the following information shall be provided:

⁹ For greater certainty, 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.

¹⁰ For greater certainty, for those sectors in which the Parties have agreed to specific obligations relating to such a body in other Chapters, the relevant provisions of those Chapters shall prevail.

- (a) the ownership and the voting structure of the entity, indicating the percentage of shares that the 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 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 body;
- (d) a description of which government departments or public bodies regulate and/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 any public bodies with respect to the appointment, dismissal or remuneration of senior executives and members of its board of directors or any other equivalent management body;
- (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 laws and regulations of the requested Party;
- (g) in respect of entities covered by New Zealand's Local Government Act 2002 or successor legislation, any information that those 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. The provisions of paragraphs 1 and 2 shall not require any Party to disclose confidential information the disclosure of which would be inconsistent with its laws and regulations, impede law

enforcement, or otherwise be contrary to the public interest, or would prejudice the legitimate commercial interests of particular enterprises.

4. If the requested information is not available to the Party, that Party shall provide the reasons for this in writing to the other Party who requested the information.