

CHAPTER 12

FINANCIAL SERVICES

ARTICLE 12.1 : SCOPE AND COVERAGE

1. This Chapter applies to measures adopted or maintained by a Party relating to:
 - (a) financial institutions of the other Party;
 - (b) investors of the other Party, and investments of such investors, in financial institutions in the Party's territory; and
 - (c) trade in financial services.

2. Chapters 9 (Cross-Border Trade in Services) and 10 (Investment) apply to measures described in paragraph 1 only to the extent that such Chapters or Articles of such Chapters are incorporated into this Chapter. For this purpose:
 - (a) Articles 9.12, 9.15, 10.11, 10.12, 10.13, 10.16, 10.17 and 10.18 are hereby incorporated into and made a part of this Chapter;
 - (b) As for Articles 9.16 and 10.12, in the event of any inconsistency between Chapter 9(Cross-Border Trade in Services) and Chapter 10 (Investment) in this Agreement, Chapter 10 shall prevail to the extent of the inconsistency; and
 - (c) Section C of Chapter 10 (Investment) is hereby incorporated into and made a part of this Chapter solely for claims that a Party has breached Articles 10.11, 10.13, 10.16 and 10.17, as incorporated into this Chapter.

3. This Chapter does not apply to measures adopted or maintained by a Party relating to:
 - (a) activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies;
 - (b) activities or services forming part of a public retirement plan or statutory system of social security; or
 - (c) activities or services conducted for the account or with the guarantee or using the financial resources of the Party, including its public entities,

except that this Chapter shall apply if a Party allows any of the activities or services referred to in subparagraphs (a), (b) or (c) to be conducted by its financial institutions in competition with a public entity or a financial institution.

4. This Chapter does not apply to laws, regulations or requirements governing the procurement by government agencies of financial services purchased for governmental purposes and not with a view to commercial resale or use in the supply of services for commercial sale.

ARTICLE 12.2 : NATIONAL TREATMENT

1. In the sectors inscribed in its Schedule in Annex 12A, and subject to any conditions and qualifications set out therein, each Party shall accord to financial services and financial service suppliers of the other Party, in like circumstance, in respect of all measures affecting the supply of financial services, treatment no less favourable than that it accords to its own like financial services and financial service suppliers.

2. In the sectors inscribed in its Schedule in Annex 12A, and subject to any conditions and qualifications set out therein, each Party shall accord to the investors of the other Party, in like circumstances, in respect of the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of financial institutions and investments in financial institutions in its territory, treatment no less favourable than that it accords to its own like investors.

3. In the sectors inscribed in its Schedule in Annex 12A, and subject to any conditions and qualifications set out therein, each Party shall accord to the financial institutions of the other Party and to investments of investors of the other Party in financial institutions, in like circumstances, in respect of establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of financial institutions and investments, treatment no less favourable than that it accords to its own like financial institutions, and to investments of its own like investors in financial institutions.

4. A Party may meet the requirement of paragraphs 1, 2 and 3 by according to financial services and financial service suppliers of the other Party, investors of the

other Party, financial institutions of the other Party and to investments of investors of the other Party in financial institutions, as the case may be, in like circumstance, either formally identical treatment or formally different treatment to that it accords to its own like financial services and financial service suppliers, its own like investors, its own like financial institutions and investments of its own like investors in financial institutions, respectively.

5. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of financial services and financial service suppliers of a Party, investors of a Party, financial institutions of a Party and to investments of investors of a Party in financial institutions compared to like financial services or financial service suppliers of the other Party, like investors of the other Party, like financial institutions of the other Party and investments of like investors of the other Party in financial institutions in like circumstance.

ARTICLE 12.3 : MARKET ACCESS

1. With respect to market access through the modes of supply identified in the definition of trade in financial services in Article 12.15, each Party shall accord financial services and financial service suppliers of the other Party treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its schedule in Annex 12A.

2. In sectors where market-access commitments are undertaken, the measures which a Party shall not maintain or adopt either on the basis of regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule in Annex 12A, are defined as:

- (a) limitations on the number of financial institutions whether in the form of numerical quotas, monopolies, exclusive service providers or the requirements of an economic needs test;
- (b) limitations on the total value of financial service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
- (c) limitations on the total number of financial service operations or the total quantity of financial services output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic

needs test;

- (d) limitations on the total number of natural persons that may be employed in a particular financial service sector or that a financial institution may employ and who are necessary for, and directly related to, the supply of a specific financial service in the form of a numerical quota or the requirement of an economic needs test;
- (e) measures which restrict or require specific types of legal entity or joint venture through which a financial institution may supply a service; and
- (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

ARTICLE 12.4 : SCHEDULE OF SPECIFIC COMMITMENTS

1. Each Party shall set out in a schedule the specific commitments it undertakes under Articles 12.2 and 12.3. With respect to sectors where such commitments are undertaken, each Schedule shall specify:

- (a) terms, limitations and conditions on market access;
- (b) conditions and qualifications on national treatment;
- (c) undertakings relating to additional commitments;
- (d) where appropriate, the time-frame for implementation of such commitments.

2. Measures inconsistent with both Articles 12.2 and 12.3 shall be inscribed in the column relating to Article 12.3. In this case the inscription will be considered to provide a condition or qualification to Article 12.2 as well.

3. Schedules of specific commitments shall be annexed to this Agreement as Annex12A and shall form an integral part thereof.

ARTICLE 12.5 : TRANSPARENCY

1. Each Party commits to promote regulatory transparency in financial services. Accordingly, the Parties shall consult with the goal of promoting objective and transparent regulatory processes in each Party, taking into account

- (a) the work undertaken by the Parties in GATS and the Parties' work in other fora relating to trade in financial services; and
- (b) the importance of regulatory transparency of identifiable policy objectives and clear and consistently applied regulatory processes that are communicated or otherwise made available to the public.

2. Each Party shall publish promptly and, except in emergency situations, at latest by the time of their entry into force, all relevant regulatory measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in financial services to which a Party is a signatory shall also be published.

3. Where publication as referred to paragraph 2 is not practicable, such information shall be made otherwise publicly available.

4. Each Party shall respond promptly to all requests by the other Party for specific information of its regulatory measures of general application or international agreements within the meaning of paragraph 2. Each Party shall also establish one or more enquiry points to provide specific information to the other Party, upon request, on all such matters.

ARTICLE 12.6 : EXCEPTIONS

1. Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining measures for prudential reasons, 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 a Party's financial system. Where such measures do not conform with the provisions of this Agreement, they shall not be used as a means of avoiding the Party's commitments or obligations under such provisions.

2. Nothing in this Chapter or Chapters 10 (Investment), 11 (Telecommunications), or 14 (Electronic Commerce) applies to non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies. This paragraph shall not affect a Party's obligations under

Article 9.15, 10.7 or 10.11.

3. Notwithstanding Articles 9.15 and 10.11, as incorporated into this Chapter, a Party may prevent or limit transfers by a financial institution or financial service supplier to, or for the benefit of, an affiliate of or a 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 institutions or 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 the adoption or enforcement by a Party of 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 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 investment in financial institutions or cross-border trade in financial services.

ARTICLE 12.7 : DOMESTIC REGULATION

In sectors where specific commitments are undertaken in its schedule to Annex 12A each Party shall ensure that all measures of general application to which this Chapter applies are administered in a reasonable, objective and impartial manner.

ARTICLE 12.8 : TREATMENT OF CERTAIN INFORMATION

Nothing in this Chapter shall require a Party to furnish confidential information, the disclosure of which would impede law enforcement or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private.

ARTICLE 12.9 : RECOGNITION

1. A Party may recognise the prudential measures of any international regulatory body or non-Party in determining how the Party's measures relating to financial services shall be applied. Such recognition, which may be achieved through harmonisation or otherwise, may be based upon an agreement or arrangement with the international regulatory body or 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 agreements or arrangements, or to negotiate comparable ones 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. Where a Party accords recognition autonomously, it shall afford adequate opportunity for the other Party to demonstrate that such circumstances exist.

ARTICLE 12.10 : FINANCIAL SERVICES COMMITTEE

1. The Parties hereby establish a Financial Services Committee. The principal representative of each Party shall be an official of the Party's authority responsible for financial services.

2. The Financial Services Committee shall:

- (a) supervise the implementation of this Chapter and its further elaboration;
- (b) consider issues regarding financial services that are referred to it by a Party;
and
- (c) participate in the dispute settlement procedures in accordance with Article 12.12.

3. The Financial Services Committee shall meet one year after this Agreement has entered into force and thereafter as otherwise agreed by both Parties, to assess the functioning of this Agreement as it applies to financial services.

ARTICLE 12.11 : CONSULTATIONS

1. A Party may request consultations with the other Party regarding any matter arising under this Agreement that affects financial services. The other Party shall give sympathetic consideration to the request. The Parties shall report the results of their consultations to the Financial Services Committee.

2. Consultation under this Article shall include officials of the authority responsible for financial services.

ARTICLE 12.12 : DISPUTE SETTLEMENT

1. Relevant Articles in Chapter 20 (Dispute Settlement) applies as modified by this Article to the settlement of disputes arising under this Chapter.

2. For the purposes of this Article, consultations held pursuant to Article 12.11 shall be deemed to be consultations within the meaning of Article 20.4.

3. When a Party claims that a dispute arises under this Chapter, Article 20.7 shall apply, except that:

(a) where the Parties so agree, the panel shall be composed entirely of panelists meeting the qualifications in paragraph 4;

(b) in any other case,

(i) each Party may select panelists meeting the qualifications set out in paragraph 4 or paragraph 4 of Article 20.7 ; and

(ii) if the Party complained against invokes Article 12.6, the chair of panel shall meet the qualifications set out in paragraph 4, unless the parties agree otherwise.

4. Financial services panelists shall:

- (a) have expertise or experience in financial services law or practice, which may include the regulation of financial institutions;
- (b) be chosen strictly on the basis of objectivity, reliability and sound judgment; and
- (c) meet the qualifications set out in paragraph 4 and paragraph 4 of Article 20.7.

5. Notwithstanding Article 20.14, where a panel finds a measure to be inconsistent with this Agreement and the measure under dispute affects:

- (a) only the financial services sector, the complaining Party may suspend benefits only in the financial services sector;
- (b) the financial services sector and any other sector, the complaining Party may suspend benefits in the financial services sector that have an effect equivalent to the effect of the measure in the Party's financial services sector; or
- (c) only a sector other than the financial services sector, the complaining Party may not suspend benefits in the financial services sector.

ARTICLE 12.13 : INVESTMENT DISPUTES IN FINANCIAL SERVICES

1. Where an investor of a Party submits a claim under Section C in Chapter 10 (Investment) against the other Party and the respondent invokes Article 10.12 or 12.6, on request of the respondent, the tribunal shall refer the matter in writing to the Financial Services Committee for a decision. The tribunal may not proceed pending receipt of a decision or report under this Article.

2. In a referral pursuant to paragraph 1, the Financial Services Committee shall decide the issue of whether and to what extent Article 10.12 or 12.6 is a valid defence to the claim of the investor. The Financial Services Committee shall transmit a copy of its decision to the tribunal. The decision shall be binding on the tribunal.

3. Where the Financial Services Committee has not decided the issue within sixty (60) days of the receipt of the referral under paragraph 1, the respondent or the Party of the claimant may request the establishment of a panel under relevant Articles in Chapter 20 (Dispute Settlement). The panel shall be constituted in accordance with Article

12.12. The panel shall transmit its final report to the Financial Services Committee and to the tribunal. The report shall be binding on the tribunal.

4. Where no request for the establishment of a panel pursuant to paragraph 3 has been made within ten (10) days of the expiration of the 60-day period referred to in paragraph 3, a tribunal may proceed to decide the matter.

5. For the purposes of this Article, tribunal means a tribunal established pursuant to Article 10.19.

ARTICLE 12.14 : MODIFICATION OF SCHEDULES

The Parties shall, on the request in writing by either Party, hold consultations to consider any modification or withdrawal of a commitment in the Schedule of specific commitments on trade in financial services. Such consultations shall be held within three months after the requesting Party makes such a request. In such consultations, the Parties shall aim to ensure that a general level of mutually advantageous commitments not less favourable to trade than that provided for in the Schedule of specific commitments in Annex 12A prior to such consultations is maintained.

ARTICLE 12.15 : DEFINITIONS

For the purposes of this Chapter:

trade in financial services means the supply of a financial service:

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

commercial presence means any type of business or professional establishment,

including through:

- (a) the constitution, acquisition or maintenance of a juridical person; or
- (b) the creation or maintenance of a branch or a representative office, within the territory of a Party for the purpose of supplying a service;

financial institution means any financial intermediary or other institution, 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;

financial institution of the other Party means a financial institution, including a branch, located in the territory of a Party that is controlled by persons of the other Party;

financial service means a service of a financial nature, including insurance, and a service incidental or auxiliary to a service of a financial nature. Financial services shall include the activities as stated in Annex 12B;

financial service consumer means any person that receives or uses a financial service;

financial service supplier of a Party means any natural or juridical person authorised by the law of a Party that is engaged in the business of supplying financial services through the trade in financial services.

investment means “investment” as defined in Chapter 10 (Investment), except that, with respect to “loans” and “debt instruments” referred to in that Chapter:

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

investor of a Party means a Party or state enterprise thereof, or a person of that Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his/her dominant and effective nationality;

juridical person means any legal entity duly constituted or otherwise organised under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association, or a branch of a financial institution constituted or otherwise organised under the law of a non-Party that is registered or set up in the territory of a Party and carrying out business activities there;

juridical person of the other Party means a juridical person which is either:

- (a) constituted or otherwise organised under the law of the other Party and, for greater certainty, includes a branch of a financial institution of a non-Party; and is engaged in substantive business operations in the territory of the other Party; or
- (b) in the case of the supply of a service through commercial presence, owned or controlled by:
 - (i) natural persons of the other Party; or
 - (ii) juridical persons of the other Party identified under subparagraph (a);

natural person of a Party means a natural person who resides in the territory of the Party or elsewhere and who under the law of that Party:

- (a) is a national of that Party; or
- (b) has the right of permanent residence in that Party;

person of a Party means either a natural person or a juridical person;

public entity means:

- (a) a government, a central bank or a monetary authority of a Party, or an entity owned or controlled by a Party, that is principally engaged in carrying out governmental functions or activities for governmental purposes, not including an entity principally engaged in supplying financial services on commercial terms; for greater certainty, a public entity shall not be considered a designated monopoly or a public enterprise for purposes of Chapter 15 (Competition); or
- (b) a private entity, performing functions normally performed by a central bank

or monetary authority, when exercising those functions;

authority responsible for financial services means:

- (a) for Korea, the Ministry of Finance and Economy; and
- (b) for Singapore, the Monetary Authority of Singapore.