

CHAPTER 11 TRADE IN SERVICES

ARTICLE 11.1: SCOPE AND COVERAGE

1. This Chapter applies to measures adopted or maintained by Parties affecting trade in services. It applies to all services sectors, except as otherwise specified in this Chapter.
2. For the purpose of this Chapter, “measures by Parties” means measures adopted or maintained 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.
3. In respect of air transport services, this Chapter shall not apply to measures affecting air traffic rights as well as 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 contained in paragraph 6 of the Annex on Air Transport Services of the GATS shall apply for the purpose of this Chapter.
4. Nothing in this Chapter shall be construed to impose any obligation with respect to government procurement, which is subject to Chapter 9 (Government Procurement).

ARTICLE 11.2: DEFINITIONS

For the purpose of this Chapter:

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;

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;

direct taxes comprises all taxes on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of property, taxes on estates, inheritances and gifts, and taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation;

juridical person of the other Party means a juridical person which is either:

1. constituted or otherwise organized under the law of that other Party, and is engaged in substantive business operations in the territory of:

(a) either Party; or

(b) any Member of the WTO and is owned or controlled by natural persons of that other Party or by juridical persons that meet all the conditions of subparagraph 1(a);

2. a subsidiary or a branch in non-Parties, owned or controlled by a juridical person constituted or otherwise organized under the law of the other Party, which is engaged in substantive business operations in the territory of that other Party; or

3. in the case of the supply of a service through commercial presence, owned or controlled by:

(a) natural persons of that other Party; or

(b) juridical persons of that other Party identified under subparagraph (1);

a juridical person is:

1. “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;

2. “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;

3. “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;

measures by a Party affecting trade in services includes measures in respect of:

1. the purchase, payment or use of a service;

2. the access to and the use of services, in connection with the supply of a service, which are required by that Party to be offered to the public generally;

3. 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 authorised or established formally or in effect by that Party as the sole supplier of that service;

natural person of the other Party means a natural person who, under the legislation of that other Party, is:

1. a national of that other Party who resides in the territory of any WTO Member; or

2. a permanent resident of that other Party who resides in the territory of that other Party, if that other Party accords substantially the same treatment to its permanent residents as to its nationals in respect of measures affecting trade in services. For the purpose of the supply of a service through presence of natural persons (Mode 4), this definition covers a permanent resident of that other Party who resides in the territory of the first Party or in the territory of any WTO Member;

sector of a service means:

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

services includes any service in any sector except services supplied in the exercise of governmental authority;

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

service of a Party means a service which is supplied:

1. from or in the territory of a Party, or in the case of maritime transport, by a vessel registered under the laws of a Party, or by a person of that Party which supplies the service through the operation of a vessel and/or its use in whole or in part; or
2. 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;

service supplier means any person that supplies, or seeks to supply, a service¹;

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:

1. from the territory of one Party into the territory of the other Party;
2. in the territory of one Party to the service consumer of the other Party;
3. by a service supplier of one Party, through commercial presence in the territory of the other Party;
4. by a service supplier of one Party, through presence of natural persons of that Party in the territory of the other Party;

¹ 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.

ARTICLE 11.3: MOST-FAVORED-NATION TREATMENT

1. Except as provided for in its List of MFN Exemptions contained in Annex 11-A a Party shall accord immediately and unconditionally, in respect of all measures affecting the supply of services, to services and service suppliers of the other Party treatment no less favourable than the treatment it accords to like services and service suppliers of any non-Party.
2. Treatment granted under other agreements concluded by one of the Parties and notified under Article V or Article V *bis* of the GATS, as well as treatment granted in accordance with Article VII of the GATS, shall not be subject to paragraph 1.
3. If a Party enters into an agreement notified under Article V or Article V *bis* of the GATS, it shall upon request from the other Party afford adequate opportunity to that Party to negotiate the benefits granted therein.
4. The provisions of this Chapter shall not be so construed as to prevent any Party from conferring or according advantages to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed.

ARTICLE 11.4: MARKET ACCESS

1. With respect to market access through the modes of supply identified in the definition of "trade in services" contained in Article 11.2 each Party shall accord services and service suppliers of the other Party treatment no less favorable than that provided for under the terms, limitations and conditions agreed and specified in its schedule.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 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 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

² To the extent that a market-access commitment is undertaken by a Party in its Schedule of Commitments, and where the cross-border movement of capital is an essential part of a service supplied through the mode of supply referred to in the definition of "trade in services" paragraph 1 contained in Article 11.2 that Party is hereby committed to allow such movement of capital. To the extent that a market-access commitment is undertaken by a Party in its Schedule of Commitments, and where a service is supplied through the mode of supply referred to in the definition of "trade in services" paragraph 3 contained in Article 11.2 that Party is hereby 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.

- (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 11.5: 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 favorable than that it accords to its own like services and service suppliers.⁴

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 favorable 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 11.6: ADDITIONAL COMMITMENTS

Parties may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles 11.4 or 11.5, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Party's schedule.

ARTICLE 11.7: 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 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

⁴ 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.

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. Where authorisation is required by a Party for the supply of a service, in sectors where specific commitments are undertaken, 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 aim to ensure that measures relating to qualification requirements and procedures, technical standards, and licensing requirements:

- (a) are based on objective and transparent criteria, such as competence and the ability to supply the service;
- (b) are not more burdensome than necessary to ensure the quality of the service; and
- (c) in the case of licensing procedures, are not in themselves a restriction on the supply of the service.

5. In determining whether a Party is in conformity with the obligation under paragraph 4, account shall be taken of international standards of relevant international organizations⁵ applied by that Party.

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

7. The Parties shall jointly review the results of the negotiations on disciplines on domestic regulation, pursuant to Article VI.4 of the GATS, with a view of incorporating them into this Chapter.

ARTICLE 11.8: RECOGNITION

1. For the purpose of the fulfilment of its relevant standards or criteria for the authorization, licensing or certification of service suppliers, each Party shall give due consideration, as appropriate, to any requests by the other Party to recognize 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 recognizes, 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

⁵ For greater certainty, the term "relevant international organizations" refers to international bodies whose membership is open to the relevant bodies of both Parties, and which have the characteristics of transparency in their behavior, impartiality and consensus in adopting regulations.

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. The professional bodies from both Parties may negotiate agreements for mutual recognition of education, or experience obtained, requirements met or licences or certifications granted. Upon a request being made in writing by a Party to the other Party, the receiving Party shall transmit the request to its relevant professional body. The Parties shall report periodically to the Joint Committee on progress and on impediments experienced. Any delay or failure by these professional bodies to negotiate or to reach and conclude an agreement on the details of such arrangements shall not be regarded as a breach of a Party's obligations under this paragraph and shall not be subject to Chapter 12 (Dispute Settlement).

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 11.9: 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 as inscribed in the Parties' respective schedules, 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 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.⁶

ARTICLE 11.10: 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.

⁶ The sole fact of requiring a visa for natural persons shall not be regarded as nullifying or impairing benefits under a specific commitment.

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

ARTICLE 11.11: 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 11.3 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) authorizes or establishes a small number of service suppliers; and
- (b) substantially prevents competition among those suppliers in its territory.

ARTICLE 11.12: BUSINESS PRACTICES

1. Parties recognize that certain business practices of service suppliers, other than those falling under Article 11.11, may restrain competition and thereby restrict trade in services.

2. Each Party shall, at the request of any 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 co-operate 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 11.13: PAYMENTS AND TRANSFERS

1. Except under the circumstances envisaged in Article 11.14, a Party shall not apply restrictions on international transfers and payments for current transactions with the other Party, relating to its specific commitments.

2. Nothing in this Chapter shall affect the rights and obligations of the Parties under the IMF Agreement, including the use of exchange actions which are in conformity with that Agreement, provided that a Party shall not impose restrictions on capital transactions inconsistently with its specific commitments regarding such transactions, except under Article 11.14 or at the request of the International Monetary Fund.

ARTICLE 11.14: RESTRICTIONS TO SAFEGUARD THE BALANCE-OF-PAYMENTS

1. The Parties shall endeavor to avoid the imposition of restrictions to safeguard the balance of payments.
2. The rights and obligations of the Parties in respect of such restrictions shall be governed by paragraphs 1 to 3 of Article XII of the GATS, which are hereby incorporated into and made part of this Chapter.
3. A Party adopting or maintaining such restrictions shall promptly notify the Joint Committee thereof.

ARTICLE 11.15: SCHEDULES OF SPECIFIC COMMITMENTS

1. Each Party shall set out in a schedule the specific commitments it undertakes under Articles 11.4, 11.5, and 11.6. 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 11.6; 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 both Articles 11.4 and 11.5 are inscribed in the column relating to Article 11.4. In this case, the inscription is considered to provide a condition or qualification to Article 11.5 as well.

ARTICLE 11.16: REVIEW

1. With the objective of further liberalizing trade in services between them, the Parties shall review their schedules of specific commitments and their Lists of MFN Exemptions at least every three years to provide for a reduction or elimination of substantially all remaining discrimination between the Parties with regard to trade in services covered in this Chapter on a mutually advantageous basis and ensuring an overall balance of rights and obligations. The first such review shall take place not later than two years after the entry into force of this Agreement.
2. The Parties shall jointly review the negotiations provided for in paragraph 4 of Article VI and paragraph 1 of Article XV of the GATS and incorporate any results of such negotiations, as appropriate, into this Chapter.

ARTICLE 11.17: ANNEXES

The following Annexes are attached to this Chapter:

Annex 11-A (Lists of MFN Exemptions);

Annex 11-B (Movement of Natural Persons Supplying Services);

Annex 11-C (Financial Services);

Annex 11-D (Telecommunications Services); and

Annex 11-E (Schedules of Specific Commitments).