

PACER PLUS REGIONAL WORKSHOP ON TRADE IN SERVICES

Day 1 S3. PACER Plus Services Chapter: Overview –
Structure & Scope



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Overview

- I. Significance of PACER Plus Services Chapter
- II. Structure of Services Chapter
- III. Scope & key definitions

I. Significance of PACER Plus Services Chapter

I.1 Significance of PACER Plus Services Chapter

- PACER Plus is first trade agreement in force between Parties with detailed commitments on trade in services
- Existing agreements between PICs / with other partners – generally focus on goods:
 - SPARTECA; PICTA; MSG Trade Agreement; EU Economic Partnership Agreement
- Pacific Island Countries Trade Agreement (PICTA) Services Protocol – concluded 2012 but not yet in force
 - Chapter obligations broadly similar to PACER Plus / GATS
 - Reports that specific commitments limited to certain service sectors
- **WTO Members** (Samoa, Solomon Islands, Tonga, Vanuatu) have existing commitments to each other (and all WTO Members) under GATS
 - PACER Plus includes higher level of commitments than GATS
- **Non-WTO Members** (Cook Islands, Kiribati, Niue, Tuvalu) made binding commitments to other PACER Plus Parties on services for first time
 - Significant development

I.1 Significance of PACER Plus Services Chapter

Development focused agreement

- PACER Plus not a standard FTA – central focus to support regional development
 - Support PICs to participate more actively in, and benefit from, regional and global trade
- Parties include a number of LDCs, DCs and non-WTO Members
- Core element of PACER Plus is Development & Economic Cooperation Chapter and Work Programme
- Development objectives reflected in preamble and flexibilities built into Chapters:
 - Special and differential treatment; flexibilities for developing Parties

I.1 Significance of PACER Plus Services Chapter

Development focused agreement

- Preamble (introduction to Agreement) sets out intention & objectives
- Why important?
 - Used in interpretation of treaty – provisions interpreted in light of ‘object and purpose’
- PACER Plus preamble – reflects development focus and relationship between the Parties
 - Recognises significant differences between Parties size and capacities – principle special & differential treatment
 - Commitment to make significant and sustainable contribution to economic and social development of FIC Parties
 - Confirms PACER Plus must be development tool for FIC Parties

III. Preamble

Recognising the unique and close historical, political, developmental, economic, geographic and cultural links that bind the Parties as well as their shared values and interests;

Recognising the significant development relationship among the Parties and seeking to further enhance and complement this relationship with improved trade and investment cooperation;

Taking into account the significant differences in the size of the Parties; the unique and particular vulnerabilities and development challenges of developing country and least developed country Parties in the region; the need to build their capacities with a view to fostering their enhanced participation in international trade and investment; and that many of the Parties are not Members of the World Trade Organization;

Affirming the desire to foster a stable and predictable environment to progressively remove barriers to trade and investment between them, while taking into account the principles of flexibility and special and differential treatment;

III. Preamble

Affirming that their commitment is to make a significant and sustainable contribution to the economic and social development of the Forum Island Country Parties and to assist their gradual integration into the world economy including, inter alia, through the strengthening of their domestic capacity, efficiency and competitiveness;

Mindful of the links between economic development, social development and environmental protection and the important role of development and economic cooperation in promoting sustainable development, the Parties resolve that PACER Plus must be a development tool for the Forum Island Countries to, inter alia, increase their production capacity and exports; support their economic and trade diversification, and competitiveness efforts; attract investment to them; and lead to the creation of jobs;

Cognisant of the role of technical assistance through trade-related assistance mechanisms and other programmes to strengthen the capacity of the Forum Island Countries to effectively participate in the multilateral trading system and improve trade competitiveness;

II. Structure of Service Chapter

II.1 Structure of FTA Services Chapters

- PACER Plus Services Chapters – draws on GATS
- Similar scope and definitions including ‘trade in services’ & ‘Modes of service supply’
- Contains core GATS obligations: National Treatment, Market Access, MFN
- Like GATS – PACER Plus takes **positive list** approach to making commitments
 - National Treatment & Market Access obligations only apply in sectors listed in a Party’s schedule
 - subject to limitations / conditions in the schedule

II.1 Structure of FTA Services Chapters

- PACER Plus Services obligations in various parts:
- Trade in Services Chapter
 - Contains core obligations and sets out how commitments are made in Schedules
- Schedules of specific commitments
 - Sets out commitments on NT and MA and any limitations / qualifications
- Schedule of MFN exemptions
 - Contains exemptions from MFN for Services & Investment
- Other Chapters contain provisions which are relevant:
 - Investment & MNP (overlap with Services)
 - General Provisions and Exceptions
 - Transparency
 - Initial Provisions & Definitions, Institutional Provisions, Dispute Settlement

II. Scope & key definitions

III.1 Scope

Article 2: Scope

1. This Chapter applies to measures affecting trade in services adopted or maintained by a Party.

- Like GATS, PACER Plus Service Chapter has broad scope – applies to “measures affecting trade in Services”
- What are “measures”?
 - includes: “law, regulation, rule, procedure, decision, administrative action or any other form”
- “affecting trade in services” interpreted broadly
 - Not just laws specific to services – any requirements which *affect* trade in services

III.1 Scope

trade in services means the supply of a service:

- (a) from the territory of one Party into the territory of another Party ('Mode 1');
- (b) in the territory of one Party to the service consumer of another Party ('Mode 2');
- (c) by a service supplier of one Party, through commercial presence in the territory of another Party ('Mode 3');
- (d) by a service supplier of one Party, through presence of natural persons of a Party in the territory of another Party ('Mode 4');

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

- Like GATS, “trade in services” defined in terms of 4 ways (modes) of supplying a service
- Services Chapter applies to **all service sectors**
 - Only sector-specific exception in area air transport services

III.1 Scope

Who is a service supplier?

- Can be either natural (real) person (citizen, PR) or enterprise (business)
 - Enterprise is broad – not just companies – includes all kinds of businesses whether privately or publicly owned

service supplier of a Party means a person of a Party that supplies a service.

person means either a natural person or an enterprise;

enterprise means any entity constituted or organised under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including any corporation, trust, partnership, sole proprietorship, joint venture, association or similar organisation, and a branch of an enterprise;

III.1 Scope

When does business qualify as service supplier of Party?

- General case – if established (incorporated) under law of a Party – or branch with substantive business operations in a Party
- Mode 3 – if owned or controlled by persons of the Party
 - E.g. Retail shop in Tuvalu – established / owned by Samoans – treated as service supplier of Samoa

enterprise of a Party means an enterprise which is either:

(a) organised or constituted under the law of that Party, or a branch located in the territory of another Party, which is engaged in substantive business operations in the territory of that Party or any other Party;
or

(b) in the case of the supply of a service through commercial presence, owned or controlled by:

(i) natural persons of that Party; or

(ii) an enterprise of that Party identified under subparagraph (a);

III.2 Denial of benefits

- Parties can “**deny the benefits**” of Services Chapter to supplier if doesn’t have genuine connection to another Party
- Party can *choose* to deny benefits (not offer commitments) to enterprise – if conditions met – not **automatic**



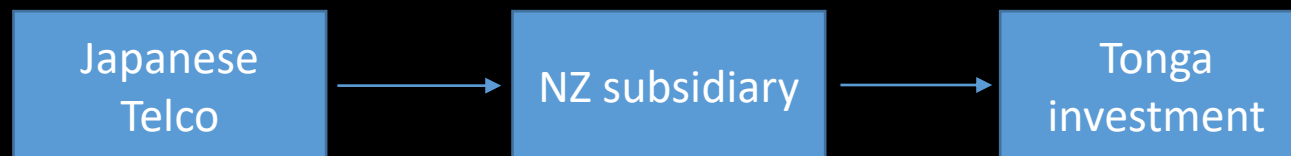
Article 16: Denial of Benefits

1. A Party may deny the benefits of this Chapter to a service supplier of another Party where the Party establishes that:
 - (a) 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 any Party; or
 - (b) 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 any Party.

III.2 Denial of benefits

Conditions:

- Only applies where business owned or controlled by persons from a *non-Party* or *denying* Party (owned by domestic investors)
- Only applies where investor has no **substantive business operations** in *any Party*
 - Factors SBO: nature of business operations, employees, investment
- Doesn't apply if investor has significant business operations in Party
- Example:



- Is the Japanese-owned NZ company covered by PACER Chapter?
 - Depends on whether NZ sub is 'shell' company or has SBO in NZ

III.3 Scope - exclusions

- PACER Plus carves-out certain issues from entire Services Chapter:
 - Services supplied in the exercise of governmental authority (SSEGA)
 - Government procurement;
 - Subsidies and grants; and
 - Measures affecting air traffic rights (except some specific supporting services)
- Based on approach in GATS but some carve-outs broader
 - **Complete carve-out for subsidies & government procurement**

Article 2: Scope

2. This Chapter shall not apply to:

- (a) services supplied in the exercise of governmental authority;
- (b) ... government procurement;
- (c) subsidies or grants provided by a Party, ...;
- (d) in respect of air transport services, measures affecting traffic rights however granted; or measures affecting services directly related to the exercise of traffic rights, other than measures affecting:
 - (i) aircraft repair and maintenance services;
 - (ii) the selling and marketing of air transport services;
 - (iii) computer reservation system services;
 - (iv) specialty air services;
 - (v) ground handling services; and
 - (vi) airport operation services.

III.3 Scope - exclusions

Services Supplied in the exercise of governmental authority

- PACER Plus follow GATS exclusion for “services supplied in the exercise of governmental authority” (SSEGA)
- SSEGA carve-out has two conditions:
 - not supplied on commercial basis; and
 - not supplied in competition with one or more service suppliers
- Publicly funded / provided government monopoly would be SSEGA
 - Eg: fire, police, ambulance, judges
- But as govt services corporatised / privatised – less common
 - E.g. – competition in areas of healthcare, education, post



III.3 Scope - exclusions

Services Supplied in the exercise of governmental authority

- Some Parties have limitations in Schedule to cover services currently within scope of SSEGA but may be privatised in future

**ANNEX 7-A: SCHEDULE OF SPECIFIC SERVICES COMMITMENTS (CHAPTER 7)
SCHEDULE OF TONGA**

| Sector or Sub-sector | Limitations on Market Access | Limitations on National Treatment | Additional Commitments |
|---------------------------------------|--|--|-------------------------------|
| I. HORIZONTAL COMMITMENTS | | | |
| ALL SECTORS INCLUDED IN THIS SCHEDULE | (3) Unbound for measures: a) as part of the act of devolving a service that is provided in the exercise of governmental authority at the time the Agreement enters into force; or, b) regarding the sale or disposal of government-owned entities or assets. | | |

Quiz

PACER Plus - Services - Scope & Structure



Thank you