

Chapter Eleven

Cross-Border Trade In Services

Article 11.1: Scope and Coverage

1. This Chapter applies to measures adopted or maintained by a Party affecting cross-border trade in services by service suppliers of another 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 distribution, transport, or telecommunications networks and services in connection with the supply of a service;
- (d) the presence in its territory of a service supplier of another Party; and
- (e) the provision of a bond or other form of financial security as a condition for the supply of a service.

2. For purposes of this Chapter, “measures adopted or maintained by a Party” 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. Articles 11.4, 11.7, and 11.8 also apply to measures by a Party affecting the supply of a service in its territory by an investor of another Party as defined in Article 10.28 (Definitions) or a covered investment.¹

4. This Chapter does not apply to:

- (a) financial services, as defined in Article 12.20 (Definitions), except as provided in paragraph 3;
- (b) air services, including domestic and international air transportation services, whether scheduled or non-scheduled, and related services in support of air services, other than:

¹ The Parties understand that nothing in this Chapter, including this paragraph, is subject to investor-state dispute settlement pursuant to Section B of Chapter Ten (Investment).

- (i) aircraft repair and maintenance services during which an aircraft is withdrawn from service, and
- (ii) specialty air services;
- (c) procurement; or
- (d) subsidies or grants provided by a Party, including government-supported loans, guarantees and insurance.

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

6. This Chapter does not apply to services supplied in the exercise of governmental authority. A “service supplied in the exercise of governmental authority” means any service that is supplied neither on a commercial basis, nor in competition with one or more service suppliers.

Article 11.2: National Treatment

1. Each Party shall accord to service suppliers of another Party treatment no less favorable than that it accords, in like circumstances, to its own service suppliers.

2. The treatment to be accorded by a Party under paragraph 1 means, with respect to a regional level of government, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that regional level of government to service suppliers of the Party of which it forms a part.

Article 11.3: Most-Favored-Nation Treatment

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

Article 11.4: Market Access

No Party may 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 requirement of an economic needs test,
 - (ii) the total value of service transactions or assets in form of numerical quotas or the requirement of an economic needs test,

- (iii) the total number of service operations or on 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,² 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.

Article 11.5: Local Presence

No Party may require a service supplier of another 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 11.6: Non-conforming Measures

1. Articles 11.2, 11.3, 11.4, and 11.5 do 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;
 - (ii) a regional level of government, as set out by that Party in its Schedule to Annex I; or
 - (iii) 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 11.2, 11.3, 11.4, and 11.5.

2. Articles 11.2, 11.3, 11.4, and 11.5 do not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors or activities as set out in its Schedule to Annex II.

² This clause does not cover measures of a Party that limit inputs for the supply of services.

Article 11.7: Transparency in Developing and Applying Regulations³

Further to Chapter Eighteen (Transparency):

- (a) each Party shall maintain or establish appropriate mechanisms for responding to inquiries from interested persons regarding its regulations relating to the subject matter of this Chapter;
- (b) at the time it adopts final regulations relating to the subject matter of this Chapter, each Party shall, to the extent possible, including on request, address in writing substantive comments received from interested persons with respect to the proposed regulations; and
- (c) to the extent possible, each Party shall allow a reasonable time between publication of final regulations and their effective date.

Article 11.8: Domestic Regulation

1. Where a Party requires authorization for the supply of a service, the Party's competent authorities shall, within a reasonable time after the submission of an application considered complete under its laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the Party's competent authorities shall provide, without undue delay, information concerning the status of the application. This obligation shall not apply to authorization requirements that are within the scope of Article 11.6.2.

2. 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 endeavor to ensure, as appropriate for individual sectors, that any such measures that it adopts or maintains 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.

3. If the results of the negotiations related to Article VI:4 of the GATS (or the results of any similar negotiations undertaken in other multilateral fora in which the Parties participate) enter into effect for each Party, this Article shall be amended, as appropriate, after consultations between the Parties, to bring those results into effect under this Agreement. The Parties will coordinate on such negotiations as appropriate.

³ For greater certainty, "regulations" includes regulations establishing or applying to licensing authorization or criteria.

Article 11.9: Mutual Recognition

1. For the purposes of the fulfillment, in whole or in part, of its standards or criteria for the authorization, licensing, or certification of services suppliers, and subject to the requirements of paragraph 4, a Party may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country, including another Party and a non-Party. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.
2. Where a Party recognizes, autonomously or by agreement or arrangement, the education or experience obtained, requirements met, or licenses or certifications granted in the territory of another Party or a non-Party, nothing in Article 11.3 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 any 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 another Party, if that other Party is interested, to negotiate its accession to such an agreement or arrangement or to negotiate a comparable one with it. Where a Party accords recognition autonomously, it shall afford adequate opportunity for another Party to demonstrate that education, experience, licenses, or certifications obtained or requirements met in that other Party's territory should be recognized.
4. No Party may accord recognition in a manner that would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing, or certification of services suppliers, or a disguised restriction on trade in services.
5. Annex 11.9 applies to measures adopted or maintained by a Party relating to the licensing or certification of professional service suppliers as set out in that Annex.

Article 11.10: 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 at the time of transfer.
3. Notwithstanding paragraphs 1 and 2, a Party may prevent 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 offenses; or
- (e) ensuring compliance with orders or judgments in judicial or administrative proceedings.

Article 11.11: Implementation

The Parties shall consult annually, or as otherwise agreed, to review the implementation of this Chapter and consider other issues of mutual interest.

Article 11.12: Denial of Benefits

1. A Party may deny the benefits of this Chapter to a service supplier of another Party if the service is being supplied by an enterprise owned or controlled by persons of a non-Party, and the denying Party:

- (a) does not maintain diplomatic relations with the non-Party; or
- (b) adopts or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise.

2. Subject to Articles 18.3 (Notification and Provision of Information) and 20.4 (Consultations), a Party may deny the benefits of this Chapter to a service supplier of another Party that is an enterprise of such other Party if the enterprise has no substantial business activities in the territory of any Party, other than the denying Party, and persons of a non-Party, or the denying Party, own or control the enterprise.

Article 11.13: Specific Commitments

1. Express Delivery Services:

- (a) The Parties affirm that measures affecting express delivery services are subject to this Agreement.
- (b) For purposes of this Agreement, express delivery services means the collection, transport, and delivery, of documents, printed matter, parcels, goods, or other items on an expedited basis, while tracking and maintaining control of these items throughout the supply of the service. Express delivery services do not include (i) air transport services, (ii) services supplied in the exercise of governmental authority, or (iii) maritime transport services.⁴

⁴ For greater certainty, for the United States, express delivery services do not include delivery of letters subject to the *Private Express Statutes* (18 U.S.C. 1693 *et seq.*, 39 U.S.C. 601 *et seq.*), but do include delivery of letters subject

- (c) The Parties express their desire to maintain at least the level of market openness they provided for express delivery services existing on the date this Agreement is signed.
- (d) No Central American Party may adopt or maintain any restriction on express delivery services that is not in existence on the date this Agreement is signed. Each Central American Party confirms that it does not intend to direct revenues from its postal monopoly to benefit express delivery services as defined in subparagraph (b). Under title 39 of the United States Code, an independent government agency determines whether postal rates meet the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the U.S. Postal Service reasonably assignable to such class or type.
- (e) Each Party shall ensure that, where its monopoly supplier of postal services competes, either directly or through an affiliated company, in the supply of express delivery services outside the scope of its monopoly rights, such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with the Party's obligations under Articles 11.2, 11.3, 11.4, 10.3 (National Treatment), or 10.4 (Most-Favored-Nation Treatment). The Parties also reaffirm their obligations under Article VIII of the GATS.⁵

2. A Party's Schedule to Annex 11.13 sets out specific commitments by that Party.

Article 11.14: 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 another Party;
- (b) in the territory of one Party by a person of that Party to a person of another Party;
or
- (c) by a national of a Party in the territory of another Party;

but does not include the supply of a service in the territory of a Party by an investor of another Party as defined in Article 10.28 (Definitions) or a covered investment;

to the exceptions to, or suspensions promulgated under, those statutes, which permit private delivery of extremely urgent letters.

⁵ For greater certainty, the Parties reaffirm that nothing in this Article is subject to investor-state dispute settlement pursuant to Section B of Chapter Ten (Investment).

enterprise means an “enterprise” as defined in Article 2.1 (Definitions of General Application), and a branch of an enterprise;

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

professional services means services, the provision of which requires specialized 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;

service supplier of a Party means a person of a Party that seeks to supply or supplies a service;⁶ and

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

⁶ The Parties understand that for purposes of Articles 11.2 and 11.3, “service suppliers” has the same meaning as “services and service suppliers” in the GATS.

Annex 11.9

Professional Services

Development of Professional Standards

1. The Parties shall encourage the relevant bodies in their respective territories to develop mutually acceptable standards and criteria for licensing and certification of professional service suppliers and to provide recommendations on mutual recognition to the Commission.
2. The standards and criteria referred to in paragraph 1 may be developed with regard to the following matters:
 - (a) education – accreditation of schools or academic programs;
 - (b) examinations – qualifying examinations for licensing, including alternative methods of assessment such as oral examinations and interviews;
 - (c) experience – length and nature of experience required for licensing;
 - (d) conduct and ethics – standards of professional conduct and the nature of disciplinary action for non-conformity with those standards;
 - (e) professional development and re-certification – continuing education and ongoing requirements to maintain professional certification;
 - (f) scope of practice – extent of, or limitations on, permissible activities;
 - (g) local knowledge – requirements for knowledge of such matters as local laws, regulations, language, geography, or climate; and
 - (h) consumer protection – alternatives to residency requirements, including bonding, professional liability insurance, and client restitution funds, to provide for the protection of consumers.
3. On receipt of a recommendation referred to in paragraph 1, the Commission shall review the recommendation within a reasonable time to determine whether it is consistent with this Agreement. Based on the Commission's review, each Party shall encourage its respective competent authorities, where appropriate, to implement the recommendation within a mutually agreed time.

Temporary licensing

4. Where the Parties agree, each Party shall encourage the relevant bodies in its territory to develop procedures for the temporary licensing of professional service suppliers of another Party.

Review

5. The Commission shall review the implementation of this Annex at least once every three years.

Annex 11.13

Specific Commitments

Section A: Costa Rica

1. Costa Rica shall repeal articles 2 and 9 of Law No. 6209, entitled *Ley de Protección al Representante de Casas Extranjeras*, dated 9 March 1978, and its regulation, and item b) of article 361 of the *Código de Comercio*, Law No. 3284 of 24 April 1964, effective on the date of entry into force of this Agreement.
2. Subject to paragraph 1, Costa Rica shall enact a new legal regime that shall become applicable to contracts of representation, distribution, or production, and:
 - (a) shall apply principles of general contract law to such contracts;
 - (b) shall be consistent with the obligations of this Agreement and the principle of freedom of contract;
 - (c) shall treat such contracts as establishing an exclusive relationship only if the contract explicitly states that the relationship is exclusive;
 - (d) shall provide that the termination of such contracts either on their termination dates or in the circumstances described in subparagraph (e) is just cause for a goods or service supplier of another Party to terminate the contract or allow the contract to expire without renewal; and
 - (e) will allow contracts with no termination date to be terminated by any of the parties by giving ten months advance termination notice.
3. The absence of an express provision for settlement of disputes in a contract of representation, distribution, or production shall give rise to a presumption that the parties intended to settle any disputes through binding arbitration. Such arbitration may take place in Costa Rica. However, the presumption of an intent to submit to arbitration shall not apply where any of the parties objects to arbitration.
4. The United States and Costa Rica shall encourage parties to existing contracts of representation, distribution, or production to renegotiate such contracts so as to make them subject to the new legal regime enacted in accordance with paragraph 2.
5. In any case, the repeal of articles 2 and 9 of Law No. 6209 shall not impair any vested right, when applicable, derived from that legislation and recognized under Article 34 of the *Constitución Política de la República de Costa Rica*.
6. Costa Rica shall, to the maximum extent possible, encourage and facilitate the use of arbitration for the settlement of disputes in contracts of representation, distribution, or production. To this end, Costa Rica shall endeavor to facilitate the operation of arbitration

centers and other effective means of alternative resolution of claims arising pursuant to Law No. 6209 or the new legal regime enacted in accordance with paragraph 2, and shall encourage the development of rules for such arbitrations that provide, to the greatest extent possible, for the prompt, low-cost, and fair resolution of such claims.

7. For purposes of this schedule:

- (a) **contract of representation, distribution, or production** has the same meaning as under Law No. 6209; and
- (b) **termination date** means the date provided in the contract for the contract to end, or the end of a contract extension period agreed upon by the parties to the contract.

Section B: El Salvador

1. Articles 394 through 399-B of the *Código de Comercio* shall apply only to contracts that were entered into after such Articles entered into force.
2. Articles 394 through 399-B of the *Código de Comercio* shall not apply to any distribution contract that a person of the United States enters into after the date of entry into force of this Agreement, as long as the contract so provides.
3. Parties to a distribution contract shall be permitted to establish in the contract the mechanisms and forums that will be available in the case of disputes.
4. If a distribution contract makes specific provision for indemnification, including a provision providing for no indemnification, Article 397 of the *Código de Comercio* shall not apply to that contract.
5. Under Salvadoran law, a distribution contract shall be treated as exclusive only if the contract states so expressly.
6. El Salvador shall encourage parties to distribution contracts made after the date of entry into force of this Agreement to include provisions providing for binding arbitration of disputes and specifying methods for determining any indemnity.
7. For purposes of this Schedule, **distribution contract** has the same meaning as under Articles 394 through 399-B of the *Código de Comercio*.

Section C: Guatemala

1. The Parties recognize that Guatemala, through Decree 8-98 of the *Congreso de la República*, which reformed the *Código de Comercio de Guatemala*, repealed Decree 78-71,

which regulated contracts of agency, distribution, or representation, and created a new regime for agents of commerce, distributors, and representatives.

2. During the year following the date of entry into force of this Agreement, the United States and Guatemala shall encourage parties to contracts without a fixed termination date that remain subject to Decree 78-71 to renegotiate such contracts. The new contracts shall be based on the terms and conditions established by mutual agreement of the parties and on the provisions of the *Código de Comercio de Guatemala*, which shall regulate the activities of agents of commerce, distributors, and representatives. The United States and Guatemala shall also encourage parties to other contracts of agency, distribution, or representation that remain subject to Decree 78-71 to renegotiate such contracts so as to make them subject to the new regime referenced in paragraph 1.

3. The absence of an express provision for settlement of disputes in a contract of agency, distribution, or representation shall, to the extent consistent with the *Constitución Política de la República de Guatemala*, give rise to a rebuttable presumption that the parties intended to settle any disputes through binding arbitration.

4. The United States and Guatemala shall encourage the parties to contracts of agency, distribution, or representation to settle any disputes through binding arbitration. In particular, if the amount and form of any indemnification payment is not established in the contract and a party wishes to terminate the contract, the parties may agree to arbitration to establish the amount, if any, of the indemnity.

5. For purposes of this schedule:

- (a) **termination date** means the date provided in the contract for the contract to end, or the end of a contract extension period agreed upon by the parties to the contract; and
- (b) **contract of agency, distribution, or representation** has the same meaning as under Decree 78-71.

Section D: Honduras

1. The obligations set out in paragraphs 2, 3, and 4 shall not apply to:

- (a) express conditions included in a contract of representation, distribution, or agency; or
- (b) to contractual relations entered into before the date of entry into force of this Agreement.

2. Honduras may not require a goods or service supplier of another Party:

- (a) to supply such goods or services in Honduras by means of a representative, agent, or distributor, except as otherwise provided by law for reasons of health, safety, or consumer protection;
 - (b) to offer or introduce goods or services in the territory of Honduras through existing concessionaires for such goods or services unless a contract between them requires an exclusive relationship; or
 - (d) to pay damages or an indemnity for terminating a contract of representation, or agency for just cause or allowing such a contract to expire without renewal for just cause.
3. Honduras may not require that a representative, agent, or distributor be a national of Honduras or an enterprise controlled by nationals of Honduras;
4. Honduras shall provide that:
- (a) the fact that a contract of representation, distribution, or agency has reached its termination date shall be considered just cause for a goods or service supplier of another Party to terminate the contract or allow the contract to expire without renewal; and
 - (b) any damages or indemnity for terminating a contract of representation, distribution, or agency, or allowing it to expire without renewal, without just cause shall be based on the general law of contracts.

Nothing in subparagraph (b) shall be construed to require Honduras to adopt any measure that affects the right of the parties to demand indemnification, when appropriate, in the form, type, and amount agreed in the contract.

5. Honduras shall provide that:
- (a) if the amount and form of any indemnification payment is not established in a contract of representation, distribution, or agency and a party wishes to terminate the contract;
 - (i) the parties may agree to resolve any dispute regarding such payment in a Center for Conciliation and Arbitration of Honduras, or if the parties agree otherwise, to another arbitration center; and
 - (ii) in such proceeding general principles of contract law will be applied;
 - (b) Decree Law No. 549 shall apply to a contract only if:
 - (i) the representative, distributor, or agent has registered with the *Secretaría de Estado en los Despachos de Industria y Comercio*, which shall be possible only if it is party to a written contract of representation, distribution, or agency; and

- (ii) the contract was entered into while such law was in effect; and
 - (c) in any decision awarding an indemnity calculated under Article 14 of Decree Law No. 549, the amount shall be calculated as of the date of entry into force of this Agreement, expressed in terms of Honduran lempiras as of that date, and converted into U.S. dollars at the exchange rate in effect on the date of the decision.
- 6. Under Honduran law, a contract of representation, distribution, or agency is exclusive only if the contract states so expressly.
- 7. For purposes of this schedule:
 - (a) **termination date** means the date provided in the contract for the contract to end, at 12:00 p.m. on that day, or the end a contract extension period agreed upon by the parties to the contract; and
 - (b) **contract of representation, distribution, or agency** has the same meaning as under Decree Law No. 549.