

CHAPTER 8

SERVICES

Article 8.1: General Undertaking

The Parties undertake to expand trade in services on a mutually advantageous basis, under conditions of transparency and progressive liberalisation through successive reviews, with the aim of securing an overall balance of rights and obligations, while recognising the rights of both Parties to regulate, and to introduce new regulations, giving due respect to national policy objectives including where these reflect local circumstances.

Article 8.2: Scope

1. This Chapter shall apply to measures by Parties affecting trade in services.
2. New services, including new financial services, shall be considered for possible incorporation into this Agreement at future reviews held in accordance with Article 15.4 (Review), or at the request of either Party immediately. The supply of services which are not technically or technologically feasible when this Agreement comes into force shall, when they become feasible, also be considered for possible incorporation at future reviews or at the request of either Party immediately.
3. In financial services, notwithstanding any other provisions of this Agreement, a Party shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of this Agreement, they shall not be used as a means of avoiding that Party's commitments or obligations hereunder.
4. Government procurement of services shall be governed by Chapter 10 (Government Procurement).

Article 8.3: Definitions

For the purposes of this Chapter:

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

- (c) **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 those 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;
- (d) **commercial presence** means any type of business or professional establishment, including through
 - (i) the constitution, acquisition or maintenance of a legal 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;
- (e) **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 of commitments;
 - (ii) otherwise, the whole of that service sector, including all of its subsectors;
- (f) **service supplier** means any person that supplies a service;¹
- (g) **service consumer** means any person that receives or uses a service;
- (h) **service of the other Party** means a service which is supplied:
 - (i) from or in the territory 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 that other Party which supplies the service through the operation of a vessel or its use in whole or in part; or

¹ Where the service is not supplied directly by a legal person but through other forms of commercial presence such as a branch or a representative office, the service supplier (i.e. the legal person) shall, nonetheless, through such presence be accorded the treatment provided for service suppliers under the Agreement. Such treatment shall be extended to the presence through which the service is supplied and need not be extended to any other parts of the supplier located outside the territory where the service is supplied.

- (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;
- (i) **person** means either a natural person or a legal person;
- (j) **natural person of the other Party** means a natural person who resides in the territory of that other Party or elsewhere and who under the law of that other Party:
 - (i) is a national of that other Party; or
 - (ii) has the right of permanent residence in that other Party, in the case of a Party which accords substantially the same treatment to its permanent residents as it does to its nationals in respect of measures affecting trade in services, provided that that Party is not obligated to accord to such permanent residents treatment more favourable than would be accorded by the other Party to such permanent residents;
- (k) **legal person** means any legal entity duly constituted or otherwise organized 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;
- (l) **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;
- (m) **financial service supplier** means any natural or legal person of a Party wishing to supply or supplying financial services but does not include a public entity. **Public entity** means:
 - (i) a government, central bank or a monetary authority of a Party or an entity owned or controlled by a Party that is principally engaged in carrying out governmental functions or activities for governmental purposes, not including an entity principally engaged in supplying financial services on commercial terms; or
 - (ii) a private entity, performing functions normally performed by a central bank or monetary authority when exercising those functions;
- (n) **trade in services** means the supply of a service:
 - (i) from the territory of one Party into the territory of the other Party (cross border mode);

- (ii) in the territory of one Party to the service consumer of the other Party (consumption abroad mode);
 - (iii) by a service supplier of one Party, through commercial presence in the territory of the other Party (commercial presence mode);
 - (iv) by a service supplier of one Party, through presence of natural persons of that Party in the territory of the other Party (presence of natural persons mode);
- (o) **measures by Parties** means measures taken by:
- (i) central, regional or local governments and authorities; and
 - (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;
- (p) **services** includes any service in any sector except services supplied in the exercise of governmental authority;
- (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 services suppliers;
- (r) in the case of financial services, **services supplied in the exercise of governmental authority** means the following:
- (i) activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies;
 - (ii) activities forming part of a statutory system of social security or public retirement plans; and
 - (iii) other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the Government.

If a Party allows any of the activities referred to in subparagraph (ii) or subparagraph (iii) to be conducted by its financial service suppliers in competition with a public entity or a financial service supplier, “services” shall include such activities; and

- (s) **new financial services** means a service of a financial nature, including services related to existing and new products or the manner in which a product is delivered, that is not supplied by any financial service supplier in the territory of one Party but is supplied in the territory of the other Party.

Article 8.4: Market Access

1. With respect to market access through the modes of supply identified in Article 8.3.1(n), 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 of commitments.²

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 of commitments, are defined as:

- (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
- (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
- (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;³
- (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 8.5: National Treatment

1. In the sectors in its schedule of commitments, and subject to any conditions and qualifications set out therein, each Party shall accord to services and service suppliers of the

² 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 8.3.1(n)(i) 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 Article 8.3.1(n)(iii), it is thereby committed to allow related transfers of capital into its territory.

³ This subparagraph does not cover measures of a Party which limit inputs for the supply of services.

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. 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 one Party compared to the like service or service suppliers of the other Party.

4. 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.

Article 8.6: Additional Commitments

The Parties may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Article 8.4 and Article 8.5, including those regarding qualifications, standards or licensing matters. Such commitments shall be entered in a Party's schedule of commitments.

Article 8.7: Specific Commitments

1. Each Party has set out an initial schedule of the specific commitments it undertakes in accordance with the objective of liberalisation of trade in most services by the date of entry into force of this Agreement.

2. Each Party's schedule of commitments shall clearly specify:

- (a) the sectors/subsectors in which commitments are undertaken;
- (b) any terms, limitations and conditions on market access;
- (c) any conditions and qualifications on national treatment; and
- (d) any additional commitments.

3. The schedules of commitments shall be annexed to this Agreement as Annex 8.1 and shall form an integral part thereof.

4. As part of the reviews of this Agreement provided for in Article 15.4 (Review), the Parties undertake to review their schedules of commitments and progressively to expand these initial commitments as well as expand market access or national treatment between them in accordance with the APEC objective of free and open trade in services.

5. Trade in a particular number of services sectors and measures affecting trade in services may not be fully liberalised by 1 January 2010. When it appears this shall be the case, the Parties agree to meet no later than 1 January 2008 to identify a list of such services sectors and measures. This list shall be set out in an exchange of letters between the Parties. The Parties shall consult on a mutually acceptable solution for these sectors and measures and such consultations shall continue for as long as it takes to achieve that solution. The solution may include agreement on a longer timeframe for liberalisation. This provision shall continue to apply after 1 January 2010.

6. The reviews referred to in paragraph 4 shall also examine limitations on market access or national treatment entered in the Parties' schedules of commitments in accordance with the objective identified in that paragraph.

7. A Party may, upon reasonable notice of at least three months, propose a modification of a commitment in its schedule of commitments by written notification to the other Party. In proposing such a modification, the Party concerned shall also propose a means by which the overall level of commitments undertaken by that Party under the Agreement shall be maintained. On receiving such written notification, the other Party may request consultations regarding the proposed modification aimed at ensuring an overall balance of benefits under the Agreement is maintained, and if such consultations fail to achieve a satisfactory solution, the matter shall be dealt with in accordance with Chapter 14 (Dispute Settlement).

Article 8.8: 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. The Parties shall jointly review the results of the negotiations on disciplines for certain regulations, including qualification requirements and procedures, technical standards and licensing requirements, 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.

3. Until the incorporation of disciplines developed pursuant to paragraph 2, in sectors where a Party has undertaken specific commitments, and subject to any terms, limitations, conditions or qualifications set out therein, a Party shall not apply licensing and qualification

requirements and technical standards that nullify or impair such specific commitments in a manner which:

- (a) does not comply with the criteria outlined in paragraph 2(a), paragraph 2(b) or paragraph 2(c); and
- (b) could not reasonably have been expected of that Party at the time the specific commitments in those sectors were made.

4. Whenever a domestic regulation is prepared, adopted and applied in accordance with international standards applied by both Parties, there shall be a rebuttable presumption that it complies with the provisions of this Article.

Article 8.9: Professional Qualifications and Registration

1. With a view to ensuring that measures relating to professional⁴ qualification and registration requirements and procedures do not constitute unnecessary barriers to trade in services between them, the Parties agree to have identified by the date of entry into force of this Agreement priority areas to address with respect to the recognition of professional qualifications or registration. In identifying initial priority areas, the Parties agree to focus on sectors where specific commitments have been undertaken, and subject to the terms, limitations, conditions, or qualifications set out therein. Thereafter the Parties shall endeavour to consider sectors where no specific commitments have been undertaken.

2. The Parties agree to facilitate the establishment of dialogue between experts in these priority areas with a view to the achievement of early outcomes on recognition of professional qualifications or registration in these areas.

3. Such recognition may be achieved through recognition of regulatory outcomes, recognition of professional qualifications awarded by one Party as a means of complying with the regulatory requirements of the other Party (whether accorded unilaterally or by

⁴Illustrative list of professions:

Professions include, but are not limited to:

Lawyers, legal executives, conveyancers; accountants, auditors, book keepers, tax agents; architects; landscape architects; engineers; doctors; dentists, dental technicians; veterinarians and veterinary nurses; midwives, nurses, physiotherapists and paramedical personnel, including acupuncturists, chiropractors, homeopaths, medical laboratory scientists and technicians, nutritionists, optometrists and dispensing opticians, pharmacists, psychologists, occupational therapists, radiographers, speech therapists; information technology designers, programmers, analysts and technicians; statisticians, surveyors, geologists, geophysicists, cartographers; management consultants; scientific and technical consultants and researchers; educationalists, at the following levels: preschool, primary, secondary, tertiary, adult and other; environmental services consultants; financial services consultants, actuaries and economists; hospital and residential health facility managers and consultants; airline pilots.

Neither Party is precluded from raising any service supplier's occupation under this Article.

mutual arrangement) or by other recognition arrangements which might be agreed between the Parties.

4. The priority areas for further work on professional recognition requirements and the recognition outcomes achieved on initial priorities shall be reviewed as part of the reviews of this Agreement provided for in Article 15.2 (Meetings of the Joint Commission).

Article 8.10: Subsidies

1. Except as provided for in this Article, subsidies related to trade in services shall not be covered under this Chapter.

2. The Parties shall review the issue of disciplines on subsidies related to trade in services in the context of the reviews of this Agreement provided for in Article 15.4 (Review). They shall pay particular attention to any disciplines agreed under Article XV of GATS with a view to their incorporation into this Agreement.

3. The Parties shall consult on appropriate steps in regard to subsidies related to trade in services where any subsidies issues arise in bilateral services trade under this Agreement.

Article 8.11: Monopolies

In sectors where specific commitments have been made, each Party shall ensure that its commitments relating to market access and national treatment pursuant to Articles 8.4 and Article 8.5 are not adversely affected by the actions of a monopoly supplier of a service in its territory.

Article 8.12: Extension of Benefits

A service supplier of a non-Party that is a legal person constituted under the laws of a Party shall be entitled to treatment granted under this Chapter provided that it engages in substantive business operations in the territory of one or both Parties.