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TRADE IN SERVICES AGREEMENT (TiSA)

Annex on State-Owned Enterprises

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EU COMMENTS 10.2016

ANNEX ON STATE-OWNED ENTERPRISES

Article X.1: Definitions

For purposes of this Annex:

EU propose: commercial activities means activities which a juridical person undertakes with an orientation towards profit-making and which result in the production of a good or supply of a service that will be sold to a consumer in the relevant market in quantities and at prices determined by the juridical person;¹

commercial considerations means price, quality, availability, marketability, transportation, and other terms and conditions of purchase or sale; or other factors that would normally be taken into account in the commercial decisions of a [privately-owned juridical person in the relevant business or industry/ EU propose: operating according to market economy principles];

EU propose:

"enterprise granted special rights or privileges" means any enterprise, public or private, including any subsidiary, that has been granted by a Party, ~~in law or in fact,~~ special rights or privileges. Special rights or privileges are granted by a Party when it designates or limits to two or more the number of enterprises authorized to provide a good or a service, other than according to objective, proportional and non-discriminatory criteria, substantially affecting the ability of any other enterprise to supply the same good or service in the same geographical area under substantially equivalent conditions.

"designated monopoly" means an entity, including a group of entities or a government agency, and any subsidiary thereof, that in a relevant market in the territory of a Party is designated as the sole supplier or purchaser of a good or service, but does not include an entity that has been granted an exclusive intellectual property right solely by reason of such grant.

"designate" means to establish or authorize a monopoly, or to expand the scope of a monopoly to cover an additional good or service.]

EU considering: independent pension fund means a juridical person owned, or controlled through ownership interests, by a Party that:

- (a) is engaged exclusively in the following activities:
 - (i) administering or providing a plan for pension, retirement (including social security), disability, death, or employee benefits, or any combination thereof, solely for the benefit of natural persons who are contributors to such a plan and their beneficiaries, or

¹ For greater certainty, activities undertaken by a juridical person that operates on a not-for-profit basis or on a cost-recovery basis are not activities undertaken with an orientation toward profit-making.

EU COMMENTS 10.2016

- (ii) investing the assets of these plans;
- (b) has a fiduciary duty to the natural persons referenced in sub-paragraph (a); and
- (c) is free from investment direction from the government of the Party;^{2]}

EU considering: sovereign wealth fund means a juridical person owned, or controlled through ownership interests, by a Party that:

- (a) serves solely as a special purpose investment fund or arrangement for asset management, investment, and related activities, using financial assets of a Party; and
- (b) is a Member of the International Forum of Sovereign Wealth Funds or endorses the *Generally Accepted Principles and Practices* (“*Santiago Principles*”) issued by the International Working Group of Sovereign Wealth Funds in October 2008; and

includes any special purpose vehicles wholly owned by the juridical person, or wholly owned by the Party but managed by the juridical person, and established solely for activities described in sub-paragraph (a); and]

state-owned enterprise means a juridical person that is EU oppose: principally] engaged in commercial activities and in which the EU oppose: central government of a Party/ EU propose: all level of government of a Party]:

- (a) EU oppose: directly] owns more than 50 percent of the share capital;
- (b) controls, EU oppose: through ownership interests], the exercise of more than 50 percent of the voting rights; or
- (c) holds the power to appoint a majority of members of the board of directors or any other equivalent management body.

EU propose: exercises or has the possibility to exercise] can exercise control over the enterprise.

ALT EU proposal “State-owned enterprise” means an enterprise, including any subsidiary, in which a Party, directly or indirectly:

(a) owns more than 50% of the enterprise’s subscribed capital or the votes attached to the shares issued by the enterprise; or

² Investment direction from the government of a Party: (a) does not include general guidance with respect to risk management and asset allocation that is not inconsistent with usual investment practices; and (b) is not demonstrated, alone, by the presence of government officials on the juridical person’s board of directors or investment panel.

EU COMMENTS 10.2016

(b) can appoint more than half of the members of the enterprise's board of directors or an equivalent body; or

(c) exercises or has the possibility to exercise control over the enterprise.]

Article X.2: Scope

1. This Annex applies with respect to the activities of state-owned enterprises of a Party that affect trade in services between Parties.

[EU propose: The rules apply to all enterprises as defined in this section engaged in a commercial activity. Where an enterprise combines commercial and non-commercial activities (such as carrying out a legitimate public service obligation), only the commercial activities of that enterprise are covered.]

[EU considering: 2. This Annex shall not apply with respect to:

- (a) the regulatory or supervisory activities of a central bank or monetary authority of a Party;³
- (b) the regulatory or supervisory activities of a financial regulatory body of a Party, including a non-governmental body, such as a securities or futures exchange or market, clearing agency, or other organization or association, that exercises regulatory or supervisory authority over financial service suppliers, by statute or delegation by a Party; or
- (c) activities undertaken for the purpose of the resolution of a failing or failed financial service supplier or any other failing or failed juridical person principally engaged in the supply of financial services.

3. Articles X.3, X.4, and X.6 shall not apply with respect to:

- (a) a sovereign wealth fund of a Party; or
- (b) an independent pension fund of a Party, or a juridical person owned or controlled by an independent pension fund of a Party.]

4. This Annex shall not apply to government procurement.

5. For greater certainty, nothing in this Annex shall be construed to prevent a Party from establishing or maintaining a state-owned enterprise. [EU propose: or designating or maintaining monopolies or granting enterprises special rights or privileges].

³ For greater certainty, this Annex does not apply with respect to activities conducted by a central bank or monetary authority of a Party in pursuit of monetary or exchange rate policies.

EU COMMENTS 10.2016**Article X. 3: Administrative Bodies**

Each Party shall ensure that any administrative body [EU propose: or function] that the Party establishes or maintains that regulates a state-owned enterprise [EU propose:., a designated monopoly or enterprises granted special rights or privileges] exercises its regulatory discretion in an impartial manner with respect to juridical persons that it regulates, including juridical persons that are not state-owned enterprises.

[EU propose: The administrative bodies are not accountable to any of the enterprises that they regulate. Impartiality is to be assessed by reference to a general pattern or practice of that regulatory body.]

Article X.4: Non-Discriminatory Treatment and Commercial Considerations

1. Each Party shall ensure that any state-owned enterprise that it establishes or maintains, when engaging in commercial activities:

- (a) acts in accordance with commercial considerations in its purchase or supply of services, and in its sale of goods to service suppliers of another Party, except to fulfil any [EU oppose: terms of its public service mandate-] [EU propose: legitimate public service obligation] that are not inconsistent with subparagraph (c);⁴
- (b) accords to services of another Party, in its purchase of services, treatment no less favorable than it accords to like services of the Party, of any other Party, or of any non-Party;
- (c) accords to persons of another Party, in its supply of services, treatment no less favorable than it accords to persons of the Party, of any other Party, or of any non-Party; and
- (d) accords to service suppliers of another Party, in its sale of goods, treatment no less favorable than it accords to persons of the Party, of any other Party, or of any non-Party.

2. Subparagraph 1(b), 1(c), and 1(d) do not preclude a state-owned enterprise from:

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

provided that such differential treatment or refusal is undertaken in accordance with commercial considerations.

⁴ A public service mandate means a government mandate pursuant to which a state-owned enterprise makes available a service, directly or indirectly, to the general public. A service to the general public includes the distribution of goods and the supply of general infrastructure services.

EU COMMENTS 10.2016

3. Nothing in this Article shall be construed to:
- (a) prevent a Party from adopting or enforcing measures to respond temporarily to a national or global economic emergency; or
 - (b) apply to state-owned enterprise with respect to which a Party has adopted or enforced measures on a temporary basis in response to a national or global economic emergency, for the duration of that emergency.

Article X.5: Non-Conforming Activities

Article X.4 (Non-Discriminatory Treatment and Commercial Considerations) shall not apply with respect to the non-conforming activities of state-owned enterprises that a Party lists in its schedule to this Annex, in accordance with the terms of the Party's schedule.

EU reflecting on adequate wording for the link to:

- the sectors which are outside the scope of this Agreement; and

-the sectors for which parties have undertaken commitments/reservations

Article X.6: Transparency

[EU oppose:1. Within six months after the date this Agreement enters into force, each Party shall provide to the other Parties, or otherwise make publicly available on an official website, a list of its state-owned enterprises, and thereafter shall update the list annually.**]**

2. On the written request of another Party, a Party shall promptly provide the following information concerning a state-owned enterprise, provided that the request includes an explanation of how the activities of the state-owned enterprise may be affecting trade in services between the Parties:

- (a) the percentage of shares that the Party or its state-owned enterprises cumulatively own, and percentage of votes that they cumulatively hold, in the entity;
- (b) a description of any special shares or special voting or other rights that the Party or its state-owned enterprises hold in the entity, to the extent the rights are different than the rights attached to the general common shares of such entity;
- (c) **[EU oppose:** the government titles of any government official serving as an officer of the entity **]or** member of the entity's board of directors;

EU COMMENTS 10.2016

[EU propose (d): a description of which government departments or public bodies regulate and/or monitor the enterprise, a description of the reporting lines⁵, and the rights and practices of the government or any public bodies in the appointment, dismissal or remuneration of managers].

- (d) the entity's annual revenue and total assets over the most recent three-year period for which information is available;
- (e) any exemptions and immunities from which the entity benefits under the Party's law; and
- (f) any additional information regarding the entity that is publicly available, including annual financial reports and third-party audits, and that is sought in the written request.

3. When a Party provides written information pursuant to a request under this Article and informs the Party that receives the information that it considers the information to be confidential, the Party that receives the information shall not disclose the information without the prior consent of the Party providing the information.

[EU propose: The provisions of paragraphs 1 and 2 shall not require any Party to disclose confidential information which would be inconsistent with its laws and regulations, impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises.]

Article X.7: Exceptions

Article X.4 (Non-discriminatory Treatment and Commercial Considerations) and Article X.6 (Transparency) shall not apply with respect to a state-owned enterprise if in any one of the three previous consecutive fiscal years, the annual revenue derived from the commercial activities of the state-owned enterprise was less than 200 million Special Drawing Rights.

[EU oppose: Article X.8: Future Negotiations

- 1. If a Party considers that:
 - (a) the state-owned enterprises of another Party play a dominant role in the market of that other Party; or
 - (b) the state-owned enterprises of a non-Party seeking to accede to this Agreement play a dominant role in the market of that non-Party,

⁵ [EU propose: For greater certainty, a Party is not obliged to divulge reports or the contents of any reports].

EU COMMENTS 10.2016

it may submit a notification to all the Parties indicating the basis for its conclusion, including statistical data and other supporting evidence.

2. For purposes of paragraph 1, state-owned enterprises of another Party or a non-Party seeking accession to this Agreement shall be deemed to play a dominant role in the relevant market if:

- (a) more than 30 of the 100 largest juridical persons of the Party or non-Party, as measured by market value, are state-owned enterprises of that Party or non-Party; or
- (b) the cumulative market value of all state-owned enterprises of the Party or non-Party represent more than 30 percent of that Party or non-Party's gross national income.

3. If a Party submits a notification pursuant to paragraph 1, the Parties shall develop disciplines on the provision of non-commercial assistance to state-owned enterprises. Such disciplines shall be an integral part of this Agreement, and shall, at minimum, aim to ensure:

- (a) non-commercial assistance provided to a Party's state-owned enterprises does not cause adverse effects to another Party's interests; and
- (b) transparency with respect to any policies or programs that provide non-commercial assistance to state-owned enterprises.

4. If, prior to the development of disciplines pursuant to paragraph 3, a Party considers that the provision of non-commercial assistance to another Party's state-owned enterprises adversely affects the Party's interests with regard to trade in a specific service sector, the Party may request consultations with the other Party with regard to the matter. The relevant Parties shall enter into consultations with a view to achieving a mutually agreed resolution to the matter raised by the requesting Party.

5. For purposes of paragraphs 1 and 2 of this Article, a state-owned enterprise includes a juridical person principally engaged in commercial activities in which the government of a non-Party seeking accession to this Agreement meets the criteria in one of the clauses of the definition of state-owned enterprise in Article X.1.]