

CHAPTER EIGHT

TRADE IN SERVICES

Article 8.1 Definitions

For purposes of this Chapter:

- (a) **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repair and maintenance services** means such activities when undertaken on an aircraft or a part thereof while it is withdrawn from service and does not include so-called line maintenance;
- (b) **Commercial presence** means any type of business or professional establishment, including through:
 - (i) the constitution, acquisition or maintenance of a legal person, or
 - (ii) the creation or maintenance of a branch or a representative office,within the territory of a Party for the purposes of supplying a service;
- (c) **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;
- (d) **Ground-handling services** include cargo-handling services provided for freight in special containers, non-containerised freight or for passenger baggage, including services of freight terminal facilities and baggage handling services at airports; aircraft cleaning and disinfecting services; hangar services; and aircraft towing services;
- (e) **Measures adopted or maintained by a Party** means any measure of a Party, whether in the form of law, regulation, rule, procedure, decision, and administrative action or practice, adopted or maintained by:
 - (i) central, state or local Government and authorities; or
 - (ii) non-governmental bodies in the exercise of powers

delegated by central, state or local Governments or authorities;

Such measures include measures affecting:

- (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; and
 - (iii) the presence, including commercial presence, of persons of a Party for the supply of a service in the territory of the other Party;
- (f) **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;
- (g) **Natural person** means:
 - (i) in respect of Malaysia, is a citizen of Malaysia or has the right of permanent residence in Malaysia; and
 - (ii) in respect of New Zealand, is a citizen of New Zealand or has the right of permanent residence in New Zealand;
- (h) **Sector** of a service means:
 - (i) with reference to a specific commitment, one or more, or all, sub-sectors of that service, as specified in a Party's Schedule in Annex 4 (Schedules of Specific Services Commitments); or
 - (ii) otherwise, the whole of that service sector, including all of its sub-sectors;
- (i) **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 or the applicable conditions;
- (j) **Service of the other Party** means a service which is supplied:
 - (i) from or in the territory of the other Party; 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;
- (k) **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;
- (l) **Service supplier of a Party** means any person of a Party that supplies a service;
- (m) **State enterprise** means an enterprise that is owned or controlled by a Party;
- (n) **Supply of a service** includes the production, distribution, marketing, sale and delivery of a service;
- (o) **Trade in services** means the supply of a service:
 - (i) from the territory of one Party into the territory of the other Party ("cross-border mode");
 - (ii) in the territory of one Party to the service consumer of the other Party ("consumption abroad mode");
 - (iii) by a service supplier of one Party, through commercial presence in the territory of the other Party ("commercial presence mode"); and
 - (iv) by a service supplier of one Party, through presence of natural persons of that Party in the territory of the other Party ("presence of natural persons mode"); and
- (p) **Traffic rights** mean the right for scheduled and non-scheduled services to operate and/or 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 Objectives

The objectives of this Chapter are to:

- (a) facilitate expansion of trade in services on a mutually advantageous basis, under conditions of transparency and progressive liberalisation, while recognising the rights of Parties to regulate services, and the role of Governments in providing and funding public services, and giving due respect to national policy objectives; and
- (b) enhance cooperation amongst the service suppliers from both Parties, aimed at promoting bilateral trade in services.

Article 8.3 Scope and Coverage

1. This Chapter shall apply to measures adopted or maintained by a Party affecting trade in services.

2. Chapter 10 (Investment) shall not apply to measures adopted or maintained by a Party affecting trade in services.

3. Notwithstanding paragraph 2, the following Articles and Sections of Chapter 10 (Investment) shall apply, *mutatis mutandis*, to measures affecting the supply of services by a service supplier of a Party through commercial presence in the territory of the other Party pursuant to this Chapter, but only to the extent that they relate to a covered investment and an obligation under Chapter 10 (Investment), regardless of whether or not such a service sector is scheduled in a Party's Schedule in Annex 4 (Schedules of Specific Services Commitments):

- (a) Article 10.7 (Transfers);
- (b) Article 10.8 (Expropriation);
- (c) Article 10.9 (Compensation for Losses);
- (d) Article 10.10 (Minimum Standard of Treatment);
- (e) Article 10.13 (Subrogation); and
- (f) Section B (Investor-State Dispute Settlement).

4. This Chapter shall not apply to:

- (a) services supplied in the exercise of governmental authority;

- (b) any measures by a Party with respect to government procurement;
- (c) subsidies or grants provided by a Party or State Enterprise thereof, including Government-supported loans, guarantees, and insurance, 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, except as provided for in Article 8.17 (Subsidies);
- (d) cabotage in maritime transport services;
- (e) measures affecting natural persons seeking access to the employment market of a Party; or
- (f) measures regarding citizenship, nationality, residence or employment on a permanent basis.

5. 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 for natural persons of either Party and not for those of others shall not be regarded as nullifying or impairing benefits under this Chapter.

6. This Chapter shall not apply to measures affecting air traffic rights, however granted, or services directly related to the exercise of traffic rights, except measures affecting:

- (a) aircraft repair and maintenance services;
- (b) the selling and marketing of air transport services;
- (c) computer reservation system services; and
- (d) ground-handling services.

7. 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 Agreement so as to incorporate the results of such multilateral negotiations.

Article 8.4

Market Access

1. With respect to market access through the modes of supply defined in Article 8.1(o) (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 in Annex 4 (Schedules of Specific Services Commitments).

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 in Annex 4 (Schedules of Specific Services 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, except measures of a Party which limit inputs for the supply of services;
- (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

National Treatment

1. In the sectors inscribed in its Schedule in Annex 4 (Schedules of Specific

Services 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.

2. A Party may meet the requirement in 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 the Party compared to the like service or service suppliers of the other Party.

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

Article 8.6 **Additional Commitments**

The Parties may negotiate commitments with respect to measures affecting trade in services not subject to Article 8.4 (Market Access) or 8.5 (National Treatment), including those regarding qualifications, standards or licensing matters. Such commitments shall be set out in a Party's Schedules in Annex 4 (Schedules of Specific Services Commitments) and Annex 6 (Schedules of Movement of Natural Persons Commitments).

Article 8.7 **Schedule of Specific Commitments**

1. Each Party's initial schedule of its specific commitments undertaken under Articles 8.4 (Market Access), 8.5 (National Treatment) and 8.6 (Additional Commitments) are set out in Annex 4 (Schedules of Specific Services Commitments). The specific commitments in respect of the supply of a service by a service supplier of one Party through presence of natural persons of that Party in the territory of the other Party are set out in Annex 6 (Schedules of Movement of Natural Persons Commitments).

2. With respect to sectors where the specific commitments are undertaken, each schedule of specific commitments in Annex 4 (Schedules of Specific Services Commitments) shall specify:

- (a) terms, limitations and conditions on market access;

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

3. Measures inconsistent with Articles 8.4 (Market Access) and 8.5 (National Treatment) have been inscribed in the column relating to Article 8.4 (Market Access). This inscription shall be considered to provide a condition or qualification to Article 8.5 (National Treatment) as well.

Article 8.8 **Most Favoured Nation Treatment**

1. In respect of the services sectors listed in Annex 5 (Most Favoured Nation Treatment Sectoral Coverage Under Article 8.8), and subject to any conditions and qualifications set out therein, each Party shall accord to services and service suppliers of the other Party treatment no less favourable than that it accords to like services and service suppliers of a third party.

2. Notwithstanding paragraph 1, the Parties reserve the right to adopt or maintain any measure that accords differential treatment to third parties under any free trade agreement or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement.

3. For greater certainty, paragraph 2 includes, in respect of agreements on the liberalisation of trade in goods or services or investment, any measures taken as part of a wider process of economic integration or trade liberalisation between the parties to such agreements.

4. The Parties reserve the right to adopt or maintain any measure that accords differential treatment to third parties under any international agreement in force or signed after the date of entry into force of this Agreement involving:

- (a) aviation;
- (b) fisheries; and
- (c) maritime matters.

Article 8.9 **Recognition**

1. For the purposes of the fulfilment, in whole or in part, of its standards or criteria for the registration, authorisation, licensing, or certification of service

suppliers, and subject to the requirements of paragraph 5, a Party may recognise the education or experience obtained, requirements met, or licences or certification granted in the other Party.

2. Recognition referred to in paragraph 1, which may be achieved through harmonisation or otherwise, may be based upon an agreement or arrangement between the Parties or may be accorded unilaterally.

3. Where a Party recognises, autonomously or by agreement or arrangement, the education or experience obtained, requirements met, or licenses or certifications granted in the territory of a third party, nothing in Article 8.8 (Most Favoured Nation Treatment) shall be construed to require the Party to accord such recognition to the education or experience obtained, requirements met, or licenses or certifications granted in the territory of the other Party.

4. A Party that is a party to an agreement or arrangement of the type referred to in paragraph 3, whether existing or future, shall afford adequate opportunity for the other Party, upon request, 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 that other Party's territory should be recognised.

5. 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 registration, authorisation, licensing, or certification of service suppliers, or a disguised restriction on trade in services.

6. Within two years of entry into force of this Agreement, both Parties shall encourage the development of mutual recognition arrangements among competent bodies on professional services, by facilitating discussion between these bodies and exchange of information through focal points.

7. Within one year of entry into force of this Agreement, the Parties shall establish a mechanism that allows for the recognition of the equivalency of qualifications granted within the other Party.

Article 8.10

Areas of Cooperation

The Parties shall facilitate strengthening of cooperation amongst services providers, *inter alia*:

- (a) by promoting joint venture and marketing arrangements;

- (b) through research and development; and
- (c) through exchange of information.

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 the Party's commitments under this Chapter.
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 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, it may request the other Party establishing, maintaining or authorising 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) authorises or establishes a small number of service suppliers; and
 - (b) substantially prevents competition among those suppliers in its territory.

Article 8.12

Emergency Safeguard Measures

1. The Parties shall initiate discussions within one year from the entry into force of this Agreement to develop mutually acceptable guidelines and procedures for the application of emergency safeguard measures. These guidelines and procedures shall be annexed to and shall form part of this Agreement.
2. Notwithstanding paragraph 1, if a Party deems to be affected by the negative impact caused by its specific commitments as set out in Annex 4 (Schedules of Specific Services Commitments), that Party may request to hold a consultation with the other Party and the other Party shall respond to such a request in good faith.
3. In the consultations, the Parties shall endeavour to reach a mutually

acceptable solution within a reasonable time.

Article 8.13

Payments and Transfers

1. Except under the circumstances envisaged in Article 17.3 (Measures to Safeguard Balance of Payments), a Party shall not apply restrictions on international transfers and payments for current transactions relating to trade in services.
2. Nothing in this Chapter shall affect the rights and obligations of the Parties as members of the International Monetary Fund ("the 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 commitments under this Chapter regarding such transactions, except under Article 17.3 (Measures to Safeguard Balance of Payments) or at the request of the Fund.

Article 8.14

Denial of Benefits

1. Subject to prior notification, a Party may deny the benefits of this Chapter to a service supplier of the other Party where the Party establishes that:
 - (a) the service is being supplied by an enterprise that is owned or controlled by persons of a third party and the enterprise has no substantive business operations in the territory of the other Party; or
 - (b) the service is being supplied by an enterprise that is owned or controlled by persons of the denying Party and the enterprise has no substantive business operations in the territory of the other Party.
2. A Party that denies benefits pursuant to paragraph 1 shall enter into consultations within 30 days following notification if requested by the other Party. Such consultations shall be without prejudice to the Parties' rights under the Chapter 16 (Dispute Settlement).

Article 8.15

Review of Commitments

1. The Parties shall enter into successive rounds of negotiations, beginning no later than two years from the date of entry into force of this Agreement, and

periodically thereafter as determined by the Joint Commission, with a view to further improving specific commitments under this Chapter so as to progressively liberalise trade in services between the Parties.

2. If a Party concludes an agreement on trade in services on a “negative list” basis⁴ with a third party after this Agreement comes into force, that Party shall, at the request of the other Party, within three months from this request, commence re-negotiation of the specific commitments set out in Annex 4 (Schedules of Specific Services Commitments) with a view to the progressive liberalisation of trade in services between them. The re-negotiation shall proceed on a “negative list” basis. The Parties shall endeavour to conclude the re-negotiation on the specific commitments within 18 months from the date the negotiations commence.

3. Any review of commitments undertaken under this Article shall also include a review of Article 8.8 (Most Favoured Nation Treatment) with a view to progressive extension of the Most Favoured Nation Treatment to additional services sectors not listed in Annex 5 (Most Favoured Nation Treatment Sectoral Coverage Under Article 8.8).

Article 8.16

Modification of Schedules

1. A Party (“modifying Party”) may modify or withdraw any commitment in its Schedules in Annex 4 (Schedules of Specific Services Commitments) and Annex 6 (Schedules of Movement of Natural Persons Commitments) at any time after three years have elapsed from the date on which that commitment entered into force.

2. The modifying Party shall notify the other Party (“the affected Party”) of its intent to modify or withdraw a commitment pursuant to this Article no later than three months before the intended date of implementation of the modification or withdrawal.

3. The modifying Party may only modify or withdraw its commitments where the modifying Party makes compensatory adjustments to its Schedules to maintain a general level of mutually advantageous commitments that is no less favourable to trade in services than provided for in its Schedules prior to the modification.

⁴ A “negative list” utilises an approach whereby a Party is required to apply certain obligations of the Chapter, such as market access and national treatment, to all services and services suppliers, unless a reservation is made in the Party’s schedule appended to the agreement. It is commonly contrasted with a “positive list” approach whereby certain obligations, such as market access and national treatment, only apply to services and service suppliers to the extent that a Party makes a specific commitment to this effect in its schedule.

4. Upon notification of a Party's intent to make such modification, the Parties shall consult and attempt to reach agreement on the appropriate compensatory adjustment.

5. If agreement pursuant to paragraphs 3 and 4 is not reached between the modifying Party and the affected Party within three months, the affected Party may refer the matter to arbitration in accordance with the procedures set out in Chapter 16 (Dispute Settlement).

6. The modifying Party may not modify or withdraw its commitment until it has made the necessary adjustments in conformity with the findings of the arbitration in relation to the question of whether paragraph 3 is satisfied in accordance with paragraph 5.

Article 8.17 Subsidies

1. Notwithstanding Article 8.3(4)(c) (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.

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

Article 8.18 Domestic Regulation

1. Each Party shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.

2. With a view to ensuring that any measure maintained or adopted by a Party relating to the authorisation, licensing or qualification of service suppliers of the other Party does not constitute an unnecessary barrier to trade in services, each Party shall ensure that such a measure:

- (a) is based on objective and transparent criteria, such as competence and the ability to supply the service;
- (b) is not more burdensome than necessary to ensure the quality of the service; and

- (c) does not constitute a disguised restriction on the supply of the services.
- 3. If the results of the negotiations under Article VI.4 of GATS enter into effect, the Parties shall jointly review these results with a view to their incorporation into this Agreement.
- 4. In determining whether a Party is in conformity with its obligations under paragraph 2, account shall be taken of international standards of relevant international organisations applied by that Party.
- 5. 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) 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 domestic laws and regulations, inform the applicant of the decision concerning the application;
 - (c) at the request of the applicant, provide, without undue delay, information concerning the status of the application under consideration; 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 shall have the possibility of resubmitting, at its discretion, a new application.
- 6. In sectors where specific commitments regarding professional services are undertaken, each Party shall provide for adequate procedures to verify the competency of professionals of the other Party.

Article 8.19

Committee on Trade in Services

1. For purposes of the effective implementation and operation of this Chapter, the Parties hereby establish a Committee on Trade in Services ("the Committee") to consider any matter arising under this Chapter and Chapter 9 (Movement of Natural Persons).

2. The functions of the Committee include:
 - (a) conducting reviews of commitments in accordance with Article 8.15 (Review of Commitments);
 - (b) reviewing the implementation and operation of this Chapter and Chapter 9 (Movement of Natural Persons);
 - (c) reviewing and discussing issues concerning effective implementation of Mutual Recognition Arrangements under Article 8.9 (Recognition) and Emergency Safeguard Measures under Article 8.12 (Emergency Safeguard Measures);
 - (d) considering other trade in services issues of interest to a Party; and
 - (e) reporting outcomes of discussions to the Joint Commission.
3. The Committee shall:
 - (a) comprise of Government representatives and may invite representatives of relevant entities, other than the Governments, with the necessary expertise relevant to the issues to be discussed; and
 - (b) be co-chaired by officials of the Governments.
4. The Committee shall convene its first meeting within one year of entry into force of this Agreement. The subsequent meetings of the Committee shall be held at such frequency to be agreed by both Parties.