

CHAPTER 9

TRADE IN SERVICES

Article 103 Definitions

For the purposes of this Chapter:

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

- (a) the constitution, acquisition or maintenance of a juridical person, or
- (b) the creation or maintenance of a branch or a representative office,

within the territory of a Party for the purpose of supplying a service;

controlled means having the power to name a majority of directors or otherwise legally direct the legal entity's actions;

juridical person of a Party 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, which is either:

- (a) constituted or otherwise organised under the law of that Party, and is engaged in substantive business operations in the territory of that Party; or
- (b) in the case of the supply of a service through commercial presence, owned or controlled by:
 - (i) natural persons of that Party; or
 - (ii) juridical persons of that Party identified under subparagraph (a);

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

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

measures by Parties affecting trade in services include measures in respect of:

- (a) the purchase, payment or use of a service;
- (b) 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;
- (c) the presence, including commercial presence, of persons of a Party for the supply of a service in the territory of the other Party;

monopoly supplier of a service means any person, public or private, which in the relevant market of the territory of a Party is authorized or established formally or in effect by that Party as the sole supplier of that service;

natural person of a Party means a national or permanent resident of a Party under its laws. Until such time as China enacts its domestic law on the treatment of permanent residents of foreign countries, the obligations of each Party with respect to the permanent residents of the other Party shall be limited to the extent of its obligations under GATS;

owned means holding more than 50 percent of the equity interest in the legal entity;

person of a Party means either a natural person or a juridical person of a Party;

qualification procedures means administrative procedures relating to the administration of qualification requirements;

qualification requirements means substantive requirements which a service supplier is required to fulfil in order to obtain certification or a licence;

sector of a service means, with reference to a specific commitment one or more or all subsectors of that service, as specified in a Party's Schedule; otherwise, the whole of that service sector, including all of its subsectors;

service consumer means any person that receives or uses a service;

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;

service supplier of a Party means any person of a Party that supplies a service;¹

¹ 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

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

trade in services is defined as the supply of a service:

- (a) from the territory of one Party into the territory of the other Party (“cross-border mode”);
- (b) in the territory of one Party to the service consumer of the other Party (“consumption abroad mode”);
- (c) by a service supplier of one Party, through commercial presence in the territory of the other Party (“commercial presence mode”); or
- (d) by a service supplier of one Party, through presence of natural persons of a Party in the territory of the other Party (“presence of natural persons mode”).

Article 104 Objectives

The objective of this Chapter is to facilitate expansion of trade in services on a mutually advantageous basis, under conditions of transparency and progressive liberalisation. Both Parties recognise the role of governments in regulating services, and in providing and funding public services; the need for this to take into consideration national policy objectives and local circumstances; and the asymmetries existing with respect to the degree of development of services regulation between the Parties.

Article 105 Scope

1. This Chapter shall apply to measures adopted or maintained by a Party affecting trade in services.
2. This Chapter shall not apply to:
 - (a) laws, regulations, policies, or procedures of general application governing the procurement by government 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;
 - (b) services supplied in the exercise of governmental authority;

juridical person) shall, nonetheless, through such presence be accorded the treatment provided for service suppliers under this Chapter. 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.

- (c) subsidies or grants provided by a Party, except as provided for in Article 119;
 - (d) measures affecting natural persons seeking access to the employment market of a Party.
- 3. This Chapter shall not apply to measures affecting:
 - (a) air traffic rights, however granted; or
 - (b) services directly related to the exercise of air traffic rights, except as provided in paragraph 4.
- 4. This Chapter shall apply to measures affecting:
 - (a) aircraft repair and maintenance services;
 - (b) the selling and marketing of air transport services;
 - (c) computer reservation system (“CRS”) services.

Article 106 National Treatment

1. In the sectors inscribed in its schedule of commitments, and subject to any conditions and qualifications set out therein, a 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.²
2. A Party may meet the requirement in 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 the like service or service suppliers of the other Party.

² Specific commitments assumed under this Article shall not be construed to require any Party to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers.

Article 107 Most-Favoured-Nation Treatment

1. In respect of the services sectors listed in Annex 9, 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 to like services and service suppliers of a third country.
2. Notwithstanding paragraph 1, the Parties reserve the right to adopt or maintain any measure that accords differential treatment to third countries under any free trade agreement or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement.
3. For greater certainty, paragraph 2 includes, in respect of agreements on the liberalisation of trade in goods or services or investment, any measures taken as part of a wider process of economic integration or trade liberalization between the parties to such agreements.

Article 108 Market Access

1. With respect to market access through the modes of supply identified in the definition of trade in services contained in Article 103, a 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 of Commitments.³
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 sub-division 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

³ 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) of the definition of trade in services contained in Article 103, 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 (c) of the definition of trade in services contained in Article 103, it is thereby committed to allow related transfers of capital into its territory.

numerical units in the form of quotas or the requirement of an economic needs test;⁴

- (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 109 Specific Commitments

1. Each Party shall set out in a Schedule the Specific Commitments it undertakes under Articles 106, 108 and 110. With respect to sectors where such commitments are undertaken, each Schedule of Specific Commitments shall specify:

- (a) terms, limitations and conditions on market access;
- (b) conditions and qualifications on national treatment;
- (c) undertakings relating to additional commitments; and
- (d) where appropriate the time-frame for implementation of such commitments.

2. Measures inconsistent with both Articles 106 and 108 shall be inscribed in the column relating to Article 108. In this case the inscription will be considered to provide a condition or qualification to Article 106 as well.

3. Schedules of Specific Commitments are annexed to this Agreement as Annex 8.⁵

⁴ Subparagraph 2(c) does not cover measures of a Party which limit inputs for the supply of services.

⁵ The specific commitments in respect of the presence of natural persons mode are set out in Annex 10.

Article 110 Additional Commitments

The Parties may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles 106 or 108, including but not limited to those regarding qualification, standards or licensing matters. Such commitments shall be inscribed in a Party's Schedule.

Article 111 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.
 - (a) 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, 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.
 - (b) The provisions of subparagraph (a) shall not be construed to require a Party to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system.
3. Where authorization is required for the supply of a service on which a specific commitment under this Agreement has been made, the competent authorities of each Party shall:
 - (a) in the case of an incomplete application, at the request of the applicant, identify all the additional information that is required to complete the application and provide the opportunity to remedy deficiencies within a reasonable timeframe;
 - (b) at the request of the applicant, provide without undue delay information concerning the status of the application; and
 - (c) if an application is terminated or denied, to the maximum extent possible, inform the applicant in writing and without delay the reasons for such action. The applicant will have the possibility of resubmitting, at its discretion, a new application.
4. With the objective of ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Parties shall

jointly review the results of the negotiations on disciplines on these measures pursuant to Article VI.4 of GATS, with a view to their incorporation into this Agreement. The Parties note that such disciplines aim to ensure that such requirements are, *inter alia*:

- (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;
 - (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.
5. (a) In sectors in which a Party has undertaken specific commitments, pending the incorporation of the disciplines referred to in paragraph 4, that Party shall not apply licensing and qualification requirements and technical standards that nullify or impair its obligation under this Agreement in a manner which:
- (i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and
 - (ii) could not reasonably have been expected of that Party at the time the specific commitments in those sectors were made.
- (b) In determining whether a Party is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations applied by that Party.⁶

6. 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 112 Recognition

1. For the purposes of the fulfilment, in whole or in part, of its standards or criteria for the authorisation, licensing, or certification of service suppliers, and subject to the requirements of paragraph 4, a Party may recognise, or encourage its relevant competent bodies to recognise, the education or experience obtained, requirements met, or licences or certifications granted in the other Party. Such recognition, which may be achieved through harmonisation or otherwise, may be based upon an agreement or arrangement

⁶ The term "relevant international organizations" refers to international bodies whose membership is open to the relevant bodies of the Parties to this Agreement.

between the Parties or their relevant competent bodies, or may be accorded autonomously.

2. Where a Party recognises, autonomously or by agreement or arrangement, the education or experience obtained, requirements met, or licences or certifications granted in the territory of a non-Party, nothing in Article 107 shall be construed to require the Party to accord such recognition to the education or experience obtained, requirements met, or licences or certifications granted in the territory of the other Party.

3. A Party that is a party to an agreement or arrangement of the type referred to in paragraph 2, whether existing or future, shall afford adequate opportunity for the other Party, upon request, 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 recognised.

4. 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 113 Qualifications Recognition Cooperation

1. Both Parties acknowledge existing work on qualifications recognition taking place under the auspices of the China – New Zealand Education Joint Working Group ("JWG") and encourage the JWG to further explore cooperation in mutual recognition of respective academic degrees and qualifications.

2. The Ministry of Labour and Social Security of China and the New Zealand Qualifications Authority ("NZQA") shall establish a joint working group to strengthen cooperation and explore possibilities for mutual recognition of respective vocational qualifications.

3. Both Parties agree to encourage NZQA and the Chinese authorities responsible for issuance and recognition of professional and vocational qualifications to strengthen cooperation to explore possibilities for recognition of other qualifications and professional and vocational licences.

Article 114 Payments and Transfers

1. Except in the circumstances envisaged in Article 202, a Party shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments.

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* (“Articles of Agreement”), including the use of exchange actions which are in conformity with the Articles of Agreement, provided that a Party shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article 202 or at the request of the International Monetary Fund.

Article 115 Denial of Benefits

Subject to prior notification and consultation, 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 operations 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 operations in the territory of the other Party.

Article 116 Transparency

- 1. Each Party shall publish international agreements pertaining to or affecting trade in services to which that Party is a signatory.
- 2. Any information provided under this Article shall be conveyed through the contact points referred to in Article 118.

Article 117 Committee on Services

- 1. The Parties hereby establish a Committee on Trade in Services that shall meet on the request of either Party or the FTA Joint Commission to consider any matter arising under this Chapter.
- 2. The Committee’s functions shall include:
 - (a) reviewing the implementation and operation of this Chapter;
 - (b) identification and recommendation of measures to promote increased services trade between the Parties; and

- (c) considering other trade in services issues of interest to a Party.

Article 118 Contact Points

Each Party shall designate one or more contact points to facilitate communications between the Parties on any matter covered by this Chapter, and shall provide details of such contact points to the other Party. The Parties shall notify each other promptly of any amendments to the details of their contact points.

Article 119 Subsidies

1. The Parties shall review the issue of disciplines on subsidies related to trade in services in the light of any disciplines agreed under Article XV of GATS with a view to their incorporation into this Agreement.
2. At the request of a Party which considers that it is adversely affected by a subsidy of the other Party, the Parties shall enter into consultations on such matters.

Article 120 Modification of Schedules

1. A Party (referred to in this article as the "modifying Party") may modify or withdraw any commitment in its Schedule of Specific Commitments, at any time after 3 years have elapsed from the date on which that commitment entered into force provided that:
 - (a) it notifies the other Party (referred to in this article as the "affected Party") of its intention to modify or withdraw a commitment no later than 3 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 3 months, the affected Party may refer the

matter to arbitration in accordance with the procedures set out in Chapter 16 (Dispute Settlement).

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.

Article 121 Safeguard Measures

The Parties note the multilateral negotiations pursuant to Article X of GATS on the question of emergency safeguard measures based on the principle of non-discrimination. Upon the conclusion of such multilateral negotiations, the Parties shall conduct a review for the purpose of discussing appropriate amendments to this Agreement so as to incorporate the results of such multilateral negotiations.

Article 122 Cooperation

1. The Parties shall strengthen cooperation efforts in service sectors, including sectors which are not covered by existing cooperation arrangements, such as cooperation on human resources, data study and sharing and capacity building in order to improve their domestic capacities, efficiencies and competitiveness.

2. Both Parties recognise China's current status as a developing country, and commit to work together to explore ways to expand services trade between them in line with their different development situations.

Article 123 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 its 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. If a Party has reason to believe that a monopoly supplier of a service of the other Party is acting in a manner inconsistent with paragraph 1 or 2, that

Party may request the other Party establishing, maintaining or authorising such supplier to provide specific information concerning the relevant operations.

4. If, after the date of entry into force of this Agreement, a Party grants monopoly rights regarding the supply of a service covered by its specific commitments, that Party shall notify the other Party no later than 3 months before the intended implementation of the grant of monopoly rights and paragraphs 1(b), 2, 3 and 4 of Article 120 shall apply.

5. This Article shall also apply to cases of exclusive service suppliers, where a Party, formally or in effect, (a) authorizes or establishes a small number of service suppliers and (b) substantially prevents competition among those suppliers in its territory.

Article 124 Review

The Parties shall consult within 2 years of entry into force of this Agreement and at least every 3 years thereafter, or as otherwise agreed, to review the implementation of this Chapter and consider other trade in services issues of mutual interest, including the extension of most-favoured-nation treatment to additional services sectors not listed in Annex 9, with a view to the progressive liberalisation of the trade in services between them on a mutually advantageous basis.