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ANNEX 8-D

TELECOMMUNICATIONS SERVICES

ARTICLE 8-D.1

Scope

1. This Annex applies to measures by a Party affecting trade in telecommunications services.
2. For greater certainty, measures by a Party affecting trade in telecommunications services are subject to the rights and obligations contained in Chapter 8 (Trade in Services), including the Parties' respective schedules as referred to in Article 8.8 (Schedule of specific commitments) and Article 8.9 (Non-conforming measures).
3. This Annex applies subject to the rules, regulations and licence conditions, as applicable within the territory of each Party, provided that they are not inconsistent with this Agreement.
4. This Annex does not apply to:
 - (a) a measure affecting services providing, or exercising editorial control over, content transmitted using telecommunications networks or services;

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- (b) a measure relating to broadcast or cable distribution of radio or television programming, except if that measure is to ensure that a cable or broadcast service supplier has continued access to and use of public telecommunications networks and services; or
- (c) a measure relating to the supply of new services.¹

5. In the event of any inconsistency between this Annex and a chapter of this Agreement, this Annex shall prevail to the extent of the inconsistency.

ARTICLE 8-D.2

Definitions

For the purposes of this Annex, the following definitions apply:

- (a) "essential facilities" means facilities of a public telecommunications network or a public telecommunications service that:
 - (i) are exclusively or predominantly provided by a single or limited number of suppliers; and
 - (ii) cannot feasibly be economically or technically substituted in order to provide a service;

¹ For the purposes of this Annex, "new services" for a Party does not include a telecommunications service that:

- (a) is covered under the Provisional Central Product Classification, published by the United Nations in 1991;
- (b) is specified under that Party's schedule of specific commitments set out in Annex 8-H (Schedule of specific commitments of India); or
- (c) is a service which is authorised by it at the date of entry into force of this Agreement.

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- (b) "interconnection" means the linking with suppliers providing public telecommunications networks or telecommunications services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by a supplier;
- (c) "internet access service" means a public telecommunications service that provides access to the internet and thereby connectivity to virtually all end points of the internet, irrespective of the network technology and terminal equipment used;
- (d) "leased circuit" means telecommunications facilities between two or more designated points that are set aside for the dedicated use of, or availability to, a user;
- (e) "major supplier" means a supplier of telecommunications networks or telecommunications services which has the ability to materially affect the terms of participation (having regard to price and supply) in a relevant market for public telecommunications networks or telecommunications services as a result of control over essential facilities or the use of its position in that market;
- (f) "mobile number portability" means the ability of subscribers of public telecommunications services who so request to retain the same telephone numbers when switching between the same category of suppliers of public telecommunications services;
- (g) "public telecommunications network" means the public telecommunications infrastructure which permits telecommunications between and among defined network termination points;
- (h) "public telecommunications service"¹ means any telecommunications service offered to the public generally;

¹ Such service shall be provided by an authorised or licensed operator of a Party.

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- (i) "reference interconnection offer" means an interconnection offer by a major supplier that is made publicly available, so that any supplier of public telecommunications services that is willing to accept it may obtain interconnection with the major supplier on that basis;
- (j) "subscriber" means any natural or juridical person which is party to a contract with a supplier of public telecommunications services for the supply of such services;
- (k) "telecommunications" means the transmission and reception of signals by any electromagnetic means;
- (l) "telecommunications network" means transmission systems and, if applicable, switching or routing equipment and other resources, including network elements that are not active, which permit the transmission and reception of signals by wire, radio, optical, or other electromagnetic means;
- (m) "telecommunications dispute resolution authority" means the body made responsible by a Party for the resolution of disputes concerning telecommunications¹;
- (n) "telecommunications regulatory authority" means the body made responsible by a Party for the regulation of telecommunications; and
- (p) "users" means service consumers and service suppliers.

¹ For greater certainty, this body may be a Party's telecommunications regulatory authority.

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ARTICLE 8-D.3

Telecommunications regulatory authority and telecommunications dispute resolution authority

1. Each Party shall ensure that its telecommunications regulatory authority and telecommunications dispute resolution authority are separate from, and not accountable to, any supplier of public telecommunications networks or services.
2. Each Party shall ensure that the procedures and regulatory decisions of its telecommunications regulatory authority and telecommunications dispute resolution authority related to provisions contained in this Annex are impartial with respect to all market participants.
3. Each Party shall grant its telecommunications regulatory authority sufficient empowerment to regulate the sector. Each Party shall ensure that the tasks to be undertaken by its telecommunications regulatory authority are made public in an easily accessible and clear form, in particular if those tasks are assigned to more than one body.
4. Each Party shall grant its telecommunications regulatory authority the power to ensure that suppliers of telecommunications networks or telecommunications services provide it, promptly upon request, with all the information, including financial information, which is necessary to enable the telecommunications regulatory authority to carry out the tasks assigned to it by each Party's law to enforce the obligations set out in this Annex.

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5. Each Party shall ensure that its telecommunications regulatory authority does not hold a financial interest or maintain an operating or management role in any supplier of public telecommunications networks or services.

6. Each Party shall endeavour to ensure that suppliers of public telecommunications networks or services are provided with adequate advance notice of, and opportunity to comment on, a regulatory decision of general application that its telecommunications regulatory authority proposes.

ARTICLE 8-D.4

License or authorisation to provide telecommunications networks or services

1. If a licence is required for the supply of a public telecommunications network or service, a Party shall make publicly available:

- (a) all the licensing criteria and procedures that it applies; and
- (b) the terms and conditions of individual licences and the period of time normally required to obtain a decision concerning an application for a licence. Each Party shall endeavour to ensure that the decision is taken within the stated period of time.

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2. Each Party shall ensure that any licensing criteria or applicable procedure, as well as any obligation or condition imposed on or associated with a licence, is objective, transparent, non-discriminatory, is related to the telecommunications network or service provided, and is not more burdensome than necessary for the telecommunications network or service provided.
3. Each Party shall ensure that the reasons for the denial of a licence or of an authorisation are made known to the applicant in writing, upon their request.

ARTICLE 8-D.5

Interconnection

Each Party shall ensure that a supplier of public telecommunications networks or services in its territory:

- (a) on request of a supplier of public telecommunications networks or services of the other Party who is within that territory, enters into negotiations for interconnection with that supplier; or
- (b) provides interconnection with a supplier of public telecommunications networks or services of the other Party, to the extent provided for in its laws and regulations.

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ARTICLE 8-D.6

Access to and use of public telecommunications networks and services

1. Each Party shall ensure that service suppliers of the other Party are accorded access to and use of public telecommunications networks and services, on reasonable and non-discriminatory¹ terms and conditions, for the supply of a service which is committed by reason of the Parties' respective schedules as referred to in Article 8.8 (Schedule of specific commitments) and Article 8.9 (Non-conforming measures). This obligation shall be applied, among others, to paragraphs 2 to 6 of this Article.
2. Each Party shall ensure that service suppliers of the other Party have access to and use of any public telecommunications network or service offered within or across the border of the former Party, including private leased circuits, and to this end shall ensure, subject to paragraphs 5 and 6, that such suppliers are permitted to:
 - (a) purchase or lease and attach terminal or other equipment which interfaces with the public telecommunications network and which is necessary to supply a supplier's service to conduct operations;
 - (b) interconnect private leased or owned circuits with public telecommunications networks and services or with circuits leased or owned by another service supplier; and

¹ For the purposes of this Article, the term "non-discriminatory" is understood to refer to most-favoured-nation and national treatment as defined in the Agreement, 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 telecommunications networks or services under like circumstances.

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(c) use the operating protocols of the service supplier's choice in their operations, other than as necessary to ensure the availability of telecommunications networks and services to the public generally.

3. Each Party shall ensure that service suppliers of the other Party may use public telecommunications networks and services for the movement of information within and across borders, including for intra-corporate communications of such service suppliers, and for access to information contained in databases or otherwise stored in machine-readable form in either Party.

4. Notwithstanding paragraph 3, a Party may take such measures as are necessary to ensure the security and confidentiality of messages, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in services.

5. Each Party shall ensure that no condition is imposed on access to and use of public telecommunications networks and services other than as necessary to:

(a) safeguard the public service responsibilities of suppliers of public telecommunications networks or services, in particular their ability to make their networks or services available to the public generally; or

(b) protect the technical integrity of public telecommunications networks or services.

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6. If they satisfy the criteria set out in paragraph 5, conditions for access to and use of public telecommunications networks and services may include:

- (a) restrictions on resale or shared use of public telephone services;
- (b) a requirement to use specified technical interfaces, including interface protocols, for the interconnection with such networks and services;
- (c) requirements, where necessary, for the inter-operability of such services;
- (d) type approval of terminal or other equipment which interfaces with the network and technical requirements relating to the attachment of such equipment to such networks;
- (e) restrictions on interconnection of private leased or owned circuits with such networks or services or with circuits leased or owned by another service supplier; or
- (f) notification, registration and licensing.

ARTICLE 8-D.7

Telecommunications dispute settlement and appeal

1. Each Party shall ensure that suppliers of public telecommunications networks or services of the other Party have timely recourse to its telecommunications regulatory authority or telecommunications dispute resolution authority to resolve disputes.

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2. Each Party shall ensure that any supplier of public telecommunications network or services affected by a determination or decision of the relevant telecommunications regulatory authority has the right to appeal such determination or decision to an independent judicial or administrative authority.

3. Each Party shall ensure that the decision issued by the telecommunications regulatory authority is made available to the public, subject to the requirements of business confidentiality. The telecommunications regulatory authority shall provide to the disputing parties a full statement of the reasons on which the decision is based. The disputing parties shall have the right to appeal that decision, in accordance with paragraph 2.

ARTICLE 8-D.8

Competitive safeguards on major suppliers

1. Each Party shall, through its relevant authorities, adopt or maintain appropriate measures for the purpose of preventing suppliers of public telecommunications networks or telecommunications services who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices.

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2. For the purposes of paragraph 1, anti-competitive practices shall include:
 - (a) engaging in anti-competitive cross-subsidisation;
 - (b) using information obtained from competitors with anti-competitive results; and
 - (c) not making available to suppliers of public telecommunications networks or services on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.

ARTICLE 8-D.9

Interconnection with major suppliers

1. Each Party shall ensure that a major supplier in its territory provides interconnection for the facilities of suppliers of public telecommunications networks or services of the other Party:
 - (a) at any technically and commercially feasible point in the major supplier's network;
 - (b) under non-discriminatory terms and conditions, including as regards rates, technical standards, specifications, and of a quality no less favourable than that provided by the major supplier for its own like services, for like services of non-affiliated suppliers, or for its subsidiaries or other affiliates;
 - (c) in a timely manner and on terms and conditions, including technical standards and specifications, and cost-oriented rates that are transparent and reasonable, having regard to economic feasibility; and

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(d) upon request, at points in addition to the network termination points offered to the majority of users, subject to mutually agreed charges that reflect the cost of construction of necessary additional facilities.

2. Each Party shall ensure that a major supplier in its territory offers access to network elements on an unbundled basis on terms and conditions that are reasonable, non-discriminatory and transparent for the supply of public telecommunications services.

3. A Party may determine the network elements required to be made available in its territory and the suppliers that may obtain those elements, in accordance with its laws and regulations.

4. Each Party shall ensure that a major supplier in its territory provides suppliers of public telecommunications networks or services of the other Party with the opportunity to interconnect their facilities and equipment with those of the major supplier through at least one of the following options:

(a) a reference interconnection offer;

(b) another standard interconnection offer containing the rates, terms and conditions that the major supplier offers generally to suppliers of public telecommunications networks or services; or

(c) the terms and conditions of an interconnection agreement in effect.

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5. In addition to the options provided in paragraph 3, each Party shall ensure that suppliers of public telecommunications networks or services of the other Party have the opportunity to interconnect their facilities and equipment with those of the major supplier through the negotiation of a new interconnection agreement.

6. Each Party shall ensure that the applicable procedures for interconnection with a major supplier in its territory are made publicly available.

7. Each Party shall ensure that major suppliers in its territory make either their interconnection agreements or a reference interconnection offer publicly available.

ARTICLE 8-D.10

Access to essential facilities

1. Subject to paragraph 2, each Party shall ensure that a major supplier in its territory provides to suppliers of public telecommunications networks or services of the other Party access to essential facilities for the purpose of providing public telecommunications networks or services, on a timely basis, on terms and conditions, and at reasonable, non-discriminatory and transparent rates.

2. Each Party shall provide its telecommunications regulatory authority with the power to determine the essential facilities to which a major supplier must provide access.

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3. Each Party shall endeavour to ensure that its telecommunications regulatory authority bases any determination under paragraph 2 on considerations that include achieving effective competition and the long-term interests of end-users.

ARTICLE 8-D.11

Submarine cable systems

Each Party may provide reasonable and non-discriminatory treatment for access to submarine cable systems, including landing facilities, in its territory, if a supplier is authorised to operate a submarine cable facility as a public telecommunications service.

ARTICLE 8-D.12

Allocation and use of scarce resources

1. Each Party shall administer its procedures for the allocation and use of scarce telecommunications resources, including radio frequencies, numbers and rights of way in an open, objective, timely, transparent and non-discriminatory manner.
2. When allocating radio spectrum for public telecommunications services, each Party shall endeavour to rely on an open and transparent process that considers the public interest, including the promotion of competition.

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3. Each Party shall make publicly available the current state of allocated frequency bands but shall not be required to provide detailed identification of frequencies allocated for specific government uses.

4. Each Party retains the right to establish and apply spectrum and frequency management policies which may affect the number of suppliers of public telecommunications networks or services, provided that it does so in a manner consistent with this Agreement. Each Party also retains the right to allocate frequency bands taking into account current and future needs and spectrum availability.

ARTICLE 8-D.13

Universal service

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

2. Each Party shall administer any universal service obligation that it defines and maintains in a transparent, non-discriminatory and competitively neutral manner. Each Party shall endeavour to ensure that its universal service obligation is not more burdensome than necessary for the kind of universal service that it has defined. Universal service obligations defined in accordance with those principles shall not be regarded, in themselves, as anti-competitive.

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ARTICLE 8-D.14

Mobile number portability

Each Party shall ensure that suppliers of public telecommunications networks or services provide mobile number portability for mobile services on a timely basis and on reasonable terms and conditions.

ARTICLE 8-D.15

Transparency

Each Party shall ensure that relevant information on conditions affecting access to and use of public telecommunications networks and services is publicly available, including:

- (a) tariffs and other terms and conditions of service;
- (b) specifications of technical interfaces with such networks and services;
- (c) information on bodies responsible for the preparation and adoption of standards affecting such access and use;
- (d) conditions applying to attachment of terminal or other equipment; and
- (e) notifications, registration or licensing requirements, if any.

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ARTICLE 8-D.16

Open internet access

Each Party shall ensure that, in accordance with its laws and regulations, suppliers of internet access services enable users of those services to:

- (a) access and distribute information and content, and use and provide applications and services of their choice, subject to non-discriminatory, reasonable, transparent and proportionate network management; and
- (b) use devices of their choice, provided that such devices do not harm the security of other devices, the network or services provided over the network.

ARTICLE 8-D.17

Confidentiality of information

Each Party shall ensure, in accordance with its laws and regulations, the confidentiality of the telecommunications and related traffic data transmitted in the use of public telecommunications networks or public telecommunications services, subject to the requirement that measures are not applied in a manner which constitutes a means of arbitrary or unjustifiable discrimination, or a disguised restriction on trade in services.
