

CHAPTER 8

TRADE IN SERVICES

Article 104: Definitions

For purposes of this Chapter:

trade in services means the supply of a service:

- (a) from the territory of a Party into the territory of the other Party;
- (b) in the territory of a Party by a person of that Party to a person of the other Party;
- (c) by a service supplier of a Party, through commercial presence in the territory of the other Party; or
- (d) by a service supplier through presence of natural persons of a Party in the territory of the other Party;

juridical person means an entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture or association;

juridical person is: (i) “**owned**” by persons of a Party if more than 50% of the equity in it is beneficially owned by persons of that Party; (ii) “**controlled**” by persons of a Party if such persons have the power to name a majority of its directors or otherwise to legally direct its actions;

service supplier of a Party means any person of that Party that supplies a service;³

measure means any measure by a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form;

supply of a service includes the production, distribution, marketing, sale and delivery of a service;

³ Where the service is not supplied directly by a juridical person but through other forms of commercial presence such as a branch or a representative office, the service supplier (i.e. the juridical person) shall, nonetheless, through such presence be accorded the treatment provided for service suppliers under the Agreement. Such treatment shall be extended to the presence through which the service is supplied and need not be extended to any other parts of the supplier located outside the territory where the service is supplied.

commercial presence means any type of business or professional establishment, including through:

- (i) the constitution, acquisition or maintenance of a juridical person; or
 - (ii) the creation or maintenance of a branch or a representative office,
- within the territory of a Party for the purpose of supplying a service; and

natural person of a Party means a natural person who resides in the territory of a Party, and who under the law of that Party is a national of that Party.

Article 105: Scope and Coverage

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

- (i) the purchase or use of, or payment for, a service;
- (ii) the access to and use of, in connection with the supply of a service, services which are required by the Parties to be offered to the public generally; or
- (iii) the presence, including commercial presence, of persons of a Party for the supply of a service in the territory of the other Party.

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

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

3. This Chapter does not apply to:

- (a) government procurement;
- (b) air services⁴, 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;

⁴ For greater certainty, the term “air services” includes traffic rights.

- (ii) the selling and marketing of air transport services; and
- (iii) computer reservation system (CRS) services; and
- (c) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.

4. This Chapter does not impose any obligation on a Party with respect to a natural person 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 natural person with respect to that access or employment.

5. This Chapter does not apply to services supplied in the exercise of governmental authority in a Party's territory. **A 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.

6. Nothing in this Chapter shall prevent a Party from applying measures to regulate the entry of natural persons of the other Party into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to the other Party under the terms of this Chapter.⁵

7. This Chapter, except for the list of financial services specific commitments in the Schedules of Specific Commitments under this Agreement, does not apply to measures affecting the supply of financial services⁶ as defined in subparagraph 5(a) of the GATS Annex on Financial Services. The obligations of each Party with respect to measures affecting the supply of financial services shall be in accordance with its obligations under GATS, the GATS Annex on Financial Services and the GATS Second Annex on Financial Services, and subject to any reservations thereto. The said obligations are hereby incorporated into this Agreement, and the schedule of financial services specific commitments of Annex 6 (Schedules of Specific Commitments) of this Agreement shall apply.

8. In addition to the provisions of this Chapter, the rights and obligations of the Parties in respect of telecommunication services shall also be governed by the provisions of:

- (a) the GATS Annex on Telecommunications; and

⁵ The sole fact of requiring a visa for natural persons of the other Party shall not be regarded as nullifying or impairing benefits under a specific commitment.

⁶ For greater certainty, "the supply of financial services" shall mean the supply of services as defined in GATS Article I.2.

- (b) the GATS Reference Paper developed in the Negotiating Group on Basic Telecommunications attached to each Party's GATS schedules of commitments,

which are hereby incorporated into this Chapter, *mutatis mutandis*, as if those provisions were fully set out herein.

Article 106: National Treatment

In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Party shall accord to services and service suppliers of the other Party treatment no less favourable than that it accords, in like circumstances, to its own services and service suppliers.

Article 107: Market Access

1. With respect to market access through the modes of supply identified in the “trade in services” definition of Article 104 (Definitions), each Party shall accord to services and service suppliers of the other Party treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule⁷.

2. In sectors where market access commitments are undertaken, the measures which a Party shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

- (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
- (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
- (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;⁸

⁷ To the extent that a market-access commitment is undertaken by a Party in its Schedule of Commitments, and where the cross-border movement of capital is an essential part of a service supplied through the mode of supply referred to in subparagraph (a) of the “trade in services” definition of Article 104 (Definitions) of this Chapter, that Party is hereby committed to allow such movement of capital. To the extent that a market-access commitment is undertaken by a Party in its Schedule of Commitments, and where a service is supplied through the mode of supply referred to in subparagraph (c) of the “trade in services” definition of Article 104 (Definitions) of this Chapter, that Party is hereby committed to allow related transfers of capital into its territory.

⁸ Subparagraph 2(c) does not cover measures of a Party which limit inputs for the supply of services.

- (d) limitations on 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;
- (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; or
- (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

Article 108: Additional Commitments

The Parties may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Article 106 (National Treatment) or Article 107 (Market Access), including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Party's Schedule.

Article 109: Schedule of Specific Commitments

1. Each Party shall set out in a schedule the specific commitments it undertakes under Article 106 (National Treatment), Article 107 (Market Access) and Article 108 (Additional Commitments). With respect to sectors where such commitments are undertaken, each Schedule shall specify:

- (a) terms, limitations and conditions on market access;
- (b) conditions and qualifications on national treatment;
- (c) undertakings relating to additional commitments referred to in Article 108 (Additional Commitments); and
- (d) where appropriate, the time-frame for implementation of such commitments and the date of entry into force of such commitments.

2. Measures inconsistent with both Articles 106 (National Treatment) and 107 (Market Access) are inscribed in the column relating to Article 107 (Market Access). In this case, the inscription is considered to provide a condition or qualification to Article 106 (National Treatment) as well.

3. The Parties' Schedules of Specific Commitments are set out in Annex 6 (Schedules of Specific Commitments).

Article 110: Domestic Regulation

1. In sectors where specific commitments are undertaken, each Party shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.

2. Each Party shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier of the other Party, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Party shall ensure that the procedures in fact provide for an objective and impartial review.

3. Where a Party requires authorization for the supply of a service, the Party's competent authorities shall, within a reasonable period of time after the submission of an application considered complete under domestic 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.

4. 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 aim to ensure 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.

5. 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 the 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 agree to coordinate on such negotiations, as appropriate.

Article 111: Recognition

1. For the purposes of the fulfillment, in whole or in part, of its standards or criteria for the authorization, licensing or certification of services suppliers, and subject to the requirements of paragraph 3, a Party may recognize the education or experience obtained, requirements met, or licences or certifications granted in the other Party or a non-Party. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the other Party or a non-Party concerned or may be accorded autonomously.
2. 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 its accession to such an agreement or arrangement or to negotiate comparable ones with it. Where a Party accords recognition autonomously, it shall afford adequate opportunity for the other Party to demonstrate that education, experience, licences or certifications obtained or requirements met in that other Party's territory should be recognized.
3. 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.
4. Each Party should encourage the relevant bodies in its respective territory to conduct future negotiations for developing mutually acceptable standards and criteria for licensing, temporary licensing and certification of professional services suppliers.

Article 112: Transfers and Payments

1. Each Party shall permit transfers and payments for current transactions relating to its specific commitments 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 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.

4. Nothing in this Chapter shall affect the rights and obligations of the members of the International Monetary Fund under the *Articles of the Agreement of the International Monetary Fund*, including the use of exchange actions which are in conformity with the *Articles of the Agreement of the International Monetary Fund*, provided that a Party shall not impose restrictions on any capital transactions inconsistently with its obligations under this Chapter regarding such transactions, except at the request of the International Monetary Fund.

Article 113: Denial of Benefits

1. A Party may deny the benefits of this Chapter to:
 - (a) service suppliers of the other Party where the service is being supplied by a juridical person that is owned or controlled by persons of a non-Party and the juridical person has no substantive business activities in the territory of the other Party; or
 - (b) service suppliers of the other Party where the service is being supplied by a juridical person that is owned or controlled by persons of the denying Party and the juridical person has no substantive business activities in the territory of the other Party.
2. Upon a written request of the other Party, the denying Party shall inform in writing and consult with the other Party on the specific case of denial as referred to in paragraph 1 of this Article.

Article 114: Transparency

Further to Chapter 13 (Transparency):

- (a) each Party shall maintain or establish appropriate mechanisms for responding to inquiries from interested persons regarding its laws and regulations relating to the subject matter of this Chapter;⁹
- (b) at the time it adopts final laws and regulations relating to the subject matter of this Chapter, each Party shall, to the extent possible, including upon request, take into consideration of substantive comments received from interested persons with respect to the proposed laws and regulations; and
- (c) to the extent possible, each Party shall allow a reasonable period of time between publication of final laws and regulations and their effective date.

Article 115: Implementation and Review

The Parties shall consult annually, or as otherwise agreed, to review the implementation of this Chapter and consider other matters of mutual interest affecting trade in services.¹⁰

⁹ The implementation of the obligation to establish appropriate mechanisms for small administrative agencies may need to take into account resource and budget constraints.

¹⁰ Such consultations will be addressed under Article 170 (Free Trade Commission) of Chapter 14 (Administration of the Agreement).