



EUROPEAN COMMISSION

Directorate-General for Trade
Directorate B - Services and Investment, Intellectual Property and Public Procurement
Services, Investment

Brussels, 2 July 2013
TRADE B1, B2/asc / 2557028

LIMITED

	COUNCIL OF THE EUROPEAN UNION
Trade Policy Committee (Services and Investment)	
m.d. :	112/1/13 REV 1
source :	Commission
for :	Information
date :	03 - 07 - 2013

FOR THE ATTENTION OF THE TRADE POLICY COMMITTEE (SERVICES & INVESTMENT)

Subject: **TTIP negotiations: Modified EU draft proposals on trade in services, investment and electronic commerce.**

Origin: **DG Trade B1 – B2**

Marco Dueerkop (B1)

Tel +32 2 296 50 95

Marco.dueerkop@ec.europa.eu

Mirosław Galar (B1)

Tel +32 2 295 71 25

miroslaw.galar@ec.europa.eu

Leopoldo Rubinacci (B2)

Tel +32 2 299 03 03

leopoldo.rubinacci@ec.europa.eu

trade-dir-b1@ec.europa.eu

Gabriela Alexandru (B2)

Tel +32 2 296 73 50

Gabriela-

Loredana.alexandru@ec.europa.eu

Objective: For information

Please find attached in annex a slightly modified version of the EU draft proposal on trade in services, investment and e-commerce for the TTIP negotiations (already circulated as MD 101/13). The modification concerns art. 3 Scope (page 5) of the document.

Please also recall that as draft negotiating texts, the annexed documents are confidential.

* * *

Draft

DISCLAIMER: Without prejudice. This is a draft text intended as a basis for discussion. The EU reserves the right to make subsequent modifications to this text and to complement its proposals at a later stage, by modifying, supplementing or withdrawing all, or any part, at any time.

TRADE IN SERVICES, INVESTMENT AND E-COMMERCE

Chapter I General provisions

Chapter II Investment

Chapter III Cross border supply of services

Chapter IV Temporary presence of natural persons for business purposes

Chapter V Regulatory framework

Chapter VI Electronic commerce

Chapter VII Exceptions

Draft

CHAPTER I GENERAL PROVISIONS

Article 1: Objective, coverage and definitions

1. The Parties, reaffirming 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 reciprocal liberalisation of trade in services, for the liberalisation of investment and for cooperation on e-commerce². Consistent with the provisions of this Title, each Party retains the right to adopt, maintain and enforce measures necessary to pursue legitimate policy objectives such as protecting society, the environment, and public health, ensuring the integrity and stability of the financial system, promoting public security and safety, , and promoting and protecting cultural diversity.

3. This Title shall not apply to measures affecting natural person seeking access to the employment market of a Party, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.

Nothing in this Title 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 benefits¹ accruing to any Party under the terms of a specific commitment in this Chapter and its Annexes 1.

4. For purposes of this Title:

- (a) a 'natural person of the EU' means a national of one of the Member States of the European Union according to its legislation and a 'natural person of the US' means a national of the US according to its legislation;
- (b) 'juridical person' means any legal entity duly constituted or otherwise organized 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;
- (c) a 'juridical person of the EU' or a 'juridical person of the US' means a juridical person set up in accordance with the laws of a Member State of the European Union or of the

¹ 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.

Draft

US and engaged in substantive business operations² in the territory of the EU or of the US, respectively;

- (d) Notwithstanding the preceding paragraph, shipping companies established outside the European Union or the US and controlled by nationals of a Member State of the European Union or of the US, respectively, shall also be beneficiaries of the provisions of this Title, with the exception of Chapter II Section (2) [Investment Protection] and of Chapter X Section Y [ISDS], if their vessels are registered in accordance with their respective legislation, in that Member State or in the US and fly the flag of a Member State or of the US;
- (e) an ‘enterprise’ means a juridical person, branch or representative office set up through establishment, as defined under this article.
- (f) ‘subsidiary’ of a juridical person of a Party means a juridical person which is effectively controlled by another juridical person of that Party³;
- (g) ‘establishment’ means the setting up, including the acquisition⁴ of, a juridical person and/or creation of a branch or a representative office in the US or in the EU respectively;
- (h) ‘economic activities’ means activities of an industrial, commercial and professional character and activities of craftsmen except activities performed in the exercise of governmental authority;
- (i) ‘operation’ of an investment means the conduct, management, maintenance, use, enjoyment, sale or other disposal of the investment by an investor of one Party in the territory of the other Party;
- (j) ‘services’ means any service in any sector except services supplied in the exercise of governmental authority;
- (k) ‘services and activities performed in the exercise of governmental authority’ means services or activities which are performed neither on a commercial basis nor in competition with one or more economic operators;
- (l) cross-border supply of services means the supply of a service:

² In line with its notification of the Treaty establishing the European Community to the WTO (WT/REG39/1), the EU understands that the concept of “effective and continuous link” with the economy of a Member State of the European Union enshrined in Article 54 of the TFEU is equivalent to the concept of “substantive business operations”. Accordingly, for a juridical person set up in accordance with the laws of the US and having only its registered office or central administration in the territory of the US, the EU shall only extend the benefits of this agreement if that juridical person possesses an effective and continuous economic link with the territory of the US.

³ A juridical person is controlled by another juridical person if the latter has the power to name a majority of its directors or otherwise to legally direct its actions.

⁴ The term “acquisition” shall be understood as including capital participation in a juridical person with a view to establishing or maintaining lasting economic links.

Draft

- (i) from the territory of a Party into the territory of the other Party
- (ii) in the territory of a Party to the service consumer of the other Party;
- (m) a 'service supplier' of a Party means any natural or juridical person of a Party that seeks to supply or supplies a service;
- (n) a 'measure' means any measure by a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form;
- (o) '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;
- (p) 'investment' means every kind of asset which is owned, directly or indirectly or controlled, directly or indirectly by investors of one Party in the territory of the other Party⁵, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk or a certain duration. Forms that an investment may take include:
 - (i) tangible or intangible, movable or immovable property, as well as any other property rights, such as leases, mortgages, liens, and pledges;
 - (ii) an enterprise, shares, stocks and other forms of equity participation in an enterprise including rights derived therefrom;
 - (iii) bonds, debentures, and loans and other debt instruments, including rights derived therefrom;
 - (iv) other financial assets including derivatives;
 - (v) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
 - (vi) claims to money, or to other assets or any contractual performance having an economic value.
 - (vii) Intellectual property rights, as defined in Chapter Y of this Agreement [Intellectual Property], technical processes, know-how and goodwill.

⁵ As an investment, a juridical person is:

- (i) "owned" by natural or juridical persons of one of the Member States of the EU or of US if more than 50 per cent of the equity interest in it is beneficially owned by persons of that/a Member State of the EU or of US respectively;
- (ii) "controlled" by natural or juridical persons of one of the Member States of the EU or of US if such persons have the power to name a majority of its directors or otherwise to legally direct its actions.

Draft

Returns that are invested shall be treated as investments and any alteration of the form in which assets are invested or reinvested shall not affect their qualification as investments.

- (q) an 'investor' means a natural person or a juridical person of a Party that seeks to make, is making or has already made an investment in the territory of the other Party.
- (r) 'returns' means all amounts yielded by or derived from an investment or reinvestment, including profits, dividends, capital gains, royalties, interest, payments in connection with intellectual property rights, payments in kind and all other lawful income.
- (s) 'freely convertible currency' means a currency which is widely traded in international foreign exchange markets and widely used in international transactions.
- (t) "territory of a Party" shall include, for the purposes of this Title, the exclusive economic zones and the continental shelf, to the extent that the Party has sovereign rights in respect of those zones pursuant to international law.

[Without prejudice to the final placement of this paragraph]

CHAPTER II INVESTMENT

Section 1 Liberalisation of Investments

Article 3: Scope

1. This Section applies to measures adopted or maintained by a Party affecting the acquisition or operation of an investment by an investor of the other Party in its territory, including the establishment in all economic activities.
2. The provisions of this Section shall not apply to audio-visual services.
3. Government procurement shall be dealt with by Chapter [X (on public procurement).] Nothing in this Section shall be construed to limit the obligations of the Parties under Chapter X on public procurement or to impose any additional obligation with respect to government procurement.
4. Subsidies shall be dealt with by Chapter [X (on competition and state aid)] and the provisions of this Section shall not apply to subsidies granted by the Parties.

[To note, however that the question of the scope of application of national treatment relating to the operation of an investment is to be discussed at a later stage].

Draft

Article 4: Market Access

1. With respect to market access through establishment, each Party shall accord treatment no less favourable than that provided for in the schedule of specific commitments contained in Annexes [...] (lists of commitments on liberalisation of investments).
2. In sectors where market access commitments are undertaken, the measures which a Party shall not maintain or adopt, unless otherwise specified in Annexes [...] (lists of commitments on liberalisation of investments), are defined as:
 - (a) limitations on the number of enterprises whether in the form of numerical quotas, monopolies, exclusive rights or other requirements relating to establishment such as economic needs tests⁶;
 - (b) limitations on the total value of transactions or assets in the form of numerical quotas or the requirement of an economic needs test⁷;
 - (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 test⁸.
 - (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.
 - (f) limitations on the total number of natural persons, other than key personnel and graduate trainees as defined in Article [...], 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 5 National Treatment

1. In the sectors inscribed in its schedule of specific commitments in Annexes [X] (lists of commitments on liberalisation of investments of both Parties) and subject to any conditions and qualifications set out therein, each Party shall accord, upon entry into force of this Agreement, with respect to establishment in its territory, treatment no less favourable than that accorded to its own like investors.

⁶ Subparagraphs 2(a), 2(b) and 2(c) do not cover measures taken in order to limit the production of an agricultural product.

⁷ Subparagraphs 2(a), 2(b) and 2(c) do not cover measures taken in order to limit the production of an agricultural product.

⁸ Subparagraphs 2(a), 2(b) and 2(c) do not cover measures taken in order to limit the production of an agricultural product.

Draft

2. A Party shall accord to investors of the other Party and to their investments, whether made prior to or after the entry into force of this Agreement, with respect to their operation, treatment no less favourable than that accorded to its own like investors and investments.
3. A Party may adopt or maintain measures with regards to establishment in accordance with paragraph 1 of this article in a manner that does not conform with paragraph 2 of this article, provided that such measures are either:
 - (a) measures that are consistent with the commitments inscribed in its schedule of specific commitments in Annex [X], and are adopted prior to the entry into force of this Agreement;
 - (b) the continuation or the prompt replacement of the measures mentioned under a) provided that they are no less consistent with paragraph 1 than the measures covered under a);
 - (c) measures that are consistent with the commitments inscribed in its schedule of specific commitments in Annex [X], adopted after the entry into force of this Agreement, provided that such measures do not apply to investments made before the entry into force of such measures.
4. For greater certainty, the provisions of paragraphs 1 and 2 do not prevent a Party from adopting or maintain specific requirements relating to the establishment or the operation, in its territory, of branches and representative offices of juridical persons incorporated in the territory of the other Party, which are justified by legal or technical differences between such branches and representative offices as compared to like branches and representative offices of companies incorporated in its territory, or, with respect to financial services, for prudential reasons.
5. Such requirements shall not go beyond what is strictly necessary as a result of such legal or technical differences or, with respect to financial services, for prudential reasons.

Article 6
Schedule of specific commitments

The sectors liberalised by each of the Parties pursuant to this Section and the terms, limitations, conditions and qualifications referred to in Articles 3 and 4 are set out in schedule of commitments included in Annexes [lists of commitments on liberalisation of investments].

Article 7 Other Obligations

Nothing in this Chapter shall be deemed to limit the right of investors and investments of a Party to benefit from more favourable treatment provided in the territory of the other Party, where such treatment is accorded by its legislation.

Draft

**Article 8
Economic Needs Tests**

No Party may impose discriminatory⁹ Economic Needs Tests prior to the establishment of an enterprise in its territory.

**Article 9
Foreign Shareholding and Joint Venture Requirements**

1. No Party shall impose joint venture requirements or limit the participation of foreign capital in terms of maximum percentage limit on foreign shareholding with a view to establishment or the total value of individual or aggregate foreign investment.
2. A Party may maintain the measures covered by Paragraph 1 in sub-sectors representing not more than 10% of the numbers of all sub-sectors covered by this Agreement¹⁰ as identified in its schedule of specific commitments.

**Article 10
Review**

1. With a view to progressively liberalising investment conditions, the Parties shall [X] years after the entry into force of this Agreement and at regular intervals thereafter, review the investment legal framework¹² and the investment environment, consistent with their commitments in international agreements.
2. In the context of the review referred to in paragraph 1, the Parties shall assess any obstacles to investment that have been encountered. As a result of such review, the [body defined by the agreement] may decide to amend the relevant schedules of specific commitments.

**Section 2
Investment Protection**

⁹ Discrimination should be understood in the meaning of Article 4(1).

¹⁰ The percentage shall be calculated as a share of the 155 sub-sectors listed in the WTO classification document MTN.GNS/W/120.

¹² This includes this Chapter and Annexes XXX.

Draft

[Note: the inclusion of investment protection and investor-State dispute settlement provisions will depend on whether a solution satisfactory for the EU is achieved with regard to the contents of section 2]

Article 11: Scope

The provisions in this Section shall apply to:

- (i) investments made by investors of a Party, in accordance with applicable laws, whether made before or after the entry into force of this Agreement in the territory of the other Party;
- (ii) investors of a Party that have already made an investment covered under (i) in the territory of the other Party, with regard to any treatment that may affect the operation of such investment.

Article 12: Treatment of Investment

1. Each Party shall accord fair and equitable treatment and full protection and security to investments and investors of the other Party in its territory.

2. To comply with the obligation to provide fair and equitable treatment in para 1, neither Party shall adopt measures that constitute, notably:

- a. Denial of justice in criminal, civil or administrative proceedings; or
- b. Disregard of the fundamental principles of due process; or
- c. Manifest arbitrariness; or
- d. Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or
- e. Abusive treatment of investors, including coercion, duress and harassment; or
- f. A breach of legitimate expectations of investors arising from a government's specific representations or investment-inducing measures; or
- g. A disregard of the principle of effective transparency in any applicable administrative or judicial procedures.

2. Neither Party shall impair by arbitrary measures the activity of investors of the other Party with regard to the operation of their investments in its territory.

Draft

3. Each Party shall observe any obligation it has entered into with regard to an investor of the other Party or an investment of such an investor.

4. A breach of another provision of this Agreement, or of a separate international agreement, does not in itself establish that there has been a breach of this Article.

Article 13: Compensation for losses

1. Investors of a Party whose investments suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the other Party shall be accorded by the latter Party, with respect to restitution, indemnification, compensation or other settlement, a treatment no less favourable than the one accorded by the latter Party to its own investors or to the investors of any third country, whichever is more favourable to the investor concerned.

2. Without prejudice to paragraph 1 of this Article, investors of a Party who, in any of the situations referred to in that paragraph, suffer losses in the territory of the other Party resulting from:

- (a). requisitioning of its investment or a part thereof by the latter's armed forces or authorities; or
- (b). destruction of its investment or a part thereof by the latter's armed forces or authorities, which was not required by the necessity of the situation;

shall be accorded by the latter Party restitution or compensation which in either case shall be prompt, adequate and effective and with respect to compensation, shall be in accordance with Article [Expropriation paragraph 2)] from the date of requisitioning or destruction until the date of actual payment.

Article 14: Expropriation

1. Neither Party shall directly or indirectly nationalise, expropriate or subject to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as 'expropriation') the investments of investors of the other Party except:

- (a) for a public purpose;
- (b) under due process of law;
- (c) on a non-discriminatory basis; and
- (d) against payment of prompt, adequate and effective compensation.

For greater certainty, this paragraph shall be interpreted in accordance with Annex X on Expropriation.

2. Such compensation shall amount to the fair market value of the investment at the time immediately before the expropriation or the impending expropriation became public knowledge plus interest at a commercial rate established on a market basis, from the date of expropriation until the date of payment. Such compensation shall be effectively realisable, freely transferable in accordance with Article Y.10 (Transfers) and made without delay.

Draft

3. The issuance of compulsory licenses in relation to intellectual property rights to the extent that such issuance is consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights in Annex 1C to the WTO Agreements ('TRIPS Agreement'), does not constitute expropriation for the purposes of paragraph 1) of this Article.

4. The investor affected shall have a right, under the law of the expropriating Party, to prompt review of its claim and of the valuation of its investment, by a judicial or other independent authority of that Party, in accordance with the principles set out in this Article.

Article 15: Transfer

1. Each Party shall permit all transfers relating to an investment. The transfer shall be made in a freely convertible currency without restriction or delay. Such transfers include:

- (a) contributions to capital, such as principal and additional funds to maintain, develop or increase the investment;
- b) profits, dividends, capital gains and other returns, proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;
- c) interest, royalty payments, management fees, and technical assistance and other fees;
- (d) payments made under a contract entered into by the investor, or its investment, including payments made pursuant to a loan agreement;
- (e) earnings and other remuneration of personnel engaged from abroad and working in connection with an investment.
- (f) payments made pursuant to art. X ['Expropriation'] and Y ['Compensation for Losses'].
- g) payments of damages pursuant to an award issued by a tribunal under Chapter X Investor to State Dispute Settlement.

Transfers shall be made at the market rate of exchange applicable on the date of transfer.

2. Notwithstanding paragraph 1, nothing in this article shall be construed to prevent a Party from applying in an equitable and non-discriminatory manner and not in a way that would constitute a disguised restriction on trade and investment, its laws relating to:

- (a) bankruptcy, insolvency, protection of the rights of creditors, bank recovery and resolution and the prudential supervision of financial service suppliers;
- (b) issuing, trading, or dealing in securities, futures, options, or derivatives;
- (c) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;
- (d) criminal or penal offenses;
- (e) ensuring compliance with orders or judgments in judicial or administrative proceedings.
- (f) social security, public retirement or compulsory savings schemes.

3. When in exceptional circumstances, capital movements cause or threaten to cause serious difficulties for the operation of monetary policy or exchange rate policy in either Party, safeguard measures affecting transfers may temporarily be taken by the Party concerned,

Draft

provided that these measures shall be strictly necessary and shall not exceed in any case a period of six months.

The Party adopting the safeguard measures shall inform the other Party forthwith and present, as soon as possible, a time schedule for their removal.

Article 16: Subrogation

If a Party, or an agency thereof, makes a payment under an indemnity, guarantee or contract of insurance it has entered into in respect of an investment made by one of its investors in the territory of the other Party, the other Party shall recognize that the Party or its agency shall be entitled in all circumstances to the same rights as those of the investor in respect of the investment. Such rights may be exercised by the Party or an agency thereof, or by the investor if the Party or an agency thereof so authorises.

Article 17: Termination

In the event that the present Agreement is terminated pursuant to with Article X [Final Provisions], the provisions of this Section and those of Chapter X Section X [on Investor-to-State Dispute Settlement Procedures] shall continue to be effective for a further period of 20 years from that date in respect of investments made before the date of termination of the present Agreement.

Article 18: Relationship with other Agreements

1. This Agreement replaces the agreements between Member States of the European Union and US listed in Annex (XX). The provisions of such agreements shall cease to apply from the date of entry into force of this Agreement.

2. In the event of the provisional application of this agreement, the application of the provisions of the agreements mentioned in paragraph 1) shall be suspended as of the date of provisional application of this agreement in accordance with Article X [Final Provisions] and until such agreements are replaced in accordance with the provisions of paragraph 1). The suspension shall be terminated in the event the provisional application is terminated.

3. Notwithstanding paragraphs 1 and 2, claims may be submitted pursuant to the provisions of the agreements listed in Annex (Y), regarding treatment accorded while the said agreements were in force, pursuant to the rules and procedures established in them, and provided that no more than three (3) years have elapsed since the date of suspension of the agreement pursuant to paragraph 2, or if the agreement is not suspended pursuant to paragraph 2, the date of entry into force of this Agreement. Where a claim has been submitted to arbitration under an agreement listed in Annex (Y), the provisions of such agreement shall remain applicable to the extent necessary for the purposes of the arbitration and the execution and enforcement of any award.

Draft

ANNEXES

Annex []: Expropriation

The Parties confirm their shared understanding that:

1. Expropriation may be either direct or indirect:

a) direct expropriation occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure.

b) indirect expropriation occurs where a measure or series of measures by a Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.

2. The determination of whether a measure or series of measures by a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:

- a) the economic impact of the measure or series of measures;
- b) the duration of the measure or series of measures by a Party or of its effects.
- c) the extent to which the government action interferes with the possibility to use, enjoy or dispose of the property;
- d) the character of the measure or series of measures, in particular in light of the Party's right to regulate the use of property in order to pursue legitimate public policy objectives, such as protecting society, the environment, and public health, ensuring the integrity and stability of the financial system, promoting public security and safety, , and promoting and protecting cultural diversity.

For greater certainty, non-discriminatory measures of general application taken by a Party that are designed to protect legitimate public policy objectives do not constitute indirect expropriation, if they are necessary and proportionate in light of the above mentioned factors and are applied in such a way that they genuinely meet the public policy objectives for which they are designed.

Annex [Y]:

The agreements between Member States of the European Union and US are:

Draft

CHAPTER III CROSS BORDER SUPPLY OF SERVICES

**Article 19
Scope**

1. This Chapter applies to measures of the Parties affecting the cross border supply of all services sectors.
2. The provisions of this Chapter shall not apply to audio-visual services.
3. Notwithstanding paragraph 1, subsidies shall be dealt with by Chapter [X (on competition and state aid)] and the provisions of this chapter shall not apply to subsidies granted by the Parties
4. Government procurement shall be dealt with by Chapter [X (on public procurement).] and nothing in this Section shall be construed to limit the obligations of the Parties under Chapter X on public procurement or to impose any additional obligation with respect to government procurement.

**Article 20
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 in the schedule of specific commitments contained in Annexes (...) (lists of commitments on cross-border supply of services).
2. In sectors where market access commitments are undertaken, the measures which a Party shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in Annexes (...) (lists of commitments on cross-border supply of services), are defined as:
 - (a) limitations on the number of services suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
 - (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
 - (c) limitations on the total number of service operations or on the total quantity of service output expressed in the terms of designated numerical units in the form of quotas or the requirement of an economic needs test.

Draft

Article 21
National Treatment

1. In the sectors where market access commitments are inscribed in Annexes [...] (lists of commitments on cross-border supply of services), and subject to any conditions and qualifications set out therein, each Party shall grant 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 services 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 to require any Party to compensate for inherent competitive disadvantages which result from the foreign character of the relevant services or services suppliers.

Article 22
Schedule of specific commitments

The sectors liberalised by each of the Parties pursuant to this Section and the terms, limitations, conditions and qualifications referred to in Articles 20 (on market access) and 21 (national treatment) are set out in schedule of commitments included in Annexes (...) [lists of commitments on cross-border supply of services].

Article 23
Review

1. With a view to further deepening liberalisation of cross border supply of services, the Parties shall [X] years after the entry into force of this Agreement and at regular intervals thereafter, review the remaining restrictions on the cross-border supply of services, consistent with their commitments in international agreements.
2. In the context of the review referred to in paragraph 1, the Parties shall assess any obstacles to the cross border supply of services that have been encountered. As a result of such review, the [body defined by the agreement] may decide to amend the relevant schedules of specific commitments.

Draft

**CHAPTER IV TEMPORARY PRESENCE OF NATURAL PERSONS FOR
BUSINESS PURPOSES**

**Article 24
Scope and definitions**

1. This Chapter applies to measures of the Parties concerning the entry and temporary stay in their territories of business visitors, intra-corporate-transferees, graduate trainees, business sellers, contractual service suppliers and independent professionals, in accordance with paragraph 2.
2. For the purpose of this Chapter:
 - (a) ‘Business visitors for establishment purposes’ mean natural persons working in a senior position who are responsible for setting up an enterprise. They do not offer or provide services or engage in any other economic activity than required for establishment purposes. They do not receive remuneration from a source located within the host Party.
 - (b) ‘Intra-corporate transferees’ mean natural persons who have been employed by a juridical person or have been partners in it for at least one year and who are temporarily transferred to an enterprise that may be a subsidiary, branch or head company of the juridical person in the territory of the other Party. The natural person concerned must belong to one of the following categories:

Managers: Persons working in a senior position within a juridical person, who primarily direct the management of the enterprise, receiving general supervision or direction principally from the board of directors or from stockholders of the business or their equivalent, including at least:

1. directing the enterprise or a department or sub-division thereof; and
2. supervising and controlling the work of other supervisory, professional or managerial employees; and
3. having the personal authority to recruit and dismiss or to recommend recruitment, dismissal or other personnel-related actions.

Specialists: Persons working within a juridical person who possess specialised knowledge essential to the enterprise’s production, research equipment, techniques, processes, procedures or management. In assessing such knowledge, account shall be taken not only of knowledge specific to the enterprise, but also of whether the person has a high level of qualification referring to a type of work or trade requiring specific technical knowledge, including membership of an accredited profession.

- (c) ‘Graduate trainees’ mean natural persons who have been employed by a juridical person of one Party or its branch for at least one year, possess a university degree and are temporarily transferred to a subsidiary, branch or representative office of the

Draft

juridical person in the territory of the other Party, for career development purposes or to obtain training in business techniques or methods¹¹.

- (d) 'Business sellers' mean natural persons who are representatives of a services or goods¹² supplier of one 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. 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.
- (e) 'Contractual services suppliers' mean natural persons employed by a juridical person of one Party which itself is not an agency for placement and supply services of personnel nor acting through such an agency, has not established in the territory of the other Party and has concluded a bona fide contract to supply services with a final consumer in the latter Party, requiring the presence on a temporary basis of its employees in that Party, in order to fulfil the contract to provide services¹³.
- (f) 'Independent professionals' mean natural persons engaged in the supply of a service and established as self-employed in the territory of a Party who have not established in the territory of the other Party and who have concluded a bona fide contract (other than through an agency for placement and supply services of personnel) to supply services with a final consumer in the latter Party, requiring their presence on a temporary basis in that Party in order to fulfil the contract to provide services¹⁴.
- (g) 'Qualifications' mean 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.

Article 25

Intra-corporate transferees, business visitors and graduate trainees

1. For every sector committed in accordance with Chapter II Section 1 [liberalisation of investment] of this Title, each Party shall allow investors of the other Party to employ in their enterprise natural persons of that other Party provided that such employees are business visitors, intra corporate-transferees or graduate trainees as defined in Article (X). The entry and temporary stay of key personnel and graduate trainees shall be for a period of up to three years for intra-corporate transferees, ninety days in any twelve

¹¹ 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 AT, CZ, DE, FR, ES and HU, training must be linked to the university degree which has been obtained.

¹² UK: The category of business sellers is only recognised for services sellers.

¹³ The service contract referred to under d) and e) shall comply with the requirements of the laws, and regulations and requirements of the Party where the contract is executed.

¹⁴ The service contract referred to under d) and e) shall comply with the requirements of the laws, and regulations and requirements of the Party where the contract is executed.

Draft

month period for business visitors for establishment purposes, and one year for graduate trainees.

2. For every sector committed in accordance with Chapter II Section 1 [liberalisation of investment] of this Title, the measures which a Party shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in Annex (...) (reservations on business visitors, intra-corporate transferees and graduate trainees), are defined as limitations on the total number of natural persons that an investor may employ as business visitors, intra-corporate transferees and graduate trainees in a specific sector in the form of numerical quotas or a requirement of an economic needs test and as discriminatory limitations.

Article 26
Business sellers

For every sector committed in accordance with Chapters II Section 1 [liberalisation of investment] or III [cross-border] of this Title and subject to any reservations listed in Annexes [...] and [...] [list of commitments on liberalisation of investments and list of commitments on cross-border supply of services], each Party shall allow the entry and temporary stay of business sellers for a period of up to ninety days in any twelve month period.

Article 27
Contractual Service Suppliers

1. The Parties reaffirm their respective obligations arising from their commitments under the General Agreement on Trade in Services with respect to the entry and temporary stay of contractual services suppliers.
2. For every sector listed below, each Party shall allow the supply of services into their territory by contractual services suppliers of the other Party, subject to the conditions specified in paragraph 3 and in Annex XXX on reservations on contractual service suppliers and independent professionals.

[list of activities to be inserted]

3. The commitments undertaken by the Parties are subject to the following conditions:
 - (a) The natural persons must 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 twelve 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 the year immediately preceding the date of submission of an application for entry into the other Party. In addition, the natural persons must possess, at the date of

Draft

submission of an application for entry into the other Party, at least three years professional experience¹⁶ in the sector of activity which is the subject of the contract.

- (c) The natural persons entering the other Party must possess:
 - (i) a university degree or a qualification demonstrating knowledge of an equivalent level¹⁷ and
 - (ii) professional qualifications where 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 or, in the case of Luxembourg, twenty-five weeks in any twelve month period or for the duration of the contract, whichever is less.
- (f) Access accorded under the provisions of 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.
- (g) The number of persons covered by the service contract shall not be larger than necessary to fulfil the contract, as it may be requested by the laws, regulations or other legal requirements of the Party where the service is supplied.
- (h) Other discriminatory limitations, including on the number of natural persons in the form of economic needs tests, specified in Annex XXX on reservations on contractual service suppliers and independent professionals.

Article 28
Independent Professionals

1. For every sector listed below, the Parties shall allow the supply of services into their territory by independent professionals of the other Party, subject to the conditions specified in paragraph 3 and in Annex XXX on reservations on contractual service suppliers and independent professionals.

¹⁶ Obtained after having reached the age of majority.

¹⁷ Where the degree or qualification has not been obtained in the Party where the service is supplied, that Party may evaluate whether this is equivalent to a university degree required in its territory.

Draft

[list of activities to be inserted]

2. The commitments undertaken by the Parties are subject to the following conditions:
- (a) The natural persons must be engaged in the supply of a service on a temporary basis as self-employed persons established in the other Party and must have obtained a service contract for a period not exceeding twelve months
 - (b) The natural persons entering the other Party must possess, at the date of submission of an application for entry into the other Party, at least six years professional experience in the sector of activity which is the subject of the contract.
 - (c) The natural persons entering the other Party must possess:
 - (i) a university degree or a qualification demonstrating knowledge of an equivalent level¹⁸ and
 - (ii) professional qualifications where this is required to exercise an activity pursuant to the law, regulations or other legal requirements of the Party where the service is supplied.
 - (d) The entry and temporary stay of natural persons within the Party concerned shall be for a cumulative period of not more than six months or, in the case of Luxembourg, twenty-five weeks in any twelve month period or for the duration of the contract, whatever is less.
 - (e) Access accorded under the provisions of this Article relates only to the service activity which is the subject of the contract; it does not confer entitlement to exercise the professional title of the Party where the service is provided.
 - (f) Other discriminatory limitations, including on the number of natural persons in the form of economic needs tests, which are specified in Annex XXX on reservations on contractual service suppliers and independent professionals.

¹⁸ Where the degree or qualification has not been obtained in the Party where the service is supplied, that Party may evaluate whether this is equivalent to a university degree required in its territory.

Draft

CHAPTER V REGULATORY FRAMEWORK

SECTION I DOMESTIC REGULATION

**Article 29
Scope and Definitions**

1. The following disciplines apply to measures by the Parties relating to licencing requirements and procedures, qualification requirements and procedures that affect:

- (a) cross-border supply of services;
- (b) establishment;
- (c) temporary stay in their territory of categories of natural persons as defined in Article 1.

2. For the establishment and the cross-border supply of services, these disciplines shall only apply to sectors for which the Party has undertaken specific commitments and to the extent that these specific commitments apply. For the temporary stay of natural persons, these disciplines shall not apply to sectors to the extent that a reservation is listed in accordance with Annexes (X) and (X).

3. These disciplines do not apply to measures to the extent that they constitute limitations subject to scheduling.

4. *These disciplines shall not apply to the following economic activities:*

[Note: sectoral exclusions, in addition to those exclusions already provided by paragraph 2 (i.e. uncommitted sectors), are to be included here depending on (i) the specific commitments to be made; and (ii) the specific sectoral or regulatory disciplines that are agreed upon]

5. For the purpose of this Section,

- (a) 'Licencing requirements' are 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 defined in paragraph 1 (a) to (c).
- (b) 'Licencing procedures' are administrative or procedural rules that a natural or a juridical person, seeking authorisation to carry out the activities as defined in paragraph 1 (a) to (c), including the amendment or renewal of a licence, must adhere to in order to demonstrate compliance with licencing requirements.

Draft

- (c) 'Qualification requirements' are substantive requirements relating to the competence of a natural person to supply a service, and which are required to be demonstrated for the purpose of obtaining authorisation to supply a service.
- (d) 'Qualification procedures' are administrative or procedural rules that a natural person must adhere to in order to demonstrate compliance with qualification requirements, for the purpose of obtaining authorisation to supply a service.
- (e) 'Competent authority' is any central, regional or local government and 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 in an economic activity other than services.

Article 30
Conditions for licencing and qualification

1. Each Party shall ensure that measures relating to licencing requirements and procedures, qualification requirements and procedures are based on criteria which preclude the competent authorities from exercising their power of assessment in an arbitrary manner.
2. The criteria referred to in paragraph 1 shall be:
 - (a) proportionate to a legitimate public policy objective;
 - (b) clear and unambiguous;
 - (c) objective;
 - (d) pre-established;
 - (e) made public in advance;
 - (f) transparent and accessible.
3. An authorisation or a licence shall be granted as soon as it is established, in the light of an appropriate examination, that the conditions for obtaining an authorisation or licence have been met.
4. Each Party shall maintain or institute judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected entrepreneur 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 agency entrusted with the administrative decision concerned, each Party shall ensure that the procedures in fact provide for an objective and impartial review.

Draft

5. Where the number of licences available for a given activity is limited because of the scarcity of available natural resources or technical capacity, each Party shall apply a selection procedure to potential candidates which provides full guarantees of impartiality and transparency, including, in particular, adequate publicity about the launch, conduct and completion of the procedure.
6. Subject to the provisions specified by this Article, in establishing the rules for the selection procedure, each Party may take into account legitimate public policy objectives, including considerations of health, safety, the protection of the environment and the preservation of cultural heritage.

Article 31

Licencing and qualification procedures

1. Licencing and qualification procedures and formalities shall be clear, made public in advance and be such as to provide the applicants with a guarantee that their application will be dealt with objectively and impartially.
2. Licencing and qualification procedures and formalities shall be as simple as possible and shall not unduly complicate or delay the provision of the service. Any licencing fees¹⁵ which the applicants may incur from their application should be reasonable and proportionate to the cost of the authorisation procedures in question.
3. Each party shall ensure that the procedures used by, and the decisions of, the competent authority in the licencing or authorisation process are impartial with respect to all applicants. The competent authority should reach its decision in an independent manner and not be accountable to any supplier of the services for which the licence or authorisation is required.
4. Where specific time periods for applications exist, an applicant shall be allowed a reasonable period 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.
5. Each Party shall ensure that the processing of an application, including reaching a final decision, is completed within a reasonable timeframe from the submission of a complete application. Each Party shall endeavour to establish the normal timeframe for processing of an application.

¹⁵ Licencing fees do not include payments for auction, tendering or other non-discriminatory means of awarding concessions, or mandated contributions to universal service provision.

Draft

6. The competent authority shall, within a reasonable period of time after receipt of an application which it considers incomplete, inform the applicant, to the extent feasible identify the additional information required to complete the application, and provide the opportunity to correct deficiencies.
7. Authenticated copies should be accepted, where possible, in place of original documents.
8. 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 request, also be informed of the reasons for rejection of the application and of the timeframe for an appeal against the decision.
9. 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.

SECTION II PROVISIONS OF GENERAL APPLICATION

Article 32

Mutual recognition

1. Nothing in this Title shall prevent a Party from requiring that natural persons must possess the necessary qualifications and/or 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 in their respective territories to provide recommendations on mutual recognition to the [body defined in the agreement], for the purpose of the fulfilment, in whole or in part, by investors and service suppliers of the criteria applied by each Party for the authorisation, licensing, operation and certification of investors and service suppliers and, in particular, professional services.
3. On receipt of a recommendation referred to in the preceding paragraph, the [body defined in the agreement] shall, within a reasonable time, review this recommendation with a view to determine whether it is consistent with this Agreement, and on the basis of the information contained, assess notably:
 - the extent to which the standards and criteria applied by each Party for the authorisation, licenses, operation and certification of services providers and investors are converging, and;
 - the potential economic value of a Mutual Recognition Agreement.

Draft

4. Where these requirements are satisfied, the [body defined in the agreement] shall establish the necessary steps to negotiate and thereafter the Parties shall engage into negotiations, through their competent authorities, of a Mutual Recognition Agreement.
5. Any such agreement shall be in conformity with the relevant provisions of the WTO Agreement and, in particular, Article VII of GATS.

Article 33

Transparency and disclosure of confidential information

1. Each Party shall respond promptly to all requests by the other Party for specific information on any of its measures of general application or international agreements which pertain to or affect this Agreement. Each Party shall also establish one or more enquiry points to provide specific information to entrepreneurs and services suppliers of the other Party, upon request, on all such matters. The Parties shall notify each other enquiry points within 3 months after entry into force of this agreement. Enquiry points need not be depositories of laws and regulations.
2. Nothing in this Agreement shall require any Party to provide confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private.

SECTION III COMPUTER SERVICES

Article 34

Understanding on computer services

1. To the extent that trade in computer services is liberalised in accordance with Chapter II, Section 1, Chapter III and IV of this Title, the Parties shall comply with the following paragraphs.
2. CPC¹⁶ 84, the United Nations code used for describing computer and related services, covers the basic functions used to provide all computer and related services: computer programmes defined as the sets of instructions required to make computers work and communicate (including their development and implementation), data processing and storage, and related services, such as consultancy and training services for staff of clients. 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.

¹⁶ 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.

Draft

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; or
 - (b) computer programmes defined as the sets of instructions required to make computers work and communicate (in and of themselves), plus 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 programs; or
 - (c) data processing, data storage, data hosting or database services; or
 - (d) maintenance and repair services for office machinery and equipment, including computers; or,
 - (e) training services for staff of clients, related to computer programmes, computers or computer systems, and not elsewhere classified.
4. Computer and related services enable the provision of other services (e.g. banking) by both electronic and other means. However, there is an important distinction between the enabling service (e.g. web-hosting or application hosting) and the content or core service that is being delivered electronically (e.g. banking). In such cases, the content or core service is not covered by CPC 84.

SECTION IV POSTAL AND COURIER SERVICES

Article 35

Scope and definitions

1. This Section sets out the principles of the regulatory framework for all postal and courier service liberalised in accordance with Chapters II, Section 1, III and IV of this Title.
2. For the purpose of this Section and of Chapters II Section 1, III and IV of this Title.
 - (a) A “licence” means an authorisation, granted to an individual supplier by an independent regulatory authority, which may be required before carrying out activity of supplying a given service.
 - (b) Universal service means the permanent provision of a postal service of specified quality at all points in the territory of a Party at affordable prices for all users.

Draft

- (c) Express delivery services means collection, transport and delivery of postal items at accelerated speed and reliability and may include value added elements such as collection from point of origin, personal delivery to addressee, tracing, possibility of changing the destination and addressee in transit, conformation of receipt.

Article 36

Prevention of anti-competitive practices in the postal and courier sector

Appropriate measures shall be maintained or introduced for the purpose of preventing suppliers who, alone or together, have the ability to affect materially the terms of participation in the relevant markets for postal and courier services as a result of use of their position in the market, from engaging in or continuing anti-competitive practices. These anti-competitive practices shall include in particular:

- a. engaging in anti-competitive cross-subsidization, such as for example using revenues of reserved services to cross-finance prices of services open for competition;
- b. discrimination and lack of transparency, such as for example unjustified differentiation in relation to the special tariffs and/or the associated conditions for services provided to big senders, bulk mailers or consolidators;
- c. unjustified preferential treatment of any service provider and/or services provided, especially in cases where these services are in free competition with services provided by other market operators such as for example express delivery services.

Article 37

Universal service

1. The universal service obligation will not be regarded as anti-competitive *per se*, provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service defined by the Party.
2. Universal service obligation shall be limited and proportional to the actual needs of the users that are not met by the market forces. In particular, the universal service obligation shall not include the express delivery services.

Article 38

Licences

Draft

1. A licence may only be required for services which are within the scope of the universal service.
2. Where a licence is required, the following shall be made 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 licences.
3. The reasons for the denial of a licence shall be made known to the applicant upon request and an appeal procedure through an independent body shall be established at the Party's level. Such a procedure shall be transparent, non-discriminatory, and based on objective criteria.

Article 39
Independence of the regulatory body

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

SECTION V ELECTRONIC COMMUNICATIONS NETWORKS AND SERVICES

Article 40
Scope and definitions

1. This Section sets out principles of the regulatory framework for the provision of electronic communications networks and services, liberalised pursuant to Chapter II Section1, Chapter III and IV of this Title.
2. For the purpose of this Sub-section:
 - (a) 'electronic communications 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;
 - (b) 'electronic communications service' means a service, other than broadcasting¹⁷, which consists wholly or mainly in the conveyance of signals on electronic

¹⁷ Broadcasting is defined as the transmission required for the distribution of TV and radio programme signals to the general public, but does not cover contribution links between operators.

Draft

communications networks. ; Those services exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services;

- (c) 'public electronic communications service' means any electronic communications service that a Party requires, explicitly or in effect, to be offered to the public generally;
- (d) 'public electronic communications network' means an electronic communications network used wholly or mainly for the provision of electronic communications services available to the public which supports the transfer of information between network termination points;
- (e) "public telecommunications transport service" means any telecommunications transport service required, explicitly or in effect, by a Member to be offered to the public generally. Such services may include, inter alia, telegraph, telephone, telex, and data transmission typically involving the real-time transmission of customer-supplied information between two or more points without any end-to-end change in the form or content of the customer's information;
- (f) a 'regulatory authority' in the electronic communications sector means the body or bodies charged by a Party with the regulation of electronic communications mentioned in this sub-section;
- (g) 'essential facilities' mean facilities of a public electronic communications network and service that
 - are exclusively or predominantly provided by a single or limited number of suppliers; and
 - cannot feasibly be economically or technically substituted in order to provide a service;
- (h) 'associated facilities' means those associated services, physical infrastructures and other facilities or elements associated with an electronic communication network and/or service which enable and/or support the provision of services via that network and/or service or have the potential to do so, and include, inter alia, buildings or entries to buildings, building wiring, antennae, towers and other supporting constructions, ducts, conduits, masts, manholes and cabinets;
- (i) a 'major supplier' in the electronic communications sector is a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for electronic communications services as a result of control over essential facilities or the use of its position in the market;
- (j) 'access' means the making available of facilities and/or services to another supplier under defined conditions, for the purpose of providing electronic communication services. It covers inter alia: access to network elements and associated facilities,

Draft

which may involve the connection of equipment, by fixed or non-fixed means (in particular this includes access to the local loop and to facilities and services necessary to provide services over the local loop); access to physical infrastructure including buildings, ducts and masts; access to relevant software systems including operational support systems; access to information systems or databases for pre-ordering, provisioning, ordering, maintaining and repair requests, and billing; access to number translation or systems offering equivalent functionality; access to fixed and mobile networks, in particular for roaming and access to virtual network services;

- (k) 'interconnection' means the physical and logical linking of public communications networks used by the same or a different suppliers in order to allow the users of one supplier to communicate with users of the same or another supplier or to access services provided by another supplier. Services may be provided by the parties involved or other parties who have access to the network;
- (l) 'universal service' means the minimum set of services of specified quality that must be made available to all users in the territory of a Party regardless of their geographical location and at an affordable price; its scope and implementation are decided by each Party;
- (m) 'number portability' means the ability of all subscribers of public electronic communications services who so request to retain, at the same location, the same telephone numbers without impairment of quality, reliability or convenience when switching between the same category of suppliers of public electronic communications services.

Article 41
Regulatory authority

1. Regulatory authorities for electronic communications networks and services shall be legally distinct and functionally independent from any supplier of electronic communications networks, electronic communications services or electronic communications equipment.
2. A party that retains ownership or control of providers of electronic communication networks and/or services shall ensure effective structural separation of the regulatory function from activities associated with ownership or control. The regulatory authority shall act independently and shall not seek or take instructions from any other body in relation to the exercise of these tasks assigned to it under national law.
3. The regulatory authority shall be sufficiently empowered to regulate the sector, and have adequate financial and human resources to carry out the task assigned to it. Only appeal bodies set up in accordance with paragraph 7 of this Article shall have the power to suspend or overturn decisions by the regulatory authority.

Draft

The tasks to be undertaken by a regulatory authority shall be made public in an easily accessible and clear form, in particular where those tasks are assigned to more than one body. Parties shall ensure that regulatory authorities have separate annual budgets. The budgets shall be made public.

4. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants.
5. The powers of the regulatory authorities shall be exercised transparently and in a timely manner.
6. Regulatory authorities shall have the power to ensure that suppliers of electronic communications 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. Information requested shall be proportionate to the performance of the regulatory authorities' tasks and treated in accordance with the requirements of confidentiality.
7. 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 parties involved. This body, which may be a court, shall have the appropriate expertise to enable it 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 national law.
8. Parties shall ensure that the head of a regulatory authority, or where applicable, members of the collegiate body fulfilling that function within a regulatory body or their replacements may be dismissed only if they no longer fulfil the conditions required for the performance of their duties which are laid down in advance in national law. The decision to dismiss the head of the regulatory authority concerned, or where applicable members of the collegiate body fulfilling that function shall be made public at the time of dismissal. The dismissed head of the regulatory authority, or where applicable, members of the collegiate body fulfilling that function shall receive a statement of reasons and shall have the right to request its publication, where this would not otherwise take place, in which case it shall be published.

Article 42

Authorisation to provide electronic communication networks and services

1. Provision of electronic communications networks and/or services shall be authorised, wherever possible, upon simple notification. In this case the service supplier concerned shall not be required to obtain an explicit decision or any other administrative act by the regulatory authority before exercising the rights stemming from the authorisation. The rights and obligations resulting from such authorisation

Draft

shall be made publicly available in an easily accessible form. Obligations should be proportionate to the service in question.

2. Where necessary, a license for the right of use for radio frequencies and numbers can be required in order to:
 - a) avoid harmful interference;
 - b) ensure technical quality of service;
 - c) safeguard efficient use of spectrum; or
 - d) fulfil other objectives of general interest.

The terms and conditions for such licences shall be made publicly available.

3. Where a licence is required:
 - (a) all the licensing criteria and a reasonable period of time normally required to reach a decision concerning an application for a licence shall be made publicly available;
 - (b) the reasons for the denial of a licence shall be made known in writing to the applicant upon request;
 - (c) the applicant for a licence shall be able to seek recourse before an appeal body in the case where a licence has been denied.
4. Any administrative costs shall be imposed on suppliers in an objective, transparent, proportionate and cost-minimising manner. Any administrative charges imposed by any Party on suppliers providing a service or a network under an authorisation referred to in paragraph 1 or a license under paragraph 2 shall in total, cover only the administrative costs normally incurred in the management, control and enforcement of the applicable authorisation and licences. These administrative charges may include costs for international cooperation, harmonisation and standardisation, market analysis, monitoring compliance and other market control, as well as regulatory work involving preparation and enforcement of legislation and administrative decisions, such as decisions on access and interconnection.¹⁸

[To be reviewed in conjunction with the sub-section on domestic regulation]

Article 43
Scarce Resources

¹⁸ Licensing fees do not include payments for auction, tendering or other non-discriminatory means of awarding concessions, or mandated contributions to universal service provision

Draft

1. The allocation and granting of rights of use of scarce resources, including radio spectrum, numbers and rights of way, shall be carried out in an open, objective, timely, transparent, non-discriminatory and proportionate manner. Procedures shall be based on objective, transparent, non-discriminatory and proportionate criteria.
2. The current state of allocated frequency bands shall be made publicly available, but detailed identification of radio spectrum allocated for specific government uses is not required.
3. A Party's measures allocating and assigning spectrum and managing frequency are not measures that are per se inconsistent with Article [...] (market access). Accordingly, each Party retains the right to establish and apply spectrum and frequency management measures that may have the effect of limiting the number of suppliers of electronic communications services, provided that it does so in a manner consistent with this Agreement. This includes the ability to allocate frequency bands taking into account current and future needs and spectrum availability.

Article 44**Access and Interconnection**

1. Access and interconnection should in principle be agreed on the basis of commercial negotiation between the suppliers concerned.
2. The Parties shall ensure that any suppliers of electronic communications services shall have a right and when requested by another supplier an obligation to negotiate interconnection with each other for the purpose of providing publicly available electronic communications networks and services. The Parties shall not maintain any legal or administrative measures which oblige suppliers granting access or interconnection to offer different terms and conditions to different suppliers for equivalent services or impose obligations that are not related to the services provided.
3. The Parties shall ensure that suppliers that acquire information from another supplier in the process of negotiating access or interconnection arrangements use that information solely for the purpose for which it was supplied and respect at all times the confidentiality of information transmitted or stored.
4. Each Party shall ensure that a major supplier in its territory grants access to its essential facilities, which may include, inter alia, network elements, associated facilities and ancillary services, to suppliers of electronic communications services on reasonable and non-discriminatory¹⁹ terms and conditions.

¹⁹ For the purpose of this sub-section, non-discrimination is understood to refer to national treatment as defined in Article XX [national treatment], as well as to reflect sector-specific usage of the term to mean "terms and conditions no less favourable than those accorded to any other user of like public electronic communication networks or services under like circumstances".

Draft

5. For public telecommunications transport services, interconnection with a major supplier shall be ensured 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, quality and maintenance) and rates, and of a quality no less favourable than that provided for the own like services of such major supplier, or for like services of non-affiliated suppliers, or for its subsidiaries or other affiliates;
 - (b) in a timely fashion, on terms, conditions (including in relation to technical standards, specifications, quality and maintenance) 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.

The procedures applicable for interconnection to a major supplier shall be made publicly available.

Major suppliers shall make publicly available either their interconnection agreements or their reference interconnection offers where it is appropriate.

Article 45
Competitive safeguards on major suppliers

The Parties shall introduce or maintain appropriate measures for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices. These anti-competitive practices shall 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 46
Universal service

1. Each Party has the right to define the kind of universal service obligations it wishes to maintain.

Draft

2. Such obligations will not be regarded per se as anti-competitive, provided they are administered in a proportionate, transparent, objective and non-discriminatory way. The administration of such obligations shall also be neutral with respect to competition and be not more burdensome than necessary for the kind of universal service defined by the Party.
3. All suppliers of electronic communications networks and/or services should be eligible to provide universal service. The designation of universal service suppliers shall be made through an efficient, transparent and non-discriminatory mechanism. Where necessary, Parties shall assess whether the provision of universal service represents an unfair burden on supplier(s) designated to provide universal service. Where justified on the basis of such calculation, and taking into account the market benefit, if any, which accrues to a supplier that offers universal service, regulatory authorities shall determine whether a mechanism is required to compensate the supplier(s) concerned or to share the net cost of universal service obligations.

Article 47
Number Portability

Each Party shall ensure that suppliers of public electronic communications services provide number portability on reasonable terms and conditions.

Article 48
Confidentiality of information

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

Article 49
Resolution of electronic communications disputes

1. In the event of a dispute arising between suppliers of electronic communications networks or services in connection with rights and obligations that arise from this subsection, 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 four months, except in exceptional circumstances.
2. When such a dispute concerns the cross-border provision of services, the regulatory authorities concerned shall co-ordinate their efforts in order to bring about a resolution of the dispute.

Draft

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 this decision, according to Article X.2, paragraph 7 of this sub-section.
4. The procedure referred to in paragraphs 1, 2 and 3 of this Article shall not preclude either party concerned from bringing an action before the courts.

Article 50: Foreign shareholding

With regard to the provision of electronic communication services and networks through commercial presence, no Party shall impose joint venture requirements or limit the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

SECTION VI FINANCIAL SERVICES

**Article 51
Scope and definitions**

1. This Section sets out the principles of the regulatory framework for all financial services liberalised pursuant to Chapters II Section 1, III and IV of this Title.
2. For the purpose of this Chapter and of Chapters II Section 1, III and IV of this Title
 - (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:
 - A. Insurance and insurance-related services
 1. direct insurance (including co-insurance):
 - (a) life;
 - (b) non-life;
 2. reinsurance and retrocession;
 3. insurance inter-mediation, such as brokerage and agency; and

Draft

4. services auxiliary to insurance, such as consultancy, actuarial, risk assessment and claim settlement services.

B. Banking and other financial services (excluding insurance):

1. acceptance of deposits and other repayable funds from the public;
2. lending of all types, including consumer credit, mortgage credit, factoring and financing of commercial transaction;
3. financial leasing;
4. all payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts;
5. guarantees and commitments;
6. trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:
 - (a) money market instruments (including cheques, bills, certificates of deposits);
 - (b) foreign exchange;
 - (c) derivative products including, but not limited to, futures and options;
 - (d) exchange rate and interest rate instruments, including products such as swaps, forward rate agreements;
 - (e) transferable securities;
 - (f) other negotiable instruments and financial assets, including bullion;
7. participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues;
8. money broking;
9. asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services;
10. settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments;

Draft

11. provision and transfer of financial information, and financial data processing and related software;
 12. advisory, intermediation and other auxiliary financial services on all the activities listed in subparagraphs (1) through (11), 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. The term 'financial service supplier' does not include a public entity.
- (c) 'public entity' means:
1. 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
 2. a private entity, performing functions normally performed by a central bank or monetary authority, when exercising those functions.
- (d) 'new financial service' means a service of a financial nature, including services related to existing and new products or the manner in which a product is delivered, that 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.

Article 52
Prudential carve-out

1. Each Party may adopt or maintain 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;
 - (b) ensuring the integrity and stability of a Party's financial system.
2. These measures shall not be more burdensome than necessary to achieve their aim.
3. Nothing in this Agreement shall be construed to require 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.

Draft

Article 53
Regulatory cooperation

[to be developed]

Article 54
Equivalence/mutual recognition

[to be developed]

Article 55
New financial services

Each Party shall permit a financial service supplier of the other Party to provide any new financial service. A Party may determine the juridical 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 56
Data processing

1. Each Party shall permit a financial service supplier 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 supplier.
2. Each Party shall adopt appropriate safeguards for the protection of privacy and fundamental rights, and freedom of individuals, in particular with regard to the transfer of personal data.

Article 57
Specific exceptions

1. Nothing in this Title shall be construed to prevent 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 regulation, by financial service suppliers in competition with public entities or private institutions.
2. Nothing in this Agreement applies to activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies.

Draft

3. Nothing in this Title shall be construed to prevent 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.
4. The provisions of this article shall not be construed as limiting the rights of investors and investments under Chapter II Section 2 [Investment Protection] of this Title.

Article 58
Self regulatory organisations

When a Party requires membership or participation in, or access to, any self-regulatory body, securities or futures exchange or market, clearing agency, or any other organization or association, in order for financial service suppliers of the other Party to supply financial services on an equal basis with financial service suppliers of the Party, or when the Party provides directly or indirectly such entities, privileges or advantages in supplying financial services, the Party shall ensure observance of the obligations of Articles X (National Treatment for investments Z (National Treatment for cross border trade).

Article 59
Clearing and payment systems

Under terms and conditions that accord 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 paragraph is not intended to confer access to the Party's lender of last resort facilities.

SECTION VII INTERNATIONAL MARITIME TRANSPORT SERVICES

Article 61
Scope, definitions and principles

1. This Section sets out the principles regarding the liberalisation of international maritime transport services pursuant to Chapters II Section 1, III and IV of this Title.
2. Definitions

Draft

For the purpose of this Section and Chapters II Section 1, III and IV of this Title:

- (a) 'international maritime transport services' means the transport of passengers and/or cargo by sea-going vessels between a port of the US and a port of the European Union. This includes the direct contracting with providers of other transport services, with a view to cover door-to-door or multimodal transport operations under a single transport document, but not the right to provide such other transport services.
- (b) 'door-to-door or 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.
- (c) 'international cargo' means cargo transported between a port of one Party and a port of another Party or of a non-Party, or between a port of one European Union Member State and a port of another European Union Member State.
- (d) 'maritime auxiliary services' means maritime cargo handling services, customs clearance services, container station and depot services, maritime agency services, and maritime freight forwarding services.
- (e) '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:
- the loading/discharging of cargo to/from a ship;
 - the lashing/unlashing of cargo;
 - the reception/delivery and safekeeping of cargoes before shipment or after discharge;
- (f) 'customs clearance services' (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;
- (g) 'container station and depot services' means activities consisting in storing containers, whether in port areas or inland, with a view to their stuffing/stripping, repairing and making them available for shipments;
- (h) 'maritime agency services' means activities consisting in representing, within a given geographic area, as an agent the business interests of one or more shipping lines or shipping companies, for the following purposes:
- marketing and sales of maritime transport and related services, from quotation to invoicing, and issuance of bills of lading on behalf of the companies, acquisition and resale of the necessary related services, preparation of documentation, and provision of business information;
 - acting on behalf of the companies organising the call of the ship or taking over cargoes when required

Draft

- (i) '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.
- (j) 'feeder services' means the pre- and onward transportation by sea, between ports located in a Party, of international cargo, notably containerised, en route to a destination outside the territory of that Party.

3. Obligations

In view of the existing levels of liberalisation between the Parties in international maritime transport:

- (a) the Parties shall apply effectively 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, the use of infrastructure and services of ports, and the use of maritime auxiliary services, as well as related fees and charges, customs facilities and the assignment of berths and facilities for loading and unloading.

In applying these principles, the parties shall:

- (i) 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
- (ii) upon the entry into force of this Agreement, abolish and abstain from introducing any unilateral measures and 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.
- (c) Each Party shall permit international maritime service suppliers of the other Party to have an enterprise its territory under conditions of establishment and operation no less favourable than those accorded to its own service suppliers.
- (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,

Draft

navigation aids, shore-based operational services essential to ship operations, including communications, water and electrical supplies, emergency repair facilities, anchorage, berth and berthing services.

- (e) Each Party shall permit the international maritime transport service suppliers of the other party to re-position owned/leased empty containers, not being carried as cargo against payment, between ports of the US or between ports of a Member State of the European Union.
- (f) Each Party, subject to the authorisation of the competent authority where applicable, shall permit international maritime transport service suppliers of the other party to provide feeder services between their national ports.

[SECTION VIII: AIR TRANSPORT SERVICES

This Section sets out the principles regarding the liberalisation of air transport services pursuant to Chapters II Section 1, and Chapters III and IV of this Title.

This Sections deals with conditions of mutual market access and regulatory issues in air transport which are not dealt with by the Air Transport Agreement between the European Union and its Member States and the United States of America, and its amendments.

Definitions: list of the items

Obligations: list of the obligations]

CHAPTER VI ELECTRONIC COMMERCE

Article 62

Objective and Principles

1. The Parties, recognising that electronic commerce increases trade opportunities in many sectors, agree to promote the development of electronic commerce between them, in particular by co-operating on the issues raised by electronic commerce under the provisions of this Title.
2. The Parties agree that electronic transmissions shall be considered as the provision of services, within the meaning of Chapter III (cross-border supply of services), which cannot be subject to customs duties.

Article 63

Regulatory aspects of e-commerce

1. The parties shall maintain a dialogue on regulatory issues raised by electronic commerce, which shall inter alia address the following issues:

Draft

- the recognition of certificates of electronic signatures issued to the public and the facilitation of cross-border certification services,
 - the liability of intermediary service providers with respect to the transmission, or storage of information,
 - the treatment of unsolicited electronic commercial communications,
 - the protection of consumers in the ambit of electronic commerce,
 - any other issue relevant for the development of electronic commerce.
2. Such cooperation can take the form of exchange of information on the Parties' respective legislation on these issues as well as on the implementation of such legislation.

CHAPTER VII EXCEPTIONS

Article 64 General exceptions

- 1 [Placeholder: paragraph defining the scope of application of this article]
2. 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 cross-border supply of services, nothing in this Title shall be construed to prevent 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 Title including those relating to:

Draft

- (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;
 - (iii) safety;
- (f) inconsistent with Articles 4 and 22 (on 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, entrepreneurs or services suppliers of the other Party²⁴.
3. The provisions of this Title and of Annexes (XYZ) (lists of commitments on cross-border supply of services) shall 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.

NOTE:

Articles on *Balance of Payments, Taxation, Security Exceptions* will be inserted in the general/horizontal part of the Agreement and will apply to this Title.

²⁴

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; or
- (ii) apply to non-residents in order to ensure the imposition or collection of taxes in the Party's territory; or
- (iii) apply to non-residents or residents in order to prevent the avoidance or evasion of taxes, including compliance measures; or
- (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; or
- (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 paragraph (f) of this provision and in this footnote are determined according to tax definitions and concepts, or equivalent or similar definitions and concepts, under the domestic law of the Party taking the measure.

LIMITED

Brussels, [] July 2013

Re: TTIP – Negotiations on Investor-State Dispute Settlement

The inclusion of a system of investor- state dispute settlement, along with the provisions on investment protection, will be subject to a satisfactory solution meeting the EU interests, concerning the EU's objectives on investment protection and investor-state dispute settlement and the overall balance of the negotiations. Subject to such a satisfactory outcome, investor-state dispute settlement should be effective and reflect the state of the art. Such a system must carefully balance the interests of investors and the public policy objectives of the respondent.

The system of investor-state dispute settlement should have the following features:

- 1) it should only apply to claims in respect of violations of the agreement concerning post-establishment treatment. To be specific, it will not apply to market access commitments in the area of investment;
- 2) appropriate mechanisms should be in place which would encourage amicable settlement of investor-state disputes;
- 3) it should only be possible to initiate investor-state dispute settlement within a certain period of time of the occurrence of the events giving rise to the claim.;
- 4) an investor which requests consultations, but which does not move to arbitration within a set period of time shall be deemed to have withdrawn its claims;
- 5) mediation shall be encouraged, and shall, in particular once started, suspend relevant time periods;
- 6) arbitration should be possible under a) the ICSID Convention, b) the ICSID Additional Facility, c) UNCITRAL Arbitration rules and d) any other set of rules when agreed by the disputing parties;
- 7) in addition to the investor in the home country, the foreign-owned locally-established company should have access to investor-state dispute settlement (Article 25(2)(b) ICSID Convention);
- 8) before submitting a claim against the EU, or a Member State, the investor must request a determination as to whether the EU or the Member State will act as respondent in any particular case;
- 9) provisions will be included which will prevent double or excess compensation for the investor and multiple claims against the respondent State;
- 10) in the absence of an agreement between disputing parties, the arbitrators shall be drawn from a roster established by the Parties. The arbitrators will need to have a number of specific qualifications, and must adhere to a Code of Conduct to be established under the agreement;

LIMITED

- 11) the agreement will specify the relevant applicable law and rules of interpretation. Provision will be made for the possibility of the Parties to adopt binding interpretations of the agreement;
- 12) the agreement will include provisions dealing with manifestly unjustified claims;
- 13) disputes under the agreement will be subject to a high standard of transparency, subject only to protection of genuinely confidential information (i.e. documents will be publicly available, hearings will be open) and amicus curiae will be able to make submissions. The other Party to the Agreement will also be able to file submissions. The applicable rules will be those set out in the UNCITRAL Arbitration Rules on Transparency (expected to be adopted in July 2013);
- 14) provisions will be included which address the form of the final award to be adopted by arbitral tribunals;
- 15) the agreement will include provisions setting a limit to the remuneration of arbitrators and establishing that the unsuccessful party shall normally bear the costs of the dispute.
- 16) provisions will be included addressing the role of the Parties to the agreement, in particular, the right to make submissions in a dispute and to allow state-to-state dispute settlement as concerns measures having a general effect;
- 17) the agreement will provide for consolidation of claims where there are questions of law or fact in common;
- 18) the Parties will explore options to permit that awards under this agreement would be subject to appeals on questions of law;
- 19) whether and the extent to which specific consideration should be given to the financial services sector as concerns prudential measures in the context of investor-state dispute settlement shall be subject to further assessment.

* * *