

CHAPTER 9 CROSS-BORDER TRADE IN SERVICES

ARTICLE 9.1 : DEFINITIONS

For the purposes of this Chapter:

cross-border provision of services or **cross-border trade in services** means the provision of a service:

- (a) from the territory of a Party into the territory of the other Party;
- (b) in the territory of a 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 provision of a service in the territory of a Party by an investment as defined in Article 10.1;

financial services is as defined in Chapter 12 (Financial Services);

professional services means services, the provision of which requires specialised post-secondary education, or equivalent training or experience, and for which the right to practice is granted or restricted by a Party, but does not include services provided by trades-persons or vessel and aircraft crew members; and

service provider of a Party means a person of a Party that seeks to provide or provides a service⁹⁻¹.

ARTICLE 9.2 : SCOPE AND COVERAGE

⁹⁻¹ The Parties understand that “seeks to provide or provides a service” has the same meaning as supplies a service as used in GATS Article XXVIII(g).

1. This Chapter applies to measures adopted or maintained by a Party affecting cross-border trade in services by service providers of the other Party, including measures with respect to:

- (a) the production, distribution, marketing, sale and delivery of a service;
- (b) the purchase or use of, or payment for, a service;
- (c) the access to and use of distribution and transportation systems in connection with the provision of a service;
- (d) the presence in its territory of a service provider of the other Party; and
- (e) the provision of a bond or other form of financial security as a condition for the provision of a service.

2. For the purposes of this Chapter, measures adopted or maintained by a Party mean measures adopted or maintained by central, or local governments and authorities or by non-governmental bodies in the exercise of any regulatory, administrative or other governmental authority delegated by central, or local governments and authorities.

3. This Chapter does not apply to:

- (a) measures adopted or maintained by a Party to the extent that they are covered by Chapter 12 (Financial Services) unless specified otherwise therein;
- (b) government procurement which shall be governed by Chapter 16 (Government Procurement);
- (c) subsidies or grants, including government-supported loans, guarantees and insurance; or to 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;
- (d) services provided in the exercise of governmental authority (such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care), provided that such services are supplied neither on a commercial basis, nor in competition with one or more service providers; and
- (e) transportation and non-transportation air services, including domestic and international services, whether scheduled or non-scheduled, and related services in support of air services⁹⁻², other than:

⁹⁻² The Parties understand that ground handling services are part of related services in support of air

- (i) aircraft repair and maintenance services,
- (ii) the selling and marketing of air transport services; and
- (iii) computerised reservation system services.

4. Nothing in this Chapter shall be construed to impose any obligation on a Party with respect to a national of the other Party seeking access to its employment market, or employed on a permanent basis in its territory, or to confer any right on that national with respect to such access or employment.

5. Article 9.11 shall also apply to measures by a Party affecting the supply of a service in its territory by investors of the other Party or investments of investors of the other Party as defined in Article 10.1⁹⁻³.

ARTICLE 9.3 : NATIONAL TREATMENT

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

2. The treatment to be accorded to a Party under paragraph 1 means, with respect to measures adopted or maintained by a local government, treatment no less favourable than the most favourable treatment accorded, in like circumstances, by that local government to service providers of the Party of which it forms a part, including itself.

ARTICLE 9.4 : LOCAL PRESENCE

Neither Party shall require a service provider 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 provision of a service.

services.

⁹⁻³ The Parties understand that nothing in this Chapter, including this paragraph, is subject to investor-state dispute settlement pursuant to Section C of Chapter 10 (Investment).

ARTICLE 9.5 : MARKET ACCESS

Neither Party shall adopt or maintain, either on the basis of a regional subdivision or on the basis of its entire territory, measures that:

- (a) limit:
 - (i) the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirement of an economic needs test;
 - (ii) the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
 - (iii) the total number of service operations or the total quantity of services output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;⁹⁻⁴
 - (iv) 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; and
- (b) restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service.

ARTICLE 9.6 : NON-CONFORMING MEASURES

1. Articles 9.3, 9.4 and 9.5 do not apply to:
 - (a) any existing non-conforming measure that is maintained by a Party as set out in its Schedule to Annex 9A; or
 - (b) the continuation or prompt renewal of any non-conforming measure referred to in paragraph (a); or
 - (c) an amendment to any non-conforming measure referred to in paragraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 9.3 , 9.4 and 9.5 .

⁹⁻⁴ This paragraph does not cover measures of a Party which limits inputs for the supply of services.

2. Articles 9.3, 9.4 and 9.5 do 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 9B.

3. Article 9.11 shall not apply to:

- (a) any existing non-conforming measure that is maintained by a Party as set out in Annex 9A; or
- (b) any existing or new measure that a Party adopts or maintains with respect to sectors, subsectors or activities as set out in Annex 9B.

ARTICLE 9.7 : ADDITIONAL COMMITMENTS

The Parties may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Article 9.6, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Party's Schedule of specific commitments in Annex 9C.

ARTICLE 9.8 : FUTURE LIBERALISATION

1. The Parties will, through future negotiations, to be scheduled pursuant to the Article 22.1, further deepen liberalisation with a view to reaching the reduction or elimination of the remaining restrictions scheduled in conformity with Article 9.6 and to adding additional commitments to Article 9.7, on a mutually advantageous basis and at ensuring an overall balance of rights and obligations.

2. If a Party makes any further liberalisation of the remaining restrictions scheduled in conformity with Article 9.6 or any additional commitments scheduled in conformity with Article 9.7 by an agreement with a non-Party, it shall afford adequate opportunity to the other Party to negotiate treatment granted therein on a mutually advantageous basis and with a view to securing an overall balance of rights and obligations.

ARTICLE 9.9 : PROCEDURES

At the first or subsequent review of this Agreement pursuant to Article 22.1, the Parties shall establish procedures for:

- (a) a Party to notify and include in its relevant Schedule:
 - (i) additional commitments pursuant to Article 9.7; and
 - (ii) amendments of measures referred to in paragraph 1(c) of Article 9.6 ;
and
- (b) consultations on non-conforming measures or additional commitments with a view to further liberalisation.

ARTICLE 9.10 : RECOGNITION

1. For the purposes of the fulfillment of, in whole or in part, its standards or criteria for the authorisation, licensing or certification of services suppliers, and subject to the requirements in paragraph 3, a Party may recognise the education or experience obtained, requirements met, or licenses 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 between the Parties, or may be accorded autonomously.

2. 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 for 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 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.

3. 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.

4. Annex 9D applies to measures adopted or maintained by a Party relating to the licensing or certification of professional service providers.

ARTICLE 9.11 : 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. 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 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. Paragraph 2 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.

4. Where authorisation is required for the supply of a service, the competent authorities of a Party 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.

5. 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.

6. Pending the incorporation of disciplines pursuant to paragraph 5, a Party shall not apply licensing and qualification requirements and technical standards that nullify or impair its obligations under this Chapter in a manner which:

- (a) does not comply with the criteria outlined in paragraphs 5(a), (b) or (c); and
- (b) could not reasonably have been expected of that Party at the time the obligations were undertaken.

7. In determining whether a Party is in conformity with its obligations under paragraph 6, account shall be taken of international standards of relevant international organisations⁹⁻⁵ applied by that Party.

ARTICLE 9.12 : DENIAL OF BENEFITS

Subject to prior notification and consultation in accordance with Article 19.3 and Article 20.4, a Party may deny the benefits of this Chapter to a service provider of the other Party where the Party establishes that the service is being provided by an enterprise that is owned or controlled by persons of a non-Party and that has no substantive business operations in the territory of the other Party.

ARTICLE 9.13 : MONOPOLY 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 the Party's obligations under Articles 9.3 and 9.5.

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 9.3 and 9.5, 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.

⁹⁻⁵ The term "relevant international organisations" refers to international bodies whose membership is open to relevant bodies of both Parties.

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

4. 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 9.14 : MODIFICATION OR ADDITION OF RESERVATIONS

1. By giving three (3) months of written notification to the other Party, a Party may modify or add to its non-conforming measures as set out in Annex 9A and add new sectors, sub-sectors or activities to its reservations set out in Annex 9B. At the request of the other Party, it shall hold consultations with a view to reaching agreement on any necessary adjustment required to maintain the overall balance of commitments undertaken by each Party under this Agreement. If agreement is not reached between the Parties on any necessary adjustment, the matter may be referred to arbitration in accordance with Chapter 20 (Dispute Settlement).

2. Paragraph 1 shall not be construed to prejudice the right of both Parties to maintain any existing measure or adopt new measures consistent with the reservations set out in Annexes 9A and 9B.

3. Within two (2) years after the date of entry into force of this Agreement, a Party may modify or add to its reservations as set out in Annex 9A in respect of any measure inconsistent with Article 9.5 so long as such a measure has been maintained by that Party before the date of the signature of this Agreement.

ARTICLE 9.15 : PAYMENTS AND TRANSFERS

1. Subject to its reservations pursuant to Article 9.6 and except under the circumstances envisaged in Article 9.16, a Party shall not apply restrictions on

international transfers and payments for current transactions.

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 Fund, 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 obligations under this Chapter regarding such transactions, except under Article 9.16, or at request of the Fund.

ARTICLE 9.16 : BALANCE- OF- PAYMENTS EXCEPTION

1. Where a Party is in serious balance of payments and external financial difficulties or threat thereof, it may, in accordance with Articles XI and XII of GATS adopt or maintain restrictions on trade in services on which it has obligations, including on payments or transfers for transactions related to such commitments. Articles XI and XII of GATS is hereby incorporated into and made part of this Agreement.

2. The Party introducing a measure under this Article shall promptly notify the other Party.