

CHAPTER 8

TRADE IN SERVICES

Article 72: Definitions

For the purposes of this Chapter:

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 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;

measure means any measure by a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form;

measures by Parties affecting trade in services include measures in respect of:

- (a) the purchase, payment or use of a service;
- (b) the 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;
- (c) 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 authorized or established formally or in effect by that Party as the sole supplier of that service;

person means either a natural person or a juridical person;

natural person of a Party means:

- (a) for China, a natural person who resides in the territory of either Party, and who under Chinese law is a national of China;
- (b) for Maldives, a natural person who resides in the territory of either Party, and who under Maldivian law is a national of Maldives;

juridical 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;

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

- (a) constituted or otherwise organized under the law of the other Party, and is engaged in substantive business operations in the territory of the other Party;
or
- (b) in the case of the supply of a service through commercial presence, owned or controlled by:
 - (i) natural persons of the other Party; or
 - (ii) juridical persons of the other Party identified under subparagraph (a);

a juridical person is:

- (a) “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;
- (b) “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;
- (c) “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;

sector of a service means:

- (a) with reference to a specific commitment, one or more, or all, subsectors of that service, as specified in a Party’s Schedule;
- (b) otherwise, the whole of that service sector, including all of its subsectors;

services include any services 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 the other Party means a service which is supplied:

- (a) from or in the territory of that other Party, or in case of maritime transport, by a vessel registered under the laws of that other Party, or by a person of that other Party which supplies the service through the operation of a vessel and/or its use in whole or in part; or
- (b) in the case of the supply of a service through commercial presence or through the presence of natural persons, by a service supplier of that other Party;

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;

service supplier means any person that supplies a service¹;

supply of a service includes the production, distribution, marketing, sale and delivery of a service; and

trade in services is defined as 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 to the service consumer of the other Party;
- (c) by a service supplier of one Party, through commercial presence in the territory of the other Party;
- (d) by a service supplier of one Party, through presence of natural persons of a Party in the territory of the other Party;

¹ Where the service is not 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 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 and need not be extended to any other parts of the service supplier located outside the territory where the service is supplied.

Article 73: Scope and Coverage²

1. This Chapter shall apply to measures adopted or maintained by a Party affecting trade in services.
2. In respect of air transport 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 *Annex on Air Transport Services* of GATS. The definitions of paragraph 6 of the *Annex on Air Transport Services* of GATS shall apply and are hereby incorporated and made part of this Agreement, *mutatis mutandis*.
3. Articles 74 and 75 shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.

Article 74: National Treatment

1. In the sectors inscribed in its Schedule of Specific Commitments, and subject to any conditions and qualifications set out therein, a 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.³
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 favorable if it modifies the conditions of competition in favor of services or service suppliers of the Party compared to like service or service suppliers of the other Party.

Article 75: Market Access

1. With respect to market access through the modes of supply identified in the definition of trade in services contained in Article 72, a Party shall accord services

² The Parties agree that any sector or sub-sector or part thereof that is inscribed explicitly in their Schedules of Specific Commitments shall be covered by the provisions of this Chapter, notwithstanding possible interpretations of the sectoral scope defined by this Article.

³ Specific commitments assumed under this Article shall not be construed to require a Party to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers.

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 of Specific Commitments.⁴

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;⁵
- (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 76: Additional Commitments

The Parties may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles 74 or 75, including those regarding qualifications, standards or licensing matters. Such commitments shall be

⁴ If a Party undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph (a) of the definition of trade in services contained in Article 72, 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 subparagraph (c) of the definition of trade in services contained in Article 72, it is thereby committed to allow related transfers of capital into its territory.

⁵ Subparagraph 2(c) does not cover measures of a Party which limit inputs for the supply of services.

inscribed in a Party's Schedule as additional commitments.

Article 77: 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 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. Each Party shall aim to 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, and are not more burdensome than necessary to ensure the quality of the service. Each Party shall ensure that licensing procedures are not in themselves a restriction on the supply of the service.

4. In determining whether a Party is in conformity with the obligation under paragraph 3, account shall be taken of international standards of relevant international organizations⁶ applied by that Party.

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

Article 78: Recognition

1. For the purpose of the fulfilment of its relevant standards or criteria for the authorization, licensing or certification of service suppliers, and subject to the requirements of paragraph 3, a Party may recognize the education or experience obtained, requirements met, or licenses or certifications granted in the other Party. Such recognition may be based upon an agreement or arrangement with that other Party, or otherwise be accorded autonomously.

⁶ The term "relevant international organizations" refers to international bodies whose membership is open to the relevant bodies of the Parties.

2. Where a Party recognizes, by agreement or arrangement, the education or experience obtained, requirements met, or licenses 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 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 licenses or certifications granted, in the territory of that other Party shall also be recognized.

3. Any such agreement or arrangement or autonomous recognition shall be in conformity with the relevant provisions of the WTO Agreement, in particular Article VII:3 of GATS.

Article 79: 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 otherwise made publicly available.

3. Nothing in this Chapter shall require a Party to provide confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private.

Article 80: 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 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 81: Business Practices

1. The Parties recognize that certain business practices of service suppliers, other than those falling under Article 80, may restrain competition and thereby restrict trade in services.

2. Each Party shall, at the request of the 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 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 law and to the conclusion of satisfactory agreement concerning the safeguarding of its confidentiality by the requesting Party.

Article 82: Subsidies

1. A Party which considers that it is adversely affected by a subsidy of the other Party may request ad hoc consultations with that other Party on such matters. The requested Party shall enter into such consultations.

2. The Parties shall review any disciplines agreed under Article XV of GATS with a view to incorporating them into this Chapter.

Article 83: Payments and Transfers

1. Subject to its specific commitments, and except in the circumstances envisaged in Article 84, a Party shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments.

2. Nothing in this Chapter shall affect the rights and obligations of the Parties under the *Articles of the Agreement of the International Monetary Fund*, including the use of exchange actions which are in conformity with the *Articles of the Agreement of the International Monetary Fund*, provided that a Party shall not impose restrictions on

any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article 84 or at the request of the International Monetary Fund.

Article 84: Restrictions to Safeguard the Balance of Payments

Any restriction to safeguard the balance of payments adopted or maintained by a Party under and in conformity with Article XII of GATS shall apply under this Chapter.

Article 85: 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 countries where like conditions prevail, 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 74, provided that the difference in treatment is aimed at ensuring the equitable or effective⁸ imposition or collection of

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;
- (ii) apply to non-residents in order to ensure the imposition or collection of taxes in the Party's territory;

direct taxes in respect of services or service suppliers of the other Party.

Article 86: Security Exceptions

Nothing in this Chapter shall be construed:

- (a) to require a Party to furnish any information, the disclosure of which it considers contrary to its essential security interests; or
- (b) to 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 purpose of provisioning a military establishment;
 - (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) to prevent a Party from taking any action in pursuance of its obligations under the *Charter of the United Nations* for the maintenance of international peace and security.

Article 87: Schedules of Specific Commitments

1. Each Party shall set out in a Schedule the Specific Commitments it undertakes under Articles 74, 75 and 76. With respect to sectors where such commitments are undertaken, each Schedule of Specific Commitments shall specify:

- (a) terms, limitations and conditions on market access;

(iii) apply to non-residents or residents in order to prevent the avoidance or evasion of taxes, including compliance measures;

(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;

(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) 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.

- (b) conditions and qualifications on national treatment;
 - (c) undertakings relating to additional commitments; and
 - (d) where appropriate the time-frame for implementation of such commitments.
2. Measures inconsistent with both Articles 74 and 75 shall be inscribed in the column relating to Article 75. In this case the inscription will be considered to provide a condition or qualification to Article 74 as well.
 3. Schedules of Specific Commitments are annexed to this Agreement as Annex 5.

Article 88: Modification of Schedules

1. A Party (referred to in this Article as the "modifying Party") may modify or withdraw any commitment in its Schedule of Specific Commitments, at any time after 3 years have elapsed from the date on which that commitment entered into force provided that:
 - (a) it notifies the other Party (referred to in this Article as the "affected Party") of its intention to modify or withdraw a commitment no later than 3 months before the intended date of implementation of the modification or withdrawal; and
 - (b) upon notification of a Party's intent to make such modification, the Parties shall consult and attempt to reach agreement on the appropriate compensatory adjustment.
2. In achieving a compensatory adjustment, the Parties shall endeavor to maintain a general level of mutually advantageous commitment that is not less favorable to trade than provided for in the Schedules of Specific Commitments prior to such negotiations.
3. If agreement under paragraph 1(b) is not reached between the modifying Party and the affected Party within 3 months, the affected Party may refer the matter to arbitration by an arbitration panel established following the same procedures as provided for in Chapter 13 (Dispute Settlement). Such an arbitration panel shall present its finding as to the ways to ensure that the general level of mutually advantageous commitments under this Chapter is maintained.
4. The modifying Party may not modify or withdraw its commitment until it has made the necessary adjustments in conformity with the findings of the arbitration in relation to the question of whether paragraph 1(b) is satisfied under paragraph 3.

Article 89: Review

With the objective of further liberalizing trade in services between them, in particular eliminating substantially all remaining discrimination, the Parties shall review at least every 2 years, or more frequently if so agreed, their Schedules of Specific Commitments, taking into account in particular any autonomous liberalization and on-going work under the auspices of the WTO. The first such review shall take place no later than 2 years after the entry into force of this Agreement.

Article 90: Committee on Trade in Services

1. The Parties hereby establish a Committee on Trade in Services that shall meet on the request of a Party or the FTA Joint Commission to consider any matter arising under this Chapter.
2. The functions of the Committee shall be:
 - (a) to monitor the implementation of this Chapter;
 - (b) to propose agreed solutions in case a problem arises in relation to the implementation of this Chapter;
 - (c) to request and provide information about each Party's laws and regulations related to trade in services;
 - (d) to exchange information on the existing possibilities for each other's service suppliers to access each Party's market;
 - (e) to examine the opportunities and benefits for the Parties to improve and facilitate market access for each other's service suppliers;
 - (f) to propose and discuss suggestions to improve the functioning of this Chapter;
and
 - (g) to execute other tasks assigned by the FTA Joint Commission.
3. The Committee shall consider the establishment of working groups as appropriate.
4. The Committee shall be co-chaired, and meet once every 2 years, unless

otherwise agreed by the Parties. The Committee meetings may be conducted by any agreed method.

5. The Committee shall include representatives of the authorities of each Party with expertise in the sectors or areas to be discussed.

6. The Committee shall report on its work to the FTA Joint Commission.

Article 91: Annexes

Annexes 4 and 5 shall form an integral part of this Chapter.