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Chapter Nine

Government Procurement

Article 9.1: Scope and Coverage

1. This Chapter applies to any measure adopted or maintained by a Party or an entity listed in Annex 9.1, relating to procurement:

- (a) by any contractual means, including purchase and rental or lease, with or without an option to buy, build-operate-transfer contracts and public works concession contracts;
- (b) subject to the conditions specified in Annex 9.1 to this Chapter.

2. This Chapter does not apply to:

- (a) non-contractual agreements or any form of assistance provided by a Party or a state enterprise, including grants, loans, equity infusions, fiscal incentives, subsidies, guarantees, cooperative agreements, government provision of goods and services to persons or to state, regional or local governments, and purchases for the direct purpose of providing foreign assistance;
- (b) purchases funded by loans and grants made to a Party or to an entity of a Party by persons, international entities, associations, international organizations or other States or foreign governments, to the extent that the conditions of such assistance are inconsistent with the provisions of this Chapter. In the case of such inconsistency, the conditions of the assistance shall prevail.
- (c) acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions, and sale and distribution services for government debt;
- (d) hiring of government employees and related employment measures;
- (e) any good or service component of any contract awarded by a procuring entity that is not listed in Annexes 9.1, Sections A, B, or C;
- (f) purchases made under exceptionally advantageous conditions which only

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arise in the very short term. This provision is intended to cover unusual disposals by companies which are not normally suppliers, or disposal of assets of businesses in liquidation or receivership. It is not intended to cover routine purchases from regular suppliers.

3. Each Party shall ensure that its procuring entities comply with the provisions of this Chapter in conducting procurement covered by this Chapter.
4. Where a procuring entity awards a contract in a procurement that is not covered by this Chapter, nothing in this Chapter shall be construed to cover any good or service component of that contract.
5. No procuring entity may prepare, design or otherwise structure or divide any procurement in order to avoid the obligations of this Chapter.
6. Nothing in this Chapter shall prevent either Party from developing new procurement policies, procedures or contractual means, provided they are not inconsistent with this Chapter.

Article 9.2: General Principles

1. With respect to measures and procurement covered by this Chapter, each Party and each procuring entity shall accord to the goods and services of another Party, and to the suppliers of another Party of such goods and services, treatment no less favorable than the most favorable treatment the Party or procuring entity accords to its own goods, services and suppliers.
2. With respect to measures and any procurement covered by this Chapter, neither a Party nor a procuring entity may:
 - (a) treat a locally established supplier less favorably than another locally established supplier on the basis of degree of foreign affiliation or ownership; or
 - (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 another Party.
3. For purposes of paragraphs 1 and 2, determination of the origin of goods shall be made in a manner consistent with the chapter on Rules of Origin.

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4. With respect to procurement covered by this Chapter, procuring entities shall not seek, take account of, or impose offsets in any stage of a procurement.

5. Paragraphs 1 and 2 of this Article do not apply to measures respecting customs duties or other charges of any kind imposed on or in connection with importation, the method of levying such duties or charges, other import regulations, including restrictions and formalities, or measures affecting trade in services other than measures specifically governing procurement covered by this Chapter.

6. A procuring entity shall conduct procurement covered by this Chapter in a manner that is transparent and consistent with this Chapter, except where specifically provided otherwise in this Chapter.¹

Article 9.3: Publication of Procurement Measures

1. Each Party shall promptly publish any law and regulation and the modifications thereof, and make publicly available any judicial decision and administrative ruling of general application and procedure specifically governing procurement covered by this Chapter.

2. Upon the request of a Party, the other Party will provide a copy of a judicial decision or administrative ruling of general application and procedure relating to procurement.

Article 9.4: Publication of Notice of Intended Procurement

1. Subject to Article 9.9.2 (Tendering Procedures), procuring entities shall publish a notice inviting interested suppliers to submit tenders for each procurement covered by this Chapter. The notices shall be published in publications that are widely disseminated and remain readily accessible to the public.

2. The information in each notice of intended procurement shall include, at a minimum, an indication that the procurement is covered by this Chapter, a description of the intended procurement, any conditions that suppliers must fulfill to participate in the procurement, the name of the procuring entity, the address where all documents relating to the procurement may be obtained, and if applicable, any sum payable for the tender

¹ Negotiators' Note: For greater certainty, nothing in this Chapter prevents a Party from adopting or modifying its procurement laws, including those affecting build-operate-transfer contracts or public works concession contracts, as long as such modifications are consistent with this Chapter.

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documentation, the time limits and address for submission of tenders and the timeframe for delivery of the goods or services being procured.

3. Each Party shall encourage its procuring entities to publish information regarding their procuring entities' future procurement plans as early as possible in each Party's fiscal year.

Article 9.5: Time Limits for the Tendering Process

1. A procuring entity shall provide suppliers sufficient time to prepare and submit responsive tenders, taking into account the nature and complexity of the procurement. In no case shall a procuring entity provide less than 40 calendar days from the date on which the notice of intended procurement is published to the final date for submission of tenders.

2. Notwithstanding paragraph 1, where there are no qualification requirements for suppliers, a procuring entity may establish a time period for tendering that is less than 40 calendar days, but in no case less than 10 calendar days, in the following circumstances:

- (a) where the procuring entity published a separate notice of intended procurement containing the information specified in Article 9.4.2 at least 40 calendar days and not more than 12 months prior to the final date on which tenders may be submitted;
- (b) procurement of commercial goods and services that are sold or offered for sale to, and customarily purchased and used by, non-governmental buyers for non-governmental purposes; or
- (c) where an unforeseen state of urgency that is duly substantiated by the procuring entity renders impracticable the time periods provided in paragraph 1.

Article 9.6: Tender Documentation

1. Procuring entities shall provide to interested suppliers tender documentation that includes all information necessary to permit suppliers to prepare and submit responsive tenders. The documentation shall include all criteria that the procuring entity will consider in the awarding of the contract, including all cost factors, and the weights or, where appropriate, the relative values, that the entity will assign to the criteria in evaluating tenders.

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2. A procuring entity may satisfy the conditions under paragraph 1 by publishing such documentation by electronic means accessible to all interested suppliers. Where a procuring entity does not publish tender documentation by electronic means accessible to all interested suppliers, it shall promptly make the documentation available on the request of a supplier.

3. Where a procuring entity, in the course of procurement,² modifies the criteria referred to in paragraph 1, it shall transmit all such modifications in writing:

- (a) to all suppliers that are participating in the procurement at the time the criteria are modified, if the identities of such suppliers are known, and in cases where suppliers participating are not known, in the same manner as the original information was transmitted; and
- (b) in adequate time to allow the suppliers to modify or re-submit their tenders, as appropriate.

Article 9.7: Technical Specifications

1. Procuring entities shall not prepare, adopt or apply any technical specification with the purpose or the effect of creating unnecessary obstacles to trade between the Parties.

2. Procuring entities shall prescribe any technical specifications where appropriate:

- (a) in terms of performance requirements rather than design or descriptive characteristics; and
- (b) based on international standards, where applicable, otherwise on recognized national standards.

3. Procuring entities shall not prescribe technical specifications that require or refer to a particular trademark or trade name, patent, design or type, specific origin or 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.

4. Procuring entities shall not seek or accept, in a manner that would have the effect of

² In the Case of Costa Rica, El Salvador, Guatemala and Honduras, such modifications may be done prior to the opening of tenders. In the case of the United States, such modifications may be done prior to the award of the contract.

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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 that procurement.

5. For greater certainty, this Article is not intended to preclude a procuring entity from preparing, adopting, or applying technical specifications to promote the conservation of natural resources.

Article 9.8: Requirements and Conditions for Suppliers' Participation in Procurement

1. Where a procuring entity requires suppliers to satisfy registration, qualification, or any other requirements or conditions for participation ("conditions for participation") in order to participate in a procurement, the procuring entity shall publish a notice inviting suppliers to apply for registration, qualification or demonstration of suppliers' satisfaction of any other conditions for participation. The procuring entity shall publish the notice sufficiently in advance to provide interested suppliers sufficient time to prepare and submit applications and for the entity to evaluate and make its determinations based on such applications.

2. Each procuring entity shall:

- (a) limit any conditions for participation in a procurement to those that are essential to ensure that the supplier has the legal, technical and financial abilities to fulfill the requirements and technical specifications of the procurement;
- (b) recognize as qualified all suppliers of another Party that have met the requisite conditions for participation; and
- (c) base qualification determinations solely on the conditions for participation that have been specified in advance in notices or tender documentation.

3. Procuring entities may establish publicly available lists of suppliers qualified to participate in procurements. Where a procuring entity requires suppliers to qualify for such a list as a condition for participation in a procurement, and a supplier that has not yet qualified applies for inclusion in the list, the procuring entity shall promptly start the qualification procedures and shall allow the supplier to submit a tender, if it is determined to be a qualifying supplier, provided there is sufficient time to fulfill the conditions for participation within the time period established for tendering.

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4. No procuring entity may make it a condition for participation in a procurement that a supplier has previously been awarded one or more contracts by a procuring entity of the Party of that entity or that the supplier has prior work experience in the territory of that Party. The financial and technical abilities of a supplier shall be evaluated on the basis of that supplier's business activity outside the territory of the Party of the procuring entity, as well as activity, if any, in the territory of the Party of the procuring entity, and shall 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 a given Party of that the supplier has prior work experience in the territory of a given Party.

5. A procuring entity shall promptly communicate to any supplier that has applied for qualification its decision on whether or not that supplier is qualified. Where a procuring entity rejects an application for qualification or ceases to recognize a supplier as qualified, that entity shall, on request of the supplier, promptly provide a written explanation of the reasons for its action.

6. Nothing in this Article shall preclude a procuring entity from prohibiting a supplier from participating in procurements by the procuring entities of that Party on grounds such as bankruptcy or false declarations.

Article 9.9: Tendering Procedures

1. Subject to paragraph 2, procuring entities shall award contracts by means of open tendering procedures.

2. Provided that the tendering procedure is not used to avoid competition or to protect domestic suppliers, procuring entities may award contracts by means other than an open tendering procedure in the following circumstances:

- (a) in the absence of tenders that conform to the essential requirements in the tender documentation provided in a prior tendering procedure, including any conditions for participation, provided that the requirements of the initial procurement are not substantially modified;
- (b) where, for works of art, or for reasons connected with the protection of exclusive intellectual property rights, such as patents, copyrights; or proprietary information or where there is an absence of competition for technical reasons, the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute exists;

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- (c) for additional deliveries by the original supplier 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 entity to procure goods or services not meeting requirements of interchangeability with existing equipment, software, services, or installations;
- (d) for goods purchased on a commodity market;
- (e) where an entity procures a prototype or a first good or service that are developed at its request in the course of, and for, a particular contract for research, experiment, study or original development. When such contracts have been fulfilled, subsequent procurements of goods or services shall be subject to Articles 9.1 through 9.8 of this Chapter;
- (f) where additional construction services which were not included in the initial contract but that were within the objectives of the original tender documentation have, due to unforeseeable circumstances, become necessary to complete the construction services described therein. However, the total value of contracts awarded for additional construction services may not exceed 50 percent of the amount of the initial contract; or
- (g) in so far as is strictly necessary where, for reasons of urgency brought about by events unforeseeable by the entity, the goods or services could not be obtained in time by means of an open tendering procedure and the use of an open tendering procedure would result in serious injury to the entity, the entity's program responsibilities or the responsible Party. For purposes of this subparagraph, lack of advance planning by a procuring entity or concerns relating to the amount of funds available to a procuring entity within a particular period of time shall not constitute unforeseen events.

3. Procuring entities shall maintain records or prepare written reports providing specific justification for any contracts awarded under paragraph 2, in a manner consistent with Article 9.11.3.

Article 9.10: Awarding of Contracts

1. To be considered for award, a tender must be submitted in writing and must, at the time it is submitted, conform to the essential requirements of the tender documentation that

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the procuring entity provided in advance to all participating suppliers, and be from a supplier that has complied with any conditions for participation that the procuring entity has communicated in advance to all participating suppliers.

2. Unless a procuring entity determines that it is not in the public interest to award a contract, the procuring entity shall award the contract to the supplier that it has been determined to be fully capable of undertaking the contract and whose tender is determined to be the most advantageous in terms of the requirements and evaluation criteria set out in the tender documentation.

3. No procuring entity may cancel a procurement, or terminate or modify awarded contracts in a manner that circumvents this Chapter.

Article 9.11: Information on Awarded Contracts

1. Procuring entities shall promptly inform suppliers that have submitted tenders of decisions on contract awards. Procuring entities shall, upon request, provide a supplier whose tender was not selected for award the reasons for not selecting its tender and the relative advantages of the tender selected.

2. Promptly after awarding a contract in a procurement covered by this Chapter, a procuring entity shall publish a notice that includes at least the following information about the contract award:

- (a) the name of the entity;
- (b) a description of the goods or services included in the contract;
- (c) the name of the supplier awarded the contract;
- (d) the value of the contract award; and
- (e) where the entity did not use open tendering procedures, an indication of the circumstances justifying the use of non-open tendering procedures.

3. Procuring entities shall maintain records and reports relating to tendering procedures and contract awards in procurements covered by this Chapter, including the records and reports provided for in Article 9.9.3, for a period of at least three years from the date of the award of a contract.

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Article 9.12: Non-Disclosure of Information

1. The Parties, their entities, and their review authorities shall not disclose confidential information the disclosure of which would prejudice legitimate commercial interests of a particular person or might prejudice fair competition between suppliers, without the formal authorization of the person that provided the information to the Party.

2. Nothing in this Chapter shall prevent the Parties or their procuring entities from withholding the release of information under this Chapter where release might:

- (a) impede law enforcement;
- (b) prejudice fair competition between suppliers;
- (c) prejudice the legitimate commercial interests of particular suppliers or entities, including the protection of intellectual property; or
- (d) otherwise be contrary to the public interest.

Article 9.13: Ensuring Integrity in Procurement Practices

Further to the provisions of Article 18.XX (Transparency), each Party shall establish and maintain systems to declare ineligible for participation in the Party's procurements, either indefinitely or for a stated period of time, suppliers that the Party has determined to have engaged in fraudulent or other illegal actions in relation to procurement. On the request of another Party, a Party shall identify the suppliers determined to be ineligible under these systems, and, where appropriate, exchange information regarding those suppliers or the fraudulent or illegal action.

Article 9.14: Procurement Exceptions

1. Provided 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 trade between the Parties, 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;

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- (c) necessary to protect intellectual property; or
 - (d) relating to goods or services of handicapped persons, of philanthropic institutions or of prison labor.
2. The Parties understand that paragraph 1(b) includes environmental measures necessary to protect human, animal or plant life or health.

Article 9.15: Domestic Review of Supplier Challenges

1. Each Party shall establish or designate at least one impartial administrative or judicial authority, which shall be independent from its procuring entities, to receive and review challenges submitted by suppliers relating to the obligations of this Chapter and make appropriate findings and recommendations.
2. In the event that a challenge by a supplier is initially reviewed by a body other than an authority established or designated under paragraph 1, the Party shall ensure that suppliers may appeal the initial decision to an impartial administrative or judicial authority, which is independent of the procuring entity that is the subject of the challenge.
3. Each Party shall provide that the authorities established or designated under paragraph 1 may take prompt interim measures, pending the resolution of a challenge, to preserve the opportunity to correct potential breaches of this Chapter, including the suspension of the award of a contract or the performance of a contract already awarded.
4. Each Party shall ensure that its review procedures are made generally available in writing, and are timely, transparent, effective and consistent with the principle of due process.
5. Each Party shall ensure that all documents related to a challenge of a procurement are available to the impartial authority established or designated under paragraph 1.
6. Procuring entities shall respond in writing to a supplier's complaint.
7. Further to paragraph 1, each Party shall ensure that the impartial authorities established or designated under paragraph 1 provide to suppliers the following:
- (a) a sufficient period of time to prepare and submit written challenges, which in no case shall be less than 10 days from the time when the basis of the complaint became known or reasonably should have become known to the

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supplier;

- (b) the opportunity to review relevant documents and to be heard by the authority in a timely manner;
- (c) the opportunity to reply to the procuring entity's response to the supplier's complaint; and
- (d) prompt delivery in writing its findings and recommendations relating to the challenge, with an explanation of the grounds for each decision.

8. Each Party shall ensure that challenges are reviewed in a manner that does not prejudice suppliers' participation in ongoing or future procurements.

Article 9.16: Modifications and Rectifications to Coverage

1. A Party may make technical rectifications of a purely formal nature to its coverage under this Chapter, or minor amendments to its schedules in Annex 9.1, Sections A through C, to this Chapter, provided that it notifies the other Parties in writing and that the other Parties do not object in writing within 30 days of the notification. For such technical rectifications or minor amendments, no compensatory adjustments need to be provided to the other Parties.

2. A Party may modify its coverage under this Chapter provided that it:

- (a) notifies the other Parties in writing and the other Parties does not object in writing within 30 calendar days of the notification; and
- (b) where necessary, offers within 30 calendar days acceptable compensatory adjustments to the other Parties to maintain a level of coverage comparable to that existing prior to the modification.

3. A Party need not provide compensatory adjustments in those circumstances where the proposed modification covers one or more procuring entities on which the Parties agree that government control or influence has been effectively eliminated. Where the Parties do not agree that such government control or influence has been effectively eliminated, the objecting Party or Parties 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.

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4. Where the Parties are in agreement on the proposed modification, technical rectification or minor amendment, the Free Trade Commission shall modify the relevant Annex to reflect such agreement.

Article 9.17: Definitions

For purposes of this Chapter:

build-operate-transfer contract and **public works concession contract** mean any contractual arrangements, the primary purpose of which is to provide for the construction or rehabilitation of physical infrastructure, plants, buildings, facilities or other government-owned works and under which, as consideration for a supplier's execution of a contract, a procuring entity grants to the supplier, for a specified period of time, temporary ownership, if such ownership is permitted by the Party, or a right to control and operate, and demand payment for the use of such works for the duration of the contract;

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;

international standard means an "international standard" as elaborated upon in Article [XX] of Chapter Seven, Technical Barriers to Trade;

offsets means conditions or undertakings imposed or considered by a procuring entity that encourage local development or improve a Party's balance of payments accounts by means of requirements of local content, licensing of technology, investment, counter-trade or similar requirements;

open tendering procedure means any type of procurement modality of a Party, except direct purchasing, provided such modalities are consistent with the general principles established in this Chapter.

procurement means the process by which a procuring entity 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;

procuring entity means an entity of a Party listed in Annex 9.1 to this Chapter;

publish means to disseminate information in an electronic or paper medium that is

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distributed widely and is readily accessible to the general public;

services includes construction services, unless otherwise specified;

supplier means a person that has provided, provides or could provide goods or services to an entity; and

technical specification means a specification that lays down the characteristics of goods to be procured or their related processes and production methods, or the characteristics of services to be procured or their related operating methods, including the applicable administrative provisions, and requirements relating to conformity assessment procedures prescribed by entities. A technical specification may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements, as they apply to a good, process, service or production or operating method.