



# Competere



## Anti-Competitive Market Distortions: A Sample Chapter for Trade Agreements By Shanker Singham

*A unique consultancy for firms and governments navigating the evolving and complex trade and regulatory environment.*

## COMPETITION POLICY

### Article 15.1: Definitions

For the purposes of this Chapter:

1. "**Arrangement**" means the Arrangement on Officially Supported Export Credits, developed within the framework of the Organization for Economic Cooperation 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 Members to the Arrangement that were members as of January 1, 1979;
2. "**commercial activities**" means activities the end result of which is the production of a good or supply of a service which will be sold to a consumer, including a state enterprise, state-owned enterprise, or designated monopoly, in the relevant market in quantities and at prices determined by the enterprise and that are undertaken with an expectation of gain or profit;<sup>1</sup>
3. "**commercial considerations**" means factors such as price, quality, availability, marketability, transportation, and other terms and conditions of purchase or sale, or other factors that influence the commercial decisions of an enterprise in the relevant business or industry;
4. "**designate**" means, whether formally or in effect, to establish, name, or authorize a monopoly, or to expand the scope of a monopoly to cover an additional good or service;
5. "**designated monopoly**" means a monopoly that a Party designates or has designated;
6. "**government monopoly**" means a monopoly that is owned or controlled by a Party or by another government monopoly;
7. "**injury**" means material injury to a domestic industry, threat of material injury to a domestic industry, or material retardation of the establishment of a domestic industry;
8. "**market**" means the geographical and commercial market for a good or service;

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<sup>1</sup> For greater certainty, this excludes activities undertaken by an enterprise which operates on a: •  
not-for-profit basis; or  
• cost recovery basis.

9. "**monopoly**" means an entity or a group of entities that, in any relevant market in the territory of a Party, is the exclusive provider or purchaser of a good or service, but does

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not include an entity that has been granted an exclusive intellectual property right solely by reason of such grant;

10. "**national competition laws**" shall mean the laws concerning the regulation of cartels and anti-competitive agreements or abuse of dominance / monopolisation;

11. "**non-commercial assistance**"<sup>2</sup> means the provision of:

(a) grant or debt forgiveness;

(b) a loan, equity infusion or capital, loan guarantee, or other type of financing or loan satisfaction on terms more favourable than those commercially available to that enterprise; or

(c) a subsidy within the meaning of Article 1 of the WTO Agreement on Subsidies and Countervailing Measures; or <sup>[L]</sup><sub>[SEP]</sub>

(d) a good or service, other than general infrastructure, on terms more favourable than those commercially available to that enterprise;

12. "**state enterprise**" means an enterprise that is owned, or controlled through ownership interests, by a Party; and

13. "**state-owned enterprise**" means an enterprise that is engaged in economic activities; and:

(a) is owned, or controlled, by a Party's government; or

(b) in which a Party's government appoints or has the power to appoint the majority of members of the board of directors or any equivalent management

(c) is controlled by a Party's government through a control person or control persons.

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<sup>2</sup> For greater certainty, non-commercial assistance does not include intra-group transactions within a corporate group including state-owned enterprises, e.g. between the parent and subsidiaries of the group, or among the group's subsidiaries, when normal accounting standards or business practices would require that the corporate entity prepare consolidated net financial statements of these intra-group transactions.

## **Article 15.2: Competition Law and Anti-Competitive Practices**

1. Each Party shall adopt or maintain national competition laws with the objective of promoting economic efficiency and consumer welfare, and shall take appropriate action

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with respect to that conduct. These laws should take into account the OECD Competition Assessment Toolkit (2007) (as revised from time to time), OECD Regulatory Toolkit and the APEC Principles to Enhance Competition and Regulatory Reform, done at Auckland, September 13, 1999.

2. Each Party shall endeavour to apply its national competition laws to all commercial activities in its territory<sup>3</sup>, including the activities of state-owned enterprises both in their commercial sales and their procurement activities. However, each Party may provide for certain exemptions from the application of its national competition laws provided that those exemptions are transparent and are based on public policy grounds or public interest grounds.
3. Each party shall maintain an authority or authorities responsible for the enforcement of its national competition laws (national competition authorities). Each Party shall provide that it is the enforcement policy of that authority or authorities to act in accordance with the objectives set out in Article 15.2.1 and not to discriminate on the basis of nationality.
4. In modifying, enforcing, applying, amending, reviewing or issuing new national competition law, regulations or procedures, Parties shall conduct themselves consistently with the provisions of Chapter 14 (Regulatory Coherence).

## **Article 15.3: Procedural Fairness in Competition Law Enforcement**

1. Both parties shall ensure that before it imposes a sanction or remedy against any person for violating its national competition laws, it shall afford such person:
  - (a) information about the national competition authority's competition concerns;
  - (b) a reasonable opportunity to be represented by counsel; and

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<sup>3</sup> For greater certainty, nothing in Article 15.2.2 shall be construed to preclude a Party from applying its competition laws to commercial activities outside its borders that have anticompetitive effects within its jurisdiction.

- (c) a reasonable opportunity to be heard and present evidence in its defence, except that a Party may provide for the person to be heard and present evidence within a reasonable time after it imposes an interim sanction or remedy
2. In particular, each Party shall afford that person a reasonable opportunity to offer evidence or testimony in its defence, including if applicable, to offer the analysis of a properly qualified expert, to cross-examine any witness (if testifying before a court); and

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to review and rebut the evidence introduced in the enforcement proceeding<sup>4</sup>, subject to the confidentiality provisions of this Chapter. Parties' competition authorities shall normally afford persons under investigation for possible violation of its competition laws reasonable opportunities to consult with such competition authorities with respect to significant legal, factual or procedural issues that arise during the course of investigation.

3. Parties shall adopt or maintain written procedures pursuant to which its national competition law investigations are conducted. If these investigations are not subject to definitive deadlines, each Party's national competition authorities shall endeavour to conduct their investigations within a reasonable time frame.
4. Each Party shall publish or otherwise make publicly available written rules of procedure and evidence that apply to enforcement proceedings concerning alleged violations of its national competition laws and the determination of sanctions and remedies thereunder. These rules shall include procedures for introducing evidence, including expert evidence where applicable.
5. Each Party shall provide a person that is subject to the imposition of a sanction or remedy for violation of its national competition laws with the opportunity to seek review of the sanction or remedy, including review of alleged substantive or procedural errors, in a court or other independent tribunal established under that Party's laws.
6. Each Party shall authorize its national competition authorities to resolve alleged violations voluntarily by consent of the authority and the person subject to the enforcement action. A Party may provide for such voluntary resolution to be subject to judicial (or independent tribunal) approval or a public comment period before becoming final.
7. If a Party's national competition authority issues a public notice that reveals the existence of a pending or ongoing investigation, that authority shall avoid implying in that notice

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<sup>4</sup> For the purposes of this Article, enforcement proceedings means judicial or administrative proceedings following an investigation into alleged violation of the competition laws.

that the person referred to in that notice has engaged in the alleged conduct or violated the Party's national competition laws.

8. If a national competition authority of a Party alleges a violation of its national competition laws, that authority shall be responsible for establishing the legal and factual basis for the alleged violation in an enforcement proceeding.<sup>5</sup>

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9. Each Party shall provide for the protection of confidential information and business secrets, and other information treated as confidential under its law, obtained by its national competition authorities during the investigative process. If a Party's national competition authority uses or intends to use that information in an enforcement proceeding, the Party shall, if it is permissible under its law and as appropriate, provide a procedure to allow the person under investigation timely access to information that is necessary to prepare an adequate defence to the national competition authority's allegations.

10. Both parties shall ensure that its national competition authorities afford a person under investigation for possible violation of the national competition laws of that Party reasonable opportunity to consult with those competition authorities with respect to significant legal, factual or procedural issues that arise during the investigation.

#### **Article 15.4: Private Rights of Action**

1. For the purposes of this Article, "**private right of action**" means the right of a legal or natural person to seek redress, including injunctive, monetary or other remedies, from a court or other independent tribunal for injury to that person's business or property caused by a violation of national competition laws, either independently or following a finding of violation by a national competition authority.
2. Recognizing that a private right of action is an important supplement to the public enforcement of national competition laws, each Party should adopt or maintain laws or other measures that provide an independent private right of action.

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<sup>5</sup> Nothing in this paragraph shall prevent a Party from requiring that a person against whom such an allegation is made be responsible for establishing certain elements in defence of the allegation.

3. If a Party does not adopt or maintain laws or other measures that provide an independent private right of action, the Party shall adopt or maintain laws or other measures that provide a right that allows a person:
  - (a) to request that the national competition authority initiate an investigation into an alleged violation of national competition laws; and
  - (b) to seek redress from a court or other independent tribunal following a finding of violation by the national competition authority.
4. Both Parties shall ensure that a right provided pursuant to Articles 15.5.2 or 15.5.3 is available to persons of the other party on terms that are no less favourable than those available to its own persons.
5. A Party may establish reasonable criteria for the exercise of any rights it creates or maintains in accordance with this Article.

#### **Article 15.5: Cooperation**

1. The Parties recognise the importance of cooperation and coordination between their respective national competition authorities to foster effective competition law enforcement in the free trade area. Accordingly, both parties shall:
  - (a) cooperate in the area of competition policy by exchanging information on the development of competition policy; and
  - (b) cooperate, as appropriate, on issues of competition law enforcement, including through notification, consultation and the exchange of information including confidential information and business secrets.
2. A Party's national competition authorities may consider entering into a cooperation arrangement or agreement with the competition authorities of the other party that sets out mutually agreed terms of cooperation.
3. The Parties agree to cooperate in a manner compatible with their respective laws, regulations and important interests, and within their reasonably available resources.
4. The Parties commit to maintaining a high level of international cooperation and coordination. The Parties acknowledge the importance of cooperation and coordination internationally and the work of multilateral organizations in this area.

## Article 15.6: Consumer Protection

1. The Parties recognise the importance of consumer protection policy and enforcement to creating efficient and competitive markets and enhancing consumer welfare in the free trade area.
2. For the purposes of this Article, fraudulent and deceptive commercial activities refers to those fraudulent and deceptive commercial practices that cause actual harm to consumers, or that pose an imminent threat of such harm if not prevented, for example:
  - (a) a practice of making misrepresentations of material fact, including implied factual misrepresentations, that cause significant detriment to the interests of misled consumers;
  - (b) a practice of failing to deliver products or provide services to consumers after the consumers are charged; or
  - (c) a practice of charging or debiting consumers' financial, telephone or other accounts without authorization.
3. Both parties shall adopt or maintain consumer protection laws or other laws or regulations that proscribe fraudulent and deceptive commercial activities.<sup>6</sup>
4. The Parties recognise that fraudulent and deceptive commercial activities increasingly transcend national borders and that cooperation and coordination between the Parties is desirable to effectively address these activities.
5. Accordingly, the Parties shall promote, as appropriate, cooperation and coordination on matters of mutual interest related to fraudulent and deceptive commercial activities, including in the enforcement of their consumer protection laws.
6. The Parties shall endeavour to cooperate and coordinate on the matters set out in this Article through the relevant national public bodies or officials responsible for consumer protection policy, laws or enforcement, as determined by each Party and compatible with their respective laws, regulations and important interests and within their reasonably available resources.

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<sup>6</sup> For greater certainty, the laws or regulations a Party adopts or maintains to proscribe these activities can be civil or criminal in nature.



### **Article 15.7: Transparency of Policies and Practices**

1. The Parties recognise the value of making their competition enforcement policies as transparent as possible.
  2. On request of the other party, a Party shall make available to the requesting Party public information concerning:
    - (a) its competition law enforcement policies and practices; and
    - (b) exemptions and immunities to its national competition laws, provided that the request specifies the particular good or service and market of concern and includes information explaining how the exemption or immunity may hinder trade or investment between the Parties.
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3. Each Party shall ensure that a final decision finding a violation of its national competition laws is made in writing and sets out, in non-criminal matters, findings of fact and the reasoning, including legal and, if applicable, economic analysis, on which the decision is based. Both parties shall further ensure that any such decisions and any orders implementing them are published, or where publication is not practicable, otherwise made available to the public in such a manner as to enable interested persons to become acquainted with them. The version of the decisions or orders that the Party makes available to the public shall omit confidential business information, as well as information that is treated as confidential under its laws.

### **Article 15.8: Consultations**

In order to foster understanding between the Parties, or to address specific matters that arise under this Chapter, on request of another Party, a Party shall enter into consultations with the requesting Party within a reasonable period of time regarding any matter arising under this Chapter. In its request, the requesting Party shall specify the matter on which it seeks to consult and indicate, if relevant, how the matter affects trade or investment between the Parties. The Party addressed shall accord full and sympathetic consideration to the concerns of the requesting Party.

### **Article 15.9: State-owned Enterprises, State Enterprises and Designated Monopolies**

1. This Chapter applies with respect to the activities of state-owned enterprises, state enterprises and designated monopolies that affect trade or investment between the Parties.
2. Notwithstanding Paragraph 1, this Chapter does not apply to:
  - (a) a central bank or monetary authority of a Party;
  - (b) a financial regulatory body or a resolution authority of a Party;
  - (c) a financial institution or other entity owned or controlled by a Party that is established or operated temporarily solely for resolution purposes;
  - (d) government procurement;
  - (e) regulatory or supervisory activities of any non-governmental entity, including any securities or futures exchange or market, clearing agency, or other organization or association, that exercises regulatory or supervisory authority over financial service suppliers or financial institutions, pursuant to direction or delegated authority of the Party;
  - (f) where the Party is exercising public power in their capacity as a public authority;
  - (g) where the Party is exercising powers of social solidarity, characteristics of schemes pursuing social solidarity include: a compulsory scheme, which pursues an exclusively social purpose, is non-profit making, where the benefits can be independent of the contribution made.
3. For greater certainty, nothing in this Chapter shall be construed to prevent a Party from:
  - (a) establishing or maintaining a state enterprise or state-owned enterprise, or
  - (b) designating a monopoly.
4. Both parties shall ensure that when its state-owned enterprises, state enterprises, and designated monopolies exercise any regulatory, administrative, or other governmental authority<sup>7</sup> which the Party has directed or delegated to such an entity to carry out, such

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<sup>7</sup> Examples of regulatory, administrative, or other governmental authority include the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges.

entity shall act in a manner that is not inconsistent with that Party's obligations under this Agreement.

5. Both parties shall ensure that its state-owned enterprises and designated monopolies, when engaging in economic activities:
  - (a) act in accordance with commercial considerations in their purchases or sales of goods or services, except, in the case of a designated monopoly, to fulfil any terms of its designation that are not inconsistent with Article 15.9.5(b) and Article 15.9.7; and
  - (b) accord to enterprises that are covered investments, goods of the other Party, and services suppliers of the other Party, treatment no less favourable than they accord to, respectively, like enterprises that are investments of the Party's investors, like goods of the Party, and like service suppliers of the Party, with respect to their purchases or sales of goods or services.
  
6. Article 15.9.5 does not preclude a state-owned enterprise or designated monopoly from:
  - (a) purchasing or supplying goods or services on different terms or conditions, including those relating to price; or

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  - (b) refusing to purchase or supply goods or services, provided that such different terms or conditions or refusal are undertaken in accordance with commercial considerations and Article 15.9.5(b).
  
7. Both parties shall ensure that any designated monopoly that it establishes or maintains does not use its monopoly position to engage in, either directly or indirectly, including through its dealings with its parent, subsidiaries, or other entities that the Party or the designated monopoly owns or controls, anticompetitive practices in a non-monopolized market in its territory that adversely affect covered investments or trade between the Parties.

#### **Article 15.10: Commercial Considerations**

Except to fulfil the purpose<sup>8</sup> for which special or exclusive rights or privileges have been granted, or in the case of a state enterprise to fulfil its public mandate, and provided that the

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<sup>8</sup> Such as a Public Service Obligation. The Public Service Obligation shall be constructed in such a way as to be the most pro-competitive and least trade restrictive consistent with regulatory goals. Violation of the principals shall be grounds for violation of this agreement.

enterprise's conduct in fulfilling that purpose or mandate is consistent with the provisions in the Chapter on Competition, both parties shall ensure that any enterprise referred to in Articles 15.9.2 (d), (e) and (f) acts in accordance with commercial considerations in the relevant territory in its purchases and sales of goods, including with regard to price, quality, availability, marketability, transportation and other terms and conditions of purchase or sale, as well as in its purchases or supply of services, including when these goods or services are supplied to or by an investment of an investor of the other Party.

#### **Article 15.11: Courts and Administrative Bodies**

1. Both parties shall provide its courts with jurisdiction over civil claims against a foreign state- owned enterprise based on a commercial activity carried on its territory, except where a Party does not provide jurisdiction over similar claims against enterprises that are not state-owned enterprises.
2. Both parties shall ensure that any body that it establishes or maintains, and that regulates a state- owned enterprise or designated monopoly, acts impartially with respect to all enterprises that it regulates, including enterprises that are not state-owned enterprises.

#### **Article 15.12: Adverse Effects**

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1. Neither party shall cause adverse effects to the interests of the other Party through the use of non-commercial assistance to enterprises active in markets open to trade.
  2. Both parties shall ensure that no state enterprise or state-owned enterprise that it establishes or maintains causes 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, where the Party explicitly limits access to the non-commercial assistance provided by the state enterprise or state-owned enterprise to its state-owned enterprises, or where the state enterprise or state-owned enterprise provides non-commercial assistance which is predominately used by the Party's state-owned enterprises, provides a disproportionately large amount of the noncommercial assistance to the Party's state-owned enterprises, or otherwise favours the Party's state-owned enterprises in the provision of non-commercial assistance.
  3. Adverse effects cannot be established on the basis of any act, omission, or factual situation, to the extent that act, omission, or factual situation took place before the date of entry into force of this Agreement.

4. For the purpose of Articles 15.12.1 to 15.12.3, adverse effects are effects that arise from the provision of a good or service by a Party's state-owned enterprise which has benefited from non-commercial assistance and:
- (a) displace or impede from the Party's market imports of a like product or service<sup>9</sup> that is an originating good of the other Party, or sales of a like product that is a good produced by an enterprise that is a covered investment;
  - (b) consist of a significant price undercutting by a product of the Party's state-owned enterprise compared with the price in the same market of a like product that is an originating good of the other Party or a like product that is a good produced by an enterprise that is a covered investment, or significant price suppression, price depression, or lost sales in the same market;
  - (c) displace or impede from the Party's market a like service supplied by a service supplier of the other Party, or a like service supplied by an enterprise that is a covered investment, or
  - (d) consist of a significant price undercutting by a service supplied by the Party's state-owned enterprise as compared with the price in the same market of a like service supplied by a service supplier of the other Party, or by an enterprise that is a covered investment, or significant price suppression, price depression, or lost sales in the same market.

5. For the purposes of Articles 15.12.4(a) and 15.12.4(c), the displacing or impeding of a product or service includes any case in which there has been a significant change in relative share of the market to the disadvantage of the like product of the other Party or of a covered investment, or to the disadvantage of a like service supplied by a service supplier of the other Party or by a covered investment.
6. A significant change in relative shares of the market shall include any of the following situations:
- (a) there is an increase in the market share of the product or service of the Party's stateowned enterprise in the range of 5-10%;

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<sup>9</sup> For greater certainty, for the purpose of this Chapter, the term "product" does not include financial instruments, including money.

- (b) the market share of the product 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 product or service of the Party's state-owned enterprise declines, but by a significantly lower amount or at a significantly slower rate than would have been the case in the absence of the non-commercial assistance.
7. Where the change manifests itself over an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the product or service, which shall be at least one year unless exceptional circumstances apply.
8. For purposes of Articles 15.12.4(b) and 15.12.4(d) significant price undercutting shall include demonstration through a comparison of prices at the same level of trade and at comparable times within the same market as follows:
- (a) the prices of a product of the Party's state-owned enterprise benefiting from non-commercial assistance with the prices of a like product of the other Party or an enterprise that is covered investment; or
  - (b) the prices of a service of the Party's state-owned enterprise benefiting from non-commercial assistance with the prices of a like service supplied by a service supplier of the other Party or an enterprise that is a covered investment.
9. Due account shall be taken for factors affecting price comparability. If a direct comparison of transactions is not possible, the existence of the price undercutting may be demonstrated on some other reasonable basis, such as, in the case of goods, a comparison of unit values.

### **Article 15.13: Injury**

1. Neither party shall cause injury to a domestic industry of the other Party through the use of non-commercial assistance that it provides, either directly or indirectly, to any enterprises in the territory of the other Party and where:
- (a) the enterprise produces and sells a good in the territory of the other Party; and
  - (b) a like good is produced and sold by a domestic industry of the other Party.

#### **Article 15.14: Requirements for Transparency & Corporate Governance**

1. The Parties shall ensure that enterprises referred to in Article 15.9 (a) and Article 15.9 (b) shall observe high standards of transparency and corporate governance in accordance with the OECD Guidelines on Corporate Governance of State-Owned Enterprises.
2. A Party which has reason to believe that its interests under this Agreement are being adversely affected by the operations of an enterprise or enterprises referred to in Article 15.13(a) and Article 15.13(b) of the other Party may request that Party to supply information about the operations of its enterprise related to the carrying out of the provisions of this Agreement.
3. Both parties shall, at the request of the other Party, make available information concerning specific enterprises referred to in Articles 15.9.1 (d), (e) and (f)) and which do not qualify as small and medium-sized enterprises as defined in UK or EU law. Requests for such information shall indicate the enterprise, the products/services and markets concerned, and include indicators that the enterprise is engaging in practices that hinder trade or investment between the Parties.
4. The information may include:
  - (a) the organizational structure of the enterprise, the composition of its board of directors or of an equivalent structure of any other executive organ exercising direct or indirect influence through an affiliated or related entity in such an enterprise; and cross holdings and other links with different enterprises or groups of enterprises referred to in Articles 15.9.1 (d), (e) and (f):
  - (b) the ownership and the voting structure of the enterprise, indicating the percentage of shares and percentage of voting rights that a Party and/or an enterprise referred to in Articles 15.9.1 (d), (e) and (f) cumulatively own;
  - (c) a description of any special shares or special voting or other rights that a Party and/or an enterprise referred to in Articles 15.9.1 (d), (e) and (f) hold, where such rights differ from the rights attached to the general common shares of such entity;
  - (d) the name and title(s) of any government official of a Party serving as an officer or member of the board of directors or of an equivalent structure or of any other executive organ exercising direct or indirect influence through an affiliated or related entity in the enterprise;

- (e) details of the government departments or public bodies which monitor the enterprise and any reporting requirements;
  - (f) the role of the government or any public bodies in the appointment, dismissal or remuneration of managers; and
  - (g) annual revenue or total assets, or both; and
  - (h) exemptions, non-conforming measures, immunities and any other measures derogating from the application of a Party's laws or regulations or granting favourable treatment by a Party.
5. The provisions of Articles 15.14.2 and 15.14.3 shall not require any Party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises.
  6. Both parties shall ensure that any regulatory body responsible for regulating any of the enterprises referred to in Articles 15.9.1 (d), (e) and (f) is independent from, and not accountable to, any of the enterprises referred to in Articles 15.9.1 (d), (e) and (f).
  7. Both parties shall ensure the enforcement of laws and regulations in a consistent and non-discriminatory manner at all levels of government, be it central or local, and their application to enterprises referred to in Articles 15.9.1 (d), (e) and (f). Exemptions must be limited and transparent.
  8. The provisions of this Article apply to enterprises operating in all sectors.

#### **Article 15.15: Provision of Information**

1. Both parties shall provide to the other Party a list of its state-owned enterprises within 180 days of the date of entry into force of this Agreement, and thereafter shall provide an updated list annually.
2. Where a Party designates a monopoly, or expands the scope of an existing designated monopoly, it shall promptly notify the other Party of the designation or expansion of scope and the conditions under which the monopoly shall operate.
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:



- (a) the percentage of shares that the Party, its state-owned enterprises, state 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 different from the rights attached to the general common shares of such entity;
  - (c) the government titles, or former government titles, and decision-making ability of any official serving as a board member, officer, director, manager, or other control person of such entity;
  - (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 law; and
  - (f) any additional information regarding the entity which is publicly available, including annual financial reports and third-party audits, and which is sought in the written request.
4. On the written request of the other party, a Party shall promptly provide the following information concerning assistance received by any of its state-owned enterprises:
- (a) any financing or re-financing that the Party, or another of the Party's state-owned enterprises or state enterprises, has provided to the state-owned enterprise, including the amount of such financing and the terms on which it was provided;
  - (b) any loan guarantee that the Party, or another of the Party's state-owned enterprises or state enterprises, has provided to the state-owned enterprise, including fees associated with the guarantee and any other conditions associated with the guarantee;
  - (c) any forgiveness of debt or other financial liability that the Party, or another of the Party's state-owned enterprises or state enterprises, has provided to the state-owned enterprise;

- (d) any goods or services that the Party, or another one of the Party's state-owned enterprises or state enterprises, has provided to the state-owned enterprise, and the conditions associated with such provision; and
  - (e) any export credit that the Party, or one of the Party's state-owned enterprises, has provided in support of the export of a good or service from one of the Party's state-owned enterprises, including the amount of such export credits, and the terms and conditions on which it was provided.
5. Both parties shall include in any written request under Article 15.15 an explanation of how the activities of the state-owned enterprise may be affecting trade or investment between the Parties.

**Article 15.16: Anti-Competitive Market Distortions**

1. The Parties agree that they will not, through laws, regulations, administrative practices or other Covered Actions, distort their markets in trade restrictive or anti-competitive ways ("Anti-Competitive Market Distortions" or "ACMDs"), unless there is a clearly expressed regulatory goal which has been published in advance consistent with Chapter 14 of this Agreement (Regulatory Coherence).
2. The Parties agree that they may provide supports to regionally impoverished areas<sup>10</sup> in their territories, and that prior to providing these supports the Parties should consult with each other through the Competition Policy Sub-Committee.
3. The Parties agree that they will develop mechanisms to deal with ACMDs of the other Party, and that these measures may include imposing a duty that is correlated to the scale of the impact of the ACMD on competition in the market, and that the imposition of such a duty, provided that it is consistent with the factors set out below it shall not

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be deemed to be a violation of this agreement or of the rules of the World Trade Organization:

- (a) the complaining party must prove that there is an ACMD<sup>11</sup>;
- (b) the complaining party must prove that there is an adverse effect, or damage to their interests;

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<sup>10</sup> Definition of Regionally Impoverished Area

<sup>11</sup> Any measure can give rise to an ACMD, including laws, regulations, government actions or inactions, statements by regulators, made publicly and privately.

- (c) the complaining party must adduce evidence of the scale of the adverse effect;  
and
  - (d) the complaining party must produce evidence of damage, and evidence that the ACMD has caused the damage.
4. The Parties agree that they will use these ACMD mechanisms with respect to ACMDs in other jurisdictions, and will mutually defend any claims brought that such mechanisms violate WTO rules.

#### **Article 15.17**

The corporate governance framework of each Party shall include provisions aiming at protecting and facilitating the effective exercise of shareholders' rights in publicly listed companies, ensuring timely and accurate disclosure on all material matters, including the financial situation, performance, ownership and governance of those companies.

#### **Article 15.18**

The Parties will ensure that they maintain corporate governance rules which require all companies to disclose government supports, privileges or other benefits as part of any applicable securities filings.

#### **Article 15.19**

1. The Parties shall adopt or maintain corporate governance mechanisms which ensure accountability of the management and board towards the shareholders, responsible, objective and independent board decision-making, and equal treatment of shareholders of the same class.

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2. The Parties may provide that some corporate governance principles, but not those set out in 15.17, may not be applied to companies outside regulated markets or early phase development of the company.

#### **Article 15.20: Sub-Committee on State-Owned Enterprises and Designated Monopolies**

1. The Parties hereby establish a Sub-Committee on State-Owned Enterprises and Designated Monopolies, State Aids and ACMDs (“SOE Committee”), comprised of officials from both parties.
2. The Sub-Committee meet within one year of the date of entry into force of the Agreement, and at least annually thereafter, unless the Parties decide otherwise.
3. The Sub-Committee shall:
  - (a) review and consider the operation and implementation of this Chapter;
  - (b) discuss, at a Party's request, the activities of any state-owned enterprise or designated monopoly of a Party specified in the request with a view to identifying any distortion of trade or investment between the Parties that may result from those activities;
  - (c) Provide a framework for consultations under this Chapter;
  - (d) develop cooperative efforts, as appropriate, to promote the principles underlying the obligations contained in this Chapter and to contribute to the development of similar obligations in regional and multilateral institutions in which the Parties participate; and
  - (e) undertake such other activities as the Sub-Committee may decide.
4. Prior to each Sub-Committee meeting, both parties shall invite, as appropriate, input from the public on matters related to state-owned enterprises or designated monopolies that may affect developing its meeting agenda.

#### **Article 15.21: Exceptions**

1. Nothing in Article 15.11 (Courts and Administrative Bodies), Article 15.12 (Adverse Effects), or Article 15.13 (Injury), Article 15.16 (state aids and ACMDs) 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 for which a Party has taken measures on a temporary basis in response to a national or global economic emergency.
2. Article 15.11(Courts and Administrative Bodies), Article 15.12 (Adverse Effects), Article 15.13 (Injury), Article 15.7 (Requirements for Transparency & Corporate Governance),

Article 15.20 (Committee on State-Owned Enterprises and Designated Monopolies), and Article 15.22 (Dispute Settlement) shall not apply where the state-owned enterprise is:

- (a) established or maintained by a Party solely to provide essential services to the general public in its territory; or
  - (b) subject to government mandates defining its public service function, such as universal service obligations, or requirements to provide services at below market rates or on a cost recovery basis which are not imposed on similarly situated private companies, except where that public services function is being fulfilled in a manner that unnecessarily damages competition or restricts trade.
3. Articles 15.11 (Courts and Administrative Bodies), Article 15.12 (Adverse Effects) and Article 15.13 (Injury) shall not apply to a state-owned enterprise or designated monopoly that provides healthcare services or finances housing, including insurance or guarantees of residential loans or mortgage securities, except where such a state-owned enterprise or designated monopoly shall accord treatment to covered investments no less favourable than the treatment it accords to like enterprises which are investments of the Party's investors, and provided that these activities do not unnecessarily damage competition or restrict trade.
4. With respect to a state-owned enterprise of a Party that provides export credits, Article 15.11] (Courts and Administrative Bodies), Article 15.12 (Adverse Effects) and Article 15.13 (Injury) shall not apply to:
- (a) the provision of export credits that fall within the scope of the Arrangement and are offered on terms consistent with the Arrangement, regardless of whether the Party is a Participant to the Arrangement; and
  - (b) the provision of short-term insurance, guarantee, or other financing with a repayment term of less than two years, provided that the state-owned enterprise charges premium rates or interest rates that are adequate to cover the long-term operating costs and losses of the program, determined on a net present value basis, under which the insurance, guarantee, or other financing is provided.

#### **Article 15.22: Dispute Settlement**

Any recourse to dispute settlement pursuant to Chapter 19 (Dispute Settlement) for any matter arising under this Chapter shall be subject to Annex 15.1 of this Chapter.

## **ANNEX 15: Process for Developing Information Concerning State-Owned Enterprises and Designated Monopolies**

1. Where a panel has been established pursuant to Chapter 19 (Dispute Settlement) to examine a matter arising under this Chapter, the panel shall administer the process set out in paragraphs 2 through 4 aimed at developing information relevant to the claim, including data regarding the volume and value of relevant purchases or sales by the state-owned enterprise or designated monopoly in question, and information about that entity's relevant purchasing, sales, and contracting procedures.<sup>12</sup> The process shall include procedures aimed at protecting information that is by nature confidential or which a disputing Party provides on a confidential basis.
  2. The complaining Party may present written questions to the other Party within 60 days of the date on which the panel is established. The responding Party shall provide its responses to the questions to the complaining Party and the panel within 60 days from the date it receives the questions.
  3. The complaining Party shall have 60 days from the date it receives the responses to its questions to review them and provide any additional questions related to the responses to the responding Party. The responding Party shall have 45 days from the date it receives the additional questions to provide its responses to the additional questions to the complaining Party and the panel.
  4. If the complaining Party considers that the responding Party has failed to cooperate in the process, the complaining Party shall inform the panel and the responding Party in writing no later than 30 days from the date responses to the complaining Party are due, and provide the basis for this view. The panel shall afford the responding Party an opportunity to reply to this view in writing.
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5. The panel may seek additional information from a disputing Party that was not provided to the panel through the information development process carried out under this Annex, 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.

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<sup>12</sup> The presentation of written questions and responses pursuant to paragraph 2 and 3 may commence prior to the date a panel is composed. Upon its composition, the complaining Party shall provide any questions it presented to the responding Party, and the responding Party shall provide any responses it provided to the complaining Party, to the panel.

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## Comments

1. This chapter does a lot of heavy lifting in the areas of SOEs, state aids and government distortions. This is not only important for both parties, but it also aligns both parties around the developing global consensus in the OECD and other venues to deal with the problem of market distortions. A high level agreement on these points should be possible between the US and UK and could be a template for dealing with these problems in China and other highly distorted markets.
2. These provisions are based on existing US-X agreements, but we have drawn in language on state owned enterprises from other FTAs, as well competition language in the OECD Regulatory Toolkit and Competition Assessment.
3. Deleted Article 15.19: We would want no exceptions, because these disclosure obligations only apply to listed companies on regulated markets.
4. The Competition Provisions also discuss market distortions which have been raised by the EU, US, and Japan in the WTO Declaration in Buenos Aires, December, 2017. Here the trilateral group is seeking to lower market distortions in third countries. The US-UK FTA should build on and improve on what has been agreed in the trilateral.

## CHAPTER 16 SUBSIDIES, STATE AID AND MARKET DISTORTIONS

### Article 16.1: Definitions

For the purposes of this Chapter:

- (a) "**economic activities**" means those activities pertaining to the offering of goods and services in a market;
- (b) "**subsidy**" means a measure which fulfils mutatis mutandis the conditions set out in Article 1.1 of the SCM Agreement, irrespective of whether the recipients of the subsidy deal in goods or services, and shall also include where a government imposes financial burdens (such as direct or indirect taxes, or other levies) on firms in the other Party which do not apply to its own firms which disturb the equality of competitive opportunity ; and

- (c) "**specific subsidy**" means a subsidy which is determined mutatis mutandis to be specific in accordance with Article 2 of the SCM Agreement.
- (d) "**Significant lessening of competition**" shall have its ordinary meaning under prevailing competition law, and can be demonstrated by a concentration of the market after firm exit through structural or price tests typically used in merger analysis.

#### **Article 16.2: Principles**

1. The Parties agree to use their best endeavours to remedy or remove through the application of their competition or state aid laws or otherwise, distortions of competition caused by subsidies in so far as they affect international trade, and to prevent the occurrence of such situations.
2. Notwithstanding these commitments, the Parties reserve their rights to adopt antisubsidy or countervailing duty measures against goods originating in the other Party in accordance with Article [insert] of this Chapter.

#### **Article 16.3: Scope**

1. This Chapter applies to specific subsidies to the extent they are related to economic activities.
2. This Chapter does not apply to:
  - (a) subsidies granted to enterprises entrusted by the government with the provision of services to the general public for public policy objectives. Such exceptions from the rules on subsidies shall be transparent and shall not go beyond their targeted public policy objectives;
  - (b) subsidies granted to compensate the damage caused by natural disasters or other exceptional occurrences.
  - (c) subsidies granted temporarily to respond to a national or global economic emergency. Such subsidies shall be targeted, economical, effective and efficient in order to remedy the identified temporary national or global economic emergency<sup>13</sup>;
  - (d) subsidies granted in relation to the supply of audio-visual services; and

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<sup>13</sup> For greater certainty, an emergency shall be understood as one that affects the whole economy of a Party. For the European Union, the whole economy of a Party means the whole economy of the European Union or at least of one of the Member States of the European Union.



- (e) subsidies for small and medium-sized enterprises granted in accordance with objective criteria or conditions as provided for in Article 16.2.1 (b) and footnote 2 attached thereto of the SCM Agreement.
3. The Parties shall use their best endeavours to develop rules applicable to subsidies to services, taking into account developments at the multilateral level, and to exchange information upon the request of either Party. The Parties agree to hold the first exchange of views on subsidies to services within three years after the entry into force of this Agreement.

#### **Article 16.4: Relation to the WTO Agreement**

1. Nothing in this Chapter shall affect the rights and obligations of either Party under the SCM Agreement, Article XVI of GATT 1994 and Article XV of GATS.
2. For the avoidance of doubt the provisions in this Chapter are without prejudice to the rights of a Party in accordance with the relevant provisions of the WTO Agreement to apply trade remedies or to take dispute settlement or other appropriate action against a subsidy granted by the other Party.

#### **Article 16.5: Transparency**

1. Every two years, each Party shall notify the other Party of the following with respect to any subsidy granted or maintained within its territory:
  - (a) the legal basis of the subsidy;
  - (b) the form of the subsidy; and
  - (c) the amount of the subsidy or the amount budgeted for the subsidy.
2. 

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If a Party makes publicly available on an official website the information specified in paragraph 1, the notification pursuant to paragraph 1 shall be deemed to have been made.
3. If a Party notifies subsidies pursuant to Article 25.2 of the SCM Agreement, the Party shall be considered to have met the requirement of paragraph 1 with respect to such subsidies.

4. Upon request by a Party, the other Party shall provide further information on any subsidy schemes and particular individual cases of subsidy which is specific. The Parties shall exchange this information, taking into account the limitations imposed by the requirements of professional and business secrecy.
5. The Parties shall keep under constant review the matters to which reference is made in this Article.

#### **Article 16.6: Prohibited subsidies**

1. The following subsidies shall be deemed to be specific under the conditions of Article 2 of the SCM Agreement and shall be prohibited for the purposes of this Agreement in so far as they adversely affect international trade of the Parties<sup>14</sup>:
  - (a) subsidies granted under any legal arrangement whereby a government or any public body is responsible for covering debts or liabilities of certain enterprises within the meaning of Article 2.1 of the SCM Agreement without any limitation, in law or in fact, as to the amount of those debts and liabilities or the duration of such responsibility; and
  - (b) subsidies (such as loans and guarantees, cash grants, capital injections, provision of assets below market prices or tax exemptions) to insolvent or ailing enterprises, without a credible restructuring plan based on realistic assumptions with a view to ensuring the return of the insolvent or ailing enterprise within a reasonable period of time to long-term viability and without the enterprise significantly contributing itself to the costs of restructuring. This does not prevent the Parties from providing subsidies by way of temporary liquidity support in the form of loan guarantees or loans limited to the amount needed to merely keep an ailing enterprise in business for the time necessary to work out a restructuring or liquidation plan.
2. Paragraph 1 does not apply to subsidies granted as compensation for carrying out public service obligations.
3. The Parties hereby agree that this Article applies to subsidies received only after the date when this Agreement enters into force.

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<sup>14</sup> International trade of the Parties comprises both domestic and exports markets.

### **Article 16.7: Use of subsidies**

1. Each Party shall ensure that enterprises use subsidies only for the specific legitimate purpose for which the subsidies were granted.
2. Each Party shall ensure that those legitimate purposes shall be publicly stated with an opportunity for private firms or individuals from either Party to comment prior to the subsidy being adopted.
3. Each Party shall ensure that subsidies shall not be granted unless they objectively achieve the legitimate purposes for which they are granted, and that they are the least trade restrictive as possible consistent with those legitimate, publicly stated goals.
4. Each Party shall ensure that any subsidies granted do not seriously prejudice international trade or competition. Serious prejudice shall have the meaning set forth in the Agreement on Subsidies and Countervailing Measures (applied to services as well as goods) as well as the following:
  - a. The effect of the subsidy is to give a producer of goods or services in one Party a cost advantage over producers in the other Party that would not have occurred if normal market conditions prevailed which causes a significant lessening of competition;
  - b. The effect of the subsidy is to artificially increase the costs of producers of goods or services in the other Party which negatively impacts the equality of competitive opportunity for firms of the other Party;
  - c. The effect of the subsidy is to create a barrier to trade for exporters from the other Party into the market of the subsidising Party

### **Article 16.8: State Aids and Disciplines on Anti-Competitive Market Distortions**

1. The Parties recognise that the provisions of Article 15.12 are to be read as additional commitments above and beyond the subsidy commitments in this Chapter.

### **Article 16.9: Consultations**

1. In the event a Party considers that a subsidy of the other Party has or could have a significant negative effect on its trade or investment interests under this Chapter, the former Party may submit a request for consultation in writing. The Parties shall enter into consultations with a view to resolving the matter, provided that the request includes an explanation of how the subsidy has or could have a significant negative effect on trade or investment between the Parties.

2. During the consultations, the Party receiving the request for consultation shall consider to provide information about the subsidy, if requested by the other Party, such as:
  - (a) the legal basis and policy objective or purpose of the subsidy;
  - (b) the form of the subsidy such as a grant, loan, guarantee, repayable advance, equity injection or tax concession;
  - (c) dates and duration of the subsidy and any other time limits attached to it;
  - (d) eligibility requirements of the subsidy;
  - (e) the total amount or the annual amount budgeted for the subsidy and the possibility of limiting the subsidy;
  - (f) where possible, the recipient of the subsidy; and
  - (g) any other information, including statistical data, permitting an assessment of the effects of the subsidy on trade or investment.
3. To facilitate the consultations, the requested Party shall provide relevant information on the subsidy in question in writing no later than 90 days after the date of receipt of the request referred to in Paragraph 1.
4. In the event that any information referred to in paragraph 2 is not provided by the requested Party, that Party shall explain the absence of such information in its written response.
5. During consultations, a Party may seek additional information on a subsidy or particular instance of government support related to trade in services provided by the other Party, including its policy objective, its amount, and any measures taken to limit the potential distortive effect on trade.
6. On the basis of the consultations, the responding Party shall endeavour to eliminate or minimise any adverse effects of the subsidy, or the particular instance of government support related to trade in services, on the requesting Party's interests.

#### **Article 16.10: Confidentiality**

When providing information under this Chapter, a Party is not required to disclose confidential information.

### **Article 16.11: Exemptions**

Nothing in this chapter shall prevent a Party from subsidising its healthcare or education sectors, or from operating a public, regulated monopoly, provided it notifies the other Party in advance of its intention to do so.