

CHAPTER 2

CROSS-BORDER TRADE IN SERVICES

Article 2.1

Definitions

For purposes of this Chapter:

"cross-border trade in services" or "cross-border supply of services" means the supply of a service:

- (a) from the territory of one Party into the territory of the other Party;
- (b) in the territory of one Party by a person of that Party to a person of the other Party; or
- (c) by a national of a Party in the territory of the other Party;

but does not include the supply of a service in the territory of a Party by an investor of the other Party or a covered investment as defined in Article 3. I (Definitions); and

"service supplier" means a person of a Party that seeks to supply or supplies a service,¹

Article 2.2

Scope and Coverage

1. This Chapter shall apply to measures by a Party affecting cross-border trade in services by service suppliers of the other Party. Such measures include measures affecting:

- (a) the production, distribution, marketing, sale and delivery of a service;
- (b) the purchase or use of, or payment for, a service;

¹ The Parties understand that "seeks to supply or supplies a service" has the same meaning as "supplies a service" as used in paragraph (g) of GATS Article XXVIII. The Parties understand that for the purposes of Articles 2.3 (Most-Favoured-Nation Treatment), 2.4 (National Treatment) and 2.5 (Market Access), "service suppliers" has the same meaning as "services and service suppliers" as used in GATS Articles II, XVI, and XVII.

(c) the access to and use of distribution, transport, or telecommunications networks and services in connection with the supply of a service; and

(d) the provision of a bond or other form of financial security as a condition for the supply of a service.

2. Articles 2.5 (Market Access) and 2.8 (Domestic Regulation) also apply to measures by a Party affecting the supply of a service in its territory by an investor of the other Party or by a covered investment as defined in

Article 3.1 (Definitions).²

3. This Chapter shall not apply to:

(a) government procurement;

(b) air services, including domestic and international air transportation services, whether scheduled or non-scheduled, or related services in support of air services;

(c) subsidies or grants provided by a Party, including government-supported loans, guarantees and insurance; or any conditions attached to the receipt or continued receipt of such subsidies or grants, whether or not such subsidies or grants are offered exclusively to domestic services, service consumers or service suppliers; or

(d) services supplied in the exercise of governmental authority within the territory of each Party.

4. For the purposes 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.

5. This Chapter does not impose any obligation on a Party with respect to a national of the other Party seeking access to its employment

² The Parties understand that nothing in this Chapter, including this paragraph, is subject to investor-state dispute settlement pursuant to Section B (Investor-State Dispute Settlement) of Chapter 3 (Investment).

market, or employed on a permanent basis in its territory, and does not confer any right on that national with respect to that access or employment, nor shall it apply to measures regarding citizenship or residence on a permanent basis.

6. Nothing in this Chapter shall prevent a Party from applying measures to regulate the entry of natural persons of the other 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 the other Party under this Chapter³.

7. This Chapter shall not apply to financial services⁴ and telecommunications⁵. The Parties reaffirm their commitments under GATS with respect to financial services and telecommunications.

Article 2.3

Most-Favoured-Nation Treatment

Each Party shall accord to service suppliers of the other Party treatment no less favourable than that it accords, in like circumstances, to service suppliers of a non-Party.

³ The sole fact of requiring a visa for natural persons of certain countries and not for those of others shall not be regarded as nullifying or impairing benefits under this Agreement.

⁴ For the purposes of this paragraph, "financial services" is as defined in subparagraph 5(a) of the Annex on Financial Services in GATS.

⁵ For the purposes of this paragraph, "telecommunications" is as defined in subparagraph 3(a) of the Annex on Telecommunications in GATS.

2.4

National Treatment

Each Party shall accord to service suppliers of the other Party treatment no less favourable than that it accords, in like circumstances, to its own service suppliers.

Article 2.5

Market Access

A Party shall not adopt or maintain, either on the basis of a regional subdivision or on the basis of its entire territory, measures that:

- (a) limit the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirement of an economic needs test;
- (b) limit the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
- (c) limit 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) limit 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; or

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

- (e) restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service.

Article 2.6

Local Presence

A Party shall not require a service supplier of the other Party to establish or maintain a representative office or any form of enterprise, or to be resident, in its territory as a condition for the cross-border supply of a service.

Article 2.7

Non-Conforming Measures

1. Articles 2.3 (Most-Favoured-Nation Treatment), 2.4 (National Treatment), 2.5 (Market Access), and 2.6 (Local Presence) shall not apply to:

- (a) any existing non-conforming measure that is maintained by a Party as set out by that Party in its Schedule to Annex I;
- (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
- (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 2.3 (Most Favoured-Nation Treatment), 2.4 (National Treatment). 2.5 (Market Access), and 2.6 (Local Presence).

2. Articles 2.3 (Most-Favoured-Nation Treatment), 2.4 (National Treatment), 2.5 (Market Access), and 2.6 (Local Presence) shall not apply

to any measure that a Party adopts or maintains with respect to sectors, subsectors or activities as set out in its Schedule to Annex II.

Article 2.8

Domestic Regulation

1. Each Party shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.
2. Where a Party requires authorisation for the supply of a service, the Party's competent authorities shall, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the competent authorities of the Party shall provide, without undue delay, information concerning the status of the application. This obligation shall not apply to authorisation requirements that are within the scope of paragraph 2 of Article 2.7 (Non-Conforming Measures).
3. With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, each Party shall endeavour to ensure, as appropriate for individual sectors, that such measures are:
 - (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; and
 - (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

4. If the results of the negotiations related to paragraph 4 of Article VI of GATS (or the results of any similar negotiations undertaken in other multilateral fora in which both Parties participate) enter into effect, this Article shall be amended, as appropriate, after consultations between the Parties, to bring those results into effect under this Agreement.

Article 2.9

Recognition

1. For the purposes of the fulfilment, in whole or in part, of a Party's standards or criteria for the authorisation, licensing or certification of service suppliers, and subject to the requirements of paragraph 4, it may recognise the education or experience obtained, requirements met, or licences or certifications granted in a particular country, including the other Party or non-Parties. Such recognition, which may be achieved through harmonisation or otherwise, may be based upon an agreement or arrangement with the Party or non-Party concerned 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 2.3 (Most-Favoured-Nation Treatment) 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 1, whether existing or future, shall afford adequate opportunity to the other Party, if the other Party is interested, 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 to 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 services suppliers, or a disguised restriction on trade in services.

Article 2.10

Monopolies and Exclusive Service Suppliers

1. Each Party shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Party's obligations under Articles 2.3 (Most-Favoured-Nation Treatment), 2.4 (National Treatment), 2.5 (Market Access), and 2.6 (Local Presence).

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 obligations under Articles 2.3 (Most-Favoured-Nation Treatment), 2.4 (National Treatment), 2.5 (Market Access) and 2.6 (Local Presence), 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 paragraphs 1 or 2, it may request the other Party establishing, maintaining or authorising such supplier to provide specific information concerning the relevant operations.

4. 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 2.11

Safeguard Measures

Neither Party shall take safeguard action against services and service suppliers of the other Party from the date of entry into force of this Agreement. Neither Party shall initiate or continue any safeguard investigations in respect of services and service suppliers of the other Party.

Article 2.12

Transfers and Payments

1. Each Party shall permit all transfers and payments relating to the cross-border supply of services to be made freely and without delay into and out of its territory.

2. Each Party shall permit such transfers and payments relating to the cross-border supply of services to be made in a freely usable currency at the market rate of exchange prevailing on the date of transfer.

3. Notwithstanding paragraphs 1 and 2, a Party may prevent or delay a transfer or payment through the equitable, non-discriminatory and good faith application of its laws relating to:

- (a) bankruptcy, insolvency or the protection of the rights of creditors;
- (b) issuing, trading or dealing in securities, futures, options, or derivatives;
- (c) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;
- (d) criminal or penal offences;
- (e) ensuring compliance with orders or judgments in judicial or administrative proceedings; or
- (f) social security, public retirement or compulsory savings schemes.

4. Nothing in this Chapter shall affect the rights and obligations of the members of the IMF under its Articles of Agreement, including the use of exchange actions which are in conformity with the said Articles of Agreement, provided that a Party shall not impose restrictions on any capital transactions inconsistently with its obligations under this Chapter regarding such transactions, except under Article 6.7 (Restrictions to Safeguard the Balance of Payments) or at the request of the IMF.

Article 2.13

Denial of Benefits

A Party may deny the benefits of this Chapter to a service supplier of the other Party if the service is being supplied by an enterprise that has no substantial business activities in the territory of the other Party and it is owned or controlled by persons of a non-Party or the denying Party.

Article 2.14

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 against the other Party, or a disguised restriction on trade in services, nothing in this Chapter shall be construed to prevent the adoption or enforcement by a Party of measures:

- (a) necessary to protect public morals or to maintain public order;⁷
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Chapter including those relating to:
 - (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
 - (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
 - (iii) safety;
- (d) inconsistent with Article 2.4 (National Treatment), provided that the difference in treatment is aimed at ensuring the equitable or effective⁸ imposition or collection of direct taxes in respect of services or service suppliers of the other Party.

⁷ 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,

⁸ 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

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- (iv) apply to consumers of services supplied in or from the territory of the other Party in order to ensure the imposition or collection of taxes on such consumers derived from sources in the Party's territory; 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 Article 2.14 (General Exceptions) and in this footnote are determined according to tax definitions and concepts, or equivalent or similar definitions and concepts, under the domestic law of the Party taking the measure.