

## **CHAPTER 8**

### **CROSS-BORDER TRADE IN SERVICES**

#### **Article 8.1 : Objectives**

The objectives of this Chapter are to:

- (a) facilitate expansion of trade in cross-border services on a mutually advantageous basis; and
- (b) improve the efficiency and transparency of the Parties' respective services sectors and competitiveness of their export trade working towards progressive liberalisation,

while recognising the right of the Parties to regulate, including to introduce new regulations to support government policy objectives which reflect local circumstances, and the role of governments in providing and funding public services, giving due respect to national policy objectives including where these reflect local circumstances.

#### **Article 8.2 : Definitions**

For the purposes of this Chapter:

**aircraft repair and maintenance services** means such activities when undertaken on an aircraft or a part thereof while it is withdrawn from service and does not include so-called line maintenance;

**computer reservation system services** means services provided by computerised systems that contain information about air carriers' schedules, availability, fares and fare rules, through which reservations can be made or tickets may be issued;

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

- (a) from the territory of a Party into the territory of the other Party;
- (b) in the territory of a Party to the service consumer of the other Party; or
- (c) by a service supplier of a Party, through presence of natural persons of that Party in the territory of the other Party,

but does not include the supply of a service in the territory of a Party by a covered investment or an investment of an investor of the other Party as defined in Article 10.2 (Definitions);

**enterprise** means an enterprise as defined in Article 1.5 (Definitions), and a branch of an enterprise;

**enterprise of a Party** means an enterprise constituted or organised under domestic laws of a Party, and a branch located in the territory of a Party and carrying out business activities there;

**financial services** means any service of a financial nature including those defined in paragraph 5(a) of the *Annex on Financial Services* of GATS;

**natural person of the other Party** means:

- (a) with respect to natural persons of Korea, a Korean national within the meaning of the *Nationality Act*, or its successor legislation; and
- (b) with respect to natural persons of New Zealand, a New Zealand national or a permanent resident under its domestic laws;

**selling and marketing of air transport services** means opportunities for the air carrier concerned to sell and market freely its air transport services including all aspects of marketing such as market research, advertising and distribution. These activities do not include the pricing of air transport services or the applicable conditions;

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

**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 of a Party** means a person of that Party that seeks to supply or supplies a service; and

**specialty air services** means air services which are non-transportation air services, such as aerial firefighting, sightseeing, spraying, surveying, mapping, photography, parachute jumping, glider towing, and helicopter-lift for logging and construction, and other airborne agricultural, industrial, and inspection services.

### **Article 8.3 : Scope**

1. This Chapter applies to measures adopted or maintained 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;
- (c) the access to and use of, in connection with the supply of a service, services which are required by a Party to be offered to the public generally;

- (d) the presence of persons of a Party for the supply of a service in the territory of the other Party; and
- (e) the provision of a bond or other form of financial security as a condition for the supply of a service.

2. Articles 8.6 and 8.10 shall also apply to measures adopted or maintained by a Party affecting the supply of a service in its territory by a covered investment.<sup>1</sup>

3. This Chapter shall not apply to:

- (a) financial services as defined in Article 8.2;
- (b) government procurement;
- (c) services supplied in the exercise of governmental authority;
- (d) subsidies or grants provided by a Party or a state enterprise thereof, 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, except as provided for in Article 8.9;
- (e) measures affecting natural persons seeking access to the employment market of a Party;
- (f) measures regarding citizenship, nationality, residence or employment on a permanent basis; or
- (g) measures affecting air transport services or related services in support of air services except that this Chapter shall apply to measures affecting:
  - (i) aircraft repair and maintenance services during which an aircraft is withdrawn from service;
  - (ii) the selling and marketing of air transport services;
  - (iii) computer reservation system services; and
  - (iv) specialty air services.

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<sup>1</sup> For greater certainty, the scope of application of Articles 8.6 and 8.10 to measures adopted or maintained by a Party affecting the supply of a service in its territory by a covered investment is limited to the scope specified in this Article, subject to any applicable non-conforming measures and exceptions.

#### **Article 8.4 : National Treatment**

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

#### **Article 8.5 : Most-Favoured-Nation Treatment**

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

#### **Article 8.6 : 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) impose limitations on:
  - (i) the number of service suppliers, whether in the form of numerical quotas, monopolies, exclusive service suppliers, or the requirements 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 service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;<sup>2</sup> or
  - (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; or
- (b) restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service.

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<sup>2</sup> This sub-subparagraph does not cover measures of a Party that limit inputs for the supply of services.

### **Article 8.7 : Local Presence**

Neither Party shall 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 supply of cross-border trade in services.

### **Article 8.8 : Non-Conforming Measures**

1. Articles 8.4 through 8.7 shall not apply to:
  - (a) any existing non-conforming measure that is maintained by a Party at:
    - (i) the central level of government, as set out by that Party in its Schedule to Annex I; or
    - (ii) a local level of government;
  - (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 8.4 through 8.7.
2. Articles 8.4 through 8.7 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 8.9: Subsidies**

1. Except as provided for in this Article, subsidies related to trade in services shall not be covered by this Chapter.
2. The Parties shall consider the issue of disciplines on the possible trade distorting effects of subsidies in relation to trade in services in the light of any disciplines agreed under Article XV of GATS, with a view to the incorporation of such disciplines into this Agreement.
3. On the request of a Party that considers it is adversely affected by a subsidy related to trade in services of the other Party, the Parties shall enter into consultations on such matters.

### **Article 8.10 : 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 authorisation is required for the supply of a service, the competent authorities of that Party shall:

- (a) in the case of an incomplete application, on the request of the applicant, identify the necessary additional information that is required to complete the application and provide the opportunity to remedy deficiencies within a reasonable timeframe;
- (b) within a reasonable period of time after the submission of an application is considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application;
- (c) on the request of the applicant, provide, without undue delay, information concerning the status of the application under consideration; and
- (d) if an application is terminated or denied, to the maximum extent possible, inform the applicant in writing, and upon request and without undue delay, provide the reasons for such action. Consistent with the denying Party's domestic laws and regulations, the applicant shall have the possibility of resubmitting, at its discretion, a new application.

3. Paragraph 2 shall not apply to authorisation requirements that a Party adopts or maintains with respect to sectors, subsectors, or activities as set out in its Schedules to Annexes I and II.

4. With a view to ensuring that measures adopted or maintained by a Party relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to cross-border trade in services, each Party shall ensure 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.

5. Each Party shall maintain or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures which, on the request of an affected services supplier, provide 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.

6. The provisions of paragraph 5 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.

7. In determining whether a Party is in conformity with its obligations under paragraph 4, account shall be taken of international standards of relevant international organisations applied by that Party.

8. Subject to any measures a Party adopts or maintains with respect to sectors, subsectors, or activities regarding professional services as set out in its Schedules to Annexes I and II, each Party shall provide adequate procedures to verify the competence of professionals of the other Party.

9. If the results of the negotiations related to Article VI:4 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. The Parties shall co-ordinate on such negotiations, as appropriate.

### **Article 8.11 : Recognition<sup>3</sup>**

1. For the purposes of the fulfilment, in whole or in part, of its standards or criteria for the authorisation, licensing, or certification of services suppliers, and subject to the requirements of paragraph 4, a Party may recognise the education or experience obtained, requirements met, or licenses or certifications granted in the other Party or a non-Party. Such recognition, which may be achieved through harmonisation or otherwise, may be based upon an agreement or arrangement with the country 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 licenses or certifications granted in the territory of a non-Party, nothing in Article 8.5 shall be construed to require the Party to accord such recognition to the education or experience obtained, requirements met, or licenses 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 for the other Party, upon request, 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 or experience obtained, requirements met, or licenses or certifications granted in the territory of the other Party should be recognised.

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<sup>3</sup> For greater certainty, Annex 8-A applies to this Article.

4. Neither Party shall accord recognition in a manner that 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 8.12 : Education Co-operation**

1. The Parties recognise the importance of education as a factor of social and national development as well as a means for facilitating a closer partnership between the Parties.

2. The Parties shall designate contact points to facilitate dialogue and exchange of information on education co-operation.

3. The Parties shall encourage and facilitate dialogue and co-operation on issues of mutual interest in the field of education to benefit both Parties.

#### **Article 8.13 : Payments and Transfers**

1. A Party shall not apply restrictions on international transfers and payments for current transactions related to cross-border trade in services.

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

3. Notwithstanding paragraphs 1 and 2, a Party may prevent or delay a payment or transfer through the equitable, non-discriminatory, and good faith application of its domestic laws and regulations 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;
- (f) social security, public retirement or compulsory savings schemes; or
- (g) taxation.



#### **Article 8.14 : Denial of Benefits**

1. Subject to notification<sup>4</sup> to the other Party, a Party may deny the benefits of this Chapter to:

- (a) a service supplier of the other Party where the service is being supplied by an enterprise that is owned or controlled by persons of a non-Party and the enterprise has no substantive business operations in the territory of the other Party; or
- (b) a service supplier of the other Party where the service is being supplied by an enterprise that is owned or controlled by persons of the denying Party and the enterprise has no substantive business operations in the territory of the other Party.

2. A Party that denies benefits pursuant to paragraph 1 shall enter into consultations promptly following notification on the request of the other Party. Such consultations shall be without prejudice to the Parties' rights under Chapter 19 (Dispute Settlement) and under the *WTO Understanding on Rules and Procedures Governing the Settlement of Disputes*.

#### **Article 8.15 : Committee on Services**

1. For the purposes of ensuring the effective implementation and operation of this Chapter, the Parties hereby establish a Committee on Services (hereinafter referred to as "the Committee") to consider any matter arising under this Chapter and Chapter 9 (Temporary Entry of Business Persons).

2. The Committee shall:

- (a) consider any matters related to the implementation of this Chapter and Chapter 9 (Temporary Entry of Business Persons);
- (b) review the implementation and operation of this Chapter and Chapter 9 (Temporary Entry of Business Persons);
- (c) explore measures for the further expansion of cross-border trade in services and movement of business persons between the Parties;
- (d) facilitate dialogue on professional services issues, and review efforts to develop reciprocal recognition outcomes where mutual interests have been identified; and
- (e) take any other action it decides appropriate for the implementation of this Chapter and Chapter 9 (Temporary Entry of Business Persons).

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<sup>4</sup> A Party shall, to the extent practicable, provide such notification to the other Party prior to denying the benefits of this Chapter.

3. The Committee shall meet within one year of entry into force of this Agreement and subsequently thereafter as mutually agreed by the Parties.

4. The Committee may establish, where appropriate, working groups to facilitate exchanges on specific topics affecting cross-border trade in services, including professional services. Individual working groups may seek input from public bodies or industry representatives.

5. The Committee may meet via teleconference, via video-conference or through any other means as mutually agreed by the Parties. Should the Parties decide to meet in person, the venue for the meetings shall, unless the Parties otherwise decide, alternate between the Parties.

#### **Article 8.16 : Work Programme on Financial Services**

Unless the Parties otherwise agree, the Parties will meet within three years of entry into force of this Agreement to discuss the feasibility and convenience of incorporating financial services into this Agreement.

#### **Article 8.17 : Telecommunication Services**

1. The rights and obligations of the Parties in respect of telecommunications shall be governed by the *Annex on Telecommunications* of GATS, which is hereby incorporated into and made part of this Chapter, *mutatis mutandis*.

2. The Parties affirm their commitment to the principles set forth in the *WTO Basic Telecommunications Reference Paper* as attached in Annex 8-B.

## **ANNEX 8-A**

### **PROFESSIONAL SERVICES**

1. The Parties recognise the value of co-operation to facilitate and enhance trade in professional services, and the importance of ensuring that measures relating to professional qualification and registration requirements and procedures do not constitute unnecessary barriers to trade in professional services between them.
2. The Parties shall designate contact points to facilitate dialogue and exchange of information on professional service issues.
3. The Parties shall encourage and facilitate the establishment of dialogue between or among their regulators and relevant professional services industry bodies in areas of mutual interest, which may include engineering, architectural and veterinary services, with a view to the achievement of early outcomes on recognition of qualifications or professional registration.
4. Such recognition may be achieved through recognition of regulatory outcomes, recognition of qualifications and professional registration awarded by a Party as a means of complying with the regulatory requirements of the other Party (whether accorded unilaterally or by mutual arrangement) or recognition arrangements concluded between the Parties and between industry bodies or through such other means as the Parties may mutually agree.

## ANNEX 8-B

### WTO BASIC TELECOMMUNICATIONS REFERENCE PAPER

The principles set forth in the *WTO Basic Telecommunications Reference Paper* are commitments additional to the *Annex on Telecommunications* of GATS referred to in Article 8.17.

#### REFERENCE PAPER

##### Scope

The following are definitions and principles on the regulatory framework for the basic telecommunications services.<sup>5</sup>

##### Definitions

Users mean service consumers and service suppliers.

Essential facilities<sup>6</sup> mean facilities of a public telecommunications transport network or service that

- (a) are exclusively or predominantly provided by a single or limited number of suppliers; and
- (b) cannot feasibly be economically or technically substituted in order to provide a service.

A major supplier is a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of:

- (a) control over essential facilities; or
- (b) use of its position in the market.

#### 1. Competitive safeguards

##### 1.1 Prevention of anti-competitive practices in telecommunications

Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices.

##### 1.2 Safeguards

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<sup>5</sup> This applies only to suppliers of basic telecommunications services and not to end-users of such services.

<sup>6</sup> The definition of “essential facilities” will be applied only to the extent consistent with New Zealand’s competition policy regime, which regulates the activities of “dominant supplier”.

The anti-competitive practices referred to above shall include in particular:

- (a) engaging in anti-competitive cross-subsidization;
- (b) using information obtained from competitors with anti-competitive results; and
- (c) not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.

## 2. Interconnection

2.1 This section applies to linking with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier.

### 2.2 Interconnection to be ensured

Interconnection with a major supplier will be ensured at any technically feasible point in the network. Such interconnection is provided:

- (a) under non-discriminatory terms, conditions (including technical standards and specifications) and rates and of a quality no less favourable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates;
- (b) in a timely fashion, on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided; and
- (c) upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities.

### 2.3 Public availability of the procedures for interconnection negotiations

The procedures applicable for interconnection to a major supplier will be made publicly available.

### 2.4 Transparency of interconnection arrangements

It is ensured that a major supplier will make publicly available either its interconnection agreements or a reference interconnection offer.

### 2.5 Interconnection: dispute settlement

A service supplier requesting interconnection with a major supplier will have recourse, either:

- (a) at any time or
- (b) after a reasonable period of time which has been made publicly known

to an independent domestic body, which may be a regulatory body as referred to in paragraph 5 below, to resolve disputes regarding appropriate terms, conditions and rates for interconnection within a reasonable period of time, to the extent that these have not been established previously.

### 3. Universal service

Any Member has the right to define the kind of universal service obligation it wishes to maintain. Such obligations will not be regarded as anti-competitive per se, provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service defined by the Member.

### 4. Public availability of licensing criteria

Where a licence is required, the following will be made publicly available:

- (a) all the licensing criteria and the period of time normally required to reach a decision concerning an application for a licence; and
- (b) the terms and conditions of individual licences.

The reasons for the denial of a licence will be made known to the applicant upon request.

### 5. Independent regulators

The regulatory body is separate from, and not accountable to, any supplier of basic telecommunications services. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants.

### 6. Allocation and use of scarce resources

Any procedures<sup>7</sup> for the allocation and use of scarce resources, including frequencies, numbers and rights of way, will be carried out in an objective, timely, transparent and non-discriminatory manner. The current state of allocated frequency bands will be made publicly available, but detailed identification of frequencies allocated for specific government uses is not required.

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<sup>7</sup> Such procedures may be administered by means of a variety of mechanisms, including laws and regulations, public tendering process and consultative processes.