

Chapter 6 Trade in Services

Article 43 Scope and Coverage

1. This Chapter shall apply to measures by a Party affecting trade in services taken by central, regional or local governments and authorities as well as by non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities. It shall apply to all services sectors.

2. In respect of air transport services, this Chapter shall not apply to measures affecting traffic rights, however granted, or measures affecting services directly related to the exercise of traffic rights, other than those affecting:

- (a) aircraft repair and maintenance services;
- (b) the selling and marketing of air transport services;
or
- (c) computer reservation system (CRS) services.

3. Articles 45 to 47 shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not for commercial resale or for use in the supply of services for commercial sale.

Article 44 Definitions

For the purposes of this Chapter:

- (a) "aircraft repair and maintenance services" means such activities when undertaken on an aircraft or a part thereof while it is withdrawn from service and does not include so-called line maintenance;
- (b) "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 Area of a Party for the purposes of supplying a service;

- (c) "computer reservation system (CRS) services" means services provided by computerised systems that contain information about air carriers' schedules, availability, fares and fare rules, through which reservations can be made or tickets may be issued;
- (d) "direct taxes" comprises all taxes on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of property, taxes on estates, inheritances and gifts, and taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation;
- (e) "juridical person" means any legal entity duly constituted or otherwise organised under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association;
- (f) a juridical person is:
 - (i) "owned" by persons of a Party if more than 50 per cent of the equity interest 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;
 - (iii) "affiliated" with another person when it controls, or is controlled by, that other person; or when it and the other person are both controlled by the same person;
- (g) "juridical person of a Party" means a juridical person which is either:
 - (i) constituted or otherwise organised under the law of that Party, and is engaged in substantive business operations in the Area of:
 - (A) either Party; or

- (B) any Member of the World Trade Organization and is owned or controlled by natural persons of that Party or by juridical persons that meet all the conditions of subparagraph (A); or
- (ii) in the case of the supply of a service through commercial presence, owned or controlled by:
 - (A) natural persons of that Party; or
 - (B) juridical persons of that Party identified under subparagraph (i);
- (h) "measure" means any measure by a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action or any other form;
- (i) "measures by a Party affecting trade in services" includes measures in respect of:
 - (i) the purchase, payment or use of a service;
 - (ii) the access to and use of, in connection with the supply of a service, services which are required by that Party to be offered to the public generally;
 - (iii) the presence, including commercial presence, of persons of the other Party for the supply of a service in the Area of the Party;
- (j) "monopoly supplier of a service" means any person, public or private, which in the relevant market of the Area of a Party is authorised or established formally or in effect by that Party as the sole supplier of that service;
- (k) "natural person of a Party" means a natural person who, under the legislation of that Party, is:
 - (i) in respect of Japan, a national of Japan; or
 - (ii) in respect of Switzerland:
 - (A) a national of Switzerland; or
 - (B) a permanent resident who resides in Switzerland;

- (l) "person" means either a natural person or a juridical person;
- (m) "selling and marketing of air transport services" means opportunities for the air carrier concerned to sell and market freely its air transport services including all aspects of marketing such as market research, advertising and distribution. These activities do not include the pricing of air transport services nor the applicable conditions;
- (n) "services" includes any service in any sector except services supplied in the exercise of governmental authority;
- (o) "service consumer" means any person that receives or uses a service;
- (p) "service of the other Party" means a service which is supplied:
 - (i) from or in the Area of the other Party, or in the case of maritime transport, by a vessel registered under the laws of the other Party, or by a person of the other Party which supplies the service through the operation of a vessel and/or its use in whole or in part; or
 - (ii) in the case of the supply of a service through commercial presence or through the presence of natural persons, by a service supplier of the other Party;
- (q) "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;

- (r) "service supplier" means any person that supplies, or seeks to supply, a service;

Note: Where the service is not supplied or sought to be 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 commercial presence be accorded the treatment provided for service suppliers under this Chapter. Such treatment shall be extended to the commercial presence through which the service is supplied or sought to be supplied and need not be extended to any other parts of the service supplier located outside the Area of a Party where the service is supplied or sought to be supplied.

- (s) "supply of a service" includes the production, distribution, marketing, sale and delivery of a service;

- (t) "trade in services" means the supply of a service:

- (i) from the Area of a Party into the Area of the other Party ("cross-border supply mode");
- (ii) in the Area of a Party to the service consumer of the other Party ("consumption abroad mode");
- (iii) by a service supplier of a Party, through commercial presence in the Area of the other Party ("commercial presence mode");
- (iv) by a service supplier of a Party, through presence, in the Area of the other Party, of natural persons of a Party ("presence of natural persons mode"); and

- (u) "traffic rights" means the rights for scheduled and non-scheduled services to operate and/or to carry passengers, cargo and mail for remuneration or hire from, to, within, or over a Party, including points to be served, routes to be operated, types of traffic to be carried, capacity to be provided, tariffs to be charged and their conditions, and criteria for designation of airlines, including such criteria as number, ownership and control.

Article 45
Most-Favoured-Nation Treatment

1. Without prejudice to measures taken in accordance with Article VII of the GATS, and unless otherwise specified in its List of Reservations referred to in Article 57, a Party shall accord immediately and unconditionally, in respect of all measures affecting the supply of services, to services and service suppliers of the other Party treatment no less favourable than that it accords to like services and service suppliers of any non-Party.
2. The provisions of this Chapter shall not be so construed as to prevent either Party from conferring or according advantages to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed.
3. Treatment granted under other agreements concluded by a Party and notified under Article V or Article Vbis of the GATS shall not be subject to paragraph 1.
4. If a Party concludes or amends an agreement of the type referred to in paragraph 3, it shall notify the other Party without delay and endeavour to accord to the other Party treatment no less favourable than that provided under that agreement. The former Party shall, upon request by the other Party, negotiate the incorporation into this Agreement of treatment no less favourable than that provided under the former agreement.

Article 46
Market Access

1. With respect to market access through the modes of supply identified in paragraph (t) of Article 44, a Party shall accord services and service suppliers of the other Party treatment in conformity with its List of Reservations referred to in Article 57.

Note: Unless otherwise specified in its List of Reservations referred to in Article 57 in respect of market access, where the cross-border movement of capital is an essential part of a service supplied through the mode of supply referred to in subparagraph (t)(i) of Article 44, a Party is hereby committed to allow such movement of capital. Unless otherwise specified in its List of Reservations referred to in Article 57 in respect of market access, where a service is supplied through the mode of supply referred to in subparagraph (t)(iii) of Article 44, a Party is hereby committed to allow related transfers of capital into its Area.

2. Unless otherwise specified in its List of Reservations referred to in Article 57, a Party shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire Area measures 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;

Note: This subparagraph 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; and
- (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 47 National Treatment

1. Unless otherwise specified in its List of Reservations referred to in Article 57, each Party shall accord to services and service suppliers of the other Party, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.

Note: This Article shall not be so construed as to require a Party to compensate for any inherent competitive disadvantage which results from the foreign character of the relevant services and service suppliers.

2. A Party may meet the requirement of paragraph 1 by according to services and service suppliers of the other Party, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.

3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of a Party compared to like services or service suppliers of the other Party.

4. A Party may not invoke this Article in dispute settlement procedures under Chapter 14 with respect to a measure of the other Party that falls within the scope of an international agreement between the Parties relating to the avoidance of double taxation.

Article 48
Domestic Regulation

1. Each Party shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.
2. Where authorisation is required by a Party for the supply of a service, the competent authorities of that Party shall, within a reasonable period of time after the submission of an application is considered complete under that Party's laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the competent authorities of that Party shall provide, without undue delay, information concerning the status of the application.
3. Each Party shall provide for adequate procedures to verify the competence of professionals of the other Party.
4. (a) Each Party shall apply licensing and qualification requirements and procedures and technical standards in a manner which:
 - (i) is based on objective and transparent criteria, such as competence and the ability to supply the service;
 - (ii) is not more burdensome than necessary to ensure the quality of the service; and
 - (iii) in the case of licensing procedures and of verification procedures related to technical standards and to qualification requirements, is not in itself a restriction on the supply of the service.
- (b) In determining whether a Party is in conformity with the obligation under subparagraph (a), account shall be taken of international standards of relevant international organisations applied by that Party.

Note: "Relevant international organisations" refers to international bodies whose membership is open to the relevant bodies of both Parties.
5. Paragraphs 1 to 4 are binding upon a Party only in sectors in which it has undertaken specific commitments in its Schedule under the GATS.

Note: For the purposes of this paragraph, "sector" means one or more, or all, sub-sectors of the service concerned, as specified in a Party's Schedule under the GATS.

6. 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.

7. The Parties shall jointly review the results of the negotiations provided for in paragraph 4 of Article VI of the GATS with a view to incorporating into this Chapter, as appropriate, any disciplines agreed in such negotiations.

Article 49 Recognition

1. For the purposes of the fulfilment, in whole or in part, of its relevant standards or criteria for the authorisation, licensing or certification of service suppliers, each Party shall give due consideration to any requests by the other Party to recognise the education or experience obtained, requirements met, or licences or certifications granted, in that other Party. Such recognition may be based upon an agreement or arrangement with that other Party, or be accorded autonomously.

2. Where a Party recognises, by an agreement or arrangement, the education or experience obtained, requirements met, or licences or certifications granted, in a non-Party, it shall afford the other Party adequate opportunity to negotiate its accession to such an agreement or arrangement, whether existing or future, or to negotiate a comparable agreement or arrangement with it. Where a Party accords recognition autonomously, it shall afford adequate opportunity for the other Party to demonstrate that the education or experience obtained, requirements met, or licences or certifications granted, in the other Party should also be recognised.

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 authorisation, licensing or certification of service suppliers, or a disguised restriction on trade in services.

Article 50 Movement of Natural Persons

1. This Article shall apply to measures affecting natural persons who are service suppliers of a Party, and natural persons of a Party who are employed by a service supplier of a Party, in respect of the supply of a service.

2. This Chapter shall not apply to measures affecting natural persons seeking access to the employment market of a Party, nor shall it apply to measures regarding nationality or citizenship, residence or employment on a permanent basis.

3. Specific commitments of a Party applying to measures affecting the movement of natural persons of the other Party supplying services are contained in Annex VIII. Natural persons covered by Annex VIII shall be allowed to supply the service in accordance with the terms of this Chapter.

4. For the purposes of this Chapter, paragraph 3 of Article 62 shall apply, *mutatis mutandis*.

Article 51 Monopolies and Exclusive Service Suppliers

1. A Party shall ensure that any monopoly supplier of a service in its Area does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Party's obligations under Articles 45 to 47.

2. Where a Party's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights, that Party shall ensure that such a supplier does not abuse its monopoly position to act in its Area in a manner inconsistent with that Party's obligations under Articles 46 and 47.

3. This Article shall also apply to cases of exclusive service suppliers, where a Party, formally or in effect:

- (a) authorises or establishes a small number of service suppliers; and

- (b) substantially prevents competition among those suppliers in its Area.

Article 52 Business Practices

1. The Parties recognise that certain business practices of service suppliers, other than those falling under Article 51, may restrain competition and thereby restrict trade in services.

2. Without prejudice to Chapter 10, a Party shall, at the request of the other Party, enter into consultations with a view to eliminating practices referred to in paragraph 1. The Party addressed shall accord full and sympathetic consideration to such a request and shall cooperate through the supply of publicly available non-confidential information of relevance to the matter in question. The Party addressed shall also provide other information available to the requesting Party, subject to its law and to the conclusion of a satisfactory agreement concerning the safeguarding of its confidentiality by the requesting Party.

Article 53 Payments and Transfers

1. Except under the circumstances envisaged in Article 54, a Party shall not apply restrictions on international transfers and payments for current transactions and capital transactions relating to trade in services.

2. Nothing in this Chapter shall affect the rights and obligations of the Parties as members of the International Monetary Fund under the Articles of Agreement of the International Monetary Fund, including the use of exchange actions which are in conformity with the Articles of Agreement of the International Monetary Fund, provided that a Party shall not impose restrictions on any capital transactions inconsistently with the obligations under this Chapter regarding such transactions, except under Article 54, or at the request of the International Monetary Fund.

Article 54 Restrictions to Safeguard the Balance of Payments

1. The Parties endeavour to avoid the imposition of restrictions to safeguard the balance of payments.

2. In the event of serious balance-of-payments and external financial difficulties or threat thereof, a Party may adopt or maintain restrictions on trade in services, including on payments or transfers for transactions.

3. The restrictions adopted or maintained by a Party referred to in paragraph 2:

- (a) shall ensure that the other Party is treated as favourably as any non-Party;
- (b) shall be consistent with the Articles of Agreement of the International Monetary Fund;
- (c) shall avoid unnecessary damage to the commercial, economic and financial interests of the other Party;
- (d) shall not exceed those necessary to deal with the circumstances described in paragraph 2; and
- (e) shall be temporary and be phased out progressively as the situation specified in paragraph 2 improves.

4. In determining the incidence of such restrictions, a Party may give priority to the supply of services which are more essential to its economic programme. However, such restrictions shall not be adopted or maintained for the purposes of protecting a particular service sector.

5. Any restrictions adopted or maintained by a Party under paragraph 2, or any changes therein, shall be promptly notified to the other Party.

Article 55 General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Chapter shall be so construed as to prevent the adoption or enforcement by either Party of measures:

- (a) necessary to protect public morals or maintain public order;

Note: The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

- (b) necessary to protect human, animal or plant life or health;
- (c) necessary to secure compliance with laws or regulations of the Party which are not inconsistent with the provisions of this Chapter including those relating to:
 - (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
 - (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; and
 - (iii) safety;
- (d) inconsistent with Article 47, provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of the other Party;

Note: Measures that are aimed at ensuring the equitable or effective imposition or collection of direct taxes include measures taken by a Party under its taxation system which:

- (i) apply to non-resident service suppliers in recognition of the fact that the tax obligation of non-residents is determined with respect to taxable items sourced or located in the Area of the Party;
- (ii) apply to non-residents in order to ensure the imposition or collection of taxes in the Area of the Party;

- (iii) apply to non-residents or residents in order to prevent the avoidance or evasion of taxes, including compliance measures;
- (iv) apply to consumers of services supplied in or from the Area of the other Party in order to ensure the imposition or collection of taxes on such consumers derived from sources in the Area of the Party;
- (v) distinguish service suppliers subject to tax on worldwide taxable items from other service suppliers, in recognition of the difference in the nature of the tax base between them; or
- (vi) determine, allocate or apportion income, profit, gain, loss, deduction or credit of resident persons or branches, or between related persons or branches of the same person, in order to safeguard the Party's tax base.

Tax terms or concepts in this paragraph and this Note are determined according to tax definitions and concepts, or equivalent or similar definitions and concepts, under the law of the Party taking the measure.

- (e) inconsistent with Article 45, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Party is bound.

Article 56 Security Exceptions

Nothing in this Chapter shall be so construed as:

- (a) to require either Party to furnish any information, the disclosure of which it considers contrary to its essential security interests;
- (b) to prevent either Party from taking any action which it considers necessary for the protection of its essential security interests:

- (i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment;
 - (ii) relating to fissionable and fusionable materials or the materials from which they are derived;
 - (iii) taken in time of war or other emergency in international relations; or
- (c) to prevent either Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Article 57 Lists of Reservations

1. The List of Reservations of the Parties referred to in Articles 45 to 47 shall be set out in Annex III.
2. The List of Reservations of a Party set out in Annex III provides for:
 - (a) existing measures that the Party may maintain, renew at any time or modify without reducing their level of conformity with Articles 45 to 47; and
 - (b) measures that the Party may adopt, maintain or modify.

Article 58
Modification of Lists of Reservations

1. A Party shall notify to the other Party its intention to modify its List of Reservations set out in Annex III. Upon written request of the other Party within 30 days from the receipt of the notification, the Parties shall hold consultations on any necessary compensatory adjustment with the aim to ensure that the general level of mutually advantageous commitments under this Chapter is not reduced. If the Parties fail to reach an agreement on compensation within 60 days after the receipt of the request for consultations, the Party receiving the notification may refer the matter to arbitration by an arbitral tribunal established following the same procedures as provided for in paragraphs 3 to 7 of Article 141. Such an arbitral tribunal shall present its findings as to the ways to ensure that the general level of mutually advantageous commitments under this Chapter is not reduced. Article 143 shall apply to the proceedings of such an arbitral tribunal *mutatis mutandis*.

2. If no consultations are requested, or once the Party which made the notification under paragraph 1 has made compensatory adjustments as agreed upon by the Parties or in conformity with the outcome of arbitration, the modification shall be incorporated into Annex III in accordance with the procedures set out in Article 152.

3. If a compensatory adjustment has been made by a Party to the benefit of the other Party as an "affected Member" in accordance with Article XXI of the GATS with regard to the same modification as intended for the List of Reservations of the former Party set out in Annex III, the Parties shall be deemed to have reached an agreement on compensation referred to in paragraph 1 with the same conclusion as agreed in the said compensatory adjustment.

Article 59
Transparency

1. Each Party shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Chapter. International agreements pertaining to or affecting trade in services to which a Party is a signatory shall also be published.

2. Where publication as referred to in paragraph 1 is not practicable, such information shall be made otherwise publicly available.

Article 60 Review

1. With the objective of further liberalising trade in services between them, the Parties shall review at least every two years, or more frequently if so agreed, their Lists of Reservations set out in Annex III. The first such review shall take place not later than two years after the entry into force of this Agreement.

2. If, after the entry into force of this Agreement, a Party further liberalises autonomously any of its services sectors, sub-sectors or activities, it shall consider any requests by the other Party for the incorporation into this Agreement of such autonomous liberalisation.

Article 61 Annexes

Annexes III, IV, V, VI and VII form an integral part of this Chapter.