

CHAPTER 8

TRADE IN SERVICES

ARTICLE 8.1

*Scope and Coverage*⁸

1. This Chapter applies to measures by Parties affecting trade in services and 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.
2. In respect of air transport services, this Chapter shall not apply to measures affecting air traffic rights or measures affecting services directly related to the exercise of air traffic rights, except as provided for in paragraph 3 of the Annex on Air Transport Services of the GATS. The definitions of paragraph 6 of the Annex on Air Transport Services of the GATS shall apply and are hereby incorporated and made part of this Agreement, *mutatis mutandis*.
3. Articles 8.3, 8.4 and 8.5 shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.

ARTICLE 8.2

Definitions

For the purpose of this Chapter:

- (a) “trade in services” is defined as the supply of a service:⁹
 - (i) from the territory of one Party into the territory of the other Party;
 - (ii) in the territory of one Party to the service consumer of the other Party;
 - (iii) by a service supplier of one Party, through commercial presence in the territory of the other Party;

⁸ The Parties agree that any sector or sub-sector or part thereof that is inscribed explicitly in their Schedules of specific commitments shall be covered by the provisions of this Chapter, notwithstanding possible interpretations of the sectoral scope defined by this Article.

⁹ It is understood that a service supplied from or in the territory of a non-party is not covered by this definition, and therefore the rights granted by the provisions of this Chapter to services supplied from or in the territory of a Party are not granted to such service.

- (iv) by a service supplier of one Party, through presence of natural persons of a Party in the territory of the other Party;
- (b) “services” includes any services in any sector except services supplied in the exercise of governmental authority;
- (c) “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;
- (d) “measure” means any measure by a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form;
- (e) “supply of a service” includes the production, distribution, marketing, sale and delivery of a service;
- (f) “measures by Parties affecting trade in services” include 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 the Parties to be offered to the public generally;
 - (iii) the presence, including commercial presence, of persons of a Party for the supply of a service in the territory of the other Party;
- (g) “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;
- (h) “sector” of a service means:
 - (i) with reference to a specific commitment, one or more, or all, subsectors of that service, as specified in a Party’s Schedule;
 - (ii) otherwise, the whole of that service sector, including all of its subsectors;

- (i) “service of the other Party” means a service which is supplied:
 - (i) from or in the territory of that other Party, or in case of maritime transport, by a vessel registered under the laws of that other Party, or by a person of that other Party which supplies the service through the operation of a vessel and/or its use in whole or in a 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 that other Party;
- (j) “service supplier” means any person that supplies a service;¹⁰
- (k) “monopoly supplier of a service” means any person, public or private, which in the relevant market of the territory of a Party is authorised or established formally or in effect by that Party as the sole supplier of that service;
- (l) “service consumer” means any person that receives or uses a service;
- (m) “person” means either a natural person or a juridical person;
- (n) “natural person of a Party” means:
 - (i) with respect to China, a natural person who resides in the territory of either Party, and who under Chinese law is a national of China;
 - (ii) with respect to Switzerland, a natural person who resides in the territory of either Party, and who under Swiss law is:
 - (A) a national of Switzerland; or
 - (B) a permanent resident of Switzerland;
- (o) “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;

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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 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 and need not be extended to any other parts of the service supplier located outside the territory where the service is supplied.

- (p) “juridical person of the other Party” means a juridical person which is either:¹¹
- (i) constituted or otherwise organised under the law of the other Party, and is engaged in substantive business operations in the territory of the other Party; or
 - (ii) in the case of the supply of a service through commercial presence, owned or controlled by:
 - (A) natural persons of the other Party; or
 - (B) juridical persons of the other Party identified under subparagraph (i);
- (q) 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; and
- (r) “direct taxes” comprise 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.

ARTICLE 8.3

Most-Favoured-Nation Treatment

1. Without prejudice to measures taken in accordance with Article VII of the GATS, and except as provided for in its List of MFN Exemptions contained in Annex VIII, each 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 the treatment it accords to like services and service suppliers of any non-party.

2. Treatment granted under other existing or future agreements concluded by a Party and notified under Article V or Article V *bis* of the GATS shall not be subject to paragraph 1.

¹¹ It is understood that a juridical person which does not meet all criteria of this definition is considered to be a juridical person of a non-party, and therefore the rights granted by the provisions of this Chapter to the juridical persons of a Party are not granted to such juridical person.

3. If a Party concludes or amends an agreement of the type referred to in paragraph 2, it shall, upon request from the other Party, endeavour to accord to the other Party treatment no less favourable than that provided under that agreement. The former Party shall, upon request from the other Party, afford adequate opportunity to the other Party to negotiate the incorporation into this Agreement of a treatment no less favourable than that provided under the former agreement.

4. The provisions of this Chapter shall not be so construed as to prevent the Parties 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.

ARTICLE 8.4

Market Access

1. With respect to market access through the modes of supply identified in subparagraph (a) of Article 8.2, each Party shall accord 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 Schedule referred to in Article 8.17.¹²

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 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;¹³
- (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;

¹² If a Party undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph (a)(i) of Article 8.2 and if the cross-border movement of capital is an essential part of the service itself, that Party is thereby committed to allow such movement of capital. If a Party undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph (a)(iii) of Article 8.2 it is thereby committed to allow related transfers of capital into its territory.

¹³ Subparagraph 2(c) does not cover measures of a Party which limit inputs for the supply of services.

- (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 8.5

National Treatment

1. 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, 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.¹⁴
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 the Party compared to like services or service suppliers of the other Party.

ARTICLE 8.6

Additional Commitments

Parties may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles 8.4 or 8.5, including those regarding qualifications, standards or licensing matters. Such commitments are inscribed in a Party's Schedule as additional commitments.

ARTICLE 8.7

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

¹⁴ Specific commitments assumed under this Article shall not be construed to require either Party to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers.

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. Each Party shall aim to ensure that measures relating to qualification requirements and procedures, technical standards, and licensing requirements and procedures are based on objective and transparent criteria, such as competence and the ability to supply the service, and are not more burdensome than necessary to ensure the quality of the service. Each Party shall ensure that licensing procedures are not in themselves a restriction on the supply of the service.

4. In determining whether a Party is in conformity with the obligation under paragraph 3, account shall be taken of international standards of relevant international organisations¹⁵ applied by that Party.

5. In sectors where specific commitments regarding professional services are undertaken, each Party shall provide for adequate procedures to verify the competence of professionals of the other Party.

ARTICLE 8.8

Recognition

1. For the purpose of the fulfilment 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 otherwise be accorded autonomously.

2. Where a Party recognises, by agreement or arrangement, the education or experience obtained, requirements met, or licences or certifications granted, in the territory of a non-party, that Party 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 territory of that other Party should also be recognised.

3. Any such agreement or arrangement or autonomous recognition shall be in conformity with the relevant provisions of the WTO Agreement, in particular paragraph 3 of Article VII of the GATS.

¹⁵ The term “relevant international organisations” refers to international bodies whose membership is open to the relevant bodies of both Parties.

ARTICLE 8.9

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.
3. Nothing in this Chapter shall require either Party to provide confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private.

ARTICLE 8.10

Monopolies and Exclusive Service Suppliers

1. Each Party shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Party's obligations under Article 8.3 and specific commitments.
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 and which is subject to that Party's specific commitments, the Party shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments.
3. The provisions of 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 territory.

ARTICLE 8.11

Business Practices

1. The Parties recognise that certain business practices of service suppliers, other than those falling under Article 8.10, may restrain competition and thereby restrict trade in services.
2. Each 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 domestic law and to the conclusion of satisfactory agreement concerning the safeguarding of its confidentiality by the requesting Party.

ARTICLE 8.12

Subsidies

1. A Party which considers that it is adversely affected by a subsidy of the other Party may request *ad hoc* consultations with that other Party on such matters. The requested Party shall enter into such consultations.
2. The Parties shall review any disciplines agreed under Article XV of the GATS with a view to incorporate them into this Chapter.

ARTICLE 8.13

Payments and Transfers

1. Subject to its specific commitments, and except in the circumstances envisaged in Article 8.14, a Party shall not apply restrictions on international transfers and payments for current transactions relating to trade in services.
2. Nothing in this Chapter shall affect the rights and obligations of the Parties under the Articles of the Agreement of the International Monetary Fund (IMF), including the use of exchange actions which are in conformity with the Articles of the Agreement of the IMF, provided that a Party shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article 8.14 or at the request of the IMF.

ARTICLE 8.14

Restrictions to Safeguard the Balance of Payments

Any restriction to safeguard the balance of payments adopted or maintained by a Party under and in conformity with Article XII of the GATS shall apply under this Chapter.

ARTICLE 8.15

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 construed to prevent the adoption or enforcement by either Party of measures:

- (a) necessary to protect public morals or to maintain public order;¹⁶
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary to secure compliance with laws or regulations 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;
 - (iii) safety;
- (d) inconsistent with Article 8.5, provided that the difference in treatment is aimed at ensuring the equitable or effective¹⁷ imposition or collection of direct taxes in respect of services or service suppliers of the other Party;

¹⁶ 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.

¹⁷ 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 Party's territory;
- (ii) apply to non-residents in order to ensure the imposition or collection of taxes in the Party's territory;
- (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 territory of the other Party in order to ensure the imposition or collection of taxes on such consumers derived from sources in the Party's territory;
- (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.

- (e) inconsistent with Article 8.3, 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 8.16

Security Exceptions

Nothing in this Chapter shall be construed:

- (a) to require either Party to furnish any information, the disclosure of which it considers contrary to its essential security interests; or
- (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 Charter of the United Nations for the maintenance of international peace and security.

ARTICLE 8.17

Schedules of Specific Commitments

1. Each Party shall set out in a schedule the specific commitments it undertakes under Articles 8.4, 8.5 and 8.6. 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 8.6; and

Tax terms or concepts in subparagraph (d) of this Article and in this footnote are determined according to tax definitions and concepts, or equivalent or similar definitions and concepts, under the domestic law of the Party taking the measure.

- (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 8.4 and 8.5 shall be dealt with as provided for in paragraph 2 of Article XX of the GATS.
- 3. The Parties' Schedules of specific commitments are set out in Annex VII.

ARTICLE 8.18

Modification of Schedules

1. A Party may modify or withdraw any commitment in its Schedule of specific commitments, at any time after three years have elapsed from the date on which that commitment entered into force provided that:
 - (a) it notifies the other Party of its intention to modify or withdraw a commitment no later than three months before the intended date of implementation of the modification or withdrawal; and
 - (b) upon notification of a Party's intent to make such modification, the Parties shall consult and attempt to reach agreement on the appropriate compensatory adjustment.
2. In achieving a compensatory adjustment, the Parties shall endeavour to maintain a general level of mutually advantageous commitment that is not less favourable to trade than provided for in the Schedules of specific commitments prior to such negotiations.
3. If agreement under paragraph 1(b) is not reached between the modifying Party and the affected Party within three months, the affected Party may refer the matter to arbitration by an arbitration panel established following the same procedures as provided for in paragraphs 3 to 10 of Article 15.4. Such an arbitration panel shall present its finding as to the ways to ensure that the general level of mutually advantageous commitments under this Chapter is maintained. Articles 15.6 and 15.7 shall apply to the proceedings of such an arbitration panel, *mutatis mutandis*.
4. The modifying Party may not modify or withdraw its commitment until it has made the necessary adjustments in conformity with the findings of the arbitration in relation to the question of whether paragraph 1(b) is satisfied under paragraph 3. The modification, including compensatory adjustments, which are agreed upon by the Parties, or which are in conformity with the outcome of the arbitration, shall be incorporated into Annex VII in accordance with the procedures set out in Article 16.3.

ARTICLE 8.19

Review

With the objective of further liberalising trade in services between them, in particular eliminating substantially all remaining discrimination, the Parties shall review at least every two years, or more frequently if so agreed, their Schedules of specific commitments and their Lists of MFN Exemptions, taking into account in particular any autonomous liberalisation and on-going work under the auspices of the WTO. The first such review shall take place no later than two years after the entry into force of this Agreement.

ARTICLE 8.20

Sub-Committee on Trade in Services

1. A Sub-Committee on Trade in Services (hereinafter referred to in this Article as the “Sub-Committee”) is hereby established under the Joint Committee of this Agreement.
2. The functions of the Sub-Committee shall be:
 - (a) to monitor the implementation of this Chapter;
 - (b) to propose agreed solutions in case a problem arises in relation to the implementation of this Chapter;
 - (c) to request and provide information about each Party’s laws and regulations related to trade in services;
 - (d) to exchange information on the existing possibilities for each other’s service suppliers to access each Party’s market;
 - (e) to examine opportunities and the benefits for the Parties to improve and facilitate market access for each other’s service suppliers;
 - (f) to propose and discuss suggestions to improve the functioning of this Chapter; and
 - (g) to execute other tasks assigned by the Joint Committee.
3. The Sub-Committee shall consider the establishment of working groups as appropriate.
4. The Sub-Committee shall be co-chaired, and meet once every two years, unless otherwise agreed by the Parties. The Sub-Committee meetings may be conducted by any agreed method.
5. The Sub-Committee shall include representatives of the authorities of each Party with expertise in the sectors or areas to be discussed.

6. The Sub-Committee shall report on its work to the Joint Committee.

ARTICLE 8.21

Annexes

The following Annexes form an integral part of this Chapter:

- Annex VI “Trade in Services” (TISA);
- Annex VII “Schedules of Specific Commitments”; and
- Annex VIII “Lists of MFN Exemptions”.