# Australia - United States Free Trade Agreement

The Government of the United States of America and the Government of Australia ("the Parties"), resolved to:

REINFORCE the longstanding ties of friendship and cooperation between them;

STRENGTHEN their economic relations and further liberalize and expand bilateral trade and investment;

ESTABLISH clear and mutually advantageous rules governing their trade and reduce the barriers to trade that exist between them;

ENCOURAGE a closer economic partnership that will bring economic and social benefits, create new employment opportunities, and improve living standards for their people;

PROMOTE a predictable, transparent, and consistent business environment that will assist enterprises to plan effectively and use resources efficiently;

FOSTER creativity and innovation and promote stronger links between dynamic sectors of their economies;

IMPLEMENT this Agreement in a mamner consistent with their commitment to high labour standards, sustainable development, and environmental protection; and

BUILD on their rights and obligations under the WTO Agreement and other agreements to which they are both parties;

HAVE AGREED as follows:

## Chapter ONE. Establishment of a Free Trade Area and Definitions

### Article 1.1. General

1. The Parties to this Agreement, consistent with Article XXIV of GATT 1994 and Article V of GATS, hereby establish a free trade area in accordance with the provisions of this Agreement.

2. The Parties affirm their existing rights and obligations with respect to each other under existing bilateral and multilateral agreements to which both Parties are party, including the WTO Agreement.

3. This Agreement shall not be construed to derogate from any international legal obligation between the Parties that entitles goods or services, or suppliers of goods or services, to treatment more favourable than that accorded by this Agreement.

### Article 1.2. General Definitions

For the purposes of this Agreement, unless otherwise specified:

1. **Agreement on Textiles and Clothing** means the Agreement on Textiles and Clothing, contained in Annex 1A to the WTO Agreement;

2. **central government** or **central level of government** means:

(a) for the United States, the federal government; and

(b) for Australia, the Commonwealth government,

3. **covered investment** means, with respect to a Party, an investment in its territory of an investor of the other Party, in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter;

4. **customs duty** includes any customs or import duty and a charge of any kind imposed in connection with the importation of a good, including any form of surtax or surcharge in connection with such importation, but does not include any:

(a) charge equivalent to an internal tax imposed consistently with Article II:2 of GATT 1994 in respect of the like domestic good or in respect of goods from which the imported good has been manufactured or produced in whole or in part;

(b) antidumping or countervailing duty that is applied pursuant to a Party's law; or

(c) fee or other charge in connection with importation commensurate with the cost of services rendered;

5. **Customs Valuation Agreement** means the Agreement on Implementation of Article VIT of the General Agreement on Tariffs and Trade 1994, contained in Annex 1A to the WTO Agreement;

6. **days** means calendar days;

7. **enterprise** means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned or controlled, including any corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization;

8. **enterprise of a Party** means an enterprise constituted or organized under a Party's law;

9. **existing** means in effect on the date of entry into force of this Agreement;

10. **GATS** means the General Agreement on Trade in Services, contained in Annex 1B to the WTO Agreement;

11. **GATT 1994** means the General Agreement on Tariffs and Trade 1994, contained in Annex 1A to the WTO Agreement,

12. **goods of a Party** means domestic products as these are understood in GATT 1994 or such goods as the Parties determine under the rules of origin applied in the normal course of trade, and includes originating goods of a Party;

13. **government procurement** means the process by which a government obtains the use of or acquires goods or services, or any combination thereof, for governmental purposes and not with a view to commercial sale or resale or use in the production or supply of goods or services for commercial sale or resale;

14. **Harmonized System (HS)** means the Harmonized Commodity Description and Coding System, including its General Rules of Interpretation, Section Notes, and Chapter Notes, as adopted and implemented by the Parties in their respective tariff laws;

15. **measure** includes any law, regulation, procedure, requirement, or practice; 16. national means a natural person referred to in Annex 1-A to this Agreement;

17. **originating** means qualifying under the rules of origin set out in Chapter Five (Rules of Origin);

18. **person** means a natural person or an enterprise; 19. person of a Party means a national or an enterprise of a Party;

20. **regional government** or **regional level of government** means,

(a) for the United States, a state of the United States, the District of Colombia, or Puerto Rico; and

(b) for Australia, a state of Australia, the Australian Capital Territory, or the Northern Territory;

21. **Safeguards Agreement** means the Agreement on Safeguards, contained in Annex 1A to the WTO Agreement;

22. **service supplied in the exercise of governmental authority** means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers;

23. **SPS Agreement** means the Agreement on Application of Sanitary and Phytosanitary Measures, contained in Annex 1A to the WTO Agreement;

24. **state enterprise** means an enterprise that is owned, or controlled through ownership interests, by the central or a regional government of a Party;

25. **TBT Agreement** means the Agreement on Technical Barriers to Trade, contained in Annex 1A to the WTO Agreement,

26. **territory** means, with respect to a Party, the territory of that Party as set out in Annex 1- A to this Agreement;

27. **textile or apparel good** means a good listed in the Annex to the Agreement on Textiles and Clothing;

28. **TRIPS Agreement** means the Agreement on Trade-Related Aspects of Intellectual Property Rights, contained in Annex 1C to the WTO Agreement;

29. **WTO** means the World Trade Organization; and

30. **WTO Agreement** means the Marrakesh Agreement Establishing the World Trade Organization, done on April 15, 1994.

### ANNEX 1-A. Certain definitions

For the purposes of this Agreement:

1. **national** means:

(a) with respect to Australia, an Australian citizen as defined in the Australian Citizenship Act 1948, or a permanent resident; and

(b) with respect to the United States, a national of the United States as defined in Title II of the Immigration and Nationality Act or a permanent resident; and

2. **territory** means:

(a) with respect to Australia, the territory of the Commonwealth of Australia:

(i) excluding all external territories other than the Territory of Norfolk Island, the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands, the Territory of Ashmore and Cartier Islands, the Territory of Heard Island and McDonald Islands, and the Coral Sea Islands Territory; and

(ii) including Australia's territorial sea, contiguous zone, exclusive economic zone, and continental shelf; and

(b) with respect to the United States:

(I) the customs territory of the United States, which includes the 50 states, the District of Columbia, and Puerto Rico;

(ii) the foreign trade zones located in the United States and Puerto Rico; and

(iii) any areas beyond the territorial seas of the United States within which, in

accordance with international law and its domestic law, the United States may exercise rights with respect to the seabed and subsoil and their natural resources.

# Chapter TWO. National Treatment and Market Access for Goods

### Article 2.1. Scope and Coverage

Except as otherwise provided, this Chapter applies to trade in goods of a Party.

# Section A. National Treatment

### Article 2.2. National Treatment

Each Party shall accord national treatment to the goods of the other Party in accordance with Article III of GATT 1994, including its interpretative notes. To this end, Article III of GATT 1994 and its interpretative notes are incorporated into and made a part of this Agreement, subject to Annex 2-A (Application of Chapter 2).

# Section B. Tariffs

### Article 2.3. Elimination of Customs Duties

1. Except as otherwise provided in this Agreement, each Party shall progressively eliminate its customs duties on originating goods of the other Party in accordance with Annex 2-B (Tariff Elimination).

2. Neither Party may increase an existing customs duty or introduce a new customs duty on imports of an originating good, other than as permitted by this Agreement, subject to Annex 2-A (Application of Chapter 2).

## Article 2.4. Customs Value

The Parties shall apply the provisions of the Customs Valuation Agreement for the purposes of determining the customs value of goods traded between the Parties.

## Article 2.5. Temporary Admission

1. Each Party shall grant duty-free temporary admission for the following goods, imported by or for the use of a resident of the other Party:

(a) professional equipment, including software and broadcasting and cinematographic equipment, necessary for carrying out the business activity, trade, or profession of a person who qualifies for temporary entry pursuant to the laws of the importing Party;

(b) goods intended for display or demonstration at exhibitions, fairs, or similar events, including commercial samples for the solicitation of orders, and advertising films and recordings; and

(c) goods temporarily admitted for sports purposes, regardless of their origin.

2. Neither Party may condition the duty-free temporary admission of a good referred to in paragraph 1, other than to require that such good:

(a) be used solely by or under the personal supervision of a national or resident of the other Party in the exercise of the business activity, trade, or profession of that person;

(b) not be sold, leased, or consumed while in its territory;

(c) be accompanied by a security in an amount no greater than the charges that would otherwise be owed on entry or final importation, releasable on exportation of the good;

(d) be capable of identification when exported;

(e) be exported on or before the departure of that person or within such other period as is reasonably related to the purpose of the temporary admission, not to exceed three years after the date of importation;

(f) be imported in no greater quantity than is reasonable for its intended use; and

(g) be otherwise admissible into the Party's territory under its laws.

3. If any condition that a Party imposes under paragraph 2 has not been fulfilled, the Party may apply the customs duty and any other charge that would normally be owed on entry or final importation of the good.

4. Each Party, through its customs authorities, shall adopt procedures providing for the expeditious release of the goods described in paragraph 1. To the extent possible, when such goods accompany a national or resident of the other Party secking temporary entry, and are imported by that person for use in the exercise of a business activity, trade, or profession of that person, the procedures shall allow for the goods to be released simultaneously with the entry of that person subject to the necessary documentation required by the customs authorities of the importing Party.

5. Each Party shall, at the request of the person concerned and for reasons deemed valid by its customs authorities, extend the time limit for temporary admission beyond the period initially fixed.

6. Each Party shall permit temporarily admitted goods to be exported through a customs port other than that through which they were imported.

7. Each Party shall relieve the importer of liability for failure to export a temporarily admitted good on presentation of satisfactory proof to the Party's customs authorities that the good has been destroyed within the original time limit for temporary admission or any lawful extension. Prior approval will have to be sought from the customs authorities of the importing Party before the good can be so destroyed.

8. Subject to Chapters Ten (Cross-Border Trade in Services) and Eleven (Investment):

(a) each Party shall allow a container used in international traffic that enters its territory from the territory of the other Party to exit its territory on any route that is reasonably related to the economic and prompt departure of the container;

(b) neither Party may require any bond or impose any penalty or charge solely by reason of any difference between the

container's port of entry and its port of departure;

(c) neither Party may condition the release of any obligation, including any bond, that it imposes in respect of the entry of a container into its territory on its exit through any particular port of departure; and

(d) neither Party may require that the carrier bringing a container from the territory of the other Party into its territory be the same carrier that takes the container to the territory of the other Party.

### Article 2.6. Goods Re-entered after Repair or Alteration

1. Neither Party may apply a customs duty to a good, regardless of its origin, that re-enters its territory after that good has been exported temporarily from its territory to the territory of the other Party for repair or alteration, regardless of whether the repair or alteration could be performed in its territory.

2. Neither Party may apply a customs duty to a good, regardless of its origin, imported temporarily from the territory of the other Party for repair or alteration.

3. For the purposes of this Article:

(a) the repairs or alterations shall not destroy the essential characteristics of the good, or change it into a different commercial item;

(b) operations carried out to transform unfinished goods into finished goods shall not be considered repairs or alterations; and

(c) parts or pieces of the goods may be subject to repairs or alterations.

### Article 2.7. Duty-free Entry of Commercial Samples of Negligible Value and Printed Advertising Materials

Each Party shall grant duty-free entry to commercial samples of negligible value, and to printed advertising materials, imported from the territory of the other Party, regardless of their origin, but may require that:

(a) the samples be imported solely for the solicitation of orders for goods of, or services provided from the territory of, the other Party or a non-Party; or

(b) the advertising materials be imported in packets that each contain no more than one copy of each such material and that neither those materials nor packets form part of a larger consignment.

### Article 2.8. Waiver of Customs Duties

1. Neither Party may adopt a new waiver of customs duties, or expand with respect to existing recipients or extend to any new recipient the application of an existing waiver of customs duties, where the waiver is conditioned, explicitly or implicitly, on the fulfilment of a performance requirement.

2. Neither Party may condition, explicitly or implicitly, the continuation of any existing waiver of customs duties on the fulfilment of a performance requirement.

3. This Article shall not apply to drawback or duty deferral programs.

## Section C. Non-tariff Measures

### Article 2.9. Import and Export Restrictions

1. Except as otherwise provided in this Agreement, neither Party may adopt or maintain any prohibition or restriction on the importation of any good of the other Party or on the exportation or sale for export of any good destined for the territory of the other Party, except in accordance with Article XI of GATT 1994, including its interpretative notes, and to this end Article XI of GATT 1994, including its interpretative notes, is incorporated into and made a part of this Agreement.

2. The Parties understand that the rights and obligations incorporated by paragraph 1 prohibit, in any circumstances in which any other form of restriction is prohibited, import licensing conditioned on the fulfilment of a performance requirement, export price requirements, and, except as permitted in enforcement of countervailing and antidumping orders

and undertakings, import price requirements.

3. In the event that a Party adopts or maintains a prohibition or restriction on the importation from or exportation to a non-Party of a good, nothing in this Agreement shall be construed as preventing the Party from:

(a) limiting or prohibiting the importation from the territory of the other Party of such good of that non-Party; or

(b) requiring as a condition of export of such good of the Party to the territory of the other Party, that the good not be re-exported to the non-Party, directly or indirectly, without being consumed in the territory of the other Party.

4. Paragraphs 1 through 3 shall not apply to the measures set out in Annex 2-A.

5. Nothing in this Article shall be construed as affecting a Party's rights and obligations under the Agreement on Textiles and Clothing.

### Article 2.10. Administrative Fees and Formalities

1. Each Party shall ensure, in accordance with Article VIII:1 of GATT 1994 and its interpretive notes, that all fees and charges of whatever character (other than customs duties, charges equivalent to an internal tax or other internal charges applied consistently with Article 1:2 of GATT 1994, and antidumping and countervailing duties applied pursuant to a Party's law), imposed on or in connection with importation or exportation, are limited in amount to the approximate cost of services rendered and do not represent indirect protection of domestic products or a taxation of imports or exports for fiscal purposes.

2. Neither Party may require consular transactions, including related fees and charges, in connection with the importation of any good of the other Party.

3. Each Party shall make available on the Internet a current list of the fees and charges it imposes in connection with importation or exportation.

### Article 2.11. Export Taxes

Neither Party may adopt or maintain any duty, tax, or other charge on the export of any good to the territory of the other Party, unless such duty, tax, or charge is adopted or maintained on any such good when destined for consumption in its territory.

## Section D. Other Measures

### Article 2.12. Merchandise Processing Fee

Neither Party may adopt or maintain a merchandise processing fee on originating goods.

## Section E. Institutional Provisions

### Article 2.13. Committee on Trade In Goods

1. The Parties hereby establish a Committee on Trade in Goods, comprising representatives of each Party.

2. The Committee shall meet on the request of either Party or the Joint Committee established in Chapter 21 (Institutional Arrangements and Dispute Settlement) to consider any matter arising under this Chapter, Chapter Five (Rules of Origin), or Chapter Six (Customs Administration).

3. The Committee's functions shall include:

(a) promoting trade in goods between the Parties; and

(b) addressing barriers to trade in goods between the Parties, especially those related to the application of non-tariff measures, and, if appropriate, referring such matters to the Joint Committee for its consideration.

## Section F. Definitions

### Article 2.13. Definitions

For the purposes of this Chapter:

1. **advertising films and recordings** means recorded visual media or audio materials, consisting essentially of images and/or sound, showing the nature or operation of goods or services offered for sale or lease by a person established or resident in the territory of a Party, provided that such materials are of a kind suitable for exhibition to prospective customers but not for broadcast to the general public;

2. **commercial samples of negligible value** means commercial samples having a value, individually or in the aggregate as shipped, of not more than one U.S. dollar, or the equivalent amount in Australian currency, or so marked, torn, perforated, or otherwise treated that they are unsuitable for sale or for use except as commercial samples;

3. **consular transactions** means requirements that goods of a Party intended for export to the territory of the other Party must first be submitted to the supervision of the consul of the importing Party in the territory of the exporting Party for the purpose of obtaining consular invoices or consular visas for commercial invoices, certificates of origin, manifests, shippers' export declarations, or any other customs documentation required on or in connection with importation;

4. **consumed** means:

(a) actually consumed; or

(b) further processed or manufactured so as to result in a substantial change in the value, form, or use of the good, or in the production of another good;

5. **drawback** means measures in which a Party refunds the amount of customs duties paid on a good imported into its territory, on condition that the good is:

(a) subsequently exported to the territory of the other Party;

(b) substituted by an identical or similar good exported to the territory of the other Party;

(c) used as a material in the production of another good that is subsequently exported to the territory of another Party;

(d) substituted by an identical or similar good used as a material in the production of another good that is subsequently exported to the territory of another Party;

6. **duty-free** means free of customs duty;

7. **duty deferral program** includes measures such as those governing foreign-trade zones, temporary importations under bond, bonded warehouses, and inward processing programs;

8. **goods intended for display or demonstration** includes their component parts, ancillary apparatus, and accessories;

9. **goods temporarily admitted for sports purposes** means:

(a) sports requisites for use in sports contests, demonstrations, or training; and

(b) for such events as deemed valid by competent authorities, in the territory of the Party into whose territory such goods are admitted;

10. **import licensing** means an administrative procedure requiring the submission of an application or other documentation (other than that generally required for customs clearance purposes) to the relevant administrative body as a prior condition for importation into the territory of the importing Party;

11. **performance requirement** means a requirement that:

(a) a given level or percentage of goods or services be exported;

(b) goods or services of the Party granting a waiver of customs duties or an import license be substituted for imported goods or services;

(c) a person benefiting from a waiver of customs duties or an import license purchase other goods or services in the territory of the Party granting the waiver of customs duties or the import license, or accord a preference to domestically produced goods or services;

(d) a person benefiting from a waiver of customs duties or an import license produce goods or supply services, in the territory of the Party granting the waiver of customs duties or the import license, with a given level or percentage of

domestic content; or

(e) relates in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows; and

12. **printed advertising materials** means those goods classified in Chapter 49 of the Harmonized System, including brochures, pamphlets, leaflets, trade catalogues, yearbooks published by trade associations, tourist promotional materials, and posters, that are used to promote, publicize, or advertise a good or service, or are essentially intended to advertise a good or service, and are supplied free of charge.

# Chapter THREE. Agriculture

## Article 3.1. Multilateral Cooperation

1. The Parties shall work together to reach an agreement on agriculture in the WTO that substantially improves market access for agricultural goods, reduces, with a view to phasing out, all forms of agricultural export subsidies, develops disciplines that eliminate restrictions on a person's right to export, and substantially reduces trade-distorting domestic support.

2. The Parties shall consult on agricultural issues arising in the WTO and in other multilateral fora in which they both participate.

## Article 3.2. Committee on Agriculture

1. The Parties hereby establish a Committee on Agriculture, comprising representatives of each Party.

2. The Committee shall provide a forum for:

(a) promoting trade in agricultural goods between the Parties; (b) addressing barriers to trade in agricultural goods;

(c) conducting consultations between the Parties on agricultural export competition issues; and

(d) considering any matters arising under this Chapter.

3. The Committee shall meet at least once a year unless the Parties otherwise agree.

4. The Committee shall report the results of each meeting to the Joint Committee.

## Article 3.3. Export Subsidies

1. Except as provided in paragraph 2, neither Party may introduce or maintain any export subsidy on any agricultural good destined for the territory of the other Party.

2. Where an exporting Party considers that a non-Party is exporting an agricultural good to the territory of the other Party with the benefit of export subsidies, the importing Party shall, on written request of the exporting Party, consult with the exporting Party with a view to agreeing on specific measures that the importing Party may adopt to counter the effect of such subsidized imports. If the importing Party adopts the agreed-upon measures, the exporting Party shall refrain from applying any export subsidy to exports of such good to the territory of the importing Party.

## Article 3.4. Agricultural Safeguard Measures

1. Notwithstanding Article 2.3 (Elimination of Duties), a Party may apply a measure in the form of an additional customs duty on an originating agricultural good listed in that Party's Schedule to Annex 3-A (Agricultural Safeguard Measures), provided that the conditions in paragraphs 2 through 5 are met. The sum of any such additional customs duty and any other customs duty on such good shall not exceed the lesser of:

(a) the prevailing most-favoured-nation ("MFN") applied rate of duty; or

(b) the MFN applied rate of duty in effect on the day immediately preceding the date of entry into force of this Agreement.

2. The additional customs duty under paragraph 1 shall be set according to each Party's Schedule to Annex 3-A.

3. Neither Party may apply or maintain an agricultural safeguard measure and at the same time apply or maintain, with

respect to the same good:

(a) a safeguard measure under Chapter Nine (Safeguards); or (b) a measure under Article XIX of GATT 1994 and the Safeguards Agreement.

4. Neither Party may apply or maintain an agricultural safeguard measure on an originating agricultural good:

(a) on or after the date that a good is subject to duty-free treatment under the Party's Schedule to Annex 2-B, except as provided in Section C of Annex 3-A; or

(b) that increases the in-quota duty on a good subject to a tariff-rate quota.

5. A Party shall implement an agricultural safeguard measure in a transparent manner. Within 60 days after applying a measure, the Party applying the measure shall notify the Party whose good is subject to the measure, in writing, and shall provide it relevant data concerning the measure. On request, the Party applying the measure shall consult with the Party whose good is subject to the measure regarding the application of the measure.

6. The operation of this Article may be the subject of discussion and review in the Committee on Agriculture. On request of either Party, the Committee on Agriculture shall review a trigger price set out in Annex 3-A.

### Article 3.5. Administration of Tariff-rate Quotas

Where an importing Party considers that an exporting Party has increased its imports of an agricultural good of a non-Party and thereby increased its exports of a domestically-produced good subject to a tariff-rate quota administered by the importing Party, the exporting Party shall, on the written request of the importing Party, immediately consult with the importing Party to develop appropriate actions to remedy the situation.

### Article 3.6. Review of Dairy Market Access Commitments

On request of cither Party after year 20 of the Agreement, the Parties shall consult on and consider the possibility of modifying market access commitments for the dairy goods listed in each Party's Schedule to Annex 2-B. An agreement by the Parties to modify the market access commitment on a dairy good listed in Annex 2-B, when approved by both Parties in accordance with their applicable legal procedures, shall supersede the terms established for the good in each Party's Schedule to Annex 2-B.

### Article 3.7. Definitions

For the purposes of this Chapter:

1. **agricultural goods** means those agricultural products referred to in Article 2 of the WTO Agreement on Agriculture, contained in Annex 1A to the WTO Agreement;

2. **agricultural safeguard measure** means a measure described in Article 3.4.1; and

3. **export subsidy** shall have the meaning assigned to that term in Article 1(e) of the WTO Agreement on Agriculture, contained in Annex 1A to the WTO Agreement, including any amendment of that article.

## Chapter FOUR. Textiles and Apparel

### Article 4.1. Bilateral Emergency Actions

1. If, as a result of the reduction or elimination of a customs duty under this Agreement, a textile or apparel good benefiting from preferential treatment under this Agreement is being imported into the territory of a Party in such increased quantities, in absolute terms or relative to the domestic market for that good, and under such conditions as to cause serious damage, or actual threat thereof, to a domestic industry producing a like or directly competitive good, the importing Party may, to the extent and for such time as may be necessary to prevent or remedy such damage and to facilitate adjustment, take emergency action, consisting of an increase in the rate of customs duty on the good to a level not to exceed the lesser of:

(a) the most-favoured-nation (MFN) applied rate of duty in effect at the time the action is taken; and

(b) the MFN applied rate of duty in effect on the date of entry into force of this Agreement.

2. In determining serious damage, or actual threat thereof, the importing Party:

(a) shall examine the effect of increased imports from the exporting Party on the particular industry, as reflected in changes in such relevant economic variables as output, productivity, utilization of capacity, inventories, market share, exports, wages, employment, domestic prices, profits, and investment, none of which is necessarily decisive; and

(b) shall not consider changes in technology or consumer preference as factors supporting a determination of serious damage or actual threat thereof.

3. The importing Party may take an emergency action under this Article only following an investigation by its competent authorities.

4. In the event that the importing Party decides to take an emergency action under this Article, the importing Party shall deliver to the exporting Party, without delay, written notice of its decision, and, on the request of the exporting Party, shall consult with that Party.

5. In critical circumstances where delay would cause damage which it would be difficult to repair, a Party may take emergency action under this Article on a provisional basis pursuant to a preliminary determination that there is clear evidence that imports from the exporting Party have increased as the result of the reduction or elimination of a customs duty under this Agreement, and such imports are causing serious damage, or actual threat thereof, to a domestic industry producing a like or directly competitive good. The duration of such a provisional measure shall not exceed 200 days, during which time an investigation by its competent authorities shall be undertaken. Any additional customs duty paid as a result of a provisional measure shall be promptly refunded if the investigation does not result in a finding of serious damage or actual threat thereof consistent with paragraph 1. The duration of any provisional measure shall be counted as part of the period described in paragraph 6(a).

6. The following conditions and limitations shall apply to any emergency action taken under this Article:

(a) no emergency action against a good may be maintained for a period exceeding two years, except that the period may be extended by up to two years if the competent authorities of the importing Party determine, in conformity with the procedures set out in this Article, that:

(i) the emergency action continues to be necessary to prevent or remedy serious damage and to facilitate adjustment by the domestic industry, and

(ii) there is evidence that the industry is adjusting;

(b) no emergency action against a good may be taken or maintained beyond the period ending ten years after customs duties on that good have been eliminated pursuant to this Agreement;

(c) no emergency action may be taken by an importing Party against any particular good of the exporting Party more than once; and

(d) on termination of the emergency action, the rate of customs duty shall be the rate that would have been in effect but for the emergency action.

7. The importing Party shall provide to the exporting Party mutually agreed trade liberalizing compensation in the form of concessions having substantially equivalent trade effects or equivalent to the value of the additional customs duties expected to result from the emergency action. Such concessions shall be limited to textile or apparel goods, unless the Parties otherwise agree. If the Parties are unable to agree on compensation, the exporting Party may take tariff action having trade effects substantially equivalent to the trade effects of the emergency action taken under this Article. The exporting Party may take such tariff action against any goods of the importing Party. The exporting Party shall apply the tariff action only for the minimum period necessary to achieve the substantially equivalent trade effects. The importing Party's obligation to provide trade compensation and the exporting Party's right to take tariff action shall terminate when the emergency action terminates.

8. (a) Each Party retains its rights and obligations under Article XIX of the GATT 1994 and the Safeguards Agreement, and the Agreement on Textiles and Clothing.

(b) Neither Party may apply, with respect to the same good at the same time, an emergency action under this Article and:

qa) a safeguard measure under Chapter Nine (Safeguards); or

(ii) a measure under Article XIX of GATT 1994 and the Safeguards Agreement, or the Agreement on Textiles and Clothing.

## Article 4.2. Rules of Origin and Related Matters

*Rules of Origin*

1. This Chapter, including its Annexes, and Chapter Five (Rules of Origin) shall apply with respect to determining whether a textile or apparel good is an originating good.

2. For greater clarity, the rules of origin set forth in this Agreement shall not apply in determining the country of origin of a textile or apparel good for non-preferential purposes.

*Consultations*

3. On the request of cither Party, the Parties shall consult to consider whether the rule of origin applicable to a particular textile or apparel good should be revised to address issues of availability of supply of fibres, yarns, or fabrics in the territories of the Parties.

4. In the consultations referred to in paragraph 3, each Party shall consider all data presented by the other Party showing substantial production in its territory of the particular good. The Parties shall consider that substantial production has been shown if a Party demonstrates that its domestic producers are capable of supplying commercial quantities of the good in a timely manner.

5. The Parties shall endeavour to conclude consultations within 60 days of a request. An agreement between the Parties resulting from the consultations on revising a rule of origin fora good shall supersede any prior rule of origin for such good when approved by the Parties in accordance with Article 23.3 (Amendments).

*De Minimis*

6. A textile or apparel good that is not an originating good because certain fibres or yarns used in the production of the component of the good that determines the tariff classification of the good do not undergo an applicable change in tariff classification set out in Annex 4-A, shall nonetheless be considered to be an originating good if the total weight of all such fibres or yarns in that component is not more than seven percent of the total weight of that component. (4-1)

7. Notwithstanding paragraph 6, a good containing elastomeric yarns in the component of the good that determines the tariff classification of the good shall be considered to be an originating good only if such yarns are wholly formed in the territory of a Party.

(4-1) For greater certainty, when the good is a fibre, yarn, or fabric, the "component of the good that determines the tariff classification of the good" is all of the fibres in the yarn, fabric, or group of fibres

*Treatment of Sets*

8. Notwithstanding the textile and apparel specific rules of origin set out in Annex 4-A, textile or apparel goods classifiable as goods put up in sets for retail sale as provided for in General Rule of Interpretation 3 of the Harmonized System shall not be regarded as originating goods unless each of the goods in the set is an originating good or the total value of the non-originating goods in the set does not exceed ten percent of the customs value of the set.

## Article 4.3. Customs Cooperation

1. The Parties shall cooperate for the purposes of:

(a) enforcing or assisting in the enforcement of their measures affecting trade in textile or apparel goods;

(b) ensuring the accuracy of claims of origin;

(c) enforcing or assisting in the enforcement of measures implementing international agreements affecting trade in textile or apparel goods; and

(d) preventing circumvention of international agreements affecting trade in textile or apparel goods.

2. On the request of the importing Party, the exporting Party shall conduct a verification for purposes of enabling the importing Party to determine that a claim of origin for a textile or apparel good is accurate. The exporting Party shall conduct such a verification, regardless of whether an importer claims preferential treatment for the good. The exporting Party may also conduct such a verification on its own initiative.

3. Where the importing Party has a reasonable suspicion that an exporter or producer of the exporting Party is engaging in unlawful activity relating to trade in textile or apparel goods, the exporting Party shall, on the request of the importing Party, conduct a verification for purposes of enabling the importing Party to determine that the exporter or producer is complying with applicable customs measures affecting trade in textile or apparel goods, including measures that the exporting Party adopts and maintains pursuant to this Agreement and measures of either Party implementing other international agreements affecting trade in textile or apparel goods, and to determine that a claim of origin for a textile or apparel good exported or produced by that person is accurate. For the purposes of this paragraph, a reasonable suspicion of unlawful activity shall be based on relevant factual information of the type set forth in Article 6.5 (Cooperation) or factors that indicate:

(a) circumvention by the exporter or producer of applicable customs measures affecting trade in textile or apparel goods, including measures adopted to implement this Agreement; or

(b) the existence of conduct that would facilitate the violation of measures relating to other international agreements affecting trade in textile or apparel goods.

4. The exporting Party, through its competent authorities, shall permit the importing Party, through its competent authorities, to assist in a verification conducted in response to a request under paragraph 2 or 3, including by conducting, along with the competent authorities of the exporting Party, visits in the territory of the exporting Party to the premises of an exporter, producer, or any person involved in the movement of a textile or apparel good from the territory of the exporting Party to the territory of the importing Party. If an exporter, producer, or other person refuses to consent to a visit by the competent authorities of the importing Party, and if the importing Party is unable to make the determination described in paragraph 2 or 3 within 12 months after its request for a verification, the importing Party may take appropriate action as described in paragraph 8.

5. In conducting a verification pursuant to paragraph 2 or 3, the exporting Party shall coordinate its activities with the importing Party and shall conclude the verification and report the results to the importing Party within a mutually agreed time. The report shall include all documents and facts supporting any conclusion that the exporting Party reaches. If the Parties cannot agree on a time for concluding the verification and providing a report or if the exporting Party does not conclude the verification and report the results to the importing Party within the agreed time, the importing Party may take appropriate action under paragraph 8.

6. Each Party shall provide to the other Party, consistent with its law, production, trade, and transit documents and other information necessary to conduct verifications under paragraphs 2 and 3. Any documents or information exchanged between the Parties in the course of sucha verification shall be treated in accordance with Article 22.4.2 (Disclosure of Information).

7. While a verification is being conducted, the importing Party may, consistent with its law, take appropriate action, which may include suspending the application of preferential treatment, to:

(a) the textile or apparel good for which a claim of origin has been made, in the case of a verification under paragraph 2; or

(b) any textile or apparel goods exported or produced by the person subject to a verification under paragraph 3, where the reasonable suspicion of unlawful activity relates to those goods.

8. (a) If the importing Party is unable to make the determination described in paragraph 2 within 12 months after its request for a verification, or makes a negative determination, it may, consistent with its laws, regulations, and procedures, take appropriate action, including denying preferential treatment to the textile or apparel good subject to the verification and to similar goods exported or produced by the person that exported or produced the good.

(b) If the importing Party is unable to make one of the determinations described in paragraph 3 within 12 months after its request for a verification, or makes a negative determination, it may, consistent with its laws, regulations, and procedures, take appropriate action, including deny preferential treatment to any textile or apparel good exported or produced by the person subject to the verification.

9. (a) The importing Party may deny preferential treatment or entry under paragraph 8 only after providing a written determination to the importer of the reason for the denial.

(b) If the importing Party takes action under paragraph 8 because it is unable to make the determination described in paragraph 2 or 3, as the case may be, it may continue to take appropriate action under paragraph 8 until it receives information sufficient to enable it to make that determination.

10. On the request of cither Party, the Parties shall consult to resolve any technical or interpretive difficulties that may arise

under this Article or to discuss ways to improve the effectiveness of their cooperative efforts. In addition, cither Party may request technical or other assistance from the other Party in implementing this Article. The Party receiving such a request shall make every effort to respond favourably and promptly to it.

### Article 4.4. Definitions

For the purposes of this Chapter:

1. **claim of origin** means a claim that a textile or apparel good is an originating good ora good of a Party;

2. **exporting Party** means the Party from whose territory a textile or apparel good is exported; and

3. **importing Party** means the Party into whose territory a textile or apparel good is imported.

# Chapter FIVE. Rules of Origin

# Section A. Rules of Origin

### Article 5.1. Originating Goods

For the purposes of this Agreement, an originating good means:

(a) a good wholly obtained or produced entirely in the territory of one or both of the Parties;

(b) a good produced entirely in the territory of one or both of the Parties where

(i) each of the non-originating materials used in the production of the good undergoes an applicable change in tariff classification specified in Annex 4-A (Textile and Apparel Specific Rules of Origin) or Annex 5-A (Product-Specific Rules of Origin); or

(ii) the good otherwise satisfies any applicable regional value content; or

(iii) the good meets any other requirements specified in Annex 4-A or Annex 5-A; and

the good satisfies all other applicable requirements of this Chapter or Chapter 4;

(c) a good produced entirely in the territory of one or both of the Parties exclusively from originating materials; or

(d) a good that otherwise qualifies as an originating good under this Chapter or Chapter 4.

### Article 5.2. De Minimis

1. Each Party shall provide that a good that does not undergo a change in tariff classification pursuant to Annex 5-A is nonetheless an originating good if:

(a) the value of all non-originating materials used in the production of the good that do not undergo the required change in tariff classification does not exceed 10 percent of the adjusted value of the good; and

(b) the good meets all other applicable criteria set forth in this Chapter for qualifying as an originating good.

The value of such non-originating materials shall, however, be included in the value of non- originating materials for any applicable regional value content requirement for the good.

2. Paragraph 1 does not apply to a:

(a) non-originating material provided for in Chapter 4 of the Harmonized System or in subheading 1901.90 that is used in the production of a good provided for in Chapter 4 of the Harmonized System;

(b) non-originating material provided for in Chapter 4 of the Harmonized System or in subheading 1901.90 that is used in the production of a good provided for in the following provisions: subheadings 1901.10, 1901.20, or 1901.90; heading 2105; or subheadings 2106.90, 2202.90, or 2309.90;

(c) non-originating material provided for in heading 0805 or subheadings 2009.11 through 2009.30 that is used in the production of a good provided for in subheadings 2009.11 through 2009.30, or subheadings 2106.90 or 2202.90;

(d) non-originating material provided for in Chapter 15 of the Harmonized System that is used in the production of a good provided for in headings 1501 through 1508, 1512, 1514, or 1515;

(e) non-originating material provided for in heading 1701 that is used in the production of a good provided for in headings 1701 through 1703;

(f) non-originating material provided for in Chapter 17 of the Harmonized System or heading 1805 that is used in the production of a good provided for in subheading 1806.10;

(g) non-originating material provided for in headings 2203 through 2208 that is used in the production of a good provided for in headings 2207 or 2208; and

(h) non-originating material used in the production of a good provided for in Chapters 1 through 21 of the Harmonized System unless the non-originating material is provided for in a different subheading than the good for which origin is being determined under this Article.

3. With respect to a textile or apparel good, Article 4.2.6 (Rules of Origin and Related Matters: De Minimis) applies in place of paragraph 1.

## Article 5.3. Accumulation

1. Originating materials from the territory of a Party, used in the production of a good in the territory of the other Party, shall be considered to originate in the territory of the other Party.

2. A good is an originating good when it is produced in the territory of one or both Parties by one or more producers, provided that the good satisfies the requirements in Article 5.1 and all other applicable requirements of this Chapter or Chapter 4.

## Article 5.4. Regional Value Content

1. Except for goods covered by paragraph 2, where Annex 5-A refers to a regional value content, cach Party shall provide that for purposes of claims for preferential treatment in accordance with Article 5.12, an importer, exporter, or producer may calculate regional value content based on one of the following methods:

(a) Build-down Method

RVC = AV-VNM x 100

AV

where

RVC is the regional value content, expressed as a percentage;

AV is the adjusted value; and

VNM is the value of non-originating materials that are acquired and used by the producer in the production of the good. VNM does not include the value of a material that is self-produced.

(b) Build-up Method

RVC = VOM x 100

AV

where

RVC is the regional value content, expressed as a percentage;

AV is the adjusted value; and

VOM. is the value of originating materials that are acquired or self-produced, and used by the producer in the production of the good.

2. When regional value content is required for certain automotive goods (5-2) under Annex 5-A to determine if a good is originating, each Party shall provide that the regional value content of a good shall be calculated solely on the basis of the

following method:

(5-2) H 8407.31 through 34 (engines), 8407.20 (diesel engines for vehicles), 84.09 (parts of engines) 87.01 through 87.05 (motor vehicles), 87.06 (chassis), 87.07 (bodies), and 87.08 (motor vehicle parts).

Method for Automotive Products ("Net Cost Method")

RVC =NC - VNM x 100

NC

where

RVC is the regional value content, expressed as a percentage; NC _ is the net cost of the good;

VNM is the value of non-originating materials acquired and used by the producer in the production of the good. VNM does not include the value of a material that is self-produced.

3. Each Party shall provide that, for the purpose of regional value content under paragraph 2 for motor vehicles, (5-3) the importer, exporter, or producer may use a calculation averaged over the producer's fiscal year using any one of the following categories:

(a) the same model line of motor vehicles in the same class of vehicles produced in the same plant in the territory of a Party;

(b) the same class of motor vehicles produced in the same plant in the territory of a Party; or

(c) the same model line of motor vehicles produced in the territory of a Party,

on the basis of all motor vehicles in the category or only those motor vehicles in the category that are exported to the territory of the other Party.

4. Each Party shall provide that, for the purpose of calculating regional value content under paragraph 2 for automotive materials (5-3) produced in the same plant, the importer, exporter, or producer may use a calculation:

(a) averaged: over the fiscal year of the motor vehicle producer to whom the good is sold,

(i) over any quarter or month, or

(ii) over its fiscal year,

provided that the good was produced during the fiscal year, quarter, or month forming the basis for the calculation;

(c) in which the average referred to in subparagraph (a) is calculated separately for such goods sold to one or more motor vehicle producers; or

in which the average in subparagraph (a) or (b) is calculated separately for those goods that are exported to the territory of the other Party.

(5-3) Motor Vehicles: HS 87.01 through 87.05 (motor vehicles). 54 Automotive Components or Materials: HS 8407.31 through 34 (engines), 8407.20 (diesel engines for vehicles), 84.09 (parts of engines), 87.06 (chassis), 87.07 (bodies), and 87.08 (motor vehicle parts).

## Article 5.5. Walue of Materials

1. Each Party shall provide that for the purpose of Articles 5.2 and 5.4, the value of a material is:

(a) for a material imported by the producer of the good, the adjusted value of the material;

(b) for a material acquired in the territory where the good is produced, the value, determined in accordance with Articles 1 through 8, Article 15, and the corresponding interpretative notes of the Customs Valuation Agreement, i.e., in the same manner as for imported goods, with such reasonable modifications as may be required due to the absence of an importation; or

(c) for a material that is self-produced, the sum of all expenses incurred in the production of the material, including general expenses, and an amount for profit equivalent to the profit added in the normal course of trade.

2. Each Party shall provide that the value of materials may be adjusted as follows:

(a) for originating materials, the following expenses may be added to the value of the material if not included under paragraph 1:

(i) the costs of freight, insurance, packing, and all other costs incurred in transporting the material within or between the Parties' territories to the location of the producer;

(ii) duties, taxes, and customs brokerage fees on the material paid in the territory of one or both of the Parties, other than duties and taxes that are waived, refunded, refundable, or otherwise recoverable, including credit against duty or tax paid or payable; and

(iii) the cost of waste and spoilage resulting from the use of the material in the production of the good, less the value of renewable scrap or by-products; and

(b) for non-originating materials, where included under paragraph 1, the following expenses may be deducted from the value of the material:

(i) the costs of freight, insurance, packing, and all other costs incurred in transporting the material within or between the Parties' territories to the location of the producer;

(ii) duties, taxes, and customs brokerage fees on the material paid in the territory of one or both of the Parties, other than duties and taxes that are waived, refunded, refundable, or otherwise recoverable, including credit against duty or tax paid or payable;

(iii) the cost of waste and spoilage resulting from the use of the material in the production of the good, less the value of renewable scrap or by-products;

(iv) the cost of processing incurred in the territory of a Party in the production of the non-originating material; and

(v) the cost of originating materials used in the production of the non- originating material in the territory of a Party.

## Article 5.6. Accessories, Spare Parts, and Tools

Each Party shall provide that accessories, spare parts, or tools delivered with a good that form part of the good's standard accessories, spare parts, or tools, shall be treated as originating goods if the good is an originating good, and shall be disregarded in determining whether all the non- originating materials used in the production of the good undergo the applicable change in tariff classification, provided that:

(a) the accessories, spare parts, or tools are not invoiced separately from the good;

(b) the quantities and value of the accessories, spare parts, or tools are customary for the good; and

(c) if the good is subject to a regional value content requirement, the value of the accessories, spare parts, or tools shall be taken into account as originating or non-

originating materials, as the case may be, in calculating the regional value content of the good.

## Article 5.7. Fungible Goods and Materials

1. Each Party shall provide that the determination of whether fungible goods or materials are originating goods shall be made cither by physical segregation of each good or material or through the use of any inventory management method, such as averaging, last-in first-out, or first-in first-out, recognized in the generally accepted accounting principles of the Party in which the production is performed or otherwise accepted by the Party in which the production is performed.

2. Each Party shall provide that that an inventory management method selected under paragraph 1 for particular fungible goods or materials shall continue to be used for those fungible goods or materials throughout the fiscal year of the person that selected the inventory management method.

## Article 5.8. Packaging Materials and Containers for Retail Sale

Each Party shall provide that packaging materials and containers in which a good is packaged for retail sale, if classified with the good, shall be disregarded in determining whether all the non- originating materials used in the production of the good undergo the applicable change in tariff classification set out in Annex 5-A or Annex 4-A, and, if the good is subject to a

regional value content requirement, the value of such packaging materials and containers shall be taken into account as originating or non-originating materials, as the case may be, in calculating the regional value content of the good.

### Article 5.9. Packing Materials and Containers for Shipment

Each Party shall provide that packing materials and containers for shipment shall be disregarded in determining whether:

(a) the non-originating materials used in the production of the good undergo the applicable change in tariff classification set out in Annex 5-A or Annex 4-A; and

(b) the good satisfies a regional value content requirement.

### Article 5.10. Indirect Materials

Each Party shall provide that an indirect material shall be treated as an originating material without regard to where it is produced and its value shall be the cost registered in the accounting records of the producer of the good.

### Article 5.11. Third Country Transportation

A good shall not be considered to be an originating good if the good undergoes subsequent production or any other operation outside the territories of the Parties, other than unloading, reloading, or any other operation necessary to preserve it in good condition or to transport the good to the territory of a Party.

## Section B. Supporting Information and Verification

### Article 5.12. Claims for Preferential Treatment

1. Each Party shall provide that an importer may make a claim for preferential treatment under this Agreement based on the importer's knowledge or on information in the importer's possession that the good qualifies as an originating good.

2. Each Party may require that an importer be prepared to submit, on request, a statement setting forth the reasons that the good qualifies as an originating good, including pertinent cost and manufacturing information. The statement need not be in a prescribed format, and may be submitted electronically, where feasible.

### Article 5.13. Obligations Relating to Importations

1. Each Party shall grant a claim for preferential treatment under this Agreement, made in accordance with this Chapter unless the Party possesses information that the claim is invalid.

2. A Party may deny preferential treatment under this Agreement to an imported good if the importer fails to comply with any requirement of this Chapter.

3. If a Party denies a claim for preferential treatment under this Agreement, it shall issue a written determination containing findings of fact and the legal basis for the determination.

4. The importing Party shall not subject an importer to any penalty for making an invalid claim for preferential treatment if the importer:

(a) on becoming aware that such claim is not valid, promptly and voluntarily corrects the claim and pays any duty owing; and

(b) in any event, corrects the claim and pays any duty owing within a period determined by the Party, which shall be at least one year from the submission of the invalid claim.

5. Nothing in this Article shall prevent a Party from taking action under Article 4.3.8 (Customs Cooperation).

### Article 5.14. Record Keeping Requirement

Each Party may require that importers maintain, for up to five years after the date of importation, records relating to the importation of the good, and may require, as set out in Article 5.12.2, that an importer provide, on request, records necessary to demonstrate that a good qualifies as an originating good, including records concerning:

(a) the purchase, cost and value of, and payment for, the good;

(b) the purchase, cost, and value of, and payment for, all materials, including indirect materials, used in the production of the good; and

(c) the production of the good in the form in which the good was exported.

### Article 5.15. Verification

1. For the purpose of determining whether a good imported into its territory from the territory of the other Party qualifies as an originating good, a Party may conduct a verification by means of one or more of the following:

(a) requests for information from the importer;

(b) written requests for information to an exporter or a producer in the territory of the other Party;

(c) requests for the importer to arrange for the producer or exporter to provide information directly to the Party conducting the verification;

(d) information received directly by the importing Party from an importer as a result of a request described in Article 5.12.2;

(e) visits to the premises of an exporter or a producer in the territory of the other Party, in accordance with any procedures that the Parties jointly adopt;

OD for textile or apparel goods, procedures set forth in Article 4.3 (Customs Cooperation); or

(g) such other procedures as the Parties may agree.

2. A Party may deny preferential tariff treatment to a good where the importer, exporter, or producer fails to provide information that the Party requests in a verification conducted in accordance with paragraph 1 demonstrating that the good is an originating good.

## Section C. Consultation and Modifications

### Article 5.16. Consultation and Modifications

1. The Parties shall consult and cooperate to ensure that this Chapter is applied in an effective and uniform manner. Unless the Parties otherwise agree, the Parties shall consult within six months of the date of entry into force of this Agreement regarding the implementation and application of this Chapter.

2. The Parties shall consult regularly pursuant to Article 21.5 (Consultations) to discuss necessary amendments to this Chapter and its Annexes, taking into account developments in technology, production processes, and other related matters.

## Section D. Application and Interpretation

### Article 5.17. Application and Interpretation

For the purposes of this Chapter:

(a) the basis for tariff classification is the Harmonized System,

(b) any cost and value referred to in this Chapter shall be recorded and maintained in accordance with the generally accepted accounting principles applicable in the territory of the Party in which the good is produced.

## Section E. Definitions

### Article 5.18. Definitions

For the purposes of this Chapter:

1. **adjusted value means** the value determined under Articles 1 through 8, Article 15, and the corresponding interpretative notes of the Customs Valuation Agreement, as adjusted to exclude any costs, charges, or expenses incurred for transportation, insurance, and related services incidental to the international shipment of the good from the country of

exportation to the place of importation;

2. **class of motor vehicles** means any one of the following categories of motor vehicles:

(a) motor vehicles provided for in subheading 8701.20, motor vehicles for the transport of 16 or more persons provided for in subheadings 8702.10 or 8702.90, and motor vehicles of subheadings 8704.10, 8704.22, 8704.23, 8704.32, or 8704.90, or headings 87.05 and 87.06;

(b) motor vehicles provided for in subheadings 8701.10 or 8701.30 through 8701.90;

(c) motor vehicles for the transport of 15 or fewer persons provided for in subheadings 8702.10 or 8702.90, and motor vehicles of subheadings 8704.21 and 8704.31; or

(d) motor vehicles provided for in subheadings 8703.21 through 8703.90;

3. **fungible goods or material**s means goods or materials that are interchangeable for commercial purposes and whose properties are essentially identical;

4. **generally accepted accounting principles** means the recognized consensus or substantial authoritative support in the territory of a Party, with respect to the recording of revenues, expenses, costs, assets, and liabilities, the disclosure of information, and the preparation of financial statements. These standards may encompass broad guidelines of general application as well as detailed standards, practices, and procedures;

5. **good wholly obtained or produced entirely in the territory of one or both of the Parties** means a good that is:

(a) a mineral good extracted there;

(b) a vegetable good, as such good is defined in the Harmonized System, harvested there;

(c) a live animal born and raised there;

(d) a good obtained from hunting, trapping, fishing, or aquaculture conducted there;

(e) a good (fish, shellfish, and any other marine life) taken from the sea by vessels registered or recorded with a Party and flying its flag;

(f) a good produced exclusively from products referred to in subparagraph (e) on board factory ships registered or recorded with a Party and flying its flag;

(g) a good taken by a Party, or a person of a Party, from the seabed or beneath the seabed outside territorial waters, provided that the Party has rights to exploit such seabed;

(h) a good taken from outer space, provided it is obtained by a Party or a person of a Party and not processed in the territory of a non-Party;

(i) waste and scrap derived from

(i) production there; or

(ii) used goods collected there, provided such goods are fit only for the recovery of raw materials;

(j) a recovered good derived there, from goods that have passed their life expectancy, or are no longer useable duc to defects, and utilized there in the production of remanufactured goods; or

(k) a good produced there exclusively from goods referred to in subparagraphs (a) through (i), or from their derivatives, at any stage of production;

6. indirect material means a good used in the production, testing, or inspection of a good but not physically incorporated into the good, or a good used in the maintenance of buildings or the operation of equipment associated with the production of a good, including:

(a) fuel and energy;

(b) tools, dies, and moulds;

(c) spare parts and materials used in the maintenance of equipment and buildings;

(d) lubricants, greases, compounding materials, and other materials used in production or used to operate equipment and buildings;

(e) gloves, glasses, footwear, clothing, safety equipment, and supplies;

(f) equipment, devices, and supplies used for testing or inspecting the goods;

(g) catalysts and solvents; and

(h) any other goods that are not incorporated into the good but whose use in the production of the good can reasonably be demonstrated to be a part of that production;

7. material means a good that is used in the production of another good;

8. material that is self-produced means an originating material that is produced by a producer of a good and used in the production of that good;

9. model line means a group of motor vehicles having the same platform or model name;

10. net cost means total cost minus sales promotion, marketing, and after-sales service costs, royalties, shipping and packing costs, and non-allowable interest costs that are included in the total cost;

11. net cost of the good means the net cost that can be reasonably allocated to the good under one of the following methods:

(a) calculate the total cost incurred with respect to all goods produced by that producer, subtract any sales promotion, marketing and after-sales service costs, royalties, shipping and packing costs, and non-allowable interest costs that are included in the total cost of all such goods, and then reasonably allocate the resulting net cost of those goods to the good;

(b) calculate the total cost incurred with respect to all goods produced by that producer, reasonably allocate the total cost to the good, and then subtract any sales promotion, marketing, and after-sales service costs, royalties, shipping and packing costs, and non-allowable interest costs that are included in the portion of the total cost allocated to the good; or

(c) reasonably allocate cach cost that forms part of the total cost incurred with respect to the good so that the aggregate of these costs does not include any sales promotion, marketing, and after-sales service costs, royalties, shipping and packing costs, and non-allowable interest costs,

provided that the allocation of all such costs is consistent with the provisions regarding the reasonable allocation of costs set out in generally accepted accounting principles;

12. non-allowable interest costs means interest costs incurred by a producer that exceed 700 basis points above the Party's applicable official interest rate for comparable maturities;

13. non-originating material means a material that has not satisfied the requirements of this Chapter;

14. preferential treatment means the customs duty rate and treatment under Article 2.12 (Merchandise Processing Fee) that is applicable to an originating good pursuant to this Agreement;

15. producer means a person who grows, raises, mines, harvests, fishes, traps, hunts, manufactures, processes, assembles, or disassembles a good;

16. production means growing, raising, mining, harvesting, fishing, trapping, hunting, manufacturing, processing, assembling, or disassembling a good;

17. reasonably allocate means to apportion in a manner appropriate under generally accepted accounting principles;

18. recovered goods means materials in the form of individual parts that result from:

(a) the complete disassembly of goods which have passed their life expectancy, or are no longer useable due to defects, into individual parts; and

(b) cleaning, inspecting, or testing, or other processes as necessary for improvement to sound working condition of such individual parts;

19. remanufactured good means an industrial good assembled in the territory of a Party, falling within Chapter 84, 85, or 87 or heading 90.26, 90.31, or 90.32, except a good under heading 84.18, 85.16, or 87.01 through 87.06 that:

(a) is entirely or partially comprised of recovered goods;

(b) has a similar life expectancy to, and meets the same performance standards as, a new good; and

(c) enjoys a factory warranty similar to such a new good;

20. total cost means all product costs, period costs, and other costs for a good incurred in the territory of one or both of the Parties; and

21. used means used or consumed in the production of goods.

# Chapter SIX. Customs Administration

## Article 6.1. Publication and Notification

1. Each Party shall ensure that its laws, regulations, guidelines, procedures, and administrative rulings governing customs matters are promptly published on the Internet and in print form.

2. Each Party shall designate one or more inquiry points to address inquiries from interested persons pertaining to customs matters, and shall make available on the Internet information concerning procedures for making such inquiries.

3. To the extent possible, each Party shall:

(a) publish in advance any regulation governing customs matters that it proposes to adopt; and

(b) provide interested persons and the other Party a reasonable opportunity to comment on the proposed regulation.

## Article 6.2. Administration

1. Each Party shall administer in a uniform, impartial, and reasonable manner all its laws, regulations, guidelines, procedures, and administrative rulings governing customs matters.

2. Each Party shall ensure that its laws and regulations governing customs matters are not prepared, adopted, or applied with a view to or with the effect of creating arbitrary or unwarranted procedural obstacles to international trade.

## Article 6.3. Advance Rulings

1. Each Party shall provide for written advance rulings to be issued to a person described in paragraph 2(a) concerning tariff classification, questions arising from the application of the Customs Valuation Agreement, country of origin, and the qualification of a good as an originating good under this Agreement.

2. Each Party shall adopt or maintain procedures for issuing written advance rulings that:

(a) provide that a potential importer in its territory or an exporter or producer in the territory of the other Party may request a ruling prior to the importation that is the subject of the advance ruling request;

(b) include a detailed description of the information required to process a request for an advance ruling; and

(c) provide that an advance ruling will be based on the facts and circumstances presented by the person requesting the ruling.

3. Each Party shall provide that its customs authorities:

(a) may request, at any time during the course of evaluating a request for an advance ruling, additional information necessary to evaluate the request;

(b) shall issue the advance ruling expeditiously, and no later than 120 days after obtaining all necessary information; and

(c) shall provide a written explanation of the reasons for the ruling.

4. Subject to paragraph 5, cach Party shall apply an advance ruling to importations into its territory beginning on the date it issues the ruling or on any other date specified in the ruling. The Party shall apply the treatment provided by the advance ruling to all importations regardless of the importer, exporter, or producer involved, provided that the facts and circumstances are identical in all material respects.

5. A Party may modify or revoke an advance ruling on a determination that the ruling was based on an error of fact or law, or where there is a change in law consistent with this Agreement, a change in a material fact, or a change in the circumstances on which the ruling is based. The issuing Party shall postpone the effective date of any such modification or revocation for at least 60 days where the person to whom the ruling was issued has relied in good faith on that ruling.

## Article 6.4. Review and Appeal

1. With respect to its determinations relating to customs matters, each Party shall provide that importers in its territory have access to:

(a) at least one level of administrative review of determinations by its customs authorities independent of the official or office responsible for the decision under review; and

(b) judicial review of decisions taken at the final level of administrative review.

## Article 6.5. Cooperation

1. Each Party shall endeavour to provide the other Party with advance notice of any significant modification of administrative policy or other similar development related to its laws or regulations governing importations that is likely to substantially affect the operation of this Agreement.

2. The Parties shall, through their competent authorities and in accordance with this Chapter, cooperate in achieving compliance with their respective laws and regulations pertaining to:

(a) the implementation and operation of this Agreement relating to importation of goods;

(b) restrictions and prohibitions on imports or exports; and (c) such other issues as the Parties may agree.

3. Where a Party has a reasonable suspicion of unlawful activity related to its laws or regulations governing importations, it may request that the other Party provide the following types of information pertaining to trade transactions relevant to the activity if the activity took place no more than five years before the date of the request, or from the date of discovery of the apparent offence in cases of fraud, and in other cases on which the Parties may agree:

(a) the name and address of the importer, exporter, manufacturer, buyer, vendor, broker, or transporter;

(b) shipping information relating to container number, size, port of loading before arrival, destination port after departure, name of vessel and carrier, the country of origin, place of export, mode of transportation, port of entry of the goods, and cargo description; and

(c) classification number, quantity, unit of measure, declared value, and tariff treatment.

4. The Party shall make its request in writing; shall specify the grounds for reasonable suspicion and the purposes for which the information is sought; and shall identify the requested information with sufficient specificity for the other Party to locate and provide the information. The requesting Party may meet this requirement by, inter alia, identifying the importer, exporter, country of origin, time period, port or ports of entry, cargo description, or Harmonized System number applicable to the importation or exportation in question.

5. The requested Party shall provide available information that is material to the request.

6. For the purposes of paragraph 3, a Party has a reasonable suspicion of unlawful activity if it is based on one or more of the following types of relevant factual information obtained from public or private sources:

(a) information gathered over time that a specific importer, exporter, manufacturer, producer, or other person involved in the movement of goods from the territory of one Party to the territory of the other Party has not complied with its laws or regulations governing importations;

(b) information gathered over time that some or all of the persons involved in the movement of goods within a specific product sector from the territory of one Party to the territory of the other Party have not complied with the Party's laws or regulations governing importations;

(c) information from trade and transit documents and other information necessary to conduct verifications; or

(d) other information that the Parties agree is sufficient in the context of a particular request.

7. Each Party shall endeavour to provide the other Party any other information that would assist it in determining whether imports from or exports to the other Party are in compliance with applicable laws or regulations governing importations, including those related to the prevention or investigation of unlawful shipments.

8. On the request of cither Party, the Parties shall enter into consultations to resolve any technical or interpretative difficulties that may arise under this Article or to consider ways to improve cooperation. Such consultations may occur between the competent authorities of the Parties directly or through the Committee on Trade in Goods established in Chapter Two (National Treatment and Market Access of Goods). In addition, either Party may request assistance from the other Party in implementing this Article. The requested Party shall endeavour to respond promptly to the request.

9. The Parties shall also endeavour to provide each other with technical advice and information for the purpose of improving risk assessment techniques, simplifying and expediting customs procedures, advancing the technical skills of their personnel, and enhancing the use of technologies that can lead to improved compliance with laws and regulations governing importations.

10. The Parties shall explore additional avenues of cooperation for the purpose of enhancing each Party's ability to enforce its laws or regulations governing importations, including by examining the establishment and maintenance of additional channels of communication to facilitate the secure and rapid exchange of information, and by considering efforts to improve effective coordination on importation issues, building on the mechanisms established in this Article and the cooperation established under any other relevant agreements.

## Article 6.6. Confidentiality

Each Party shall treat information provided pursuant to this Chapter in accordance with Article 22.4 (Disclosure of Information).

## Article 6.7. Penalties

Each Party shall adopt or maintain measures that provide for the imposition of civil or administrative penalties and, where appropriate, criminal penalties for violations of its customs laws and regulations governing classification, valuation, country of origin, and eligibility for preferential treatment under this Agreement.

## Article 6.8. Release and Security

1. Each Party shall adopt or maintain procedures:

(a) providing for the release of goods within a period no greater than that required to ensure compliance with its customs laws;

(b) allowing, to the extent possible, goods to be released within 48 hours of arrival;

(c) allowing, to the extent possible, goods to be released at the point of arrival, without interim transfer to customs warehouses or other locations; and

(d) allowing importers who have complied with the procedures that the Party may have relating to the determination of value and payment of customs duty to withdraw goods from customs, although the Party may require importers to provide security as a condition for the release of goods when such security is required to ensure that obligations arising from the entry of the goods will be fulfilled.

2. Each Party shall:

(a) adopt procedures allowing importers:

(i) to provide security such as bank guarantees, bonds, or other non-cash financial instruments;

(ii) that regularly enter goods to provide security such as standing bank guarantees, continuous bonds, or other non-cash financial instruments covering multiple entries; and

(iii) to provide security in any other forms specified by its customs authorities; and

(b) ensure that the amount of any security is no greater than that required to ensure that obligations arising from the importation of the goods will be fulfilled, and, where applicable, shall not be in excess of the amount chargeable, based on tariff rates under domestic and international law, including this Agreement, and based on valuation in accordance with the

Customs Valuation Agreement; and

(c) ensure that any security is discharged as soon as possible after its customs authorities are satisfied that the obligations arising from the importation of the goods have been fulfilled.

### Article 6.9. Risk Assessment

Each Party shall employ risk management systems that enable its customs authorities to concentrate inspection activities on high-risk goods and that facilitate the movement of low-risk goods, including systems that allow for information regarding an importation to be processed before the goods arrive.

### Article 6.10. Express Shipments

Each Party shall adopt or maintain separate, expedited customs procedures for express shipments, while maintaining appropriate customs control and selection, including procedures:

(a) under which the information necessary for the release of an express shipment may be submitted and processed by the Party's customs authorities before the shipment arrives;

(b) allowing a shipper to submit a single manifest covering all goods contained in a shipment transported by the express shipment service through, if possible, electronic means;

(c) that, to the extent possible, minimise the documentation required for the release of express shipments; and

(d) that, under normal circumstances, allow for an express shipment that has arrived at a point of entry to be released no later than six hours after the information necessary for release is submitted.

### Article 6.11. Definition of Customs Matters

For the purposes of this Chapter,

**customs matters** means matters pertaining to the classification and valuation of goods for customs duty purposes, rates of duty, country of origin, and eligibility for preferential treatment under this Agreement, and all other procedural and substantive requirements, restrictions, and prohibitions that a Party maintains on imports or exports, including those pertaining to goods imported or exported by or on behalf of travellers. Customs matters do not include matters pertaining to antidumping or countervailing duties.

## Chapter SEVEN. Sanitary and Phytosanitary Measures

### Article 7.1. Objectives

The objectives of this Chapter are to protect human, animal, or plant life or health in the Parties' territories, enhance the Parties' implementation of the SPS Agreement, provide a forum for addressing bilateral sanitary and phytosanitary matters, resolve trade issues, and thereby expand trade opportunities.

### Article 7.2. Scope and Coverage

1. This Chapter applies to all sanitary and phytosanitary measures of a Party that may, directly or indirectly, affect trade between the Parties.

2. Neither Party may have recourse to dispute settlement under this Agreement for any matter arising under this Chapter.

### Article 7.3. Affirmation of the Sps Agreement

Further to Article 1.1.2, the Parties affirm their existing rights and obligations with respect to each other under the SPS Agreement.

### Article 7.4. Committee on Sanitary and Phytosanitary Matters

1. The Parties hereby establish a Committee on Sanitary and Phytosanitary Matters ("Committee"), comprising

representatives of each Party who have responsibility for sanitary and phytosanitary matters.

2. Each Party shall identify its primary representative on the Committee and the Parties shall establish the Committee's operating procedures not later than 30 days after the date of entry into force of this Agreement.

3. The objectives of the Committee shall be to enhance each Party's implementation of the SPS Agreement, protect human, animal, or plant life or health, enhance consultation and cooperation between the Parties on sanitary and phytosanitary matters, and facilitate trade between the Parties.

4. The Committee shall seek to enhance and complement existing and future relationships between the Parties' agencies responsible for sanitary and phytosanitary matters.

5. The mandate of the Committee shall be to:

(a) enhance mutual understanding of each Party's sanitary and phytosanitary measures and the regulatory processes that relate to those measures;

(b) improve mutual understanding of specific issues relating to the implementation of the SPS Agreement;

(c) review progress on and, as appropriate, resolve through mutual consent, sanitary and phytosanitary matters that may arise between the Parties' agencies responsible for such matters; and

(d) consult on:

(i) matters related to the development or application of sanitary and phytosanitary measures that affect, or may affect, trade between the Parties;

(ii) issues, positions, and agendas for meetings of the WTO SPS Committee, the Codex Alimentarius Commission and its subsidiary bodies, the International Plant Protection Convention, the International Office of Fpizootics, and other international and regional fora on food safety and human, animal, or plant health; and

(iii) technical cooperation activities on sanitary and phytosanitary matters.

6. Each Party shall ensure that the appropriate representatives responsible for the development, implementation, and enforcement of sanitary and phytosanitary measures from its relevant trade and regulatory agencies participate in meetings of the Committee.

7. The Committee shall meet within 45 days after the date of entry into force of this Agreement, and at least once a year thereafter, unless the Parties otherwise agree. The Committee shall inform the Joint Committee established under Article 21.1 (Joint Committee) of the results of each meeting.

8. The Committee shall perform its work in accordance with its operating procedures, which it may revise at any time.

9. The Parties hereby establish a Standing Technical Working Group on Animal and Plant Health Measures, as set out in Annex 7-A.

10. The Committee may establish additional technical working groups in accordance with its mandate.

### Article 7.5. Definitions

For the purposes of this Chapter, **sanitary or phytosanitary measure** means any measure referred to in Annex A, paragraph 1, of the SPS Agreement.

# Chapter EIGHT. Technical Barriers to Trade Article

### Article 8.1. Scope and Coverage

This Chapter applies to all standards, technical regulations, and conformity assessment procedures of the central government that may, directly or indirectly, affect trade in any product between the Parties, except:

(a) technical specifications prepared by government bodies for the production or consumption requirements of such bodies; and

(b) sanitary and phytosanitary measures as defined in Annex A of the SPS Agreement.

## Article 8.2. Affirmation of the Tbt Agreement

Further to Article 1.1.2, the Parties affirm their existing rights and obligations with respect to each other under the TBT Agreement.

## Article 8.3. Regional Governments

Each Party shall provide information to authorities of regional governments to encourage their adherence to this Chapter, as appropriate.

## Article 8.4. International Standards

1. Each Party shall use relevant international standards, to the extent provided in Article 2.4 of the TBT Agreement, as a basis for its technical regulations.

2. In determining whether an international standard, guide, or recommendation within the meaning of Articles 2 and 5 and Annex 3 of the TBT Agreement exists, each Party shall apply the principles set out in Decisions and Recommendations adopted by the Committee since 1 January 1995, G/TBT/1/Rev.8, 23 May 2002, Section [IX (Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement), issued by the WTO Committee on Technical Barriers to Trade.

3. The Parties shall consult and exchange views on matters under discussion in relevant international or regional bodies that develop standards, guidelines, recommendations, or policies relevant to this Chapter.

## Article 8.5. Technical Regulations

1. Each Party shall give positive consideration to accepting as equivalent technical regulations of the other Party, even if these regulations differ from its own, provided it is satisfied that these regulations adequately fulfil the objectives of its regulations.

2. Where a Party does not accept a technical regulation of the other Party as equivalent to its own, it shall, at the request of the other Party, explain its reasons. The Parties will, if they so agree, give further consideration to whether a Party should accept a particular regulation as equivalent to its own and consider establishing an ad hoc working group, as provided for in Article 8.9.3, for this purpose.

3. Neither Party may have recourse to dispute settlement under this Agreement for any matter arising under this Article.

## Article 8.6. Conformity Assessment Procedures

1. The Parties recognise that a broad range of mechanisms exists to facilitate the acceptance in a Party's territory of the results of conformity assessment procedures conducted in the other Party's territory. For example:

(a) the importing Party may rely on a supplier's declaration of conformity;

(b) conformity assessment bodies located in each Party's territory may enter into voluntary arrangements to accept the results of each other's assessment procedures;

(c) a Party may agree with the other Party to accept the results of conformity assessment procedures that bodies located in the other Party's territory conduct with respect to specific technical regulations;

(d) a Party may adopt accreditation procedures for qualifying conformity assessment bodies located in the territory of the other Party;

(e) a Party may designate conformity assessment bodies located in the territory of the other Party; and

(f) a Party may facilitate the consideration of a request by the other Party to recognise the results of conformity assessment procedures conducted by bodies in the other Party's territory, including through negotiation of agreements in a sector nominated by that other Party.

The Parties shall exchange information on these and other similar mechanisms with a view to facilitating acceptance of conformity assessment results.

2. Where a Party does not accept the results of a conformity assessment procedure conducted in the territory of the other Party, it shall, on request of that other Party, explain the reasons for its decision.

3. Each Party shall accredit, approve, license, or otherwise recognise conformity assessment bodies in the territory of the other Party on terms no less favourable than those it accords to conformity assessment bodies in its territory. Where a Party accredits, approves, licenses, or otherwise recognises a body assessing conformity with a specific technical regulation or standard in its territory and refuses to accredit, approve, license, or otherwise recognise a body assessing conformity with that technical regulation or standard in the territory of the other Party, it shall, on request of that other Party, explain the reasons for its decision.

4. Where a Party declines a request from the other Party to engage in negotiations or conclude an agreement on facilitating recognition in its territory of the results of conformity assessment procedures conducted by bodies in the other Party's territory, it shall, on request of that other Party, explain the reasons for its decision. The Parties will, if they so agree, give further consideration with respect to this matter and consider establishing an ad hoc working group, as provided for in Article 8.9.3, for this purpose.

## Article 8.7. Transparency

1. Each Party shall allow persons of the other Party to participate in the development of standards, technical regulations, and conformity assessment procedures on terms no less favourable than those accorded to its own persons.

2. Each Party shall recommend that non-governmental bodies in its territory observe paragraph 1 in relation to the development of standards and voluntary conformity assessment procedures.

3. The Parties acknowledge the importance of transparency in decision-making, including providing a meaningful opportunity for persons to provide comments on proposed technical regulations and conformity assessment procedures. Where a Party publishes a notice under Article 2.9 or 5.6 of the TBT Agreement, it shall:

(a) include in the notice a statement describing the objective of the proposed technical regulation or conformity assessment procedure and the rationale for the approach the Party is proposing; and

(b) transmit the proposal electronically to the other Party through the enquiry point the Party has established under Article 10 of the TBT Agreement at the same time as it notifies WTO Members of the proposal pursuant to the TBT Agreement.

Each Party should allow at least 60 days after it transmits a proposal under subparagraph (b) for the public and the other Party to make comments in writing on the proposal.

4. Each Party shall publish, or otherwise make available to the public, in print or electronically, its responses to significant comments it receives from the public or the other Party under paragraph 3 no later than the date it publishes the final technical regulation or conformity assessment procedure.

5. Where a Party makes a notification under Article 2.10 or 5.7 of the TBT Agreement, it shall at the same time transmit the notification to the other Party electronically through the enquiry point referenced in subparagraph 3(b).

6. On request of the other Party, a Party shall provide the other Party information regarding the objective of, and rationale for, a standard, technical regulation, or conformity assessment procedure that the Party has adopted or is proposing to adopt.

## Article 8.8. Trade Facilitation

1. The Parties shall work cooperatively in the fields of standards, technical regulations, and conformity assessment procedures with a view to facilitating trade between the Parties. In particular, the Parties shall seek to identify trade facilitating bilateral initiatives regarding standards, technical regulations, and conformity assessment procedures that are appropriate for particular issues or sectors. Such initiatives may include cooperation on regulatory issues, such as convergence or equivalence of technical regulations and standards, alignment with international standards, reliance on a supplier's declaration of conformity, and use of accreditation to qualify conformity assessment bodies, as well as cooperation through recognition of conformity assessment procedures.

2. At the request of the other Party, a Party shall encourage non-governmental bodies in its territory to cooperate with the non-governmental bodies in the territory of the other Party with respect to particular standards or conformity assessment procedures

## Article 8.9. Chapter Coordinators

1. In order to facilitate implementation of this Chapter and cooperation between the Parties, each Party shall designate a Chapter Coordinator who shall be responsible for coordinating with interested persons in the Party's territory and communicating with the other Party's Coordinator in all matters pertaining to this Chapter. The Coordinators' functions shall include:

(a) monitoring the implementation and administration of this Chapter,

(b) promptly addressing any issue that a Party raises related to the development, adoption, application, or enforcement of standards, technical regulations, or conformity assessment procedures;

(c) enhancing cooperation in the development and improvement of standards, technical regulations, and conformity assessment procedures;

(d) exchanging information on standards, technical regulations, and conformity assessment procedures, in response to all reasonable requests for such information from a Party;

(e) facilitating the consideration of any sector-specific proposal a Party makes for further cooperation between conformity assessment bodies, both governmental and nongovernmental, in the territories of the Parties ;

(f) facilitating the consideration of a request that a Party recognise the results of conformity assessment procedures conducted by bodies in the other Party's territory, including a request for the negotiation of an agreement, in a sector nominated by that other Party;

(g) facilitating cooperation in the area of specific technical regulations by referring enquiries from a Party to the appropriate regulatory authorities;

(h) on request of a Party, consulting on any matter arising under this Chapter; and

(i) reviewing this Chapter in light of any developments under the TBT Agreement and developing recommendations for amendments to this Chapter in light of those developments.

2. The Coordinators shall communicate with one another by any agreed method that is appropriate for the efficient and effective discharge of their functions.

3. Where a matter covered under this Chapter cannot be clarified or resolved through the Chapter Coordinators, the Parties may establish an ad hoc technical working group with a view to identifying a workable and practical solution that would facilitate trade. A working group shall comprise representatives of the Parties and may include regional government representatives, where appropriate, with responsibility for the standards, technical regulations, or conformity assessment procedures in question. Where a Party declines a request from the other Party to establish a working group, it shall, on request, explain the reasons for its decision.

### Article 8.10. Information Exchange

Any information or explanation that is provided on request of a Party pursuant to this Chapter shall be provided in print or electronically within a reasonable period of time.

### Article 8.11. Definitions

For the purposes of this Chapter:

**technical regulation, standard, and conformity assessment procedures** shall have the meanings assigned to those terms in Annex 1 of the TBT Agreement.

## Chapter NINE. Safeguards

### Article 9.1. Imposition of a Safeguard Measure

During the transition period, if as a result of the reduction or elimination of a customs duty under this Agreement, an originating good of the other Party is being imported into the territory of a Party in such increased quantities, in absolute terms or relative to domestic production, and under such conditions that the imports of such originating good from the other Party constitute a substantial cause of serious injury, or threat thereof, to a domestic industry producing a like or

directly competitive good, that Party may:

(a) suspend the further reduction of any rate of customs duty on the good provided for under this Agreement for the good;

(b) increase the rate of customs duty on the good to a level not to exceed the lesser of

(i) the most-favoured-nation (MFN) applied rate of duty on the good in effect at the time the action is taken; and

(ii) the MFN applied rate of duty on the good in effect on the day immediately preceding the date of entry into force of this Agreement; or

(c) in the case of a customs duty applied to a good on a seasonal basis, increase the rate of duty to a level not to exceed the lesser of

(i) the MFN applied rate of duty that was in effect on the good for the immediately preceding corresponding season; and

(ii) the MFN applied rate of duty that was in effect on the good on the day immediately preceding the date of entry into force of this Agreement.

## Article 9.2. Conditions and Limitations

Each Party shall apply the following conditions and limitations with regard to a safeguard measure:

1. A Party shall notify the other Party in writing upon initiation of an investigation described in paragraph 2 and shall consult with the other Party as far in advance of taking a safeguard measure as practicable, with a view to reviewing the information arising from the investigation, exchanging views on the measure and, as set out in Article 9.4, reaching an agreement on compensation. The Party shall also notify the other Party before taking a provisional safeguard measure pursuant to Article 9.3 and shall immediately initiate consultations with the other Party after taking such a measure.

2. A Party shall take a safeguard measure only following an investigation by that Party's competent authorities in accordance with Articles 3 and 4.2(c) of the Safeguards Agreement; and to this end, Articles 3 and 4.2(c) of the Safeguards Agreement are incorporated into and made a part of this Agreement, mutatis mutandis.

3. In the investigation described in paragraph 2, a Party shall comply with the requirements of Article 4.2(a) of the Safeguards Agreement; and to this end, Article 4.2(a) is incorporated into and made a part of this Agreement, mutatis mutandis.

4. Each Party shall ensure that its competent authorities complete any such investigation within one year of its date of initiation.

5. Neither Party may maintain a safeguard measure:

(a) except to the extent, and for such time, as may be necessary to prevent or remedy serious injury and to facilitate adjustment;

(b) for a period exceeding two years; except that the period may be extended by up to two years if the competent authorities determine, in conformity with the procedures set out in paragraphs 1 through 4, that the safeguard measure continues to be necessary to prevent or remedy serious injury and to facilitate adjustment and that there is evidence that the industry is adjusting; or

(c) beyond the expiration of the transition period, except with the consent of the other Party.

6. Neither Party may impose a safeguard measure more than once on the same good.

7. Where the expected duration of the measure is over one year, the importing Party shall ensure that the measure is progressively liberalized at regular intervals.

8. When a Party terminates a safeguard measure, the rate of customs duty shall be no higher than the rate that, according to the Party's Schedule to Annex 2-B (Tariff Elimination), would have been in effect one year after the initiation of the measure. Beginning on January 1 of the year following the termination of the action, the Party shall:

(a) apply the rate of duty set out in the Party's Schedule to Annex 2-B as if the safeguard measure had never been applied; or

(b) eliminate the tariff in equal annual stages ending on the date set out in the Party's Schedule to Annex 2-B for the

elimination of the tariff.

## Article 9.3. Provisional Safeguard Measures

In critical circumstances where delay would cause damage which it would be difficult to repair, a Party may take a safeguard measure on a provisional basis pursuant to a preliminary determination that there is clear evidence that imports of an originating good from the other Party have increased as the result of the reduction or elimination of a customs duty under this Agreement, and such imports constitute a substantial cause of serious injury, or threat thereof, to the domestic industry. The duration of such a provisional measure shall not exceed 200 days, during which time the requirements of Articles 9.2.2 and 9.2.3 shall be met. Any tariff increases shall be promptly refunded if the investigation described in Article 9.2.2 does not result ina finding that the requirements of Article 9.1 are met. The duration of any provisional measure shall be counted as part of the period described in Article 9.2.5.

## Article 9.4. Compensation

1. The Party applying a safeguard measure shall, in consultation with the Party whose goods are subject to a safeguard measure, provide to that Party mutually agreed trade liberalizing compensation in the form of concessions having substantially equivalent trade effects or equivalent to the value of the additional duties expected to result from the measure. Such consultations shall begin within 30 days of the imposition of the measure.

2. If the Parties are unable to agree on compensation within 30 days after the consultations commence, the Party against whose originating good the measure is applied may suspend the application of concessions with respect to originating goods of the other Party that have trade effects substantially equivalent to the safeguard measure.

3. A Party shall notify the other Party in writing at least 30 days before suspending concessions under paragraph 2.

4. The obligation to provide compensation under paragraph 1 and the right to suspend substantially equivalent concessions under paragraph 2 shall terminate on the later of: (a) the termination of the safeguard measure, and (b) the date on which the rate of customs duty returns to the rate of duty set out in the Party's Schedule to Annex 2-B.

## Article 9.5. Global Safeguard Measures

Each Party retains its rights and obligations under Article XIX of GATT 1994 and the Safeguards Agreement. This Agreement does not confer any additional rights or obligations on the Parties with regard to global safeguard measures, except that a Party taking a global safeguard measure may exclude imports of an originating good from the other Party if such imports are not a substantial cause of serious injury or threat thereof.

## Article 9.6. Definitions

For the purposes of this Chapter:

1. **domestic industry** means the producers as a whole of the like or directly competitive product operating in the territory of a Party, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products;

2. **global safeguard measure** means a measure applied under Article XIX of GATT 1994 and the WTO Agreement on Safeguards;

3. **safeguard measure** means a safeguard measure described in Article 9.1;

4. **serious injury** means a significant overall impairment in the position of a domestic industry;

5. **substantial cause** means a cause which is important and not less than another cause;

6**. threat of serious injury** means serious injury that, on the basis of facts and not merely on allegation, conjecture, or remote possibility, is clearly imminent; and

7. **transition period** means the ten-year period following entry into force of this Agreement, except that for any good for which the Schedule in Annex 2-B of the Party applying the measure provides for the Party to eliminate its tariffs on the good over a period of more than ten years, transition period shall mean the tariff elimination period for the good.

# Chapter TEN. Cross-border Trade In Services

## Article 10.1. Scope and Coverage

1. This Chapter applies to measures adopted or maintained by a Party affecting cross-border trade in services by service suppliers of the other Party. Such measures include measures affecting:

(a) the production, distribution, marketing, sale, and delivery of a service;

(b) the purchase or use of, or payment for, a service;

(c) the access to and use of distribution, transport, or telecommunications networks and services in connection with the supply of a service;

(d) the presence in its territory of a service supplier of the other Party; and

(e) the provision of a bond or other form of financial security as a condition for the supply of a service.

2. For the purposes of this Chapter, measures adopted or maintained by a Party means measures adopted or maintained by:

(a) central, regional, or local governments and authorities; and

(b) non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities.

3. Articles 10.4, 10.7, and 10.8 shall also apply to measures by a Party affecting the supply of a service in its territory by a covered investment.

4. This Chapter does not apply to:

(a) financial services as defined in Article 13.19 (Definitions), except that paragraph 3 shall apply where the financial service is supplied by a covered investment that is not a covered investment in a financial institution (as defined in Article 13.19) in the Party's territory;

(b) government procurement;

(c) air services, including domestic and international air transportation services, whether scheduled or non-scheduled, and related services in support of air services, other than:

(i) aircraft repair and maintenance services during which an aircraft is withdrawn from service; and

(ii) specialty air services;

(d) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance; or

(e) services supplied in the exercise of governmental authority within the territory of each respective Party, as defined in Article 1.2.22.

5. This Chapter does not impose any obligation on a Party with respect to a national of the other Party seeking access to its employment market, or employed on a permanent basis in its territory, and does not confer any right on that national with respect to that access or employment.

## Article 10.2. National Treatment

Each Party shall accord to service suppliers of the other Party treatment no less favourable than that it accords, in like circumstances, to its own service suppliers.

## Article 10.3. Most-favoured-nation Treatment

Each Party shall accord to service suppliers of the other Party treatment no less favourable than that it accords, in like circumstances, to service suppliers of a non-Party.

## Article 10.4. Market Access

Neither Party may adopt or maintain, cither on the basis of a regional subdivision or on the basis of its entire territory, measures that:

(a) impose limitations on:

(i) the number of service suppliers, whether in the form of numerical quotas, monopolies, exclusive service suppliers, or the requirement of an economic needs test;

(ii) the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;

(iii) the total number of service operations or the total quantity of services output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;!! or

(iv) the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test; or

(b) restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service.

## Article 10.5. Local Presence

Neither Party may require a service supplier of the other Party to establish or maintain a representative office or any form of enterprise, or to be resident, in its territory as a condition for the cross-border supply of a service.

## Article 10.6. Non-conforming Measures

1. Articles 10.2, 10.3, 10.4, and 10.5 do not apply to:

(a) any existing non-conforming measure that is maintained by a Party at:

(i) the central level of government, as set out by that Party in its Schedule to Annex I;

(ii) a regional level of government, as set out by that Party in its Schedule to Annex I; or

(iii) a local level of government;

(b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or

(c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 10.2, 10.3, 10.4, or 10.5.

2. Articles 10.2, 10.3, 10.4, and 10.5 do not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors, or activities as set out in its Schedule to Annex II.

(10-1) This paragraph does not cover measures of a Party which limit inputs for the supply of services.

## Article 10.7. Domestic Regulation

1. Where a Party requires authorization for the supply of a service, the Party's competent authorities shall, within a reasonable time after the submission of an application considered complete under its laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the competent authorities of the Party shall provide, without undue delay, information concerning the status of the application. This obligation shall not apply to authorization requirements that a Party adopts or maintains with respect to sectors, sub-sectors, or activities as set out in its Schedule to Annex II.

2. With a view to ensuring that measures relating to qualification requirements and procedures, technical standards, and licensing requirements do not constitute unnecessary barriers to trade in services, each Party shall endeavour to ensure, as appropriate for individual sectors, that such measures are:

(a) based on objective and transparent criteria, such as competence and the ability to supply the service;

(b) not more burdensome than necessary to ensure the quality of the service; and

(c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

3. If the results of the negotiations related to Article VI:4 of GATS (or the results of any similar negotiations undertaken in other multilateral fora in which both Parties participate) enter into effect, this Article shall be amended, as appropriate, after consultations between the Parties, to bring those results into effect under this Agreement. The Parties shall coordinate on such negotiations, as appropriate.

## Article 10.8. Transparency In Development and Application of Regulations

Further to Chapter Twenty (Transparency):

1. Each Party shall maintain or establish appropriate mechanisms for responding to inquiries from interested persons regarding its regulations relating to the subject matter of this Chapter.

2. If a Party does not provide advance notice and opportunity for comment pursuant to Article 20.2 (Publication), it shall, to the extent possible, address in writing the reasons therefore.

3. At the time it adopts final regulations relating to the subject matter of this Chapter, each Party shall, to the extent possible, including on request, address in writing substantive comments received from interested persons with respect to the proposed regulations.

4. To the extent possible, each Party shall provide notice of the requirements of final regulations prior to their effective date.

## Article 10.9. Recognition

1. For the purposes of fulfilment, in whole or in part, of its standards or criteria for the authorisation, licensing, or certification of services suppliers, and subject to the requirements of paragraph 4, a Party may recognise the education or experience obtained, requirements met, or licences or certifications granted in a particular country. Such recognition, which may be achieved through harmonisation or otherwise, may be based on an agreement or arrangement with the country concerned or may be accorded autonomously.

2. Where a Party recognizes, autonomously or by agreement or arrangement, the education or experience obtained, requirements met, or licenses or certifications granted in the territory of a non-Party, nothing in Article 10.3 shall be construed to require the Party to accord such recognition to the education or experience obtained, requirements met, or licenses or certifications granted in the territory of the other Party.

3. A Party that is a party to an agreement or arrangement of the type referred to in paragraph 1, whether existing or future, shall afford adequate opportunity for the other Party, if the other Party is interested, to negotiate accession to such an agreement or arrangement or to negotiate a comparable one with it. Where a Party accords recognition autonomously, it shall afford adequate opportunity for the other Party to demonstrate that education, experience, licenses, or certifications obtained or requirements met in that other Party's territory should be recognized.

4. A Party shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing, or certification of services suppliers, or a disguised restriction on trade in services.

5. Annex 10-A (Professional Services) applies to measures adopted or maintained by a Party relating to the licensing or certification of professional service suppliers as set out in that Annex.

## Article 10.10. Transfers and Payments

1. Each Party shall permit all transfers and payments relating to the cross-border supply of services to be made freely and without delay into and out of its territory.

2. Each Party shall permit such transfers and payments relating to the cross-border supply of services to be made in a freely usable currency at the market rate of exchange prevailing on the date of transfer.

3. Notwithstanding paragraphs 1 and 2, a Party may prevent or delay a transfer or payment through the equitable, non-discriminatory, and good faith application of its laws relating to:

(a) bankruptcy, insolvency, or the protection of the rights of creditors; (b) issuing, trading, or dealing in securities, futures, options, or derivatives;

(c) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;

(d) criminal or penal offences; or

(e) ensuring compliance with orders or judgments in judicial or administrative proceedings.

## Article 10.11. Denial of Benefits

1. A Party may deny the benefits of this Chapter to a service supplier of the other Party if the service supplier is an enterprise owned or controlled by persons of a non-Party, and the denying Party:

(a) does not maintain diplomatic relations with the non-Party; or

(b) adopts or maintains measures with respect to the non-Party or a person of the non- Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise.

2. A Party may deny the benefits of this Chapter to a service supplier of the other Party if the service supplier is an enterprise owned or controlled by persons of a non-Party or of the denying Party that has no substantial business activities in the territory of the other Party.

## Article 10.12. Specific Commitments

*Express Delivery Services*

1. For the purposes of this Chapter, express delivery services means the collection, transport, and delivery, of documents, printed matter, parcels, or other items on an expedited basis, while tracking and maintaining control of these items throughout the supply of the service. Express delivery services do not include (i) air transport services, (ii) services supplied in the exercise of governmental authority, as defined in Article 1.2.22, or (iii) maritime transport services. (10-2)

2. The Parties confirm their desire to maintain at least the level of market openness for express delivery services that is in existence on the date this Agreement is signed. If a Party considers that the other Party is not maintaining such level of access, it may request consultations. The other Party shall afford adequate opportunity for consultations and, to the extent possible, shall provide information in response to inquiries regarding the level of access and any related matter.

3. Each Party confirms its intention to prevent the direction of revenues derived from monopoly postal services to confer an advantage to its own or any other competitive supplier's express delivery services in a manner inconsistent with that Party's laws and practices applicable to the monopoly supply of postal services.

4. For greater certainty, this Agreement, including Articles 14.3 (Designated Monopolies) and 14.5 (State Enterprises and Related Matters), applies to express delivery services.

(10-2) For greater clarity, express delivery services do not include: (a) for the United States, delivery of letters subject to the Private Express Statutes (18 U.S.C. 1693 et seq., 39 U.S.C. 601 et seq.), but do include delivery of letters subject to the exceptions to, or suspensions promulgated under, those statutes, which permit private delivery of extremely urgent letters; and (b) for Australia, services reserved for exclusive supply by Australia Post as set out in the Australian Postal Corporation Act 1989 and its subordinate legislation and regulations.

## Article 10.13. Implementation

The Parties shall meet annually, or as otherwise agreed, on issues related to implementation of this Chapter and any other issues of mutual interest affecting trade in services.

## Article 10.14. Definitions

For the purposes of this Chapter:

1. **cross-border trade in services** or **cross-border supply of services** means the supply of a service:

(a) from the territory of one Party into the territory of the other Party;

(b) in the territory of one Party by a person of that Party to a person of the other Party; or

(c) by a national of a Party in the territory of the other Party;

but does not include the supply of a service in the territory of a Party by a covered investment;

2. **enterprise** means an enterprise as defined in Article 1.2.7 (General Definitions), and a branch of an enterprise; 3. enterprise of a Party means an enterprise organized or constituted under the laws of a Party, and a branch located in the territory of a Party and carrying out business activities there;

4. **freely usable currency** means a currency determined by the International Monetary Fund under its Articles of Agreement to be a currency that is, in fact, widely used to make payments for international transactions and is widely traded in the principal exchange markets;

5. **professional services** means services, the supply of which requires specialized post-secondary education, or equivalent training or experience, and for which the right to practice is granted or restricted by a Party, but does not include services supplied by trades-persons or vessel and aircraft crew members;

6. **service supplier of a Party** means a person of that Party that seeks to supply or supplies a service; (10-3) and

7. **specialty air services** means any non-transportation air services, such as aerial fire- fighting, sightseeing, spraying, surveying, mapping, photography, parachute jumping, glider towing, and helicopter-lift for logging and construction, and other airborne agricultural, industrial, and inspection services.

# Chapter ELEVEN. Investment

## Article 11.1. Scope and Coverage

1. This Chapter applies to measures adopted or maintained by a Party relating to:

(a) investors of the other Party;

(b) covered investments; and

(c) with respect to Articles 11.9 and 11.11, all investments in the territory of the Party.

2. For greater certainty, nothing in this Chapter imposes an obligation on a Party to privatise.

## Article 11.2. Relation to other Chapters

1. In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.

2. A requirement by a Party that a service supplier of the other Party post a bond or other form of financial security as a condition of the cross-border supply of a service does not of itself make this Chapter applicable to measures adopted or maintained by the Party relating to such cross-border supply of the service. This Chapter applies to measures adopted or maintained by the Party relating to the posted bond or financial security, to the extent that such bond or financial security is a covered investment.

3. This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Thirteen (Financial Services).

## Article 11.3. National Treatment

1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

## Article 11.4. Most-favoured Nation Treatment

1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like

circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

## Article 11.5. Minimum Standard of Treatment (11-1)

1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.

2. For greater certainty, the concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

(b) "full protection and security" requires cach Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

(11-1) Article 11.5 shall be interpreted in accordance with Annex 11-A. 11-2

## Article 11.6. Treatment In Case of Strife

1. Notwithstanding Article 11.13.5(b), each Party shall accord to investors of the other Party, and to covered investments, with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife, treatment no less favourable than that it accords, in like circumstances, to:

(a) its own investors and their investments; and

(b) investors of any non-Party and their investments.

2. Notwithstanding paragraph 1, if an investor of a Party, in the situations referred to in paragraph 1, suffers a loss in the territory of the other Party resulting from:

(a) requisitioning of its covered investment or part thereof by the latter's forces or authorities; or

(b) destruction of its covered investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation,

the latter Party shall provide the investor with restitution, compensation, or both, as appropriate, for such loss. Any compensation shall be prompt, adequate, and effective in accordance with Article 11.7.2 through 11.7.4, mutatis mutandis.

3. Paragraph 1 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 11.3 but for Article 11.13.5(b).

## Article 11.7. Expropriation and Compensation (11-2)

1. Neither Party may expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation ("expropriation"), except:

(a) for a public purpose;

(b) in a non-discriminatory manner;

(c) on payment of prompt, adequate, and effective compensation; and

(d) in accordance with due process of law.

2. The compensation referred to in paragraph 1(c) shall:

(a) be paid without delay;

(b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation");

(c) not reflect any change in value occurring because the intended expropriation had become known earlier; and

(d) be fully realisable and freely transferable.

3. If the fair market value is denominated in a freely usable currency or the Australian dollar, the compensation referred to in paragraph 1(c) shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

4. However, if the fair market value is denominated in the Australian dollar and the Australian dollar is not transferable on the date of payment at the market rate of exchange, or if it is denominated in another currency that is not freely usable, the compensation referred to in paragraph 1(c) — converted into the currency of payment at the market rate of exchange prevailing on the date of payment — shall be no less than:

(a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus

(b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with Chapter Seventeen (Intellectual Property Rights), (11-3)

(11-2) Article 11.7 shall be interpreted in accordance with Annexes 11-A and 11-B. 11-3

(11-3) For greater certainty, the reference to the "TRIPS Agreement" in paragraph 5 includes any waiver in force between the Parties of any provision of that Agreement granted by WTO Members in accordance with the WTO Agreement.

## Article 11.8. Transfers

1. Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include:

(a) contributions to capital, including the initial contribution;

(b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;

(c) interest, royalty payments, management fees, and technical assistance and other fees;

(d) payments made under a contract, including a loan agreement;

(e) payments made pursuant to Articles 11.6.1 and 11.6.2 and Article 11.7; and

(f) payments arising out of a dispute.

2. Each Party shall permit transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer.

3. Each Party shall permit returns in kind relating to a covered investment to be made as authorised or specified in a written agreement between the Party and a covered investment or an investor of the other Party that takes effect on or after the date of entry into force of this Agreement.

4. Notwithstanding paragraphs 1 through 3, a Party may prevent or delay a transfer through the equitable, non-discriminatory, and good faith application of its laws relating to:

(a) bankruptcy, insolvency, or the protection of the rights of creditors;

(b) issuing, trading, or dealing in securities, futures, options, or derivatives; criminal or penal offences;

(c) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or

(d) ensuring compliance with orders or judgments in judicial or administrative proceedings.

## Article 11.9. Performance Requirements

1. Neither Party may, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement, or enforce any commitment or undertaking, to: (11-4)

(a) export a given level or percentage of goods or services;

(b) achieve a given level or percentage of domestic content;

(c) purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;

(d) relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;

(e) restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;

(f) transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory; or

(g) supply exclusively from the territory of the Party the goods that such investment produces or the services that such investment supplies to a specific regional market or to the world market.

2. Neither Party may condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of a Party or of a non- Party, on compliance with any requirement to:

(a) achieve a given level or percentage of domestic content;

(b) purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;

(c) relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or

(d) restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

3. (a) Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

(b) Paragraph 1(f) does not apply:

(i) when a Party authorises use of an intellectual property right in accordance with Article 17.9.7 (Patents), or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or

(ii) when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under a Party's laws relating to the prevention of anti- competitive behaviour, (11-5)

(c) Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on investment or international trade, paragraphs 1(b), (c), and (f), and 2(a) and (b),

shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:

(i) necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement;

(ii) necessary to protect human, animal, or plant life or health; or

(iii) related to the conservation of living or non-living exhaustible natural resources.

(d) Paragraphs 1 (a), (b), and (c), and 2(a) and (b), do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs.

(e) Paragraphs 1(b), (c), (f), and (g), and 2(a) and (b), do not apply to government procurement.

(f) Paragraphs 2(a) and (b) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

4. For greater certainty, paragraphs 1 and 2 do not apply to any requirement other than the requirements set out in those paragraphs.

5. This Article does not preclude enforcement of any commitment, undertaking, or requirement between private parties, where a Party did not impose or require the commitment, undertaking, or requirement.

(11-4) For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 2 does not constitute a "commitment or undertaking" for the purposes of paragraph 1.

(11-5) The Parties recognize that a patent does not necessarily confer market power.

## Article 11.10. Senior Management and Boards of Directors

1. Neither Party may require that an enterprise of that Party that is a covered investment appoint to senior management positions natural persons of any particular nationality.

2. A Party may require that a majority or less of the board of directors, or any committee thereof, of an enterprise of that Party that is a covered investment, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

## Article 11.11. Investment and Environment

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

## Article 11.12. Denial of Benefits

1. A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party:

(a) does not maintain diplomatic relations with the non-Party; or

(b) adopts or maintains measures with respect to the non-Party or a person of the non- Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or its investments.

2. A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise.

## Article 11.13. Non-conforming Measures

1. Articles 11.3, 11.4, 11.9, and 11.10 do not apply to: (a) any existing non-conforming measure that is maintained by a Party

at:

(i) the central level of government, as set out by that Party in its Schedule to Annex I,

(ii) a regional level of government, as set out by that Party in its Schedule to Annex I, or

(iii) a local level of government;

(b) the continuation or prompt renewal of any non-conforming measure referred to in sub-paragraph (a); or

(c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Article 11.3, 11.4, 11.9, or 11.10.

2. Articles 11.3, 11.4, 11.9, and 11.10 do not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors, or activities, as set out in its Schedule to Annex II.

3. Neither Party may, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to Annex II, require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

4. Articles 11.3 and 11.4 do not apply to any measure that is an exception to, or derogation from, the obligations under Article 17.1.6 (National Treatment) as specifically provided in that Article.

5. Articles 11.3, 11.4, and 11.10 do not apply to: 11-8

(a) government procurement; or

(b) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.

## Article 11.14. Special Formalities and Information Requirements

1. Nothing in Article 11.3 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as a requirement that investors be residents of the Party or that covered investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not materially impair the protections afforded by a Party to investors of the other Party and covered investments pursuant to this Chapter.

2. Notwithstanding Articles 11.3 and 11.4, a Party may require an investor of the other Party, or a covered investment, to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect any confidential information from any disclosure that would prejudice the competitive position of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.

## Article 11.15. Implementation

The Parties shall meet annually, or as agreed otherwise, to discuss the implementation of this Chapter and other issues of mutual interest, including the operation of their respective investment regimes.

## Article 11.16. Consultations on Investor-state Dispute Settlement

1. If a Party considers that there has been a change in circumstances affecting the settlement of disputes on matters within the scope of this Chapter and that, in light of such change, the Parties should consider allowing an investor of a Party to submit to arbitration with the other Party a claim regarding a matter within the scope of this Chapter, the Party may request consultations with the other Party on the subject, including the development of procedures that may be appropriate. On such a request, the Parties shall promptly enter into consultations with a view towards allowing such a claim and establishing such procedures.

2. For greater certainty, nothing in this Article prevents a Party from raising any matter arising under this Chapter pursuant to the procedures set out in Chapter 21 (Institutional Arrangements and Dispute Settlement). Nor does anything in this Article prevent an investor of a Party from submitting to arbitration a claim against the other Party to the extent permitted under that Party's law.

## Article 11.17. Definitions

For the purposes of this Chapter:

1. **enterprise** means an enterprise as defined in Article 1.2.7 (General Definitions), and a branch of an enterprise;

2. **enterprise of a Party** means an enterprise constituted or organized under the law ofa Party, and a branch located in the territory of a Party and carrying out business activities there;

3. **freely usable currency** means a currency determined by the International Monetary Fund under its Articles of Agreement to be a currency that is, in fact, widely used to make payments for international transactions and is widely traded in the principal exchange markets;

4. **investment** means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

(a) an enterprise;

(b) shares, stock, and other forms of equity participation in an enterprise;

(c) bonds, debentures, other debt instruments, and loans; (11-6)

(d) futures, options, and other derivatives;

(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;

(f) intellectual property rights;

(g) licenses, authorisations, permits, and similar rights conferred pursuant to the applicable domestic law (11-7)(11-8); and

(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges;

5. **investor of a non-Party** means, with respect to a Party, an investor that seeks to make, is making, or has made an investment in the territory of that Party, that is not an investor of either Party;

6. **investor of a Party** means a Party, or a national or an enterprise of a Party, that secks to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a citizen of both Parties or of a Party and a non-Party shall be deemed to be exclusively a citizen of the State of his or her dominant and effective nationality.

(11-6) Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.

(11-7) Whether a particular type of license, authorisation, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the applicable domestic law. Among the licenses, authorisations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorisation, permit, or similar instrument has the characteristics of an investment.

(11-8) The term investment does not include an order or judgment entered in a judicial or administrative action.

# Chapter TWELVE. Telecommunications

## Article 12.1. Scope and Coverage

1. This Chapter applies to measures affecting trade in telecommunications services.

2. Except to ensure that enterprises operating broadcast stations and cable systems have continued access to and use of public telecommunications services, this Chapter does not apply to measures that a Party adopts or maintains relating to broadcast or cable distribution of radio or television programming.

3. Nothing in this Chapter shall be construed as:

(a) requiring a Party to compel any enterprise to establish, construct, acquire, lease, operate, or provide telecommunications networks or services where such networks or services are not offered to the public generally; or

(b) requiring a Party to compel any enterprise exclusively engaged in the broadcast or cable distribution of radio or television programming to make available its broadcast or cable facilities as a public telecommunications network.

# Section A. Access to and Use of Public Telecommunications Services

## Article 12.2. Access and Use

1. Each Party shall ensure that enterprises of the other Party have access to and use of any public telecommunications service, including leased circuits, offered in its territory or across its borders, on terms and conditions that are reasonable and non-discriminatory (including with respect to timeliness), such as those set out in paragraphs 2 through 5.

2. Each Party shall ensure that such enterprises are permitted to:

(a) purchase or lease, and attach terminal or other equipment that interfaces with a public telecommunications network;

(b) provide services to individual or multiple end-users over leased or owned circuits; (c) connect owned or leased circuits with public telecommunications networks and services in the territory, or across the borders, of that Party, or with circuits leased or owned by another enterprise;

(d) perform switching, signalling, processing, and conversion functions; and

(e) use operating protocols of their choice.

3. Each Party shall ensure that enterprises of the other Party may use public telecommunications services for the movement of information in its territory or across its borders and for access to information contained in databases or otherwise stored in machine-readable form in the territory of either Party or any WTO Member.

4. Notwithstanding paragraph 3, a Party may take such measures as are necessary to ensure the security and confidentiality of messages subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in services.

5. Each Party shall ensure that no condition is imposed on access to and use of public telecommunications networks or services, other than as necessary to:

(a) safeguard the public service responsibilities of suppliers of public telecommunications networks or services, in particular their ability to make their networks or services available to the public generally; or

(b) protect the technical integrity of public telecommunications networks or services.

# Section B. Suppliers of Public Telecommunications Services (12-1)

(12-1) For the purposes of this Chapter, Articles 12.4 and 12.5 do not apply to suppliers of commercial mobile services. In addition, a state regulatory authority may exempt a rural local exchange carrier, as defined in section 251(f)(2) of the United States Communications Act of 1934, as amended by the Telecommunications Act of 1996, from the obligations contained in Articles 12.4 and 12.5.

## Article 12.3. Interconnection

1. Each Party shall ensure suppliers of public telecommunications services in its territory provide, directly or indirectly, interconnection with the suppliers of public telecommunications services of the other Party.

2. In carrying out paragraph 1, each Party shall ensure that suppliers of public telecommunications services in its territory

take reasonable steps to protect the confidentiality of commercially sensitive information of, or relating to, suppliers and end-users of public telecommunications services and only use such information for the purpose of providing those services.

### Article 12.4. Number Portability

Each Party shall ensure that suppliers of public telecommunications services in its territory provide number portability for fixed telephony and any other service designated by that Party to the extent technically feasible, and on terms and conditions that are reasonable and non- discriminatory (including with respect to timeliness).

### Article 12.5. Dialing Parity

Each Party shall ensure that suppliers of public telecommunications services in its territory provide dialing parity to suppliers of public telecommunications services of the other Party, and afford suppliers of public telecommunications services of the other Party non-discriminatory access to telephone numbers and related services.

### Article 12.6. Submarine Cable Systems

Each Party shall ensure reasonable and non-discriminatory treatment for access to submarine cable systems (including landing facilities) in its territory, where a supplier is authorized to operate a submarine cable system as a public telecommunications service.

## Section C. Conduct of Major Suppliers of Public Telecommunications Services (12-2) (12-3)

(12-2) For greater clarity, the obligations imposed under this Section only apply with respect to those public telecommunications services that result in a supplier of public telecommunications services being a major supplier.

(12-3) For the purposes of this Chapter, Section C does not apply to suppliers of commercial mobile services. In addition, with respect to the United States, Section C does not apply to rural telephone companies, as defined in section 3(37) of the U.S. Communications Act of 1934, as amended by the Telecommunications Act of 1996, unless a state regulatory authority orders otherwise. A state regulatory authority may also exempt a rural local exchange carrier, as defined in section 251(f)(2) of the U.S. Communications Act of 1934, as amended by the Telecommunications Act of 1996, from the obligations contained in Section C.

### Article 12.7. Treatment by Major Suppliers

Each Party shall ensure that major suppliers in its territory accord suppliers of public telecommunications services of the other Party treatment no less favourable than such major suppliers accord in like circumstances to their subsidiaries, their affiliates, or non-affiliated service suppliers, regarding:

(a) the availability, provisioning, rates, or quality of like public telecommunications services; and

(b) the availability of technical interfaces necessary for interconnection.

### Article 12.8. Competitive Safeguards

Each Party shall maintain appropriate measures for the purpose of preventing suppliers who, alone or together, are a major supplier in its territory from engaging in or continuing anti- competitive practices, including in particular:

(a) engaging in anti-competitive cross- subsidization;

(b) using information obtained from competitors with anti-competitive results; and

(c) not making available, on a timely basis, to suppliers of public telecommunications services, technical information about essential facilities and commercially relevant information that are necessary for them to provide services.

### Article 12.9. Resale

1. Each Party shall ensure that major suppliers in its territory:

(a) offer for resale, at reasonable rates, (12-4) to suppliers of public telecommunications services of the other Party, public telecommunications services that such major supplier provides at retail to end users that are not suppliers of public telecommunications services; and

(b) do not impose unreasonable or discriminatory conditions or limitations on the resale of such services, (12-5)

2. Each Party may determine in accordance with its law and regulations which public telecommunications services must be offered for resale by major suppliers in accordance with paragraph 1, based on the need to promote competition or such other factors as the Party considers relevant.

(12-4) For the purposes of subparagraph (a): 1) a Party may determine reasonable rates through any methodology it considers appropriate; and 2) wholesale rates, set pursuant to a Party's law and regulations, shall be considered reasonable.

(12-5) Where provided in its law or regulations, a Party may prohibit a reseller that obtains, at wholesale rates, a public telecommunications service available at retail to only a limited category of subscribers from offering the service to a different category of subscribers.

## Article 12.10. Unbundling of Network Elements

Each Party shall provide its telecommunications regulatory body with the authority to require that major suppliers in its territory provide suppliers of public telecommunications services of the other Party access to network elements for the provision of public telecommunications services on an unbundled basis, and on terms and conditions, and at cost-oriented rates that are reasonable, non-discriminatory, and transparent.

## Article 12.11. Interconnection

*General Terms and Conditions*

1. Each Party shall ensure that major suppliers in its territory provide interconnection for the facilities and equipment of suppliers of public telecommunications services of the other Party:

(a) at any technically feasible point in the major supplier's network;

(b) under non-discriminatory terms, conditions (including technical standards and specifications), and rates;

(c) of a quality no less favourable than that provided by such major suppliers for their own like services, for like services of non-affiliated service suppliers, or for their subsidiaries or other affiliates;

(d) in a timely fashion, on terms, conditions (including technical standards and specifications), and cost-oriented rates, that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that suppliers secking interconnection need not pay for network components or facilities that they do not require for the service to be provided; and

(e) on request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities.

*Options for Interconnecting with Major Suppliers*

2. Each Party shall ensure that suppliers of public telecommunications services of the other Party may interconnect their facilities and equipment with those of major suppliers in its territory pursuant to at least one of the following options:

(a) a reference interconnection offer or another standard interconnection offer containing the rates, terms, and conditions that the major supplier offers generally to suppliers of public telecommunications services;

(b) the terms and conditions of an existing interconnection agreement;

(c) through negotiation of a new interconnection agreement; or

(d) arbitration.

*Public Availability of Interconnection Offers*

3. Each Party shall ensure that major suppliers in its territory make publicly available reference interconnection offers or other standard interconnection offers containing the rates, terms, and conditions that the major suppliers offer generally to suppliers of public telecommunications services.

*Public Availability of Procedures for Interconnection Negotiations*

4. Each Party shall ensure that applicable procedures for interconnection negotiations with major suppliers in its territory are made publicly available.

*Public Availability of Terms and Conditions for Interconnection with Major Suppliers*

5. Each Party shall ensure that the rates, terms, and conditions for interconnection with major suppliers:

(a) contained in reference interconnection offers or other standard interconnection offers approved by a telecommunications regulatory body; or

(b) determined by a telecommunications regulatory body through arbitration are made publicly available.

## Article 12.12. Provisioning and Pricing of Leased Circuit Services

1. Each Party shall ensure that major suppliers in its territory provide suppliers of public telecommunications services of the other Party leased circuit services that are public telecommunications services on terms and conditions, and at rates, that are reasonable, non- discriminatory (including with respect to timeliness), and transparent.

2. In carrying out paragraph 1, each Party shall provide its telecommunications regulatory body the authority to require major suppliers in its territory to offer such leased circuit services that are public telecommunications services to public telecommunications services suppliers of the other Party at capacity-based, cost-oriented prices.

## Article 12.13. Co-location

1. Subject to paragraphs 2 and 3, cach Party shall ensure that major suppliers in its territory provide to suppliers of public telecommunications services of the other Party physical co- location of equipment necessary for interconnection or access to unbundled network elements on terms and conditions, and at cost-oriented rates, that are reasonable, non-discriminatory (including with respect to timeliness), and transparent.

2. Where physical co-location is not practical for technical reasons or because of space limitations, each Party shall ensure that major suppliers facilitate alternative solutions, which may include:

(a) conditioning additional equipment space or providing virtual co-location, on terms and conditions, and at cost-oriented rates, that are reasonable, non-

discriminatory (including with respect to timeliness), and transparent;

(b) permitting facilities-based suppliers to locate equipment in a nearby building and to comnect such equipment to the major supplier's network;

(c) optimising the use of existing space; or (d) finding adjacent space.

3. Each Party may determine, in accordance with its law and regulations, which premises in its territory are subject to paragraphs 1 and 2.

## Article 12.14. Access to Poles, Ducts, Conduits, and Rights of Way

1. Each Party shall ensure that major suppliers in its territory provide access to poles, ducts, conduits, and rights of way owned or controlled by such major suppliers to suppliers of public telecommunications services of the other Party on terms and conditions, and at cost-oriented (12-6) rates, that are reasonable, non-discriminatory (including with respect to timeliness), and transparent.

2. Nothing in this Chapter shall prevent a Party from determining, under its law and regulations, which particular structures owned or controlled by major suppliers in its territory are required to be made available in accordance with paragraph 1, provided that this determination is based on a conclusion that such structures cannot feasibly be economically or technically substituted in order to provide a competing service.

(12-6) In the United States, the obligation to provide cost-oriented rates does not apply to those states that regulate such rates as a matter of state law.

# Section D. Other Measures

## Article 12.15. Flexibility In the Choice of Technology

Neither Party may prevent suppliers of public telecommunications services or suppliers of value- added services from choosing the technologies they wish to use to supply their services, including packet-based services and commercial mobile wireless services, subject to requirements necessary to satisfy legitimate public policy interests.

## Article 12.16. Conditions for the Supply of Value-added Services

1. Neither Party may require an enterprise in its territory that supplies value-added services over facilities that it does not own to:

(a) supply such services to the public generally;

(b) cost-justify its rates for such services;

(c) file a tariff for such services;

(d) interconnect its networks with any particular customer for the supply of such services; or

(e) conform with any particular standard or technical regulation for interconnection other than for interconnection to a public telecommunications network,

except to remedy a practice that the Party has found in a particular case to be anti-competitive under its law or regulations or to otherwise promote competition or safeguard the interests of consumers.

2. For greater clarity, nothing in this Article shall exempt a Party from complying with the obligations in Articles 12.2 through 14.

## Article 12.17. Independent Regulatory Bodies and Divestment

1. Each Party shall ensure that any telecommunications regulatory body that it establishes or maintains is independent and separate from, and not accountable to, any supplier of public telecommunications service.

2. Each Party shall ensure that the decisions and procedures of its telecommunications regulatory body are impartial with respect to all interested persons. To this end, each Party shall ensure that its regulatory body does not hold a financial interest in any supplier of public telecommunications services, and that any financial interest that the Party holds in a supplier of a public telecommunications services does not influence the decisions and procedures of its telecommunications regulatory body.

3. Where a Party has an ownership interest in a supplier of a public telecommunications service and it intends to reduce or eliminate that interest, it shall notify the other Party as soon as feasible.

## Article 12.18. Universal Service

Each Party shall administer any universal service obligation that it maintains in a transparent, non-discriminatory, and competitively neutral manner and shall ensure that its universal service obligation is not more burdensome than necessary for the kind of universal service that it has defined.

## Article 12.19. Regulatory Procedures

1. Each Party shall ensure that rules, including the basis for such rulemaking, of its telecommunications regulatory body are promptly published or otherwise made available to all interested persons.

2. When a Party requires a supplier of public telecommunications services to have a license, the Party shall make publicly available:

(a) all the licensing criteria and procedures it applies, including any standard terms and conditions of the license;

(b) the time it normally requires to reach a decision concerning an application for a license; and

(c) the terms and conditions of all licenses it has issued.

3. Each Party shall ensure that, on request, an applicant receives the reasons for the denial of a license.

4. Each Party shall ensure that tariffs filed with its telecommunications regulatory body are promptly published or otherwise made available to all interested parties.

## Article 12.20. Allocation and Use of Scarce Telecommunications Resources

1. Each Party shall administer its procedures for the allocation and use of scarce telecommunications resources, including frequencies, numbers, and rights of way, in an objective, timely, transparent, and non-discriminatory manner. (12-7)

2. Each Party shall make publicly available the current state of allocated frequency bands but shall not be required to provide detailed identification of frequencies assigned for specific government uses.

3. For greater clarity, measures regarding the allocation and assignment of spectrum and regarding frequency management are not measures that are per se inconsistent with Article 10.4 (Market Access), which is applied to Chapter Eleven (Investment) through Article 10.1.3 (Scope and Coverage). Accordingly, each Party retains the right to establish and apply its spectrum and frequency management policies, which may limit the number of suppliers of public telecommunications services, provided that it does so in a manner that is consistent with this Agreement. Each Party also retains the right to allocate frequency bands taking into account current and future needs.

4. When making a spectrum allocation for non-government telecommunications services, each Party shall endeavour to rely on an open and transparent public comment process that considers the overall public interest. Each Party shall endeavour to rely generally on market-based approaches in assigning spectrum for terrestrial non-government telecommunications services.

(12-7) For greater clarity, telecommunications resources do not include spectrum allocated and used for the broadcast of radio and television programming.

## Article 12.21. Enforcement

1. Each Party shall provide its relevant regulatory body with the authority to enforce compliance with the Party's measures relating to the obligations set out in Articles 12.2 through 12.7 and Articles 12.9 through 12.14. (12-8)

2. Such authority shall include the ability to impose, or seek from administrative or judicial bodies, effective sanctions, which may include financial penalties, injunctive relief (on an interim or final basis), or the modification, suspension, and revocation of licenses.

(12-8) For the purpose of Australia's obligations under this Chapter, notwithstanding this paragraph, a supplier of public telecommunications services may be required to apply to a judicial body for the enforcement of a determination by a regulatory body in relation to the resolution of a dispute under a domestic measure relating to the obligations in Article 12.11.

## Article 12.22. Resolution of Telecommunications Disputes and Appeal Processes

Further to Articles 20.4 (Administrative Agency Processes) and 20.5 (Review and Appeal), each Party shall ensure that:

(a) enterprises of the other Party may seek timely review by a telecommunications regulatory body or other relevant body to resolve disputes regarding the Party's measures relating to a matter set out in Articles 12.2 through 12.7 and Articles 12.9 through 12.14;

(b) suppliers of public telecommunications of the other Party that have requested interconnection with a major supplier in the Party's territory will have recourse to a telecommunications regulatory body: (12-9)

(i) at any time; or

(ii) after a reasonable and publicly specified period,

to review disputes regarding appropriate terms, conditions, and rates for interconnection;

(c) any enterprise that is aggrieved or whose interests are adversely affected by a determination or decision of the Party's telecommunications regulatory body may obtain judicial review of such determination or decision by an impartial and independent judicial authority. An application for judicial review shall not constitute grounds for non-compliance with such a determination or decision unless stayed by the relevant judicial body.

(12-9) In the United States, this body may be a state regulatory authority.

## Article 12.23. Forbearance (12-10)

(12-10) For the purposes of this Agreement, the extent to which the United States telecommunications regulatory body may forbear is governed by section 10 of the U.S. Communications Act of 1934, as amended by the Telecommunications Act of 1996.

1. The Parties recognize the importance of relying on market forces to achieve wide choices in the supply of telecommunications services. To this end, each Party may forebear from applying a regulation or other measure, to the extent provided for in the Party's law, to a service that the Party classifies as a public telecommunications service if its telecommunications regulatory body determines that:

(a) enforcement of such regulation is not necessary to prevent unreasonable or discriminatory practices;

(b) enforcement of such regulation is not necessary for the protection of consumers; and

(c) forbearance is consistent with the public interest, including promoting and enhancing competition among suppliers of public telecommunications services.

2. Each Party shall provide interested persons of the other Party adequate public notice and opportunity to comment before the Party's telecommunication regulatory body makes any decision regarding forbearance.

3. Each Party shall ensure that any enterprise aggrieved by a decision of the Party's regulatory body regarding forbearance may obtain judicial review of such decision by an independent and impartial judicial authority.

## Article 12.24. Relationship to other Chapters

In the event of any inconsistency between this Chapter and another Chapter, this Chapter shall prevail to the extent of the inconsistency.

## Article 12.25. Definitions

For the purposes of this Chapter:

1. **commercial mobile services** means public telecommunications services supplied through mobile wireless means;

2. **cost-oriented** means based on cost, and may include a reasonable profit, and may involve different cost methodologies for different facilities or services;

3. **dialing parity** means the ability of an end-user to use an equal number of digits to access a like public telecommunications service, regardless of the public telecommunications service supplier chosen by such end-user and in a way that involves no unreasonable dialing delays;

4. **end-user** means a final consumer of or subscriber to a public telecommunications service, including a service supplier other than a supplier of public telecommunications services;

5. **essential facilities** means facilities of a public telecommunications network or service that:

(a) are exclusively or predominantly provided by a single or limited number of suppliers, and

(b) cannot feasibly be economically or technically substituted in order to provide a service;

6. **interconnection** means linking with suppliers providing public telecommunications services in order to allow the users of one supplier to communicate with the users of another supplier and to access services provided by another supplier;

7. l**eased circuit** means telecommunications facilities between two or more designated points that are set aside for the dedicated use of, or availability to, a particular customer or other users;

8. **major supplier** means a supplier of a public telecommunications service that has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for public telecommunications services as a result of control over essential facilities or use of its position in the market;

9. **network element** means a facility or equipment used in supplying a public telecommunications service, including features, functions, and capabilities provided by means of such a facility or equipment;

10. **non-discriminatory** means treatment no less favourable than that accorded to any other user of like public telecommunications services in like circumstances;

11. **number portability** means the ability of end-users of public telecommunications services to retain, at the same location, existing telephone numbers when switching between suppliers of like public telecommunications services;

12. **physical co-location** means physical access to space in order to install, maintain, or repair equipment, at premises owned or controlled and used by a major supplier to supply public telecommunications services;

13. **public telecommunications service** means any telecommunications service that a Party requires, explicitly or in effect, to be offered to the public generally. Such services may include, inter alia, telephone and data transmission typically involving customer-supplied information between two or more points without any end-to-end change in the form or content of the customer's information; (12-11)

14. **telecommunications** means the transmission and reception of signals by any electromagnetic means;

15. **telecommunications regulatory body** means a central level body responsible for the regulation of telecommunications;

16. **user** means an end-user or a supplier of public telecommunications services; and

17. **value-added services** means services that add value to telecommunications services through enhanced functionality. More specifically, with respect to the obligations of the United States under this Chapter, these are services as defined in 47 USC § 153(20), and with respect to the obligations of Australia under this Chapter, value-added services are telecommunications services for which suppliers "add value" to customer information by enhancing its form or content or by providing for its storage and retrieval.

(12-11) Because the United States does not classify services described in 47 USC § 153(20) as public telecommunications services, these services are not considered public telecommunications services for the purposes of this Agreement. This does not prejudice either Party's position in the WTO on the scope and definition of these services.

# Chapter THIRTEEN. Financial Services

## Article 13.1. Scope and Coverage

1. This Chapter applies to measures adopted or maintained by a Party relating to: (a) financial institutions of the other Party; (b) investors of the other Party, and investments of such investors, in financial institutions in the Party's territory; and (c) cross-border trade in financial services.

2. Chapters Ten (Cross-Border Trade in Services) and Eleven (Investment) apply to measures described in paragraph 1 only to the extent that such Chapters or Articles of such Chapters are incorporated into this Chapter.

(a) Articles 10.11 (Denial of Benefits), 11.7 (Expropriation and Compensation), 11.8 (Transfers), 11.11 (nvestment and the Environment), 11.12 (Denial of Benefits), and 11.14 (Special Formalities and Information Requirements) are hereby incorporated into and made a part of this Chapter.

(b) Article 10.10 (Transfers and Payments) is incorporated into and made a part of this Chapter to the extent that cross-border trade in financial services is subject to obligations pursuant to Article 13.5.

3. This Chapter does not apply to measures adopted or maintained by a Party relating to:

(a) activities or services forming part of a public retirement plan or statutory system of social security; or

(b) activities or services conducted for the account or with the guarantee or using the

financial resources of the Party, including its public entities,

except that if a Party allows any of the activities or services referred to in subparagraphs (a) or (b) to be conducted by its financial institutions in competition with a public entity or a financial institution, this Chapter shall apply to measures of that Party relating to such activities or services.

## Article 13.2. National Treatment

1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords to its own investors, in like circumstances, with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of financial institutions and investments in financial institutions in its territory.

2. Each Party shall accord to financial institutions of the other Party and to investments of investors of the other Party in financial institutions treatment no less favourable than that it accords to its own financial institutions, and to investments of its own investors in financial institutions, in like circumstances, with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of financial institutions and investments.

## Article 13.3. Most-favoured-nation Treatment

Each Party shall accord to investors of the other Party, financial institutions of the other Party, investments of investors in financial institutions, and cross-border financial service suppliers of the other Party treatment no less favourable than that it accords to the investors, financial institutions, investments of investors in financial institutions, and cross-border financial service suppliers of a non-Party, in like circumstances.

## Article 13.4. Market Access for Financial Institutions

A Party shall not adopt or maintain, with respect to investors of the other Party, cither on the basis of a regional subdivision or on the basis of its entire territory, measures that:

(a) impose limitations on

(i) the number of financial institutions, whether in the form of numerical quotas, monopolies, exclusive service suppliers, or the requirement of an economic needs test;

(ii) the total value of financial service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;

(iii) the total number of financial service operations or on the total quantity of financial services output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test; (13-1) or

(iv) the total number of natural persons that may be employed in a particular financial service sector or that a financial institution may employ and who are necessary for, and directly related to, the supply of a specific financial service in the form of numerical quotas or the requirement of an economic needs test; or

(b) restrict or require specific types of legal entity or joint venture through which a financial institution may supply a service.

(13-1) This clause does not cover measures of a Party which limit inputs for the supply of financial services.

## Article 13.5. Cross-border Trade

1. Each Party shall permit, under terms and conditions that accord national treatment, cross- border financial service suppliers of the other Party to supply the services specified in Annex 13- A. National treatment requires that a Party shall accord to cross-border financial service suppliers of the other Party treatment no less favourable than that which it accords to its own financial service suppliers, in like circumstances, with respect to the supply of the relevant service.

2. Each Party shall permit persons located in its territory, and its nationals wherever located, to purchase financial services from cross-border financial service suppliers of the other Party located in the territory of the other Party. This obligation

does not require a Party to permit such suppliers to do business or solicit in its territory. Each Party may define "doing business" and "solicitation" for the purposes of this obligation, provided that those definitions are not inconsistent with paragraph 1.

3. Without prejudice to other means of prudential regulation of cross-border trade in financial services, a Party may require the registration of cross-border financial service suppliers of the other Party and of financial instruments.

## Article 13.6. New Financial Services

Each Party shall permit a financial institution of the other Party to supply any new financial service that the Party would permit its own financial institutions, in like circumstances, to supply without additional legislative action by the first Party. Notwithstanding Article 13.4(b), a Party may determine the institutional and juridical form through which the new financial service may be supplied and may require authorisation for the supply of the service. Where a Party requires authorisation to supply a new financial service, a decision shall be made within a reasonable time and the authorisation may only be refused for prudential reasons. (13-2)

(13-2) The Parties understand that nothing in Article 13.6 prevents a financial institution of a Party from applying to the other Party to consider authorising the supply of a financial service that is supplied in neither Party's territory. Such application shall be subject to the law of the Party to which the application is made and, for greater certainty, shall not be subject to the obligations of Article 13.6.

## Article 13.7. Treatment of Certain Information

Nothing in this Chapter requires a Party to furnish or allow access to information related to the financial affairs and accounts of individual customers of financial institutions or cross-border financial service suppliers.

## Article 13.8. Senior Management and Boards of Directors

1. A Party may not require financial institutions of the other Party to engage individuals of any particular nationality as senior managerial or other essential personnel.

2. A Party may not require that more than a minority of the board of directors of a financial institution of the other Party be composed of nationals of the Party, persons residing in the territory of the Party, or a combination thereof.

## Article 13.9. Non-conforming Measures

1. Articles 13.2 through 13.5 and 13.8 do not apply to:

(a) any existing non-conforming measure that is maintained by a Party at

(i) the central level of government, as set out by that Party in Section A of its Schedule to Annex II,

(ii) a regional level of government, as set out by that Party in Section A of its Schedule to Annex III, or

(iii) a local level of government;

(b) the continuation or prompt renewal of any non-conforming measure referred to in sub-paragraph (a); or

(c) an amendment to any non-conforming measure referred to in sub-paragraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed

(i) immediately before the amendment, with Articles 13.2, 13.3, 13.4, or 13.8; or

(ii) on the date of entry into force of the Agreement, with Article 13.5.

2. Articles 13.2 through 13.5 and 13.8 do not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors, or activities, as set out in Section B of its Schedule to Annex III.

3. Annex 13-B sets out certain specific commitments by each Party.

4. A non-conforming measure set out in a Party's Schedule to Annex I or II as not subject to Articles 10.2, 10.3, 11.3, 11.4, or 11.10 shall be treated as a non-conforming measure not subject to Articles 13.2, 13.3, 13.5.1, or 13.8.2, as the case may be, to the extent that the measure, sector, sub-sector, or activity set out in the non-conforming measure is covered by this

Chapter.

## Article 13.10. Exceptions

1. Notwithstanding any other provision of this Chapter or Chapters Eleven (Investment), Twelve (Telecommunications), or Sixteen (Electronic Commerce), including specifically Article 12.24 (Relationship to Other Chapters), and Article 10.1 (Scope and Coverage) with respect to the supply of financial services in the territory of a Party by an investor of the other Party or a covered investment, a Party shall not be prevented from adopting or maintaining measures for prudential reasons, including for the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial institution or cross-border financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform to the provisions of this Agreement referred to in this paragraph, they shall not be used as a means of avoiding the Party's commitments or obligations under such provisions.

2. Nothing in this Chapter or Chapters Eleven, Twelve, or Sixteen, including specifically Article 12.24, and Article 10.1 with respect to the supply of financial services in the territory of a Party by an investor of the other Party or a covered investment, applies to non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies. This paragraph shall not affect a Party's obligations under Article 11.9 (Performance Requirements) with respect to measures covered by Chapter Eleven, or under Articles 10.10 or 11.8.

3. Notwithstanding Articles 10.10 and 11.8, as incorporated into this Chapter, a Party may prevent or limit transfers by a financial institution or cross-border financial service supplier to, or for the benefit of, an affiliate of or person related to such institution or supplier, through the equitable, non-discriminatory, and good faith application of measures relating to maintenance of the safety, soundness, integrity, or financial responsibility of financial institutions or cross-border financial service suppliers. This paragraph does not prejudice any other provision of this Agreement that permits a Party to restrict transfers.

4. For greater certainty, nothing in this Chapter shall be construed to prevent the adoption or enforcement by a Party of measures necessary to secure compliance with laws or regulations that are not inconsistent with this Chapter, including those relating to the prevention of deceptive and fraudulent practices or to deal with the effects of a default on financial services contracts, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on investment in financial institutions or cross-border trade in financial services.

## Article 13.11. Regulatory Transparency

1. The Parties recognize that transparent regulations and policies governing the activities of financial institutions and cross-border financial service suppliers are important in facilitating their ability to gain access to and operate in each other's market. Each Party commits to promote regulatory transparency in financial services.

2. Each Party shall ensure that all measures of general application to which this Chapter applies are administered in a reasonable, objective, and impartial manner.

3. In lieu of Article 20.2.2 (Publication), each Party shall, to the extent practicable,

(a) publish in advance any regulations of general application relating to the subject matter of this Chapter that it proposes to adopt and the purpose of the regulation; and

(b) provide interested persons and the other Party a reasonable opportunity to comment on such proposed regulations.

4. At the time it adopts final regulations, a Party should, to the extent practicable, address in writing substantive comments received from interested persons with respect to the proposed regulations.

5. To the extent practicable, each Party should provide notice of the requirements of final regulations a reasonable time prior to their effective date.

6. Each Party shall ensure that the rules of general application adopted or maintained by self-regulatory organisations of the Party are promptly published or otherwise made available in such a manner as to enable interested persons to become acquainted with them.

7. Each Party shall maintain or establish appropriate mechanisms for responding to inquiries from interested persons regarding measures of general application covered by this Chapter.

8. Each Party's regulatory authorities shall make publicly available their requirements, including any documentation

required, for completing applications relating to the supply of financial services.

9. On the request of an applicant, a Party's regulatory authority shall inform the applicant of the status of its application. If the authority requires additional information from the applicant, it shall notify the applicant without undue delay.

10. A Party's regulatory authority shall make an administrative decision on a completed application of an investor in a financial institution, a financial institution, or a cross-border financial service supplier of the other Party relating to the supply of a financial service within 120 days, and shall promptly notify the applicant of the decision. An application shall not be considered complete until all relevant hearings are held and all necessary information is received. Where it is not practicable for a decision to be made within 120 days, the regulatory authority shall notify the applicant without undue delay and shall endeavour to make the decision within a reasonable time thereafter.

11. On the request of an unsuccessful applicant, a regulatory authority that has denied an application shall, to the extent practicable, inform the applicant of the reasons for denial of the application.

## Article 13.12. Self-regulatory Organisations

Where a Party requires a financial institution or a cross-border financial service supplier of the other Party to be a member of, participate in, or have access to, a self-regulatory organisation to provide a financial service in or into its territory, the Party shall ensure observance of the obligations of Articles 13.2 and 13.3 by such self-regulatory organisation.

## Article 13.13. Payment and Clearing Systems

Under terms and conditions that accord national treatment, each Party shall grant financial institutions of the other Party access to payment and clearing systems operated by public entities, and to official funding and refinancing facilities available in the normal course of ordinary business. This paragraph is not intended to confer access to the Party's lender of last resort facilities.

## Article 13.14. Expedited Availability of Insurance Services

The Parties recognise the importance of maintaining and developing regulatory procedures to expedite the offering of insurance services by licensed suppliers.

## Article 13.15. Recognition

1. A Party may recognise prudential measures of a non-Party in the application of measures covered by this Chapter. Such recognition may be:

(a) accorded autonomously; (b) achieved through harmonisation or other means; or (c) based upon an agreement or arrangement with the non-Party.

2. A Party according recognition of prudential measures under paragraph 1 shall provide adequate opportunity to the other Party to demonstrate that circumstances exist in which there are or would be equivalent regulation, oversight, implementation of regulation, and, if appropriate, procedures concerning the sharing of information between the Parties.

3. Where a Party accords recognition of prudential measures under paragraph 1(c) and the circumstances set out in paragraph 2 exist, the Party shall provide adequate opportunity to the other Party to negotiate accession to the agreement or arrangement, or to negotiate a comparable agreement or arrangement.

## Article 13.16. Financial Services Committee

1. The Parties hereby establish a Financial Services Committee. The principal representative of each Party shall be an official of the Party's authority responsible for financial services set out in Annex 13-C.

2. The Committee shall:

(a) supervise the implementation of this Chapter and its further elaboration, and

(b) consider issues regarding financial services that are referred to it by a Party, including ways to further integrate financial services sectors between the Parties.

3. The Committee shall meet annually, or as otherwise agreed, to assess the functioning of this Agreement as it applies to

financial services. The Committee shall inform the Joint Committee established under Article 21.1 (Joint Committee) of the results of each meeting.

## Article 13.17. Consultations

1. A Party may request consultations with the other Party regarding any matter arising under this Agreement that affects financial services. The other Party shall give sympathetic consideration to the request. The Parties shall report the results of their consultations to the Committee.

2. Consultations under this Article shall include officials of the authorities specified in Annex 13-C.

## Article 13.18. Dispute Settlement

1. Section B of Chapter Twenty-One (Dispute Settlement) applies as modified by this Article to the settlement of disputes arising under this Chapter.

2. When a Party claims that a dispute arises under this Chapter, Article 21.7 shall apply, except that:

(a) where the Parties so agree, the panel shall be composed entirely of panellists meeting the qualifications in paragraph 3; and

(b) in any other case,

(i) each Party may select panellists meeting the qualifications set out in paragraph 3 or in Article 21.7.3, and

(ii) if the Party complained against invokes Article 13.10, the chair of the panel shall meet the qualifications set out in paragraph 3, unless the Parties agree otherwise.

3. Financial services panellists shall:

(a) have expertise or experience in financial services law or practice, which may include the regulation of financial institutions;

(b) be chosen strictly on the basis of objectivity, reliability, and sound judgment;

(c) be independent of, and not be affiliated with or take instructions from, either Party; and not have a conflict of interest or appearance thereof, as set forth ina code of conduct to be established by the Joint Committee; and

(d) comply with the code of conduct.

4. Further to Article 21.11 (Non-implementation), where a panel finds a measure to be inconsistent with this Agreement and the measure under dispute affects:

(a) only a sector other than the financial services sector, the complaining Party may not suspend benefits in the financial services sector; or

(b) the financial services sector and any other sector, the complaining Party may suspend benefits in the financial services sector that have an effect equivalent to the effect of the measure in the Party's financial services sector.

## Article 13.19. Definitions

For the purposes of this Chapter:

1. **cross-border financial service supplier of a Party** means a person of a Party that is engaged in the business of supplying a financial service within the territory of the Party and that seeks to supply or supplies a financial service through the cross-border supply of such services;

2. **cross-border trade in financial services** or **cross-border supply of financial services** means the supply of a financial service:

(a) from the territory of one Party into the territory of the other Party,

(b) in the territory of one Party by a person of that Party to a person of the other Party, or

(c) by a national of one Party in the territory of the other Party,

but does not include the supply of a financial service in the territory of a Party by an investment in that territory;

3. **financial institution** means any financial intermediary or other enterprise that is authorised to do business and regulated or supervised as a financial institution under the law of the Party in whose territory it is located;

4. **financial institution of the other Party** means a financial institution, including a branch, located in the territory of a Party that is controlled by persons of the other Party;

5. **financial service** means any service of a financial nature. Financial services include all insurance and insurance-related services, and all banking and other financial services (excluding insurance), as well as services incidental or auxiliary to a service of a financial nature. Financial services include the following activities:

*insurance and insurance-related services*

(a) Direct insurance (including co-insurance):

(i) life,

(ii) non-life;

(b) Reinsurance and retrocession;

(c) Insurance intermediation, such as brokerage and agency; and

(d) Services auxiliary to insurance, such as consultancy, actuarial, risk assessment, and claim settlement services.

*banking and other financial services (excluding insurance)*

(e) Acceptance of deposits and other repayable funds from the public;

(f) Lending of all types, including consumer credit, mortgage credit, factoring, and financing of commercial transactions;

(g) Financial leasing;

(h) All payment and money transmission services, including credit, charge, and debit cards, travellers checks, and bankers drafts;

(i) Guarantees and commitments;

(j) Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market, or otherwise, the following:

(i) money market instruments (including checks, bills, certificates of deposits);

(ii) foreign exchange;

(iii) derivative products including, but not limited to, futures and options;

(iv) exchange rate and interest rate instruments, including products such as swaps, forward rate agreements;

(v) transferable securities; and

(vi) other negotiable instruments and financial assets, including bullion;

(k) Participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues;

(l) Money broking;

(m) Asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository, and trust services;

(n) Settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments;

(0) Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services;

(p) Advisory, intermediation, and other auxiliary financial services on all the activities listed in clauses (c) through (0), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy;

6. **financial service supplier of a Party** means a person of a Party that is engaged in the business of supplying a financial service within the territory of that Party;

7. **investment** means "investment" as defined in Article 11.17.4 (Definitions), except that, with respect to "loans" and "debt instruments" referred to in that Article:

(a) a loan to or debt instrument issued by a financial institution is an investment only where it is treated as regulatory capital by the Party in whose territory the financial institution is located; and

(b) a loan granted by or debt instrument owned by a financial institution, other than a loan to or debt instrument of a financial institution referred to in sub-paragraph (a), is not an investment.

For greater certainty, a loan granted by or debt instrument owned by a cross-border financial service supplier, other than a loan to or debt instrument issued by a financial institution, is an investment for the purposes of Chapter Eleven, if such loan or debt instrument meets the criteria for investments set out in Article 11.17.4;

8. **investor of a Party** means a Party, or a person of a Party, that secks to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a citizen of both Parties or a Party and a non-Party shall be deemed to be exclusively a citizen of the State of his or her dominant and effective nationality;

9. **new financial service** means a financial service not supplied in the Party's territory that is supplied within the territory of the other Party, and includes any new form of delivery of a financial service or the sale of a financial product that is not sold in the Party's territory;

10. **person of a Party** means "person of a Party" as defined in Article 1.2 (Establishment of a Free Trade Area and General Definitions) and, for greater certainty, does not include a branch of an enterprise of a non-Party;

11. **public entity** means a central bank or monetary authority of a Party, or any financial institution owned or controlled by a Party; for greater certainty, a public entity (13-3) shall not be considered a designated monopoly or a state enterprise for the purposes of Chapter Fourteen (Competition); and

12. **self-regulatory organisation** means any non-governmental body, including any securities or futures exchange or market, clearing agency, or other organisation or association, that exercises its own or delegated regulatory or supervisory authority over financial service suppliers or financial institutions; for greater certainty, a self-regulatory organisation shall not be considered a designated monopoly for the purposes of Chapter Fourteen (Competition).

(13-3) The Federal Deposit Insurance Corporation of the United States shall be deemed to be within the definition of public entity for purposes of Chapter Fourteen (Competition).

# Chapter FOURTEEN. Competition-related Matters

## Article 14.1. Objectives

Recognizing that the conduct subject to this Chapter has the potential to restrict bilateral trade and investment, the Parties believe that proscribing such conduct, implementing policies that promote economic efficiency and consumer welfare, and cooperating on matters covered by this Chapter will help secure the benefits of this Agreement.

## Article 14.2. Competition Law and Anticompetitive Business Conduct

1. Each Party shall maintain or adopt measures to proscribe anticompetitive business conduct and take appropriate action with respect thereto, recognizing that such measures will help realise the objectives of this Agreement. To this end, the Parties shall consult from time to time about the effectiveness of measures that a Party has undertaken. Each Party shall ensure that a person subject to the imposition of a sanction or remedy for violation of such measures is provided with the opportunity to be heard and to present evidence, and to seck review of such sanction or remedy in a court or independent tribunal of that Party.

2. Each Party shall maintain an authority or authorities responsible for the enforcement of its national competition laws. The

enforcement policy of each Party's central government authorities responsible for the enforcement of such laws includes treating non-nationals no less favourably than nationals in like circumstances, and each Party's authorities intend to maintain this policy, in that regard.

3. The Parties recognize the importance of cooperation and coordination between their respective authorities to further effective competition law enforcement in the free trade area. The Parties shall cooperate in relation to the enforcement of competition laws and policy, including through mutual assistance, notification, consultation, and exchange of information.

(a) The Parties recognize their existing mechanisms for cooperation in relation to competition law enforcement, specifically:

(i) *The Agreement between the Government of Australia and the Government of the United States of America relating to Cooperation on Antitrust Matters of 1982*; and

(ii) *The Agreement between the Government of Australia and the Government of the United States of America on Mutual Antitrust Enforcement Assistance of 1999*.

(b) The Parties shall work to further strengthen their cooperation in these areas. Such cooperation shall include consideration by a Party's central government authorities responsible for the enforcement of its competition laws, where feasible and appropriate, of a request by the other Party's central government authorities responsible for the enforcement of its competition laws to initiate or expand enforcement activities.

4. To further advance their cooperation, the Parties shall examine the scope for strengthening support for, and minimizing legal impediments to, the effective enforcement of each other's competition laws and policies. The Parties shall establish a joint working group with the goal of seeking to reach a common view, by the first meeting of the Joint Committee established pursuant to Chapter 21 (Institutional Arrangements and Dispute Settlement), of appropriate steps to enhance their respective legal and regulatory regimes in that regard.

## Article 14.3. Designated Monopolies

1. Recognizing that designated monopolies should not operate in a manner that creates obstacles to trade and investment, each Party shall ensure that any privately-owned monopoly that it designates after the date of entry into force of this Agreement and any government monopoly that it designates or has designated:

(a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it in connection with the monopoly good or service, such as the power to grant import or export licenses, approve commercial transactions, or impose quotas, fees, or other charges;

(b) acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market, including with regard to price, quality, availability, marketability, transportation, and other terms and conditions of purchase or sale, except to comply with any terms of its designation that are not inconsistent with subparagraph (c) or (d);

(c) provides non-discriminatory treatment to covered investments, to goods of the other Party, and to service suppliers of the other Party in its purchase or sale of the monopoly good or service in the relevant market; and

(d) does not use its monopoly position to engage, either directly or indirectly, including through its dealings with its parent, subsidiaries, or other enterprises with common ownership, in anticompetitive practices in a non-monopolized market in its territory, where such practices adversely affect covered investments.

2. Nothing in this Chapter shall be construed as preventing a Party from designating a monopoly.

3. This Article does not apply to government procurement.

## Article 14.4. State Enterprises and Related Matters

1. The Parties recognize that state enterprises should not operate in a manner that creates obstacles to trade and investment. In that light, each Party shall ensure that any state enterprise that it establishes or maintains:

(a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such enterprise exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges; and

(b) accords non-discriminatory treatment in the sale of its goods or services.

2. The United States shall ensure that anticompetitive activities by sub-federal state enterprises are not excluded from the reach of its national antitrust laws solely by reason of their status as sub-federal state enterprises, to the extent that their activities are not protected by the State Action Doctrine.

3. Australia shall take reasonable measures, including through its policy of competitive neutrality, to ensure that its governments at all levels do not provide any competitive advantage to any government businesses simply because they are government-owned. This paragraph applies to the business activities of government businesses and not to their non-business, non- commercial activities. Australia shall ensure that its competitive neutrality complaints offices treat complaints lodged by the United States, or persons of the United States, no less favourably than complaints lodged by persons or government bodies of Australia.

## Article 14.5. Differences In Pricing

Article 14.3 and 14.4 shall not be construed as preventing a monopoly or state enterprise from charging different prices in different markets, or within the same market, where such differences are based on normal commercial considerations, such as taking account of supply and demand conditions.

## Article 14.6. Cross Border Consumer Protection

1. The Parties recognize the importance of cooperation and coordination on matters related to their consumer protection laws in order to enhance consumer welfare in the free trade area. Accordingly, the Parties shall cooperate in the enforcement of their consumer protection laws.

2. The Parties recognize the existing mechanisms for cooperation in relation to consumer protection, including:

(a) *the Agreement between the Federal Trade Commission of the United States of America and the Australian Competition and Consumer Commission on the Mutual Enforcement Assistance in Consumer Protection Matters of 2000*;

(b) *the OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders of 2003*; and

(c) *the International Consumer Protection and Enforcement Network (ICPEN).*

3. The Parties shall further strengthen cooperation and coordination among their respective agencies, including the U.S. Federal Trade Commission (FTC) and the Australian Competition and Consumer Commission (ACCC) in areas of mutual concern, in particular fraudulent and deceptive commercial practices against consumers:

(a) in the development of appropriate procedures for

(i) cooperating in the prompt detection of consumer protection law violations affecting consumers or markets in both Parties' territories,

(ii) notifying each other of significant investigations and proceedings involving consumer protection law violations occurring or originating in the territory of the other Party or significantly affecting consumers or markets in the territory of the other Party,

(iii) exchanging information related to the administration of their consumer protection laws,

(iv) providing enforcement and investigative assistance to each other to the extent compatible with each Party's laws, in appropriate consumer protection law cases, and

(v) consulting and coordinating on enforcement actions against consumer protection law violations that have a significant cross-border dimension;

(b) in the development of coordinated strategies to combat fraudulent and deceptive commercial practices against consumers, both bilaterally and multilaterally; and

(c) through joint study of additional measures to enhance the scope and effectiveness of information sharing, investigative assistance, and cooperation and coordination in the enforcement of the Parties' respective consumer protection laws, including the use of investigative powers and participation in appropriate court proceedings.

4. Nothing in this Article shall limit the discretion of the FTC or ACCC to decide whether to take action on particular requests

by the other agency, or shall preclude either agency from taking action with respect to particular cases.

5. In addition, the Parties shall identify, in areas of mutual concern and consistent with their important interests, obstacles to effective cross-border cooperation in the enforcement of consumer protection laws, and shall consider changing their domestic frameworks to overcome such obstacles and enhance the ability of the Parties to cooperate, share information, and assist in the enforcement of each other's consumer protection laws, including, if appropriate, adopting or amending national legislation to overcome such obstacles.

## Article 14.7. Recognition and Enforcement of Monetary Judgments

1. The Parties recognize the importance of civil proceedings by the FTC, U.S. Securities and Exchange Commission, U.S. Commodity Futures Trading Commission, Australian Securities and Investments Commission, and the ACCC to provide monetary restitution to consumers, investors, or customers who have suffered economic harm as a result of being deceived, defrauded, or misled. The Parties further recognize the importance of facilitating cross-border recognition and enforcement of monetary judgments obtained for such purposes.

2. When an agency listed in paragraph 1 obtains a civil monetary judgment from a judicial authority of a Party for the purpose of providing monetary restitution to consumers, investors, or customers who have suffered economic harm as a result of being deceived, defrauded, or misled, a judicial authority of the other Party generally should not disqualify such a monetary judgment from recognition or enforcement on the ground that it is penal or revenue in nature or based on other foreign public law, including where such judgment contains provisions for recovery of monies or other disposition in the event that restitution is impractical or for payment of expenses related to the collection or distribution of such a monetary judgment.

3. The judicial authorities of a Party should consider the recognition or enforcement of provisions for monetary judgments described in paragraph 2 separately from other provisions of the judgment, to the extent such other provisions are deemed to be penal or revenue in nature or based on other foreign public law for the purposes of recognition or enforcement.

4. Nothing in this Article is intended to affect whether any other category of law or judgment is appropriately viewed as penal or revenue in nature or based on other foreign public law for the purposes of the recognition or enforcement of foreign judgments.

5. Each Party's agencies listed in paragraph 1 should cooperate with the relevant agencies of the other Party, where feasible and appropriate, in facilitating the identification of consumers, investors, and customers described in paragraph 2 and on other matters relating to payment of monetary judgments.

6. The Parties shall work together to examine the scope for establishing greater bilateral recognition of foreign judgments of their respective judicial authorities obtained for the benefit of consumers, investors, or customers who have suffered economic harm as a result of being deceived, defrauded, or misled; and shall report on the feasibility and appropriateness of, and progress toward, greater recognition of such foreign judgments at the first meeting of the Joint Committee.

## Article 14.8. Transparency

1. The Parties recognize the value of transparency in their competition policies.

2. On request of a Party, each Party shall make available to the other Party public information concerning:

(a) the enforcement of its measures proscribing anticompetitive business conduct;

(b) its state enterprises, government businesses, and public or private designated monopolies, provided that requests for such information shall indicate the entities involved, specify the particular products and markets concerned, and include indicia that these entities may be engaging in practices that may hinder trade or investment between the Parties; and

(c) exemptions and immunities to its measures proscribing anticompetitive business conduct, provided that requests shall specify the particular goods and markets of concern and include indicia that the exemptions and immunities may hinder trade or investment between the Parties.

## Article 14.9. Cooperation

The Parties recognize that policies related to matters covered by this Chapter can be a force for open and competitive markets domestically and internationally. They also recognize that such policies can have an effect on investment and on the extent to which enterprises of a Party can compete with, sell goods and services to, and purchase good and services

from enterprises of the other Party. Accordingly, the Parties shall cooperate, including in the manner provided for in Articles 14.2.3 and 14.6, to promote policies related to matters covered by this Chapter that foster free trade and investment and competitive markets.

## Article 14.10. Consultations

1. To foster understanding between the Parties, or to address specific matters that arise under this Chapter, each Party shall, on request of the other Party, enter into consultations regarding representations made by the other Party. In its request, the Party shall indicate, if relevant, how the matter affects trade or investment between the Parties.

2. The Party to which a request for consultations has been addressed shall accord full and sympathetic consideration to the concerns raised by the Party having made the request.

## Article 14.11. Dispute Settlement

Neither Party may have recourse to dispute settlement under this Agreement for any matter arising under Articles 14.2, 14.4.2, 14.4.3, 14.6, 14.7, 14.9, or 1410.2.

## Article 14.12. Definitions

For the purposes of this Chapter:

1. **consumer protection laws** means:

(a) in the case of the United States, laws and regulations prohibiting "unfair or deceptive acts or practices" within the meaning of Section 5 of the Federal Trade Commission Act; and

(b) in the case of Australia, Parts IVA, V, and VC of the Trade Practices Act 1974;

as well as any amendments thereto, and such other laws or regulations as the Parties may agree in writing;

2. **designate** means, whether formally or in effect, to establish, designate, or authorize a monopoly or to expand the scope of a monopoly to cover an additional good or service;

3. **government businesses** means Australian government businesses within the meaning of Australia's Competition Principles Agreement of 1995;

4. **government monopoly** means a monopoly that is owned, or controlled through ownership interests, by the central government of a Party or by another such monopoly;

5. **in accordance with commercial considerations** means consistent with normal business practices of privately-held enterprises in the relevant business or industry;

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

7. **monopoly** means an entity, including a consortium or government agency, that in any relevant market in the territory of a Party is designated as the sole provider or purchaser of a good or service, but does not include an entity that has been granted an exclusive intellectual property right solely by reason of such grant;

8. **non-discriminatory treatment** means the better of national treatment and most- favoured-nation treatment, as set out in the relevant provisions of this Agreement, including the terms and conditions set out in the relevant Annexes thereto; and

9. **state enterprise** means an enterprise owned, or controlled through ownership interests, by any level of government of a Party.

# Chapter FIFTEEN. Government Procurement

## Article 15.1. Scope and Coverage

*Application of Chapter*

1. This Chapter applies to any measure regarding covered procurement.

2. For the purposes of this Chapter, covered procurement means a procurement of goods, services, or both:

(a) by any contractual means, including purchase, rental, or lease, with or without an option to buy, build-operate-transfer contracts, and public works concessions contracts;

(b) for which the value, as estimated in accordance with paragraphs 6, 7, or 8, as appropriate, equals or exceeds the relevant threshold specified in Annex 15-A;

(c) that is conducted by a procuring entity; and

(d) is not excluded from coverage by this Agreement.

3. This Chapter does not apply to:

(a) non-contractual agreements or any form of assistance that a Party or a government enterprise provides, including grants, loans, equity infusions, fiscal incentives, subsidies, guarantees, cooperative agreements, and sponsorship arrangements;

(b) procurement of goods and services by a Party from its own entities and provision of goods or services by or between a procuring entity of a Party and a regional or local government of that Party;

(c) purchases funded by international grants, loans, or other assistance, where the provision of such assistance is subject to conditions inconsistent with this Chapter;

(d) purchases funded by grants and sponsorship payments from persons not listed in Annex 15-A;

(e) procurement for the direct purpose of providing foreign assistance;

(f) procurement of research and development services;

(g) procurement of goods and services (including construction) outside the territory of the procuring Party, for consumption outside the territory of the procuring Party; and

(h) acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions, and sale and distribution services for government debt.

4. (a) The Parties acknowledge and reaffirm the commitments made in the Memorandum of Agreement Between the Government of Australia and the Government of the United States Concerning Reciprocal Defense Procurement, dated April 19, 1995 (the "MOA") and acknowledge that the MOA, and any extension thereof, applies to certain defence procurements that are outside the scope of this Chapter.

(b) The Parties will continue discussions on improving and expanding the relationship established by the MOA, recognising that this Agreement will have no application to, or impact on, the MOA or any of the rights and responsibilities established under the MOA.

*Compliance*

5. Each Party shall ensure that its procuring entities comply with this Chapter in conducting covered procurements.

*Valuation*

6. In estimating the value of a procurement for the purpose of ascertaining whether it is a covered procurement, a procuring entity shall:

(a) neither divide a procurement into separate procurements nor use a particular method for estimating the value of the procurement for the purpose of avoiding the application of this Chapter;

(b) take into account all forms of remuneration, including any premiums, fees, commissions, interest, other revenue streams that may be provided for under the contract, and, where the procurement provides for the possibility of option clauses, the total maximum value of the procurement, inclusive of optional purchases; and

(c) without prejudice to paragraph 7, where the procurement is to be conducted in multiple parts, with contracts to be awarded at the same time or over a given period to one or more suppliers, base its calculation on the total maximum value of the procurement over its entire duration.

7. In the case of procurement by lease or rental or procurement that does not specify a total price, the basis for estimating

the value of the procurement shall be, with respect to:

(a) a fixed-term contract,

(i) where the term is 12 months or less, the total estimated contract value for the contract's duration, or

(ii) where the term exceeds 12 months, the total estimated contract value, including the estimated residual value, or

(b) a contract for an indefinite period, the estimated monthly instalment multiplied by 48. Where there is doubt as to whether the contract is to be a fixed-term contract, a procuring entity shall use the basis for estimating the value of the procurement described in this subparagraph.

8. Where the total estimated maximum value of a procurement over its entire duration is not known, the procurement shall be a covered procurement, unless otherwise excluded under this Agreement

9. All orders under contracts awarded for covered procurements shall be subject to Articles 15.2.1 and 15.2.2.

## Article 15.2. General Principles

*National Treatment and Non-Discrimination*

1. Each Party and its procuring entities shall accord unconditionally to the goods and services of the other Party and to the suppliers of the other Party offering the goods or services of that Party, treatment no less favourable than the most favourable treatment the Party or the procuring entity accords to domestic goods, services and suppliers.

2. A procuring entity of a Party may not:

(a) treat a locally established supplier less favourably than other locally established suppliers on the basis of degree of foreign affiliation or ownership; nor

(b) discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of the other Party.

*Procurement Methods*

3. A procuring entity may use:

(a) open tendering procedures;

(b) selective tendering procedures, in accordance with Article 15.7.6; and

(c) limited tendering procedures, in accordance with Article 15.8.

*Rules of Origin*

4. Each Party shall apply to covered procurement of goods the rules of origin that it applies in the normal course of trade to those goods.

*Offsets*

5. A procuring entity may not seck, take account of, impose, or enforce offsets in the qualification and selection of suppliers, goods, or services, in the evaluation of tenders or in the award of contracts, before or in the course of a covered procurement.

*Measures Not Specific to Procurement*

6. Paragraphs 1 and 2 shall not apply to customs duties and charges of any kind imposed on or in connection with importation, the method of levying such duties and charges, other import regulations or formalities, and measures affecting trade in services other than measures governing covered procurements.

*Non-Disclosure of Information*

7. Nothing in this Chapter shall be construed as requiring a Party or its procuring entities to disclose, furnish, or allow access to confidential information furnished by a person where such disclosure might prejudice fair competition between suppliers, without the authorization of the person that furnished the information.

## Article 15.3. Publication of Procurement Information

1. Each Party shall promptly publish the following information relating to covered procurements, and any changes or additions to this information, in electronic or paper media that are widely disseminated and remain readily accessible to the public:

(a) laws, regulations, procedures, and policy guidelines; and (b) = judicial decisions and administrative rulings of general application.

2. Each Party shall, on request, provide an explanation relating to such information to the requesting Party.

## Article 15.4. Publication of Notice of Intended Procurement

1. For each covered procurement, except in the circumstances described in Articles 15.7.7(a) and (d) and 15.7.8, a procuring entity shall publish a notice inviting interested suppliers to submit tenders ("notice of intended procurement") or, where appropriate, applications for participation in a procurement. The notice shall be published in electronic or paper media that are widely disseminated and remain readily accessible to the public for the entire period established for tendering.

2. A procuring entity shall include the following information in each notice of intended procurement:

(a) the name and address of the procuring entity and other information necessary to contact the procuring entity and obtain all relevant documents relating to the procurement;

(b) a description of the procurement and any conditions for participation; and

(c) the address and the time limit for the submission of tenders and, where appropriate, any time limit for the submission of an application for participation in a procurement, and the time frame for the delivery of goods or services.

*Notice of Planned Procurement*

3. Each Party shall encourage its procuring entities to publish as carly as possible in each fiscal year a notice regarding their procurement plans. The notice should include the subject matter of any planned procurement and the estimated date of the publication of the notice of intended procurement. Where the notice is published in accordance with Article 15.5.3(a), a procuring entity may apply Article 15.5.3 for the purpose of establishing shorter time limits for tendering for covered procurements.

## Article 15.5. Time Limits

1. A procuring entity shall prescribe time limits for tendering that allow suppliers adequate time to submit applications or requests to participate in a covered procurement, including pursuant to Article 15.7.7(b) and (c), and to prepare and submit responsive tenders, taking into account the nature and complexity of the procurement.

2. Except as provided for in paragraphs 3 and 4, a procuring entity shall establish that the final date for the submission of tenders shall not be less than 30 days:

(a) from the date on which the notice of intended procurement is published; or

(b) where the entity has used selective tendering, from the date on which the entity invites suppliers to submit tenders.

3. Under the following circumstances, a procuring entity may establish a time limit for tendering that is less than 30 days, provided that such time limit is sufficiently long to enable suppliers to prepare and submit responsive tenders and is in no case less than ten days:

(a) where the procuring entity published a separate notice, including a notice of planned procurement under Article 15.4.3 at least 30 days and not more than 12 months in advance, and such separate notice contains a description of the procurement, the time limits for the submission of tenders or, where appropriate, applications for participation in a procurement, and the address from which documents relating to the procurement may be obtained;

(b) where the procuring entity procures commercial goods or services;

(c) in the case of second or subsequent publication of notices for procurement of a recurring nature; or

(d) where a state of urgency duly substantiated by the procuring entity renders impracticable the time limits specified in

paragraph 1.

4. When a procuring entity publishes a notice of intended procurement in accordance with Article 15.4 in an electronic medium, or, in the case of selective tendering, issues an invitation to tender via an electronic medium and provides, to the extent practicable, the tender documentation via an electronic medium, the procuring entity may reduce the time limit for submission of a tender by up to five days. In no case shall the procuring entity reduce either time limit to less than ten days from the date on which the notice of intended procurement is published.

5. Where a procuring entity intends to limit the submission of tenders to all suppliers that the entity has determined have satisfied the conditions for participation, except where a notice of a multi-use list has been readily accessible in electronic form for a reasonable period, the entity shall include in an invitation to tender the time limit for submitting applications. Any conditions for participation in a tendering procedure shall be published sufficiently in advance to enable interested suppliers of the other Party to initiate and, to the extent that it is compatible with the efficient operation of the procurement process, complete the registration and qualification procedures within the time allowed for tendering.

6. A procuring entity shall require all participating suppliers to submit tenders in accordance with a common deadline. For greater certainty, this requirement also applies where:

(a) as a result of a need to amend information provided to suppliers during the procurement process, the procuring entity extends the time limit for qualification or tendering procedures; or

(b) negotiations are terminated and suppliers are permitted to submit new tenders.

## Article 15.6. Information on Intended Procurements

*Tender Documentation*

1. A procuring entity shall promptly provide, on request, to any supplier participating ina covered procurement, tender documentation that includes all information necessary to permit suppliers to prepare and submit responsive tenders. Unless already provided in the notice of intended procurement, such documentation shall include a complete description of:

(a) the procurement, including the nature, scope and, where known, the quantity of the goods or services to be procured and any requirements to be fulfilled, including any technical specifications, conformity certification, plans, drawings, or instructional materials;

(b) any conditions for participation, including any financial guarantees, information, and documents that suppliers are required to submit;

(c) all criteria to be considered in the awarding of the contract;

(d) where there will be a public opening of tenders, the date, time, and place for the opening of tenders; and

(e) any other terms or conditions relevant to the evaluation of tenders.

2. A procuring entity shall promptly reply to any reasonable request for relevant information by a supplier participating in the covered procurement, provided that the procuring entity may not make available information with regard to a specific procurement in a manner that would give a supplier or group of suppliers an advantage over its competitors in the procurement.

*Technical Specifications*

3. A procuring entity may not prepare, adopt, or apply any technical specification or prescribe any conformity assessment procedure with the purpose or the effect of creating unnecessary obstacles to trade between the Parties.

4. In prescribing the technical specifications for the good or service being procured, a procuring entity shall:

(a) specify the technical specifications, wherever appropriate, in terms of performance and functional requirements, rather than design or descriptive characteristics; and

(b) base the technical specifications on international standards, where such exist and are applicable to the procuring entity, except where the use of an international standard would fail to meet the procuring entity's program requirements or would impose greater burdens than the use of a recognized national standard.

5. A procuring entity may not prescribe technical specifications that require or refer to a particular trademark or trade name, patent, copyright, design or type, specific origin, producer, or supplier, unless there is no other sufficiently precise or

intelligible way of describing the procurement requirements and provided that, in such cases, words such as "or equivalent" are included in the tender documentation.

6. A procuring entity may not seck or accept, in a manner that would have the effect of precluding competition, advice that may be used in the preparation or adoption of any technical specification for a specific procurement from a person that may have a commercial interest in the procurement.

7. Notwithstanding paragraph 6, a procuring entity may:

(a) conduct market research in developing specifications for a particular procurement; or

(b) allow a supplier that has been engaged to provide design or consulting services to participate in procurements related to such services, provided it would not give the supplier an unfair advantage over other suppliers.

8. For greater clarity, this Article is not intended to preclude a procuring entity from preparing, adopting, or applying technical specifications to promote the conservation of natural resources and the environment.

*Modifications*

9. Where, during the course of a covered procurement, a procuring entity modifies the criteria or technical requirements set out in a notice or tender documentation provided to participating suppliers, or amends or reissues a notice or tender documentation, it shall transmit all such modifications or amended or re-issued notice or tender documentation:

(a) to all the suppliers that are participating at the time the information is amended, if known, and in all other cases, in the same manner as the original information; and

(b) in adequate time to allow such suppliers to modify and re-submit their initial tenders, as appropriate.

## Article 15.7. Tendering Procedures

*Conditions for Participation*

1. A Party, and its procuring entities, shall limit any conditions for participation in a covered procurement to those that ensure that a supplier has the legal, commercial, technical, and financial abilities to fulfill the requirements of the procurement.

2. In assessing whether a supplier satisfies the conditions for participation, a procuring entity:

(a) shall evaluate the financial, commercial, and technical abilities of a supplier on the basis of that supplier's business activities both inside and outside the territory of the Party of the procuring entity;

(b) may not impose the condition that, in order for a supplier to participate in a procurement, the supplier has previously been awarded one or more contracts by a procuring entity of that Party or that the supplier has prior work experience in the territory of that Party;

(c) shall base its determination of whether a supplier has satisfied the conditions for participation solely on the conditions that the procuring entity has specified in advance in notices or tender documentation; and

(d) may require relevant prior experience where essential to meet the requirements of the procurement.

3. Nothing in this Article shall preclude the exclusion of a supplier on grounds such as:

(a) bankruptcy;

(b) false declarations; or

(c) significant deficiencies in performance of any substantive requirement or obligation under a prior contract.

*Multi-Use Lists*

4. A Party, and its procuring entities, may establish a multi-use list provided that the procuring entity or other government agency annually publishes or otherwise makes available continuously in electronic form a notice inviting interested suppliers to apply for inclusion on the list. The notice shall include:

(a) a description of the goods and services, or categories thereof, for which the list may be used;

(b) the conditions for participation to be satisfied by suppliers and the methods that the procuring entity or other government agency will use to verify a supplier's satisfaction of the conditions;

(c) the name and address of the procuring entity or other government agency and other information necessary to contact the entity and obtain all relevant documents relating to the list; and

(d) any deadlines for submission of applications for inclusion on that list.

5. A procuring entity or other government agency that maintains a multi-use list shall include on the list all suppliers that satisfy the conditions for participation within a reasonably short time.

*Selective Tendering*

6.To ensure optimum effective competition under selective tendering procedures, procuring entities shall, for each intended covered procurement, invite tenders from the largest number of domestic suppliers and suppliers of the other Party that is consistent with the efficient operation of the procurement system.

7. A procuring entity applying selective tendering procedures shall use, in accordance with paragraph 6:

(a) a multi-use list, provided such a list is compiled in accordance with the provisions of this Chapter and is appropriate to the type of procurement being undertaken;

(b) a list of suppliers that have responded to a notice inviting suppliers to submit applications for participation in a procurement;

(c) a list of suppliers that have responded to a notice requesting all interested suppliers to express their interest in the procurement, provided that the procuring entity:

(i) publishes a notice requesting any interested supplier to submit an expression of its interest in the procurement and any information requested in the notice; the notice may be the notice of planned procurement under Article 15.4.3 where that notice invited suppliers to express their interest in the procurement; and

(ii) sends an invitation to submit tenders to all the suppliers that expressed an interest in the procurement, unless it has stated in the notice that it may limit the suppliers that it will invite, in accordance with paragraph 8; or

(d) a list of all the suppliers that have been granted a license or that have been determined by the appropriate agency, authority, or organization to comply with specific legal requirements that exist independent of the procurement process, provided that:

(i) the requirement for a license or compliance with specific legal requirements is essential to the conduct of the procurement;

(ii) the complete list of such suppliers is maintained by the appropriate agency, authority, or organization and is available to the procuring entity; and

(iii) the entity invites all the suppliers on the list to submit tenders in the procurement.

8. Provided that relevant requirements and criteria have been specified in advance in a notice or in tender documentation, a procuring entity, in determining the suppliers that will be invited to tender, under paragraphs 7(b) and (c) may:

(a) in assessing technical ability, assess the extent to which the suppliers' proposals or responses meet the technical and performance specifications of the procurement; and

(b) limit the number of suppliers that it invites to tender based on the rating of the supplier proposals or responses.

9. A procuring entity shall apply the time limits set out in Article 15.5 for responses to the notices referred to in paragraphs 7(b) and (c).

*Information on Procuring Entity Decisions*

10. Where a supplier applies for participation in a covered procurement, including through a procedure described in paragraphs 7(b) or (c), or for inclusion on a list referred to in paragraph 4, a procuring entity shall promptly advise such supplier of its decision with respect to its application.

11. Where a procuring entity:

(a) rejects an application for participation in a covered procurement, including an application through a procedure described in paragraph 7(b) or (c);

(b) rejects a request for inclusion on a list, referred to in paragraph 4, or (c) ceases to recognize a supplier as having satisfied the conditions for participation;

the procuring entity shall promptly inform the supplier and, on request of such supplier, promptly provide the supplier with a written explanation of the reasons for its decision.

## Article 15.8. Limited Tendering

1. Provided that it does not use this provision for the purpose of avoiding competition, to protect domestic suppliers, or in a manner that discriminates against suppliers of the other Party, a procuring entity may contact a supplier or suppliers of its choice and may choose not to apply Articles 15.4 through 15.7, 15.9.1, and 15.9.3 through 15.9.7 in relation to a covered procurement in any of the following circumstances:

(a) where, in response to a prior notice, invitation to participate, or invitation to tender,

(i) no tenders were submitted,

(ii) no tenders were submitted that conform to the essential requirements in the tender documentation, or

(iii) no suppliers satisfied the conditions for participation,

and the entity does not substantially modify the essential requirements of the procurement;

(b) where the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute goods or services exist for the following reasons:

(i) the requirement is for works of art;

(ii) the protection of patents, copyrights, or other exclusive rights, or proprietary information; or

(iii) due to an absence of competition for technical reasons;

(c) for additional deliveries of goods or services by the original supplier or authorized representative that are intended either as replacement parts, extensions, or continuing services for existing equipment, software, services, or installations, where a change of supplier would compel the procuring entity to procure goods or services that do not meet requirements of interchangeability with existing equipment;

(d) for goods purchased on a commodity market;

(e) where a procuring entity procures a prototype or a first good or service that is intended for limited trial or that is developed at its request in the course of, and for, a particular contract for research, experiment, study, or original development;

(f) in so far as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseen by the procuring entity, the goods or services could not be obtained in time under tendering procedures consistent with Article 15.4 through 15.7;

(g) for new construction services consisting of the repetition of similar construction services that conform to a basic project for which an initial contract was awarded following use of open tendering or selective tendering in accordance with this Chapter and for which the entity has indicated in the notice of intended procurement concerning the initial construction service, that limited tendering procedures might be used in awarding contracts for those construction services;

(h) for purchases made under exceptionally advantageous conditions that only arise in the very short term, such as from unusual disposals, unsolicited innovative proposals, liquidation, bankruptcy, or receivership and not for routine purchases from regular suppliers; or

(i) in the case of a contract awarded to the winner of a design contest provided that:

(i) the contest has been organized in a manner that is consistent with this Chapter, and

(ii)the contest is judged by an independent jury with a view to a design contract being awarded to the winner.

2. For each contract awarded under paragraph 1, a procuring entity shall prepare a written report that includes:

(a) the name of the procuring entity;

(b) the value and kind of goods or services procured; and

(c) a statement indicating the circumstances and conditions described in paragraph 1 that justify the use of a procedure other than open or selective tendering procedures.

## Article 15.9. Treatment of Tenders and Awarding of Contracts

*Receipt and Opening of Tenders*

1. A procuring entity shall receive and open all tenders under procedures that guarantee the fairness and impartiality of the procurement process.

2. A procuring entity shall treat tenders in confidence. In particular, it shall not provide information to particular suppliers that might prejudice fair competition between suppliers.

3. A procuring entity shall not penalize any supplier whose tender is received after the time specified for receiving tenders if the delay is due solely to mishandling on the part of the procuring entity.

4. Where a procuring entity provides suppliers with opportunities to correct unintentional errors of form between the opening of tenders and the awarding of the contract, the procuring entity shall provide the same opportunities to all participating suppliers.

*Awarding of Contracts*

5. A procuring entity may not consider a tender for award unless, at the time of opening, the tender conforms to the essential requirements of all notices issued during the course of a covered procurement or tender documentation.

6. Unless a procuring entity determines that it is not in the public interest to award a contract, it shall award a contract to the supplier that the entity has determined satisfies the conditions for participation and is fully capable of undertaking the contract and whose tender is determined to be the lowest price, the best value, or the most advantageous, in accordance with the essential requirements and evaluation criteria specified in the notices and tender documentation.

7. A procuring entity may not cancel a covered procurement, nor terminate or modify awarded contracts so as to circumvent the requirements of this Chapter.

*Information Provided to Suppliers*

8. A procuring entity shall promptly inform suppliers that have submitted tenders of the contract award decision. Subject to Article 15.2.7, a procuring entity shall, on request, provide an unsuccessful supplier with the reasons that the entity did not select its tender.

*Publication of Award Information*

9. Not later than 60 days after the award of a contract for a covered procurement, a procuring entity shall publish a notice in an officially designated publication, which may be in an electronic or paper medium. The notice shall include at least the following information about the contract:

(a) the name and address of the procuring entity;

(b) a description of the goods or services procured;

(c) the date of award or the contract date;

(d) the contract value;

(e) the name and address of the successful supplier; and

(f) the procurement method used.

*Provision of Information to the Other Party*

10. On request of the other Party, a Party shall provide information on the tender and evaluation procedures used in the conduct of a covered procurement sufficient to demonstrate that the particular procurement was conducted fairly, impartially, and in accordance with this Chapter. The information shall include, at a minimum, the information specified in

Article 15.8.2, and, to the extent necessary and without disclosing confidential information, information on the characteristics and relative advantages of the successful tender and on the contract price.

*Maintenance of Records*

11. A procuring entity shall maintain records and reports of tendering procedures relating to covered procurements, including the reports provided for in Article 15.8, and shall retain such records and reports for a period of at least three years after the award of a contract.

## Article 15.10. Ensuring Integrity In Procurement Practices

1. Each Party shall ensure that criminal or administrative penalties exist to sanction:

(a) a procurement official of that Party who solicits or accepts, directly or indirectly, any article of monetary value or other benefit, for that procurement official or for another person, in exchange for any act or omission in the performance of that procurement official's procurement functions;

(b) any person who offers or grants, directly or indirectly, to a procurement official of that Party, any article of monetary value or other benefit, for that procurement official or for another person, in exchange for any act or omission in the performance of his or her procurement functions; and

(c) any person intentionally offering, promising or giving any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign procurement official, for that foreign procurement official or a third party, in order that the foreign procurement official act or refrain from acting in relation to the performance of procurement duties, in order to obtain or retain business or other improper advantage.

## Article 15.11. Domestic Review of Supplier Challenges

1. In the event of a complaint by a supplier of a Party that there has been a breach of the other Party's measures implementing this Chapter in the context of a covered procurement in which the supplier has or had an interest, the Party of the procuring entity shall encourage the supplier to seek resolution of its complaint in consultation with the procuring entity. In such instances the procuring entity shall accord timely and impartial consideration to any such complaint.

2. Each Party shall maintain at least one impartial administrative or judicial authority that is independent of its procuring entities to receive and review challenges that suppliers submit, in accordance with the Party's law, relating to a covered procurement. Each Party shall ensure that any such challenge not prejudice the supplier's participation in ongoing or future procurement activities.

3. Where a body other than an authority referred to in paragraph 2 initially reviews a challenge, the Party shall ensure that the supplier may appeal the initial decision to an impartial administrative or judicial authority that is independent of the procuring entity that is the subject of the challenge.

4. Each Party shall ensure that the authorities referred to in paragraph 2 have the power to take prompt interim measures, pending the resolution of a challenge, to preserve the supplier's opportunity to participate in the procurement and to ensure that the procuring entities of the Party comply with its measures implementing this Chapter. Such interim measures may include, where appropriate, suspending the contract award or the performance of a contract that has already been awarded.

5. Each Party shall ensure that its review procedures are conducted in accordance with the following:

(a) a supplier shall be allowed sufficient time to prepare and submit a written challenge, which in no case shall be less than ten days from the time when the basis of the complaint became known or reasonably should have become known to the supplier;

(b) a procuring entity shall respond in writing to a supplier's complaint and provide all relevant documents to the review authority;

(c) a supplier that initiates a complaint shall be provided an opportunity to reply to the procuring entity's response before the review authority takes a decision on the complaint; and

(d) the review authority shall provide its decision on a supplier's challenge ina timely fashion, in writing, with an explanation of the basis for the decision.

## Article 15.12. Exceptions

1. Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail, or a disguised restriction on international trade, nothing in this Chapter shall be construed to prevent a Party from adopting or maintaining measures:

(a) necessary to protect public morals, order or safety;

(b) necessary to protect human, animal, or plant life or health;

(c) necessary to protect intellectual property; or

(d) relating to the goods or services of handicapped persons, of philanthropic or not for profit institutions, or of prison labour.

2. The Parties understand that subparagraph 1(b) includes environmental measures necessary to protect human, animal or plant life or health.

## Article 15.13. Modifications and Rectifications to Coverage

1. The Joint Committee shall modify the relevant section of Annex 15-A to reflect any agreed modification, rectification, or minor amendment in the following circumstances:

(a) each Party may make rectifications of a purely formal nature to its coverage under this Chapter, or minor amendments to its Schedules to Section 1, 2, or 3 of Annex 15-A, provided that it notifies the other Party in writing and the other Party does not object in writing within 30 days of the notification. A Party that makes sucha rectification or minor amendment need not provide compensatory adjustments.

(b) each Party may otherwise modify its coverage under this Chapter provided that it:

(i) notifies the other Party in writing and that Party does not object in writing within 30 days of the notification; and

(ii) offers within 30 days of the notification compensatory adjustments acceptable to the other Party to maintain a level of coverage comparable to that existing prior to the modification, where necessary.

2. A Party need not provide compensatory adjustments where the Parties agree that the proposed modification covers a procuring entity over which a Party has effectively eliminated its control or influence in respect of procurement by that entity. Where a Party objects to the assertion that such government control or influence has been effectively eliminated, the objecting Party may request further information or consultations with a view to clarifying the nature of any government control or influence and reaching agreement on the procuring entity's status under this Chapter.

3. Each Party shall continue to encourage increased participation under this Chapter by its regional government entities.

## Article 15.14. Cooperation

1. The Parties recognize their shared interest in promoting international liberalization of government procurement markets in the context of the rules-based international trading system, including in the WTO and Asia Pacific Economic Cooperation.

2. Not later than 24 months after the date of entry into force of this Agreement, and at least biennially thereafter, the Joint Commission shall review the operation and implementation of this Chapter.

## Article 15.15. Definitions

For the purposes of this Chapter:

1. **build-operate-transfer contract and public works concession contract** mean any contractual arrangement the primary purpose of which is to provide for the construction or rehabilitation of physical infrastructure, plant, buildings, facilities, or other government owned works and under which, as consideration for a supplier's execution of a contractual arrangement, a procuring entity grants the supplier, for a specified period of time, temporary ownership or a right to control and operate, and demand payment for the use of such works for the duration of the contract;

2. **commercial goods and services** mean goods and services of a type of goods and services that are sold or offered for sale to, and customarily purchased by, non-governmental buyers for non-governmental purposes; it includes goods and

services with modifications customary in the commercial marketplace, as well as minor modifications not customarily available in the commercial marketplace;

3. **conditions for participation** means registration, qualification, and other pre-requisites for participation in a procurement;

4. **in writing** or **written** means any worded or numbered expression that can be read, reproduced, and later communicated. It may include electronically transmitted and stored information;

5. **measure**, as defined in Article 1.2.15, includes any guidelines;

6. **multi-use list** means a list of suppliers that a procuring entity has determined satisfy the conditions for participation in that list, and that the procuring entity intends to use more than once;

7. **offsets** means any conditions or undertakings that require use of domestic content, domestic suppliers, the licensing of technology, technology transfer, investment, counter-trade, or similar actions to encourage local development or to improve a Party's balance-of-payments accounts;

8. **open tendering** means a procurement method where all interested suppliers may submit a tender; 9. procurement official means any person who performs procurement functions;

10. **procuring entity** means an entity listed in Sections 1 through 3 of Annex 15-A;

11. **selective tendering** means a procurement method where the procuring entity determines the suppliers that it will invite to submit tenders;

12. **services** includes construction services, unless otherwise specified; 13. supplier means a person that provides or could provide goods or services to a procuring entity; and

14. **technical specification** means a tendering requirement that:

(a) sets out the characteristics of:

(i) goods to be procured, including quality, performance, safety and dimensions, or the processes and methods for their production; or

(ii) services to be procured, or the processes or methods for their provision, including any applicable administrative provisions; or

(b) addresses terminology, symbols, packaging, marking, or labelling requirements, as they apply to a good or service.

# Chapter SIXTEEN. Electronic Commerce

## Article 16.1. General

The Parties recognise the economic growth and opportunity that electronic commerce provides, the importance of avoiding barriers to its use and development, and the applicability of the WTO Agreement to measures affecting electronic commerce.

## Article 16.2. Electronic Supply of Services

For greater certainty, the Parties affirm that measures affecting the supply of a service delivered or performed electronically are subject to the obligations contained in the relevant provisions of Chapters Ten (Cross-Border Trade in Services), Eleven (Investment), and Thirteen (Financial Services), subject to any exceptions applicable to such obligations and to the non-conforming measures described in Articles 10.6 (Non-Conforming Measures), 11.13 (Non-Conforming Measures), or 13.9 (Non-Conforming Measures).

## Article 16.3. Customs Duties

Neither Party may impose customs duties, fees, or other charges (16-1) on or in connection with the importation or exportation of digital products, regardless of whether they are fixed on a carrier medium or transmitted electronically.

(16-1) For greater clarity, Article 16.3 does not preclude a Party from imposing internal taxes or other internal charges on digital products,

provided that such taxes or charges are imposed in a manner consistent with this Agreement.

## Article 16.4. Non-discriminatory Treatment of Digital Products

1. Neither Party may accord less favourable treatment to some digital products than it accords to other like digital products:

(a) on the basis that the digital products receiving less favourable treatment are created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms outside its territory;

(b) on the basis that the author, performer, producer, developer, or distributor of such digital products is a person of the other Party or a non-Party; or

(c) so as to otherwise afford protection to other like digital products that are created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in its territory.

2. Neither Party may accord less favourable treatment to digital products: (16-2)

(A) created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in the territory of the other Party than it accords to like digital products created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in the territory of a non-Party, or

(b) whose author, performer, producer, developer, or distributor is a person of the other Party than it accords to like digital products whose author, performer, producer, developer, or distributor is a person of a non-Party.

3. Paragraphs 1 and 2 do not apply to:

(a) non-conforming measures adopted or maintained in accordance with Articles 10.6, 11.13, or 13.9;

(b) the extent that they are inconsistent with Chapter Seventeen (Intellectual Property Rights),

(c) subsidies or grants that a Party provides to a service or service supplier, including government-supported loans, guarantees, and insurance; and

(d) services supplied in the exercise of governmental authority, as defined in Article 1.2.22 (Definitions).

4. For greater clarity, paragraphs 1 and 2 do not prevent a Party from adopting or maintaining measures, including measures in the audio-visual and broadcasting sectors, in accordance with its reservations to Chapters Ten and Eleven.

(16-2) Nothing in this Article shall be construed as affecting the Parties' rights and obligations with respect to each other under Article 4 of the TRIPS Agreement.

## Article 16.5. Authentication and Digital Certificates

1. Neither Party may adopt or maintain legislation for electronic authentication that would

(a) prohibit parties to an electronic transaction from mutually determining the appropriate authentication methods for that transaction; or

(b) prevent parties from having the opportunity to prove in court that their electronic transaction complies with any legal requirements with respect to authentication.

2. Each Party shall work towards the recognition at the central level of government of digital certificates issued by the other Party or under authorisation of that Party.

## Article 16.6. Online Consumer Protection

The Parties recognise the importance of maintaining and adopting transparent and effective measures to protect consumers from fraudulent and deceptive commercial practices when they engage in electronic commerce.

## Article 16.7. Paperless Trade Administration

1. Each Party shall endeavour to make all trade administration documents available to the public in electronic form.

2. Each Party shall endeavour to accept trade administration documents submitted electronically as the legal equivalent of the paper version of such documents.

### Article 16.8. Definitions

For the purposes of this Chapter:

1. **authentication** means the process or act of establishing the identity of a party to an electronic communication or transaction or ensuring the integrity of an electronic communication;

2. **carrier medium** means any physical object capable of storing a digital product, by any method now known or later developed, and from which a digital product can be perceived, reproduced, or communicated, directly or indirectly, including an optical medium, floppy disk, and magnetic tape;

3. **digital certificate** means an electronic document or file that is issued or otherwise linked to a party to an electronic communication or transaction for the purpose of establishing the party's identity, authority, or other attribute;

4. **digital products** means the digitally encoded form of computer programs, text, video, images, sound recordings, and other products, (16-3) regardless of whether they are fixed on a carrier medium or transmitted electronically; (16-4)

5. **electronic transmission** or transmitted electronically means the transfer of digital products using any electromagnetic or photonic means; and

6. **trade administration documents** means forms that a Party issues or controls that must be completed by or for an importer or exporter in connection with the import or export of goods.

(16-3) For greater clarity, digital products can be a component of a good, be used in the supply of a service, or exist separately, but do not include digitized representations of financial instruments that are settled or transmitted through central bank-sponsored payment or settlement system.

(16-4) The definition of digital products should not be understood to reflect a Party's view on whether trade in digital products through electronic transmission should be categorized as trade in services or trade in goods.

## Chapter SEVENTEEN. Intellectual Property Rights

### Article 17.1. General Provisions

1. Each Party shall, at a minimum, give effect to this Chapter. A Party may provide more extensive protection for, and enforcement of, intellectual property rights under its law than this Chapter requires, provided that the additional protection and enforcement is not inconsistent with this Agreement.

*International Agreements*

2. Each Party affirms that it has ratified or acceded to the following agreements, as revised and amended:

(a) the Patent Cooperation Treaty (1970);

(b) the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (1974);

(c) the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (1989);

(d) the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure (1980);

(e) the International Convention for the Protection of New Varieties of Plants (1991); # the Trademark Law Treaty (1994);

(g) the Paris Convention for the Protection of Industrial Property (1967) (the Paris Convention); and

(h) the Berne Convention for the Protection of Literary and Artistic Works (1971) (the Berne Convention).

3. Further to Article 1.1.2 (General), the Parties affirm their rights and obligations with respect to each other under the TRIPS Agreement.

4. Each Party shall ratify or accede to the WIPO Copyright Treaty (1996) and the WIPO Performances and Phonograms Treaty (1996) by the date of entry into force of this Agreement, subject to the fulfilment of their necessary internal requirements.

5. Each Party shall make its best efforts to comply with the provisions of the Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs (1999), and the Patent Law Treaty (2000), subject to the enactment of laws necessary to apply those provisions in its territory.

*National Treatment*

6. In respect of all categories of intellectual property covered in this Chapter, each Party shall accord to nationals (17-1) of the other Party treatment no less favourable than it accords to its own nationals with regard to the protection (17-2) and enjoyment of such intellectual property rights and any benefits derived from such rights. With respect to secondary uses of phonograms by means of analogue communications and free over-the-air radio broadcasting, however, a Party may limit the rights of the performers and producers of the other Party to the rights its persons are accorded in the territory of the other Party.

7. A Party may derogate from paragraph 6 in relation to its judicial and administrative procedures, including requiring a national of the other Party to designate an address for service of process in its territory, or to appoint an agent in its territory, provided that such derogation is:

(a) necessary to secure compliance with laws and regulations that are not inconsistent with this Chapter; and

(b) not applied in a manner that would constitute a disguised restriction on trade.

8. Paragraph 6 does not apply to procedures provided in multilateral agreements concluded under the auspices of World Intellectual Property Organization (WIPO) in relation to the acquisition or maintenance of intellectual property rights.

*Application of Agreement to Existing Subject Matter*

9. Except as it provides otherwise, including Article 17.4.5, this Chapter gives rise to obligations in respect of all subject matter existing at the date of entry into force of this Agreement, that is protected on that date in the territory of the Party where protection is claimed, or that meets or comes subsequently to meet the criteria for protection under this Chapter.

10. Except as otherwise provided in this Chapter, including Article 17.4.5, a Party shall not be required to restore protection to subject matter that on the date of entry into force of this Agreement has fallen into the public domain in the territory of the Party where the protection is claimed.

*Application of Agreement to Prior Acts*

11. This Chapter does not give rise to obligations in respect of acts that occurred before the date of entry into force of this Agreement.

*Transparency*

12. Further to Article 20.2 (Publication), and with the object of making its protection and enforcement of intellectual property rights as transparent as possible, each Party shall ensure that all laws, regulations, and procedures concerning the protection or enforcement of intellectual property rights shall be in writing and shall be published, (17-3) or where such publication is not practicable, made publicly available, in a national language in such a manner as to enable governments and right holders to become acquainted with them.

(17-1) For the purposes of Articles 17.1.6, 17.1.7, 17.2.12(b), and 17.6.1, anational of a Party also means, in respect of the relevant right, an entity of that Party that would meet the criteria for eligibility for protection provided for in the agreements listed in Articles 17.1.2 and 17.1.4, and the TRIPS Agreement.

(17-2) For the purposes of this paragraph, protection includes matters affecting the availability, acquisition, scope, maintenance, and enforcement of intellectual property rights, as well as those matters affecting the use of intellectual property rights specifically covered by this Chapter. Further, for the purposes of this paragraph, protection also includes the prohibition on circumvention of effective technological measures specified in Article 17.4.7 and the rights and obligations concerning rights management information specified in Article 17.4.8.

(17-3) Party may satisfy the requirement for publication by making the law, regulation, or procedure available to the public on the Internet.

## Article 17.2. Trademarks, Including Geographical Indications

1. Each Party shall provide that marks (17-4) shall include marks in respect of goods and services, collective marks, and certification marks. Each Party shall also provide that geographical indications are eligible for protection as marks. (17-5)

2. Neither Party may require, as a condition of registration, that marks be visually perceptible, nor may a Party deny registration of a mark solely on the ground that the sign of which it is composed is a sound or a scent, (17-6)

3. Each Party shall ensure that its measures mandating the use of the term customary in common language as the common name for a good or service ("common name") including, inter alia, requirements concerning the relative size, placement, or style of use of the mark in relation to the common name, do not impair the use or effectiveness of marks used in relation to such goods or services.

4. Each Party shall provide that the owner of a registered mark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs, including geographical indications, for goods or services that are related to those goods or services in respect of which the owner's mark is registered, where such use would result in a likelihood of confusion. In case of the use of an identical sign, including a geographical indication, for identical goods or services, a likelihood of confusion shall be presumed.

5. Each Party may provide limited exceptions to the rights conferred by a mark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interest of the owner of the mark and of third parties.

6. Article 6bis of the Paris Convention shall apply, mutatis mutandis, to goods or services that are not identical or similar to those identified by a well-known mark, (17-7) whether registered or not, provided that use of that mark in relation to those goods or services would indicate a connection between those goods or services and the owner of the mark, and provided that the interests of the owner of the mark are likely to be damaged by such use.

7. Recognising the importance of registration systems for marks that provide rights of presumptive validity, through the conduct of examination as to substance as well as to formalities, and through opposition and cancellation procedures, each Party shall provide a system for the registration of marks, which shall include:

(a) providing to the applicant a communication in writing, which may be electronic, of the reasons for any refusal to register a mark;

7. Recognising the importance of registration systems for marks that provide rights of presumptive validity, through the conduct of examination as to substance as well as to formalities, and through opposition and cancellation procedures, each Party shall provide a system for the registration of marks, which shall include:

(a) providing to the applicant a communication in writing, which may be electronic, of the reasons for any refusal to register a mark;

(b) an opportunity for the applicant to respond to communications from the authorities responsible for registration of marks, to contest an initial refusal, and to appeal judicially any final refusal to register;

(c) an opportunity for interested parties to oppose the registration of a mark or to seek cancellation of a mark after it has been registered; and

(d) a requirement that decisions in opposition or cancellation proceedings be reasoned and in writing.

8. Each Party shall provide:

(a) a system for the electronic application, processing, registration, and maintenance of marks; and

(b) a publicly available electronic database, including an on-line database, of applications for marks and registrations.

9. Each Party shall provide that initial registration and each renewal of registration of a mark shall be for a term of no less than ten years.

10. Neither Party may require recordal of licences for marks.

11. Each Party shall endeavour to reduce differences in law and practice between the Parties' respective systems for the protection of marks, including differences that affect the cost to users. In addition, cach Party shall endeavour to participate in international trademark harmonisation efforts, including the WIPO fora dealing with reform and development of the international trademark system.

12. (a) Each Party shall provide a system that permits owners to assert rights in marks, and interested parties to challenge rights in marks, through administrative or judicial means, or both.

(b) Consistent with sub-paragraph (a), where a Party provides the means to apply for protection or petition for recognition of geographical indications, through a system for the protection of marks or otherwise, it shall accept such applications and petitions without the requirement for intercession by a Party on behalf of its nationals, and shall:

(i) process applications or petitions, as relevant, for geographical indications with a minimum of formalities;

(ii) make its regulations governing filing of such applications or petitions, as relevant, readily available to the public;

(iii) ensure that applications or petitions, as relevant, for geographical indications are published for opposition, and provide procedures for opposing geographical indications that are the subject of applications or petitions. Each Party shall also provide procedures to cancel any registration resulting from an application or a petition;

(iv) ensure that measures governing the filing of applications or petitions, as relevant, for geographical indications set out clearly the procedures for these actions. These procedures shall include contact information sufficient for applicants or petitioners, as relevant, to obtain specific procedural guidance regarding the processing of those applications or petitions; and

(v) provide that grounds for refusing an application for protection or recognition of a geographical indication include the following:

(A) the geographical indication is likely to cause confusion with a mark that is the subject of a good-faith pending application or registration; and

(B) the geographical indication is likely to cause confusion with a pre-existing mark, the rights to which have been acquired through use in good faith in the territory of the Party.

(17-4) For the purposes of this Article, in respect of the law of Australia, marks means "trademarks".

(17-5) A geographical indication shall be capable of constituting a mark to the extent that the geographical indication consists of any sign, or any combination of signs (such as words, including geographic and personal names, as well as letters, numerals, figurative elements and colours, including single colours), capable of identifying a good as originating in the territory of a Party, or a region or locality in that territory, where a given quality, reputation, or other characteristic of the good is essentially attributable to its geographical origin. For the purposes of this Chapter, originating does not have the meaning ascribed to that term in Article 1.2 (General Definitions).

(17-6) A Party may require an adequate description, which can be represented graphically, of the mark.

(17-7) In determining whether a mark is well known, the reputation of the mark need not extend beyond the sector of the public that normally deals with the relevant goods or services.

## Article 17.3. Domain Names on the Internet

1. In order to address trademark cyber-piracy, cach Party shall require that the management of its country-code top-level domain (ccTLD) provide an appropriate procedure for the settlement of disputes, based on the principles established in the Uniform Domain-Name Dispute-Resolution Policy.

2. Each Party shall require that the management of its ccTLD provide online public access to a reliable and accurate database of contact information for domain-name registrants.

## Article 17.4. Copyright

1. Each Party shall provide (17-8) that the following have the right to authorise or prohibit (17-9) all reproductions, in any manner or form, permanent or temporary (including temporary storage in material form):

(a) authors, in respect of their works;

(b) performers, in respect of their performances; (17-10) and

(c) producers of phonograms, in respect of their phonograms. (17-11)

2. Each Party shall provide to authors, performers, and producers of phonograms the right to authorise or prohibit the making available to the public of the original and copies(17-12) of their works, performances, and phonograms through sale or other transfer of ownership. (17-13)

3. In order to ensure that no hierarchy is established between rights of authors, on the one hand, and rights of performers and producers of phonograms, on the other hand, each Party shall provide that in cases where authorisation is needed from both the author of a work embodied ina phonogram and a performer or producer owning rights in the phonogram, the need for the authorisation of the author does not cease to exist because the authorisation of the performer or producer is also required. Likewise, each Party shall provide that in cases where authorisation is needed from both the author of a work embodied in a phonogram and a performer or producer owning rights in the phonogram, the need for the authorisation of the performer or producer does not cease to exist because the authorisation of the author is also required.

4. Each Party shall provide that, where the term of protection of a work (including a photographic work), performance, or phonogram is to be calculated:

(a) on the basis of the life of a natural person, the term shall be not less than the life of the author and 70 years after the author's death; and

(b) on a basis other than the life of a natural person, the term shall be:

(i) not less than 70 years from the end of the calendar year of the first authorised publication of the work, performance, or phonogram; or

(ii) failing such authorised publication within 50 years from the creation of the work, performance, or phonogram, not less than 70 years from the end of the calendar year of the creation of the work, performance, or phonogram.

5. Each Party shall apply Article 18 of the Berne Convention and Article 14.6 of the TRIPS Agreement, mutatis mutandis, to the subject matter, rights, and obligations in this Article and Articles 17.5 and 17.6.

6. (a) Each Party shall provide that for copyright, any person acquiring or holding any economic right in a work, performance, or phonogram:

(i) may freely and separately transfer that right by contract; and

(ii) by virtue of a contract, including contracts of employment underlying the creation of works, performances, and phonograms, shall be able to exercise that right in that person's own name and enjoy fully the benefits derived from that right.

(b) Each Party may establish measures to give effect to the measures specified in Article 14¢er of the Berne Convention.

7. (a) In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors, performers, and producers of phonograms use in connection with the exercise of their rights and that restrict unauthorised acts in respect of their works, performances, and phonograms, each Party shall provide that any person who:

(i) knowingly, or having reasonable grounds to know, circumvents without authority any effective technological measure that controls access to a protected work, performance, or phonogram, or other subject matter; or

(ii) manufactures, imports, distributes, offers to the public, provides, or otherwise traffics in devices, products, or components, or offers to the public, or provides services that:

(A) are promoted, advertised, or marketed for the purpose of circumvention of any effective technological measure;

(B) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure; or

(C) are primarily designed, produced, or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure,

shall be liable and subject to the remedies specified in Article 17.11.13. Each Party shall provide for criminal procedures and penalties to be applied where any person is found to have engaged wilfully and for the purposes of commercial advantage or financial gain in any of the above activities. Each Party may provide that such criminal procedures and penalties do not

apply to a non-profit library, archive, educational institution, or public non-commercial broadcasting entity.

(b) **Effective technological measure** means any technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, or other protected subject matter, or protects any copyright.

(c) In implementing sub-paragraph (a), neither Party shall be obligated to require that the design of, or the design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as the product does not otherwise violate any measures implementing sub-paragraph (a).

(d) Each Party shall provide that a violation of a measure implementing this paragraph is a separate civil or criminal offence and independent of any infringement that might occur under the Party's copyright law.

(e) Each Party shall confine exceptions to any measures implementing sub-paragraph (a) to the following activities, which shall be applied to relevant measures in accordance with sub-paragraph (f):

(i) non-infringing reverse engineering activities with regard to a lawfully obtained copy of a computer program, carried out in good faith with respect to particular elements of that computer program that have not been readily available to the person engaged in those activities, for the sole purpose of achieving interoperability of an independently created computer program with other programs,

(ii) non-infringing good faith activities, carried out by an appropriately qualified researcher who has lawfully obtained a copy, unfixed performance, or display of a work, performance, or phonogram and who has made a good faith effort to obtain authorisation for such activities, to the extent necessary for the sole purpose of identifying and analysing flaws and vulnerabilities of technologies for scrambling and descrambling of information;

(iii) the inclusion of a component or part for the sole purpose of preventing the access of minors to inappropriate online content in a technology, product, service, or device that itself is not prohibited under the measures implementing sub-paragraph (a)(ii);

(iv) non-infringing good faith activities that are authorised by the owner of a computer, computer system, or computer network for the sole purpose of testing, investigating, or correcting the security of that computer, computer system, or computer network;

(v) non-infringing activities for the sole purpose of identifying and disabling a capability to carry out undisclosed collection or dissemination of personally identifying information reflecting the online activities of a natural person in a way that has no other effect on the ability of any person to gain access to any work;

(vi) lawfully authorised activities carried out by government employees, agents, or contractors for law enforcement, intelligence, essential security, or similar governmental purposes;

(vii) access by a non-profit library, archive, or educational institution to a work, performance, or phonogram not otherwise available to it, for the sole purpose of making acquisition decisions; and

(viii) non-infringing uses of a work, performance, or phonogram in a particular class of works, performances, or phonograms, when an actual or likely adverse impact on those non-infringing uses is credibly demonstrated in a legislative or administrative review or proceeding; provided that any such review or proceeding is conducted at least once every four years from the date of conclusion of such review or proceeding.

(f) The exceptions to any measures implementing sub-paragraph (a) for the activities set forth in sub-paragraph (c) may only be applied as follows, and only to the extent that they do not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological measures:

(i) any measures implementing sub-paragraph (a)(i) may be subject to exceptions with respect to cach activity set forth in sub-paragraph (c);

(ii) any measures implementing sub-paragraph (a)(ii), as they apply to effective technological measures that control access to a work, performance, or phonogram, may be subject to exceptions with respect to activities set forth in sub-paragraph (c)(i), (ii), (aii), (iv), and (vi); and

(iii) any measures implementing sub-paragraph (a)(ii), as they apply to effective technological measures that protect any copyright, may be subject to exceptions with respect to the activities set forth in sub-paragraph (e)(i) and (vi).

8. In order to provide adequate and effective legal remedies to protect rights management information:

(a) each Party shall provide that any person who without authority, and knowing, or, with respect to civil remedies, having reasonable grounds to know, that it would induce, enable, facilitate, or conceal an infringement of any copyright:

(i) knowingly removes or alters any rights management information;

(ii) distributes or imports for distribution rights management information knowing that the rights management information has been removed or altered without authority; or

(iii) distributes to the public, imports for distribution, broadcasts, communicates, or makes available to the public copies of works, performances, or phonograms, knowing that rights management information has been removed or altered without authority,

shall be liable and subject to the remedies specified in Article 17.11.13. Each Party shall provide for criminal procedures and penalties to be applied where any person is found to have engaged wilfully and for purposes of commercial advantage or financial gain in any of the above activities. Each Party may provide that these criminal procedures and penalties do not apply to a non-profit library, archive, educational institution, or public non-commercial broadcasting entity;

(b) each Party shall confine exceptions to measures implementing sub-paragraph (a) to lawfully authorised activities carried out by government employees, agents, or contractors for the purpose of law enforcement, intelligence, essential security, or similar government purposes;

(c) **rights management information** means:

(i) electronic information that identifies a work, performance, or phonogram; the author of the work; the performer of the performance; the producer of the phonogram; or the owner of any right in the work, performance, or phonogram; or

(ii) electronic information about the terms and conditions of the use of the work, performance, or phonogram; or

(iii) any electronic numbers or codes that represent such information,

when any of these items is attached to a copy of the work, performance, or phonogram or appears in connection with the communication or making available of a work, performance, or phonogram to the public. Nothing in this paragraph shall obligate a Party to require the owner of any right in the work, performance, or phonogram to attach rights management information to copies of the work, performance, or phonogram, or to cause rights management information to appear in connection with a communication of the work, performance, or phonogram to the public.

9. Each Party shall provide appropriate laws, orders, regulations, government issued guidelines, or administrative or executive decrees providing that its central government agencies not use infringing computer software and only use computer software as authorised in the relevant licence. These measures shall provide for the regulation of the acquisition and management of software for such government use and may take the form of procedures such as those under which an agency prepares and maintains inventories of software present on the agency's computers and inventories of software licenses.

10. With respect to Articles 17.4, 17.5, and 17.6:

(a) each Party shall confine limitations or exceptions to exclusive rights to certain special cases that do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder;

(b) notwithstanding sub-paragraph (a) and Article 17.6.3(b), neither Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorisation of the right holder or right holders, if any, of the content of the signal and of the signal;

(c) unless otherwise specifically provided in this Chapter, nothing in this Article shall be construed as reducing or extending the scope of applicability of the limitations and exceptions permitted under the agreements referred to in Articles 17.1.2 and 17.1.4 and the TRIPS Agreement.

(17-8) The Parties reaffirm that it is a matter for each Party's law to prescribe that works and phonograms shall not be protected by copyright unless they have been fixed in some material form.

(17-9) For the purposes of Articles 17.4, 17.5, and 17.6, aright to authorise or prohibit means an exclusive right.

(17-10) For the purposes of Articles 17.4, 175, and 17.6, a performance refers to a performance fixed in a phonogram unless otherwise specified.

(17-11) References in this Chapter to authors, performers and producers of phonograms include any successors in interest.

(17-12) The expressions copies and original and copies subject to the right of distribution in this paragraph refer exclusively to fixed copies that can be put into circulation as tangible objects.

(17-13) Nothing in this Agreement shall affect a Party's right to determine the conditions, if any, under which the exhaustion of this right applies after the first sale or other transfer of ownership of the original or a copy of their works, performances, or phonograms with the authorisation of the right holder.

## Article 17.5. Copyright Works

Without prejudice to Articles 11(1)(ii), 11is(1)@) and (ii), 11éer(1)Gi), 14(1)(i), and 145is(1) of the Berne Convention, each Party shall provide to authors the exclusive right to authorise or prohibit the communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

## Article 17.6. Performers and Producers of Phonograms

1. Each Party shall accord the rights provided for in this Chapter with respect to performers and producers of phonograms to the performers and producers of phonograms who are nationals of the other Party and to performances first fixed or phonograms first fixed or first published in the territory of the other Party. A performance or phonogram shall be considered first published in the territory of a Party in which it is published within 30 days of its original publication (17-14)

2. Each Party shall provide to performers the right to authorise or prohibit:

(a) the broadcasting and communication to the public of their unfixed performances, except where the performance is already a broadcast performance; and

(b) the fixation of their unfixed performances.

3. (a) Each Party shall provide to performers and producers of phonograms the right to authorise or prohibit the broadcasting or any communication to the public of their performances or phonograms by wire or wireless means, including the making available to the public of those performances and phonograms in such a way that members of the public may access them from a place and at a time individually chosen by them.

(b) Notwithstanding sub-paragraph (a) and Article 17.4.10, the application of this right to traditional free over-the-air (i.e., non-interactive) broadcasting, and exceptions or limitations to this right for such broadcasting activity, shall be a matter of each Party's law.

(c) Each Party may adopt limitations to this right in respect of other non-interactive transmissions in accordance with Article 17.4.10, provided that the limitations do not prejudice the right of the performer or producer of phonograms to obtain equitable remuneration.

4. Neither Party may subject the enjoyment and exercise of the rights of performers and producers of phonograms provided for in this Chapter to any formality.

5. For the purposes of this Article and Article 17.4, the following definitions apply with respect to performers and producers of phonograms:

(a) **broadcasting** means the transmission to the public by wireless means or satellite of sounds or sounds and images, or representations thereof, including wireless transmission of encrypted signals where the means for decrypting are provided to the public by the broadcasting organisation or with its consent; "broadcasting" does not include transmissions over computer networks or any transmissions where the time and place of reception may be individually chosen by members of the public;

(b) **communication to the public** of a performance or a phonogram means the transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed ina phonogram. For the purposes of paragraph 3, communication to the public includes making the sounds or representations of sounds fixed in a phonogram audible to the public;

(c) **fixation** means the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced, or communicated through a device;

(d) **performers** means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore;

(e) **phonogram** means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work;

(f) **producer of a phonogram** means the person who, or the legal entity which, takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds; and

(g) **publication of a performance or a phonogram** means the offering of copies of the performance or the phonogram to the public, with the consent of the right holder, and provided that copies are offered to the public in reasonable quantity.

(17-14) For the purposes of this Article, fixation includes the finalisation of the master tape or its equivalent.

## Article 17.7. Protection of Encrypted Programme-carrying Satellite Signals

1. Each Party shall make it a criminal offence:

(a) to manufacture, assemble, modify, import, export, sell, lease, or otherwise distribute a tangible or intangible device or system, knowing or having reason to know that the device or system is primarily of assistance in decoding an encrypted programme-carrying satellite signal without the authorisation of the lawful distributor of such signal; and

(b) wilfully to receive and make use of, or further distribute, a programme-carrying signal that originated as an encrypted programme-carrying satellite signal knowing that it has been decoded without the authorisation of the lawful distributor of the signal.

2. Each Party shall provide for civil remedies, including compensatory damages, for any person injured by any activity described in paragraph 1, including any person that holds an interest in the encrypted program-carrying signal or its content.

## Article 17.8. Designs

1. Each Party shall maintain protection for industrial designs that provides a right of presumptive validity and shall endeavour to simplify and streamline its administrative system for the benefit of users.

2. Each Party shall endeavour to reduce differences in law and practice between the Parties' industrial design systems. In addition, each Party shall endeavour to participate in international activities concerning industrial designs, including those ongoing within WIPO.

## Article 17.9. Patents

1. Each Party shall make patents available for any invention, whether a product or process, in all fields of technology, provided that the invention is new, involves an inventive step, and is capable of industrial application. The Parties confirm that patents shall be available for any new uses or methods of using a known product. For the purposes of this Article, a Party may treat the terms "inventive step" and "capable of industrial application" as synonymous with the terms "non-obvious" and "useful", respectively.

2. Each Party may only exclude from patentability:

(a) inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal, or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by law; and

(b) diagnostic, therapeutic, and surgical methods for the treatment of humans and animals.

3. A Party may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.

4. Each Party shall provide that the exclusive right of the patent owner to prevent importation of a patented product, or a product that results from a patented process, without the consent of the patent owner shall not be limited by the sale or distribution of that product outside its territory, at least where the patentee has placed restrictions on importation by contract or other means.

5. Each Party shall provide that a patent may only be revoked on grounds that would have justified a refusal to grant the patent, or on the basis of fraud, misrepresentation, or inequitable conduct.

6. Consistent with paragraph 3, if a Party permits a third person to use the subject matter of a subsisting patent to generate information necessary to support an application for marketing approval of a pharmaceutical product, that Party shall provide that any product produced under such authority shall not be made, used, or sold in the territory of that Party other than for purposes related to generating information to meet requirements for marketing approval for the product, and if the Party permits exportation, the product shall only be exported outside the territory of that Party for purposes of meeting marketing approval requirements of that Party.

7. A Party shall not permit the use (17-15) of the subject matter of a patent without the authorisation of the right holder except in the following circumstances:

(a) to remedy a practice determined after judicial or administrative process to be anti- competitive under the Party's laws relating to prevention of anti-competitive practices; (17-6) or

(b) in cases of public non-commercial use, or of national emergency, or other circumstances of extreme urgency, provided that:

(i) the Party shall limit such use to use by the government or third persons authorised by the government;

(ii) the Party shall ensure that the patent owner is provided with reasonable compensation for such use; and

(iii) the Party may not require the patent owner to provide undisclosed information or technical know-how related to a patented invention that has been authorised for use in accordance with this paragraph.

8. (a) If there are unreasonable delays in a Party's issuance of patents, that Party shall provide the means to, and at the request of a patent owner, shall, adjust the term of the patent to compensate for such delays. An unreasonable delay shall at least include a delay in the issuance of a patent of more than four years from the date of filing of the application in the Party, or two years after a request for examination of the application has been made, whichever is later. For the purposes of this paragraph, any delays that occur in the issuance of a patent due to periods attributable to actions of the patent applicant or any opposing third person need not be included in the determination of such delay.

(b) With respect to a pharmaceutical product (17-17) that is subject to a patent, each Party shall make available an adjustment of the patent term to compensate the patent owner for unreasonable curtailment of the effective patent term as a result of the marketing approval process.

9. Each Party shall disregard information contained in public disclosures used to determine if an invention is novel or has an inventive step if the public disclosure, (a) was made or authorised by, or derived from, the patent applicant and (b) occurs within 12 months prior to the date of filing of the application in the territory of the Party.

10. Each Party shall provide patent applicants with at least one opportunity to make amendments, corrections, and observations in connection with their applications.

11. Each Party shall provide that a disclosure of a claimed invention shall be considered to be sufficiently clear and complete if it provides information that allows the invention to be made and used by a person skilled in the art, without undue experimentation, as of the filing date.

12. Each Party shall provide that a claimed invention is sufficiently supported by its disclosure if the disclosure reasonably conveys to a person skilled in the art that the applicant was in possession of the claimed invention, as of the filing date.

13. Each Party shall provide that a claimed invention is useful if it has a specific, substantial, and credible utility.

14. Each Party shall endeavour to reduce differences in law and practice between their respective systems, including in respect of differences in determining the rights to an invention, the prior art effect of applications for patents, and the

division of an application containing multiple inventions. In addition, each Party shall endeavour to participate in international patent harmonisation efforts, including the WIPO fora addressing reform and development of the international patent system.

15. Each Party shall endeavour to establish a cooperative framework between their respective patent offices as a basis for progress towards the mutual exploitation of search and examination work.

(17-15) "Use" in this paragraph refers to use other than that allowed under paragraph 3 and Article 30 of the TRIPS Agreement.

(17-16) with respect to sub-paragraph (a), the Parties recognize that a patent does not necessarily confer market power.

(17-17) For Australia, the term pharmaceutical substance as used in Section 70 of the Patents Act 1990 on the date of entry into force of this Agreement may be treated as synonymous with the term pharmaceutical product as used in this sub-paragraph.

## Article 17.10. Measures Related to Certain Regulated Products

1. (a) If a Party requires, as a condition of approving the marketing of a new pharmaceutical product, the submission of undisclosed test or other data concerning safety or efficacy of the product, the Party shall not permit third persons, without the consent of the person who provided the information, to market the same or a similar product on the basis of that information, or the marketing approval granted to the person who submitted such information, for at least five years from the date of marketing approval by the Party.

(b) If a Party requires, as a condition of approving the marketing of a new agricultural chemical product, including certain new uses of the same product, the submission of undisclosed test or other data concerning safety or efficacy of that product, the Party shall not permit third persons, without the consent of the person who provided the information, to market the same or a similar product on the basis of that information, or the marketing approval granted to the person who submitted such information, for ten years from the date of the marketing approval of the new agricultural chemical product by the Party.

(c) If a Party permits, as a condition of approving the marketing of a new pharmaceutical or agricultural chemical product, third persons to submit evidence concerning the safety or efficacy of a product that was previously approved in another territory, such as evidence of prior marketing approval, the Party shall not permit third persons, without the consent of the person who previously submitted information concerning safety or efficacy, to market the same or a similar product on the basis of evidence of prior marketing approval in another territory, or information concerning safety or efficacy that was previously submitted to obtain marketing approval in another territory, for at least five years, and ten years for agricultural chemical products, from the date of marketing approval by the Party, or the other territory, whichever is late, (17-18)

(d) For the purposes of this Article, a **new product** is one that does not contain a chemical entity that has been previously approved for marketing in the Party.

(e) If any undisclosed information concerning the safety or efficacy of a product submitted to a government entity, or entity acting on behalf of a government, for the purposes of obtaining marketing approval is disclosed by a government entity, or entity acting on behalf of a government, each Party is required to protect such information from unfair commercial use in the manner set forth in this Article.

2. With respect to pharmaceutical products, if a Party requires the submission of: (a) new clinical information (other than information related to bioequivalency) or (b) evidence of prior approval of the product in another territory that requires such new information, which is essential to the approval of a pharmaceutical product, the Party shall not permit third persons not having the consent of the person providing the information to market the same or a similar pharmaceutical product on the basis of the marketing approval granted to a person submitting the information for a period of at least three years from the date of the marketing approval by the Party or the other territory, whichever is later. (17-19)

3. When a product is subject to a system of marketing approval in accordance with paragraph 1 or 2, as applicable, and is also subject to a patent in the territory of that Party, the Party shall not alter the term of protection that it provides pursuant to paragraph 1 or 2 in the event that the patent protection terminates on a date earlier than the end of the term of protection specified in paragraph 1 or 2, as applicable.

4. Where a Party permits, as a condition of approving the marketing of a pharmaceutical product, persons, other than the

person originally submitting the safety or efficacy information, to rely on evidence or information concerning the safety or efficacy of a product that was previously approved, such as evidence of prior marketing approval by the Party or in another territory:

(a) that Party shall provide measures in its marketing approval process to prevent those other persons from:

(i) marketing a product, where that product is claimed in a patent; or

(ii) marketing a product for an approved use, where that approved use is claimed in a patent, during the term of that patent, unless by consent or acquiescence of the patent owner; and

(b) if the Party permits a third person to request marketing approval to enter the market with:

(i) a product during the term of a patent identified as claiming the product; or

(ii) a product for an approved use, during the term of a patent identified as claiming that approved use,

the Party shall provide for the patent owner to be notified of such request and the identity of any such other person.

(17-18)The Parties acknowledge that, at the time of entry into force of this Agreement, neither Party permits third persons, not having the consent of the person that previously submitted information concerning the safety and efficacy of a product in order to obtain marketing approval in another territory, to market a same or similar product in the territory of the Party on the basis of such information or evidence of prior marketing approval in another territory.

(17-19) (As an alternative to this paragraph, where a Party, on the date of entry into force of this Agreement, has in place a system for protecting information submitted in connection with the approval of a pharmaceutical product that utilizes a previously approved chemical component from unfair commercial use, the Party may retain that system, notwithstanding the obligations of this paragraph.

## Article 17.11. Enforcement of Intellectual Property Rights

*General obligations*

1. For greater clarity, the obligations specified in this Article are limited to the enforcement of intellectual property rights, or, if mentioned, a particular intellectual property right.

2. Each Party shall provide that final judicial decisions or administrative rulings for the enforcement of intellectual property rights that under the Party's law are of general applicability shall be in writing and shall state any relevant findings of fact and the reasoning, or the legal basis on which the decisions or rulings are based. Each Party shall provide that such decisions or rulings shall be published (17-20) or, where such publication is not practicable, otherwise made available to the public, in a national language in such a manner as to enable governments and right holders to become acquainted with them.

3. Each Party shall inform the public of its efforts to provide effective enforcement of intellectual property rights in its civil, administrative, and criminal system, including any statistical information that the Party may collect for such purpose.

4. In civil, criminal, and if applicable, administrative procedures, involving copyright, each Party shall provide for a presumption that, in the absence of evidence to the contrary, the person whose name is indicated in the usual manner is the right holder in the work, performance, or phonogram as designated. Each Party shall also provide for a presumption, in the absence of evidence to the contrary, of all the factual elements necessary to establish under its law that copyright subsists in such subject matter.

(17-20) A Party may satisfy the requirement for publication by making the measure available to the public on the Internet.

*Civil and Administrative Procedures and Remedies*

5. Each Party shall make available to right holders (17-21) civil judicial procedures concerning the enforcement of any intellectual property right.

6. Each Party shall provide that:

(a) in civil judicial proceedings, its judicial authorities shall have the authority to order the infringer to pay the right holder:

(i) damages adequate to compensate for the injury the right holder has suffered as a result of the infringement; and

(ii) at least in the case of copyright infringement and trademark counterfeiting, the profits of the infringer that are attributable to the infringement and that are not taken into account in computing the amount of the damages referred to in clause (1).

(b) in determining damages for infringement of intellectual property rights, its judicial authorities shall consider, inter alia, any legitimate measure of the value of the infringed on good or service that the right holder submits, including the suggested retail price.

7. (a) In civil judicial proceedings, each Party shall, at least with respect to works, phonograms, and performances protected by copyright, and in cases of trademark counterfeiting, establish or maintain pre-established damages, which shall be available on the election of the right holder. Such pre-established damages shall be in an amount sufficient to constitute a deterrent to future infringements and to compensate fully the right holder for the harm caused by the infringement.

(b) As an alternative to the requirements in sub-paragraph (a) with respect to both copyright and to trademark counterfeiting, a Party may maintain a system of additional damages in civil judicial proceedings involving infringement of copyright in works, phonograms, and performances; provided that if such additional damages, while available, are not regularly awarded in proceedings involving deliberate acts of infringement where needed to deter infringement, that Party shall promptly ensure that such damages are regularly awarded or establish a system of pre-established damages as specified in sub-paragraph (a) with respect to copyright infringement.

8. Each Party shall provide that its judicial authorities shall have the authority to order, at the conclusion of civil judicial proceedings at least for copyright infringement and trademark counterfeiting, that the prevailing party be awarded payment of court costs or fees and reasonable attorney's fees by the losing party. (17-22) Further, each Party shall provide that its judicial authorities, at least in exceptional circumstances, shall have the authority to order, at the conclusion of civil judicial proceedings concerning patent infringement, that the prevailing party be awarded payment of reasonable attorney's fees by the losing party.

9. In civil judicial proceedings concerning copyright infringement and trademark counterfeiting, each Party shall provide that its judicial authorities shall have the authority to order the seizure of suspected infringing goods, any related materials and implements, and, at least for trademark counterfeiting, documentary evidence relevant to the infringement.

10. Each Party shall provide that:

(a) in civil judicial proceedings, at the right holder's request, goods that have been found to be pirated or counterfeit in breach of a copyright or trademark of the right holder shall be destroyed, except in exceptional circumstances; (17-23)

(b) its judicial authorities shall have the authority to order that materials and implements that have been used in the manufacture or the creation of such pirated or counterfeit goods be, without compensation of any sort, promptly destroyed or, in exceptional circumstances, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimise the risks of further infringements; and

(c) in regard to counterfeit trademarked goods, the simple removal of the trademark unlawfully affixed shall not be sufficient to permit the release of goods into the channels of commerce.

11. Each Party shall provide that in civil judicial proceedings concerning the enforcement of intellectual property rights, its judicial authorities shall have the authority to order the infringer to provide any information that the infringer possesses regarding any person involved in any aspect of the infringement and regarding the means of production or distribution channel of the infringing material, and to provide this information to the right holder's representative in the proceedings. (17-24)

12. Each Party shall provide that in judicial proceedings concerning the enforcement of intellectual property rights, its judicial authorities shall have the authority to:

(a) fine or imprison, in appropriate cases, a party to litigation who fails to abide by valid orders issued by such authorities; and

(b) impose sanctions on parties to litigation, their counsel, experts, or other persons subject to the court's jurisdiction, for violation of judicial orders regarding the protection of confidential information produced or exchanged in a proceeding.

13. (a) In civil judicial proceedings concerning the acts described in Article 17.4.7 and 17.4.8, each Party shall provide that its judicial authorities shall have the authority to order or award at least:

(i) provisional measures, including the seizure of devices and products suspected of being involved in the proscribed activity;

(ii) damages of the type available for infringement of copyright;

(iii) payment to the prevailing party of court costs and fees and reasonable attorney's fees; (17-25) and

(iv) destruction of devices and products found to be involved in the proscribed activity.

(b) A Party may provide that damages shall not be available against a non-profit library, archive, education institution, or public non-commercial broadcasting entity that sustains the burden of proving that it was not aware or had no reason to believe that its acts constituted a proscribed activity.

14. Each Party shall provide that its judicial authorities shall have the authority to enjoin a party to a civil judicial proceeding from the exportation of goods that are alleged to infringe an intellectual property right.

15. If a Party's judicial or other authorities appoint technical or other experts in civil judicial proceedings concerning the enforcement of intellectual property rights, and require that the parties to litigation or other civil or criminal proceedings bear the costs of such experts, the Party should seek to ensure that these costs are reasonable and related appropriately to, inter alia, the quantity and nature of work to be performed and do not unreasonably deter recourse to such litigation or proceeding.

(17-21)For the purpose of this Article, the term right holder shal] include exclusive licensees as well as federations and associations having the legal standing and authority to assert such rights; the term exclusive licensee shall include the exclusive licensee of any one or more of the exclusive intellectual property rights encompassed in a given intellectual property.

(17-22) A Party may limit this authority in exceptional circumstances.

(17-23) A Party may give effect to paragraph 10(a) through, inter alia, the exercise of judicial discretion or pursuant to specific causes of action, as applicable.

(17-24) For greater clarity, this provision does not apply to the extent that it would conflict with common law or statutory privileges, such as legal professional privilege.

(17-25) Reasonable attorney's fees may include those levied pursuant to relevant court fee schedules.

*Provisional measures*

16. Each Party's authorities shall act on requests for relief inaudita altera parte expeditiously in accordance with the Party's judicial rules.

17. With respect to provisional measures, each Party shall provide that its judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a reasonable security or equivalent assurance set at a level sufficient to protect the respondent and to prevent abuse, and so as not to unreasonably deter recourse to such procedures.

18. In proceedings concerning the grant of provisional measures in relation to enforcement of a patent, each Party shall provide for a rebuttable presumption that the patent is valid.

*Special requirements related to border measures*

19. Each Party shall provide that any right holder initiating procedures for that Party's customs authorities to suspend the release of suspected counterfeit (17-26) or confusingly similar trademark goods, or pirated copyright goods, (17-27) into free circulation is required to provide adequate evidence to satisfy the competent authorities, administrative or judicial that, under the laws of the territory of importation, there is prima facie an infringement of the right holder's intellectual property right and to supply sufficient information that may reasonably be expected to be within the right holder's knowledge to make the suspected goods reasonably recognisable by the Party's customs authorities. The requirement to provide sufficient information shall not unreasonably deter recourse to these procedures. Each Party shall provide that the

application to suspend the release of goods shall remain in force for a period of not less than one year from the date of application or the period that the good is protected by copyright or the relevant trademark is registered, whichever is shorter.

20. Each Party shall provide that its competent authorities shall have the authority to require a right holder initiating procedures to suspend the release of goods suspected of being counterfeit trademark or pirated copyright goods to provide a reasonable security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse. Each Party shall provide that such security or equivalent assurance shall not unreasonably deter recourse to these procedures. Each Party may provide that such security may be in the form of a documentary guarantee conditioned to hold the importer or owner of the imported merchandise harmless from any loss or damage resulting from any suspension of the release of goods in the event the competent authorities determine that the article is not an infringing good.

21. Where its competent authorities have made a determination that goods are counterfeit or pirated, a Party shall provide that its competent authorities have the authority to inform the right holder of the names and addresses of the consignor, the importer, and the consignee, and of the quantity of the goods in question.

22. Each Party shall provide that its customs authorities may initiate border measures ex officio with respect to imported merchandise suspected of infringing being counterfeit trademark or pirated copyright goods, without the need for a specific formal complaint.

23. Each Party shall provide that goods that have been suspended from release by its customs authorities, and that have been forfeited as pirated or counterfeit, shall be destroyed, except in exceptional cases. In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient to permit the release of the goods into the channels of commerce. In no event shall the competent authorities be authorised to permit the exportation of counterfeit or pirated goods that have been seized, nor shall they be authorised to permit such goods to be subject to movement under customs control, except in exceptional circumstances.

24. Each Party shall provide that where an application fee or merchandise storage fee is assessed in connection with border measures to enforce a trademark or copyright, the fee shall not be set at an amount that unreasonably deters recourse to these measures.

25. Each shall provide the other, on mutually agreed terms, with technical advice on the enforcement of border measures concerning intellectual property rights, and the Parties shall promote bilateral and regional cooperation on such matters.

(17-26) For the purposes of paragraphs 19 through 24, counterfeit trademark goods means any goods, including packaging, bearing without authorisation a trademark that is identical to the trademark validly registered in respect of such goods, or that cannot be distinguished in its essential aspects from such a trademark, and that thereby infringes the rights of the owner of the trademark in question under the law of the country of importation.

(17-27) For the purposes of paragraphs 19 through 24, pirated copyright goods means any goods that are copies made without the consent of the right holder or person duly authorised by the right holder in the country of production and that are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.

*Criminal procedures and remedies*

26. (a) Each Party shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Wilful copyright piracy on a commercial scale includes:

(i) significant wilful infringements of copyright, that have no direct or indirect motivation of financial gain; and

(ii) wilful infringements for the purposes of commercial advantage or financial gain.

(b) Each Party shall treat wilful importation or exportation (17-28) of pirated copyright goods or of counterfeit trademark goods as unlawful activities subject to criminal penalties to at least the same extent as trafficking or distributing such goods in domestic commerce.

27. In cases of wilful trademark counterfeiting or copyright piracy on a commercial scale, each Party shall provide:

(a) penalties that include imprisonment and monetary fines sufficiently high to provide a deterrent to infringement consistent with a policy of removing the monetary incentive of the infringer. Also, each Party shall encourage its judicial

authorities to impose fines at levels sufficient to provide a deterrent to future infringements;

(b) that its judicial authorities shall have the authority to order the seizure of suspected counterfeit or pirated goods, any related materials and implements that have been used in the commission of the offence, any assets traceable to the infringing activity, and any documentary evidence relevant to the offence; (17-29)

(c) that its judicial authorities shall have the authority, among other measures, to order the forfeiture of any assets traceable to the infringing activity for at least indictable offences, and shall, except in exceptional circumstances, order the forfeiture and destruction of all goods found to be counterfeit or pirated, and, at least with respect to wilful copyright piracy, order the forfeiture and destruction of materials and implements that have been used in the creation of the infringing goods. Each Party shall further provide that such forfeiture and destruction shall occur without compensation to the defendant; and

(d) that the appropriate authorities, as determined by each Party, shall have the authority to initiate criminal legal action ex officio with respect to the offences described in this Chapter without the need for a formal complaint by a private party or right holder.

28. Each Party shall provide for criminal procedures and penalties for the knowing transport, transfer, or other disposition of, in the course of trade, or the making or obtaining control of, with intent to so transport, transfer, or otherwise dispose of, in the course of trade, to another for anything of value:

(a) either false or counterfeit labels affixed or designed to be affixed to, at least the following:

(i) a phonogram;

(ii) a copy of a computer program or documentation;

(iii) the packaging for a computer program; or

(iv) a copy of a motion picture or other audiovisual work; or

(b) counterfeit documentation or packaging for a computer program where the documentation or packaging has been made or obtained without the authorisation of the right holder.

(17-28) A Party may comply with paragraph 26(b) in relation to exportation through its measures concerning distribution or trafficking.

(17-29) Each Party shall provide that items that are subject to seizure pursuant to any such judicial order need not be individually identified so long as they fall within general categories specified in the order.

*Limitations on liability for service providers*

29. Consistent with Article 41 of the TRIPS Agreement, for the purposes of providing enforcement procedures that permit effective action against any act of copyright infringement covered under this Chapter, including expeditious remedies to prevent infringements and criminal and civil remedies, cach Party shall provide, consistent with the framework specified in this Article:

(a) legal incentives for service providers to cooperate with copyright owners in deterring the unauthorised storage and transmission of copyrighted materials; and

(b) limitations in its law regarding the scope of remedies available against service providers for copyright infringements that they do not control, initiate, or direct, and that take place through systems or networks controlled or operated by them or on their behalf, as set forth in this sub-paragraph. (17-30)

(i) These limitations shall preclude monetary relief and provide reasonable restrictions on court-ordered relief to compel or restrain certain actions for the following functions, and shall be confined to those functions: (17-31)

(A) transmitting, routing, or providing connections for material without modification of its content, or the intermediate and transient storage of such material in the course thereof;

(B) caching carried out through an automatic process;

(C) storage at the direction of a user of material residing on a system or network controlled or operated by or for the service provider; and

(D) referring or linking users to an online location by using information location tools, including hyperlinks and directories.

(ii) These limitations shall apply only where the service provider does not initiate the chain of transmission of the material and does not select the material or its recipients (except to the extent that a function described in clause (i)(D) in itself entails some form of selection).

(iii) Qualification by a service provider for the limitations as to each function in clause (i)(A) through (D) shall be considered separately from qualification for the limitations as to each other function, in accordance with the conditions for qualification set forth in clauses (iv) through (vii).

(iv) With respect to function referred to in clause (i)(B), the limitations shall be conditioned on the service provider:

(A) permitting access to cached material in significant part only to users of its system or network who have met conditions on user access to that material;

(B) complying with rules concerning the refreshing, reloading, or other updating of the cached material when specified by the person making the material available online in accordance with a relevant industry standard data communications protocol for the system or network through which that person makes the material available that is generally accepted in the Party's territory;

(C) not interfering with technology used at the originating site consistent with industry standards generally accepted in the Party's territory to obtain information about the use of the material, and not modifying its content in transmission to subsequent users; and

(D) expeditiously removing or disabling access, on receipt of an effective notification of claimed infringement, to cached material that has been removed or access to which has been disabled at the originating site.

(v) With respect to functions referred to in clause (i)(C) and (D), the limitations shall be conditioned on the service provider:

(A) not receiving a financial benefit directly attributable to the infringing activity, in circumstances where it has the right and ability to control such activity;

(B) expeditiously removing or disabling access to the material residing on its system or network on obtaining actual knowledge of the infringement or becoming aware of facts or circumstances from which the infringement was apparent, such as through effective notifications of claimed infringement in accordance with clause (ix); and

(C) publicly designating a representative to receive such notifications.

(vi) Eligibility for the limitations in this sub-paragraph shall be conditioned on the service provider:

(A) adopting and reasonably implementing a policy that provides for termination in appropriate circumstances of the accounts of repeat infringers; and

(B) accommodating and not interfering with standard technical measures accepted in the Party's territory that protect and identify copyrighted material, that are developed through an open, voluntary process by a broad consensus of copyright owners and service providers, that are available on reasonable and non- discriminatory terms, and that do not impose substantial costs on service providers or substantial burdens on their systems or networks.

(vii) Eligibility for the limitations in this subparagraph may not be conditioned on the service provider monitoring its service, or affirmatively seeking facts indicating infringing activity, except to the extent consistent with such technical measures.

(viii) If the service provider qualifies for the limitations with respect to the function referred to in clause (i)(A), court-ordered relief to compel or restrain certain actions shall be limited to terminating specified accounts, or to taking reasonable steps to block access to a specific, non-domestic online location. If the service provider qualifies for the limitations with respect to any other function in clause (i), court-ordered relief to compel or restrain certain actions shall be limited to removing or disabling access to the infringing material, terminating specified accounts, and other remedies that a court may find necessary provided that such other remedies are the least burdensome to the service provider among comparably effective forms of relief. Each Party shall provide that any such relief shall be issued with due regard for the relative burden to the service provider and harm to the copyright owner, the technical feasibility and effectiveness of the remedy, and whether less burdensome, comparably effective enforcement methods are available. Except for orders ensuring the preservation of evidence, or other orders having no material adverse effect on the operation of the service provider's communications network, each Party shall provide that such relief shall be available only where the service provider has received notice and an opportunity to appear before the judicial authority.

(ix) For the purposes of the notice and take down process for the functions referred to in clause (i)(C) and (D), each Party

shall establish appropriate procedures for effective notifications of claimed infringement, and effective counter-notifications by those whose material is the subject of a notice for removal or disabling, on the basis of a good faith belief that it was issued by mistake or misidentification in accordance with clause (v)(B). Each Party shall also provide for monetary remedies against any person who makes a knowing material misrepresentation in a notification or counter-notification that causes injury to any interested party as a result of a service provider relying on the misrepresentation.

(x) If the service provider removes or disables access to material in good faith based on claimed or apparent infringement, each Party shall provide that the service provider shall be exempted from liability for any resulting claims, provided that, in the case of material residing on its system or network, it takes reasonable steps promptly to notify the person making the material available on its system or network that it has done so and, if such person makes an effective counter-notification and is subject to jurisdiction in an infringement suit, to restore the material online unless the person giving the original effective notification seeks judicial relief within a reasonable time.

(xi) Each Party shall provide for an administrative or judicial procedure enabling copyright owners who have given effective notification of claimed infringement to obtain expeditiously from a service provider information in its possession identifying the alleged infringer.

(xii) For the purposes of the function referred to in clause (i)(A), service provider means a provider of transmission, routing, or connections for digital online communications without modification of their content between or among points specified by the user of material of the user's choosing, and for the purposes of the functions referred to in clause (i)(B) through (D), service provider means a provider or operator of facilities for online services or network access.

(17-30) Paragraph 29(b) is without prejudice to the availability of defences to copyright infringement that are of general applicability.

(17-31) Either Party may request consultations with the other Party to consider how to address under this paragraph functions of a similar nature to the functions identified in paragraphs (A) through (D) above that a Party identifies after the entry into force of this Agreement.

### Article 17.12. Transitional Provisions

Recognizing that Australian law currently restricts making and distributing devices or providing services to circumvent effective technological measures, Australia shall fully implement the obligations set forth in Article 17.4.7 within two years of the date of entry into force of this Agreement. In the interim, Australia may not adopt any new measure that is less consistent with Article 17.4.7 or apply any new or existing measure so as to reduce the level of protection provided on the date of entry into force of this Agreement.

## Chapter EIGHTEEN. Labour

### Article 18.1. Statement of Shared Commitment

1. The Parties reaffirm their obligations as members of the International Labour Organization (ILO) and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998) (ILO Declaration). Each Party shall strive to ensure that such labour principles and the internationally recognised labour principles and rights set forth in Article 18.7 are recognised and protected by its law.

2. Recognizing the right of each Party to establish its own labour standards, and to adopt or modify accordingly its labour laws, cach Party shall strive to ensure that its laws provide for labour standards consistent with the internationally recognised labour principles and rights set forth in Article 18.7 and shall strive to improve those standards consistent with the goal of maintaining high quality and high productivity workplaces.

### Article 18.2. Application and Enforcement of Labour Laws

1. (a) A Party shall not fail to effectively enforce its labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.

(b) The Parties recognise that cach Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other labour matters determined to have higher priority. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or

results from a bona fide decision regarding the allocation of resources.

2. The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in their respective labour laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognised labour principles and rights referred to in Article 18.7 as an encouragement for trade with the other Party, or as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.

## Article 18.3. Procedural Guarantees and Public Awareness

1. Each Party shall ensure that persons with a legally recognised interest under its law ina particular matter have appropriate access to administrative, quasi-judicial, judicial, or labour tribunals for the enforcement of the Party's labour laws.

2. Each Party shall ensure that the proceedings of its administrative, quasi-judicial, judicial, or labour tribunals for the enforcement of its labour laws are fair, equitable, and transparent.

3. Each Party shall provide that the parties to such proceedings may seek remedies to ensure the enforcement of their rights under its labour laws.

4. Each Party shall promote public awareness of its labour laws by ensuring that information is available to the public regarding its labour laws and enforcement and compliance procedures. A Party may use a variety of means available for this purpose, such as publishing information and notices in official bulletins and the mass media, publishing and distributing information manuals, undertaking compliance assistance programs, conducting meetings, and making information available through the Internet.

5. For greater certainty, nothing in this Chapter shall be construed as calling for the examination under this Agreement of whether a Party's court has appropriately applied that Party's labour laws.

## Article 18.4. Institutional Arrangements

1. In carrying out its functions, the Joint Committee established under Chapter 21 Unstitutional Arrangements and Dispute Settlement) shall consider matters related to the operation of this Chapter and the pursuit of the Chapter's objectives. The Joint Committee may establish a Subcommittee on Labour Affairs, comprised of central government officials of each Party who are primarily responsible for labour or workplace relations, and officials of other appropriate agencies, to meet at such times as they deem appropriate to discuss the operation of this Chapter. Each meeting of the Subcommittee normally shall include a public session.

2. Each Party shall designate an office within its central government agency that deals with labour or workplace relations, which shall serve as a contact point with the other Party, and with the public, for the purposes of this Chapter. Each Party's contact point shall:

(a) provide for the submission, receipt, and consideration of public communications on matters related to this Chapter, make the communications available to the other Party and, as appropriate, to the public, and review the communications, as appropriate, in accordance with its procedures; and

(b) coordinate the development and implementation of cooperative activities under Article 18.5.

3. Each Party may consult with representatives of its labour and business organizations and other persons, including through its advisory committees, for advice on the operation of this Chapter by whatever means that Party considers appropriate.

4. Each formal decision of the Parties concerning the operation of this Chapter shall be made public, unless the Joint Committee decides otherwise.

## Article 18.5. Labour Cooperation

1. Recognizing that cooperation provides opportunities to promote respect for workers' rights and the rights of children consistent with core labour standards of the ILO, the Parties shall cooperate on labour matters of mutual interest and explore ways to further advance labour standards on a bilateral, regional, and multilateral basis. To that end, the Parties hereby establish a consultative mechanism for such cooperation.

2. Cooperative activities may include work on labour law and practice in the context of the ILO Declaration, and such other matters as the Parties agree. In identifying areas for cooperation, the Parties shall consider the views of their respective worker and employer representatives and other persons, as appropriate.

3. Cooperative activities may take the form of exchanges of information, joint research activities, visits, or conferences, and such other forms of technical exchange as the Parties may agree.

## Article 18.6. Labour Consultations

1. A Party may request consultations with the other Party regarding any matter arising under this Chapter. Unless the Parties agree otherwise, consultations shall commence within 30 days after a Party delivers a request for consultations to the other Party's contact point designated pursuant to Article 18.4.2.

2. The Parties shall make every attempt to arrive at a mutually satisfactory resolution of the matter and may seck advice or assistance from any person or body they deem appropriate.

3. If the consultations fail to resolve the matter, either Party may request that the Subcommittee on Labour Affairs be convened. The Subcommittee shall convene within 30 days after a Party delivers a request to the other Party's contact point, unless the Parties otherwise agree. If the Joint Committee has not established the Subcommittee as of the date a Party delivers a request, they shall do so during the 30-day period described in this paragraph. The Subcommittee shall endeavour to resolve the matter expeditiously, including, where appropriate, by consulting governmental or outside experts and having recourse to such procedures as good offices, conciliation, or mediation.

4. If a Party considers that the other Party has failed to carry out its obligations under Article 18.2. 1(a), the Party may request consultations under paragraph 1 or pursuant to Article 21.5 (Consultations).

(a) lf a Party requests consultations pursuant to Article 21.5 at a time when the Parties are engaged in consultations on the same matter under paragraph 1 or the Subcommittee is endeavouring to resolve the matter under paragraph 3, the Parties shall discontinue their efforts to resolve the matter under this Article.

Once consultations have begun under Article 21.5, no consultations on the same matter may be entered into under this Article.

(b) lf a Party requests consultations pursuant to Article 21.5 more than 60 days after the delivery of a request for consultations under paragraph 1, the Parties may agree at any time to refer the matter to the Joint Committee pursuant to Article 21.6 (Referral of Matters to the Joint Committee).

5. Articles 21.2 (Scope of Application) and 21.5 shall not apply to a matter arising under any provision of this Chapter other than Article 18.2.1(a).

## Article 18.7. Definitions

For the purposes of this Chapter,

1. **internationally recognised labour principles and rights** means:

(a) the right of association;

(b) the right to organize and bargain collectively;

(c) a prohibition on the use of any form of forced or compulsory labour;

(d) labour protections for children and young people, including a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labour, (18-1) and

(e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

2. **labour laws** means:

(a) for the United States, acts of the Congress, regulations promulgated pursuant to an act of Congress, or provisions of such acts or regulations, where such acts, regulations, or provisions are directly related to internationally recognised labour principles and rights and are enforceable by action of the federal government;

(b) for Australia, acts of a parliament of Australia, or regulations promulgated pursuant to such acts, directly related to

internationally recognised labour principles and rights.

(18-1) Australia provides labour protections for children and young people primarily through laws and regulations that regulate age levels for compulsory education.

# Chapter NINETEEN. Environment

## Article 19.1. Levels of Protection

Recognizing the right of each Party to establish its own levels of environmental protection and environmental development priorities, and to adopt or modify accordingly its environmental laws and policies, each Party shall ensure that its laws provide for and encourage high levels of environmental protection and shall strive to continue to improve their respective levels of environmental protection, including through such environmental laws and policies.

## Article 19.2. Application and Enforcement of Environmental Laws

1. (a) A Party shall not fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.

(b) The Parties recognise that cach Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources.

2. The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in their respective environmental laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for trade with the other Party, or as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.

## Article 19.3. Procedural Guarantees and Public Awareness

1. Each Party shall ensure that judicial, quasi-judicial, or administrative proceedings for the enforcement of its environmental laws are fair, equitable, transparent, and provide for appropriate administrative and procedural protections in accordance with its law.

2. Each Party shall ensure that persons with a legally recognised interest under its law ina particular matter have appropriate access to proceedings referred to in paragraph 1.

3. Each Party shall provide remedies for violations of its environmental laws to ensure the effective enforcement of those laws. The Parties recognise that a variety of activities can contribute to enforcement of environmental laws.

14. Each Party shall promote public awareness of its environmental laws by ensuring that information is available to the public regarding its environmental laws and enforcement and compliance procedures, including procedures for interested persons to request the Party's competent authorities to investigate alleged violations of its environmental laws. A Party may use a variety of means available for this purpose, such as publishing information and notices in official bulletins and the mass media, publishing and distributing information manuals, undertaking compliance assistance programs, conducting meetings, and making information available through the Internet.

5. For greater certainty, nothing in this Chapter shall be construed as calling for the examination under this Agreement of whether a Party's court has appropriately applied that Party's environmental laws.

## Article 19.4. Voluntary Mechanisms to Enhance Environmental Performance

The Parties recognise that flexible, voluntary, and market-based mechanisms can contribute to the achievement and maintenance of high levels of environmental protection. As appropriate and in accordance with its law, each Party shall encourage the development of such mechanisms, which may include partnerships, sharing information, and market-based mechanisms that encourage the protection of natural resources and the environment.

## Article 19.5. Institutional Arrangements and Public Participation

1. In carrying out its functions, the Joint Committee established under Chapter 21 Unstitutional Arrangements and Dispute Settlement) shall consider matters related to the operation of this Chapter and the pursuit of the environmental objectives of this Agreement. The Joint Committee may establish a Subcommittee on Environmental Affairs comprising government officials of each Party, to mect at such times as they deem appropriate to discuss the operation of this Chapter. Each meeting of the Subcommittee normally shall include a public session.

2. Each formal decision of the Parties concerning the operation of this Chapter shall be made public, unless the Joint Committee decides otherwise.

3. Each Party shall provide an opportunity for its public, which may include national advisory committees, to provide views, recommendations, or advice on matters related to the implementation of this Chapter, and shall make available such views, recommendations, or advice to the other Party and, as appropriate, to the public in accordance with its law.

## Article 19.6. Environmental Cooperation

1. The Parties recognise the importance of strengthening capacity to protect the environment and to promote sustainable development in concert with strengthening bilateral trade and investment relations. Toward this end, the Parties acknowledge the importance of ongoing joint bilateral, regional, and multilateral environmental activities. The Parties agree to negotiate a United States—Australia Joint Statement on Environmental Cooperation under which the Parties will explore ways to further support these ongoing activities.

2. Each Party shall take into account, as appropriate, public comments and recommendations it receives regarding these ongoing cooperative environmental activities undertaken by the Parties.

3. The Parties shall, as appropriate, share information with each other and the public regarding their experiences in assessing and taking into account the positive and negative environmental effects of trade agreements and policies.

## Article 19.7. Environmental Consultations

1. A Party may request consultations with the other Party regarding any matter arising under this Chapter. Unless the Parties agree otherwise, consultations shall commence within 30 days after a Party delivers a request for consultations to the contact point designated by the other Party for this purpose.

2. The Parties shall make every attempt to arrive at a mutually satisfactory resolution of the matter and may seck advice or assistance from any person or body they deem appropriate.

3. If the consultations fail to resolve the matter, either Party may request that the Subcommittee on Environmental Affairs be convened. The Subcommittee shall convene within 30 days after a Party delivers a written request to the other Party's contact point, unless the Parties agree otherwise. If the Joint Committee has not established the Subcommittee as of the date a Party delivers a request, it shall do so during the 30-day period described in this paragraph. The Subcommittee shall endeavour to resolve the matter expeditiously, including, where appropriate, by consulting governmental or non-governmental experts and by having recourse to such procedures as good offices, conciliation, or mediation.

4. If a Party considers that the other Party has failed to carry out its obligations under Article 19.2. 1(a), the Party may request consultations under paragraph 1 or pursuant to Article 21.5 (Consultations).

(a) If a Party requests consultations pursuant to Article 21.5 at a time when the Parties are engaged in consultations on the same matter under paragraph 1 or the subcommittee is endeavouring to resolve the matter under paragraph 3, the Parties shall discontinue their efforts to resolve the matter under this Article. Once consultations have begun under Article 21.5, no consultations on the same matter may be entered into under this Article.

(b) If a Party requests consultations pursuant to Article 21.5 more than 60 days after the delivery of a request for consultations under paragraph 1, the Parties may agree at any time to refer the matter to the Joint Committee pursuant to Article 21.6 (Referral of Matters to the Joint Committee).

5. Articles 21.2 (Scope of Application) and 21.5 (Consultations) shall not apply to a matter arising under any provision of this Chapter other than Article 19.2.1(a).

## Article 19.8. Relationship to Environmental Agreements

The Parties recognise that multilateral environmental agreements to which they are both party play an important role, globally and domestically, in protecting the environment and that their respective implementation of these agreements is critical to achieving the environmental objectives of these agreements. Accordingly, the Parties shall continue to seck means to enhance the mutual supportiveness of multilateral environmental agreements to which they are both party and international trade agreements to which they are both party. The Parties shall consult regularly with respect to negotiations in the WTO regarding multilateral environmental agreements.

### Article 19.9. Definitions

For the purposes of this Chapter:

1. **environmental law** means any statute or regulation of a Party, or provision thereof, the primary purpose (19-1) of which is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health, through:

(a) the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants;

(b) the control of environmentally hazardous or toxic chemicals, substances, materials, and wastes, and the dissemination of information related thereto; or

(c) the protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas,

in areas with respect to which a Party exercises sovereignty, sovereign rights, or jurisdiction, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.

2. For the United States, **statute** or **regulation** means an act of Congress or regulation promulgated pursuant to an act of Congress that is enforceable by action of the federal government.

(19-1) For the purposes of this Article, the primary purpose of a particular statutory or regulatory provision shall be determined by reference to its primary purpose, rather than to the primary purpose of the statute or regulation of which it is part. A particular provision whose primary purpose is not the protection of the environment or the prevention of a danger to human, animal, or plant life or health is not an environmental law as defined by this Article.

## Chapter TWENTY. Transparency

### Article 20.1. Contact Points

1. Each Party shall designate a contact point or points to facilitate communications between the Parties on any matter covered by this Agreement.

2. On the request of the other Party, a Party's contact point shall identify the office or official responsible for the matter and assist, as necessary, in facilitating communications with the requesting Party.

### Article 20.2. Publication

1. Each Party shall ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and the other Party to become acquainted with them.

2. To the extent possible, each Party shall:

(a) publish in advance any such laws, regulations, procedures, and administrative rulings that it proposes to adopt; and

(b) provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures.

### Article 20.3. Notification and Provision of Information

1. To the maximum extent possible, cach Party shall notify the other Party of any proposed or actual measure that the Party considers might materially affect the operation of this Agreement or otherwise substantially affect the other Party's interests under this Agreement.

2. On request of the other Party, a Party shall promptly provide information and respond to questions pertaining to any actual or proposed measure that the requesting Party considers might materially affect the operation of this Agreement or otherwise substantially affect its interests under this Agreement, regardless of whether the requesting Party has been previously notified of that measure.

3. Any notification, request, or information under this Article shall be provided to the other Party through the relevant contact points.

4. Any notification or information provided under this Article shall be without prejudice as to whether the measure in question is consistent with this Agreement.

## Article 20.4. Administrative Agency Processes (20-1)

With a view to administering its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement in a consistent, impartial, and reasonable manner, cach Party shall ensure that its administrative agencies, in applying such measures to particular persons, goods, or services of the other Party in specific cases through adjudication, rulemaking, licensing, determination, and approval processes:

(a) provide, wherever possible, persons of the other Party that are directly affected by an agency's processes reasonable notice, in accordance with domestic procedures, when a process is initiated, including a description of the nature of the relevant process, a statement of the legal authority under which the process is initiated, and a general description of any issues in controversy;

(b) afford such persons a reasonable opportunity to present facts and arguments in support of their positions prior to any final administrative action, when time, the nature of the process, and the public interest permit; and

(c) follow procedures that are in accordance with its law.

## Article 20.5. Review and Appeal

1. Each Party shall maintain judicial, quasi-judicial, or administrative tribunals or procedures for the purpose of the prompt review (20-2) and, where warranted, correction of final administrative actions regarding matters covered by this Agreement. Such tribunals shall be impartial and independent of the office or authority entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter.

2. Each Party shall ensure that, in any such tribunals or procedures, the parties to the proceeding are provided with the right to:

(a) a reasonable opportunity to support or defend their respective positions; and

(b) a decision based on the evidence and submissions of record or, where required by the Party's law, the record compiled by the administrative authority.

3. Each Party shall ensure, subject to appeal or further review as provided in its law, that such decision shall be implemented by, and shall govern the practice of, the offices or authorities with respect to the administrative action at issue.

(20-1) For avoidance of doubt, "wherever possible" shall not be construed as requiring a Party to provide treatment in relation to persons, goods, or services of the other Party that is more favourable than that which the Party provides to its own persons, goods, or services.

(20-2) For avoidance of doubt, ‘review' includes merits (de novo) review only where provided for under the Party's law.

## Article 20.6. Definitions

For the purposes of this Chapter:

**administrative ruling of general application** means an administrative ruling or interpretation that applies to all persons and fact situations that fall generally within its ambit and that establishes a norm of conduct, but does not include:

(a) a determination or ruling made in an administrative or quasi-judicial proceeding that applies to a particular person, good, or service of the other Party in a specific case, or

(b) a ruling that adjudicates with respect to a particular act or practice.

# Chapter TWENTY-ONE. Institutional Arrangements and Dispute Settlement

## Section A. Institutional Arrangements and Administration

### Article 21.1. Joint Committee

1. The Parties hereby establish a Joint Committee to supervise the implementation of this Agreement and to review the trade relationship between the Parties.

(a) The Joint Committee shall be composed of government officials of cach Party and shall be co-chaired by (i) the United States Trade Representative for the United States and (ii) the Minister for Trade for Australia, or their respective designees.

(b) The Joint Committee may establish and delegate responsibilities to ad hoc and standing committees, working groups, or other bodies, and seek the advice of non-governmental persons or groups.

2. The Joint Committee shall:

(a) review the general functioning of this Agreement;

(b) review and consider specific matters related to the operation and implementation of this Agreement in the light of its objectives;

(c) facilitate the avoidance and settlement of disputes arising under this Agreement, including through consultations pursuant to Articles 21.5 and 21.6;

(d) consider and adopt any amendment to this Agreement or other modification to the commitments therein, subject to completion of necessary legal procedures by each Party;

(e) as appropriate, issue interpretations of the Agreement;

(f) consider ways to further enhance trade relations between the Parties and to further the objectives of this Agreement; and

(g) take such other action as the Parties may agree.

3. Unless the Parties agree otherwise, the Joint Committee shall convene: (a) in regular session every year to review the general functioning of the Agreement and such other issues as the Parties may agree, with such sessions to be held alternately in the territory of each Party; and

(b) in special session within 30 days of the request of a Party, with such sessions to be held in the territory of the other Party or at such location as may be agreed by the Parties.

4. The Joint Committee shall adopt its own rules of procedure.

5. Each Party shall treat any confidential information exchanged in relation to a meeting of the Joint Committee or any body created under Article 21.1.1(b) on the same basis as the Party providing the information.

6. Recognizing the importance of transparency and openness, the Parties affirm their respective practices of considering the views of members of the public in order to draw ona broad range of perspectives in the implementation of this Agreement.

7. At its first meeting, the Joint Committee shall consider each Party's review of the environmental effects of this Agreement and shall provide the public an opportunity to provide views on those effects.

## Section B. Dispute Settlement Proceedings

### Article 21.2. Scope of Application

Except as otherwise provided in this Agreement or as the Parties otherwise agree, the dispute settlement provisions of this Section shall apply with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement or wherever a Party considers that:

(a) a measure of the other Party is inconsistent with its obligations under this Agreement;

(b) the other Party has otherwise failed to carry out its obligations under this Agreement, or

(c) a benefit the Party could reasonably have expected to accrue to it under Chapters Two (National Treatment and Market Access for Goods), Three (Agriculture), Five (Rules of Origin), Ten (Cross-Border Trade in Services), Fifteen (Government Procurement), or Seventeen (Intellectual Property Rights) is being nullified or impaired as a result of a measure that is not inconsistent with this Agreement.

## Article 21.3. Administration of Dispute Settlement Proceedings

1. Each Party shall:

(a) designate an office that shall be responsible for providing administrative assistance to panels established under Article 21.7;

(b) be responsible for the operation and costs of its designated office; and

(c) notify the other Party of the location of its designated office.

2. The Joint Committee shall establish the amounts of remuneration and expenses to be paid to panellists.

3. The remuneration of panellists, their travel and lodging expenses, and all general expenses relating to proceedings of a panel established under Article 21.7 shall be borne equally by the Parties.

4. Each panellist shall keep a record and render a final account of the panellist's time and expenses, and the panel shall keep a record and render a final account of all general expenses.

## Article 21.4. Choice of Forum

1. Where a dispute regarding any matter arises under this Agreement and under another trade agreement to which both Parties are party, including the WTO Agreement, the complaining Party may select the forum in which to settle the dispute.

2. Once the complaining Party has requested a panel under an agreement referred to in paragraph 1, the forum selected shall be used to the exclusion of the others.

## Article 21.5. Consultations

1. Without prejudice to the provisions of Articles 18.6 (Labour Consultations) and 19.8 (Environment Consultations), either Party may request consultations with the other Party with respect to any matter it considers might affect the operation of this Agreement by delivering written notification to the other Party's office designated under Article 21.3. If a Party requests consultations with respect to a matter, the other Party shall reply promptly to the request for consultations and enter into consultations in good faith.

2. In consultations under this Article, a Party may request the other Party to make available personnel of its government agencies or other regulatory bodies who have expertise in the matter subject to consultations.

3. In the consultations, each Party shall:

(a) provide sufficient information to enable a full examination of how the matter subject to consultations might affect the operation of this Agreement; and

(b) treat any confidential information exchanged in the course of consultations on the same basis as the Party providing the information.

4. Promptly after requesting or receiving a request for consultations pursuant to this Article, each Party shall solicit and consider the views of members of the public on the matter in order to draw on a broad range of perspectives.

## Article 21.6. Referral of Matters to the Joint Committee

If the consultations fail to resolve the matter within 60 days of the delivery of a Party's request for consultations under Article 21.5, or 20 days where the matter concerns perishable goods, either Party may refer the matter to the Joint Committee by delivering written notification to the other Party's office designated under Article 21.3. The Joint Committee shall endeavour to resolve the matter.

## Article 21.7. Establishment of Panel

1. If the Joint Committee has not resolved a matter within 60 days after delivery of the notification described in Article 21.6, within 30 days where the matter concerns perishable goods, or within such other period as the Parties may agree, the complaining Party may refer the matter to a dispute settlement panel by delivering written notification to the other Party's office designated under Article 21.3.

2. A Party may not refer a proposed measure to a dispute settlement panel. 3. Unless the Parties agree otherwise: (a) The panel shall have three members.

(b) Each Party shall appoint one panellist, in consultation with the other Party, within 30 days after the matter has been referred to a panel. Ifa Party fails to appoint a panellist within such period, a panellist shall be selected by lot from the contingent list established under paragraph 4 to serve as the panellist appointed by that Party.

(c) The Parties shall endeavour to agree on a third panellist who shall serve as chair.

(d) If the Parties are unable to agree on the chair within 30 days after the date on which the second panelist has been appointed, the chair shall be selected by lot from the contingent list established under paragraph 4.

(e) The date of establishment of the panel shall be the date on which the chair is appointed.

4. By the date of entry into force of this Agreement, the Parties shall establish a contingent list of ten individuals who are willing and able to serve as panellists. Individuals on the contingent list shall be appointed by agreement of the Parties for a minimum term of three years, and shall remain on the list until the Parties constitute a new contingent list.

5. The panellists chosen pursuant to paragraph 3 and the individuals on the contingent list established pursuant to paragraph 4 shall:

(a) be chosen strictly on the basis of objectivity, reliability, and sound judgment and have expertise or experience in law, international trade, or the resolution of disputes arising under international trade agreements;

(b) be independent of, and not be affiliated with or take instructions from, either Party and not have a conflict of interest or appearance thereof, as set forth in a code of conduct to be established by the Joint Committee; and

(c) comply with the code of conduct.

In addition, in any dispute arising under Chapters Eighteen (Labour) or Nineteen (Environment), panellists other than those chosen by lot from the contingent list shall have expertise or experience relevant to the subject matter under dispute.

## Article 21.8. Rules of Procedure

1. The Parties shall establish by the date of entry into force of this Agreement model rules of procedure, which shall ensure:

(a) a right to at least one hearing before the panel and that, subject to subparagraph (f, any such hearings shall be open to the public;

(b) an opportunity for each Party to provide initial and rebuttal submissions;

(c) that each Party's written submissions, written versions of its oral statement, and written responses to a request or questions from the panel shall be made public within ten days after they are submitted, subject to subparagraph (f);

(d) that the panel shall consider requests from nongovernmental persons or entities in the Parties' territories to provide written views regarding the dispute that may assist the panel in evaluating the submissions and arguments of the Parties and provide the Parties an opportunity to respond to such written views;

(e) a reasonable opportunity for each Party to submit comments on the initial report presented pursuant to Article 21.9.1; and

(f) the protection of confidential information.

2. Unless the Parties otherwise agree, the panel shall follow the model rules of procedure and may, after consulting the Parties, adopt additional rules of procedure not inconsistent with the model rules.

3. On request of a Party, or on its own initiative, the panel may seek information and technical advice from any person or body that it deems appropriate, provided that the Parties so agree and subject to such terms and conditions as the Parties

may agree.

## Article 21.9. Panel Report

1. Unless the Parties agree otherwise, the panel shall, within 180 days after the chair is appointed, present to the Parties an initial report containing findings of fact, and its determination regarding:

(a) whether the measure at issue is inconsistent with the obligations of this Agreement;

(b) whether a Party has otherwise failed to carry out its obligations under this Agreement, or

(c) whether a Party's measure is causing nullification or impairment in the sense of Article 21.2(c); and

(d) any other matter that the Parties have jointly requested that the Panel address, as well as reasons for its findings and determinations.

2. The panel shall consider this Agreement in accordance with applicable rules of interpretation under international law as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (1969). It shall base its report on the relevant provisions of the Agreement and the submissions and arguments of the Parties. The panel may, at the request of the Parties, make recommendations for the resolution of the dispute.

3. After considering any written comments by the Parties on the initial report, the panel may modify its report and make any further examination it considers appropriate.

4. The panel shall present a final report to the Parties within 45 days of presentation of the initial report, unless the Parties otherwise agree. The Parties shall release the final report to the public within 15 days thereafter, subject to the protection of confidential information.

## Article 21.10. Implementation of the Final Report

1. On receipt of the final report of a panel, the Parties shall agree on the resolution of the dispute, which normally shall conform with the determinations and recommendations, if any, of the panel.

2. If, in its final report, the panel determines that a Party has not conformed with its obligations under this Agreement or that a Party's measure is causing nullification or impairment in the sense of Article 21.2(c), the resolution, whenever possible, shall be to eliminate the non- conformity or the nullification or impairment.

## Article 21.11. Non-implementation

1. If a panel has made a determination of the type described in Article 21.10.2, and the Parties are unable to reach agreement on a resolution pursuant to Article 21.10.1 within 45 days of receiving the final report, or such other period as the Parties agree, the Party complained against shall enter into negotiations with the other Party with a view to developing mutually acceptable compensation.

2. If the Parties:

(a) are unable to agree on compensation within 30 days after the period for developing such compensation has begun, or

(b) have agreed on compensation or on a resolution pursuant to Article 21.10 and the complaining Party considers that the other Party has failed to observe the terms of such agreement,

the complaining Party may at any time thereafter provide written notice to the office designated by the other Party pursuant to Article 21.3 that it intends to suspend the application to the other Party of benefits of equivalent effect. The notice shall specify the level of benefits that the Party proposes to suspend. Subject to paragraph 5, the complaining Party may begin suspending benefits 30 days after the later of the date on which it provides notice to the other Party's designated office under this paragraph or the panel issues its determination under paragraph 3, as the case may be.

3. If the Party complained against considers that:

(a) the level of benefits that the other Party has proposed to be suspended is manifestly excessive; or

(b) it has eliminated the non-conformity or the nullification or impairment that the panel has found,

it may, within 30 days after the complaining Party provides notice under paragraph 2, request that the panel be reconvened

to consider the matter. The Party complained against shall deliver its request in writing to the office designated by the other Party pursuant to Article 21.3. The panel shall reconvene as soon as possible after delivery of the request to the designated office and shall present its determination to the Parties within 90 days after it reconvenes to review a request under cither subparagraph (a) or (b), or within 120 days for a request under both subparagraphs (a) and (b). If the panel determines that the level of benefits proposed to be suspended is manifestly excessive, it shall determine the level of benefits it considers to be of equivalent effect.

4. The complaining Party may suspend benefits up to the level the panel has determined under paragraph 3 or, if the panel has not determined the level, the level the Party has proposed to suspend under paragraph 2, unless the panel has determined that the Party complained against has eliminated the non-conformity, or the nullification or impairment.

5. The complaining Party may not suspend benefits if, within 30 days after it provides written notice of intent to suspend benefits or, if the panel is reconvened under paragraph 3, within 20 days after the panel provides its determination, the Party complained against provides written notice to the other Party's office designated pursuant to Article 21.3 that it will pay an annual monetary assessment. The Parties shall consult, beginning no later than ten days after the Party complained against provides notice, with a view to reaching agreement on the amount of the assessment. If the Parties are unable to reach an agreement within 30 days after consultations begin, the amount of the assessment shall be set at a level, in U.S. dollars, equal to 50 percent of the level of the benefits the panel has determined under paragraph 3 to be of equivalent effect or, if the panel has not determined the level, 50 percent of the level that the complaining Party has proposed to suspend under paragraph 2.

6. Unless the Joint Committee decides otherwise, a monetary assessment shall be paid to the complaining Party in U.S. currency, or in an equivalent amount of Australian currency, in equal, quarterly instalments beginning 60 days after the Party complained against gives notice that it intends to pay an assessment. Where the circumstances warrant, the Joint Committee may decide that an assessment shall be paid into a fund established by the Joint Committee and expended at the direction of the Joint Committee for appropriate initiatives to facilitate trade between the Parties, including by further reducing unreasonable trade barriers or by assisting a Party in carrying out its obligations under the Agreement.

7. If the Party complained against fails to pay a monetary assessment, the complaining Party may suspend the application to the Party complained against of benefits in accordance with paragraph 4.

8. This Article shall not apply with respect to a matter described in Article 21.12.1.

## Article 21.12. Non-implementation In Certain Disputes

1. If, in its final report, a panel determines that a Party has not conformed with its obligations under Article 18.2.1(a) or Article 19.2.1(a), and the Parties:

(a) are unable to reach agreement on a resolution pursuant to Article 21.10.1 within 45 days of receiving the final report; or

(b) have agreed on a resolution pursuant to Article 21.10.1 and the complaining Party considers that the other Party has failed to observe the terms of the agreement,

the complaining Party may at any time thereafter request that the panel be reconvened to impose an annual monetary assessment on the other Party. The complaining Party shall deliver its request in writing to the office designated by the other Party pursuant to Article 21.3. The panel shall reconvene as soon as possible after delivery of the request to the designated office.

2. The panel shall determine the amount of the monetary assessment in U.S. dollars within 90 days after it reconvenes under paragraph 1. In determining the amount of the assessment, the panel shall take into account:

(a) the bilateral trade effects of the Party's failure to effectively enforce the relevant law;

(b) the pervasiveness and duration of the Party's failure to effectively enforce the relevant law;

(c) the reasons for the Party's failure to effectively enforce the relevant law;

d) the level of enforcement that could reasonably be expected of the Party given its resource constraints;

(e) the efforts made by the Party to begin remedying the non-enforcement after the final report of the panel; and

(f) any other relevant factors.

The amount of the assessment determined by the Panel shall not exceed 15 million U.S. dollars annually, adjusted for

inflation as specified in Annex 21-A.

3. On the date on which the panel determines the amount of the monetary assessment under paragraph 2, or at any other time thereafter, the complaining Party may provide notice in writing to the office designated by the Party complained against pursuant to Article 21.3 demanding payment of the monetary assessment. The monetary assessment shall be payable in U.S. currency, or in an equivalent amount of Australian currency, in equal, quarterly instalments beginning 60 days after the complaining Party provides such notice. Each of the first four quarterly instalments shall be equal to one quarter of the monetary assessment determined by the panel under Article 21.12.2. The fifth quarterly instalment and subsequent quarterly instalments shall be adjusted for inflation as specified in Annex 21-A.

4. Assessments shall be paid into a fund established by the Joint Committee and shall be expended at the direction of the Joint Committee for appropriate labour or environmental initiatives, including efforts to improve or enhance labour or environmental law enforcement, as the case may be, in the territory of the Party complained against, consistent with its law. In deciding how to expend monies paid into the fund, the Joint Committee shall consider the views of interested persons in each Party's territory.

5. If the Party complained against fails to pay a monetary assessment, and if the Party has created and funded an escrow account to ensure payment of any assessments against it, the other Party shall, before having recourse to any other measure, seck to obtain the funds from the account.

6. If the complaining Party cannot obtain the funds from the other Party's escrow account within 30 days of the date on which payment is due, or if the other Party has not created an escrow account, the complaining Party may take other appropriate steps to collect the assessment or otherwise secure compliance. These steps may include suspending tariff benefits under the Agreement as necessary to collect the assessment, while bearing in mind the Agreement's objective of eliminating barriers to bilateral trade and while secking to avoid unduly affecting parties or interests not party to the dispute.

### Article 21.13. Compliance Review

1. Without prejudice to the procedures set out in Article 21.11.3, if the Party complained against considers that it has eliminated the non-conformity or the nullification or impairment that the panel has found, it may refer the matter to the panel by providing written notice to the office designated by the other Party pursuant to Article 21.3. The panel shall issue its report on the matter within 90 days after the Party complained against provides notice.

2. If the panel decides that the Party complained against has eliminated the non-conformity or the nullification or impairment, the complaining Party shall promptly reinstate any benefits it has suspended under Article 21.11 or 21.12, and the Party complained against shall no longer be required to pay any monetary assessment it has agreed to pay under Article 21.11.5 or that has been imposed on it under Article 21.12.

### Article 21.14. Five-year Review

The Joint Committee shall review the operation and effectiveness of Articles 21.11 and 21.12 not later than five years after the Agreement enters into force, or within six months after benefits have been suspended or monetary assessments have been imposed in five proceedings initiated under this Chapter, whichever occurs first.

### Article 21.15. Private Rights

Neither Party may provide for a right of action under its domestic law against the other Party on the ground that a measure of the other Party is inconsistent with this Agreement.

## Chapter TWENTY-TWO. General Provisions and Exceptions

### Article 22.1. General Exceptions

1. For the purposes of Chapters Two through Eight (National Treatment and Market Access for Goods, Agriculture, Textiles, Rules of Origin, Customs Administration, Sanitary and Phytosanitary Measures, and Technical Barriers to Trade), GATT 1994 Article XX and its interpretive notes are incorporated into and made part of this Agreement, mutatis mutandis. The Parties understand that the measures referred to in GATT 1994 Article XX(b) include environmental measures necessary to protect human, animal, or plant life or health, and that GATT 1994 Article XX(g) applies to measures relating to the conservation of living and non- living exhaustible natural resources.

2. For the purposes of Chapters Ten, Twelve, and Sixteen (Cross Border Trade in Services, Telecommunications, and Electronic Commerce),GATS Article XIV (including its footnotes) is incorporated into and made part of this Agreement, mutatis mutandis. The Parties understand that the measures referred to in GATS Article XI V(b) include environmental measures necessary to protect human, animal, or plant life or health.

## Article 22.2. Essential Security

Nothing in this Agreement shall be construed:

(a) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or

(b) to preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

## Article 22.3. Taxation

1. Except as set out in this Article, nothing in this Agreement shall apply to taxation measures.

2. (a) Nothing in this Agreement shall affect the rights and obligations of either Party under any tax convention. In the event of any inconsistency between this Agreement and any such convention, that convention shall prevail to the extent of the inconsistency.

(b) In the case of a tax convention between the Parties the competent authorities under that convention shall have sole responsibility for determining whether any inconsistency exists between this Agreement and that convention.

3. Notwithstanding paragraph 2:

(a) Article 2.2 (National Treatment) and such other provisions of this Agreement as are necessary to give effect to that Article shall apply to taxation measures to the same extent as does GATT 1994 Article III; and

(b) Article 2.11 (Export Taxes) shall apply to taxation measures.

4. Subject to paragraph 2:

(a) Article 10.2 (National Treatment), Article 13.2 (National Treatment), and Article 13.5.1 (Cross-Border Trade) shall apply to taxation measures on income, capital gains, or on the taxable capital of corporations that relate to the purchase or consumption of particular services, except that nothing in this sub-paragraph shall prevent a Party from conditioning the receipt or continued receipt of an advantage relating to the purchase or consumption of particular services on requirements to provide the service in its territory; (22-1) and

(b) Articles 11.3, 11.4 (Most-Favoured-Nation Treatment), 10.2 (National Treatment), 10.3 (Most-Favoured-Nation Treatment), 13.2, 13.3 (Most-FavouredNation Treatment), and 13.5.1 shall apply to all taxation measures, other than those on income, capital gains, or on the taxable capital of corporations, taxes on estates, inheritances, gifts, and generation-skipping transfers;

except that nothing in those Articles shall apply:

(c) any most-favoured-nation obligation in this Agreement with respect to an advantage accorded by a Party pursuant to a tax convention;

(d) to a non-conforming provision of any existing taxation measure;

(e) to the continuation or prompt renewal of a non-conforming provision of any existing taxation measure;

(f) to an amendment to a non-conforming provision of any existing taxation measure to the extent that the amendment does not decrease its conformity, at the time of the amendment, with any of those Articles;

(g) to the adoption or enforcement of any taxation measure aimed at ensuring the equitable or effective imposition or collection of taxes (as permitted by GATS Article XIV(d) without regard to the limitation in Article XTV(d) to direct taxes); or

(h) to a provision that conditions the receipt, or continued receipt of an advantage relating to the contributions to, or income of, a pension trust, superannuation fund, or other arrangement to provide pension, superannuation, or similar benefits on a requirement that the Party maintain continuous jurisdiction, regulation, or supervision over such trust, fund, or other

arrangement.

5. Subject to paragraph 2 and without prejudice to the rights and obligations of the Parties under paragraph 3, paragraphs 2, 3, and 4 of Article 11.9 (Performance Requirements) shall apply to taxation measures.

6. (a) Article 11.7 (Expropriation and Compensation) shall apply to taxation measures.

(b) Where a Party alleges in writing that a taxation measure of the other Party is an expropriation, that other Party's designated authority may request in writing consultations between the designated authorities regarding whether a determination that the taxation measure is an expropriation under this Agreement would give rise to an inconsistency with any tax convention between the Parties. Unless the designated authorities agree within sixty days after receipt of the request for consultations (which period may be extended by mutual agreement of such designated authorities) that an inconsistency would arise in case of such determination, the Party alleging an expropriation may pursue the matter under Section B of Chapter 21 (Dispute Settlement Procedures). Notwithstanding sub- paragraph 2(b), the designated authorities shall have sole responsibility with respect to this issue of whether a determination that a taxation measure alleged by a Party to be an expropriation under this Agreement would give rise to an inconsistency with any tax convention between the Parties.

(c) For the purposes of this paragraph, **designated authority** means:

(i) in the case of Australia, the Secretary to the Treasury or his authorised representative; and

(ii) in the case of the United States, the Assistant Secretary of the Treasury (Tax Policy).

7. For the purposes of this Article, **taxes** and **taxation measures** do not include any import or customs duties.

(22-1) For the avoidance of doubt, nothing in this exception to the obligation imposed by sub-paragraph 4(a) allows a Party to condition the receipt or continued receipt of an advantage relating to the purchase or consumption of particular services on the nationality of the service supplier.

### Article 22.4. Disclosure of Information

1. Nothing in this Agreement shall be construed as requiring a Party to furnish or allow access to confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest (22-2) or which would prejudice the legitimate commercial interests of particular enterprises, public or private.

2. When a Party provides written information pursuant to a request or a requirement under this Agreement and informs the other Party that it considers the information to be of the type described in paragraph 1, the Party receiving the information shall not disclose or use the information for a purpose other than that for which it was requested or required, except where the disclosure or use is required or authorised pursuant to the receiving Party's law and regulations or with the prior consent of the Party providing the information.

(22-2) For the purposes of this paragraph the public interest includes, for Australia, compliance with the Privacy Act Cth) 1988.

### Article 22.5. Anti-corruption

The Parties shall cooperate in seeking to eliminate bribery and corruption and to promote transparency in international trade. They are committed to secking avenues in relevant international fora to address bribery, corruption, and transparency and to build on anti-corruption efforts in these fora.

## Chapter TWENTY-THREE. Final Provisions

### Article 23.1. Accession

1. Any country or group of countries may accede to this Agreement subject to such terms and conditions as may be agreed between such country or countries and the Parties and following approval in accordance with the applicable legal procedures of each country.

2. This Agreement shall not apply as between any Party and any acceding country or group of countries if, at the time of the

accession, either Party does not consent to such application.

## Article 23.2. Annexes

The Annexes to this Agreement constitute an integral part of this Agreement.

## Article 23.3. Amendments

1. The Parties may agree, in writing, to amend this Agreement. An amendment shall enter into force after the Parties complete any necessary internal requirements and on such date as the Parties may agree.

2. If any provision of the WTO Agreement that the Parties have incorporated into this Agreement is amended, the Parties will consult on whether to amend this Agreement.

## Article 23.4. Entry Into Force and Termination

1. This Agreement shall enter into force 60 days after the date on which the Parties exchange written notifications certifying that they have completed respective necessary internal requirements, or on such other date as the Parties may agree.

2. A Party may terminate this Agreement by written notification to the other Party, and such termination shall take effect six months after the date of the notification.

3. Within 30 days of delivery of a notification under paragraph 2, either Party may request consultations regarding whether any provision of this Agreement should terminate on a date later than that provided under paragraph 2. Consultations shall commence within 30 days after the Party delivers such a request.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, have signed this Agreement.

Done at Washington, D.C., in duplicate, this 18th day of May 2004.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

/s/ Robert B. Zoellick

FOR THE GOVERNMENT OF AUSTRALIA:

/s/ Mark Vaile

## ANNEX I.

1. The Schedule of a Party to this Annex sets out, pursuant to Articles 10.6 (Non- Conforming Measures) and 11.13 (Non-Conforming Measures), a Party's existing measures that are not subject to some or all of the obligations imposed by:

(a) Article 10.2 (National Treatment) or 11.3 (National Treatment);

(b) Article10.3 (Most-Favoured-Nation Treatment) or 11.4 (Most-Favoured-Nation Treatment);

(c) Article 10.4 (Market Access);

(d) Article 10.5 (Local Presence);

(e) Article 11.9 (Performance Requirements); or

(f) Article 11.10 (Senior Management and Boards of Directors).

2. Each Schedule entry sets out the following elements:

(a) **Sector** refers to the sector for which the entry is made;

(b) **Obligations Concerned** specifies the obligation(s) referred to in paragraph 1 that, pursuant to Articles 10.6.1(a) and 11.13.1(a), do not apply to the listed measure(s);

(c) **Level of Government** indicates the level of government maintaining the listed measure(s);

(d) For the United States, **Measures** identifies the laws, regulations, or other measures for which the entry is made. For Australia, **Source of Measure** means the laws, regulations, or other measures that are the source of the non-conforming measure for which the entry is made. A measure cited in the **Measures** or **Source of Measure** element:

(i) means the measure as amended, continued, or renewed as of the date of entry into force of this Agreement, and

(ii) includes any subordinate measure adopted or maintained under the authority of and consistent with the measure;

(e) **Description**, for Australia, sets out the non-conforming measure for which the entry is made; and **Description**, for the United States, provides a general, nonbinding, description of the Measures.

3. In accordance with Article 10.6.1(a) and 11.13.1(a), the articles of this Agreement specified in the Obligations Concerned element of an entry do not apply, in the case of Australia, to the non-conforming measure identified in the Description element of that entry or, in the case of the United States, to the law, regulation, or other measure identified in the Measures element of that entry. Local Presence and National Treatment are separate disciplines and a measure that is only inconsistent with Local Presence need not be reserved against National Treatment.

4. Where a Party maintains a measure that requires that a service supplier be a citizen, permanent resident, or resident of its territory as a condition to the supply of a service in its territory, a Schedule entry for that measure taken with respect to Article 10.2, 10.3, or 10.5 shall operate as a Schedule entry with respect to Article 11.3, 11.4, or 11.9 to the extent of that measure.

## ANNEX I. Schedule of australia

Sector: All Sectors

Obligations Concerned: National Treatment (Articles 10.2 and 11.3) Most-Favoured-Nation Treatment (Articles 10.3 and 11.4) Local Presence (Article 10.5) Performance Requirements (Article 11.9) Senior Management and Boards of Directors (Article 11.10)

Level of Government: Regional

Source of Measure: All existing non-conforming measures at the regional level of government.

Description: Cross-Border Trade in Services and Investment

All existing non-conforming measures at the regional level of government.

Sector: All Sectors

Obligations Concerned: National Treatment (Article 11.3) Senior Management and Boards of Directors (Article 11.10)

Level of Government: Central

Source of Measure: Australia's Foreign Investment Policy, which comprises the Foreign Acquisitions and Takeovers Act 1975 (FATA); Foreign Acquisitions and Takeovers Regulations 1989; Financial Sector (Shareholdings) Act 1998 and Ministerial Statements on foreign investment policy including the Treasurer's Press Release No.28 of 9 April 1997.

Description: Investment

A. The following investments may be subject to objections by the Australian Government and may also require notification to the Government (1):

(a) Investments by foreign persons (2) in existing (3) Australian businesses in the media sector as follows:

(a) Direct (i.e., non-portfolio) investment irrespective of size; and

(ii) Portfolio investments of 5 per cent or more;

(b) Investments by foreign persons in existing Australian businesses, or prescribed corporations, (4) the value of whose total assets exceeds $A50 million (5) in the following sectors:

(i) The telecommunications sector;

(ii) The transport sector, including airports, portfacilities, rail infrastructure, international and. domestic aviation and shipping services provided either within, or to and from, Australia;

(iii) The supply of training or human resources, or the manufacture or supply of military goods, equipment or technology, to the Australian or other defence forces;

(iv) The manufacture or supply of goods, equipment or technologies able to be used for a military purpose;

(v) The development, manufacture or supply of, or provision of services relating to, encryption and security technologies and communication systems; and

(vi) The extraction of (or rights to extract) uranium or plutonium, or the operation of nuclear facilities;

(c) Investments by foreign persons in existing Australian businesses, or prescribed corporations, in all other sectors, excluding financial sector companies(6), the value of whose total assets exceeds $A800 million(7);

(d) Acquisitions by foreign persons of developed non- residential commercial real estate valued at more than $A800 million(8); and

(e) Direct (i.e., non-portfolio) investment by foreign governments or their agencies, or companies with greater than a 15 per cent direct or indirect holding by a foreign government or agency or otherwise regarded as controlled by a foreign government, irrespective of size.

Notified investments may be refused, subject to interim orders, and/or approved subject to compliance with certain conditions. Investments referred to in (a) through (e) for which no notification is required or received may be subject to orders under Sections 18, 19, 20,21 and 21A of the FATA.

B. The acquisition of an interest in shares in an Australian corporation by a foreign custodian company (9) is exempt from the application of the FATA where the company is granted a certificate of exemption in respect of that interest. (10)

C. The acquisition of a stake in an existing financial sector company by a foreign investor, or entry into an arrangement by a foreign investor, that would lead to an unacceptable shareholding situation or to practical control (11) of an existing financial sector company, may be refused, or be subject to certain conditions (12).

D. In addition to the measures identified in this entry, other entries in Annex I or Annex II set out additional non-conforming measures imposing specific limits on, or requirements relating to, foreign investment in the following areas:

- Newspapers;

- Broadcasting;

- Telstra;

- CSL;

- Qantas Airways Ltd;

- Australian international airlines, other than Qantas;

- Urban land;

- Federal leased airports; and

- Shipping.

(1) Foreign Acquisitions and Takeovers Act 1975 (FATA). Investments means activities covered by Part II of FATA or, where applicable, Ministerial statements on foreign investment policy. Funding arrangements that include debt instruments having quasi-equity characteristics will be treated as direct foreign investment.

(2) A foreign person means, as defined in section 5 of the FATA: (a) a natural person not ordinarily resident in Australia; (b) a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest; (c) a corporation in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate

controlling interest; (d) the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or (e) the trustee of a trust estate in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.

(3) For the purposes of this entry, existing means in existence at the time the investment is proposed or made.

(4) For the purposes of this entry, prescribed corporation means: (a) a trading corporation; (b) a financial corporation; (c) a corporation incorporated in a Territory under the law in force in that Territory relating to companies; (d) a foreign corporation that, on its last accounting date, held assets the sum of the values of which exceeded A$50 million (for item (b) of the entry) or A$800 million (for item (c) of the entry), being assets consisting of all or any of the following: (i) land situated in Australia (including legal and equitable interests in such land); (ii) mineral rights; (iii) shares in a corporation incorporated in Australia; (e) a foreign corporation that was, on its last accounting date, a holding corporation of an Australian corporation or Australian corporations, where the sum of the values on that date of the assets of the Australian corporation or Australian corporations exceeded A$50 million (for item b) of the entry) or A$800 million (for item c) of the entry); (f) acorporation that was, on its last accounting date, a holding corporation of an foreign corporation referred to in (d) or (e) of this footnote; (g) a foreign corporation that, on its last accounting date, held assets of a kind or kinds referred to in paragraph (d) of this footnote, where the sum of the values on that date of those assets was not less than one-half of the sum of the values on that date of the assets of that corporation and of all the subsidiaries of that corporation; or (h) a foreign corporation that was, on its last accounting date, a holding corporation of an Australian corporation or Australian corporations, where the sum of the values on that date of the assets of that Australian corporation or those Australian corporations was not less than one-half of the sum of the values on that date of the assets of the foreign corporation and of all the subsidiaries of that corporation.

(5) To be indexed on 1 January each year to the GDP implicit price deflator in the Australian National Accounts for the previous financial year.

(6) A financial sector company means, as defined in section 3 of the Financial Sector (Shareholdings) Act 1998: (a) an authorised deposit-taking institution; or (b) an authorised insurance company; or (c) aholding company of a company covered by (a) or (b) of this footnote..

(7) To be indexed on 1 January each year to the GDP implicit price deflator in the Australian National Accounts for the previous financial year.

(8) To be indexed on 1 January each year to the GDP implicit price deflator in the Australian National Accounts for the previous financial year.

(9) A foreign custodian company means, as defined in the Foreign Acquisitions and Takeovers Regulations 1989, a corporation that: (i) is a foreign person; and (ii) is the holder of an Australian financial services licence under Chapter 7 of the Corporations Act 2001; and (iii) is in the business of providing custodian services to other persons in relation to the ownership of shares

(10) As provided in the Foreign Acquisitions and Takeovers Regulations 1989.

(11) 'Unacceptable shareholding situation' and ‘practical control' as defined in the Financial Sector (Shareholdings) Act 1998.

(12) Ministerial statements on foreign investment policy including the Treasurer's Press Release No. 28 of 9 April 1997.

Sector: Professional Services

Obligations Concerned: Local Presence (Article 10.5)

Level of Government:Central

Source of Measure: Patents Act 1990

Description: Cross-Border Trade in Services

In order to register to practice in Australia, patent attorneys must:

(a) be ordinarily resident in Australia;(13) and.

(b) attend a place of business in Australia.

(13) For the purposes of this entry, a person is taken to be "ordinarily resident" in Australia if: (a) the person has his or her home in Australia; or (b) Australia is the country of his or her permanent abode even though he or she is temporarily absent from Australia. However, the person is taken not to be ordinarily resident in Australia if he or she resides in Australia for a special or temporary purpose only.

Sector: Professional Services

Obligations Concerned: National Treatment (Article 10.2) Most-Favoured-Nation Treatment (Article 10.3)

Level of Government: Central

Source of Measure: Migration Act 1958

Description: Cross-Border Trade in Services

To practise as a migration agent in Australia a person must be an Australian citizen or permanent resident or a citizen of New Zealand with a special category visa.

Sector: Information and Communications Technology

Obligations Concerned: Performance Requirements (Article 11.9)

Level of Government: Central

Source of Measure: Government announcement of Whole-of-Government Information Technology Infrastructure Consolidation and Outsourcing Initiative in 1997.

Description: Investment Existing contracts, including any extensions, under the Government IT Outsourcing Program requiring specified levels of exports.

Sector: Professional Services

Obligations Concerned: Local Presence (Article 10.5)

Level of Government: Central

Source of Measure: Corporations Act 2001

Description: Cross-Border Trade in Services

A person who is not ordinarily resident in Australia may be tefused registration as a company auditor. At least one partner in a firm providing auditing services must be a registered company auditor who is ordinarily resident in Australia.

Sector: Fishing

Obligations Concerned: National Treatment (Articles 10.2 and 11.3)

Level of Government: Central

Source of Measure: Fisheries Management Act 1991 Foreign Fishing Licenses Levy Act 1991

Description: Cross-Border Trade in Services and Investment

Foreign fishing vessels(14) seeking to undertake fishing activity in the Australian Fishing Zone must be authorised.

Where foreign fishing vessels are authorised they may then be subject to a levy (15).

(14) For the purposes of this entry, a foreign vessel is one that does not meet the definition of an Australian boat, that is, a boat based in Australia which is owned by an Australian resident or corporation.

(15) The levy charged will be in accordance with the Foreign Fishing Licenses Levy Act 1991 ot any amendments thereto.

Sector: Distribution Services

Obligations concerned: National Treatment (Articles 10.2 and 11.3) Market Access (Article 10.4)

Source of Measure: Wheat Marketing Act (1989)

Description: Cross-Border Trade in Services and Investment

A person, other than AWB (International) Ltd. (AWBD, may not export wheat unless the Wheat Export Authority (WEA) has given its written consent. The WEA must consult AWBI before giving such consent and must not give consent to bulk exports of wheat without the prior approval in writing of AWBI.

Sector: Professional Services

Obligations Concerned: Local Presence (Article 10.5)

Level of Government: Central

Source of Measure: Customs Act 1901

Description: Cross-Border Trade in Services

To act as a customs broker in Australia, service suppliers must supply the service in and from Australia.

Sector:Telecommunications

Obligations Concerned: National Treatment (Article 11.3) Senior Management and Boards of Directors (Article 11.10)

Level of Government: Central

Source of Measure: Telstra Corporation Act 1991

Description: Investment

The maximum aggregate foreign ownership allowed in Telstra is 35 per cent of the Telstra shares that are not Commonwealth held. The maximum individual foreign ownership allowed in Telstra is 5 per cent of the Telstra shares that are not Commonwealth held.

The Chairperson and a majority of directors of Telstra must be Australian citizens, and Telstra is required to maintain its head office, main base of operations, and place of incorporation in Australia.

Sector: Broadcasting and Audiovisual Services Advertising Services

Obligations Concerned: National Treatment (Articles 10.2 and 11.3) Most-Favoured-Nation Treatment (6) (Articles 10.3 and 11.4) Performance Requirements (Article 11.9)

Source of Measure: Broadcasting Services Act 1992

Level of Government: Central

Description: Cross-Border Trade in Services and Investment

(a) Transmission quotas for local content imposed on free-to- air commercial analogue and digital (other than multichannelling) television broadcasting services shall not exceed 55 percent of programming transmitted annually between 6:00am. and midnight. Subquotas for particular program formats (eg drama, documentary) may be applied within the 55 percent quota.

(b) Transmission quotas for local content imposed on advertising broadcast by providers of free-to-air commercial analogue and digital (other than multichannelling) television broadcasting services shall not exceed 80 percent of advertising time transmitted annually between 6:00am. and midnight.

(6) Applies only to the equal treatment as local content of New Zealand programs or production.

Sector: Broadcasting

Obligations Concerned: National Treatment (Article 11.3) Senior Management and Boards of Directors (Article 11.10)

Level of Government: Central

Source of Measure: Broadcasting Services Act 1992 (BSA)

Description of Reservation: Investment

A foreign person must not be in a position to exercise control of a commercial television broadcasting licence.

Two or more foreign persons must not have company interests in a commercial television broadcasting licensee that exceed 20 per cent.

No more than 20 per cent of the directors of each commercial television broadcasting licensee may be foreign persons.

A foreign person must not have company interests in a subscription television broadcasting licence:

(a) of more than 20 per cent; or

(b) that, when added to the company interests in that licence held by other foreign persons, exceed 35 per cent.

The terms "foreign person", "in a position to exercise control", "commercial television broadcasting licence", "subscription television broadcasting licence" and "company interests" have the meanings they have in the BSA (sections 6, 7 and 8 and Schedule 1).

Sector: Newspapers

Obligations Concerned: National Treatment (Article 11.3)

Level of Government: Central

Source of Measure: Foreign Acquisitions and Takeovers Act 1975; Foreign Acquisitions and Takeovers Regulations; and Ministerial Statements.

Description of Reservation: Investment

The maximum permitted aggregate foreign interest direct (non- portfolio) investment/involvement in national and metropolitan newspapers is 30 per cent with any single foreign shareholder limited to a maximum interest of 25 per cent.

The maximum permitted aggregate foreign interest direct (non-portfolio) investment/involvement in provincial and suburban newspapers is less than 50 per cent.

Sector: Health

Obligations Concerned: National Treatment (Article 11.3) Senior Management and Boards of Directors (Article 11.10)

Level of Government: Central

Source of Measure: Commonwealth Serum Laboratories Act 1961

Description: Investment

The votes attaching to significant foreign shareholdings (7) may not be counted in respect of the appointment, replacement or removal of more than one-third of the directors of CSL who hold office at a particular time. The head office and principal facilities must remain in Australia. Two-thirds of the directors of the board of CSL and the chairperson of any meeting must be Australian citizens. CSL must not seek incorporation outside of Australia.

(7) For the purposes of this entry, significant foreign shareholding means a holding of voting shares in CSL in which a foreign person has a relevant interest, if the foreign person has relevant interests in at least 5 per cent of the voting shares in CSL.

Sector: Transport services

Obligations Concerned: National Treatment (Articles 10.2 and 11.3) Local Presence (Article 10.5)

Level of Government: Central

Source of Measure: Trade Practices Act 1974

Description: Cross-Border Trade in Services and Investment

Every ocean carrier who provides international liner cargo shipping services to or from Australia must, at all times, be represented by a natural person who is resident in Australia.

Only Australian flag operators may apply to the Australian Competition and Consumer Commission to examine whether conference members, and non-conference operators with substantial market power, are hindering other shipping operators from engaging efficiently in the provision of outward liner cargo services to an extent that is reasonable.

Sector: Transport

Obligations Concerned: National Treatment (Article 11.3) Senior Management and Boards of Directors (Article 11.10)

Level of Government: Central

Source of Measure: Air Navigation Act 1920 Ministerial Statement

Description: Investment

Total foreign ownership of individual Australian international airlines (other than Qantas) is restricted to a maximum of 49 per cent.

Furthermore:

- at least two-thirds of the Board members must be Australian citizens;

- the Chairperson of the Board must be an Australian citizen;

- the airline's head office must be in Australia; and

- the airline's operational base must be in Australia.

Sector: Transport

Obligations Concerned: National Treatment (Article 11.3) Senior Management and Boards of Directors (Article 11.10)

Source of Measure: Qantas Sale Act 1992

Description: Investment

Total foreign ownership of Qantas Airways Ltd. is restricted to a maximum of 49 per cent in aggregate, with individual foreign holdings limited to 25 per cent and aggregate holdings by foreign airlines to 35 per cent. In addition:

- the head office of Qantas must always be located in Australia;

- the majority of Qantas' operational facilities must be located in Australia;

- at all times, at least two thirds of the directors of Qantas must be Australian citizens;

- at a meeting of the board of directors of Qantas, the director presiding at the meeting (however described) roust be an Australian citizen; and

- Qantas is prohibited from taking any action to become incorporated outside Australia.

## ANNEX I. Schedule of the united states

Sector: Atomic Energy

Obligations Concerned: National Treatment (Article 11.3)

Level of Government: Central

Measures: Atomic Energy Act of 1954, 42 U.S.C. 8§ 2011 et seq.

Description: Investment

A license issued by the United States Nuclear Regulatory Commission is required for any person in the United States to transfer or receive in interstate commerce, manufacture, produce, transfer, use, import, or export any nuclear "utilization or production facilities" for commercial or industrial purposes. Such a license may not be issued to any entity known or believed to be owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government (42 U.S.C. § 2133(d)). A license issued by the United States Nuclear Regulatory Commission is also required for nuclear "utilization and production facilities," for use in medical therapy, or for research and development activities. The issuance of such a license to any entity known or believed to be owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government is also prohibited (42 U.S.C. § 2134(d)).

Sector: Business Services

Obligations Concerned: National Treatment (Article 10.2) Local Presence (Article 10.5)

Level of Government: Central

Measures: Export Trading Company Act of 1982, 15 U.S.C. §§ 4011-4021 15 CFR. Part 325

Description: Cross-Border Trade in Services

Title II of the Export Trading Company Act of 1982 authorizes the Secretary of Commerce to issue "certificates of review" with respect to export conduct. The Act provides for the issuance of a certificate of review where the Secretary determines, and the Attorney General concurs, that the export conduct specified in an application will not have the anticompetitive effects proscribed by the Act. A certificate of review limits the liability under federal and state antitrust laws in engaging in the export conduct certified.

Only a "person" as defined by the Act can apply for a certificate of review. "Person" means "an individual who is a resident of the United States; a partnership that is created under and exists pursuant to the laws of any State or of the United States; a State or local government entity; a corporation, whether organized as a profit or nonprofit corporation, that is created under and exists pursuant to the laws of any State or of the United States; or any association or combination, by contract or other arrangement, between such persons."

A foreign national or enterprise may receive the protection provided by a certificate of review by becoming a "member" of a qualified applicant. The regulations define "member" to mean "an entity (U.S. or foreign) that is seeking protection under the certificate with the applicant. A member may be a partner in a partnership or a joint venture; a shareholder of a corporation; or a participant in an association, cooperative, or other form of profit or nonprofit organization or relationship, by contract or other arrangement."

Sector: Business Services

Obligations Concerned:National Treatment (Article 10.2) Local Presence (Article 10.5)

Level of Government: Central

Measures: Export Administration Act of 1979, as amended, 50 U.S.C. app. 2401-2420. International Emergency Economic Powers Act, 50 U.S.C. 8§ 1701-1706. Export Administration Regulations, 15 C.F R. Parts 730 through 774.

Description: Cross-Border Trade in Services

With some limited exceptions, exports and reexports of commodities, software, and technology subject to the Export Administration Regulations require a license from the Bureau of Industry and Security, U.S. Department of Commerce (BIS). Certain activities of U.S. persons, wherever located, also tequire a license from BIS. An application for a license must be made by a person in the United States.

In addition, release of controlled technology to a foreign national in the United States is deemed to be an export to the home country of the foreign national and requires the same written authorization from BIS as an export from the territory of the United States.

Sector: Mining

Obligations Concerned: National Treatment (Article 11.3 ) Most-Favored-Nation Treatment (Article 11.4 )

Level of Government: Central

Measures: Mineral Lands Leasing Act of 1920, 30 U.S.C. Chapter 3A 10 USC. § 7435

Description: Investment

Under the Mineral Lands Leasing Act of 1920, aliens and foreign corporations may not acquire rights-of-way for oil or gas pipelines, or pipelines carrying products refined from oil and gas, across on-shore federal lands or acquire leases or interests in certain minerals on on-shore federal lands, such as coal or oil. Non-U.S. citizens may own a 100 percent interest in a domestic corporation that acquires a right-of-way for oil or gas pipelines across on-shore federal lands, or that acquires a lease to develop mineral resources on on-shore federal lands, unless the foreign investor's home country denies similar or like privileges for the mineral or access in question to U.S. citizens or corporations, as compared with the privileges it accords to its own citizens or corporations or to the citizens or corporations of other countries (30 U.S.C. §§ 181, 185(a)).

Nationalization is not considered to be denial of similar or like privileges.

Foreign citizens, or corporations controlled by them, are restricted from obtaining access to federal leases on Naval Petroleum Reserves if the laws, customs, or regulations of their country deny the privilege of leasing public lands to citizens or corporations of the United States (10 U.S.C. § 7435).

Sector: All Sectors

Obligations Concerned: National Treatment (Article 11.3 ) Most-Favored-Nation Treatment (Article 11.4 )

Level of Government: Central

Measures: 22 USC. §§ 2194 and 2198(c)

Description: Investment

The Overseas Private Investment Corporation insurance and loan guarantees are not available to certain aliens, foreign enterprises, or foreign-controlled domestic enterprises.

Sector: Air Transportation

Obligations Concerned: National Treatment (Article 11.3) Most-Favored-Nation Treatment (Article 11.4) Senior Management and Boards of Directors (Article 11.10)

Level of Government: Central

Measures: 49 USC. Subtitle VII, Aviation Programs 14CF.R.Part 297 (foreign freight forwarders); 14 CFR. Part 380, Subpart E (registration of foreign (passenger) charter operators)

Description: Investment

Only air carriers that are "citizens of the United States" may operate aircraft in domestic air service (cabotage) and may provide international scheduled and non-scheduled air service as US. air carriers.

US. citizens also have blanket authority to engage in indirect air transportation activities (air freight forwarding and passenger charter activities other than as actual operators of the aircraft). In order to conduct such activities, non-US. citizens must obtain authority from the Department of Transportation. Applications for such authority may be rejected for reasons relating to the failure of effective reciprocity, or if the Department of Transportation finds that it is in the public interest to do so.

Under 49 U.S.C. § 40102(a)(15), a citizen of the United States" means: an individual who is a U.S. citizen; ora partnership in which each member is a US. citizen; ora US. corporation of which the president and at least two-thirds of the board of directors and other managing officers are U.S. citizens, which is under the actual control of US. citizens, and in which at least seventy-five percent of the voting interest in the corporation is owned or controlled by US. citizens.

Sector: Air Transportation

Obligations Concerned: National Treatment (Articles 10.2 and 11.3) Most-Favored-Nation Treatment (Article 10.3 and 11.4) Local Presence (Article 10.5.) Senior Management and Boards of Directors (Article 11.10)

Level of Government: Central

Measures: 49 USC.., Subtitle VI, Aviation Programs 49 USC. § 41703 14CFR. Part 375

Description: Cross-Border Trade in Services

1. Authorization from the Department of Transportation is required for the provision of specialty air services in the territory

of the United States.*

Investment

2. "Foreign civil aircraft" require authority from the Department of Transportation to conduct specialty air services in the territory of the United States. "Foreign civil aircraft" are aircraft of foreign registry or aircraft of U.S. registry that are owned, controlled, or operated by persons who are not citizens or permanent residents of the United States (14 CFR. § 375.1). Under 49 U.S.C.a citizen of the United States means an individual who is a U.S. citizen or a partnership in which each member is a U.S. citizen or a U.S. corporation of which the president and at least two-thirds of the board of directors and other managing officers are US. citizens, which is under the actual control of U.S. citizens, and in which at least seventy- five percent of the voting interest in the corporation is owned or controlled by U.S. citizens.

*A person of Australia will be able to obtain such an authorization given the application of Chapter Ten (Cross- Border Trade in Services) to specialty air services.

Sector: Transportation Services - Customs Brokers

Obligations Concerned: National Treatment (Articles 10.2 and 11.3) Local Presence (Article 10.5)

Level of Government: Central

Measures: 19 U.S. § 1641(b)

Description: Cross-Border Trade in Services and Investment

A customs broker's license is required to conduct customs business on behalf of another person. Only U.S. citizens may obtain such a license. A corporation, association, or partnership established under the law of any state may receive a customs broker's license if at least one officer of the corporation or association, or one member of the partnership, holds a valid customs broker's license.

Sector: All Sectors

Obligations Concerned: National Treatment (Article 11.3 ) Most-Favored-Nation Treatment (Article 11.4)

Level of Government: Central

Measures: Securities Act of 1933, 15 USC. §§ 77C(b), 77£, 77g, 77h, 77), and. 77s(a) 17 CFR. §§ 230.251 and 230.405 Securities Exchange Act of 1934, 15 USC. §§ 781, 78m, 780(d), and 78w(a) 17 CFR. § 240.12b-2

Description: Investment

Foreign firms, except for certain Canadian issuers, may not use the small business registration forms under the Securities Act of 1933 to register public offerings of securities or the small business registration forms under the Securities Exchange Act of 1934 to register a class of securities or file annual reports.

Sector: Communications — Radiocommunications

Obligations Concerned: National Treatment (Article 11.3)

Level of Government: Central

Measures: 47 USC. § 310 Foreign Participation Order 12 FCC Red 23841 (1997)

Description: Investment

The United States reserves the right to restrict ownership of radio licenses in accordance with the above statutory and regulatory provisions. Radiocommunications consists of all communications by radio, including broadcasting

Sector: Professional Services - Patent Attorneys, Patent Agents, and Other Practice before the Patent and Trademark Office

Obligations Concerned: National Treatment (Article 10.2) Most-Favored-Nation Treatment (Article 10.3) Local Presence (Article 10.5)

Level of Government: Central

Measures: 35 USC. Chapter 3 (practice before the U.S. Patent and Trademark Office) 37 CFR. Part 10 (representation of others before the U.S. Patent and Trademark Office)

Description: Cross-Border Trade in Services

As a condition to be registered to practice for others before the US. Patent and Trademark Office (USPTO):

(a) a patent attorney must be a US. citizen or an alien lawfully residing in the United States 87 CFR. § 10.6(a));

(b) a patent agent must be a US. citizen, an alien lawfully residing in the United States, or a non-resident who is tegistered to practice in a country that permits patent agents registered to practice before the USPTO to practice in that country; the latter is permitted to practice for the limited purpose of presenting and prosecuting patent applications of applicants located in the country in which he or she resides (37 CFR. §10.6(c)); and

(c) a practitioner in trademark and non-patent cases must be an attorney licensed in the United States, a "grandfathered" agent, an attorney licensed to practice in a country that accords equivalent treatment to attorneys licensed in the United States, or an agent registered to practice in such a country; the latter two are permitted to practice for the limited purpose of representing parties located in the country in which he or she resides 37 CFR. § 10.14(a)-(c)).

Sector: All Sectors

Obligations Concerned: National Treatment (Articles 10.2 and 11.3) Most-Favored-Nation Treatment (Articles 10.3 and 11.4) Local Presence (Article 10.5) Performance Requirements (Article 11.9) Senior Management and Boards of Directors (Article 11.10)

Level of Government: Regional

Measures: All existing non-conforming measures of all states of the United States, the District of Columbia, and Puerto Rico

Description: Cross-Border Trade in Services and Investment

## ANNEX II.

1. The Schedule of a Party to this Annex sets out, pursuant to Articles 10.6 (Non- Conforming Measures) and 11.13 (Non-Conforming Measures), the specific sectors, sub-sectors, or activities for which that Party may maintain existing, or adopt new or more restrictive, measures that do not conform with obligations imposed by:

(a) Article 10.2 (National Treatment) or 11.3 (National Treatment);

(b) Article 10.3 (Most-Favoured-Nation Treatment) or 11.4 (Most-Favoured-Nation Treatment);

(c) Article 10.4 (Market Access);

(d) Article 10.5 (Local Presence);

(e) Article 11.9 (Performance Requirements); or

(f) Article 11.10 (Senior Management and Boards of Directors).

2. Each Schedule entry sets out the following elements:

(a) **Sector** refers to the sector for which the entry is made;

(b) **Obligations Concerned** specifies the obligation(s) referred to in paragraph 1 that, pursuant to Articles 10.6.2 and Article 11.13.2, do not apply to the sectors, sub- sectors, or activities listed in the entry;

(c) **Description** sets out the scope of the sector, sub-sector, or activities covered by the entry; and

(d) **Existing Measures** identifies, for transparency purposes, existing measures that apply to the sector, sub-sector, or activities covered by the entry.

3. In accordance with Articles 10.6.2 and 11.13.2, the articles of this Agreement specified in the **Obligations Concerned** element of an entry do not apply to the sectors, sub-sectors, and activities identified in the **Description** element of that entry.

## ANNEX II. Schedule of australia

Sector: All

Obligations Concerned: National Treatment (Articles 10.2 and 11.3) Market Access (Article 10.4) Performance Requirements (Article 11.9) Local Presence (Article 10.5) Senior Management and Boards of Directors (Article 11.10)

Description: Cross-Border Trade in Services and Investment

Australia reserves the right to adopt or maintain any measure according preferences to any indigenous person or organisation or providing for the favourable treatment of any indigenous person or organisation in relation to the acquisition, establishment, or operation of any commercial or industrial undertaking in the service sector.

Australia reserves the right to adopt or maintain any measure with respect to investment that accords preferences to any indigenous person or organisation or provides for the favourable treatment of any indigenous person or organisation.

For the purpose of this entry, "indigenous person" means a person of the Aboriginal race of Australia or a descendent of an indigenous inhabitant of the Torres Strait Islands.

Existing Measures: Legislation and ministerial statements at all levels of government including Australia's foreign investment policy and the Native Title Act 1993.

Sector: All

Obligations Concerned: Market Access (Article 10.4)

Description: Cross-Border Trade in Services

Australia reserves the right to adopt or maintain any measure with respect to the supply of a service by a service supplier of the United States, through presence of natural persons of the United States in the territory of Australia,-that is not inconsistent with Australia's obligations under Article XVI of the General Agreement on Trade in Services (GATS).

Australia reserves the right to adopt or maintain any measure at the regional level of government that is not inconsistent with Australia's obligations under Article XVI of the GATS.

Existing Measures:

Sector: All

Obligations National Treatment (Article 11.3) Concerned: Performance Requirements (Article 11.9)

Description: Investment

Australia reserves the right to adopt or maintain any measure with respect to proposals by ‘foreign persons' to invest in Australian urban land (1) (including interests that arise via leases, financing and profit sharing arrangements and the acquisition of interests in urban land corporations and trusts), other than developed non-residential commercial real estate.

Existing Measures: Australia's foreign investment policy, which comprises the:

- Foreign Acquisitions and Takeovers Act 1975 (FATA);

- Foreign Acquisitions and Takeovers Regulations 1989; and Ministerial statements.

(1) Australian urban land means land situated in Australia that is not used wholly or exclusively for carrying on a business of primary production.

Sector: Social Services

Obligations Concerned: National Treatment (Articles 10.2 and 11.3) Most-Favoured-Nation Treatment (Articles 10.3 and 11.4) Local Presence (Article 10.5) Performance Requirements (Article 11.9) Senior Management and Boards of Directors (Article 11.10) Market Access (Article 10.4)

Description: Cross-Border Trade in Services and Investment

Australia reserves the right to adopt or maintain any measure with respect to the provision of law enforcement and correctional services, and the following services to the extent that they are social services established or maintained for a public purpose: income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care.

Existing Measures:

Sector: Broadcasting and Audiovisual Services. Advertising Services. Live Performance (2)

Obligations Concerned: National Treatment (Articles 10.2 and 11.3) Market Access (Article 10.4) Most-Favoured-Nation Treatment (3)(Articles 10.3 and 11.4) Performance Requirements (Article 11.9) Local Presence (Article 10.5)(4)

Description: Cross-Border Trade in Services and Investment

Australia reserves the right to adopt or maintain:

(a) Multichannelled free-to-air commercial television broadcasting services

- Transmission quotas for local content, where more than one channel of programming is made available by a provider of free-to-air commercial television broadcasting services. Such quotas may not exceed 55 per cent of the programming on an individual channel of a service provider transmitted annually between 6:00am. and. midnight and may not be imposed on more than two channels or 20 per cent of the total number of channels (whichever is greater) made available by that provider. No such transmission quotas shall be applied to more than three channels of an individual service provider. Subquotas for particular program formats (e.g. drama, documentary, children's) may be applied within the transmission quotas in a manner consistent with existing standards.

- Transmission quotas for local content in relation to advertising, where more than one channel of programming on a particular service is made available by a service provider of free-to-air commercial television broadcasting services. Such quotas may not exceed 80 per cent of the advertising time on an individual channel of a service provider transmitted annually between 6:00am. and midnight and may not be imposed on more than three channels made available by that provider.

(b) Free-to-air commercial television broadcasting services

- Requirements that, where a free-to-air commercial television channel subject to a transmission quota is rebroadcast over another transmission platform, the quota may be applied to the rebroadcast channel.

- Requirements that, where a free-to-air commercial television broadcasting service provider moves a channel subject to a transmission quota to another transmission platform, the quota may be applied to that channel.

(c) Subscription television broadcasting services

- Expenditure requirements for Australian production not exceeding 10 per cent of total program expenditure. Such requirements may be imposed on service providers making available services in the following program formats: the arts, children's, documentary, drama, and. educational (5)

- Upon a finding by the Government of Australia that the expenditure requirement for the production of Australian drama is insufficient to meet its stated goal for such expenditure, this expenditure requirement may be increased up to a maximum level of 20 per cent. Such a finding shall be made through a transparent process that includes consultations with any affected parties including the United States. Any increase imposed shall be non-discriminatory and no more burdensome than necessary.

(d) Free-to-air radio broadcasting services

Transmission quotas for local content not exceeding 25 per cent of the programming (e.g. of musical items) on individual stations of a service provider transmitted annually between 6.00a m. and midnight.

(e) Interactive audio and/or video services

Measures to ensure that, upon a finding by the Government of Australia that Australian audiovisual content or genres thereof is not readily available to Australian consumers, access to such programming on interactive audio and/or video services is not unreasonably denied to Australian consumers. Any measures addressing such a situation will be implemented through a transparent process permitting participation by any affected parties, be based. on objective criteria, be the minimum necessary, be no more trade restrictive than necessary, not be unreasonably burdensome, and be applied only to a service provided by an enterprise that carries on business activities in Australia in relation to the supply of that service.

(f) Spectrum and licensing

Measures inconsistent with Articles 10.4 with respect to spectrum management and licensing of broadcasting services as

currently defined in the Broadcasting Services Act 1992, i.e., commercial broadcasting services, community broadcasting services, narrowcasting services and. subscription broadcasting services.

Measures, as currently specified in the Broadcasting Services Act 1992, that restrict the eligibility for broadcasting services licenses to enterprises that are a specific legal type and/or are established in Australia or in an external territory.

(g) Subsidies or grants

Subsidies or grants for investment in Australian cultural activity where eligibility for the subsidy or grant is subject to local content or production requirements.

This entry does not apply to foreign investment restrictions in the broadcasting and audiovisual services sector.

Existing Measures: Broadcasting Services Act 1992 Radiocommunications Act 1992 Income Tax Assessment Act 1936 Income Tax Assessment Act 1997 Australian Film Commission Act 1975 Broadcasting Services (Australian Content) Standard 1999 Television Program Standard 23 — Australian Content in Advertising Commercial Radio Codes of Practice and Guidelines Community Broadcasting Codes of Practice

(2) Applies only in respect of item (g).

(3) Applies only to the treatment as local content of New Zealand programs or productions.

(4) Applies only in respect of item (f)

(5) No one channel will be subject to an expenditure requirement for more than a single program format.

Sector: Broadcasting and Audiovisual Services

Obligations Concerned: Most-Favoured-Nation Treatment (Article 10.3 and 11.4) Performance Requirements (Article 11.9)

Description: Cross-Border Trade in Services and Investment

Australia reserves the right to adopt or maintain, under the International Co-production Program, preferential co-production arrangements for film and television productions. Official co- production status, which may be granted to a co-production produced under these co-production arrangements, confers national treatment on works covered by these arrangements.

Existing Measures: International Co-production Program

Sector: Distribution Services

Obligations Concerned: Market Access (Article 10.4)

Description: Cross-Border Trade in Services

Australia reserves the right to adopt or maintain any measure with respect to wholesale and retail trade services of tobacco products, alcoholic beverages, or firearms.

Existing Measures:

Sector: Education Services

Obligations Concerned: National Treatment (Articles 10.2 and 11.3) Market Access (Article 10.4) Local Presence (Article 10.5) Senior Management and Boards of Directors (Article 11.10) Performance Requirements (Article 11.9)

Description: Cross-Border Trade in Services and Investment

Australia reserves the right to adopt or maintain any measure with respect to primary education.

Existing Measures:

Sector: Maritime

Obligations Concerned: National Treatment (Article 11.3)

Description: Investment

Australia reserves the right to adopt or maintain any measure with respect to the registration of vessels in Australia.

Existing Measures:

Sector: Maritime Transport

Obligations Concerned: National Treatment (Articles 10.2 and 11.3) Local Presence (Article 10.5) Market Access (Article 10.4) Performance Requirements (Article 11.9) Senior Management and Boards of Directors (Article 11.10)

Description: Cross-Border Trade in Services and Investment

Australia reserves the right to adopt or maintain any measure with respect to maritime cabotage services and offshore transport services (6)

Existing Measures:

(6) For the purposes of this entry, **cabotage** means the transportation of passengers or goods between a port located in Australia and another port located in Australia and traffic originating and terminating in the same port located in Australia. **Offshore transport** means shipping services involving the transportation of passengers or goods between a port located in Australia and any location associated with or incidental to the exploration or exploitation of natural resources of the continental shelf of Australia, the seabed of the Australian coastal sea, and the subsoil of that seabed.

Sector: Transport

Obligations Concerned: National Treatment (Article 11.3) Senior Management and Boards of Directors (Article 11.10)

Description: Investment

Australia reserves the right to adopt or maintain any measure with respect to investment in federal leased airports.

Existing Measures: Airports Act 1996. Airports (Ownership-Interests in Shares) Regulations 1996 Airports Regulations 1997

Sector: All

Obligations Concerned: Most-Favoured-Nation Treatment (Article 10.3 and 11.4)

Description: Cross-Border Trade in Services and Investment

Australia reserves the right to adopt or maintain any measure that accords more favourable treatment to the service suppliers or investors of non-Parties under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement.

Australia reserves the right to adopt or maintain any measure that accords more favourable treatment to the service suppliers or investors of non-Parties under any bilateral or multilateral international agreement in force or signed after the date of entry into force of this Agreement involving:

(a) aviation;

(b) fisheries; or

(c) maritime matters, including salvage.

Existing Measures:

## ANNEX II. Schedule of united states

Sector: Communications

Obligations Concerned: Most-Favored-Nation Treatment (Articles 10.3 and 11.4)

Description: Cross-Border Trade in Services and Investment

The United States reserves the right to adopt or maintain any measure that accords differential treatment to persons of other countries due to application of reciprocity measures or through international agreements involving sharing of the radio spectrum, guaranteeing market access, or national treatment with respect to the one-way satellite transmission of direct-to-home (DTH) and direct broadcasting satellite (DBS) television services and digital audio services.

Sector: Communications - Cable Television

Obligations Concerned: National Treatment (Article 11.3) Most-Favored-Nation Treatment (Article 11.4) Senior Management and Boards of Directors (Article 11.10)

Description: Investment

The United States reserves the right to adopt or maintain any measure that accords equivalent treatment to persons of any country that limits ownership by persons of the United States in an enterprise engaged in the operation of a cable television system in that country.

Sector: Social Services

Obligations Concerned: National Treatment (Articles 10.2 and 11.3) Most-Favored-Nation Treatment (Articles 10.3 and 11.4) Local Presence (Article 10.5) Performance Requirements (Article 11.9) Senior Management and Boards of Directors (Article 11.10)

Description: Cross-Border Trade in Services and Investment

The United States reserves the right to adopt or maintain any measure with respect to the provision of law enforcement and correctional services, and the following services to the extent they are social services established or maintained for a public purpose: income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care.

Sector: Minority Affairs

Obligations Concerned: National Treatment (Articles 10.2 and 11.3) Local Presence (Article 10.5) Performance Requirements (Article 11.9) Senior Management and Boards of Directors (Article 11.10)

Description: Cross-Border Trade in Services and Investment

The United States reserves the right to adopt or maintain any measure according rights or preferences to socially or economically disadvantaged minorities, including corporations organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act.

Existing Measures: Alaska Native Claims Settlement Act, 43 US.C.8§ 1601 et seq.

Sector: Transportation

Obligations Concerned: National Treatment (Articles 10.2 and 11.3) Most-Favored-Nation Treatment (Articles 10.3 and 11.4) Local Presence (Article 10.5) Performance Requirements (Article 11.9) Senior Management and Boards of Directors (Article 11.10)

Description: Cross-Border Trade in Services and Investment

The United States reserves the right to adopt or maintain any measure relating to the provision of maritime transportation services and the operation of U S.-flagged vessels, including the following:

(a) requirements for investment in, ownership and control of, and operation of vessels and other marine structures, including drill rigs, in maritime cabotage services, including maritime cabotage services performed in the domestic offshore trades, the coastwise trades, U.S. territorial waters, waters above the continental shelf, and in the inland waterways;

(b) requirements for investment in, ownership and control of, and operation of U.S.-flagged vessels in foreign trades;

(c) requirements for investment in, ownership or control of, and operation of vessels engaged in fishing and related activities in U.S. territorial waters and the Exclusive Economic Zone;

(d) requirements related to documenting a vessel under the US. flag;

(e) promotional programs, including tax benefits, available for shipowners, operators, and vessels meeting certain requirements;

(f) certification, licensing, and citizenship requirements for crew members on US -flagged vessels;

(g) manning requirements for U.S.-flagged vessels;

(h) all matters under the jurisdiction of the Federal Maritime Commission;

(i) negotiation and implementation of bilateral and other international maritime agreements and understandings;

(j) limitations on longshore work performed by crew members;

(k) tonnage duties and light money assessments for entering US. waters; and.

(l) certification, licensing, and citizenship requirements for pilots performing pilotage services in US. territorial waters.

The following activities are not included in this reservation. However, the treatment in (b) is conditional upon obtaining comparable market access in these sectors from Australia:

(a) vessel construction and repair; and

(b) landside aspects of port activities, including operation and maintenance of docks; loading and unloading of vessels directly to or from land; marine cargo handling; operation and maintenance of piers; ship cleaning; stevedoring; transfer of cargo between vessels and trucks, trains, pipelines, and wharves; waterfront terminal operations; boat cleaning; canal operation; dismantling of vessels; operation of marine railways for drydocking; marine surveyors, except cargo; marine wrecking of vessels for scrap; and ship classification societies.

Existing Measures: Merchant Marine Act of 1920, §§ 19 and 27, 46 App. USC. § 876 and § 883 et seq. Jones Act Waiver Statute, 64 Stat 1120, 46 U.S.C. App., note preceding Section 1 Shipping Act of 1916, 46 U.S.C. App. §§ 802 and 808 Merchant Marine Act of 1936, 46 U.S.C. App. §§ 1151 et seq., 1160-61, 1171 et seq., 1241(b), 1241-1, 1244, and 1271 et seq. Merchant Ship Sales Act of 1946, 50 U.S.C. App. § 1738 46 App. U.S.C. §§ 121, 292, and 316 46 U.S.C. 8§ 12101 et seq. and 31301 et seq. 46 U.S.C. 8§ 8904 and 31328(2) Passenger Vessel Act, 46 App.U S.C. § 289 42 USC. §8§ 9601 et seq.; 33 U.S.C. §§ 2701 et seq.; 33 USC. §§ 1251 et seq. 46 USC. §§ 3301 et seq., 3701 et seq., 8103, and 12107(b) Shipping Act of 1984, 46 App. U.S.C. §§ 1708 and 1712 The Foreign Shipping Practices Act of 1988, 46 App. USC. § 1710a Merchant Marine Act, 1920, 46 App. USC. 8§ 861 et seq. Shipping Act of 1984, 46 App. U.S.C. §§ 1701 et seq. Alaska North Slope, 104 Pub. L. 58; 109 Stat. 557 Longshore restrictions and reciprocity, 8 U.S.C. §§ 1101 et seq. Vessel escort provisions, Section 1119 of Pub. L. 106-554, as amended Nicholson Act, 46 App. U.S.C. § 251 Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987, 46 U.S.C. § 2101 and 46 U.S.C. § 12108 43 USC. § 1841 22 USC. § 1980 Intercoastal Shipping Act, 46 U.S.C. App. § 843 46 USC. § 9302, 46 U.S.C. § 8502; Agreement Governing the Operation of Pilotage on the Great Lakes, Exchange of Notes at Ottawa, August 23, 1978, and March 29, 1979, TIAS 9445 Magnuson Fishery Conservation and Management Act, 16 USC. §§ 1801 et seq. 19 USC. § 1466 North Pacific Anadramous Stocks Convention Act of 1972, P.L. 102-587; Oceans Act of 1992, Title VIT Tuna Convention Act, 16 U.S.C. §§ 951 et seq. South Pacific Tuna Act of 1988, 16 U.S.C. §§ 973 et seq. Northern Pacific Halibut Act of 1982, 16 U.S.C. §§ 773 et seq. Atlantic Tunas Convention Act, 16 U.S.C. §§ 971 et seq. Antarctic Marine Living Resources Convention Act of 1984, 16 USC. §§ 2431 et seq. Pacific Salmon Treaty Act of 1985, 16 U.S.C. §§ 3631 et seq. American Fisheries Act, 46 U.S.C. § 12102(c) and 46 USC. § 31322(a)

Sector: All

Obligations Concerned: Market Access (Article 10.4)

Description: Cross-Border Trade in Services

The United States reserves the right to adopt or maintain any measure that is not inconsistent with the United States' obligations under Article XVI of the General Agreement on Trade in Services.

Sector: All

Obligations Concerned: Most-Favored-Nation Treatment (Articles 10.3 and 11.4) Cross-Border Trade in Services and Investment

Description: The United States reserves the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement.

The United States reserves the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed after the date of entry into force of this Agreement involving:

(a) aviation;

(b) fisheries; or

(c) maritime matters, including salvage.