

## CHAPTER 8

### LIBERALISATION OF INVESTMENT, TRADE IN SERVICES AND ELECTRONIC COMMERCE

#### SECTION A

#### GENERAL PROVISIONS

#### ARTICLE 8.1

##### Objectives and Scope

1. The Parties, affirming their respective commitments under the WTO Agreement and their commitment to create a better climate for the development of trade and investment between the Parties, hereby lay down the necessary arrangements for the progressive liberalisation of investment and trade in services and for cooperation on electronic commerce.
2. Consistent with the provisions of this Chapter, each Party retains the right to adopt, maintain and enforce measures necessary to pursue legitimate policy objectives such as the protection of the environment and public health, social policy, the integrity and stability of the financial system, the promotion of security and safety, and the promotion and protection of cultural diversity.

3. This Chapter does not apply to measures affecting natural persons seeking access to the employment market of a Party, nor does it apply to measures regarding citizenship, residence or employment on a permanent basis.
4. Nothing in this Chapter shall prevent a Party from applying measures to regulate the entry of natural persons 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<sup>1</sup> accruing to any Party under the terms of a specific commitment in this Chapter and its Annexes.
5. Nothing in this Chapter shall be construed as limiting the obligations of the Parties under Chapter 9 (Government Procurement) or to impose any additional obligation relating to government procurement.
6. This Chapter does not apply to subsidies granted by the Parties<sup>2</sup>, except for Article 8.8 (Performance Requirements).

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<sup>1</sup> The sole fact of requiring a visa for natural persons of certain countries and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitment.

<sup>2</sup> In the case of the Union, "subsidy" includes "state aid" as defined in the Union's law. For Viet Nam, "subsidy" includes investment incentives, and investment assistance such as production site assistance, human resources training and competitiveness strengthening activities, such as assistance for technology, research and development, legal aids, market information and promotion.

7. A Party's decision not to issue, renew or maintain a subsidy or grant, shall not constitute a breach of Article 8.8 (Performance Requirements), in the following circumstances:

- (a) in the absence of any of the Party's specific commitments to the investor under law or contract to issue, renew, or maintain that subsidy or grant; or
- (b) in accordance with any terms or conditions attached to the issuance, renewal or maintenance of the subsidy or grant.

8. This Chapter does not apply to the Parties' respective social security systems or to activities in the territory of each Party, which are connected, even occasionally, with the exercise of official authority.

## ARTICLE 8.2

### Definitions

1. For the purposes of this Chapter:

- (a) "aircraft repair and maintenance services during which an aircraft is withdrawn from service" means such activities when undertaken on an aircraft or a part thereof while it is withdrawn from service and do not include so-called line maintenance;

- (b) "computer reservation system (CRS) 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;
- (c) "cross-border supply of services" means the supply of a service:
  - (i) from the territory of a Party into the territory of the other Party; or
  - (ii) in the territory of a Party to the service consumer of the other Party;
- (d) "economic activities" include activities of an industrial, commercial and professional character and activities of craftsmen, but do not include activities performed in the exercise of governmental authority;
- (e) "enterprise" means a juridical person, branch<sup>3</sup> or representative office set up through establishment;
- (f) "establishment" means the setting up, including the acquisition, of a juridical person or creation of a branch or a representative office in the Union or in Viet Nam, respectively<sup>4</sup>, with a view to establishing or maintaining lasting economic links;

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<sup>3</sup> For greater certainty, a branch of a legal entity of a third country shall not be considered as an enterprise of a Party.

<sup>4</sup> For greater certainty, this does not include the operation of an enterprise as defined in subparagraph (m).

- (g) "ground handling services" means the supply at an airport of the following services: airline representation, administration and supervision; passenger handling; baggage handling; ramp services; catering; air cargo and mail handling; fuelling of an aircraft, aircraft servicing and cleaning; surface transport; flight operation, crew administration and flight planning. Ground handling services do not include security, aircraft repair and maintenance, or management or operation of essential centralised airport infrastructure such as de-icing facilities, fuel distribution systems, baggage handling systems, and fixed intra-airport transport systems;
- (h) "investor" means a natural person or a juridical person of a Party that seeks to establish<sup>5</sup>, is establishing or has established an enterprise in the territory of the other Party;
- (i) "juridical person" means any legal entity duly constituted or otherwise organised under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association;

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<sup>5</sup> For greater certainty, an investor that "seeks to establish" an enterprise refers to an investor of a Party that has taken active steps to establish an enterprise in the territory of the other Party, such as channelling resources or capital in order to set up a business, or applying for a permit or license.

- (j) "juridical person of a Party" means a juridical person of the Union or a juridical person of Viet Nam, set up in accordance with the domestic laws and regulations of the Union or its Member States, or of Viet Nam, respectively, and engaged in substantive business operations<sup>6</sup> in the territory of the Union or of Viet Nam, respectively;
- (k) "measures adopted or maintained by a Party" means measures taken by:
  - (i) central, regional or local governments and authorities; and
  - (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;
- (l) "natural person" means a natural person of a Party as defined in subparagraph (h) of Article 1.5;

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<sup>6</sup> In line with its notification of the Treaty establishing the European Community to the WTO (WT/REG39/1), the Union understands that the concept of "effective and continuous link" with the economy of a Member State of the Union enshrined in Article 54 of the Treaty on the Functioning of the European Union is equivalent to the concept of "substantive business operations". Accordingly, for a juridical person set up in accordance with the laws and regulations of Viet Nam and having only its registered office or central administration in the territory of Viet Nam, the Union shall only extend the benefits of this Agreement if that juridical person possesses an effective and continuous economic link with the territory of Viet Nam.

- (m) "operation" means, with respect to an enterprise, the conduct, management, maintenance, use, enjoyment, sale or other forms of disposal of the enterprise;<sup>7</sup>
- (n) "selling and marketing of air transport services" means opportunities for the air carrier concerned to freely sell and market its air transport services, including all aspects of marketing such as market research, advertising and distribution; those activities do not include the pricing of air transport services nor the applicable conditions;
- (o) "services" include any service in any sector except services supplied in the exercise of governmental authority;
- (p) "services supplied and activities performed in the exercise of governmental authority" means services supplied or activities performed neither on a commercial basis nor in competition with one or more economic operators;
- (q) "service supplier" of a Party means any natural or juridical person of a Party that supplies a service; and

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<sup>7</sup> For greater certainty, this does not include steps taking place at the time of or before the procedures required for setting up the related enterprise are completed in accordance with the applicable laws and regulations.

(r) "subsidiary" of a juridical person of a Party means a juridical person which is controlled by another juridical person of that Party in accordance with its domestic laws and regulations.<sup>8</sup>

2. A juridical person is:

(a) "owned" by natural or juridical persons of one of the Parties if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Party; or

(b) "controlled" by natural or juridical persons of one of the Parties if such persons have the power to name a majority of its directors or otherwise to legally direct its actions.

3. Notwithstanding the definition of a "juridical person of a Party" in subparagraph 1(j), shipping companies established outside the Union or Viet Nam and controlled by nationals of a Member State of the Union or of Vietnam, respectively, shall also be covered by this Chapter if their vessels are registered in accordance with the respective domestic laws and regulations in a Member State or in Viet Nam and fly the flag of that Member State or of Viet Nam, respectively.

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<sup>8</sup> For greater certainty, a subsidiary of a juridical person of a Party may also refer to a juridical person which is a subsidiary of another subsidiary of a juridical person of that Party.

## SECTION B

### LIBERALISATION OF INVESTMENT

#### ARTICLE 8.3

##### Scope

1. This Section applies to measures adopted or maintained by a Party affecting the establishment or the operation of an enterprise by an investor of the other Party in the territory of the Party that adopts or maintains those measures.
  
2. This Section does not apply to:
  - (a) audio-visual services;
  
  - (b) mining, manufacturing and processing<sup>9</sup> of nuclear materials;
  
  - (c) production of or trade in arms, munitions and war material;

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<sup>9</sup> For greater certainty, processing of nuclear materials includes all the activities contained in the *International Standard Industrial Classification of all Economic Activities* as set out in Statistical Office of the United Nations, Statistical Papers, Series M, N 4, ISIC REV 3.1, 2002 code 2330.

- (d) national maritime cabotage;<sup>10</sup>
- (e) domestic and international air transport services, whether scheduled or non-scheduled, and services directly related to the exercise of traffic rights, other than:
  - (i) aircraft repair and maintenance services during which an aircraft is withdrawn from service;
  - (ii) the selling and marketing of air transport services;
  - (iii) computer reservation system (CRS) services; and
  - (iv) ground handling services;and
- (f) services supplied and activities performed in the exercise of governmental authority.

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<sup>10</sup> Without prejudice to the scope of activities which constitute cabotage under domestic laws and regulations, national maritime cabotage under this Section covers transportation of passengers or goods between a port or point located in a Member State of the Union or in Viet Nam and another port or point located in that same Member State of the Union or Viet Nam, including on its continental shelf, as provided for in UNCLOS, and traffic originating and terminating in the same port or point located in a Member State of the Union or Viet Nam.

## ARTICLE 8.4

### Market Access

1. With respect to market access through establishment and maintenance of an enterprise, each Party shall accord treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule of Specific Commitments in Annexes 8-A (The Union's Schedule of Specific Commitments) or 8-B (Viet Nam's Schedule of Specific Commitments), respectively.

2. In sectors where market access commitments are undertaken, the measures which a Party shall not adopt or maintain either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule of Specific Commitments in Annexes 8-A (The Union's Schedule of Specific Commitments) or 8-B (Viet Nam's Schedule of Specific Commitments), respectively, are defined as:

- (a) limitations on the number of enterprises that may perform a specific economic activity, whether in the form of numerical quotas, monopolies, exclusive rights or the requirements of an economic needs test;
- (b) limitations on the total value of transactions or assets in the form of numerical quotas or the requirement of an economic needs test;

- (c) limitations on the total number of operations or on the total quantity of 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 participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment;
- (e) measures which restrict or require specific types of legal entity or joint ventures through which an investor of the other Party may perform an economic activity; and
- (f) limitations on the total number of natural persons that may be employed in a particular sector or that an investor may employ and who are necessary for, and directly related to, the performance of the economic activity in the form of numerical quotas or the requirement of an economic needs test.

## ARTICLE 8.5

### National Treatment

1. In the sectors inscribed in its Schedule of Specific Commitments in Annexes 8-A (The Union's Schedule of Specific Commitments) or 8-B (Viet Nam's Schedule of Specific Commitments) and subject to any conditions and qualifications set out therein, each Party shall accord to investors of the other Party and to their enterprises, with respect to establishment in its territory, treatment no less favourable than that accorded, in like situations, to its own investors and to their enterprises.
  
2. A Party shall accord to investors of the other Party and to their enterprises<sup>11</sup>, with respect to the operation of those enterprises, treatment no less favourable than that accorded, in like situations, to its own investors and to their enterprises.

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<sup>11</sup> For the purposes of this paragraph and Article 8.6 (Most-Favoured-Nation Treatment), "their enterprises" means enterprises of investors of a Party in existence in the territory of the other Party on the date of entry into force of this Agreement, or set up or acquired thereafter, that have been established in accordance with that other Party's applicable laws and regulations.

3. Notwithstanding paragraph 2 and, in the case of Viet Nam subject to Annex 8-C (Exemption for Viet Nam on National Treatment), a Party may adopt or maintain any measure with respect to the operation of an enterprise provided that such measure is not inconsistent with the commitments set out in Annexes 8-A (The Union's Schedule of Specific Commitments) and 8-B (Viet Nam's Schedule of Specific Commitments), respectively, where such measure is:

- (a) a measure that is adopted on or before the date of entry into force of this Agreement;
- (b) a measure referred to in subparagraph (a) that is being continued, replaced or amended after the date of entry into force of this Agreement, provided the measure is no less consistent with paragraph 2 after it is continued, replaced or amended than the measure as it existed prior to its continuation, replacement or amendment; or
- (c) a measure not falling within subparagraphs (a) or (b), provided it is not applied in respect of, or in a way that causes loss or damage to, enterprises established in the territory of the Party before the date of entry into force of such measure.<sup>12</sup>

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<sup>12</sup> For the purposes of this subparagraph, the Parties understand that if a Party has provided for a reasonable phase-in period for the implementation of a measure or if that Party has made any other attempt to address the effects of the measure on enterprises established before the date of entry into force of the measure, those factors shall be taken into account in determining whether the measure causes loss or damage to enterprises made before the date of entry into force of the measure.

## ARTICLE 8.6

### Most-Favoured-Nation Treatment

1. Each Party shall accord to investors of the other Party and to their enterprises as regards their operation in its territory, treatment no less favourable than the treatment it accords, in like situations, to investors of a third country and their enterprises.
2. Paragraph 1 does not apply to the following sectors:
  - (a) communication services, except for postal services and telecommunication services;
  - (b) recreational, cultural and sporting services;
  - (c) fishery and aquaculture;
  - (d) forestry and hunting; and
  - (e) mining, including oil and gas.
3. Paragraph 1 shall not be construed as obliging a Party to extend to the investors of the other Party or their enterprises the benefit of any treatment granted pursuant to any bilateral, regional or multilateral agreement that entered into force before the date of entry into force of this Agreement.

4. Paragraph 1 shall not be construed as obliging a Party to extend to the investors of the other Party or their enterprises the benefit of:

- (a) any treatment granted pursuant to any bilateral, regional or multilateral agreement which includes commitments to abolish substantially all barriers to the operation of enterprises among the parties or requires the approximation of legislation of the parties in one or more economic sectors;<sup>13</sup>
- (b) any treatment resulting from any international agreement for the avoidance of double taxation or other international agreement or arrangement relating wholly or mainly to taxation; or
- (c) any treatment resulting from measures providing for the recognition of qualifications, licences or prudential measures in accordance with Article VII of GATS or its Annex on Financial Services.

5. For greater certainty, the "treatment" referred to in paragraph 1 does not include dispute resolution procedures or mechanisms, such as resolution of investment disputes between investors and states, provided for in any other bilateral, regional or multilateral agreements. Substantive obligations in such agreements do not in themselves constitute "treatment" and thus cannot be taken into account when assessing a breach of this Article. Measures by a Party pursuant to those substantive obligations shall be considered "treatment".

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<sup>13</sup> For greater certainty, the ASEAN Economic Community falls within the concept of a regional agreement under this subparagraph.

6. This Article shall be interpreted in accordance with the principle of *ejusdem generis*.<sup>14</sup>

## ARTICLE 8.7

### Schedule of Specific Commitments

The sectors liberalised by each Party pursuant to this Sub-Section and the terms, limitations, conditions and qualifications referred to in Articles 8.4 (Market Access), 8.5 (National Treatment) and 8.8 (Performance Requirements) are set out in Annexes 8-A (The Union's Schedule of Specific Commitments) or 8-B (Viet Nam's Schedule of Specific Commitments), respectively.

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<sup>14</sup> For greater certainty, this paragraph shall not be construed as preventing the interpretation of other provisions of this Agreement, where appropriate, in accordance with the principle of *ejusdem generis*.

## ARTICLE 8.8

### Performance Requirements

1. In the sectors inscribed in its respective Schedule of Specific Commitments in Annexes 8-A (The Union's Schedule of Specific Commitments) and 8-B (Viet Nam's Schedule of Specific Commitments) and subject to any conditions and qualifications set out therein, a Party shall not impose or enforce any of the following requirements which are mandatory or enforceable under domestic law or under administrative rulings, in connection with the establishment or operation of any enterprises of investors of a Party or of a third country in its territory to:

- (a) export a given level or percentage of goods or services;
- (b) achieve a given level or percentage of domestic content;
- (c) purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from natural persons or enterprises in its territory;
- (d) relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such enterprise;
- (e) restrict sales of goods or services in its territory that such enterprise produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;

- (f) transfer technology, a production process or other proprietary knowledge to a natural person or enterprises in its territory; or
- (g) supply exclusively from the territory of the Party a good produced or a service provided by the enterprise to a specific regional or world market.

2. In the sectors inscribed in its respective Schedule of Specific Commitments in Annexes 8-A (The Union's Schedule of Specific Commitments) and 8-B (Viet Nam's Schedule of Specific Commitments) and subject to any conditions and qualifications set out therein, a Party shall not condition the receipt or continued receipt of an advantage, in connection with the establishment or operation of an enterprise of an investor of a Party or of a third country in its territory, on compliance with any of the following requirements to:

- (a) achieve a given level or percentage of domestic content;
- (b) purchase, use or accord a preference to goods produced in its territory, or to purchase goods from producers in its territory;
- (c) relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such enterprise; or
- (d) restrict sales of goods or services in its territory that such enterprise produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

3. Paragraph 2 shall not be construed as preventing a Party from conditioning the receipt or continued receipt of an advantage in connection with any enterprise in its territory on compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development in its territory.

4. Subparagraph 1(f) shall not be construed as preventing the application of a requirement imposed or a commitment or undertaking enforced by a court, administrative tribunal or competition authority, in order to remedy an alleged violation of competition laws.

5. Subparagraphs 1(a) to 1(c), 2(a) and 2(b) do not apply to qualification requirements for goods or services with respect to participation in export promotion and foreign aid programmes.

6. For greater certainty, subparagraphs 2(a) and 2(b) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

7. For greater certainty, paragraphs 1 and 2 do not apply to any requirement other than the requirements set out in those paragraphs.

8. This Article does not apply to measures adopted or maintained by a Party in accordance with subparagraph 8(b) of Article III of GATT 1994.

## SECTION C

### CROSS-BORDER SUPPLY OF SERVICES

#### ARTICLE 8.9

##### Scope

This Section applies to measures of the Parties affecting the cross-border supply of all services sectors with the exception of:

- (a) audio-visual services;
- (b) national maritime cabotage;<sup>15</sup> and

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<sup>15</sup> Without prejudice to the scope of activities which constitute cabotage under the domestic laws and regulations, national maritime cabotage under this Section covers transportation of passengers or goods between a port or point located in Viet Nam or a Member State of the Union and another port or point located in Viet Nam or that same Member State of the Union, including on its continental shelf, as provided in UNCLOS, and traffic originating and terminating in the same port or point located in Viet Nam or a Member State of the Union.

- (c) domestic and international air transport services, whether scheduled or non-scheduled, and services directly related to the exercise of traffic rights, other than:
  - (i) aircraft repair and maintenance services during which an aircraft is withdrawn from service;
  - (ii) the selling and marketing of air transport services;
  - (iii) computer reservation system (CRS) services; and
  - (iv) ground handling services.

## ARTICLE 8.10

### Market Access

1. With respect to market access through the cross-border supply of services, each Party shall accord services and service suppliers of the other Party treatment not less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule of Specific Commitments.

2. In sectors where market access commitments are undertaken, the measures which a Party shall not adopt or maintain either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule of Specific Commitments, are defined as:

- (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirement 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; and
- (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.

## ARTICLE 8.11

### National Treatment

1. In the sectors inscribed in its Schedule of Specific Commitments and subject to any conditions and qualifications set out therein, each Party shall accord to services and service suppliers of the other Party, in respect of all measures affecting the cross-border 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 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.

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

## ARTICLE 8.12

### Schedule of Specific Commitments

The sectors liberalised by each Party pursuant to this Section and the terms, limitations, conditions and qualifications referred to in Articles 8.10 (Market Access) and 8.11 (National Treatment) are set out in its Schedule of Specific Commitments included in Appendix 8-A-1 of Annex 8-A (The Union's Schedule of Specific Commitments) or Appendix 8-B-1 of Annex 8-B (Viet Nam's Schedule of Specific Commitments), respectively.

## SECTION D

### TEMPORARY PRESENCE OF NATURAL PERSONS FOR BUSINESS PURPOSES

#### ARTICLE 8.13

##### Scope and Definitions

1. This Section applies to measures of a Party concerning the entry and temporary stay in its territory of business visitors, intra-corporate-transferees, business sellers, contractual service suppliers and independent professionals.
  
2. For the purposes of this Section:
  - (a) "business sellers" means natural persons who are representatives of a supplier of goods or services of a Party seeking entry and temporary stay in the territory of the other Party for the purpose of negotiating the sale of services or goods, or entering into agreements to sell services or goods for that supplier and who do not engage in supplying the services or the goods; they do not engage in making direct sales to the general public and do not receive remuneration from a source located within the host Party, nor are they commission agents;

- (b) "business visitors for establishment purposes" means natural persons working in a senior position within a juridical person of a Party who are responsible for setting up an enterprise of such juridical person, provided they do not offer or provide services or engage in any other economic activity than required for establishment purposes and they do not receive remuneration from a source located within the host Party;
- (c) "contractual services suppliers" means natural persons employed by a juridical person of a Party which is not an agency for placement and supply services of personnel nor acting through such an agency, which has not been established in the territory of the other Party and which has concluded a *bona fide* contract<sup>16</sup> to supply services with a final consumer in the other Party, requiring the presence on a temporary basis of its employees in that Party, in order to fulfil the contract to provide services;
- (d) "independent professionals" means natural persons engaged in the supply of a service and established as self-employed in the territory of a Party who have not been established in the territory of the other Party and who have concluded a *bona fide* contract<sup>17</sup> other than through an agency for placement and supply services of personnel to supply services with a final consumer in the other Party, requiring their presence on a temporary basis in that Party in order to fulfil the contract to provide services;

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<sup>16</sup> The service contract shall comply with the requirements of the laws, and regulations and requirements of the Party where the contract is executed.

<sup>17</sup> The service contract shall comply with the requirements of the laws, and regulations and requirements of the Party where the contract is executed.

- (e) "intra-corporate transferees" means natural persons who have been employed by a juridical person or its branch or have been partners in it for at least one year and who are temporarily transferred to an enterprise of the juridical person in the territory of the other Party, provided that the natural person concerned belongs to the categories of managers or executives, specialists or trainee employees;
  
- (f) "managers or executives" means natural persons working in a senior position within a juridical person of a Party, who primarily direct the management of the enterprise<sup>18</sup> in the other Party, and who are receiving general supervision or direction principally from the board of directors or from stockholders of the business or their equivalent, including at least:
  - (i) directing the enterprise or a department or sub-division thereof;
  
  - (ii) supervising and controlling the work of other supervisory, professional or managerial employees; and
  
  - (iii) having the personal authority to recruit and dismiss or to recommend recruitment, dismissal or other personnel-related actions;

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<sup>18</sup> For greater certainty, while managers or executives do not directly perform tasks concerning the actual supply of the services, this does not prevent them, in the course of executing their duties, from performing such tasks as may be necessary for the provision of the services.

- (g) "qualifications" means diplomas, certificates and other evidence of formal qualification issued by an authority designated pursuant to legislative, regulatory or administrative provisions and certifying successful completion of professional training;
- (h) "specialists" means natural persons working within a juridical person possessing specialised knowledge essential to the establishments' areas of activity, techniques or management; in assessing such knowledge, account shall be taken not only of knowledge specific to the establishment, but also of whether the person has a high level of qualification including adequate professional experience referring to a type of work or activity requiring specific technical knowledge, including possible membership of an accredited profession; and
- (i) "trainee employees" means natural persons who have been employed by a juridical person or its branch for at least one year, and who possess a university degree and are temporarily transferred for career development purposes or to obtain training in business techniques or methods.<sup>19</sup>

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<sup>19</sup> The recipient enterprise may be required to submit a training programme covering the duration of the stay for prior approval, demonstrating that the purpose of the stay is for training. For Czech Republic, Germany, Spain, France, Hungary, and Austria, training must be linked to the university degree which has been obtained.

## ARTICLE 8.14

### Business Visitors and Intra-Corporate Transferees

1. For the sectors liberalised in accordance with Section B (Liberalisation of Investment), each Party shall allow investors of the other Party to employ in their enterprises natural persons of that other Party provided that such employees are business visitors or intra-corporate transferees.<sup>20</sup>

2. The entry and temporary stay shall be:

(a) for managers or executives, a period of up to three years;

(b) for specialists, a period of up to three years;

(c) for trainee employees, a period of up to one year; and

(d) for business visitors for establishment purposes, a period of up to 90 days<sup>21</sup>.

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<sup>20</sup> For Viet Nam, the obligations stemming from this Section in relation to trainee employees shall enter into force three years after the date of entry into force of this Agreement.

<sup>21</sup> For the Union, the period of up to 90 days has to be within any 12 month period.

3. For every sector liberalised in accordance with Section B (Liberalisation of Investment), a Party shall not adopt or maintain, either on the basis of a regional subdivision or on the basis of its entire territory, limitations on the total number of natural persons that an investor may employ as business visitors for establishment purposes and intra-corporate transferees in a specific sector in the form of numerical quotas or a requirement of an economic needs test and as discriminatory limitations, unless otherwise specified in Appendix 8-A-3 of Annex 8-A (The Union's Schedule of Specific Commitments) and Appendix 8-B-2 of Annex 8-B (Viet Nam's Schedule of Specific Commitments, respectively).

## ARTICLE 8.15

### Business Sellers

For every sector liberalised in accordance with Section B (Liberalisation of Investment) or Section C (Cross-Border Supply of Services) and subject to any reservations listed in Appendix 8-A-3 of Annex 8-A (The Union's Schedule of Specific Commitments) and Appendix 8-B-2 of Annex 8-B (Viet Nam's Schedule of Specific Commitments), respectively, each Party shall allow the entry and temporary stay of business sellers for a period of up to 90 days<sup>22</sup>.

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<sup>22</sup> For the Union, the period of up to 90 days has to be within any 12 month period.

## ARTICLE 8.16

### Contractual Service Suppliers

1. The Parties affirm their respective obligations arising from their commitments under GATS with respect to the entry and temporary stay of contractual services suppliers.

2. Each Party shall allow the supply of services into its territory by contractual services suppliers of the other Party, subject to the conditions specified in paragraph 3 and any reservations listed in Appendix 8-A-3 of Annex 8-A (The Union's Schedule of Specific Commitments) and Appendix 8-B-2 of Annex 8-B (Viet Nam's Schedule of Specific Commitments), respectively, for the following sectors or sub-sectors:

- (a) architectural services;
- (b) urban planning and landscape architecture services;
- (c) engineering services;
- (d) integrated engineering services;
- (e) computer and related services;
- (f) higher education services (only privately funded services);

(g) foreign language training; and

(h) environmental services.

3. The commitments undertaken by the Parties are subject to the following conditions:

(a) the natural persons shall be engaged in the supply of a service on a temporary basis as employees of a juridical person, which has obtained a service contract not exceeding 12 months;

(b) the natural persons entering the other Party should be offering such services as employees of the juridical person supplying the services for at least two years immediately preceding the date of submission of an application for entry into the other Party, in addition, the natural persons shall possess, at the date of submission of an application for entry into the other Party, at least five years professional experience<sup>23</sup> in the sector of activity which is the subject of the contract;

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<sup>23</sup> For greater certainty, this period is calculated after the natural persons have reached the age of majority.

- (c) the natural persons entering the other Party shall possess:
- (i) a university degree or a qualification demonstrating knowledge of an equivalent level<sup>24</sup>; and
  - (ii) professional qualifications in the case that this is required to exercise an activity pursuant to the laws, regulations or legal requirements of the Party where the service is supplied;
- (d) the natural person shall not receive remuneration for the provision of services in the territory of the other Party other than the remuneration paid by the juridical person employing the natural person;
- (e) the entry and temporary stay of natural persons within the Party concerned shall be for a cumulative period of not more than six months<sup>25</sup> or for the duration of the contract, whichever is less;
- (f) access accorded under this Article relates only to the service activity which is the subject of the contract and does not confer entitlement to exercise the professional title of the Party where the service is provided;

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<sup>24</sup> If the degree or qualification has not been obtained in the Party where the service is supplied, that Party may evaluate whether this degree or qualification is equivalent to a university degree required in its territory.

<sup>25</sup> For the Union, the cumulative period of not more than six months has to be within any 12 month period.

- (g) the number of persons covered by the service contract shall not be larger than necessary to fulfil the contract, as may be required by the laws and regulations or other measures of the Party where the service is supplied; and
- (h) other discriminatory limitations, including on the number of natural persons in the form of an economic needs test, specified in Appendix 8-A-3 of Annex 8-A (The Union's Schedule of Specific Commitments) and Appendix 8-B-2 of Annex 8-B (Viet Nam's Schedule of Specific Commitments).

#### ARTICLE 8.17

##### Independent Professionals

Five years after the date of entry into force of this Agreement, the Parties shall review this Section to consider establishing the modalities to extend the provisions therein to independent professionals.

SECTION E

REGULATORY FRAMEWORK

SUB-SECTION 1

DOMESTIC REGULATION

ARTICLE 8.18

Scope and Definitions

1. This Sub-Section applies to measures by the Parties relating to licensing requirements and procedures, qualification requirements and procedures that affect:
  - (a) cross-border supply of services;
  - (b) establishment and maintenance of juridical or natural persons; and
  - (c) temporary stay in their respective territories of categories of natural persons.

2. This Sub-Section only applies to sectors for which a Party has undertaken specific commitments and to the extent that these specific commitments apply.
3. This Sub-Section does not apply to measures to the extent that they constitute limitations as scheduled under Articles 8.4 (Market Access), 8.5 (National Treatment), 8.10 (Market Access) or 8.11 (National Treatment).
4. For the purposes of this Section:
  - (a) "competent authority" means any central, regional or local government or authority or non-governmental body in the exercise of powers delegated by central or regional or local governments or authorities, which takes a decision concerning the authorisation to supply a service, including through establishment or concerning the authorisation to establish an economic activity other than services;
  - (b) "licensing procedures" means administrative or procedural rules that a natural or a juridical person, seeking authorisation to carry out the activities as referred to in paragraph 1, including the amendment or renewal of a licence, must adhere to in order to demonstrate compliance with licensing requirements;
  - (c) "licensing requirements" means substantive requirements, other than qualification requirements, with which a natural or a juridical person is required to comply in order to obtain, amend or renew authorisation to carry out the activities as referred to in paragraph 1;

- (d) "qualification procedures" means administrative or procedural rules to which a natural person must adhere in order to demonstrate compliance with qualification requirements, for the purpose of obtaining authorisation to supply a service; and
- (e) "qualification requirements" means substantive requirements relating to the competence of a natural person to supply a service, and which are required to be demonstrated for the purposes of obtaining authorisation to supply a service.

## ARTICLE 8.19

### Conditions Licensing and Qualification

1. Each Party shall ensure that measures relating to licensing requirements and procedures, as well as qualification requirements and procedures are based on criteria which are:
  - (a) clear;
  - (b) objective and transparent; and
  - (c) pre-established and accessible to the public and interested persons.

2. An authorisation or a licence shall, subject to availability, be granted as soon as it is established, on the basis of an appropriate examination that the conditions for obtaining an authorisation or licence have been met.

3. Each Party shall maintain or institute judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected investor or service supplier, for a prompt review of, and where justified, appropriate remedies for, administrative decisions affecting establishment, cross-border supply of services or temporary presence of natural persons for business purposes. Where such procedures are not independent of the authority entrusted with the administrative decision concerned, each Party shall ensure that the procedures provide for an objective and impartial review.

This paragraph shall not be construed as requiring a Party to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system.

## ARTICLE 8.20

### Licensing and Qualification Procedures

1. Licensing and qualification procedures and formalities shall not in themselves constitute a restriction on the supply of a service or the pursuit of any other economic activity. Each Party shall endeavour to make such procedures and formalities as simple as possible and shall not unduly complicate or delay the provision of the service. Any licensing fees<sup>26</sup> which the applicants may incur from their applications should be reasonable and shall not in themselves restrict the supply of the relevant service.
2. Each Party shall ensure that the procedures used by, and the decisions of, the competent authority in the licensing or authorisation process are impartial with respect to all applicants. The competent authority should reach its decisions in an independent manner and not be accountable to any person supplying the services or carrying out the economic activities for which the licence or authorisation is required.
3. In case specific time periods for applications exist in each Party's laws and regulations, an applicant shall be allowed a reasonable period of time for the submission of an application. The competent authority shall initiate the processing of an application without undue delay. Where possible, applications should be accepted in electronic format under the same conditions of authenticity as paper submissions.

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<sup>26</sup> Licensing fees do not include payments for auction, tendering or other non-discriminatory means of awarding concessions, or mandated contributions to universal service provision.

4. Each Party shall ensure that the processing of an application, including the reaching of a final decision, is completed within a reasonable timeframe after the date of the submission of a complete application. Each Party shall endeavour to establish the normal timeframe for processing an application.
  
5. The competent authority shall inform the applicant within a reasonable period of time after the receipt of an application which it considers incomplete, identify, to the extent feasible, the additional information required to complete the application, and provide the opportunity to correct deficiencies.
  
6. Authenticated copies should be accepted, whenever possible, in place of original documents.
  
7. If an application is rejected by the competent authority, the applicant shall be informed in writing and without undue delay. In principle, the applicant shall, upon formal request, also be informed of the reasons for rejection of the application. An applicant should be permitted, within reasonable time limits, to resubmit an application.
  
8. Each Party shall ensure that a licence or an authorisation, once granted, enters into effect without undue delay in accordance with the terms and conditions specified therein.

## SUB-SECTION 2

### PROVISIONS OF GENERAL APPLICATION

#### ARTICLE 8.21

##### Mutual Recognition of Professional Qualifications

1. Nothing in this Article shall prevent a Party from requiring that natural persons possess the necessary qualifications and professional experience specified in the territory where the service is supplied, for the sector of activity concerned.
  
2. The Parties shall encourage the relevant professional bodies or respective authorities, as appropriate, in their respective territories to develop and provide a joint recommendation on mutual recognition of professional qualifications to the Committee on Investment, Trade in Services, Electronic Commerce and Government Procurement established pursuant to Article 17.2 (Specialised Committees). Such a joint recommendation shall be supported by evidence of:
  - (a) the economic value of an envisaged agreement on mutual recognition of professional qualifications (hereinafter referred to as "Mutual Recognition Agreement"); and

(b) the compatibility of the respective regimes, such as the extent to which the criteria applied by each Party for the authorisation, licensing, operation and certification of entrepreneurs and service suppliers are compatible.

3. Upon receipt of a joint recommendation, the Committee on Investment, Trade in Services, Electronic Commerce and Government Procurement shall, within a reasonable period of time, review the joint recommendation with a view to determining whether it is consistent with this Agreement.

4. Where, on the basis of the information provided for in paragraph 2, the joint recommendation has been found to be consistent with this Agreement, the Parties shall take necessary steps to negotiate, through their competent authorities or designees authorised by a Party, a Mutual Recognition Agreement.

## SUB-SECTION 3

### COMPUTER SERVICES

#### ARTICLE 8.22

##### Understanding on Computer Services

1. To the extent that trade in computer services is liberalised in accordance with Section B (Liberalisation of Investment), Section C (Cross-Border Supply of Services) and Section D (Temporary Presence of Natural Persons for Business Purposes), the Parties shall comply with paragraphs 2 to 4.

2. The Parties understand that CPC<sup>27</sup> 84 which is the United Nations code used for describing computer and related services, covers the basic functions used to provide all computer and related services. Technological developments have led to the increased offering of these services as a bundle or package of related services that can include some or all of these basic functions. For example, services such as web or domain hosting, data mining services and grid computing each consist of a combination of basic computer services functions.

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<sup>27</sup> CPC means the Central Products Classification as set out in Statistical Office of the United Nations, Statistical Papers, Series M, N° 77, CPC prov, 1991.

3. Computer and related services, regardless of whether they are delivered via a network, including the Internet, include all services that provide:

- (a) consulting, strategy, analysis, planning, specification, design, development, installation, implementation, integration, testing, debugging, updating, support, technical assistance, or management of or for computers or computer systems;
- (b) consulting, strategy, analysis, planning, specification, design, development, installation, implementation, integration, testing, debugging, updating, adaptation, maintenance, support, technical assistance, management or use of or for computer programmes;
- (c) data processing, data storage, data hosting or database services;
- (d) maintenance and repair services for office machinery and equipment, including computers; or
- (e) training services for staff of clients, relating to computer programmes, computers or computer systems, and not elsewhere classified.

4. The Parties understand that, in many cases, computer and related services enable the provision of other services<sup>28</sup> by both electronic and other means. In these cases, it is important to distinguish between the computer and related services, such as web-hosting or application hosting, and the other service enabled by the computer and related service. The other service, regardless of whether it is enabled by a computer and related service, is not covered by CPC 84.

#### SUB-SECTION 4

#### POSTAL SERVICES<sup>29</sup>

#### ARTICLE 8.23

##### Prevention of Anti-Competitive Practices in the Postal Services Sector

Each Party shall maintain or introduce appropriate measures for the purposes of preventing suppliers who, alone or together, have the ability to affect materially the terms of participation in the relevant markets for postal services as a result of use of their position in the market, from engaging in or continuing anti-competitive practices.

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<sup>28</sup> E.g., W/120.1.A.b. (accounting, auditing and bookkeeping services), W/120.1.A.d (architectural services), W/120.1.A.h (medical and dental services), W/120.2.D (audiovisual services), W/120.5. (educational services).

<sup>29</sup> This Sub-Section applies to both CPC 7511 and CPC 7512.

## ARTICLE 8.24

### Licences

1. Where a Party requires a licence for providing postal services, it shall make publicly available:

- (a) all the licensing criteria and the period of time normally required to reach a decision concerning an application for a licence; and
- (b) the terms and conditions of such licence.

2. The reasons for the denial of a licence shall be made known to the applicant upon request and an appeal procedure through a relevant regulatory body shall be established by each Party. The appeal procedure shall be transparent, non-discriminatory and based on objective criteria.

## ARTICLE 8.25

### Postal Regulatory Authority

The regulatory body shall be separate from, and not accountable to, any supplier of postal services. The decisions of, and the procedures used by the regulatory body shall be impartial with respect to all market participants.

## SUB-SECTION 5

### TELECOMMUNICATIONS NETWORKS AND SERVICES

#### ARTICLE 8.26

##### Scope

1. This Sub-Section sets out principles of the regulatory framework for the provision of public telecommunications networks and services, liberalised pursuant to Section B (Liberalisation of Investment), Section C (Cross-Border Supply of Services) and Section D (Temporary Presence of Natural Persons for Business Purposes).
2. This Sub-Section does not apply to any measure adopted or maintained by a Party relating to broadcasting<sup>30</sup> or cable distribution of radio or television programming.

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<sup>30</sup> "Broadcasting" shall be defined as provided for in the relevant laws and regulations of each Party. For greater certainty, broadcasting does not cover contribution links between operators.

## ARTICLE 8.27

### Definitions

For the purposes of this Sub-Section:

- (a) "end user" means a final service consumer or a final service supplier to whom a public telecommunications network or service is supplied, other than for use in the further supply of a public telecommunications network or service;
- (b) "essential facilities" means facilities of a public telecommunications network and service that:
  - (i) are exclusively or predominantly provided by a single or limited number of suppliers; and
  - (ii) cannot feasibly be economically or technically substituted in order to provide a service;
- (c) "interconnection" means linking with suppliers providing public telecommunications transport service in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier;

- (d) "major supplier" means a supplier of public telecommunications services which has the ability to materially affect the terms of participation, having regard to price and supply, in the relevant market for public telecommunications services as a result of control over essential facilities or use of its position in the market;
- (e) "number portability" means the ability of end users of public telecommunications services who so request to retain, at the same location, the same telephone numbers when switching between the same category of suppliers of public telecommunications services;
- (f) "public telecommunications network" means a telecommunications network which a Party requires to provide public telecommunications services between defined network termination points;
- (g) "public telecommunications service" means any telecommunications service that a Party requires, explicitly or in effect, to be offered to the public generally;
- (h) "regulatory authority" in the telecommunications sector means the body or bodies charged by a Party with the regulation of telecommunications;
- (i) "telecommunications network" means transmission systems and, where applicable, switching or routing equipment and other resources, including network elements which are not active, which permit the conveyance of signals by wire, radio, optical, or other electromagnetic means;

- (j) "telecommunications services" means all services consisting of the transmission and reception of electro-magnetic signals but excludes broadcasting services and economic activities consisting of the provision of content which requires telecommunications for its transport; and
- (k) "user" means a service consumer or a service supplier.

## ARTICLE 8.28

### Regulatory Authority

1. The regulatory authority shall be separate from, and not accountable to, any supplier of public telecommunications networks or services.
2. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants. To that end, a Party that retains ownership or control of providers of telecommunications networks or services shall ensure that regulatory actions, decisions or measures taken by the regulatory authority with respect to such providers do not discriminate against and, as a result, materially disadvantage any of their competitors.
3. The regulatory authority shall be sufficiently empowered to regulate the sector, and have adequate financial and human resources to carry out the tasks assigned to it.
4. The tasks to be undertaken by a regulatory authority shall be made public in an easily accessible and clear form, in particular when those tasks are assigned to more than one body.

5. The powers of the regulatory authority shall be exercised transparently and in a timely manner.

6. Regulatory authorities shall have the power to ensure that suppliers of telecommunications networks and services provide them, promptly upon request, with all the information, including financial information, which is necessary to enable the regulatory authorities to carry out their tasks in accordance with this Sub-Section. The information requested shall be no more than is necessary to allow the performance of the regulatory authorities' tasks and treated in accordance with the requirements of confidentiality.

#### ARTICLE 8.29

##### Authorisation to Provide Telecommunications Networks and Services

1. Each Party shall ensure that licensing procedures should be publicly available, including:

- (a) all the licensing criteria, terms, conditions and procedures it applies; and
- (b) a reasonable period of time normally required to reach a decision concerning an application for a licence.

2. Each Party shall ensure that an applicant receives in writing, upon request, the reasons for the denial of a licence.
3. The applicant for a licence shall be able to seek recourse before an appeal body in case a licence has been denied.
4. Any licensing fees<sup>31</sup> which the applicants may incur from their application to get a licence shall be reasonable and shall not in themselves restrict the supply of the service.

## ARTICLE 8.30

### Scarce Resources

1. Any procedures for the allocation and use of scarce resources, including frequencies, numbers and rights of way, shall be carried out in an objective, timely, transparent and non-discriminatory manner.
2. The current state of allocated frequency bands shall be made publicly available but detailed identification of radio spectrum allocated for specific government uses shall not be required.

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<sup>31</sup> Licensing fees do not include payments for auction, tendering or other non-discriminatory means of awarding concessions, or mandated contributions to universal service provision.

3. Decisions on allocating and assigning spectrum and frequency management are not measures that are *per se* inconsistent with Article 8.4 (Market Access), Article 8.8 (Performance Requirements) and 8.10 (Market Access). Accordingly, each Party retains the right to exercise its spectrum and frequency management policies, which may affect the number of suppliers of public telecommunications services, provided that this is done in a manner that is consistent with this Chapter. The Parties also retain the right to allocate frequency bands in a manner that takes into account existing and future needs.

### ARTICLE 8.31

#### Access to and Use of Public Telecommunications Networks and Services

1. Each Party shall ensure that all service suppliers of the other Party have access to, and use of, any public telecommunications network and service of a major supplier<sup>32</sup>, including private leased circuits, offered within or across the borders of that Party on reasonable, non-discriminatory and transparent terms and conditions, including as set out in paragraphs 2 and 3.

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<sup>32</sup> For the purposes of this Article, the designation of a supplier of public telecommunications networks and services as a major supplier shall be in accordance with the domestic laws, regulations and procedures of each Party.

2. Each Party shall ensure that suppliers of public telecommunications services requesting to have access to the network of a major supplier are permitted to:
  - (a) purchase or lease, and attach terminal or other equipment which interfaces with the public telecommunications network;
  - (b) interconnect private leased or owned circuits with public telecommunications networks and services in its territory, or across its borders, or with circuits leased or owned by other service suppliers; and
  - (c) use operating protocols of their choice, other than as necessary to ensure the availability of telecommunications networks and services to the public generally.
  
3. Each Party shall ensure that all service suppliers of the other Party may use public telecommunications networks and services for the movement of information in its territory or across its borders, including for intra-corporate communications of such service suppliers and for access to information contained in databases or otherwise stored in machine-readable form in the territory of either Party. Any new or amended measures of a Party significantly affecting such use shall be notified to the other Party and shall be subject to consultations.
  
4. Each Party shall ensure that suppliers that acquire information from another supplier in the process of negotiating access use that information solely for the purpose for which it was supplied and at all times respect the confidentiality of information transmitted or stored.

## ARTICLE 8.32

### Interconnection

1. Each Party shall ensure that any suppliers of public telecommunications services shall have the right, and when requested by another supplier, the obligation, to negotiate interconnection with each other for the purposes of providing public telecommunications networks and services.
2. Each Party shall ensure that suppliers that acquire information from another supplier in the process of negotiating interconnection arrangements use that information solely for the purpose for which it was supplied and at all times respect the confidentiality of information transmitted or stored.
3. For public telecommunications services, each Party shall ensure interconnection with a major<sup>33</sup> supplier at any technically feasible point in the network. Such interconnection shall be provided:
  - (a) under non-discriminatory terms, conditions (including in relation to technical standards, specifications) and rates, and of a quality no less favourable than that provided for such major supplier's own like services, or for like services of non-affiliated suppliers, or for its subsidiaries or other affiliates;

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<sup>33</sup> For the purposes of this Article, the designation of a supplier of public telecommunications networks and services as a major supplier shall be in accordance with the domestic laws, regulations and procedures of each Party.

- (b) in a timely fashion, on terms, conditions (including in relation to technical standards, specifications) and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided; and
  - (c) upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities.
4. The procedures applicable for interconnection to a major supplier shall be made publicly available.
5. Major suppliers shall make publicly available either their interconnection agreements or their reference interconnection offers where appropriate.

### ARTICLE 8.33

#### Competitive Safeguards on Major Suppliers

The Parties shall introduce or maintain appropriate measures for the purposes of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices. These anti-competitive practices in their territories include, in particular:

- (a) engaging in anti-competitive cross-subsidisation;

- (b) using information obtained from competitors with anti-competitive results; and
- (c) not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.

#### ARTICLE 8.34

##### Universal Service

1. Each Party shall have the right to define the kind of universal service obligation it wishes to maintain. Each Party shall administer any universal service obligation that it maintains in a transparent, non-discriminatory, and competitively neutral manner and shall ensure that its universal service obligation is not more burdensome than necessary for the kind of universal service that it has defined.
2. The designation of universal service suppliers shall be made through an efficient, transparent and non-discriminatory mechanism.

## ARTICLE 8.35

### Number Portability

Each Party shall ensure that suppliers of public telecommunications networks or services in its territory provide number portability for mobile services and any other services designated by that Party, to the extent technically and economically feasible, on a timely basis and on reasonable terms and conditions.

## ARTICLE 8.36

### Confidentiality of Information

Each Party shall ensure the confidentiality of telecommunications and related traffic data by means of a public telecommunications network and publicly available telecommunications services without restricting trade in services.

## ARTICLE 8.37

### Resolution of Telecommunications Disputes

1. In the event of a dispute arising between suppliers of telecommunications networks or services in connection with rights and obligations that arise from this Sub-Section, the regulatory authority concerned shall, at the request of either party concerned, issue a binding decision to resolve the dispute in the shortest possible timeframe and in any case within a reasonable period of time, except in exceptional circumstances.
2. Where a dispute referred to in paragraph 1 concerns the cross-border provision of services, the regulatory authorities concerned shall coordinate their efforts in order to induce a resolution of the dispute.
3. The decision of the regulatory authority shall be made available to the public, having regard to the requirements of business confidentiality. The parties concerned shall be given a full statement of the reasons on which it is based and shall have the right to appeal that decision in accordance with paragraph 5.
4. The procedure referred to in paragraphs 1, 2 and 3 shall not preclude either party concerned from bringing an action before the courts.

5. Any user or supplier affected by the decision of a regulatory authority shall have a right to appeal against that decision to an appeal body that is independent of the party involved. This body, which may be a court, shall have the appropriate expertise to carry out its functions effectively. The merits of the case shall be duly taken into account and the appeal mechanism shall be effective. Where the appeal body is not judicial in character, written reasons for its decision shall always be given and its decisions shall also be subject to review by an impartial and independent judicial authority. Decisions taken by appeal bodies shall be effectively enforced. Pending the outcome of the appeal, the decision of the regulatory authority shall stand, unless interim measures are granted in accordance with the domestic laws and regulations.

## ARTICLE 8.38

### Co-location

1. Each Party shall ensure that major suppliers in its territory:
  - (a) provide to suppliers of public telecommunications networks or services of the other Party that are facilities-based suppliers in the territory of that Party, physical co-location of equipment necessary for interconnection; and

(b) in situations where physical co-location referred to in subparagraph (a) is not practical for technical reasons or because of space limitations, cooperate with suppliers of public telecommunications networks or services of the other Party that are facilities-based suppliers in the territory of that Party, to find and implement a practical and commercially viable alternative solution.

2. Each Party shall ensure that major suppliers in its territory provide to suppliers of public telecommunications networks or services the physical co-location or practical and commercially viable alternative solution referred to in paragraph 1 in a timely manner and on terms and conditions, including technical standards and specifications, and at rates that are reasonable having regard to economic feasibility, non-discriminatory and transparent.

3. Each Party may determine, in accordance with its domestic laws and regulations, the locations at which it requires major suppliers in its territory to provide the physical co-location or the practical and commercially viable alternative solutions referred to in paragraph 1.

## ARTICLE 8.39

### Leased Circuits Services

Each Party shall, unless it is not technically feasible, ensure that major suppliers in its territory make leased circuits services that are public telecommunications services, available to suppliers of public telecommunications networks or services of the other Party in a timely manner and on terms and conditions (including technical standards and specifications), and at rates that are reasonable having regard to economic feasibility, non-discriminatory and transparent.

## ARTICLE 8.40

### Unbundled Network Elements

Each Party shall ensure that their telecommunications regulatory authority has the power to require major suppliers to meet reasonable requests by suppliers of public telecommunications networks or services for access to, and use of, specific network elements, on an unbundled basis, in a timely manner and on terms and conditions that are reasonable, transparent, and non-discriminatory. Each Party shall determine such specific network elements requested to be made available in its territory in accordance with its domestic laws and regulations.

## SUB-SECTION 6

### FINANCIAL SERVICES

#### ARTICLE 8.41

##### Scope and Definitions

1. This Sub-Section sets out the principles of the regulatory framework for all financial services liberalised pursuant to Section B (Liberalisation of Investment), Section C (Cross-Border Supply of Services) and Section D (Temporary Presence of Natural Persons for Business Purposes).
2. For the purposes of this Sub-Section:
  - (a) "financial service" means any service of a financial nature offered by a financial service supplier of a Party; financial services comprise the following activities:
    - (i) insurance and insurance-related services:
      - (A) direct insurance (including co-insurance):
        - (1) life; and
        - (2) non-life;

- (B) reinsurance and retrocession;
  - (C) insurance inter-mediation, such as brokerage and agency; and
  - (D) services auxiliary to insurance, such as consultancy, actuarial, risk assessment and claim settlement services;
- (ii) banking and other financial services (excluding insurance):
- (A) acceptance of deposits and other repayable funds from the public;
  - (B) lending of all types, including consumer credit, mortgage credit, factoring and financing of commercial transaction;
  - (C) financial leasing;
  - (D) all payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts;
  - (E) guarantees and commitments;

- (F) trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, of the following:
  - (1) money market instruments (including cheques, bills, certificates of deposits);
  - (2) foreign exchange;
  - (3) derivative products including, but not limited to, futures and options;
  - (4) exchange rate and interest rate instruments, including products such as swaps, forward rate agreements;
  - (5) transferable securities; and
  - (6) other negotiable instruments and financial assets, including bullion;
- (G) participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services relating to such issues;
- (H) money broking;

- (I) asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services;
  - (J) settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments;
  - (K) provision and transfer of financial information, and financial data processing and the provision of related software by suppliers of other financial service; and
  - (L) advisory, intermediation and other auxiliary financial services on all the activities listed in subparagraphs 2(a)(ii)(A) to 2(a)(ii)(K), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy;
- (b) "financial service supplier" means any natural or juridical person of a Party that seeks to provide or provides financial services but does not include a public entity;
- (c) "new financial service" means a service of a financial nature including services relating to existing and new products or the manner in which a product is delivered, which is not supplied by any financial service supplier in the territory of a Party but which is supplied in the territory of the other Party;

(d) "public entity" means:

- (i) a government, a central bank or a monetary authority, of a Party, or an entity owned or controlled by a Party, that is principally engaged in carrying out governmental functions or activities for governmental purposes, not including an entity principally engaged in supplying financial services on commercial terms; or
- (ii) a private entity, performing functions normally performed by a central bank or monetary authority, when exercising those functions;

and

(e) "self-regulatory organisation" means any non-governmental body, any securities or futures exchange or market, clearing agency, other organisation or association, that exercises regulatory or supervisory authority over financial service suppliers by statute or delegation from central, regional or local governments or authorities, where applicable.

## ARTICLE 8.42

### Prudential Carve-Out

1. Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining measures for prudential reasons, such as:
  - (a) the protection of investors, depositors, policy-holders or persons to whom a fiduciary duty is owed by a financial service supplier; or
  - (b) ensuring the integrity and stability of a Party's financial system.
2. The measures referred to in paragraph 1 shall not be more burdensome than necessary to achieve their aim.
3. Nothing in this Agreement shall be construed as requiring a Party to disclose information relating to the affairs and accounts of individual consumers or any confidential or proprietary information in the possession of public entities.

4. Each Party shall endeavour to ensure that internationally agreed standards for regulation and supervision in financial services and for the fight against tax evasion and avoidance are implemented and applied in its territory. Such internationally agreed standards are, *inter alia*, the *Core Principle for Effective Banking Supervision* of the Basel Committee, the *Insurance Core Principles* of the International Association of Insurance Supervisors, the *Objectives and Principles of Securities Regulation* of the International Organization of Securities Commissions, the *Agreement on Exchange of Information on Tax Matters* of the Organisation for Economic Cooperation and Development, the *Statement on Transparency and Exchange of Information for Tax Purposes* of the G20 and the *Forty Recommendations on Money Laundering* and the *Nine Special recommendations on Terrorist Financing* of the Financial Action Task Force.

5. The Parties take note of the *Ten Key Principles for Information Exchange* promulgated by the Finance Ministers of the G7 Nations.

6. Without prejudice to other means of prudential regulation of cross-border trade in financial services, a Party may require the registration or authorisation of cross-border financial service suppliers of the other Party and of financial instruments.

## ARTICLE 8.43

### Transparent Regulation

Each Party shall make available to interested persons its requirements for completing applications relating to the supply of financial services.

Upon the request of an applicant, the concerned Party shall inform the applicant of the status of its application. If the concerned Party requires additional information from the applicant, it shall notify the applicant without undue delay.

## ARTICLE 8.44

### New Financial Services

Each Party shall permit a financial service supplier of the other Party to provide any new financial service that the former Party would permit its own financial service suppliers to provide in accordance with its domestic laws and regulations, in like situations, provided that the introduction of the new financial services does not require a new law or modification of an existing law. A Party may determine the institutional and legal form through which the service may be provided and may require authorisation for the provision of the service. Where such authorisation is required, a decision shall be made within a reasonable time and the authorisation may only be refused for prudential reasons.

## ARTICLE 8.45

### Data Processing

1. Each Party shall adopt or maintain appropriate safeguards to protect personal data and privacy, including individual records and accounts.
2. No later than two years from the date of entry into force of this Agreement, each Party shall permit financial service suppliers<sup>34</sup> of the other Party to transfer information in electronic or other form, into and out of its territory, for data processing where such processing is required in the ordinary course of business of such financial service suppliers.
3. Nothing in this Article restricts the right of a Party to protect personal data and privacy, so long as such right is not used to circumvent this Agreement.

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<sup>34</sup> For greater certainty, in Viet Nam under its domestic laws and regulations existing on the date of signature of this Agreement no natural person may transfer data.

## ARTICLE 8.46

### Specific Exceptions

1. Nothing in this Chapter shall be construed as preventing a Party, including its public entities, from exclusively conducting or providing in its territory activities or services forming part of a public retirement plan or statutory system of social security, except when those activities may be carried out, as provided by the Party's domestic laws and regulations, by financial service suppliers in competition with public entities or private institutions.
2. Nothing in this Agreement, except for Section B (Liberalisation of Investment) which is subject to paragraph 3, shall apply to activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary policy or exchange rate policies.
3. Nothing in Section B (Liberalisation of Investment) shall apply to non-discriminatory measures of general application taken by any public entity in pursuit of monetary policy or exchange rate policy.
4. Nothing in this Chapter shall be construed as preventing a Party, including its public entities, from exclusively conducting or providing in its territory activities or services for the account, or with the guarantee or using the financial resources of the Party, or its public entities, except when those activities may be carried out, as provided by the Party's domestic laws and regulations, by financial service suppliers in competition with public entities or private institutions.

5. For greater certainty, the Parties understand that paragraphs 1 and 4 shall not be construed as permitting the Parties to apply, without protecting the rights of affected investors or investments, measures referred to in those paragraphs when the activities or services mentioned therein have been liberalised or may be carried out, as provided by the Party's domestic laws and regulations, by financial services suppliers in competition with public entities or private institutions.

#### ARTICLE 8.47

##### Self-Regulatory Organisations

When a Party requires membership of, participation in or access to any self-regulatory organisation in order for financial service suppliers of the other Party to supply financial services in or into the territory of the first Party, the Party shall ensure observance of the obligations under Articles 8.5 (National Treatment), 8.6 (Most-Favoured-Nation Treatment) and 8.11 (National Treatment).

## ARTICLE 8.48

### Clearing and Payment Systems

Under the terms and conditions that accord national treatment as provided for in Articles 8.5 (National Treatment) and 8.11 (National Treatment), each Party shall grant to financial service suppliers of the other Party established in its territory access to payment and clearing systems operated by public entities, and to official funding and refinancing facilities available in the normal course of ordinary business. This Article shall not confer access to the Party's lender of last resort facilities.

## SUB-SECTION 7

### INTERNATIONAL MARITIME TRANSPORT SERVICES

## ARTICLE 8.49

### Scope, Definitions and Principles

1. This Sub-Section sets out the principles regarding the liberalisation of international maritime transport services pursuant to Section B (Liberalisation of Investment), Section C (Cross-Border Supply of Services) and Section D (Temporary Presence of Natural Persons for Business Purposes).

2. For the purposes of this Sub-Section:

- (a) "container station and depot services" means activities consisting in storing containers, whether in port areas or inland, with a view to their stuffing or stripping, repairing and making them available for shipments;
- (b) "customs clearance services" or alternatively, "customs house brokers' services" means activities consisting in carrying out on behalf of another party customs formalities concerning import, export or through transport of cargoes, whether this service is the main activity of the service provider or a usual complement of its main activity;
- (c) "feeder services" means the pre- and onward transportation by sea, between ports located in the territory of a Party, of international cargo, notably containerised, *en route* to a destination outside the territory of that Party;
- (d) "freight forwarding services" means the activity consisting of organising and monitoring shipment operations on behalf of shippers, through the acquisition of transport and related services, preparation of documentation and provision of business information;
- (e) "international cargo" means cargo transported between a port of one Party and a port of the other Party or of a third country, or between a port of one Member State of the Union and a port of another Member State of the Union;

- (f) "international maritime transport services" means the transport of passengers or cargo by sea-going vessels between a port of a Party and a port of the other Party or of a third country including the direct contracting with providers of other transport services, with a view to cover multimodal transport operations under a single transport document, but not the right to provide such other transport services;
- (g) "maritime auxiliary services" means maritime cargo handling services, customs clearance services, container station and depot services, maritime agency services and maritime freight forwarding services;
- (h) "maritime cargo handling services" means activities exercised by stevedore companies, including terminal operators but not including the direct activities of dockers, when this workforce is organised independently of the stevedoring or terminal operator companies; the activities covered include the organisation and supervision of:
  - (i) the loading or discharging of cargo to or from a ship;
  - (ii) the lashing or unlashng of cargo; and
  - (iii) the reception or delivery and safekeeping of cargoes before shipment or after discharge;and
- (i) "multimodal transport operations" means the transport of cargo using more than one mode of transport, involving an international sea-leg, under a single transport document.

3. In view of the existing levels of liberalisation between the Parties in international maritime transport the following principles apply:
- (a) the Parties shall effectively apply the principle of unrestricted access to the international maritime markets and trades on a commercial and non-discriminatory basis;
  - (b) each Party shall grant to ships flying the flag of the other Party or operated by service suppliers of the other Party treatment no less favourable than that accorded to its own ships, with regard to, *inter alia*, access to ports, use of infrastructure and use of maritime auxiliary services, as well as related fees and charges, customs facilities and access to berths and facilities for loading and unloading;
  - (c) each Party shall permit international maritime service suppliers of the other Party to have an enterprise in its territory under conditions of establishment and operation in accordance with the conditions set out in its Schedule of Specific Commitments;
  - (d) the Parties shall make available to international maritime transport suppliers of the other Party, on reasonable and non-discriminatory terms and conditions, the following services at the port: pilotage, towing and tug assistance, provisioning, fuelling and watering, garbage collecting and ballast waste disposal, port captain's services, navigation aids, emergency repair facilities, anchorage, berth and berthing services as well as shore-based operational services essential to ship operations, including communications, water and electrical supplies;

- (e) the Union, subject to the authorisation by its competent authorities, shall permit the international maritime transport service suppliers of Viet Nam to re-position their owned or leased empty containers which are not being carried as cargo against payment and are transported for their use in handling their cargo in foreign trade, between ports of a Member State of the Union;
- (f) Viet Nam, subject to the authorisation by its competent authorities,<sup>35</sup> shall permit the international maritime transport service suppliers of the Union or its Member States to reposition their owned or leased empty containers, which are not being carried as cargo against payment and are transported for their use in handling their cargo in foreign trade, between Quy Nhon port and Cai Mep-Thi Vai port. After five years from the date of entry into force of this Agreement, Viet Nam shall permit the international maritime transport service suppliers of the Union or its Member States to reposition owned or leased empty containers, which are not being carried as cargo against payment and are transported for their use in handling their cargo in foreign trade, between its national ports with the condition that the fed vessels (namely mother vessels) should call at ports of Viet Nam;

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<sup>35</sup> For greater certainty, an authorisation is an administrative procedure established to ensure all relevant requirements are met. The authorisation shall be granted as soon as it is established, in the light of an appropriate examination, that the conditions for obtaining an authorisation have been met. The authorisation shall not act as a disguised restriction on supplying of the services.

- (g) the Union, subject to the authorisation by its competent authorities, shall permit international maritime transport service suppliers of Viet Nam to provide feeder services between their national ports;
  - (h) Viet Nam, subject to the authorisation by its competent authorities,<sup>36</sup> shall permit international maritime transport service suppliers of the Union or its Member States to provide feeder services between Quy Nhon port and Cai Mep-Thi Vai port for their own vessels with the condition that the fed vessels (namely mother vessels) should call at Cai Mep-Thi Vai port.
4. In applying the principles referred to in subparagraphs 3(a) and 3(b), the Parties shall:
- (a) not introduce cargo-sharing arrangements in future agreements with third countries concerning maritime transport services, including dry and liquid bulk and liner trade, and terminate, within a reasonable period of time, such cargo-sharing arrangements in case they exist in previous agreements; and
  - (b) abstain, upon the date of entry into force of this Agreement, from introducing or applying any unilateral measures or administrative, technical and other obstacles which could constitute a disguised restriction or have discriminatory effects on the free supply of services in international maritime transport.

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<sup>36</sup> For greater certainty, an authorisation is an administrative procedure established to ensure all relevant requirements are met. The authorisation shall be granted as soon as it is established, in the light of an appropriate examination, that the conditions for obtaining an authorisation have been met. The authorisation shall not act as a disguised restriction on supplying of the services.

## SECTION F

### ELECTRONIC COMMERCE

#### ARTICLE 8.50

##### Objective and Principles

The Parties, recognising that electronic commerce increases trade opportunities in many sectors, shall promote the development of electronic commerce between them, in particular by cooperating on the issues raised by electronic commerce under the provisions of this Chapter.

#### ARTICLE 8.51

##### Customs Duties

The Parties shall not impose customs duties on electronic transmissions.

## ARTICLE 8.52

### Regulatory Cooperation on Electronic Commerce

1. The Parties shall maintain a dialogue on regulatory issues raised by electronic commerce, which shall, *inter alia*, address the following issues:
  - (a) the recognition of certificates of electronic signatures issued to the public and the facilitation of cross-border certification services;
  - (b) the liability of intermediary service providers with respect to the transmission, or storage of information;
  - (c) the treatment of unsolicited electronic commercial communications;
  - (d) the protection of consumers in the ambit of electronic commerce; and
  - (e) any other issue relevant for the development of electronic commerce.
  
2. This dialogue may take the form of exchange of information on the Parties' respective laws and regulations on the issues referred to in paragraph 1 as well as on the implementation of such laws and regulations.

## SECTION G

### EXCEPTIONS

#### ARTICLE 8.53

##### General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on establishment or operation of an enterprise or cross-border supply of services, nothing in this Chapter shall be construed as preventing the adoption or enforcement by any Party of measures:

- (a) necessary to protect public security or public morals or to maintain public order;
- (b) necessary to protect human, animal or plant life or health;
- (c) relating to the conservation of exhaustible natural resources if such measures are applied in conjunction with restrictions on domestic investors or on the domestic supply or consumption of services;
- (d) necessary for the protection of national treasures of artistic, historic or archaeological value;

(e) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Chapter including those relating to:

(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contracts;

(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; or

(iii) safety;

or

- (f) inconsistent with paragraphs 1 or 2 of Article 8.5 (National Treatment) or paragraph 1 of Article 8.11 (National Treatment), provided that the difference in treatment is aimed at ensuring the effective or equitable imposition or collection of direct taxes in respect of economic activities, investors or services suppliers of the other Party.<sup>37</sup>

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<sup>37</sup> Measures that are aimed at ensuring the equitable or effective imposition or collection of direct taxes include measures taken by a Party under its taxation system which:

- (i) apply to non-resident investors and services suppliers in recognition of the fact that the tax obligation of non-residents is determined with respect to taxable items sourced or located in the Party's territory;
- (ii) apply to non-residents in order to ensure the imposition or collection of taxes in the Party's territory
- (iii) apply to non-residents or residents in order to prevent the avoidance or evasion of taxes, including compliance measures;
- (iv) apply to consumers of services supplied in or from the territory of another Party in order to ensure the imposition or collection of taxes on such consumers derived from sources in the Party's territory;
- (v) distinguish investors and service suppliers subject to tax on worldwide taxable items from other investors and service suppliers, in recognition of the difference in the nature of the tax base between them; or
- (vi) determine, allocate or apportion income, profit, gain, loss, deduction or credit of resident persons or branches, or between related persons or branches of the same person, in order to safeguard the Party's tax base.

Tax terms or concepts in subparagraph (f) and in this footnote are determined according to tax definitions and concepts, or equivalent or similar definitions and concepts, under the domestic laws and regulations of the Party taking the measure.

## SECTION H

### INSTITUTIONAL PROVISION

#### ARTICLE 8.54

##### Committee on Investment, Trade in Services, Electronic Commerce and Government Procurement

1. The Committee on Investment, Trade in Services, Electronic Commerce and Government Procurement established pursuant to Article 17.2 (Specialised Committees) shall be composed of representatives of the Parties.
2. The Committee on Investment, Trade in Services, Electronic Commerce and Government Procurement shall be responsible for the implementation of this Chapter. To that end it shall monitor and regularly review the implementation by the Parties and consider any matter in relation to this Chapter that is referred to it by a Party.
3. The responsibility for Chapter 9 (Government Procurement) is set out in Article 9.23 (Committee on Investment, Services, Electronic Commerce and Government Procurement).