

Observação

À luz do crescente interesse do público nas negociações recentemente concluídas entre o MERCOSUL e a União Europeia, os governos dos países do MERCOSUL decidiram publicar os textos do pilar comercial, a fim de garantir tanto o efetivo exercício do direito de acesso à informação pública quanto a transparência da gestão pública.

Esses textos são publicados, no entanto, apenas para fins informativos e podem sofrer modificações adicionais em decorrência do processo de revisão legal a que estarão sujeitos, sem prejuízo dos compromissos assumidos.

Os textos só serão definitivos quando o Acordo for assinado. O Acordo será vinculante para as Partes, conforme o direito internacional, somente após a conclusão dos procedimentos legais internos necessários para a entrada em vigor.

CHAPTER

STATE-OWNED ENTERPRISES, ENTERPRISES GRANTED EXCLUSIVE OR SPECIAL PRIVILEGES

Article 1

Definitions

For the purposes of this Chapter:

- (a) “Commercial activities” means activities, the end result of which is the production of a good or supply of a service, which will be sold in the relevant market in quantities and at prices determined by the enterprise, and are undertaken with an orientation towards profit-making¹.
- (b) “Commercial considerations” means price, quality, availability, marketability, transportation and other terms and conditions of purchase or sale; or other factors that would normally be taken into account in the commercial decisions of a privately owned enterprise operating according to market economy principles in the relevant business or industry.

¹ For greater certainty, this excludes activities undertaken by an enterprise which operates: (a) on a not-for-profit basis; or (b) on cost recovery basis.

Without Prejudice

- (c) “Enterprise granted exclusive or special privileges” means an enterprise, public or private, including a subsidiary, to which a Party has granted formally or in effect, exclusive or special privileges.
- (d) “Exclusive or special privileges” means rights or privileges granted by a Party to a sole or to a limited number of enterprises authorized to supply a good or a service, other than according to objective, proportional and non-discriminatory criteria, taking into account the specific sectorial regulation under which the granting of the right or privilege has taken place, thereby substantially affecting the ability of any other enterprise to supply the same good or service in the same geographical area under substantially equivalent conditions.²
- (e) "A service supplied in the exercise of governmental authority" has the same meaning as in the Article 1:3(c) of the GATS, as well as the meaning in Articles 1.(b), (c) and (d) of its Annex on Financial Services where applicable.
- (f) “State-owned enterprise” means an enterprise owned or controlled by a Party³.

Article 2

Scope of application

1. This Chapter applies to state-owned enterprises and to enterprises to which a Party has granted, formally or in effect, exclusive or special privileges, engaged in commercial activities. Where an enterprise combines commercial and non-commercial activities⁴, only the commercial activities of that enterprise are covered by this Chapter.
2. This Chapter does not apply to the procurement by a Party of a good or service purchased for governmental purposes and not with a view to commercial resale nor with a view to use in the production or the supply of a good or service for commercial sale, whether or not that procurement is a “covered procurement” within the meaning of Article XX (Scope and coverage of the Government Procurement Chapter).
3. This Chapter shall not apply to any service supplied in the exercise of governmental authority.
4. This Chapter shall not apply to state-owned enterprises or to enterprises granted exclusive or special privileges if in any one of the three previous consecutive fiscal years the annual revenue derived from the commercial activities covered by this Chapter of the corresponding enterprise was less than 200 million SDR.
5. This Chapter does not apply to the sectors which are outside the scope of this Agreement.
6. This Chapter shall not apply to the commercial activities of state-owned enterprises and

² For greater certainty, the granting of a licence to a limited number of enterprises in allocating a scarce resource through objective, proportional and non-discriminatory criteria is not in and of itself an exclusive or special privilege.

³ For the purposes of this definition, the term “owned or controlled” refers to situations in which a Party owns more than 50% of the share capital or controls the exercise of more than 50% of the voting rights, or otherwise exercises an equivalent degree of control of the enterprise according to its governance rules.

⁴ Such as carrying out a legitimate public service obligation.

Without Prejudice

enterprise granted exclusive or special privileges with respect to sectors or sub-sectors not committed or committed but unbound in a Party's schedules of commitments in the Chapter on Trade in Services and Establishment, nor with respect to sectors or sub-sectors committed with limitations in a Party's schedules of commitments, to the extent of those limitations and subject to conditions or qualifications set out therein.

7. This Chapter does not apply to State Owned Enterprises in the Defense sector.

8. This Chapter does not apply to state-owned enterprises and enterprises granted exclusive or special privileges listed in Schedule to Annex X.A (Brazil's schedule) and Schedule to Annex X.B (Argentina's Schedule). Article 4 (Commercial considerations) does not apply to state-owned enterprises that Argentina lists in its Schedule to Annex X.B (Argentina's schedule).

Article 3

General provisions

1. The Parties confirm their rights and obligations of Article XVII of the GATT 1994, the Understanding on the Interpretation of Article XVII of the GATT 1994, as well as under Article VIII of the GATS.

2. Nothing in this Chapter prevents the Parties from establishing or maintaining state-owned enterprises, designating or maintaining monopolies, nor from granting enterprises exclusive or special rights or privileges.

Article 4

Commercial considerations

1. Each Party shall ensure that its state-owned enterprises and enterprises granted exclusive or special privileges, when engaging in commercial activities in the territory of any Party, act in accordance with commercial considerations in their purchases or sales of goods or services, except to fulfil its public mandate or purpose⁵ as provided for in domestic legislation.

2. Paragraph 1 does not preclude these enterprises from:

(a) purchasing or supplying goods or services on different terms or conditions, including those relating to price; or

(b) refusing to purchase or supply goods or services,

provided that such different terms or conditions or refusal are undertaken in accordance with commercial considerations.

⁵ For greater certainty, the concept of public mandate or purpose includes the activities of national banks regarding the purchase of goods and services under federal procurement laws, and lending policies in support of affordable housing, exports or imports, micro, small and medium-sized enterprises and farmers. The concept of public mandate or purpose also includes activities carried out by a public entity or trust relating to social security or public retirement plans.

Article 5

Transparency

1. A Party which has reason to believe that its interests under this Chapter are being adversely affected by the commercial activities of a state-owned enterprise or of an enterprise granted exclusive or special privileges of the other Party, subject to the scope of this Chapter as defined in Article 2, may request in writing that Party to supply information about the operations of that enterprise related to the carrying out of the provisions of this Chapter. The requested Party shall, to the extent possible, provide an answer in a timely manner.
2. Requests for such information shall indicate the enterprise, the products/services and markets concerned, and include indications of the interests under this Chapter that the requesting Party believes to be adversely affected.
3. The provisions of this Article shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises.

Article 6

Cooperation

The Parties hereby agree to cooperate on state-owned enterprises and enterprises granted exclusive or special privileges in order to:

- (a) explore the possibility to adopt further commitments on state-owned enterprises and enterprises granted exclusive or special privileges in the future;
- (b) exchange experiences in the development of best practices of corporate governance of state-owned enterprises.

ANNEX X

Party-specific schedules on State-owned enterprises and enterprises granted exclusive or special privileges

ANNEX X.A

BRAZIL

Chapter X (State-owned enterprises, enterprises granted exclusive or special privileges) does not apply to state-owned enterprises and enterprises granted exclusive or special privileges at sub-central level.

Five years after entry into force of the Agreement this Annex shall be subject to review by the Association Council with a view to exploring the possibility to establish further commitments. The Association Council shall have the power to adopt a decision to modify the present Annex as appropriate.

ANNEX X.B

ARGENTINA

1. Chapter X (State-owned enterprises, enterprises granted exclusive or special privileges) does not apply to state-owned enterprises and enterprises granted exclusive or special privileges at sub-central level.

Five years after entry into force of the Agreement this Annex shall be subject to review by the Association Council with a view to exploring the possibility to establish further commitments. The Association Council shall have the power to adopt a decision to modify the present Annex as appropriate.

2. Article 4 (Commercial considerations) of Chapter X (State-owned enterprises, enterprises granted exclusive or special privileges) does not apply to the following state-owned enterprises and enterprises granted exclusive or special privileges, nor to their controlled enterprises, subsidiaries and affiliates or any new, reorganized or successor enterprises or entities:

- (a) Nucleoeléctrica Argentina S.A.
- (b) Soluciones Satelitales S.A.
- (c) Integración Energética Argentina S.A.

(d) Banco de Inversiones y Comercio Exterior S.A.