

PACER PLUS REGIONAL WORKSHOP ON TRADE IN SERVICES

Day 1 S4. PACER Plus Services Chapter – obligations



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Overview

1. National Treatment
2. MFN
3. Market Access
4. Monopoly & exclusive service suppliers
5. Domestic Regulation
6. Recognition
7. Payments & Transfers
8. Transparency
9. Exceptions

1. National Treatment

Article 6: National Treatment

1. In the sectors specified in its Schedule of Specific Services Commitments at Annex 7-A to this Agreement, and subject to any conditions and qualifications set out therein, each Party shall accord to services and service suppliers of another Party, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.

1. National Treatment

- Non-discrimination - can't treat services / service suppliers of other PACER Parties *less favourably* than local suppliers
- Examples:
 - Sectors / activities closed to foreign suppliers or foreign ownership limits
 - Extra / stricter requirements for foreign suppliers
- NT only applies to sectors committed in **Schedules** (Annex 7-A)
 - Subject to any conditions / limitations in Schedule



1. National Treatment

- If no commitments in a sector in Schedule – NT does not apply
 - E.g. Kiribati commitments on Communication Services limited to Courier Services – no commitments on postal services

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

SCHEDULE OF KIRIBATI

Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence

Sector or Sub-Sector	Limitations on Market Access	Limitations on National Treatment
II. Sector-Specific Commitments		
2. COMMUNICATION SERVICES		
B. Courier Services (CPC 7512)	1) None 2) None 3) None	1) None 2) None 3) None

1. National Treatment

- Requirements that discriminate against foreign suppliers not breach NT if set out in Schedule
 - E.g. All Parties have restrictions on foreign ownership of land – set out in Schedules – not breach NT

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

SCHEDULE OF TUVALU

Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence

Sector or Sub-Sector	Limitations on Market Access	Limitations on National Treatment
I. HORIZONTAL COMMITMENTS		
All sectors included in this schedule		3) Natural persons who are not citizens of Tuvalu and enterprises that are not wholly-owned by citizens of Tuvalu are prohibited from owning land. Land may be leased for a period not exceeding 25 years. Leases have to be approved by the Lands Court and by the relevant Minister under a non-discriminatory process.

Article 6: National Treatment

...

2. A Party may meet the [National Treatment] requirement ... by according to services and service suppliers of another Party either formally identical treatment or formally different treatment to that which it accords to its own like services and service suppliers.

3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Party compared to the like service or service suppliers of another Party.

- NT Article explains meaning “**less favourable treatment**”
- Difference in treatment of foreign suppliers / services not always LFT
- **Key question**: does the different treatment “modify the conditions of competition” in favour of local suppliers/ services
 - Does it give them a **competitive advantage**?

1. National Treatment

Less favourable treatment

- Key issue is *effect* of treatment on service suppliers – whether affects competition in the market – favours domestic suppliers:
 - requiring foreign retailer to fill out extra form – not likely competitive disadvantage
 - But: imposing minimum capital requirement (invest over US\$10m) on establishment of foreign-owned retail – likely LFT – effectively excludes from small retail

Who do you compare?

- Only breach NT if less favourable treatment of **like services** or **like service suppliers**
 - Ensure comparing similar services / suppliers
- ‘likeness’: whether services / service suppliers are in a **competitive relationship**

2. Most-Favoured-Nation Treatment

Article 3: Most-Favoured-Nation Treatment

1. With respect to any measure covered by this Chapter, each Party shall accord immediately and unconditionally to services and service suppliers of another Party treatment no less favourable than that it accords to like services and service suppliers of a non-party.
2. A Party may maintain a measure inconsistent with Paragraph 1 provided that such a measure falls within the scope of any exemptions list in Annex I (Schedule of Most-Favoured-Nation Exemptions on Services and Investment).

2. Most-Favoured-Nation Treatment

- Similar elements to National Treatment
- Also concerned with discrimination but instead of comparing foreign & domestic service suppliers – compare one group of foreign suppliers (from PACER Plus Party) with any *other* foreign suppliers
- Key question: is there preferential treatment for suppliers from a *particular* country?
- MFN does not apply to any measures (requirements, laws, policies) set out in the [Annex I Exemptions](#)
- All Parties carve-out preferences under pre-existing FTAs & all Pacific Parties carve-out treatment under PICTA or any protocol (addition / amendment) to PICTA

ANNEX I - LIST OF MOST-FAVOURED-NATION EXEMPTIONS (CHAPTER 7 AND CHAPTER 9)

SCHEDULE OF NIUE

1. Niue specifies below a list of most-favoured-nation exemptions for commitments under Article 3, paragraph 2 (Most-Favoured-Nation Treatment) of Chapter 7 (Trade in Services), and under Article 7, paragraph 2 (Most-Favoured-Nation Treatment) of Chapter 9 (Investment).

Sector or Sub-Sector	Exemption	Applicable countries and territories	Conditions creating the need for the exemption
All sectors	<p>Any measure that accords more favourable treatment to parties to any bilateral or multilateral international agreement or in force or signed prior to the date of entry into force of this Agreement.</p> <p>For greater certainty, this right extends to any differential treatment accorded pursuant to a subsequent review or amendment of the relevant bilateral, regional or multilateral international agreement, including the expansion of an agreement covering only trade in goods to trade in services or investment. For the avoidance of doubt, this includes measures adopted or maintained under any existing or future protocol to the <i>Pacific Island Countries Trade Agreement</i> (PICTA).</p>	Any country to which the Niue accords more favourable treatment in this area.	Management of existing trade agreements.

2. Most-Favoured-Nation Treatment

Impact of MFN

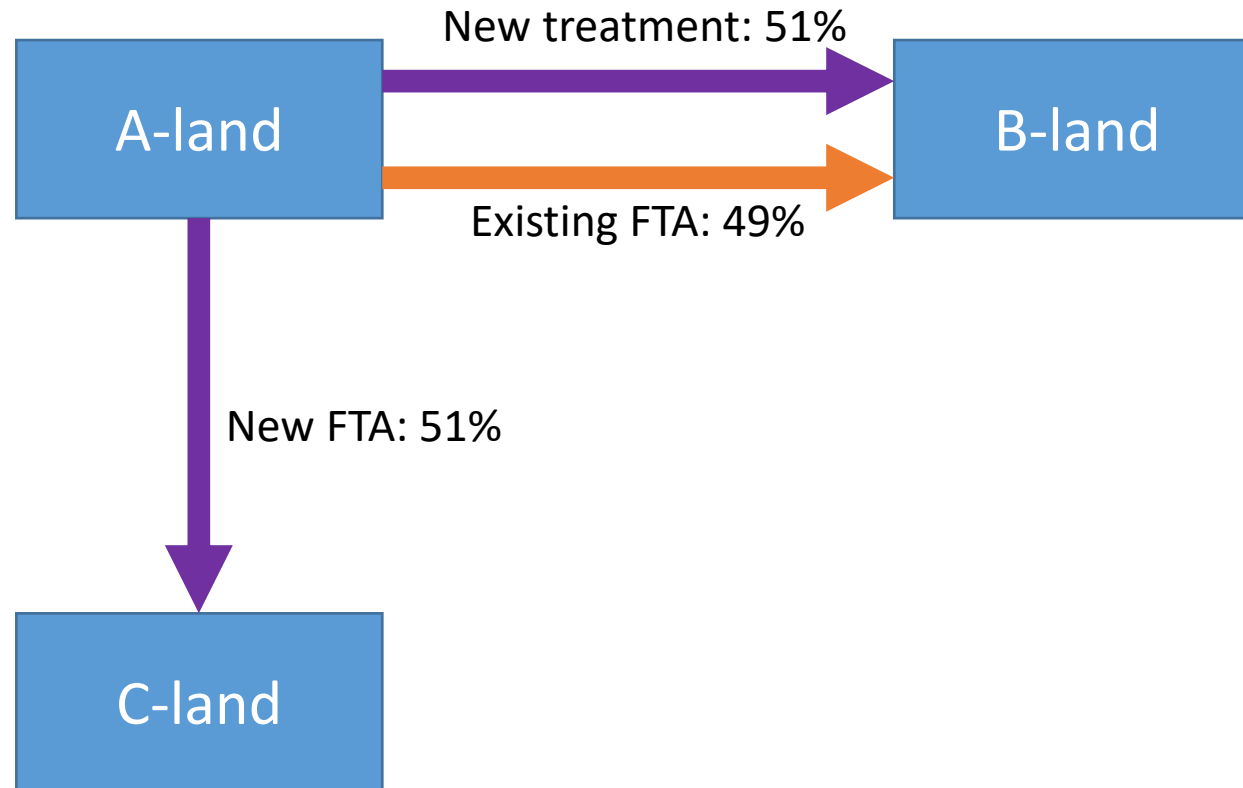
- MFN allows service suppliers to claim entitled to 'more favourable' treatment granted to suppliers in other treaties
- In PACER Plus – limited to future FTAs (carve-out for pre-existing FTAs in MFN Exemptions Annex)
- Any other specific carve-outs from MFN in MFN exemptions Annex also apply
 - If preferential treatment / area carved-out in MFN Annex – MFN obligation does not apply



FTAs & MFN - example

Example

- A-land & B-land have existing FTA with MFN
- A allows up to 49% foreign equity in telecom sector companies
- A-land signs new FTA with C-land - commits to 51% foreign equity
- A-land must grant same treatment to B-land investors
 - Invest up to 51%
 - No change to FTA text



Article 5: Market Access

2. In the sectors where market access commitments are undertaken, a Party shall not maintain or adopt, ... unless otherwise specified in its Schedule, measures which:

(a) limit the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or ... an economic needs test;

(b) limit the total value of service transactions or assets in the form of numerical quotas or ... an economic needs test;

(c) limit the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or ... an economic needs test, ...;

(d) limit the total number of natural persons who may be employed in a particular service sector ... in the form of numerical quotas or ... an economic needs test;

(e) restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and

(f) limit the participation of foreign capital ...

3. Market Access

- In sectors where Party makes commitments, MA prohibits six types of restrictions (unless set out in Schedule):
 - (a) number of service suppliers
 - (b) value of service transactions or assets
 - (c) number of operations or quantity of output
 - (d) number of natural persons supplying a service
 - (e) type of legal entity or joint venture
 - (f) participation of foreign capital
- Note:
 - Apart from (f) – not necessarily discriminatory
 - 4 types of quantitative restrictions (paragraphs a-d) – numerical quotas or ENT
 - limitations on legal form (paragraph e); and
 - foreign equity Limits (paragraph f)

3. Market Access

(a) Limitations on the number of service suppliers:

- Licence for restaurant based on impact on existing restaurants (economic needs test)
- Only citizens allowed to supply service (equivalent to zero quota)

(b) Limitations on the total value of transaction or assets:

- Foreign banks limited to total 10% of total domestic deposits

(c) Limitations on the total number of service operations or quantity of service output:

- Cruise boat operators limited to 3 cruises a week

(d) Limitations on the total number of natural persons:

- Retail business may not employ more than 5 people

(e) Restrictions or requirements regarding type of legal entity or joint venture:

- Foreign telco businesses can only establish through a joint venture with a local business

(f) Limitations on the participation of foreign capital:

- Foreign equity in media companies limited to 30%

3. Market Access

Economic Needs Test

- Paras (a)-(d) of MA all refer to limitations through numerical quotas or the requirements of an economic needs test

What is an ENT?

- ENT not defined in Agreement - test to assess need for additional suppliers and impact on existing suppliers – may consider:
 - number of existing suppliers in market;
 - demand & demographics;
 - impact on existing suppliers;
 - availability of local labour ...

3. Market Access

- List of prohibited restrictions is exhaustive
- MA does not prohibit all 'market access' restrictions
 - If limitation doesn't fall under one of the specific requirements (paragraphs (a)-(f)) – doesn't need to be scheduled against MA
- Like National Treatment – MA only applies in sectors where a Party makes commitments in its Schedule
 - If sector not listed in Schedule – cannot be in breach of MA
- Parties can maintain restrictions which are prohibited by MA as long as set out in Schedule
 - Not in breach of MA

3. Market Access

- Example: some Parties require approval for foreign enterprises to establish and perform certain activities – if set out in Schedule – not in breach of MA

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

Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence

Sector or Sub-Sector	Limitations on Market Access	Limitations on National Treatment
I. HORIZONTAL COMMITMENTS		
ALL SECTORS INCLUDED IN THIS SCHEDULE	3) Foreign enterprises seeking to carry on business activities in Niue require registration by Cabinet. Registration is granted subject to meeting an economic needs test on the basis of established criteria in relevant laws and regulations.	

4. Monopoly & exclusive service suppliers

- Applies where government authorises monopoly (sole) supplier of service or small number exclusive service suppliers
- Must ensure any monopoly service supplier (or exclusive service suppliers) complies with MFN and any specific commitments (under NT, MA)
 - Not discriminate against suppliers from other Parties

Article 13: Monopolies and Exclusive Service Suppliers

1. Each Party shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Party's obligations under [MFN], [Market Access], [National Treatment] and [Additional Commitments].

4. This Article shall also apply to cases of exclusive service suppliers, where a Party, formally or in effect:

- (a) authorises or establishes a small number of service suppliers; and
- (b) substantially prevents competition among those suppliers in its territory.

4. Domestic regulation

- Even if licensing & qualification requirements not discriminatory, still potential to frustrate trade / undermine commitments
 - Rules on Dom Reg target behind-the-border barriers
 - Aim to reduce regulatory barriers - increase transparency - simplify procedures for qualifications and licensing
 - DR two components:
 - General commitment (applies all sectors)
 - Specific commitments (only apply to sectors with specific commitments)
- (a) General commitment** – applies to all sectors / measures:
- Administrative remedies for decisions affecting trade in services

Article 10: Domestic Regulation

1. In sectors where specific commitments are undertaken, each Party shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.
2. (a) Each Party shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures, which provide, ... for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services...
4. In sectors in which a Party has undertaken specific commitments ... that Party shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments under this Agreement in a manner which:
 - (a) does not comply with the criteria outlined in paragraph 3(a), (b) or (c); and
 - i. *[[based on objective and transparent criteria, such as competence and the ability to supply the service;*
 - ii. *not more burdensome than necessary to ensure the quality of the service;*
 - iii. *in the case of licensing procedures, not in themselves a restriction on the supply of the service.]]*
 - (b) could not reasonably have been expected of that Party at the time the specific commitments in those sectors were made.

4. Domestic regulation

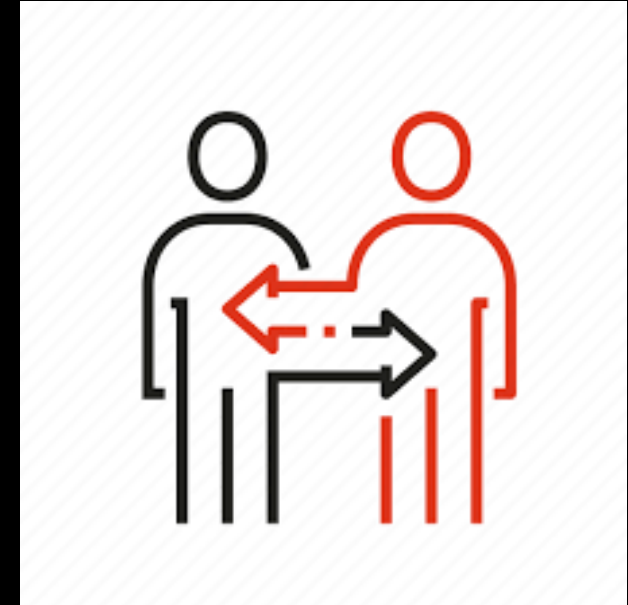
(b) Specific obligations - only apply in sectors where specific commitments

- Rules on how measures affecting services are administered / implemented (para 1):
 - **Measures of general application** administered "in a reasonable, objective & impartial manner"
 - laws, requirements which apply broadly – not limited to particular supplier / case
- Rules on how licensing and qualification requirements are applied – ensure not undermine commitments (para 4):
 - based on objective & transparent criteria;
 - not overly burdensome;
 - not restriction on trade
- Rules on processes to authorise service suppliers (para 6):
 - give applicant opportunity to fix missing information
 - decide in reasonable time & inform applicant
 - Provide info on status of application
 - If reject application – provide reasons to maximum extent possible

5. Recognition

What is recognition about?

- Many professions / services – suppliers must meet criteria for authorisation: education, experience, licenses
- Recognition - country recognises education / licenses granted by another country as satisfying their own requirements
 - Generally reciprocal basis under mutual recognition agreement / arrangement (MRA)
 - Each country agrees to recognise qualifications / licenses granted by other country



Article 11: Recognition

1. For the purposes of the fulfilment, ... of its standards or criteria for the authorisation, licensing or certification of service suppliers, ... a Party may recognise the education or experience obtained, requirements met, or licenses or certifications granted in a particular country. Such recognition, ... may be based upon an agreement or arrangement ... or may be accorded autonomously.
3. A Party that is a party to an agreement or arrangement of the type referred to in paragraph 2, whether existing or future, shall afford adequate opportunity for other interested Parties to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it. ...
4. A Party shall not accord recognition in a manner which would constitute a means of discrimination between other Parties in the application of its standards or criteria for the authorisation, licensing or certification of services suppliers, or a disguised restriction on trade in services.
5. If appropriate, recognition should be based on multilaterally agreed criteria. ...
6. The Parties shall actively encourage their competent bodies to consult with each other and with relevant regional bodies after the entry into force of this Agreement to explore the possibilities for recognition of qualifications or professional recognition or registration. ...

5. Recognition

Key rules on recognition

- PACER Plus based on GATS – no *requirement* to recognise
- Art 11: *allows* for Parties to grant recognition to suppliers from a particular party – not inconsistent with MFN
- Key requirement: if Party agrees MRA with another country – must give other Parties to opportunity to negotiate comparable MRA
- Other requirements:
 - Can't grant recognition in discriminatory way or disguised restriction trade
 - Where appropriate - recognition based on multilaterally agreed criteria
 - Parties required to encourage professional bodies to explore possibility of recognition

6. Payments & Transfers

Article 12: Payments and Transfers

1. Except under the circumstances envisaged in Article [Security Exceptions], a Party shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments.
2. Nothing in this Chapter shall affect the rights and obligations of a Party as a Member of the International Monetary Fund (IMF) ..., provided that a Party shall not impose restrictions on any capital transactions inconsistent with its specific commitments regarding such transactions, except under Article [Measures to Safeguard the Balance of Payments] ...

- In sectors where Parties have made specific commitments in Schedules –
 - must not restrict transfers and payments related to service transactions
 - limited exceptions

6. Payments & Transfers

- **Current transactions** (e.g. payment for service supplied by foreign service supplier)
 - No restrictions on transfers relating to specific commitments unless justified by **Security Exception**
- **Capital transactions** (e.g. transfer \$ from foreign (mode 3) investor to make investment or transfer from sale of investment)
 - Restriction on transfers relating to specific commitments only where justified by **Balance of Payments Safeguard**



6. Payments & Transfers

Measures to Safeguard the Balance of Payments (Art 3, Exceptions Chapter)

- Applies in case of “serious balance of payments and external financial difficulties”
- Permits restrictions on payments and transfers related to trade in services
- Conditions:
 - No more restrictive than necessary & avoid unnecessary damage to interests of other Parties
 - Temporary and phased out when situation improves
 - Non-discriminatory

7. Transparency

Article 17: Contact Points and Transparency

1. Each Party shall designate a contact point to facilitate communications between the Parties on any matter covered by this Chapter, and shall provide details of such contact point to the other Parties. ...
3. To the extent of its capacity, each Party shall ensure that all measures of general application relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards are published promptly through printed or electronic means, or otherwise.
4. Each Party shall respond promptly to all requests by another Party for specific information on any measures of general application which pertain to or affect the operation of this Chapter ...

7. Transparency

Services Chapter

- Requirement to establish **contact points** and respond to requests for information on “measures of general application” affecting trade in Services
- Requirement **promptly publish**, measures of general application relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards
 - Qualified: *to the extent of its capacity*

7. Transparency

Transparency Chapter

- Core transparency obligations related to publication; advance notice; opportunity to comment on proposed measures
- In most cases - *qualified* obligations (not strict / absolute)
 - Recognise might not be possible in all cases and capacity constraints
- Prompt publication of all measures relating to services (wherever possible) - electronic format (if possible)
- Publish in advance (if possible) and provide Parties with opportunity to comment (where appropriate)
- Notify other Parties of proposed measures (to extent possible) – provide information / respond to questions

CHAPTER 13: TRANSPARENCY

Article 2: Publication

1. Each Party shall ensure, wherever possible, that its laws, regulations, procedures, and administrative rulings of general application relating to any matter covered by this Agreement are promptly published or otherwise made publicly accessible to interested persons.
2. To the extent possible, each Party shall make the measures referred to in paragraph 1 available in electronic form, or online.
3. To the extent possible, each Party shall:
 - (a) publish in advance any measure referred to in paragraph 1 that it proposes to adopt; and
 - (b) where appropriate, provide all Parties with a reasonable opportunity to comment on such proposed measures.

CHAPTER 13: TRANSPARENCY

Article 3: Notification and Provision of Information

1. To the extent possible, each Party shall notify the other Parties of any proposed or actual measure that the Party considers might materially affect the operation of this Agreement or otherwise substantially affect another Party's interests under this Agreement.
2. On request of another Party, a Party shall provide information and respond to questions pertaining to any actual or proposed measure that the requesting Party considers might materially affect the operation of this Agreement or otherwise substantially affect its interests under this Agreement, regardless of whether the requesting Party has been previously notified of that measure.

8. Exceptions: **General Exceptions**

- PACER Plus incorporates GATS General Exceptions for Services
- Even if government action otherwise inconsistent with PACER Plus – not breach if justified by general exceptions
- Exceptions for measures taken for certain policy interests including:
 - Protection of (human, animal or plant) life or health;
 - Protection of public morals
 - conservation / environment
 - taxation



GATS Article XIV: General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

- (a) necessary to protect public morals or to maintain public order;
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
 - (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
 - (ii) the protection of the privacy of individuals ... ;
 - (iii) safety;
- (d) inconsistent with [NT], provided the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes

8. Exceptions: **General Exceptions**

- PACER Plus includes 2 additional general exceptions for measures:
- Relating to **conservation** of exhaustible natural resources; and
- Necessary to protect **cultural** works or sites of support **creative** arts:
 - broadly defined to include traditional practice and cultural expression

CHAPTER 11 - Article 1: General Exceptions

7. For the purposes of Chapter 7 (Trade in Services) ... subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination ..., or a disguised restriction on trade in services ..., nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures:

(a) necessary to protect national works or specific sites of historical or archaeological value, or measures necessary to support creative arts of national value;³ or

(b) relating to the conservation of living or non-living exhaustible natural resources.

8. Exceptions: **General Exceptions**

- To benefit from general exception – must satisfy conditions (WTO interpretation)
- **First** measure must fit into one of the categories / policy areas – e.g.:
 - *Necessary* to protect human health
 - *Relating to* conservation of natural resources
- Different language effects scope: harder for a measure to be “necessary” than “relating to” policy interest
- **Second** must satisfy requirements of introduction to exceptions
 - Not arbitrary or unjustifiable discrimination
 - Not disguised restriction on trade
- Protects against abuse / improper use of exceptions

8. Exceptions: **Security Exception**

- Exception for actions / requirements to protect certain essential security interests
 - Broader than general exceptions – fewer disciplines / more discretion
- PACER-Plus security exception based on WTO / GATS approach
 - applies to certain specific security interests – core security concerns
- Broad exception to withhold information where disclosure contrary to essential security interests
- Broad exception for measures Party considers necessary to protect essential security interests relating to:
 - Nuclear materials;
 - Services for military establishments;
 - to **protect critical infrastructure from attacks**; and
 - In times of war / emergency in international relations
- Broad exception for any action to fulfill obligations under UN Charter

Article 2: Security Exceptions

1. Nothing in this Agreement shall be construed:

- (a) to require any Party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent any Party from taking any action which it considers necessary for the protection of its essential security interests:
 - (i) relating to fissionable and fusionable materials ...;
 - (ii) relating to the traffic in arms, ammunition, ..., or relating to the supply of services, as carried on ... for the purpose of supplying or provisioning a military establishment;
 - (iii) taken so as to protect critical public infrastructures including communications, power and water infrastructures from deliberate attempts intended to disable or degrade such infrastructures;
 - (iv) taken in time of war or other emergency in international relations; or
- (c) to prevent any Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

8. Exceptions: **Security Exception**

- PACER-Plus security exception applies to certain *specific* security interests
- Parties have discretion to determine which actions are necessary
 - Depends on facts / circumstances
- Not unlimited discretion – actions should be justifiable
- WTO interpretation suggests there must be a ‘plausible connection’ between actions and essential security interest being protected

8. Exceptions: Prudential Exception

Article 4: Prudential Measures

Notwithstanding any other provisions of this Agreement, a Party shall not be prevented from taking measures for prudential reasons,⁵ including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. If such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Party's commitments or obligations under the Agreement.

- Prudential exception provides important policy space for financial regulators / prudential regulation
- Confirms nothing in *Agreement* prevents a Party from taking measures for prudential reasons

8. Exceptions: Prudential Exception

- Broad exception for prudential reasons - applies to whole Agreement including all Service Chapter obligations
- Provides **Inclusive list** of prudential reasons:
 - measures for the protection of investors, depositors, policy holders
 - to ensure integrity and stability of financial system.
- But exception not limited to these specific interests
 - Provides space for broader prudential reasons – can evolve over time
- Broad exception – but subject to condition: ‘not used as a means of avoiding a Party’s commitments or obligations under the Agreement’
 - Less demanding than conditions to satisfy general exceptions

Quiz

PACER Plus - Services - Key Obligations



Thank you