

CHAPTER 8 TRADE IN SERVICES

Article 8.1 Scope and Coverage

1. This Chapter applies to measures by a Party affecting trade in services.
2. This Chapter shall not apply to:
 - (a) a service supplied in the exercise of governmental authority;
 - (b) a juridical person which is not a juridical person of the other Party, and a natural person who is not a natural person of the other Party;
 - (c) any measures by a Party with respect to government procurement;
 - (d) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance, 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, except as provided for in Article 8.14 (Subsidies);
 - (e) cabotage in maritime transport services; and
 - (f) measures affecting natural person seeking access to the employment market of a Party, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.
3. This Chapter shall not apply to measures affecting air traffic rights, however granted, or services directly related to the exercise of air traffic rights, except measures affecting:
 - (a) aircraft repair and maintenance services;
 - (b) the selling and marketing of air transport services; and
 - (c) computer reservation system services.

Paragraph 1 and the definitions of paragraph 6 of the GATS Annex on Air Transport Services are hereby incorporated *mutatis mutandis* and made part of this Chapter.

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 such a manner as to nullify or impair the benefits

accruing to the other Party under the terms of this Chapter as well as the terms of specific commitments undertaken.

5. New services shall be considered for possible incorporation into this Chapter at future reviews held in accordance with Article 8.8 (Review), or at the request of either Party immediately. The supply of services which are not technically or not technologically feasible when this Agreement comes into force shall, when they become feasible, also be considered for possible incorporation at future reviews or at the request of either Party immediately.

Article 8.2

Definitions

For the purposes of this Chapter:

- (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 territory 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, association, or cooperative¹;
- (e) **juridical person of the other Party** means a juridical person which is either:
 - (i) constituted or otherwise organised under the law of the other Party, and is engaged in substantive business operations in the territory of that Party; or

¹ A cooperative is a legal entity constituted under the relevant applicable laws in India and Malaysia.

- (ii) in the case of the supply of a service through commercial presence, owned or controlled by:
 - (AA) natural persons of that other Party; or
 - (BB) juridical persons of that other Party as identified under subparagraph (e)(i);
- (f) a **juridical person** is:
 - (i) **owned** by persons of a Party if more than fifty 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) **licensing requirements** means substantive requirements, other than qualification requirements, with which a natural or a juridical person is required to comply in order to obtain, amend or renew authorisation to supply a service;
- (h) **licensing procedures** means administrative or procedural rules that a natural or a juridical person, seeking authorisation to supply a service, including amendment or renewal of a license, must adhere to in order to demonstrate compliance with licensing requirements;
- (i) **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 a Party 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 territory of the other Party;
- (j) **monopoly supplier of a service** means any person, public or private, which in the relevant market of the territory of a Party is authorised or established formally or in effect by that Party as the sole supplier of that service;

- (k) **natural person of the other Party** means a natural person who resides in the territory of that other Party or elsewhere, and who under the law of that other Party:
- (i) is a citizen of that other Party; or
 - (ii) has the right of permanent residence in that other Party, provided that such other Party accords substantially the same treatment to its permanent residents as it does to its citizens in respect of measures affecting trade in services, provided that the Party is not obligated to accord to such permanent residents treatment more favourable than would be accorded by that other Party to such permanent residents;
- (l) **person** means either a natural person or a juridical person;
- (m) **qualification requirements** means substantive requirements relating to the competence of a natural person to supply a service, and which are required to be demonstrated for the purpose of obtaining authorization to supply a service;
- (n) **qualification procedures** means administrative or procedural rules that a natural person must adhere to in order to demonstrate compliance with qualification requirements, for the purpose of obtaining authorization to supply a service;
- (o) **services** includes any service in any sector except services supplied in the exercise of governmental authority;
- (p) **service consumer** means any person that receives or uses a service;
- (q) **service of the other Party** means a service which is supplied:
- (i) from or in the territory of the other Party, or in the case of maritime transport, by a vessel registered under the laws of the other Party, or by a person of the other Party which supplies the service through the operation of a vessel and/or its use in whole or in part; or
 - (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 the other Party;

- (r) **service supplier** means any person that supplies a service²;
- (s) **supply of a service** includes the production, distribution, marketing, sale and delivery of a service;
- (t) **technical standards** means measures that lay down characteristics of a service or the manner in which it is supplied. Technical standards also include the procedures relating to the enforcement of such standards; and
- (u) **trade in services** is defined as the supply of a service:
 - (i) from the territory of a Party into the territory of the other Party;
 - (ii) in the territory of a Party to the service consumer of the other Party;
 - (iii) by a service supplier of a Party, through commercial presence in the territory of the other Party;
 - (iv) by a service supplier of a Party, through presence of natural persons of a Party in the territory of the other Party.

Article 8.3 **Market Access**

1. With respect to market access through the modes of supply defined in paragraph (u) of Article 8.2 (Definitions), each Party shall accord services and 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 of Specific Commitments.³

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 territory, unless otherwise specified in its Schedule of Specific Commitments, are defined as:

² 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 territory where the service is supplied.

³ If a Party undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in Article 8.2(u)(i) 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 Article 8.2(u)(iii), it is thereby committed to allow related transfers of capital into its territory.

- (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;⁴
- (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 8.4 **National Treatment**

1. 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 favourable than that it accords to its own like services and service suppliers.⁵

2. A Party may meet the requirement of paragraph 1 by according to services and service suppliers of the 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 a Party compared to like services or service suppliers of the other Party.

⁴ Subparagraph 2(c) does not cover measures of a Party which limit inputs for the supply of services.

⁵ 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 8.5

Additional Commitments

The Parties may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles 8.3 (Market Access) or 8.4 (National Treatment), including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Party's Schedule of Specific Commitments.

Article 8.6

Schedule of Specific Commitments

1. Each Party shall set out in a schedule the specific commitments it undertakes under Articles 8.3 (Market Access), 8.4 (National Treatment) and 8.5 (Additional Commitments). With respect to sectors where such commitments are undertaken, each Schedule of Specific Commitments 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; and
- (e) the date of entry into force of such commitments.

2. Measures inconsistent with both Articles 8.3 (Market Access) and 8.4 (National Treatment) shall be inscribed in both the columns relating to Articles 8.3 (Market Access) and 8.4 (National Treatment).

3. Schedules of Specific Commitments shall be annexed to this Chapter as Annex 8-1 and shall form an integral part of this Agreement.

Article 8.7

Modification of Schedules

1. A Party may modify or withdraw any commitment in its Schedule of Specific Commitments in Annex 8-1, at any time after three year has elapsed from the date on which that commitment entered into force, in accordance with the provisions of this Article. It shall notify the other Party of its intent to so modify or withdraw a commitment no later than three months before the intended date of implementation of the modification or withdrawal.

2. At the request of the other Party, the modifying Party shall enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment. In such negotiations and agreement, the Party shall endeavour to maintain a general level of mutually advantageous commitments not less favourable

to trade than that provided for in Schedules of Specific Commitments prior to such negotiations.

3. If agreement on paragraph 2 is not reached between the modifying Party and the affected Party within six months, the affected Party may refer the matter in accordance with the procedures set out in Chapter 14 (Dispute Settlement).

Article 8.8

Review

The Parties shall review commitments on trade in services with the first review within five years from the date of entry into force of this Agreement. In this process, there shall be due respect for the national policy objectives and the level of development of the Parties, both overall and in individual sectors.

Article 8.9

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. Each Party shall maintain or institute practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier of the other Party, 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.

3. The provisions of paragraph 2 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.

4. Where authorisation is required for the supply of a service on which a specific commitment has been made, the competent authorities of that Party shall:

- (a) within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application;
- (b) at the request of the applicant, without undue delay provide information concerning the status of the application, including incomplete application. In the case of an incomplete application, identify all the additional information that is required to complete the application and provide an opportunity to the applicant to remedy deficiencies within a reasonable timeframe;

- (c) 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 shall have the possibility of resubmitting, at its discretion, a new application.

5. With a view to ensuring that domestic regulation, including 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 Article VI.4 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;
- (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

6. Pending the incorporation of disciplines pursuant to paragraph 5, for sectors where a Party has undertaken specific commitments and subject to any terms, limitations, conditions or qualifications set out therein, a Party shall not apply licensing and qualification requirements and procedures and technical standards that nullify or impair such specific commitments in a manner which:

- (a) does not comply with the criteria outlined in paragraphs 5(a), 5(b) or 5(c);
- (b) could not reasonably have been expected of that Party at the time the specific commitments in those sectors were made; and
- (c) in determining whether the Party is in conformity with the obligation under paragraph 6, account shall be taken of international standards of relevant international organizations⁶ applied by that Party.

7. 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 in accordance with the provisions in paragraph 6.

⁶ The term "relevant international organisations" refers to international bodies whose membership is open to the relevant bodies of both Parties.

Article 8.10 Recognition

1. For the purposes of the fulfilment of its standards or criteria for the authorisation, licensing or certification of services suppliers, each Party shall give due consideration to any requests by the other Party to recognise the education or experience obtained, requirements met, or licenses or certifications granted in the other Party. Such recognition may be based upon an agreement or arrangement with the other Party, or otherwise be accorded autonomously.

2. Where a Party is a party to an agreement or arrangement of the type referred to in paragraph 1, whether existing or future, that Party shall afford the other Party adequate opportunity, upon request to negotiate its accession to such an agreement or arrangement, or to negotiate a comparable agreement or arrangement with it. Where Party accords recognition autonomously, it shall afford adequate opportunity for the other Party to demonstrate that the education or experience obtained, requirements met, or licences or certifications granted in the territory of that other Party should also be recognised.

3. After the entry into force of this Agreement, the Parties shall encourage their relevant authorities or professional bodies in the service sectors such as accounting and auditing, architecture, medical (doctors), dental and nursing to negotiate and conclude, within twelve months or a reasonable period of time from the date of entry into force of this Agreement, any such agreements or arrangements providing mutual recognition of the education or experience obtained, qualification requirements and procedures and licensing requirements and procedures. Any delay or failure by these professional bodies to reach and conclude agreement on details of such agreement or arrangements shall not be regarded as a breach of a Party's obligation under this paragraph and shall not be subject to Chapter 14 (Dispute Settlement). Progress in this regard will be continuously reviewed by the Parties.

4. In respect of regulated service sectors, other than those mentioned in paragraph 3 above, upon a request being made in writing by a Party to the other Party in such sector, the Parties shall encourage that their respective professional bodies negotiate, in that service sector, agreements for mutual recognition of education, or experience obtained, qualifications requirements and procedures, and licensing requirements and procedures in that service sector, with a view to the achievement of early outcomes. The Parties shall report periodically to the Joint Committee on progress and on impediments experienced.

Article 8.11 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 Schedule of 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 Schedule of 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 reason to believe that a monopoly supplier of a service of the other Party is acting in a manner inconsistent with paragraphs 1 or 2 above, it may request that 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 territory.

Article 8.12 Business Practices

1. The Parties recognise that certain business practices of service suppliers, other than those falling under Article 8.11 (Monopolies and Exclusive Service Suppliers), may restrain competition and thereby restrict trade in services.

2. A Party shall, at the request of the other Party, enter into consultations with a view to eliminating practices referred to in paragraph 1. The Party addressed 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 Party addressed shall also provide other information available to the requesting Party, subject to its domestic law and to the conclusion of satisfactory agreement concerning the safeguarding of its confidentiality by the requesting Party.

Article 8.13 Safeguard Measures

1. The Parties note that multilateral negotiations pursuant to Article X of GATS on the question of emergency safeguard measures are based on the principles 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 Agreement so as to incorporate the results of the multilateral negotiations.

2. In the event that the implementation of this Agreement 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, including the duration for which the measure shall apply, 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 8.14

Subsidies

1. Notwithstanding Article 8.1 (Scope and Coverage), the Parties shall review the issue of disciplines on subsidies related to trade in services in the light of any disciplines agreed under Article XV of GATS, with a view to their incorporation into this Chapter.

2. The Parties recognise that, in certain circumstances, subsidies or grants may have distortive effects on trade in services. Any Party which considers that it is adversely affected by a subsidy or grants of the other Party may request consultations with that Party on such matters. Such request shall be accorded sympathetic consideration.

3. The provisions of Chapter 14 (Dispute Settlement) shall not apply to any requests made or consultations held under the provisions of this Article or to any disputes that may arise between the Parties out of, or under, the provisions of this Article.

Article 8.15

Payments and Transfers

1. Except under the circumstances envisaged in Article 12.4 (Measures 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 the Parties as members of the International Monetary Fund under the Articles of Agreement of the Fund, including the use of exchange actions which are in conformity with the Articles of Agreement, provided that a Party shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article 12.4 (Measures to Safeguard the Balance of Payments) or at the request of the Fund.

Article 8.16

Denial of Benefits

1. Subject to prior notification and consultation, 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 country that is not a Party to this Agreement;
- (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 of a non-Party; and
 - (ii) by a person which operates and/or uses the vessel in whole or in part but which is of a non-Party;
- (c) to the supply of a service from or in the territory of the other Party, if the Party establishes that the service is supplied by a service supplier that is owned or controlled by a person of a non-Party and the denying Party:
 - (i) does not maintain diplomatic relations with the non-Party; or
 - (ii) adopts or maintains measures with respect to the non-Party that prohibit transactions with the juridical person, or through other forms of commercial presence such as a branch or representative office that would be violated or circumvented if the benefits of this Chapter were accorded to the juridical person or through other forms of commercial presence such as a branch or representative office.

Article 8.17
Affirmation of GATS Annex on Financial Services

The Parties reaffirm their rights and obligations with respect to each other under the GATS Annex on Financial Services.

Article 8.18
Implementation

The Sub-Committee on Trade in Services established under Article 15.2 (Sub-Committees) shall consider matters relating to the implementation of this Chapter.