

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 Services¹²⁻¹

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).

¹²⁻¹For 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 12.5 : 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}

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

¹²⁻²For 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.

¹²⁻³For 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.

- (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 : RE SALE

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.

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;

¹²⁻⁴For 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.

- (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 seeking 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, each 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 connect 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-oriented¹²⁻⁶ 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.

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.

¹²⁻⁶In 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.

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.

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.

¹²⁻⁷For greater clarity, telecommunications resources do not include spectrum allocated and used for the broadcast of radio and television programming.

¹²⁻⁸For 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.

ARTICLE 12.23 : FORBEARANCE¹²⁻¹⁰

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 forbear 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

¹²⁻⁹ In the United States, this body may be a state regulatory authority.

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.

- (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. **leased 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

¹²⁻¹¹Because 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.

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.