

CHAPTER 8

TRADE IN SERVICES

Article 1

Definitions

For the purposes of this Chapter, unless the context otherwise requires:

- (a) **a service supplied in the exercise of governmental authority** means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers;
- (b) **commercial presence** means any type of business or professional establishment, including through:
 - (i) the constitution, acquisition or maintenance of a juridical person; or
 - (ii) the creation or maintenance of a branch or a representative office,within the Area of a Party for the purpose of supplying a service;
- (c) **direct taxes** comprise all taxes on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of property, taxes on estates, inheritances and gifts, and taxes on the total amounts of wages or salaries paid by

enterprises, as well as taxes on capital appreciation;

- (d) **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;
- (e) **juridical person of another Party** means a juridical person which is either:
 - (i) constituted or otherwise organised under the law of that other Party, and is engaged in substantive business operations in the Area of that Party or any other Party; or
 - (ii) in the case of the supply of a service through commercial presence, owned or controlled by:
 - (1) natural persons of that Party; or
 - (2) juridical persons of that other Party identified under subparagraph (i);
- (f) a **juridical person** is:
 - (i) “owned” by persons of a Party if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Party;
 - (ii) “controlled” by persons of a Party if such persons have the power to name a majority

of its directors or otherwise to legally direct its actions;

- (iii) “affiliated” with another person when it controls, or is controlled by, that other person; or when it and the other person are both controlled by the same person;
- (g) **measure** means any measure by a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form;
- (h) **measures by Parties affecting trade in services** include measures in respect of:
 - (i) the purchase, payment or use of a service;
 - (ii) the access to and use of, in connection with the supply of a service, services which are required by the Parties to be offered to the public generally;
 - (iii) the presence, including commercial presence, of persons of a Party for the supply of a service in the Area of another Party;
- (i) **monopoly supplier of a service** means any person, public or private, which in the relevant market of the Area of a Party is authorised or established formally or in effect by that Party as the sole supplier of that service;

- (j) in respect of the meaning of **natural person of another Party**, Article XXVIII (k) of GATS shall apply to this Chapter, *mutatis mutandis*⁷;
- (k) **person** means either a natural person or a juridical person;
- (l) **sector** of a service means:
 - (i) with reference to a specific commitment, one or more, or all, subsectors of that service, as specified in a Party's Schedule;
 - (ii) otherwise, the whole of that service sector, including all of its subsectors;
- (m) **services** includes any service in any sector except services supplied in the exercise of governmental authority;
- (n) **service consumer** means any person that receives or uses a service;
- (o) **service of another Party** means a service which is supplied:
 - (i) from or in the Area of that other Party, or in the case of maritime transport, by a vessel registered under the laws of that other Party or by a person of that other Party which supplies the service through the operation of a vessel and/or its use in whole or in part; or

⁷ For Thailand, for a Party that has both nationals and permanent residents and has not notified the WTO, a natural person of that Party shall be limited to a national who resides in the Area of that Party or elsewhere and who under the law of that Party is a national of that Party.

- (ii) in the case of the supply of a service through commercial presence or through the presence of natural persons, by a service supplier of that other Party;
- (p) **service supplier** means any person that supplies a service;⁸
- (q) **supply of a service** includes the production, distribution, marketing, sale and delivery of a service; and
- (r) **trade in services** is defined as the supply of a service:
 - (i) from the Area of a Party into the Area of any other Party (cross-border supply: Mode 1);
 - (ii) in the Area of a Party to the service consumer of any other Party (consumption abroad: Mode 2);
 - (iii) by a service supplier of a Party, through commercial presence in the Area of any other Party (commercial presence: Mode 3);
 - (iv) by a service supplier of a Party, through presence of natural persons of a Party in the Area of any other Party (presence of natural persons: Mode 4).

⁸ Where the service is not supplied directly by a juridical person but through other forms of commercial presence such as a branch or a representative office, the service supplier (i.e. the juridical person) shall, nonetheless, through such presence be accorded the treatment provided for service suppliers under this Chapter. Such treatment shall be extended to the presence through which the service is supplied and need not be extended to any other parts of the supplier located outside the Area where the service is supplied.

Article 2

Scope

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

2. For the purposes of this Chapter, measures by a Party means measures taken by:

- (a) central, regional, or local governments or authorities; and
- (b) non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities.

3. In fulfilling its obligations and commitments under this Chapter, each Party shall take reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its Area.

4. This Chapter shall not apply to measures affecting:

- (a) government procurement;
- (b) cabotage in maritime transport services;
- (c) subject to Article 13 (Subsidies), subsidies or grants including government-supported loans, guarantees, and insurance, provided by a Party or to any conditions attached to the receipt of such subsidies or grants, whether or not such subsidies or grants are offered

exclusively to domestic services, service consumers or service suppliers;

- (d) services supplied in the exercise of governmental authority within the Area of each respective Party; or
- (e) in respect of air transport services, traffic rights however granted; or 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; and
 - (iii) computer reservation system services.

5. The Parties note the multilateral negotiations pursuant to the review of the *GATS Annex on Air Transport Services*. Upon the conclusion of such multilateral negotiations, the Parties shall conduct a review for the purpose of discussing appropriate amendments to this Chapter so as to incorporate the results of such multilateral negotiations.

6. Nothing in this Chapter shall apply to measures affecting natural persons seeking access to the employment market of another Party, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.

7. For greater certainty, this Chapter shall not prevent a Party from applying measures to regulate the entry of natural persons of another Party into, or their temporary stay in, its Area, including those measures necessary to protect the integrity of, and to ensure the

orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to another Party under the terms as set out in Article 19 (Schedule of Specific Commitments) of the Party applying the measures⁹.

Article 3

Transparency

Article III of GATS is incorporated into and shall form an integral part of this Chapter, *mutatis mutandis*.

Article 4

Disclosure of Confidential Information

Article III *bis* of GATS is incorporated into and shall form an integral part of this Chapter, *mutatis mutandis*.

Article 5

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, at the request of an affected service supplier, for the prompt review of,

⁹ The sole fact of requiring a visa for natural persons of another Party and not for those of a non-Party shall not be regarded as nullifying or impairing benefits accruing to another Party under the terms of a specific commitment.

and where justified, appropriate remedies for, administrative decisions affecting trade in services. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Party shall ensure that the procedures in fact provide for an objective and impartial review.

(b) The provisions of subparagraph (a) shall not be construed to require a Party to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system.

3. Where authorisation is required for the supply of a service on which a specific commitment under this Chapter has been made, the competent authorities of each Party shall:

- (a) in the case of an incomplete application, at the request of the applicant, identify all the additional information that is required to complete the application and provide the opportunity to remedy deficiencies within a reasonable timeframe;
- (b) within a reasonable period of time after the submission of an application considered complete under its internal laws and regulations, inform the applicant of the decision whether or not to grant the relevant authorisation;
- (c) at the request of the applicant, provide without undue delay information concerning the status of the application; and
- (d) if an application is terminated or denied, to the maximum extent possible, inform the

applicant in writing and without delay the reasons for such action. The applicant will have the possibility of resubmitting, at its discretion, a new application.

4. With the objective of ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Parties shall jointly review the results of the negotiations on disciplines on these measures, pursuant to paragraph 4 of Article VI of GATS, with a view to their incorporation into this Chapter. The Parties note that such disciplines aim to ensure that such requirements are, *inter alia*:

- (a) based on objective and transparent criteria, such as competence and the ability to supply the service;
- (b) not more burdensome than necessary to ensure the quality of the service; and
- (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

5. (a) In sectors in which a Party has undertaken specific commitments, pending the incorporation of the disciplines referred to in paragraph 4, that Party shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:

- (i) does not comply with the criteria outlined in subparagraph 4 (a), 4 (b) or 4 (c); and

- (ii) could not reasonably have been expected of that Party at the time the specific commitments in those sectors were made.

(b) In determining whether a Party is in conformity with the obligation under subparagraph (a), account shall be taken of international standards of relevant international organisations¹⁰ applied by that Party.

6. In sectors where specific commitments regarding professional services are undertaken, each Party shall provide for adequate procedures to verify the competence of professionals of any other Party.

7. Where a Party maintains measures relating to qualification requirements and procedures, technical standards and licensing requirements, the Party shall endeavour to make publicly available:

- (a) information on requirements and procedures to obtain, renew or retain any licences or professional qualifications; and
- (b) information on technical standards.

8. In respect of non-governmental bodies which are not exercising governmental authority or are not administering mandatory domestic regulations, each Party shall endeavour to encourage them to comply, where appropriate, with the provisions of this Article.

¹⁰ The term “relevant international organisations” refers to international bodies whose membership is open to the relevant bodies of at least all Parties of this Agreement.

Article 6

Recognition

1. For the purposes of fulfilment, in whole or in part, of their respective standards or criteria for the authorisation, licensing or certification of service suppliers, and subject to the requirements of paragraph 4, each Party may recognise the education or experience obtained, requirements met, or licences or certifications granted in another Party. Such recognition, which may be achieved through harmonisation or otherwise, may be based upon an agreement or arrangement between the Parties or the relevant competent bodies of the Parties or may be accorded autonomously.

2. Two or more Parties may enter into, or encourage their relevant competent bodies to enter into, negotiations on recognition of qualification requirements, qualification procedures, licensing and/or registration procedures for the purposes of fulfilment of their respective standards or criteria for the authorisation, licensing or certification of service suppliers.

3. A Party that is a party to an agreement or arrangement of the type referred to in paragraph 1, whether existing or future, shall afford adequate opportunity for other interested Parties to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it. Where a Party accords recognition autonomously, it shall afford adequate opportunity for any other Party to demonstrate that education, experience, licences, or certifications obtained or requirements met in that other Party's Area should be recognised.

4. A Party shall not accord recognition in a manner which would constitute a means of discrimination among the 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.

Article 7

Monopolies and Exclusive Service Suppliers

1. Each Party shall ensure that any monopoly supplier of a service in its Area does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Party's obligations under specific commitments.

2. Where a Party's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to that Party's specific commitments, the Party shall ensure that such a supplier does not abuse its monopoly position to act in its Area in a manner inconsistent with such commitments.

3. If any Party has reason to believe that a monopoly supplier of a service of any other Party is acting in a manner inconsistent with paragraph 1 or 2, that Party may request the Party establishing, maintaining or authorising such supplier to provide specific information concerning the relevant operations.

4. The provisions of 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 Area.

Article 8

Business Practices

1. The Parties recognise that certain business practices of service suppliers, other than those falling under Article 7 (Monopolies and Exclusive Service Suppliers), may restrain competition and thereby restrict trade in services.

2. Each Party shall, at the request of any other Party (the "Requesting Party"), enter into consultations with a view to eliminating practices referred to in paragraph 1. The Party addressed (the "Requested Party") shall accord full and sympathetic consideration to such a request and shall co-operate through the supply of publicly available non-confidential information of relevance to the matter in question. The Requested Party shall also provide other information available to the Requesting Party, subject to its internal law and to the conclusion of satisfactory agreement concerning the safeguarding of its confidentiality by the Requesting Party.

Article 9

Safeguards

1. The Parties note the multilateral negotiations pursuant to Article X of GATS on the question of emergency safeguard measures based on the principle of non-discrimination. Upon the conclusion of such multilateral negotiations, the Parties shall conduct a review for the purpose of discussing appropriate amendments to this Chapter so as to incorporate the results of such multilateral negotiations.

2. In the event that the implementation of this Chapter causes substantial adverse impact to a service sector of a Party before the conclusion of the multilateral negotiations referred to in paragraph 1, the affected Party may request for consultations with the other Party for the purposes of discussing any measure with respect to the affected service sector. Any measure taken pursuant to this paragraph shall be mutually agreed by the Parties concerned. The Parties concerned shall take into account the circumstances of the particular case and give sympathetic consideration to the Party seeking to take a measure.

Article 10

Payments and Transfers

1. Except under the circumstances envisaged in Article 11 (Restrictions to Safeguard the Balance of Payments), 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 any Party who is a member of the

International Monetary Fund (the “Fund”) under the Articles of Agreement of the Fund, including the use of exchange actions which are in conformity with the Articles of Agreement of the Fund, provided that a Party shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article 11 (Restrictions to Safeguard the Balance of Payments) or at the request of the Fund.

Article 11

Restrictions to Safeguard the Balance of Payments

Where a Party is in serious balance-of-payments and external financial difficulties or threat thereof, it may adopt or maintain restrictions on trade in services in accordance with Article XII of GATS.

Article 12

Security Exceptions

Nothing in this Chapter shall be construed to:

- (a) require any Party to furnish any information, the disclosure of which it considers contrary to its essential security interests; or
- (b) prevent any Party from taking any action which it considers necessary for the protection of its essential security interests, including but not limited to:
 - (i) action relating to fissionable and fusionable materials or the materials from which they are derived;

- (ii) action relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
 - (iii) action 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) action taken in time of war or other emergency in domestic or international relations; or
- (c) 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.

Article 13

Subsidies

1. Except as provided in this Article, this Chapter shall not apply to subsidies or grants provided by a Party, or to any conditions attached to the receipt or continued receipt of such subsidies or grants, whether or not such subsidies or grants are offered exclusively to domestic services, service consumers or service suppliers. If such subsidies or grants significantly affect trade in services committed under this Chapter, any Party may request for consultations with a view to an amicable resolution of this matter.

2. Pursuant to this Article, the Parties shall:
 - (a) on request, provide information on subsidies related to trade in services committed under this Chapter to any requesting Party; and
 - (b) review the treatment of subsidies when relevant disciplines are developed by the WTO.

Article 14

WTO Disciplines

Subject to any future agreements as may be agreed pursuant to reviews of this Chapter by the Parties under Article 23 (Review), the Parties hereby agree and reaffirm their commitments to abide by the provisions of the agreements under the framework of WTO Agreement as are relevant and applicable to trade in services.

Article 15

Increasing Participation of Cambodia, Lao PDR, Myanmar and Viet Nam

The increasing participation of Cambodia, Lao PDR, Myanmar, and Viet Nam in this Chapter shall be facilitated through negotiated specific commitments, relating to:

- (a) the strengthening of their domestic services capacity and its efficiency and competitiveness, *inter alia*, through access to technology on a commercial basis;

- (b) the improvement of their access to distribution channels and information networks;
- (c) the liberalisation of market access in sectors and modes of supply of export interest to them; and
- (d) appropriate flexibility for Cambodia, Lao PDR, Myanmar, and Viet Nam for opening fewer sectors, liberalising fewer types of transactions and progressively extending market access in line with their respective level of development.

Article 16

Market Access

1. With respect to market access through the modes of supply identified in subparagraph (r) of Article 1 (Definitions), a Party shall accord services and service suppliers of any other Party treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.¹¹

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

- (a) limitations on the number of service suppliers whether in the form of numerical

¹¹ If a Party undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph (r) (i) of Article 1 (Definitions) and if the cross-border movement of capital is an essential part of the service itself, that Party is thereby committed to allow such movement of capital. If a Party undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph (r) (iii) of Article 1 (Definitions), it is thereby committed to allow related transfers of capital into its Area.

quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;

- (b) limitations on the total value of 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 service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;¹²
- (d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
- (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier 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.

¹² Subparagraph 2 (c) does not cover measures of a Party which limit inputs for the supply of services.

Article 17

National Treatment

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Party shall accord to services and service suppliers of any other 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 suppliers¹³.

2. A Party may meet the requirement of paragraph 1 by according to services and service suppliers of any other Party, either formally identical treatment or formally different treatment to that 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 like services or service suppliers of any other Party.

Article 18

Additional Commitments

The Parties may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Article 16 (Market Access) and Article 17 (National Treatment) including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Party's Schedule.

¹³ Specific commitments assumed under this Article shall not be construed to require any Party to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers.

Article 19

Schedule of Specific Commitments

1. Each Party shall set out in a schedule the specific commitments it undertakes under Article 16 (Market Access), Article 17 (National Treatment) and Article 18 (Additional Commitments). With respect to sectors where such commitments are undertaken, each Schedule shall specify:

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

2. Measures inconsistent with both Article 16 (Market Access) and Article 17 (National Treatment) shall be inscribed in the columns relating to Article 16 (Market Access).

3. The Parties' schedules of specific commitments shall be annexed to this Chapter at Annex 8-1 (Schedules of Specific Commitments) and shall form an integral part thereof.

Article 20

Application and Extension of Commitments

1. Hong Kong, China shall make a single schedule of specific commitments under Article 19 (Schedule of Specific Commitments) and shall apply its Schedule to all ASEAN Member States.
2. Each ASEAN Member State shall make its individual schedule of specific commitments under Article 19 (Schedule of Specific Commitments) and shall apply its Schedule to Hong Kong, China and the rest of the ASEAN Member States.

Article 21

Modification of Commitments

1. A Party may modify or withdraw any commitment in its Schedule (the “modifying Party”) at any time after three years from the date on which that commitment has entered into force, provided that:
 - (a) the modifying Party notifies the other Parties as well as the ASEAN Secretariat of its intention to modify or withdraw a commitment no later than three months before the intended date of implementation of the modification or withdrawal; and
 - (b) the modifying Party enters into negotiations with any affected Party to agree to the necessary compensatory adjustment.
2. In achieving a compensatory adjustment, the Parties concerned shall ensure that the general level of mutually advantageous commitment is not less

favourable to trade than provided for in the Schedules prior to such negotiations.

3. Any compensatory adjustment pursuant to this Article shall be accorded on a non-discriminatory basis to all Parties.

4. If the Parties concerned are unable to reach an agreement on the compensatory adjustment, the matter shall be resolved by arbitration under Chapter 13 (Consultations and Dispute Settlement). The modifying Party may not modify or withdraw its commitment until it has made compensatory adjustments in conformity with the findings of the arbitration.

5. If the modifying Party implements its proposed modification or withdrawal and does not comply with the findings of the arbitration, any Party that participated in the arbitration may modify or withdraw substantially equivalent benefits in conformity with those findings. Notwithstanding Article 20 (Application and Extension of Commitments), such a modification or withdrawal may be implemented solely with respect to the modifying Party.

Article 22

Contact Point

1. Each Party shall designate a contact point to facilitate communications among the Parties on any matter covered by this Chapter, including the exchange of information relevant to the implementation and operation of this Chapter.
2. At the request of any Party, the contact point of the requested Party shall identify the office or official responsible for the matter and assist in facilitating communication with the requesting Party.

Article 23

Review

1. The Parties shall review this Chapter in accordance with Article 7 (Review) of Chapter 14 (Final Provisions) for the purpose of considering further measures to liberalise trade in services as well as to develop disciplines and negotiate agreements on matters referred to in Article 14 (WTO Disciplines) or any other relevant matters as may be agreed.
2. The Parties may, at the reviews pursuant to paragraph 1, enter into negotiations to negotiate further improvements to specific commitments under this Chapter so as to progressively liberalise trade in services between the Parties.

Article 24

Miscellaneous Provisions

1. The GATS Annexes, namely, *Annex on Movement of Natural Persons Supplying Services under the Agreement*, *Annex on Air Transport Services*, *Annex on Financial Services*, and *Annex on Telecommunications*, shall apply to this Chapter, *mutatis mutandis*.
2. Except as otherwise provided in this Chapter, this Chapter or any action taken under it shall not affect or nullify the rights and obligations of a Party under existing agreements to which it is a party.

Article 25

Denial of Benefits

A Party may deny the benefits of this Chapter:

- (a) to the supply of a service, if the Party establishes that the service is supplied from or in the area of a non-Party;
- (b) in the case of the supply of a maritime transport service, if the Party establishes that the service is supplied:
 - (i) by a vessel registered under the laws of a non-Party; and
 - (ii) by a person of a non-Party which operates and/or uses the vessel in whole or in part;

- (c) to a service supplier that is a juridical person, if the Party establishes that that juridical person is not a service supplier of another Party.