



# CHAPTER 4

## RCEP Services Liberalisation: Key Features and Implications

**Ramonette B. Serafica**  
**Intan M. Ramli**

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The Trade in Services Chapter of the RCEP Agreement establishes the rules for the progressive liberalisation of trade in the region and sets out regulatory disciplines to mitigate barriers to competition. Considered the most significant feature of the RCEP agreement compared to other FTAs of ASEAN is the scheduling of market access commitments using the negative list approach. Thus, an immediate challenge for members that initially adopted the positive list is the transition to the negative list scheduling approach. Furthermore, members will need to implement competitive and robust regulations in liberalising services. Developing countries, especially LDCs, might also face capacity constraints to fully take advantage of the market access given by the RCEP partners.

## Introduction

In the last 2 decades, services liberalisation have been bound in regional trade agreements rather than at the multilateral level (World Trade Organization, 2019). The General Agreement on Trade in Services (GATS) establishes a regulatory framework within which the World Trade Organization (WTO) members can undertake and implement commitments for the liberalisation of trade in services. The preamble to the GATS explicitly recognises the rights of the WTO members to regulate and introduce new regulations on the supply of services in their countries in order to meet national policy objectives. Hence, it is obvious that the objective of the GATS is not to deregulate services but rather it allows room for flexibility.

The trend to include services in preferential trade agreements intensified in the 2000s and continues to this day. Moreover, the involvement of developing countries in services agreements has been growing either as part of agreements between developed and developing countries or within developing countries only (Gootiiz et al., 2020). The Regional Comprehensive Economic Partnership (RCEP) is the latest and largest preferential trade agreement to recognise the increasing significance of services.

This chapter reviews the key features of the trade in services chapter of the RCEP Agreement and examines the implications for services liberalisation and the challenges moving forward.

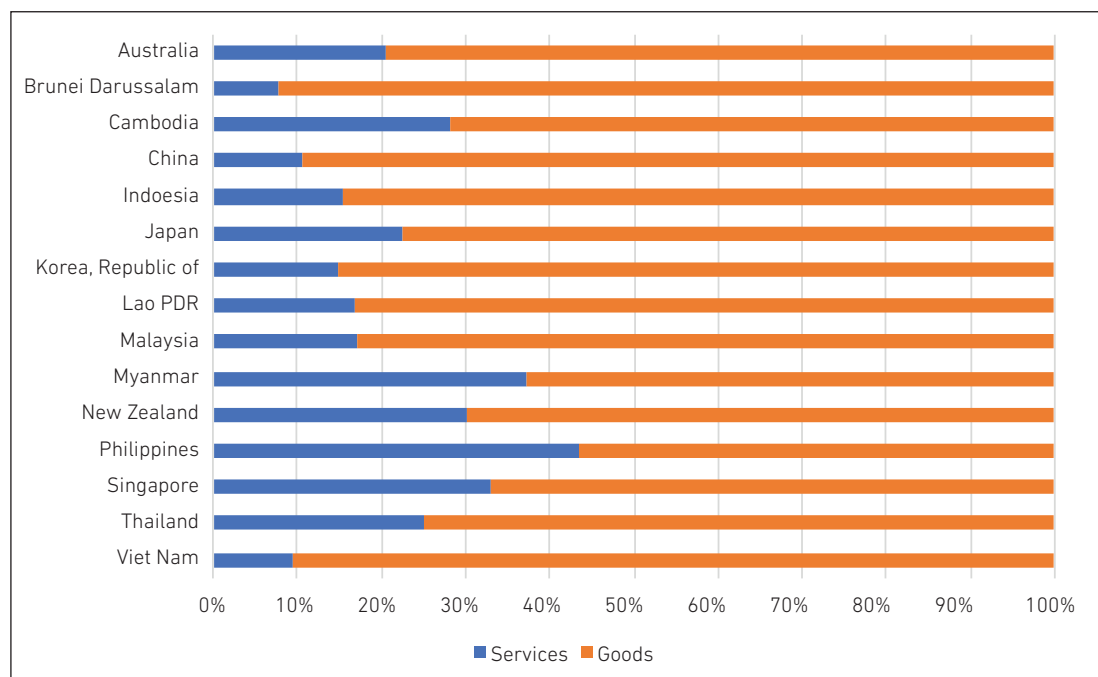
# Overview of services trade in the RCEP region

Services play a central role in the world economy as they represent 68.5% of the world's gross domestic product (GDP).<sup>1</sup> From just under a tenth of global trade in 1970, services today account for over a fifth, and this share is likely to grow to a third of world trade by 2040 (WTO, 2019). The projected 50% increase in the share of services signifies their increasing role in transforming the world economy and, as the WTO states, the potential of services globalisation 'to scale up growth, deepen integration, and level the playing field in ways that go beyond the changes wrought by the globalization of manufacturing in recent decades' (WTO, p.17).

## Cross-border trade

The share of services in the cross-border trade of RCEP countries varies from 7.67% in Brunei Darussalam to 43.54% in the Philippines (Figure 4.1).

**Figure 4.1 Composition of Exports (BOP6), 2019**



Source: World Trade Organization, <https://data.wto.org/> (accessed 20 July 2021).

<sup>1</sup> See World Bank, Services, Etc., Value Added (% of GDP), available online at <https://data.worldbank.org/indicator/BG.GSR.NFSV.GD.ZS> (accessed 1 December 2021).

RCEP members account for 18% of global services exports. On average, services exports of RCEP had been growing faster than the rest of the world prior to the 2020 downturn due to the pandemic (Table 4.1).

**Table 4.1 Share and Growth Rate of Services Exports**

		2015	2016	2017	2018	2019	2020
World	Value (US\$ million)	4,927,868	5,015,246	5,457,881	6,012,230	6,150,175	4,913,807
	Growth rate (%)		1.77	8.83	10.16	2.29	-20.10
Rest of the World	Value (US\$ million)	4,070,525	4,135,224	4,511,386	4,940,823	5,028,097	4,022,156
	Growth rate (%)		1.59	9.10	9.52	1.77	-20.01
RCEP	Value (US\$ million)	857,343	880,022	946,495	1,071,407	1,122,078	891,651
	Share (%)	17.40	17.55	17.34	17.82	18.24	18.15
	Growth rate (%)		2.65	7.55	13.20	4.73	-20.54

Source: World Trade Organization, <https://data.wto.org/> (accessed 20 July 2021).

In terms of cross-border trade, the RCEP region has a mix of net importers and net exporters of services. Countries that relied heavily on tourism, such as Cambodia and Thailand, saw a reversal in their net position from a surplus to a deficit in 2020 due to the global travel restrictions (see Table 4.2).

**Table 4.2 Trade Balance in Commercial Services (US\$ million)**

RCEP Member	2015	2016	2017	2018	2019	2020
Australia	-8,728	-4,232	-3,042	-3,662	-577	10,652
Brunei Darussalam	-996	-1,107	-687	-995	-1,178	-844
Cambodia	1,575	1,448	1,676	2,215	2,616	-230
China	-215,405	-240,903	-237,744	-250,986	-215,316	-99,444
Indonesia	-9,166	-7,714	-7,927	-7,153	-8,292	-10,195
Japan	-18,325	-13,494	-8,992	-11,973	-1,493	-26,360
Korea, Republic of	-14,342	-16,868	-36,033	-29,343	-27,118	-15,442
Lao PDR	-232	-188	-337	-257	-63	-98

RCEP Member	2015	2016	2017	2018	2019	2020
Malaysia	-5,081	-4,383	-5,000	-4,182	-2,461	-11,280
Myanmar	1,301	1,201	866	1,048	2,875	911
New Zealand	2,904	3,310	3,313	2,707	1,733	480
Philippines	5,692	7,382	8,968	12,107	13,559	13,645
Singapore	-8,582	-6,623	-10,336	6,550	8,914	14,781
Thailand	15,510	20,302	24,282	22,491	24,221	-15,142
Viet Nam	-4,707	4,337	3,954	6,675	8,869	1,763

Source: World Trade Organization, <https://data.wto.org/> (accessed 20 July 2021).

### Services trade by mode of supply

It is not easy to calculate the value of services trade as the balance of payments figures only reflect cross-border trade. Experimental data developed by the WTO attempt to estimate services trade by mode of supply (see Wettstein et al. (2019)).

For Australia, China, Japan, the Republic of Korea (henceforth, Korea), New Zealand, and Singapore, the supply of services through commercial presence (Mode 3) is the dominant mode of supply to the rest of the world. For countries with strong tourism sectors, such as Cambodia, the Lao PDR, Myanmar, and Thailand, Mode 2, or consumption abroad, has the biggest share. Mode 1, or cross-border supply, is the leading mode of supply for Brunei, Indonesia, the Philippines, and Viet Nam. For Malaysia, Modes 1 and 2 are almost equally important. The supply of services through the presence of natural persons is most significant for the Philippines, where the share is 9%. Overall, the distribution of exports or the outward foreign affiliates statistics (FATS) of RCEP members closely mirror the world pattern which is dominated by Mode 3 whilst Mode 4 represents the smallest share. See Table 4.3.

**Table 4.3 Composition of Exports or Outward FATS, 2017**

RCEP Member	Total (US\$ million)	M1 (%)	M2 (%)	M3 (%)	M4 (%)	Total (%)
Australia	239,114	11.36	9.95	77.58	1.10	100.00
Brunei Darussalam	1,134	43.58	21.95	34.37	0.10	100.00
China	856,714	22.27	7.61	66.52	3.60	100.00
Indonesia	38,500	40.38	33.40	23.57	2.66	100.00
Japan	690,419	21.39	4.33	72.22	2.05	100.00
Cambodia	3,954	25.11	73.32	1.06	0.51	100.00

RCEP Member	Total (US\$ million)	M1 (%)	M2 (%)	M3 (%)	M4 (%)	Total (%)
Korea, Republic of	252,858	25.96	5.57	64.82	3.65	100.00
Lao PDR	906	25.06	71.19	3.75	0.00	100.00
Myanmar	3,608	34.15	55.49	5.88	4.49	100.00
Malaysia	50,253	35.71	36.39	23.72	4.18	100.00
New Zealand	29,872	19.28	23.88	55.10	1.75	100.00
Philippines	40,825	54.46	26.62	10.13	8.78	100.00
Singapore	342,855	40.47	7.97	47.74	3.82	100.00
Thailand	78,990	29.76	56.34	11.23	2.66	100.00
Viet Nam	20,021	57.05	36.35	5.46	1.14	100.00
Total RCEP	2,650,023	25.26	10.08	61.66	3.01	100.00
Total World	13,420,090	27.75	10.53	58.61	3.10	100.00

Source: World Trade Organization, Trade in Services Data by Mode of Supply (accessed 20 July 2021).

As Table 4.4 shows, based on the WTO estimates, RCEP accounts for a fifth of total world services trade through the four modes of supply. The same pattern emerges more or less for each mode.

**Table 4.4 Share of RCEP Exports or Outward FATS, 2017**

	Total	Mode 1	Mode 2	Mode 3	Mode 4
World (US\$ million)	13,420,090	3,724,525	1,413,580	7,865,379	416,606
RCEP					
Value (US\$ million)	2,650,023	669,391	267,016	1,633,900	79,716
Share (%)	19.75	17.97	18.89	20.77	19.13

Source: World Trade Organization, Trade in Services Data by Mode of Supply (accessed 20 July 2021).

Mode 3 accounts for the biggest share of foreign services supplied in most countries in RCEP. In Cambodia and Thailand, Mode 1 leads. The same is true for Malaysia and Singapore, although Mode 3 comes a close second. Overall, the distribution of the imports or inward FATS of RCEP members closely mirrors the world pattern, which is dominated by Mode 3, whilst Mode 4 represents the smallest share. However, unlike the pattern for exports, the shares of Mode 2 imports and Mode 3 inward FATS are somewhat different for RCEP compared to the world shares (see Table 4.5).

**Table 4.5 Composition of Imports or Inward FATS, 2017**

RCEP Member	Total (US\$ million)	M1 (%)	M2 (%)	M3 (%)	M4 (%)	Total (%)
Australia	167,471	21.63	12.20	64.48	1.69	100.00
Brunei Darussalam	2,674	23.46	16.62	56.79	3.13	100.00
China	1,100,755	21.88	16.41	59.92	1.79	100.00
Indonesia	64,772	34.59	20.67	42.56	2.18	100.00
Japan	408,991	36.82	8.47	50.20	4.52	100.00
Cambodia	4,309	53.88	15.48	28.21	2.43	100.00
Korea, Republic of	267,360	26.37	15.85	54.59	3.19	100.00
Lao PDR	1,832	17.55	36.45	44.87	1.13	100.00
Myanmar	6,823	43.70	2.67	50.35	3.27	100.00
Malaysia	71,256	41.23	13.58	39.34	5.86	100.00
New Zealand	31,848	25.12	12.09	60.81	1.98	100.00
Philippines	46,407	33.68	26.66	37.07	2.59	100.00
Singapore	317,022	41.93	13.30	39.99	4.78	100.00
Thailand	80,893	45.41	16.53	35.70	2.35	100.00
Viet Nam	41,381	41.97	13.95	43.12	0.96	100.00
Total RCEP	2,613,796	29.34	14.56	53.23	2.87	100.00
Total World	13,092,336	27.74	10.24	59.25	2.77	100.00

Source: World Trade Organization, Trade in Services Data by Mode of Supply (accessed 20 July 2021).

Based on the WTO estimates, RCEP accounts for a fifth of total world services imports through the four modes of supply. However, its share is higher in terms of Mode 2, or consumption abroad, accounting for 28% of global imports (Table 4.6).

**Table 4.6 Share of RCEP Imports or Inward FATS, 2017**

	Total	Mode 1	Mode 2	Mode 3	Mode 4
World (US\$ million)	13,092,336	3,632,362	1,340,857	7,756,963	362,154
RCEP					
Value (US\$ million)	2,613,796	766,813	380,622	1,391,446	74,915
Share (%)	19.96	21.11	28.39	17.94	20.69

Source: World Trade Organization, Trade in Services Data by Mode of Supply (accessed 20 July 2021).

In terms of the trade balance, when all modes of supply are considered, only Australia, Japan, and Singapore are net services suppliers to the rest of the world. However, some countries are net exporters in specific modes of supply. For Mode 1, or cross-border supply, the Philippines and Singapore are net exporters. For Mode 2, or consumption abroad, several countries with competitive tourism sectors enjoy a surplus, namely: Australia, Cambodia, Myanmar, Malaysia, New Zealand, Thailand, and Viet Nam. In terms of Mode 4, or the movement of natural persons, countries with a positive trade balance include China, Korea, the Philippines, and Thailand. For Mode 3, or the supply of services via commercial presence, outward FATS surpass inward FATS in Australia, Japan, Korea, and Singapore (Table 4.7).

**Table 4.7 Trade Balance by Mode of Supply, 2017**

RCEP Member	M1 (US\$ million)	M2 (US\$ million)	M3 (US\$ million)	M4 (US\$ million)	TOTAL (US\$ million)
Australia	-9,059	3,359	77,535	-192	71,643
Brunei Darussalam	-133	-196	-1,129	-82	-1,540
China	-50,077	-115,431	-89,634	11,100	-244,041
Indonesia	-6,858	-533	-18,495	-387	-26,272
Japan	-2,873	-4,710	293,328	-4,317	281,428
Cambodia	-1,329	2,232	-1,173	-85	-355
Korea, Republic of	-4,837	-28,315	17,954	696	-14,502
Lao PDR	-95	-23	-788	-21	-926
Myanmar	-1,750	1,820	-3,224	-61	-3,215
Malaysia	-11,432	8,613	-16,112	-2,072	-21,003
New Zealand	-2,240	3,283	-2,910	-109	-1,976
Philippines	6,606	-1,504	-13,068	2,384	-5,582
Singapore	5,828	-14,838	36,927	-2,085	25,833
Thailand	-13,226	31,132	-20,008	199	-1,903
Viet Nam	-5,948	1,506	-16,749	-168	-21,360

Source: World Trade Organization, Trade in Services Data by Mode of Supply (accessed 20 July 2021).



## Review of the elements or key features of the RCEP chapter on trade in services<sup>2</sup>

### Structure and scope

A typical structure of a chapter on trade in services refers to how services are covered in an agreement in terms of definition and the inclusion of different modes of supply, the relevance of the investment chapter and its relation to the services chapter, other services provisions, and the existence of specific sectoral rules, either in separate chapters or in annexes/annotations to the main services chapter.

The RCEP Agreement includes a chapter on trade in services (Chapter 8) with three sectoral annexes, namely: financial services, telecommunications services, and professional services. A separate chapter on the temporary movement of natural persons (MNP), Chapter 9, covers measures affecting the temporary entry of natural persons engaged in trade in goods, the supply of services, or the conduct of investment. The MNP Chapter is generally a Mode 4 services agreement similar to the ASEAN–Australia–New Zealand Free Trade Agreement (AANZFTA) (Chapter 9) and the ASEAN Framework Agreement on Services (AFAS) (Mode 4). Amongst its salient features is that it facilitates and establishes rules for the parties on the temporary entry and temporary stay of natural persons. However, it does not apply to those seeking access to the employment market or any measures related to citizenship, residence, or employment on a permanent basis. This wording emulates the GATS Annex on the MNP.

The investment chapter (Chapter 10) does not apply to measures adopted or maintained that are covered in Chapters 8 or 9. It covers the four pillars of investments, protection, liberalisation, promotion, and facilitation, which upgrade and enhance the existing ASEAN Plus One free trade agreements (FTAs). The chapter includes a most-favoured-nation (MFN) treatment clause and commitments on the prohibition of performance requirements that go beyond their multilateral obligations under the WTO Trade-Related Investment Measures (TRIMS) Agreement. It also includes a Schedule of Reservations and Non-Conforming Measures, which provides for the parties' investment commitments using the negative list approach with a standstill and ratchet mechanism.

Similar to the GATS, Chapter 8 of the RCEP Agreement defines 'trade in services' as the supply of a service: (i) from the territory of one party into the territory of any other party; (ii) in the territory of one party to the service consumer of any other party; (iii) by a service supplier of one party through a commercial presence in the territory of any other party;

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<sup>2</sup> The RCEP chapter on trade in services was reviewed following the outline in Gootiiz et al. (2020).

and (iv) by a service supplier of one party through the presence of natural persons of a party in the territory of any other party. Also, the supply of a service encompasses the production, distribution, marketing, sale, and delivery of a service.

The scope of application also follows GATS in that the chapter applies to measures affecting trade in services, which concern: (i) the purchase or use of, or payment for, a service; (ii) the access to and use of, in connection with the supply of a service, services that 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 another party. Moreover, measures include those taken by: (a) central, regional, or local governments and authorities of that party; and (b) non-governmental bodies in the exercise of powers delegated by the central, regional, or local governments or authorities of that party.

### Sectoral and policy exclusions

Sectors excluded from the coverage of Chapter 8 are the following: (1) services supplied in the exercise of governmental authority; (2) air traffic rights; (3) air transport services beyond (i) aircraft repair and maintenance services, (ii) the selling and marketing of air transport services, (iii) computer reservation system services, (iv) speciality air services, (v) ground handling services, and (vi) airport operation services; and (4) cabotage in maritime transport.

Chapter 8 also provides that the disciplines do not apply for government procurement, measures affecting natural persons seeking access to employment, measures regarding nationality, citizenship, residence, or employment on a permanent basis, or subsidies or grants, including government-supported loans, guarantees, and insurance (see Table 4.8).

**Table 4.8 Structure and Scope of the Trade in Services Chapter of RCEP**

Region	Impact
Chapter	Chapter 8 – Trade in Services (covers four modes of supply) Chapter 9 – Temporary Movement of Natural Persons (covers those engaged in trade in goods, the supply of services, or the conduct of investment) Chapter 10 – Investment
Inclusion of provisions clarifying the relationship between the investment chapter and trade in services chapter	Chapter 10: Investment Article 10.2. ‘This Chapter shall not apply to ... (d) measures adopted or maintained by a Party to the extent that they are covered by Chapter 8 (Trade in Services); and (e) measures adopted or maintained by a Party to the extent that they are covered by Chapter 9 (Temporary Movement of Natural Persons).’

Region	Impact
Inclusion of sector-specific provisions in an annex to the Trade in Services Chapter	Annex 8A – Financial Services Annex 8B – Telecommunications Services Annex 8C – Professional Services
Excluded services supplied in the exercise of governmental authority	Yes Art. 8.1(l) Art. 8.2.3(c)
Excluded air traffic rights (cross-border air transport)	Yes Art.8.2.3(e)
Air transport services covered beyond (1) computer reservation systems, (2) marketing and sale services, or (3) maintenance and repair services	Yes Art. 8.2.3(e) (iv) Specialty air services; (v) ground handling services; and (vi) airport operation services
Other sectoral exclusions	Yes Art.8.2.3(d) – Cabotage in maritime transport services
Government procurement excluded	Yes Art. 8.2.3(a)
Job seekers, citizenship, residence or employment on a permanent basis excluded	Yes Art.8.2.4
Subsidies excluded	Yes Art. 8.2.3(b)
Coverage of new issues (i.e. cross-border data flows)	Chapter 12 on E-commerce Art. 12.16 (Dialogue on E-commerce)

Source: RCEP. <https://rcepsec.org/legal-text/> (accessed 21 July 2021).

## Liberalisation approach

The main distinction between the Trade in Services Chapters is based on their approach to liberalisation commitments. For a 'negative-list' approach agreement, obligations such as national treatment will apply to all the services sectors falling under the purview of the chapter unless the party lists relevant non-conforming measures (for example, in the Annex on existing non-conforming measures) and/or identifies sectors or subsectors to which the obligation does not apply.

For the 'positive-list' approach, like the GATS, where the national treatment obligation, for example, applies only to those sectors that are listed or committed to in the members' schedule (positive listing) and subject to any conditions and qualifications set out therein. Whilst positive-list-type agreements only allow for reservations on market access and national treatment, negative-list-type agreements allow for reservations not only for market access and national treatment but also most favoured nations, the obligation to forbid local presence requirements, the obligation to eliminate performance requirements, and the obligation not to request nationality/residency senior management personnel and members of boards of directors.

Considered the most significant feature of the RCEP agreement compared to other FTAs of ASEAN is the scheduling of market access commitments using the negative list approach either at the conclusion of the negotiations or within a specified period after the entry into force of the agreement (ASEAN Secretariat, 2021, p.45).

Members that chose the **positive list approach** prepared schedules using a format similar to GATS, whereby limitations on market access and national treatment are inscribed for each service subsector included. Specifically, a member defines under each mode of supply (1) the 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 the implementation of such commitments. Under RCEP, members should also identify sectors or subsectors for future liberalisation with 'FL', which must be bound to the current regulatory practice. Furthermore, any future amendment of the measure cannot be more restrictive. In addition, members are required to make commitments under the MFN treatment or transparency list. However, least developed countries are exempt from these obligations (i.e. identifying sectors or subsectors for future liberalisation, making commitments under MFN, or the transparency list) but may do so voluntarily. The schedule of specific commitments of the members that adopted this approach is contained in Annex II of the agreement.

The transparency list comprises existing measures maintained at the central government level that are inconsistent with national treatment or the market access provisions of the agreement. It is prepared solely for the purposes of transparency, must be made publicly available on the internet, and is a non-binding list of measures in the sectors where specific commitments have been undertaken by the member.

Countries that initially prepared their commitments using the positive list approach in order to transition to a negative list, namely, Cambodia, China, the Lao PDR, Myanmar, New Zealand, the Philippines, Thailand, and Viet Nam, shall submit a proposed Schedule of Non-Conforming Measures, which should reflect an equivalent or a greater level of liberalisation no later than 3 years, or for the least developed country (LDC) members, no later than 12 years, after the date of entry into force of the agreement. The transition process, which involves the preparation, verification, clarification, and adoption of the Schedule of Non-Conforming Measures, including the completion of applicable domestic processes, shall be completed no later than 6 years, or for LDC members, no later than 15 years, after the date of entry into force of the agreement.

The other RCEP members have already adopted the negative list approach, whereby exemptions with respect to the obligations of national treatment, market access, MFN treatment, and local presence are listed in the schedules of reservations and non-conforming measures contained in Annex III of the agreement. Services that are not listed in the schedules are considered fully open. They may also make additional commitments using this approach.

Measures currently maintained at the central, regional, and local levels of government that are inconsistent with the obligations must be included. Each schedule in turn is further divided into two main lists. In List A, members may continue to maintain the limitations identified, which reflect the current regulatory regime. Moreover, any future changes in the measures listed cannot be more restrictive. Thus, List A comes with standstill and ratchet obligations wherein a member (a) binds the existing level of restrictiveness based on the current regulation and (b) commits not to backtrack such that any amendment can only be towards further liberalisation. In List B, a member maintains full reservation in the sectors, subsectors, or activities included. This means that a member can keep existing measures that do not conform to the four liberalisation obligations and may even introduce new limitations. A member also reserves the right to impose future measures that may be more restrictive than the current regulations (see Reyes (2019)). A third list, List C, could be prepared if a member wishes to make additional commitments (for example, regarding qualifications, standards, or licensing matters). Regardless of the approach taken, RCEP allows for the modification of schedules that involve compensatory adjustment accorded on a non-discriminatory basis in the case of backtracking.

Two obligations that are embedded in a negative list approach are the standstill and ratchet provisions. Standstill clauses are intended to lock in the applied regime at the time an agreement enters into force and, thus, prevent a 'binding overhang'. Ratcheting, which is generally included in the negative list approach chapter or agreement, serves to automatically bind liberalisation undertaken autonomously after the entry into force of a commitment. As pointed out by Adlung and Mamdouh (2013, p.8), these features are not unique to a scheduling technique and can be introduced whether in a bottom-up (positive list) or top-down (negative list) approach. To some extent, RCEP obligations for the positive list approach approximate the perceived advantages of the negative list approach (see Table 4.9).

**Table 4.9 Preserving Negotiating Objectives in the Scheduling Approach**

Objective	Schedules of Specific Commitments (Positive List Approach)	Schedule of Non-conforming Measures (Negative List Approach)
Maintain policy space (called 'water' or binding overhang)	(1) Non-scheduling of subsectors (2) Partial commitment only for scheduled subsectors and binding below actual policy	List B – Full reservations maintained
Transparency of policy space	Transparency list covering sectors where specific commitments were undertaken	List B – Full reservations maintained
Reduce uncertainty (less water, no rollback; future measures not more restrictive)	Future liberalisation ('FL') commitments bound at current regulatory practice Transparency list	List A – Existing non-conforming measures with standstill and ratchet obligations

Source: Authors' compilation.

It should be noted that the ASEAN Trade in Services Agreement (ATISA) signed in 2020 adopts the negative list approach as well. ATISA sets out to create a more stable and predictable environment and the stage for future services integration and liberalisation by establishing commitments that can serve to reduce discriminatory regulatory barriers, for a more transparent regime.<sup>3</sup> It provides specific timelines for all ASEAN Member States to transition their final AFAS commitments, which have been scheduled using a GATS-type positive list scheduling of specific commitments, into a negative-list scheduling of reservations. In ATISA, the member states must submit their schedules of non-conforming measures within 5 years after entry into force of the agreement, although Viet Nam can submit within 7 years whilst Cambodia, the Lao PDR, and Myanmar are given 13 years. ATISA will supersede the AFAS, including all of its implementing protocols as signed by the ASEAN Economic Ministers, ASEAN Transport Ministers, and ASEAN Finance Ministers (ASEAN Secretariat, 2021).

The negative list approach is seen to provide greater transparency on the details of the current services regime by listing down all measures that do not conform with, or are not in compliance with, the obligations under the ATISA, which include market access, national treatment, MFN treatment, local presence, and senior management and boards of directors. Therefore, the ATISA increases transparency and predictability, thus providing service suppliers with higher levels of confidence in the economy of the region (ASEAN Secretariat, 2021, p.30).

As to which approach is more liberalising, it has been argued that substance matters more than form (Adlung and Mamdouh, 2013; Tham, 2019). A negative list approach does not automatically lead to greater liberalisation as reservations can be used to exclude a broad range of measures from meaningful liberalisation (i.e. significant reservations). In theory, both the 'positive' and 'negative' approaches can be used to attain the same level of liberalisation, and what matters are the commitments and the limitations in the 'positive' list as well as the reservations in the 'negative' list. As explained by Adlung and Mamdouh (2013, p.13), the desired openness can be achieved using either approach. The real challenge in services negotiations is not the legal architecture, but rather reaching an agreement on a commercially meaningful agenda.

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<sup>3</sup> See The Straits Times (2019).

## Obligations

### [General obligations](#)

#### **Most-favoured-nation treatment**

In RCEP, the services chapter includes a **most-favoured-nation treatment (MFN)** obligation, which requires members to automatically extend to other members additional liberalisation enjoyed by third countries in subsequent agreements. However, members of ASEAN reserve the right to accord differential treatment to each other in line with the economic integration agenda of ASEAN. Similarly, adjacent countries can extend better treatment to each other to facilitate the exchange of services.

#### **Domestic regulation**

Transparency is pivotal to facilitating trade as procedures may be complicated and lengthy for good reasons. Therefore, providing information contributes to more efficient procedures and reduced trade costs by making cross-border business transactions more predictable in terms of time and costs.

In 2016, the Pacific Economic Cooperation Council conducted a survey of regional policies addressing businesses, governments, academics, media, and civil society. It found that the most cumbersome barriers to trade in services were the lack of transparency, multiple layers of bureaucracy, and lack of predictability: 63% of business respondents considered the lack of transparency as a serious to very serious impediment to services trade, compared to 54% of government respondents (Pacific Economic Cooperation Council, 2016).

Many of the 'new generation' agreements have now moved towards addressing regulatory obstacles and cutting procedural red tape. This is intended to promote good governance in services markets and render national regulatory frameworks more transparent, predictable, and conducive to economic activities and, thereby, further boost growth and development (Baiker, Bertola, and Jelitto, 2021). As of 2020, 112 WTO members have concluded at least one regional trade agreement (RTA) with obligations equivalent to the domestic regulation disciplines designed by the Joint Initiative on Services Domestic Regulation. Like the disciplines developed by the initiative, domestic regulation provisions in RTAs do not interfere with substantive requirements that regulators can develop and implement to pursue their national policy objectives (Baiker, Bertola, and Jelitto, 2021). The RCEP members are also committed to regulatory transparency. As in the GATS, transparency is an unconditional general obligation, which applies even to service subsectors that are not included in the respective schedules.

As Table 4.10 shows, the RCEP services chapter contains an obligation to promptly publish all relevant laws and regulations affecting services trade as well as relevant international agreements. To the extent possible, the measures and international agreements should be available on the internet and in the English language or in the chosen language, if not practicable. A contact point must also be designated to facilitate communications amongst the members on any matter covered in the services chapter. Members must also respond promptly to any request for specific information, including any new measures or changes to existing measures that significantly affect services trade.

For sectors and measures included in a member's schedule, regulations affecting services trade must be administered in a reasonable, objective, and impartial manner. Members must also set up judicial, arbitral, or administrative tribunals or procedures for the prompt review and possible remedies for administrative decisions affecting trade in services.

Like the disciplines in the Joint Initiative on Services Domestic Regulation, domestic regulation provisions in RCEP do not interfere with substantive requirements that regulators can develop and implement to pursue their national policy objectives. Regulatory requirements and procedures, particularly on licensing, qualifications, or technical standards, may still act as obstacles to foreign services and service suppliers, even in the absence of market access or national treatment limitations (Gootiiz et al., 2020). Thus, RCEP requires that members exert their best efforts to ensure that for the sectors included in their schedules, such measures are (1) based on objective and transparent criteria, (2) not more burdensome than is necessary to ensure the quality of the service, and (3) in the case of licensing procedures, are not in themselves a trade restriction.

In addition to ensuring that regulations do not constitute unnecessary barriers to trade, there are also disciplines imposed on the regulator, such as an obligation for the competent authority to inform applicants on the decision or the status of an application and to ensure that decisions are made within a reasonable period of time.

**Table 4.10 Domestic Regulation**

Transparency – Obligation to publish relevant laws and regulations	Yes, including all international agreements Art. 8.14.2 ('shall publish promptly')
<b>Transparency – Obligation to provide for prior comment on proposed regulation</b>	Yes Art. 8.14.6 (b) – Provide information on new or changes to existing measures Art. 17.3.2 – Provide interested persons and other RCEP parties with a reasonable opportunity to comment
Obligation to set up an independent authority for appeals procedures	Yes Art. 8.15.2 ('shall maintain or institute as soon as practicable')



Provisions on qualification, licensing, and technical standards	Yes, for sectors and measures subject to market access (MA) or national treatment (NT). Art. 8.15.5; Art. 8.15.6; Art. 8.15.7; Art. 8.15.8;
Measures on qualification, licensing, and technical standards subject to a necessity test	Yes, for sectors and measures subject to MA or NT Art. 8.15.5 ('shall endeavour to ensure')
Obligation for competent authority to inform applicant on status of application	Yes – Art. 8.15.7(d) Mandatory – Art. 8.15.7 ('shall ensure')
Obligation for competent authority to inform applicant of the decision	Yes – Art. 8.15.7(b) and (f) Mandatory – Art. 8.15.7 ('shall ensure')
Obligation for competent authority to make decisions within a certain period of time	Yes – Art. 8.15.7(b) ('within a reasonable period of time') Mandatory – Art. 8.15.7 ('shall ensure')
Obligation to administer laws/regulations in a reasonable, objective, and impartial manner	Yes, for sectors and measures subject to MA or NT and measures of general application affecting services trade. Art. 8.15.1 ('shall ensure')
Mutual recognition provisions	Yes – Art. 8.16 Voluntary obligation – Art. 8.16.1 ('may recognise')

Source: RCEP. <https://rcepsec.org/legal-text/> (accessed 21 July 2021).

## Specific Commitments

### **Market access**

**Market access** is an obligation universally found in preferential trade agreements (Gootiiz et al., 2020). Following the GATS, limitations on market access that are not allowed in RCEP include:

- 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;
- 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 entities or joint ventures through which a service supplier may supply a service; and
- f) limitations on the participation of foreign capital in terms of a maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

## National treatment

**National treatment**, defined as the treatment accorded to foreign services and service suppliers that is no less favourable than the treatment accorded to like domestic services and service suppliers, is another core obligation in RCEP. However, there is no requirement to compensate for any inherent competitive disadvantages that result from the foreign character of the relevant services or service suppliers. In the GATS, the national treatment standard does not require formally identical treatment of domestic and foreign suppliers, as formally different measures can result in the effective equality of treatment; conversely, formally identical measures can in some cases result in the less favourable treatment of foreign suppliers (de facto discrimination) (UNCTAD, 2020b, p.37). This is echoed in RCEP, which considers formally identical or formally different treatment to be less favourable if it modifies the conditions of competition in favour of domestic services or service suppliers.

Another prohibition in RCEP is on **local presence**, which means that a member cannot require the service suppliers of another member to establish a representative office, a branch, or any form of juridical person, or to be resident as a condition to supply a service through Modes 1, 2, or 4.

Table 4.11 provides a summary of the services liberalisation approach and obligations in RCEP.

**Table 4.11 Liberalisation Approach and Obligations**

Scheduling of commitments	Positive list and negative list – Art. 8.3 Transition from positive list to negative list – Art. 8.12
Market access obligation	As defined in the GATS (by reference to six prohibited market access limitations) Art. 8.5.2 (a)–(f)
National treatment obligation	Art. 8.4
Most-favoured-nation treatment	Art. 8.6
Local presence	Art. 8.11
Ratchet provision	Positive list – Art. 8.7.4 Negative list – Art. 8.8.1 (c)
Standstill provision	Positive list – Art. 8.7.3 Negative list – Art. 8.8.1 (a) on List A
Additional commitments	Yes. Art. 8.9
Gradual liberalisation	Yes – Art. 8.7.3 on future liberalisation Except ASEAN LDCs – Art. 8.7.5

Source: RCEP. <https://rcepsec.org/legal-text/> (accessed 21 July 2021).

## Scheduling of services commitments

At the initial stage, RCEP parties may undertake Schedules of Specific Commitments, which is based on the positive list approach or Schedules of Reservations and Non-conforming Measures, based on the negative list as well as additional commitments. However, Chapter 8 provides that the parties are to schedule their services commitments using the negative list approach, either on the date of entry into force of the RCEP Agreement or within a defined time period after the date of entry into force of the RCEP Agreement. Table 4.12 shows the scheduling approach adopted by the parties at the signing of the RCEP Agreement.

**Table 4.12 RCEP Members and the Scheduling Approaches Adopted**

RCEP Parties	Annex II – Schedules of Specific Commitments for Services (Positive List)	Annex III – Schedules of Reservations and Non-conforming Measures for Services (Negative List)	Annex IV – Schedules of Specific Commitments on Temporary Movement of Natural Persons (Positive List)
Brunei Darussalam		X	X
Cambodia	X		X
Indonesia		X	X
Lao PDR	X		X
Malaysia		X	X
Myanmar	X		X
Philippines	X		X
Singapore		X	X
Thailand	X		X
Viet Nam	X		X
Australia		X	X
China	X		X
Japan		X	X
Rep. of Korea		X	X
New Zealand	X		X

Source: RCEP. <https://rcepsec.org/legal-text/> (accessed 21 July 2021).

## Other elements

The chapter also contains provisions on anti-competitive business practices and monopolies. In terms of other policy objectives, similar to GATS, RCEP members can restrict trade in specific cases, regardless of obligations. Examples of such circumstances include the protection of public morals or to maintain public order; the protection of human, animal, or plant life or health; national security; and balance-of-payments difficulties (see Table 4.13).

**Table 4.13 Other Elements**

Discipline on monopolies	Yes Art. 8.17
Business practices	Yes. Upon request, enter into consultations with the view of eliminating practices that may restrain competition and restrict trade. Art. 8.18 ('shall accord full and sympathetic consideration')
Includes general exceptions (GATS Article XIV)	Yes Art 17.12
Includes prudential exception for financial services	Yes Annex 8A, Art. 4
Includes security exceptions	Yes Art. 17.13
Emergency safeguard provision in a specific sector and/or mode	Yes Art. 8.21
Provision allowing the renegotiation of specific commitments or reservations	Yes Art. 8.13
Provision allowing measures to counter balance-of-payments difficulties	Yes Art. 8.19 Art. 17.5
Dispute settlement	Chapter 19 on Dispute Settlement (State-to-State)
Rules of origin for juridical persons	Be constituted in a member country and have substantial business operations in that country or any other RCEP member – Art. 8.1.e (i) In the case of services supply by Mode 3, owned and controlled by a natural person of a member country or a juridical person as described above – Art. 8.e (ii) For Thailand and Viet Nam, juridical persons are described in Art. 8.1.f
Rules of origin for natural persons	Be a national of a party – Art. 8.1.i (i) Be a permanent resident in the territory of a party – Art. 8.1.i (ii)
Other regional objectives promoted	Increasing participation of LDCs – Art. 8.23 Cooperation – Art. 8.25

Source: RCEP. <https://rcepsec.org/legal-text/> (accessed 21 July 2021).

# Maximising the benefits of RCEP: Key challenges and the way forward

The RCEP economies account for a fifth of global services trade. They are home to globally competitive suppliers of distributive services (transportation, communications, and wholesale and retail trade), producer services (financial, insurance, engineering, law, and business services), social services (health and education), and personal services (hotel and accommodation, entertainment).<sup>4</sup> At the same time, the quality, price, and availability of different types of services vary across countries. Thus, there is significant room to improve the services sectors and the competitiveness of economies more widely by increasing services trade amongst RCEP members through the four modes of supply. The priorities of individual members will differ given their respective economic development requirements.

The Trade in Services Chapter of the RCEP Agreement establishes the rules for the progressive liberalisation of trade in the region. It ensures market access and non-discriminatory treatment in sectors identified by the respective members and sets out regulatory disciplines to mitigate barriers to competition. The chapter, together with the chapter on the Temporary Movement of Natural Persons, is considered substantially better than any of ASEAN's previous FTAs. The terms of market access commitments obtained will help advance economic engagement between ASEAN and its FTA partners (ASEAN Secretariat, 2021). The improved commitments for services, it should be noted, are relevant for non-services companies as well. Goods exporters that are seeking to undertake services-related activities to support their regional operations (for example, by providing after-sales services), would also benefit (New Zealand Foreign Affairs and Trade, 2021).

Although the RCEP Agreement has been signed and is now in force, the work of services negotiations continues. According to Marconini and Sauv  (2010, p.21) the full cycle of trade in services negotiations involves (1) mapping a strategy for services negotiations in development plans, (2) preparing for service negotiations, (3) conducting service negotiations, (4) implementing negotiated outcomes, and (5) supplying newly opened markets with competitive services. Effective implementation of the services agreement requires, amongst other things, strengthening regulatory frameworks to ensure compliance, whilst supplying to new markets entails improving the capacities of the private sector and removing policy and other barriers. For some RCEP members, the transition to a negative list is the next step for full implementation.

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<sup>4</sup> Following the industry classification suggested by Browning and Singelmann (1975).

## Transition to the negative list approach

An immediate challenge for members that initially adopted the positive list is the transition to the negative list scheduling approach. Since LDC members in particular were not required to prepare a transparency list (and did not do so at the conclusion of negotiations), the conduct of a regulatory audit would be a good starting point. Laws and regulations at the national and subnational level should be covered along with the agreements entered into by the LDCs. Tham (2019) cautions that for countries with no prior experience, such an exercise could be quite onerous. Citing the case of Malaysia's preparation for the Trans-Pacific Partnership Agreement, the laws and regulations for about 80% of its services subsectors that were not included in previous agreements had to be identified and reviewed.

Whilst the task of conducting a trade-related regulatory audit is quite formidable, it is not insurmountable if adequate technical resources are made available. A proper regulatory audit, however, must go beyond a mechanical exercise of identifying non-conforming measures but also examine the underlying rationale for the regulations. Doing so would facilitate the next step of identifying the list of reservations on restrictions and sensitive sectors or policy space to maintain, change, or adopt new measures in certain sectors or areas.

As earlier discussed, the negative list could still result in limited liberalisation via a long list of reservations. At the same time, a lack of understanding or coordination in government, amongst other things, could result in countries unintentionally opening up sectors or giving up policy space. As Adlung and Mamdouh (2013) argue, it is possible that without thorough evaluation and coordination, the resulting commitments in a top-down approach might be more ambitious than what is intended using the more deliberate bottom-up approach. Given the wide range of agencies involved at different levels of government, officials may be unaware or may not understand how the commitments in a trade agreement might affect their sectors. Regardless of the approach, it is important that countries have a clear vision for the services sector in their development agenda, as this would guide them in determining their liberalisation objectives and sensitivities. Learning how to address their concerns whilst preserving policy options is especially crucial in the context of trade agreements (Sáez, 2010).

## Plugging regulatory deficits

In relation to the transition to the negative list, developing countries may have difficulties implementing competitive and robust regulations in liberalising services. In reviewing laws and regulations or related measures, the relevant issues likely include the policy objective behind the measure, the effectiveness and efficiency of the regulation, and implementation of these regulations (Marconini and Sauvé, 2010). Thus, a thorough review will not only identify measures that do not conform with the treaty obligations of market access, national treatment, MFN treatment, and local presence but go deeper into the domestic regulation disciplines.

Equally important, and in some cases possibly more critical, is the identification of missing regulations and/or regulatory authorities to support well-functioning markets. The Annex on Telecommunications, for example, sets the obligations to ensure that the gains from market access commitments are not negated by the lack of pro-competition regulations or the absence of an independent authority. Sound regulations and institutions are especially important for ensuring good quality infrastructure services. Thus, there is a need for coherence and coordination between domestic policymaking, regulation, and trade liberalisation to derive benefits from any trade in services agreement (UNCTAD, 2020a).

## Strengthening the export capacities of LDCs

Developing countries, especially LDCs, might also potentially face capacity constraints to be able to maximise the advantages of the market access given by the RCEP partners. The Trade in Services Chapter contains specific provisions to assist members, particularly the LDCs (see Box 1). This is where the Chapter on Small and Medium Enterprises (Chapter 14) and Economic and Technical Cooperation (Chapter 15) in the agreement should also be considered in ensuring the LDCs can benefit well from the agreement.

### Box 4.1 Assistance to LDCs in the Trade in Services Chapter of RCEP

Article 8.23: Increasing Participation of Least Developed Country Parties which are Member States of ASEAN

To increase the participation of Least Developed Country Parties which are Member States of ASEAN, this Chapter shall facilitate:

- (a) strengthening their domestic services capacity and their efficiency and competitiveness, inter alia, through access to technology on a commercial basis;
- (b) improving their access to distribution channels and information networks; and the liberalisation of market access in sectors and modes of supply of export interest to them, and
- (c) the provision of market access in sectors beneficial to them

Art. 8.25 Cooperation

The Parties shall strengthen cooperation efforts in sectors, including sectors which are not covered by current cooperation arrangements. The Parties shall discuss and agree on the sectors for cooperation and develop cooperation programmes in these sectors in order to improve their domestic services capacity and their efficiency and competitiveness.

Source: RCEP. <https://rcepsec.org/legal-text/> (accessed 21 July 2021).

To better target support for building capacities, it would be useful to determine the export potential and interests of each country. For example, the Trade Integration Strategy of Cambodia (Ministry of Commerce, 2019) has identified the following subsectors as part of the country's strategy for export diversification: legal services, information technology and information technology-enabled services, animation services, banking services, entertainment services, and tourism services. Technical assistance could be focused on alleviating the supply constraints in these subsectors and addressing regulatory bottlenecks, including market access restrictions (UNCTAD, 2018).



## Conclusion

The RCEP Agreement presented an opportunity to the members to consolidate the many proliferating and overlapping FTAs. During the RCEP services negotiations, there were some challenges due to the varying degrees of interest and levels of ambition of each of the members. There have been some vigorous rounds of negotiations on the relative extent to which they seek to undertake commitments on liberalisation in trade in services. Initially, there were to be two baselines in negotiating the chapter i.e. to consider the commitments undertaken by the members under the GATS and also ASEAN+1 FTAs. However, it was deemed a relatively low level of ambition since many of the members have internally liberalised their services sectors to a larger extent than what has been committed to under the GATS. Liberalisation within ASEAN has been fairly conservative, but that of the non-ASEAN members has been rather ambitious, hence culminating in an interesting and diversified chapter that finally entered into force this year.

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