

CHAPTER 10
FINANCIAL SERVICES

Article 10.1: Definitions

1. For the purposes of this Chapter:

financial institution means any financial intermediary or other enterprise that is authorised to do business and regulated or supervised as a financial institution under the law of the Party in whose territory it is located by entities such as a central bank or a financial services authority;

financial service means any service of a financial nature. Financial services include all insurance and insurance-related services, and all banking and other financial services (excluding insurance), as well as services auxiliary to a service of a financial nature. Financial services include the following activities:

Insurance and insurance-related services

- (i) direct insurance (including co-insurance):
 - (A) life;
 - (B) non-life;
- (ii) reinsurance and retrocession;
- (iii) insurance intermediation, such as brokerage and agency; and
- (iv) services auxiliary to insurance, such as consultancy, actuarial, risk assessment and claim settlement services;

Banking and other financial services (excluding insurance)

- (v) acceptance of deposits and other repayable funds from the public;
- (vi) lending of all types, including consumer credit, mortgage credit, factoring and financing of commercial transactions;
- (vii) financial leasing;
- (viii) all payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts;

- (ix) guarantees and commitments;
- (x) trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:
 - (A) money market instruments (including cheques, bills, certificates of deposits);
 - (B) foreign exchange;
 - (C) derivative products, including futures and options;
 - (D) exchange rate and interest rate instruments, including products such as swaps, forward rate agreements;
 - (E) transferable securities; and
 - (F) other negotiable instruments and financial assets, including bullion;
- (xi) participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues;
- (xii) money broking;
- (xiii) asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services;
- (xiv) settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments;
- (xv) provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services; and
- (xvi) advisory, intermediation and other auxiliary financial services on all the activities listed in subparagraphs (e) through (o), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy;

financial service supplier means a person that seeks to supply or supplies a financial service;

new financial services means a financial service that is not supplied by any financial services supplier in the territory of a Party but which is supplied and regulated in the territory of the other Party. This may include services related to existing and new products or the manner in which the product is delivered;

public entity means a government, a central bank or monetary authority or financial services authority of a Party, or any financial institution that is owned or controlled by a Party; and

self-regulatory organisation means any non-governmental body, including any securities or futures exchange or market, clearing or payment settlement agency, other organisation or association that:

- (i) is recognised as having self-regulatory powers; or
- (ii) exercises regulatory or supervisory authority;

over financial service suppliers by legislation or delegation from central, regional or local governments or authorities.

2. For the purposes of subparagraph (f) of Article 14.1 (Definitions) of Chapter 14 (Investment), the term **investment** means, in respect of a financial service:

(a) ‘investment’ as defined in Article 14.1 (Definitions) of Chapter 14 (Investment), except that, with respect to ‘loans’ and ‘debt instruments’ referred to in that Article:

- (i) a loan to or debt instrument issued by a financial institution is an investment only if it is treated as regulatory capital by the Party in whose territory the financial institution is located; and
- (ii) a loan granted by or debt instrument owned by a financial institution, other than a loan to or debt instrument issued by a financial institution referred to in subparagraph (i), is not an investment;

(b) for greater certainty, a loan granted by or debt instrument owned by a financial service supplier of the other Party, other than a loan to or debt instrument issued by a financial institution, is an investment for the purposes of Chapter 14 (Investment), if such loan or debt instrument meets the criteria for investments set out in Article 14.1 (Definitions) of Chapter 14 (Investment).

3. For the purposes of Article 9.1 (Definitions) of Chapter 9 (Trade in Services), the term “services supplied in the exercise of governmental authority” means, in respect of a financial service:

- (a) activities or services forming part of a public retirement plan or statutory system of social security; or
- (b) activities or services conducted for the account or with the guarantee or using the financial resources of the Party, including its public entities,

except where a Party allows any of the activities or services referred to in subparagraphs (a) or (b) to be conducted by its financial service suppliers in competition with a public entity or a financial service supplier.

4. The definition of “services supplied in the exercise of governmental authority” in Article 9.1 (Definitions) of Chapter 9 (Trade in Services) shall not apply to the services covered by this Chapter.

Article 10.2: Scope

1. This Chapter provides for commitments additional to Chapter 9 (Trade in Services) and Chapter 14 (Investment) in relation to financial services.

2. This Chapter shall apply to measures adopted or maintained by a Party affecting the trade or supply of a financial service. Reference to trade in financial services or supply of a financial service in this Chapter shall mean ‘trade in services or supply of a service’ as defined in Article 9.1 (Definitions) of Chapter 9 (Trade in Services).

3. Notwithstanding paragraph 1,

- (a) sub-paragraphs 6 through 15 of Article 9.8 (Domestic Regulation) of Chapter 9 (Trade in Services) and Article 14.6 (Prohibition of Performance Requirements) of Chapter 14 (Investment) shall not apply to the services covered by this Chapter; and

- (b) Section B (Investor-State Dispute Settlement) of Chapter 14 (Investment) shall only apply to the services covered by this Chapter for claims that a Party has breached Articles 14.7 (Minimum Standard of Treatment), 14.8 (Treatment in Case of Armed Conflict or Civil Strife), 14.9 (Transfers), 14.11 (Expropriation and Compensation), 14.15 (Special Formalities and Disclosure of Information) and 14.13 (Denial of Benefits) of Chapter 14 (Investment).

4. In the event of any inconsistency between this Chapter and Chapter 9 (Trade in Services), Chapter 11 (Telecommunications), Chapter 13 (Electronic Commerce), Chapter 14 (Investment) or Chapter 19 (Transparency), this Chapter shall prevail to the extent of the inconsistency.

Article 10.3: New Financial Services¹

Each Party shall endeavour to permit a financial institution of the other Party established in its territory to supply a new financial service that the Party would permit its own financial institutions, in like circumstances, to supply without adopting a law or regulation, or modifying an existing law or regulation. Notwithstanding Article 9.5 (Market Access) of Chapter 9 (Trade in Services), a Party may determine the institutional and juridical form through which the new financial service may be supplied and may require authorisation for the supply of the service. If a Party requires a financial institution to obtain authorisation to supply a new financial service, the Party shall decide within a reasonable period of time whether to issue the authorisation and may refuse the authorisation for prudential reasons under Article 10.5.

Article 10.4: Treatment of Certain Information and Processing of Information

Neither Party shall take measures that prevent transfers of information or the processing of financial information, including transfers of data by electronic means, or that, subject to importation rules consistent with international agreements, prevent transfers of equipment, where such transfers of information, processing of financial information or transfers of equipment are necessary for the conduct of the ordinary business of a financial service supplier. Nothing in this Article restricts the right of a Party to protect personal data, personal privacy and the confidentiality of individual records and accounts or to require compliance with domestic regulation in relation to data management and storage and system maintenance so long as such right is not used to circumvent the provisions of this Chapter and Chapter 9 (Trade in Services) and Chapter 14 (Investment).

Article 10.5: Exceptions

1. Notwithstanding any other provisions of this Agreement except for Chapter 2 (Trade in Goods), Chapter 4 (Rules of Origin), Chapter 5 (Customs Procedures), Chapter 7 (Sanitary and Phytosanitary Measures) and Chapter 8 (Technical Barriers to Trade), a Party shall not be prevented from adopting or maintaining measures for prudential reasons,^{2 3} including for the protection of investors, depositors, policy holders, or persons

¹ The Parties understand that nothing in this Article prevents a financial institution of a Party from applying to the other Party to request that it authorise the supply of a financial service that is not supplied in the territory of the other Party. That application shall be subject to the law of the Party to which the application is made and, for greater certainty, shall not be subject to this Article.

² The Parties understand that the term ‘prudential reasons’ includes the maintenance of the safety, soundness, integrity, or financial responsibility of individual financial service suppliers as well as the safety, and financial and operational integrity of payment and clearing systems.

³ For greater certainty, if a measure challenged under Section B (Investor-State Dispute Settlement) of Chapter 14 (Investment) is determined to have been adopted or maintained by a Party for prudential reasons in accordance with the procedures in Article 10.12, a tribunal shall find that the measure is not inconsistent with the Party’s obligations under this Agreement and, accordingly, shall not award any damages with respect to that measure.

to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. If these measures do not conform with the provisions of this Agreement to which this exception applies, they shall not be used as a means of avoiding the Party's commitments or obligations under those provisions.

2. Nothing in this Chapter, Chapter 9 (Trade in Services), Chapter 11 (Telecommunications), Chapter 13 (Electronic Commerce), or Chapter 14 (Investment), shall apply to non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies.

3. Notwithstanding Article 14.9 (Transfers) of Chapter 14 (Investment) and Article 9.12 (Payments and Transfers) of Chapter 9 (Trade in Services), a Party may prevent or limit transfers by a financial service supplier to, or for the benefit of, an affiliate of or person related to such institution or supplier, through the equitable, non-discriminatory and good faith application of measures relating to maintenance of the safety, soundness, integrity, or financial responsibility of financial service suppliers. This paragraph does not prejudice any other provision of this Agreement that permits a Party to restrict transfers.

4. For greater certainty, nothing in this Chapter shall be construed to prevent a Party from adopting or enforcing measures necessary to secure compliance with laws or regulations that are not inconsistent with this Chapter, including those relating to the prevention of deceptive and fraudulent practices or to deal with the effects of a default on financial services contracts, subject always to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Parties or between Parties and non-Parties where like conditions prevail, or a disguised restriction on investment in financial institutions or trade in financial services as covered by this Chapter.

5. For greater certainty, nothing in this Chapter, Chapter 9 (Trade in Services), Chapter 11 (Telecommunications), Chapter 13 (Electronic Commerce) or Chapter 14 (Investment) shall prevent a Party from requiring the non-discriminatory licensing or registration of financial service suppliers supplying a service from the territory of a Party into the territory of the other Party and of financial instruments for prudential reasons in accordance with paragraph 1 of this Article.

Article 10.6: Recognition

1. A Party may recognise prudential measures of any international standard setting body, the other Party, or non-Party in determining how the Party's measures relating to financial services shall be applied. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the international standard setting body, other Party, or a non-Party concerned or may be accorded autonomously.

2. A Party that is a party to such an agreement or arrangement referred to in paragraph 1, whether future or existing, shall afford adequate opportunity for the other Party to negotiate its accession to such an agreement or arrangement, or to negotiate one comparable with it, under circumstances in which there would be equivalent regulation, oversight, implementation of such regulation, and, if appropriate, procedures concerning the sharing of information between the parties to the agreement or arrangement.

3. Where a Party accords recognition autonomously, it shall afford adequate opportunity for the other Party to demonstrate that such circumstances as referred to in paragraph 2 exist.

Article 10.7: Transparency and Administration of Certain Measures

1. The Parties recognise that transparent measures governing the activities of financial service suppliers are important in facilitating their ability to gain access to and operate in each other's markets.

2. Each Party shall ensure that all measures of general application to which this Chapter applies are administered in a reasonable, objective and impartial manner.

3. To the extent practicable, each Party should allow a reasonable period of time between publication of a final regulation of general application and the date when it enters into effect.

4. Each Party shall ensure that the rules of general application adopted or maintained by a self-regulatory organisation of the Party are promptly published or otherwise made available in a manner that enables interested persons to become acquainted with them.

5. Each Party shall maintain or establish appropriate mechanisms for responding to inquiries from interested persons regarding measures of general application covered by this Chapter.

6. Each Party's regulatory authorities shall make publicly available the requirements, including any documentation required, for completing an application relating to the supply of financial services.

7. On request of an applicant in writing, a Party's regulatory authority shall inform the applicant of the status of its application in writing. If the authority requires additional information from the applicant, it shall notify the applicant without undue delay.

8. A Party's regulatory authority shall make an administrative decision on a complete application of a financial service supplier of the other Party relating to the supply of a financial service, within 180 days and shall notify the applicant of the decision. An application shall not be considered complete until all relevant hearings have been held and all necessary information has been received. If it is not practicable for a

decision to be made within 180 days, the regulatory authority shall notify the applicant without undue delay and shall endeavour to make the decision within a reasonable time thereafter.

9. On request of an unsuccessful applicant, a regulatory authority that has denied an application shall, to the extent practicable, inform the applicant of the reasons for denial of the application.

Article 10.8: Self-Regulatory Organisations

Where a Party requires a financial service supplier of the other Party to be a member of, participate in, or have access to, a self-regulatory organisation in order to provide a financial service in or into its territory, the Party shall endeavour to ensure that the self-regulatory organisation accords national treatment and most-favoured-nation treatment to financial service suppliers of the other Party in accordance with Article 9.3 (National Treatment) and Article 9.4 (Most-Favoured-Nation Treatment) of Chapter 9 (Trade in Services) and Article 14.4 (National Treatment) and Article 14.5 (Most-Favoured-Nation Treatment) of Chapter 14 (Investment).⁴ Each Party shall accord to financial services suppliers of the other Party treatment no less favourable than it accords, in like circumstances, to financial services suppliers of a non-Party with respect to the treatment afforded by self-regulatory organisations.

Article 10.9: Payment and Clearing Systems

Under terms and conditions that accord national treatment, each Party shall grant financial institutions of the other Party established in its territory access to payment and clearing systems operated by public entities, and to official funding and refinancing facilities available in the normal course of ordinary business. This Article is not intended to confer access to the Party's lender of last resort facilities.⁵

Article 10.10: Consultations

1. A Party may request, in writing, consultations with the other Party regarding any matter arising under this Agreement that affects financial services, including matters arising at the regional level of government of the other Party. The other Party shall give sympathetic consideration to the request to hold consultations. The Parties shall report the results of their consultations to the Committee on Trade in Services.

⁴ For greater certainty, a Party may require a financial service supplier to be present in its territory as a requirement for membership of, participation in, or access to a self-regulatory organisation of a Party.

⁵ For greater certainty, a Party need not grant access under this Article to a financial institution of the other Party established in its territory if such access is not granted to its own financial institution in like circumstances.

2. Consultations under this Article shall include officials of the authorities specified in Annex 10-A.

3. For greater certainty, nothing in this Article shall be construed to require a Party to derogate from its law regarding sharing of information between financial regulators or the requirements of an agreement or arrangement between financial authorities of the Parties, or to require a regulatory authority to take any action that would interfere with specific regulatory, supervisory, administrative or enforcement matters.

Article 10.11: Dispute Settlement

1. Chapter 20 (Consultations and Dispute Settlement) shall apply as modified by this Article to the settlement of disputes concerning measures affecting financial services arising under this Chapter, Chapter 9 (Trade in Services) and Chapter 14 (Investment).

2. If a Party claims that a dispute arises within the meaning of paragraph 1, Article 20.8 (Establishment and Reconvening of Panels) of Chapter 20 (Consultations and Dispute Settlement) shall apply, except that:

(a) if the disputing Parties agree, each panellist shall meet the qualifications in paragraph 3; and

(b) in any other case:

(i) each disputing Party shall select panellists that meet the qualifications set out in either paragraph 3 or Article 20.8 (Establishment and Reconvening of Panels) of Chapter 20 (Consultations and Dispute Settlement); and

(ii) if the responding Party indicates an intention to invoke or invokes Article 10.5 prior to a Party's request for the establishment of a panel, the chair of the panel shall meet the qualifications set out in paragraph 3, unless the disputing Parties otherwise agree.

3. In addition to the requirements set out in Article 20.8 (Establishment and Reconvening of Panels) of Chapter 20 (Consultations and Dispute Settlement), panellists shall have expertise or experience in financial services law or practice, which may include the regulation of financial services.

4. A Party may request the establishment of a panel in accordance with Chapter 20 (Consultations and Dispute Settlement) to consider whether and to what extent Article 10.5 is a valid defence to a claim. The panel shall present its interim and final reports in accordance with Article 20.10 (Panel Procedures) of Chapter 20 (Consultations and Dispute Settlement). The final report of the panel shall be binding on any tribunal established in accordance with Section B (Investor-State Dispute Settlement) of Chapter

14 (Investment) to consider the same measure, and any decision or award issued by such a tribunal must be consistent with the final report of the panel.

5. If a Party seeks to suspend benefits in the financial services sector, a panel that reconvenes to make a determination on the proposed suspension of benefits, in accordance with Article 20.14 (Compensation and Suspension of Concessions or other Obligations) of Chapter 20 (Consultations and Dispute Settlement), shall seek the views of financial services experts, as necessary.

Article 10.12: Investment Disputes in Financial Services

1. If an investor of a Party submits a claim to arbitration under Section B (Investor-State Dispute Settlement) of Chapter 14 (Investment) challenging a measure relating to regulation or supervision of financial services, markets or instruments, the expertise or experience of any particular candidate with respect to financial services law or practice shall be taken into account in the appointment of arbitrators to the tribunal.

2. If an investor of a Party submits a claim to arbitration under Section B (Investor-State Dispute Settlement) of Chapter 14 (Investment), and the disputing Party invokes Article 10.5 as a defence, the following provisions of this Article shall apply:

(a) the disputing Party shall, no later than the date the tribunal fixes for the disputing Party to submit its counter-memorial, or in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the disputing Party to submit its response to the amendment, submit in writing to the authorities responsible for financial services of the Party of the disputing investor, as set out in Annex 10-A, a request for a joint determination by the authorities of the Parties on the issue of whether and to what extent Article 10.5 is a valid defence to the claim. The disputing Party shall promptly provide the tribunal, if constituted, a copy of the request. The arbitration may proceed with respect to the claim only as provided in paragraphs 3 and 4. Any applicable timeframes under Section B (Investor-State Dispute Settlement) of Chapter 14 (Investment) shall be suspended for the duration of the 180 day period established under paragraph 2(d) and the duration of any Chapter 20 (Consultations and Dispute Settlement) proceedings conducted under paragraph 2(d);

(b) the authorities of the Parties shall attempt in good faith to make a determination as described in subparagraph (a). Any such determination shall be transmitted promptly to the disputing parties, the Investment Committee and, if constituted, to the tribunal. The determination shall be binding on the tribunal and any decision or award issued by the tribunal must be consistent with that determination;

(c) if a panel has made findings, rulings or recommendations under Article 20.9 (Functions of Panels) of Chapter 20 (Consultations and Dispute Settlement)

with respect to the same measure which is the subject of a disputing investor's claim under Section B (Investor-State Dispute Settlement) of Chapter 14 (Investment), the Parties shall transmit the final report to the disputing parties and the tribunal. The panel report shall be binding on the tribunal, and any decision or award issued by the tribunal must be consistent with the panel report; and

(d) if the authorities referred to in subparagraphs (a) and (b) have not made a determination within 180 days of the date of receipt of the disputing Party's written request for a determination under subparagraph (a), either Party may request the establishment of a panel under Chapter 20 (Consultations and Dispute Settlement) to consider whether and to what extent Article 10.5 is a valid defence to the claim. The panel established under Article 20.8 (Establishment and Reconvening of Panels) of Chapter 20 (Consultations and Dispute Settlement) shall be constituted in accordance with Article 10.11. Further to Article 20.10 (Panel Procedures) of Chapter 20 (Consultations and Dispute Settlement), the panel shall transmit its final report to the disputing parties and to the tribunal.

3. If a panel is established under paragraph 2(d), a tribunal established under Article 14.25 (Submission of a Claim) of Chapter 14 (Investment) may only proceed with respect to the claim once it has received the final report of the panel. The final report of panel referred to in paragraph 2(d) shall be binding on the tribunal, and any decision or award issued by the tribunal must be consistent with the final report.

4. If no request for the establishment of a panel in accordance with paragraph 2(d) has been made within 10 days of the expiration of the 120 day period referred to in paragraph 2(d), the tribunal established under Article 14.25 (Submission of a Claim) of Chapter 14 (Investment) may proceed with respect to the claim.

(a) The tribunal shall draw no inference regarding the application of Article 10.5 from the fact that the authorities have not made a determination as described in paragraphs 2(a), (b) and (d).

(b) The Party of the disputing investor may make oral and written submissions to the tribunal regarding the issue of whether and to what extent Article 10.5 is a valid defence to the claim. Unless it makes such a submission, the Party of the disputing investor shall be presumed, for the purposes of the arbitration, to take a position on Article 10.5 that is not inconsistent with that of the disputing Party.

5. For the purposes of this Article, the definitions of the following terms set out in Article 14.1 (Definitions) of Chapter 14 (Investment) are incorporated, *mutatis mutandis*: 'disputing investor', 'disputing parties', 'disputing party' and 'disputing Party'.

ANNEX 10-A

AUTHORITIES RESPONSIBLE FOR FINANCIAL SERVICES

The authorities for each Party responsible for financial services are:

- (a) for Australia, the Treasury and the Department of Foreign Affairs and Trade; and
- (b) for Indonesia, the Ministry of Finance, Financial Services Authority, Bank Indonesia, Ministry of Trade, and Ministry of Foreign Affairs.