

## **CHAPTER 8**

### **TRADE IN SERVICES**

#### **Article 8.1 : Scope**

1. This Chapter shall apply to measures by a Party affecting trade in services. Such measures include measures in respect of:
  - (a) the purchase or use of, or payment for a service;
  - (b) the access to and use of, relating to the supply of a service, services which are required by a Party to be offered to the public generally; and
  - (c) the presence, including commercial presence, in its territory of a service supplier of the other Party.
2. For the purposes of this Chapter, **measures by a Party** means measures taken by:
  - (a) central or local governments or authorities; and
  - (b) non-governmental bodies in the exercise of powers delegated by central or local governments or authorities.
3. This Chapter shall not apply to:
  - (a) a service supplied in the exercise of the governmental authority within the territory of each Party;
  - (b) measures affecting air traffic rights, however granted, or measures affecting services directly related to the exercise of air 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;
  - (c) cabotage in maritime transport services;
  - (d) subsidies or grants provided by a Party, or to any conditions attached to the receipt or continued receipt of such subsidies or grants, except as provided for in Article 8.16; or
  - (e) measures affecting natural persons seeking access to the employment market of a Party and measures regarding citizenship, residence or employment on a permanent basis.

4. Nothing in this Chapter shall prevent a Party from applying measures to regulate the entry of natural persons of the other Party into, or their temporary stay in, its territory, 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 a manner to nullify or impair the benefits<sup>1</sup> accruing to the other Party under the terms of a specific commitment.

5. Articles 8.2 through 8.4 shall not apply to laws, regulations or requirements governing the procurement by government agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.

### **Article 8.2 : National Treatment**

In the sectors inscribed in its Schedule of Specific Commitments, and subject to any conditions and qualifications set out therein, each Party shall accord to services and service suppliers of the other Party in respect of all measures affecting the supply of services, treatment no less favorable than that it accords, in like circumstances, to its own services and service suppliers.

### **Article 8.3 : Most-Favored-Nation Treatment**

1. If, after this Agreement enters into force, a Party enters into any agreement on trade in services with a non-Party in which it provides treatment to services or service suppliers of that non-Party more favorable than that it accords, in like circumstances, to services or service suppliers of the other Party under this Agreement, the other Party may request consultations to discuss the possibility of extending, under this Agreement, treatment no less favorable than that provided under the agreement with the non-Party. The requested Party shall enter into consultations with the requesting Party bearing in mind the overall balance of benefits.

2. The treatment, as set out in paragraph 1, shall not include any preferential treatment accorded to services or service suppliers under:

- (a) any existing bilateral, regional or international agreements with any non-Party;  
or
- (b) any bilateral or plurilateral agreement among ASEAN Member States.

### **Article 8.4 : Market Access**

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<sup>1</sup> The sole fact of requiring a visa for natural persons of certain countries and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitment.

1. With respect to the market access through the modes of supply of trade in services defined in Article 8.20, a Party shall accord services and service suppliers of the other Party treatment no less favorable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule of Specific Commitments.<sup>2</sup>

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

- (a) limitations on the number of service suppliers whether in the form of numerical 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;<sup>3</sup>
- (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.

## **Article 8.5 : Additional Commitments**

The Parties may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Article 8.2 or 8.4, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Party's Schedule of Specific Commitments.

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<sup>2</sup> If a Party undertakes a market access commitment relating to the supply of a service through the mode of supply referred to in subparagraph (a) of "trade in services" defined in Article 8.20 and if the cross-border movement of capital is an essential part of the service itself, that Party is thereby committed to allowing such movement of capital. If a Party undertakes a market access commitment relating to the supply of a service through the mode of supply referred to in subparagraph (c) of "trade in services" defined in Article 8.20, it is thereby committed to allowing related transfers of capital into its territory.

<sup>3</sup> This subparagraph does not cover measures of a Party which limit inputs for the supply of services.

## **Article 8.6 : Schedules of Specific Commitments**

1. Each Party shall set out in a Schedule the Specific Commitments it undertakes under Articles 8.2, 8.4, and 8.5. 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 timeframe for implementation of such commitments;  
and
- (e) the date of entry into force of such commitment.

2. Measures inconsistent with Article 8.2 shall be inscribed in the column relating to Article 8.2, and measures inconsistent with Article 8.4 shall be inscribed in the column relating to Article 8.4.

3. The Schedules of Specific Commitments shall be annexed to this Chapter and shall form an integral part thereof.

## **Article 8.7 : Transparency**

Further to Chapter 14 (Transparency):

- (a) each Party shall establish or maintain appropriate mechanisms for responding to inquiries from the other Party regarding its regulations of general application relating to the subject matter of this Chapter;
- (b) if, consistent with paragraphs 2 and 4 of Article 14.1 (Publication), a Party does not publish in advance, and provide opportunity for comment on, regulations of general application it proposes to adopt relating to the subject matter of this Chapter, it shall, upon request in writing by the other Party, address in writing, to the extent possible, the reasons for not doing so; and
- (c) in accordance with its domestic laws and regulations, each Party shall allow a reasonable period of time between publication of final regulations of general application relating to the subject matter of this Chapter and their effective date.

## **Article 8.8 : 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, upon request of an affected service supplier, for the prompt review of, 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 authorization is required for the supply of a service on which a specific commitment has been made, the competent authorities of a Party shall, within a reasonable period of time after the submission of an application considered complete under its domestic laws and regulations, inform the applicant of the decision concerning the application. Upon request of the applicant, the competent authorities of the Party shall provide, without undue delay, information concerning the status of the application.

4. With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Joint Committee shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall 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 entry into force of disciplines developed in these sectors pursuant to paragraph 4, the 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), (b) or (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 organizations<sup>4</sup> 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 the other Party.

## **Article 8.9 : Recognition**

1. For the purposes of fulfillment of its respective standards or criteria for the authorization, licensing or certification of service suppliers, each Party may recognize the education or experience obtained, requirements met, or licenses or certifications granted in the other Party. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement between the Parties or the relevant competent bodies or may be accorded autonomously.

2. 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 the other Party, if the other Party is interested, to negotiate its 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 the other Party to demonstrate that education, experience, licenses, or certifications obtained or requirements met in the other Party's territory should be recognized.

3. A Party shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing or certification of service suppliers, or a disguised restriction on trade in services.

4. Each Party shall endeavor:

- (a) within 12 months from the date on which this Agreement enters into force, to inform the Joint Committee of its existing recognition measures and state whether such measures are based on the agreements or arrangements of the type referred to in paragraph 1;
- (b) to promptly inform the Joint Committee as far in advance as possible of the opening of negotiations on an agreement or arrangement of the type referred to in paragraph 1 in order to provide adequate opportunity to the other Party to indicate its interest in participating in the negotiations before they enter a substantive phase; and

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<sup>4</sup> The term "relevant international organizations" refers to international bodies whose membership is open to the relevant bodies of at least all Members of the WTO.

- (c) to promptly inform the Joint Committee when it adopts new recognition measures or significantly modifies existing ones and state whether the measures are based on an agreement or arrangement of the type referred to in paragraph 1.

5. Wherever appropriate, recognition should be based on multilaterally agreed criteria. In appropriate cases, the Parties shall work in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions.

#### **Article 8.10 : 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 specific commitments under this Chapter.

2. Where a Party's monopoly supplier competes, either directly or through an affiliated juridical person, 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 territory in a manner inconsistent with such commitments.

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

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

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

#### **Article 8.11 : Business Practices**

1. The Parties recognize that certain business practices of service suppliers, other than those falling under Article 8.10, may restrain competition and thereby restrict trade in services.

2. Each Party shall, upon request of the other Party (hereinafter referred to as the "requesting Party"), enter into consultations with a view to eliminating practices referred to in paragraph 1. The Party addressed (hereinafter referred to as the "requested Party"), shall accord full and sympathetic consideration to such a request and shall cooperate 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 domestic laws and regulations and to the conclusion of satisfactory agreement concerning the safeguarding of its confidentiality by the requesting Party.

#### **Article 8.12 : Payments and Transfers<sup>5</sup>**

1. Except under the circumstances envisaged in Article 8.13, a Party shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments.

2. Nothing in this Agreement shall affect the rights and obligations of any Party who is a member of the International Monetary Fund (hereinafter referred to as “IMF”) under the *Articles of Agreement of the International Monetary Fund*, including the use of exchange actions which are in conformity with the *Articles of Agreement of the International Monetary Fund*, provided that a Party shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article 8.13 or upon request of the IMF.

#### **Article 8.13 : Restrictions to Safeguard the Balance of Payments**

1. 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.

2. Any restriction adopted or maintained under paragraph 1, or any changes therein, shall be promptly notified to the other Party.

#### **Article 8.14 : Denial of Benefits**

1. A Party may deny the benefits of this Chapter:

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

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<sup>5</sup> For greater certainty, Annex 9-C (Transfers) shall apply to this Article.



- (c) to a service supplier that is a juridical person, if it establishes that it is not a service supplier of the other Party.
- 2. A Party may deny the benefits of this Chapter to a service supplier that is a juridical person of the other Party:
  - (a) if the juridical person is owned or controlled by a person or persons of a non-Party and the denying Party adopts or maintains measures with respect to the non-Party or a person or persons of the non-Party that prohibit transactions with the juridical person or that would be violated or circumvented if the benefits of this Chapter were accorded to the juridical person; or
  - (b) if the juridical person is owned or controlled by a person or persons of a non-Party or the denying Party and the juridical person has no substantial business activities in the territory of the other Party.
- 3. The denying Party shall, to the extent practicable, notify the other Party before denying the benefits. If the denying Party provides such notice, it shall consult with the other Party upon the other Party's request.

#### **Article 8.15 : Consultations for Safeguard**

In the event that the implementation of this Chapter causes substantial adverse impact to a service sector of a Party, the affected Party may request 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 Article shall be mutually agreed by the Parties. The other Party shall take into account the circumstances of the particular case and give sympathetic consideration to the Party seeking to take a measure.

#### **Article 8.16 : Subsidies**

- 1. If subsidies or grants by a Party significantly affect trade in services committed under this Chapter, the other Party may request consultations with a view to an amicable resolution of this matter.
- 2. Pursuant to this Chapter, a Party shall, upon request by the other Party, provide information on subsidies related to trade in services committed under this Chapter to the other Party.

#### **Article 8.17 : Modification of Schedules**

- 1. A Party may modify or withdraw any commitment in its Schedule of Specific Commitments, at any time after three years have elapsed from the date on which that commitment has entered into force, provided that:

- (a) it notifies the other Party 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) it enters into negotiations with the other Party to agree to the necessary compensatory adjustment.

2. In achieving a compensatory adjustment, the Parties shall ensure that the general level of mutually advantageous commitment is not less favorable to trade than that provided for in the Schedules of Specific Commitments prior to such negotiations.

#### **Article 8.18 : Miscellaneous Provisions**

Annexes 8-A through 8-D and all future legal instruments agreed pursuant to this Chapter shall form an integral part of this Agreement.

#### **Article 8.19 : Renegotiation Based on the Negative List Approach**

1. If, after the entry into force of this Agreement, a Party ratifies any agreement on trade in services adopting a negative list approach with a non-Party, or non-Parties, the other Party may request the former to renegotiate the Chapters with the Annexes relating to trade in services and investment based on a negative list approach.
2. Upon such request, and subject to each Party's domestic procedures and requirements, the Parties shall enter into negotiations with an objective of concluding the negotiations within one year.
3. The Parties shall undertake the negotiations taking into account the overall balance of benefits between the Parties in the mutually agreed areas. At any event, the Parties shall not decrease the level of liberalization commitments of this Agreement at the negotiations.
4. Neither Party shall have recourse to Chapter 15 (Dispute Settlement) for any matter arising under this Article.

#### **Article 8.20 : Definitions**

For the purposes of this Chapter:

**aircraft repair and maintenance services** means such activities when undertaken on an aircraft or a part thereof while it is withdrawn from service and does not include so-called "line maintenance";

**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 purposes of supplying a service;

**computer reservation system (CRS) services** means services provided by computerized systems that contain information about air carriers' schedules, availability, fares and fare rules, through which reservations can be made or tickets may be issued;

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

- (a) constituted or otherwise organized under the domestic laws and regulations of the other 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) a natural person of the other Party; or
  - (ii) a juridical person of the other Party identified under subparagraph (a);

a **juridical person** is:

- (i) **owned** by persons of a Party if more than 50 percent 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; or
- (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;

**monopoly supplier of a service** means any person, public or private, which in the relevant market of the territory of a Party is authorized or established formally or in effect by that Party as the sole supplier of that service;

**natural person of the other Party** means a natural person who resides in the territory of the other Party or elsewhere, and who is a national of the other Party under the domestic laws and regulations of that Party;

**sector of a service** means:

- (a) with reference to a specific commitment, one or more, or all, subsectors of that service, as specified in a Party's Schedule of Specific Commitments; or
- (b) otherwise, the whole of that service sector, including all of its subsectors;

**selling and marketing of air transport services** means opportunities for the air carrier concerned to sell and market freely its air transport services including all aspects of marketing such as market research, advertising and distribution. These activities do not include the pricing of air transport services nor the applicable conditions;

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

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

**service of the other Party** means a service which is supplied:

- (a) from or in the territory of the other Party, or in the case of maritime transport, by a vessel registered under the domestic laws and regulations of the other Party, or by a person of the other Party which supplies the service through the operation of a vessel or its use in whole or in part; or
- (b) in the case of the supply of a service through commercial presence or through the presence of natural persons, by a service supplier of the other Party;

**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;

**service supplier** means any person that supplies a service;<sup>6</sup>

**supply of a service** includes the production, distribution, marketing, sale and delivery of a service;

**trade in services** is defined as the supply of a service:

- (a) from the territory of a Party into the territory of the other Party;

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<sup>6</sup> 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 commercial 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 part of the supplier located outside the territory where the service is supplied.

- (b) in the territory of a Party to the service consumer of the other Party;
- (c) by a service supplier of a Party, through commercial presence in the territory of the other Party; or
- (d) by a service supplier of a Party, through presence of natural persons of a Party in the territory of the other Party; and

**traffic rights** means the right for scheduled and non-scheduled services to operate or to carry passengers, cargo and mail for remuneration or hire from, to, within, or over the territory of a Party, including points to be served, routes to be operated, types of traffic to be carried, capacity to be provided, tariffs to be charged and their conditions, and criteria for designation of airlines, including such criteria as number, ownership, and control.