

CHAPTER 3

TRADE IN SERVICES

ARTICLE 3.1

Scope and Coverage

1. This Chapter applies to measures by the 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. With respect to air transport services, whether scheduled or non-scheduled, and ancillary 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 GATS Annex on Air Transport Services. For the purposes of this Chapter, the definitions of paragraph 6 of the GATS Annex on Air Transport Services are hereby incorporated and made part of this Agreement.
3. Nothing in this Chapter shall be construed to impose any obligation with respect to government procurement.

ARTICLE 3.2

Definitions

For the purposes of this Chapter:

- (a) a juridical person is:
 - (i) “owned” by persons of a Party if more than 50% 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 person; or when it and that person are both controlled by the same person;
- (b) “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;

- (c) “commercial presence” means any type of business or professional establishment, including through:
 - (i) constitution, acquisition or maintenance of a juridical person; or
 - (ii) creation or maintenance of a branch or a representative office, within the territory of a Party for the purpose of supplying a service;
- (d) “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;
- (e) “juridical person” means any legal entity duly constituted or otherwise organised under applicable laws and regulations, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association;
- (f) “juridical person of another Party” means a juridical person which is either:
 - (i) constituted or otherwise organised under the applicable laws and regulations of that Party, and is engaged in substantive business operations in the territory of a Party; or
 - (ii) in the case of the supply of a service through commercial presence, owned or controlled by:
 - (aa) natural persons of that Party; or
 - (bb) juridical persons of that Party identified under subparagraph (i);
- (g) “measure” means any measure by a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form;
- (h) “measures by the Parties affecting trade in services” include measures with respect to:
 - (i) purchase, payment or use of a service;
 - (ii) 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) presence, including commercial presence, of persons of a Party for the supply of a service in the territory of another Party;
- (i) “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;
- (j) “natural person of another Party” means a natural person who, under applicable laws and regulations of that Party, is a national of that Party who resides in the territory of any WTO Member;
- (k) “person” means either a natural person or a juridical person;
- (l) “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;
- (m) “services” means any service in any sector, except services supplied in the exercise of governmental authority;
- (n) “service consumer” means any person that receives or uses a service;
- (o) “service of a Party” means a service which is supplied:
 - (i) from or in the territory of a Party, or in the case of maritime transport, by a vessel registered under the domestic laws and regulations of a Party, or by a person of a 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 a Party;
- (p) “service supplier” means any person that supplies a service;⁴

⁴ This definition includes any person that seeks to supply services. 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 territory where the service is supplied or sought to be supplied.

- (q) “supply of a service” includes the production, distribution, marketing, sale and delivery of a service; and
- (r) “trade in services” means the supply of a service:
 - (i) from the territory of a Party into the territory of another Party;
 - (ii) in the territory of a Party to the service consumer of another Party;
 - (iii) by a service supplier of a Party, through commercial presence in the territory of another Party; and
 - (iv) by a service supplier of a Party, through presence of natural persons of that Party in the territory of another Party.

ARTICLE 3.3

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 (Lists of MFN-Exemptions), each Party shall accord immediately and unconditionally, with respect to all measures affecting the supply of services, to services and service suppliers of another 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 *Vbis* of the GATS shall not be subject to paragraph 1.
3. If a Party concludes an agreement of the type referred to in paragraph 2, it shall notify the other Parties without delay. The Party concluding such an agreement shall, upon request by another Party, afford adequate opportunity to negotiate the incorporation into this Agreement of a treatment no less favourable than that provided under that agreement.
4. For the purposes of this Chapter, with regard to the rights and obligations of the Parties in respect of advantages accorded to adjacent countries, paragraph 3 of Article II of the GATS shall apply and is hereby incorporated into and made part of this Agreement.

ARTICLE 3.4

Market Access

1. With respect to market access through the modes of supply identified in subparagraph (r) of Article 3.2 (Definitions), each Party shall accord services and service suppliers of another Party treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule of Specific Commitments.⁵

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;⁶
- (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.

⁵ If a Party undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in Article 3.2 (Definitions) 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.

⁶ This subparagraph does not cover measures of a Party, which limit inputs for the supply of services.

ARTICLE 3.5

National Treatment

1. In the sectors inscribed in its Schedule of Specific Commitments, and subject to the conditions and qualifications set out therein, each Party shall accord to services and service suppliers of another 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 suppliers⁷.
2. A Party may meet the requirement of paragraph 1 by according to services and service suppliers of another 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 another Party.

ARTICLE 3.6

Additional Commitments

Parties may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Article 3.4 (Market Access) or 3.5 (National Treatment), including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Party's Schedule.

ARTICLE 3.7

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. (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 of another 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

⁷ 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.

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 a Party requires authorisation for the supply of a service, on which a specific commitment has been made, 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 domestic 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.

4. In sectors where specific commitments are undertaken, each Party shall 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.

5. Upon conclusion of the multilateral negotiations on the disciplines on Domestic Regulation pursuant to Article VI:4 of the GATS, the Parties shall conduct a review for the purpose of discussing appropriate amendments to this Chapter based on the result of such multilateral negotiations.

- 6. (a) In sectors in which a Party has undertaken specific commitments, pending the entry into force of a decision incorporating WTO disciplines for these sectors pursuant to paragraph 5, that Party shall not apply qualification requirements and procedures, technical standards and licensing requirements and procedures that nullify or impair such specific commitments in a manner which is:

- (i) more burdensome than necessary to ensure the quality of the service; or
- (ii) in the case of licensing procedures, 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 organisations⁸ applied by that Party.

7. Each Party shall provide for adequate procedures to verify the competence of professionals of another Party.

⁸ The term "relevant international organisations" refers to international bodies whose membership is open to the relevant bodies of at least all Parties.

ARTICLE 3.8

Recognition

1. For the purposes 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 requests by another Party to recognise the education or experience obtained, requirements met, or licences or certifications granted in that Party. Such recognition may be based upon an agreement or arrangement with the requesting Party, or 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 another Party adequate opportunity to negotiate a comparable agreement or arrangement. Where a Party accords recognition autonomously, it shall afford adequate opportunity for another Party to demonstrate that the education or experience obtained, requirements met, or licences or certifications granted, in the territory of that 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.

ARTICLE 3.9

Movement of Natural Persons

1. This Article applies 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, residence or employment on a permanent basis.
3. Natural persons covered by a specific commitment shall be allowed to supply the service in accordance with the terms of that commitment.
4. This Chapter shall not prevent a Party from applying measures to regulate the entry of natural persons of another 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 any Party under the terms of a specific commitment.⁹

⁹ The sole fact of requiring a visa for natural persons shall not be regarded as nullifying or impairing benefits under a specific commitment.

ARTICLE 3.10

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 any Party to disclose confidential information, which would impede law enforcement, or otherwise be contrary to the public interest or that would prejudice legitimate commercial interests of particular enterprises, public or private.
4. Each Party shall treat as confidential the information submitted by another Party, which has been designated as confidential by the Party submitting the information.

ARTICLE 3.11

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 3.3 (Most-Favoured-Nation Treatment) 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, that 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 3.12

Business Practices

1. The Parties recognise that certain business practices of service suppliers, other than those falling under Article 3.11 (Monopolies and Exclusive Service Suppliers), may restrain competition and thereby restrict trade in services.
2. Each Party shall, at the request of another 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 laws and regulations and to the conclusion of a satisfactory agreement concerning the safeguarding of its confidentiality by the requesting Party.

ARTICLE 3.13

Payments and Transfers

1. Subject to its specific commitments and except under the circumstances referred to in Article 3.14 (Restrictions to Safeguard the Balance of Payments), no Party shall apply restrictions on international transfers and payments for current transactions with another Party.
2. Nothing in this Chapter shall affect the rights and obligations of the Parties under the Articles of Agreement of the IMF, including the use of exchange actions which are in conformity with the Articles of Agreement of the IMF, provided that a Party shall not impose restrictions on capital transactions inconsistent with its specific commitments regarding such transactions, except under Article 3.14 (Restrictions to Safeguard the Balance of Payments) or at the request of the IMF.

ARTICLE 3.14

Restrictions to Safeguard the Balance of Payments

For the purposes of this Chapter, paragraphs 1 to 3 of Article XII of the GATS, shall apply and are hereby incorporated into and made part of this Agreement.

ARTICLE 3.15

Consultation on Implementation

If, after the entry into force of this Agreement, difficulties arise in a services sector of a Party where that Party has undertaken a specific commitment, that Party may request consultations with the other Parties, regardless whether such difficulties arise from liberalisation or not, for the purposes of exchanging information, data or experience, or exchanging views on possible ways and means to address such difficulties, taking into account the circumstances of the case at hand.

ARTICLE 3.16

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 the Parties where like conditions prevail, or a disguised restriction on trade in services, nothing in this Chapter shall prevent a Party from the adoption or enforcement of measures:

- (a) necessary to protect public morals or to maintain public order¹⁰;
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary to secure compliance with domestic laws and regulations which are not inconsistent with the provisions of this Chapter including those relating to:
 - (i) the prevention of deceptive and fraudulent practices or dealing 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;

¹⁰ 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.

- (d) inconsistent with Article 3.5 (National Treatment), provided that the difference in treatment is aimed at ensuring the equitable or effective¹¹ imposition or collection of direct taxes with respect to services or service suppliers of the other Parties;
- (e) inconsistent with Article 3.3 (Most-Favoured-Nation Treatment), 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 3.17

Security Exceptions

Nothing in this Chapter shall be construed to:

- (a) require a Party to furnish any information, the disclosure of which it considers contrary to its essential security interests; or
- (b) prevent a 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 purposes of provisioning a military establishment;

¹¹ 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; or
- (ii) apply to non-residents in order to ensure the imposition or collection of taxes in the Party's territory; or
- (iii) apply to non-residents or residents in order to prevent the avoidance or evasion of taxes, including compliance measures; or
- (iv) apply to consumers of services supplied in or from the territory of another Party in order to ensure the imposition or collection of taxes on such consumers derived from sources in the Party's territory; or
- (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 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 laws and regulations of the Party taking the measure.

- (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) prevent a Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

ARTICLE 3.18

Schedules of Specific Commitments

1. Each Party shall set out in a schedule the specific commitments it undertakes under Articles 3.4 (Market Access), 3.5 (National Treatment) and 3.6 (Additional Comments). 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 3.6 (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 Articles 3.4 (Market Access) and 3.5 (National Treatment) shall be inscribed in the column relating to Article 3.4 (Market Access). The inscription will be considered to provide a condition or qualification to Article 3.5 (National Treatment).

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

ARTICLE 3.19

Modification of Schedules

1. Upon written request of a Party, the Parties shall hold consultations to consider any modification or withdrawal of a specific commitment in the requesting Party's Schedule of Specific Commitments. The consultations shall be held within three months from the date of the request.

2. In the consultations, the Parties shall aim to ensure that a general level of mutually advantageous commitments no less favourable to trade than that provided for in the Schedule of Specific Commitments prior to such consultations is maintained. Modifications of Schedules of Specific Commitments are subject to the procedures set out in Articles 10.1 (Joint Committee) and 12.2 (Amendments).

ARTICLE 3.20

Review

With the objective of further liberalising trade in services between them the Parties shall review at least every three 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 five years from the date of entry into force of this Agreement.

ARTICLE 3.21

Annexes

The following Annexes form an integral part of this Chapter:

- Annex VIII (Lists of MFN-Exemptions);
- Annex IX (Movement of Natural Persons Supplying Services);
- Annex X (Recognition of Qualifications of Service Suppliers);
- Annex XI (Recognition of Certification of Competency and Training of Seafarers for Service on Board Vessels Registered in Switzerland);
- Annex XII (Schedules of Specific Commitments);
- Annex XIII (Telecommunications Services);
- Annex XIV (Financial Services); and
- Annex XV (Tourism and Travel Services).