

CHAPTER 8 TRADE IN SERVICES

Article 8.1: 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) **aircraft repair and maintenance services** means such activities when undertaken on an aircraft or a part thereof while it is withdrawn from service and do not include so-called line maintenance;

(c) **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;

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

(e) **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;

(f) **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;

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

(i) constituted or otherwise organised under the law of that Party, and is engaged in substantive business operations in the territory of that Party,

(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 Party, identified under subparagraph (i);

(h) **a juridical person** is

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.

controlled by persons of a Party if such persons have the power to name a majority of directors or otherwise legally direct its actions.

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;

(i) **measure** means any measure by a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form;

(j) **measures by a Party** means measures taken by:

(i) central, regional or local governments and authorities; and

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

In fulfilling its obligations and commitments under this Chapter, each Party shall take such 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 territory;

(k) **measures by a Party affecting trade in services** includes 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 that Party for the supply of a service in the territory of the other Party;

(l) **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;

(m) **natural person of a Party** means a natural person who resides in the territory of a Party or elsewhere and who under the law of that Party is a national of that Party;

(n) **person** means either a natural person or a juridical person;

(o) **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;

(p) **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 application conditions;

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

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

(s) **service of a Party** means a service which is supplied:

(i) from or in the territory 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 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 that other Party;

(t) **service supplier** means any person that supplies a service;

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

(v) **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 ("cross-border");

(ii) in the territory of a Party to the service consumer of the other Party ("consumption abroad");

(iii) by a service supplier of a Party, through commercial presence in the territory of the other Party ("commercial presence");

(iv) by a service supplier of a Party, through presence of natural persons of a Party in the territory of the other Party ("presence of natural persons"); and

(w) **air traffic rights** means the right for scheduled and non-scheduled services to operate and/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.

Article 8.2: Scope and Coverage

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

2. This Chapter shall not apply to measures affecting:

(a) subsidies or grants including government-supported loans, guarantees and insurance 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 are offered exclusively to domestic services, service consumers or service suppliers;

(b) a service supplied in the exercise of governmental authority;

(c) government procurement;

(d) air traffic rights, however granted; or to 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;

(iii) computer reservation system services;

(e) natural persons seeking access to the employment market of a Party;

or

(f) citizenship, residence or employment on a permanent basis.

3. 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. The sole fact of requiring a visa shall not be regarded as nullifying or impairing benefits under a specific commitment.

4. Unless they are specifically defined in this Chapter or in Annex 8A (Schedule of Specific Commitments – Thailand) or Annex 8B (Schedule of Specific Commitments – Sri Lanka), terms used in this Chapter and in the Annexes shall be construed in accordance with their meaning in GATS, *mutatis mutandis*.

5. Notwithstanding any other provision of this Chapter, a Party shall not be prevented from taking 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 the financial system; or to ensure the stability of the exchange rate, including to prevent speculative capital flows subject to the following:

(i) where such measures do not conform with the provisions of this Chapter, they shall not be used as a means of avoiding the Party's commitments or obligations under this Chapter.

(ii) for measures to ensure the stability of the exchange rate including to prevent speculative capital flows, such measures shall be no more than necessary, and phased out when conditions no longer justify their institution or maintenance.

Article 8.3: Market Access

1. With respect to market access through the modes of supply defined in subparagraph (v) of Article 1 (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 Annex 8A (Schedule of Specific Commitments – Thailand) or Annex 8B (Schedule of Specific Commitments – Sri Lanka)¹.

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 Annex 8A (Schedule of Specific Commitments – Thailand) or Annex 8B (Schedule of Specific Commitments – Sri Lanka), are:

(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;

¹ 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 (v) (i) of Article 1 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 (v) (iii) of Article 1, it is thereby committed to allow related transfers of capital into its territory.

(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;²

(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 Annex 8A (Schedule of Specific Commitments – Thailand) or Annex 8B (Schedule of Specific Commitments – Sri Lanka), 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.³

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

² This subparagraph does not cover measures of a Party which limit inputs for the supply of services.

³ Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers.

or service suppliers of a Party compared to like services or service suppliers of the other Party.

Article 8.5: Additional Commitments

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

Article 8.6: Schedule of Specific Commitments

1. Each Party shall set out in a Schedule the Specific Commitments it undertakes under Article 8.3 (Market Access), Article 8.4 (National Treatment) and Article 8.5 (Additional Commitments). 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; and
- (e) the date of entry into force of such commitments.

2. Measures inconsistent with both Article 8.3 (Market Access) and Article 8.4 (National Treatment) shall be inscribed in the column relating to Article 8.3 (Market Access). In this case, the inscription will be considered to provide a condition or qualification to Article 8.4 (National Treatment) as well.

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

Article 8.7: Modification of Schedules

1. A Party may modify or withdraw any commitment in its Schedule, at any time after three years have 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 whose benefits under this Agreement may be affected by a proposed modification or withdrawal notified under paragraph 1, 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 concerned 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. The Parties shall endeavour to conclude negotiations on such compensatory adjustment to mutual satisfaction within six months, failing which recourse may be had to the provisions of Chapter 13 (Dispute Settlement).

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. 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 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 a Party shall, 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. At the request of the applicant, the competent authorities of the Party shall provide, without undue delay, information concerning the status of the application.

5. With the objective of ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute an unnecessary barrier 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 the 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. For sectors where a Party has undertaken specific commitments and subject to any terms, limitations, conditions or qualifications set out therein, pending the incorporation of disciplines pursuant to paragraph 5, a Party shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:

(a) does not comply with the criteria outlined in sub-paragraphs (a), (b) or (c) of paragraph 5; and

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

7. In determining whether a Party is in conformity with the obligation under paragraph 6, account shall be taken of international standards of relevant international organisations⁴ applied by that Party.

Article 8.9: Recognition

1. For the purposes of the fulfilment of its standards or criteria for the authorisation, licensing or certification of services suppliers, a Party may recognise the education or experience obtained, requirements met, or licenses or certifications granted in the other Party.

2. The Parties shall encourage their relevant competent bodies to enter into negotiations on recognition of professional qualifications, licenses, or registration procedures with a view to the achievement of early outcomes.

3. Any arrangement reached pursuant to paragraph 2 shall be consistent with this Agreement.

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 obligations under 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 another Party is acting in a manner inconsistent with paragraphs 1 or 2, it may request the Party establishing, maintaining or authorising such supplier to provide specific information concerning the relevant operations.

⁴ The term "relevant international organisations" refers to international bodies whose membership are open to the relevant bodies of the Parties.

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 8.11: Business Practices

1. The Parties recognise that certain business practices of service suppliers, other than those falling under Article 10, 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 laws and regulations and to the conclusion of satisfactory agreement concerning the safeguarding of its confidentiality by the requesting Party.

Article 8.12: Emergency Safeguard Measures

1. The Parties note the multilateral negotiations pursuant to Article X of the 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 Agreement so as to incorporate the results of such 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 shall be mutually agreed by the Parties. The Parties shall take

into account the circumstances of the particular case and give sympathetic consideration to the Party seeking to take a measure.

Article 8.13: Payments and Transfers

1. Except under the circumstances envisaged in Article 8.14 (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 the Parties as members of the International Monetary Fund 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 8.14 (Restrictions to Safeguard the Balance-of-Payments) or at the request of the International Monetary Fund.

Article 8.14: Restrictions to Safeguard Balance of Payments

1. In the event of serious balance-of-payments and external financial difficulties or threat thereof, a Party may adopt or maintain restrictions on trade in services, including on payments or transfers for transactions relating to such obligations. It is recognised that particular pressures on the balance-of-payments of a Party in the process of economic development may necessitate the use of restrictions to ensure, *inter alia*, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development.
2. The restrictions referred to in paragraph 1:
 - (a) shall not discriminate among WTO Members;
 - (b) shall be consistent with the *Articles of Agreement of the International Monetary Fund*;

(c) shall avoid unnecessary damage to the commercial, economic and financial interests of the other Party;

(d) shall not exceed those necessary to deal with the circumstances described in paragraph 1;

(e) shall be temporary and be phased out progressively as the situation specified in paragraph 1 improves.

3. In determining the incidence of such restrictions, a Party may give priority to the supply of services which are more essential to its economic or development programmes. However, such restrictions shall not be adopted or maintained for the purpose of protecting a particular service sector.

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

5. The Party adopting any restrictions in accordance with paragraph 1 shall commence consultations with the other Party promptly in order to review the restrictions adopted.

Article 8.15: Transparency

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

2. Where publication as referred to in paragraph 1 is not practicable, such information shall be made otherwise publicly available.

3. Each Party shall respond promptly to all requests by the other Party for specific information on any of its measures of general application or international agreements within the meaning of paragraph 1. Communication between the Parties in this regard shall be done through their designated contact points.

Article 8.16: Disclosure of Confidential Information

Nothing in this Chapter shall require any Party to provide 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 8.17: Denial of Benefits

Subject to prior notification and prompt consultation, a Party may deny the benefits of this Chapter:

(a) to the supply of any 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 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 a service supplier, that is juridical person, if it establishes that it is not a service supplier of the other Party where the Party establishes that the service supplier is owned or controlled by persons of a non-Party and that it has no substantive business operations in the territory of a Party.

Article 8.18: Contact Points

Each Party shall designate one or more contact points to facilitate communication between the Parties on any matter covered by this Chapter, and shall provide details of such contact points to the other Party. The Parties shall notify each other promptly of any amendments to the details of their contact points.

Article 8.19: Committee on Trade in Services

1. The Parties hereby establish a Committee on Trade in Services that shall meet as mutually determined by the Parties or the Joint Committee to consider any matter arising under this Chapter.
2. The Committee's functions shall include:
 - (a) reviewing the implementation and operation of this Chapter,
 - (b) exchanging information and recommendation of measures to promote increased trade in services between the Parties; and
 - (c) considering and discussing any issues related to this Chapter

Article 8.20 Miscellaneous Provisions

The GATS Annexes, namely, Annex on Movement of the 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*.