

CHAPTER 8 TRADE IN SERVICES

ARTICLE 59 Definitions

For the purposes of this Chapter:

- (a) **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;
- (b) **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;
- (c) **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, branch, trust, partnership, joint venture, sole proprietorship or association;
- (d) **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 the other Party; or
 - (ii) in the case of the supply of a service through commercial presence, owned or controlled by:
 - (A) natural persons of the other Party; or
 - (B) juridical persons of the other Party identified under sub-paragraph (d)(i);
- (e) a juridical person is:

- (i) **owned** by persons of a Party if more than 50% 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;
- (f) **measure** means any measure by a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form;
- (g) **measures by Parties** 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;
- (h) **measures by Parties affecting trade in services** include measures in respect of:
 - (i) the purchase, payment or use of a service;
 - (ii) the access to and use of, in connection with the supply of a service, services which are required by the Parties to be offered to the public generally;
 - (iii) the presence, including commercial presence, of persons of a Party for the supply of a service in the territory of the other Party;
- (i) **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;
- (j) **natural person of a Party** is a national or a permanent resident of a Party under its laws. Until such time as China enacts its law on treatment of permanent residents of foreign countries, the obligations of each Party with respect to the permanent residents of the other Party shall be limited to the extent of its obligations under the GATS;

- (k) **person** means either a natural person or a juridical person;
- (l) **qualification procedures** means administrative procedures relating to the administration of qualification requirements;
- (m) **qualification requirements** means substantive requirements which a service supplier is required to fulfil in order to obtain certification or a license;
- (n) **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 in Annex 5 (Schedules of Specific Commitments on Services);
 - (ii) otherwise, the whole of that service sector, including all of its subsectors;
- (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 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;
- (s) **service supplier** means any person that supplies a service¹⁰;

¹⁰ 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 (*ie*, 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.

- (t) **supply of a service** includes the production, distribution, marketing, sale and delivery of a service; 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 (“cross-border” mode);
 - (ii) in the territory of a Party to the service consumer of the other Party (“consumption abroad” mode);
 - (iii) by a service supplier of a Party, through commercial presence in the territory of the other Party (“commercial presence” mode); or
 - (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” mode).

ARTICLE 60

Scope and Coverage

1. This Chapter applies to measures by a Party affecting trade in services.
2. This Agreement shall not apply to:
 - (a) services supplied in the exercise of governmental authority within the territory of each Party; or
 - (b) regulations or requirements governing the procurement by governmental 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.
3. This Chapter shall not apply to subsidies or grants provided by a Party or to any conditions attached to its receipt or continued receipt of such subsidies or grants, except:
 - (a) as otherwise specified in this Agreement; or
 - (b) disciplines that may be developed under Article XV of the GATS as may be reviewed with a view to their incorporation into this Agreement.
4. This Agreement, including its dispute settlement procedures, shall not apply to measures affecting:
 - (a) traffic rights, however granted; or

(b) services directly related to the exercise of traffic rights,
except as provided in paragraph 5.

5. This Chapter shall apply to measures affecting:

- (a) aircraft repair and maintenance services;
- (b) the selling and marketing of air transport services; and
- (c) computer reservation system (“CRS”) services.

ARTICLE 61

Market Access

1. With respect to market access through the modes of supply identified in Article 59(u) (Definitions) a 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.¹¹

2. In sectors where market access commitments are undertaken, the measures which a Party shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, 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;¹²
- (d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier

¹¹ If a Party undertakes a market access commitment in relation to the supply of a service through the mode of supply referred to in Article 59(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 59(u)(iii), it is thereby committed to allow related transfers of capital into its territory.

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

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 62

National Treatment

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

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

ARTICLE 63

Additional Commitments

The Parties may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles 61 (Market Access) and 62 (National Treatment) including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Party's Schedule.

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

ARTICLE 64
Schedule of Specific Commitments

1. Each Party shall set out in a Schedule the specific commitments it undertakes under Articles 61 (Market Access), 62 (National Treatment) and 63 (Additional Commitments). With respect to sectors where such commitments are undertaken, each Schedule shall specify:
 - (a) the sectors in which such commitments are undertaken;
 - (b) terms, limitations and conditions on market access;
 - (c) conditions and qualifications on national treatment;
 - (d) undertakings relating to additional commitments; and
 - (e) where appropriate the time-frame for implementation of such commitments.
2. Measures inconsistent with both Articles 61 (Market Access) and 62 (National Treatment) shall be inscribed in both the columns relating to Articles 61 (Market Access) and 62 (National Treatment).
3. The Parties' Schedules of specific commitments shall be annexed to this Agreement as Annex 5 (Schedules of Specific Commitments on Services) and shall form an integral part thereof.
4. Upon the conclusion of the second package of services commitments between ASEAN and China, pursuant to Article 23(2) of the *Agreement on Trade in Services of the Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations and the People's Republic of China* done on 14 January 2007, the commitments undertaken by each Party shall be incorporated into this Agreement and take effect between the Parties.

ARTICLE 65
Domestic Regulation

1. In sectors where specific commitments are undertaken under Articles 61 (Market Access), 62 (National Treatment), 63 (Additional Commitments) and 64 (Schedule of Commitments), each Party shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.
2. (a) Each Party shall maintain or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, 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 sub-paragraph (a) shall not be construed to require a Party to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system.

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

- (a) in the case of an incomplete application, at the request of the applicant, identify all the additional information that is required to complete the application and provide the opportunity to remedy deficiencies within a reasonable timeframe;
- (b) at the request of the applicant, provide without undue delay, information concerning the status of the application; and
- (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 will have the possibility of resubmitting, at its discretion, a new application.

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

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

5. (a) In sectors in which a Party has undertaken specific commitments under Articles 61 (Market Access), 62 (National Treatment), 63 (Additional Commitments) and 64 (Schedule of Commitments) pending the incorporation of the disciplines referred to in paragraph 4, that Party shall not apply licensing and qualification requirements and technical standards that

nullify or impair its obligation under this Agreement in a manner which:

- (i) does not comply with the criteria outlined in paragraphs 4(a), (b) or (c) of this Article; 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 paragraph 5(a), account shall be taken of international standards of relevant international organisations¹⁴ 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 66

Recognition

1. For the purposes of the fulfilment, in whole or in part, of its standards or criteria for the authorisation, licensing, or certification of service suppliers, and subject to the requirements of paragraph 3, a Party may recognise, or encourage its relevant competent bodies to recognise, the education or experience obtained, requirements met or licences or certifications granted in the other Party. Such recognition, which may be achieved through harmonisation or otherwise, may be based upon an agreement or arrangement between the Parties or their 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 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, licences or certifications obtained or requirements met in that other Party's territory should be recognised.

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

¹⁴ **Relevant international organisations** refers to international bodies whose membership is open to the relevant bodies of both Parties to this Agreement.

ARTICLE 67
Recognition Co-operation

1. The Parties shall ensure that their relevant competent authorities commence negotiations on areas for mutual recognition of the equivalence of each Party's:

- (a) accounting work experience and qualifications;
- (b) auditing work experience and qualifications; and
- (c) accounting and auditing standards,

as soon as possible.

2. The Parties shall commence negotiation on a Mutual Recognition Arrangement ("MRA") for qualifications or experience obtained, requirements met, or licenses or certifications for architects following the entry into force of this Agreement, with a view to reaching such an MRA as soon as possible, and exploring the possibilities for expanding the MRA to other architectural and engineering areas.

ARTICLE 68
Joint Committee on Recognition Co-operation

1. For the purposes of effective implementation of Article 67 (Recognition Co-operation), a Joint Committee on Recognition Co-operation (the "Committee"), including a working group on accounting and auditing, shall be established. The functions of the Committee shall be:

- (a) reviewing and discussing the issues concerning the effective implementation of Article 67 (Recognition Co-operation);
- (b) identifying and recommending areas for and ways of furthering co-operation between the Parties; and
- (c) discussing other issues relating to the implementation of Article 67 (Recognition Co-operation).

2. The Committee, including the working group on accounting and auditing, shall meet on the request of either Party or the FTA Joint Committee established under Article 111 (Implementation and Review) at mutually acceptable time and venue.

ARTICLE 69
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.
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 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 70
Business Practices

1. The Parties recognise that certain business practices of service suppliers, other than those falling under Article 69 (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 co-operate 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 to the conclusion of satisfactory agreement concerning the safeguarding of its confidentiality by the requesting Party.

ARTICLE 71

Safeguard Measures

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.

ARTICLE 72

Payments and Transfers

1. Except under the circumstances envisaged in Article 107 (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 Agreement 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* (the “Articles of Agreement”), 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 107 (Restrictions to Safeguard the Balance-of-Payments) or at the request of the International Monetary Fund.

ARTICLE 73

Transparency

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

ARTICLE 74

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 75

Denial of Benefits

A Party may deny the benefits of this Agreement:

- (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 of a non-Party; and
 - (ii) by a person of a non-Party which operates and/or uses the vessel in whole or in part.
- (c) to a service supplier that is a juridical person, if it establishes that it is not a service supplier of the other Party.

ARTICLE 76

Miscellaneous Provisions

The GATS Annexes, namely: the *Annex on Movement of Natural Persons Supplying Services*; the *Annex on Air Transport Services*; the *Annex on Financial Services*; and the *Annex on Telecommunications*, shall be incorporated, *mutatis mutandis*, into and form an integral part of this Agreement.