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Framing the right to regulate in the public interest in International Economic Law

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ABSTRACT

The thesis assesses the limits and possibilities for the legal framing of the right to regulate in the International Economic Law domain, taking into account the international investment and trade regimes as the main *loci* for manifestations of this legal institution. Initially, the right to regulate in the public interest is placed on the different paradigms of International Economic Law over time. After elucidating the main features of the current paradigm, the methodological approach of the present work is presented. Taking into account the literature on the right to regulate in the public interest at the World Trade Organization (WTO) and at the International Investments Agreements (IIAs), as well as some treaties and cases, the present work sustain that specific factors to international trade law and international investment law may influence the adoption of a standard of review. Moreover, it argues that, where the standard of review is not clear, which one the adjudicator will choose will depend on his perception of the nature of the regime and her role in it. Finally, the work provides a framework for the framing of the right to regulate in international economic law from a pluralist public international law view, contrasting it with standards of review of cases from the WTO Dispute Settlement Body and arbitral tribunals arising from IIAs, where domestic regulatory measures have been adjudged.

Keywords: right to regulate; World Trade Organization; International Investment Agreements; standards of review.

RESUMO

A tese analisa os limites e possibilidades para o enquadramento jurídico do direito a regular no domínio do Direito Internacional Econômico, levando em consideração os regimes de comércio internacional e de investimentos como os principais *loci* para manifestação desta instituição jurídica. Inicialmente, o direito a regular em defesa do interesse público é situado nos diferentes paradigmas de Direito Internacional Econômico ao longo do tempo. Levando em conta a literatura sobre o direito a regular em defesa do interesse público no âmbito da Organização Mundial do Comércio (OMC) e nos Acordos Internacionais de Investimentos (AII), além de tratados e casos, o presente trabalho argumenta que especificidades do direito internacional do comércio e do direito internacional dos investimentos podem influenciar a adoção dos critérios de revisão. Além disso, sustenta-se que onde o critério de revisão não está claro, sua escolha pelo julgador dependerá de sua percepção acerca da natureza do regime, bem como de seu papel nele. Por fim, o trabalho apresenta uma estrutura para enquadramento do direito a regular no âmbito do Direito Internacional Econômico, desde uma visão pluralista do direito internacional público, contrastando-a com os critérios de revisão adotados em casos do Órgão de Solução de Controvérsias da OMC, bem como em tribunais arbitrais, onde a adoção de medidas regulatórias domésticas foi julgada.

Palavras-chave: direito a regular; Organização Mundial do Comércio; Acordos de Investimentos Internacional; critérios de revisão.

RESUMEN

La tesis analiza los límites y posibilidades para el marco jurídico del derecho a regular en el ámbito del Derecho Internacional Económico, teniendo en cuenta los regímenes de comercio internacional y de inversiones como los principales *loci* para la manifestación de esta institución jurídica. Inicialmente, el derecho a regular en defensa del interés público es situado en los diferentes paradigmas de Derecho Internacional Económico a lo largo del tiempo. Teniendo en cuenta la literatura sobre el derecho a regular en defensa del interés público en el marco de la Organización Mundial del Comercio (OMC) y en los Acuerdos Internacionales de Inversiones (AII), además de tratados y casos, el presente trabajo argumenta que factores específicos del derecho internacional del comercio y del derecho internacional de las inversiones pueden influir en la adopción de los criterios de revisión. Además, se sostiene que donde el criterio de revisión no está claro, su elección por el juzgador dependerá de su percepción acerca de la naturaleza del régimen, así como de su papel en él. Por último, el trabajo presenta una estructura para encuadrar el derecho a regular en el ámbito del Derecho Internacional Económico, desde una visión pluralista del derecho internacional público, contrastándola con los criterios de revisión adoptados en casos del Órgano de Solución de Controversias de la OMC, así como en tribunales arbitrales, donde la adopción de medidas regulatorias domésticas fue juzgada.

Palabras clave: derecho a regular; Organización Mundial del Comercio; Acuerdos Internacionales de Inversiones (AII); criterios de revisión.

Table of Contents

INTRODUCTION

The title of my thesis is, perhaps, initially misleading. It points to an act of "framing" of a "right" in international law, as in laying down or finding definite concepts in international treaties. It does concern this act of framing in treaty-making, but also the "framing" done by the international adjudicator when reviewing a domestic regulatory measure, and its predeterminants and consequences.

I first became interested in the emergence of the concept of a "right to regulate in the public interest" due to its elusive nature and its strength in current international discourse. In the last years, it became a banner carried by both developing, developed countries and civil society in the broader context of a "backlash" against globalization. The international economic institutions born in the 20th century were dealt particularly harsh blows, as mega-regional trade agreements and, most particularly, International Investment Agreements (IIAs) and Investor State Dispute Settlement (ISDS), were perceived as limiting the States inherent right to regulate in the public interest.

Although the term "right to regulate" is employed by developed and developing countries alike, this has not always been the case. In the first chapter, I analyze the development of international economic law, more specifically, international trade law and international investment law, focusing on the concept's initial role as a locus of resistance in foreign investment law and subsequent efforts of framing it in international treaties.

In the second chapter, we explore how the concept has been used in the academic literature, and its relation with the fragmentation and criticism directed to international economic law and the different narratives and methodologies aimed at responding to them. Thus, I set the basis of the pluralist approach to public international law employed in this thesis. We conclude that treaty reforms with consideration to the public interest do address the problem of expansive interpretation by adjudicators, but it is the *ex post* framing of the right to regulate that will determine her perceived bias. We thus elaborate on the concept of "standards of review" and its role on the framing of a right to regulate.

Thus, in the third chapter we investigate the specific factors to international trade law and international investment law that may influence the adoption of a standard of review. We argue that, where the standard of review is not clear, which one the adjudicator will choose will depend on his perception of the nature of the regime and its role in it. Finally, we provide our framework for the framing of the right to regulate in international economic law from a pluralist public international law view.

In the fourth chapter, we analyze cases from the World Trade Organization Dispute Settlement Body and arbitral tribunals arising from International Investment Agreements where domestic regulatory measures have been adjudged. We contrast the standards of review adopted by adjudicators with our proposed framework. We conclude that the extent to which the cases follow our framework is varied, and a variety of standards of review have been adopted in, we argue, sometimes inadequate way. In this sense, due to its institutional characteristics, the WTO has adopted more appropriate standards of review, although some unexpected deviation may be of concern.

In the fifth chapter, we assess the reforms undertaken in five so-called “new generation treaties”. We analyze whether and how they address some of the problems we identified in the fourth chapter. We further try to draw some pragmatic conclusions and recommendations.

Conclusion

It is not an easy task to attempt to grasp contested concepts such as the right to regulate in the public interest. Instead of trying to define it, my aim was, first, to provide the context in which it emerged and transformed. Second, to address the relationship of the "right to regulate in the public interest" as enshrined in treaties and as interpreted and applied by international adjudicators. In doing so, I adopted a culturalist approach, and proposed a framework by which any strict review of objective or form has to be avoided. From our limited set of cases, we can see how the assessment of standards of review by international courts is not an easy task. In this sense, the WTO DSB has been diligent in laying down the reasoning behind the method it is applying to interpretation, that is, a textual one. On the other hand, in the IIA cases we analyzed the methods applied were not always clearly defined.

In EC-Asbestos the Panel and AB were confronted with how to evaluate the "regulatory purpose" in relation to a non-discrimination provision under the GATT. The AB provided a textual and contextual justification to conclude that differentiation of products due to "risk to human health" should be evaluated only to the extent that it affects competition in the market. The full extent to which "regulatory purpose" will be taken into consideration under article III:4, however, has been laid down by the AB in EC-Seals. Asked to consider the "legitimate regulatory distinction" when determining the impact of a measure, the Appellate Body affirmed that only whether "competition in the market" was affected was the only relevant factor, as a member's right to regulate is accommodated under Article XX.

With regards to the TBT Agreement, the AB expressed in a *dicta* in EC-Asbestos that, although identically worded, the standard of review under article 2.1 was different from that adopted under art. III:4. In that sense, when reviewing a domestic measure that differentiates between products, if there is a "legitimate regulatory distinction". The justification for such approach was found in the preamble of the TBT, which recognizes a Member's right to regulate.

Although the standards of review adopted under the provisions of non-discrimination are distinct, the AB has provided clear justification in the textual basis for such reasoning. In that sense, the AB stressed that: "If there is a perceived imbalance in the existing rights and obligations under the TBT Agreement and the GATT 1994, the authority rests with the Members of the WTO to address that imbalance."

Finally, with regards to General Exceptions, we see that the AB approach is less clear. In Korea-Beef, the AB adopted a standard of review that could have equaled the proportionality test *stricto sensu* as it considered ***weighing and balancing a series of factors*** which include the **contribution** of the measure, the **importance** of the common interests or values protected by law and the **impact** of the law or regulation on imports or exports.

This could imply the AB exercising a constitutional role if the legitimacy of the domestic measure is examined strictly. On the other hand, if policy objective of the measure is not strictly evaluated and the particular context is taken in consideration, this approach could lean towards a "reasonableness" standard. Because the AB found that Korea did not prove the contribution made by the compliance measure, the AB did not proceed with the balancing of the values at issue. Nevertheless, it seems to have adopted a more nuanced view of the "necessity test", as referenced by Continental v. USA. According to the extract the arbitral tribunal referenced, the test can be articulated as a measure being necessary if it is either indispensable or alternative measures are not reasonably available to achieve the same legitimate policy objective. This test that does not review the policy objective and seems to respect the appellate body's mandate of serving the rule of law.

Finally, with regards to the *caput* analysis at EC-Seal, the AB has adopted a strict rationality test to the analysis of the measure's design. In finding that the IC exception could not be reconciled nor was related to the policy objective of the EU Regime, the AB imposed a standard by which the political context in Europe were not taken in consideration. Instead, it adopted a strict, "goal-oriented" approach of achieving perfect consistency. Furthermore, the AB has not justified the textual basis for such an approach.

The EC-Seal case is a perfect example of the risks of transplanting standards of review from one regime to the other. At the end the EU Regime was amended so that the IC exception was kept in the condition that IC hunt is conciliated with the humane treatment of seals. Because the remedies at the WTO are not retrospective, the EU was able to adjust its measure, without having to compensate Canada and Norway. This strict rationality approach could not, for example, be transplanted to IIAs since any inconsistency in a measure, regardless of context, could result in the violation of a standard and the need to compensate the investor.

In this sense, we see how the arbitral tribunal was careful in Methanex v. USA not to rely on the transposition of the Appellate Body's standard of review of "likeness" for the

purposes of reviewing a standard of non-discrimination. We see that the "likeness" definition where the regulatory purpose only plays a role as one element that might affect the "competition in the market", was developed in the context of the GATT, where their right to regulate is preserved under article XX, a provision that is absent in the NAFTA.

Nevertheless, in Continental v. Argentina the arbitral tribunal did accept the authoritative status of WTO case law. However, the tribunal referred to supplementary means of interpretation, such as the origin of necessity concept in FCN treaties, instead of a simply functional transplantation of WTO jurisprudence.

Furthermore, with regards to expropriation, we see how radically different standards can arise from adjudicating the same provision. In Methanex, the US resorted to the "police powers" doctrine to allow the arbitrator to depart from the strict standard first employed in Metalclad. This case shows the importance of providing guidance with regards to vague concepts such as indirect expropriation.

We see that in the five treaties that we analyzed much of the shortcomings of international arbitration have been addressed, mainly with regards to the vagueness of its standards. Nevertheless, the matter of standard of review cannot be completely controlled by treaty text, even by careful technical analysis, like the one conducted at the WTO. In this sense, the Investment Court proposed by CETA, EUVIPA and EUSIPA are promising avenues for effective change in the investment arbitration scenario. The Investment Court provides the institutional density that set arbitral tribunals aside from the WTO. Even further, this regional arrangements could prove to be even more effective in facing criticism since, due to the rules of arbitral selection, arbitrators will be closer to the affected communities.

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Appendix - Table 1 – Preamble

ASEAN -CIA
RECALLING the decisions of the 39th ASEAN Economic Ministers ("AEM") Meeting held in Makati City, Philippines on 23 August 2007 to revise the Framework Agreement on the ASEAN Investment Area signed in Makati City, Philippines on 7 October 1998 ("AIA Agreement"), as amended, into a comprehensive investment agreement which is forward-looking, with improved features and provisions, comparable to international best practices in order to increase intra-ASEAN investments and to enhance ASEAN's competitiveness in attracting inward investments into ASEAN; RECOGNISING the different levels of development within ASEAN especially the least developed Member States which require some flexibility including special and differential treatment as ASEAN moves towards a more integrated and interdependent future; REAFFIRMING the need to move forward from the AIA Agreement and the ASEAN Agreement for the Promotion and Protection of Investments signed in Manila, Philippines on 15 December 1987 ("ASEAN IGA"), as amended, in order to further enhance regional integration to realise the vision of the ASEAN Economic Community ("AEC"); CONVINCED that sustained inflows of new investments and reinvestments will promote and ensure dynamic development of ASEAN economies; RECOGNISING that a conducive investment environment will enhance freer flow of capital, goods and services, technology and human resource and overall economic and social development in ASEAN; and DETERMINED to further intensify economic cooperation between and among Member States,
CETA
FURTHER strengthen their close economic relationship and build upon their respective rights and obligations under the *Marrakesh Agreement Establishing the World Trade Organization*, done on 15 April 1994, and other multilateral and bilateral instruments of cooperation; CREATE an expanded and secure market for their goods and services through the reduction or elimination of barriers to trade and investment; ESTABLISH clear, transparent, predictable and mutually-advantageous rules to govern their trade and investment; AND, REAFFIRMING their strong attachment to democracy and to fundamental rights as laid down in the Universal Declaration of Human Rights, done at Paris on 10 December 1948, and sharing the view that the proliferation of weapons of mass destruction poses a major threat to international security; RECOGNISING the importance of international security, democracy, human rights and the rule of law for the development of international trade and economic cooperation; **RECOGNISING that the provisions of this Agreement preserve the right of the Parties to regulate within their territories and the Parties' flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity;** AFFIRMING their commitments as parties to the UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, done at Paris on 20 October 2005, and recognising that states have the right to preserve, develop and implement their cultural policies, to support their cultural industries for the purpose of strengthening the diversity of cultural expressions, and to preserve their cultural identity, including through the use of regulatory measures and financial support; RECOGNISING that the provisions of this Agreement protect investments and investors with respect to their investments, and are intended to stimulate mutually-beneficial business activity, without undermining the right of the Parties to regulate in the public interest within their territories; REAFFIRMING their commitment to promote sustainable development and the development of international trade in such a way as to contribute to sustainable development in its economic, social and environmental dimensions; ENCOURAGING enterprises operating within their territory or subject to their jurisdiction to respect internationally recognised guidelines and principles of corporate social responsibility, including the OECD Guidelines for Multinational Enterprises, and to pursue best practices of responsible business conduct; IMPLEMENTING this Agreement in a manner consistent with the enforcement of their respective labour and environmental laws and that enhances their levels of labour and environmental protection, and building upon their international commitments on labour and environmental matters; RECOGNISING the strong link between innovation and trade, and the importance of innovation to future economic growth, and affirming their commitment to encourage the expansion of cooperation in the area of innovation, as well as the related areas of research and development and science and technology, and to promote the involvement of relevant public and private sector entities;
CPTPP
REAFFIRM the matters embodied in the preamble to the Trans-Pacific Partnership Agreement, done at Auckland on 4 February 2016 (hereinafter referred to as "the TPP"); REALISE expeditiously the benefits of the TPP through this Agreement and their strategic and economic significance; CONTRIBUTE to maintaining open markets, increasing world trade, and creating new economic opportunities for people of all incomes and economic backgrounds; PROMOTE further regional economic integration and cooperation between them; ENHANCE opportunities for the acceleration of regional trade liberalisation and investment; REAFFIRM the importance of promoting corporate social responsibility, cultural identity and diversity, environmental protection and conservation, gender equality, indigenous rights, labour rights, inclusive trade, sustainable development and traditional knowledge, as well as **the importance of preserving their right to regulate in the public interest**; and WELCOME the accession of other States or separate customs territories to this Agreement,

[…] TPP PREAMBLE ESTABLISH a comprehensive regional agreement that promotes economic integration to liberalise trade and investment, bring economic growth and social benefits, create new opportunities for workers and businesses, contribute to raising living standards, benefit consumers, reduce poverty and promote sustainable growth; STRENGTHEN the bonds of friendship and cooperation between them and their peoples; BUILD on their respective rights and obligations under the Marrakesh Agreement Establishing **the World Trade Organization**; RECOGNISE the differences in their levels of development and diversity of economies; STRENGTHEN the competitiveness of their businesses in global markets and enhance the competitiveness of their economies by promoting opportunities for businesses, including promoting the development and strengthening of regional supply chains; SUPPORT the growth and development of micro, small and medium- sized enterprises by enhancing their ability to participate in and benefit from the opportunities created by this Agreement; ESTABLISH a predictable legal and commercial framework for trade and investment through mutually advantageous rules; FACILITATE regional trade by promoting efficient and transparent customs procedures that reduce costs and ensure predictability for their importers and exporters; RECOGNISE their inherent right to regulate and resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities, safeguard public welfare, and protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals; RECOGNISE further their inherent right to adopt, maintain or modify health care systems; I AFFIRM that state-owned enterprises can play a legitimate role in the diverse economies of the Parties, while recognising that the provision of unfair advantages to state-owned enterprises undermines fair and open trade and investment, and resolve to establish rules for state-owned enterprises that promote a level playing field with privately owned businesses, transparency and sound business practices; PROMOTE high levels of environmental protection, including through effective enforcement of environmental laws, and further the aims of sustainable development, including through mutually supportive trade and environmental policies and practices; PROTECT and enforce labour rights, improve working conditions and living standards, strengthen cooperation and the Parties' capacity on labour issues; PROMOTE transparency, good governance and the rule of law, and eliminate bribery and corruption in trade and investment; RECOGNISE the important work that their relevant authorities are doing to strengthen macroeconomic cooperation, including on exchange rate issues, in appropriate fora; RECOGNISE the importance of cultural identity and diversity among and within the Parties, and that trade and investment can expand opportunities to enrich cultural identity and diversity at home and abroad; CONTRIBUTE to the harmonious development and expansion of world trade and provide a catalyst to broader regional and international cooperation; ESTABLISH an Agreement to address future trade and investment challenges and opportunities, and contribute to advancing their respective priorities over time; and EXPAND their partnership by encouraging the accession of other States or separate customs territories in order to further enhance regional economic integration and create the foundation of a Free Trade Area of the Asia Pacific,
EU-Vietnam
RECOGNISING their longstanding and strong partnership based on the common principles and values reflected in the *Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part*, signed in Brussels on 27 June 2012 (hereinafter referred to as the "Partnership and Cooperation Agreement"), and their important economic, trade and investment relationship, including as reflected in the *Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam*, signed in Brussels on dd/mm/yyyy (hereinafter referred to as the "Free Trade Agreement"); DESIRING to further strengthen their economic relationship as part of, and in a manner coherent with, their overall relations, and convinced that this Agreement will create a new climate for the development of investment between the Parties; RECOGNISING that this Agreement will complement and promote regional economic integration efforts; DETERMINED to strengthen their economic, trade and investment relationship in accordance with the objective of sustainable development, in its economic, social and environmental dimensions, and to promote investment under this Agreement in a manner mindful of high levels of environmental and labour protection and relevant internationally recognised standards and agreements; DESIRING to raise living standards, promote economic growth and stability, create new employment opportunities and improve the general welfare and, to this end, reaffirming their commitment to promoting investment; REAFFIRMING their commitments to the principles of sustainable development in the Free Trade Agreement; RECOGNISING the importance of transparency as reflected in their commitments in the Free Trade Agreement; REAFFIRMING their commitment to the *Charter of the United Nations*, done at San Francisco on 26 June 1945, and having regard to the principles articulated in *The Universal Declaration of Human Rights*, adopted by the General Assembly of the United Nations on 10 December 1948; BUILDING on their respective rights and obligations under the *Marrakesh Agreement establishing the World Trade Organization*, done at Marrakesh on 15 April 1994 (hereinafter referred to as the "WTO

Agreement") and other multilateral, regional and bilateral agreements and arrangements to which they are party, in particular, the Free Trade Agreement; DESIRING to promote the competitiveness of their companies by providing them with a predictable legal framework for their investment relations,
EU-Singapore
RECOGNISING their longstanding and strong partnership based on the common principles and values reflected in the Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore, of the other part (hereinafter referred to as "EUSPCA"), and their important economic, trade and investment relationship including as reflected in the Free Trade Agreement between the European Union and the Republic of Singapore (hereinafter referred to as "EUSFTA"); DESIRING to further strengthen their relationship as part of and in a manner coherent with their overall relations, and convinced that this Agreement will create a new climate for further development of investment between the Parties; RECOGNISING that this Agreement will complement and promote regional economic integration efforts; DETERMINED to strengthen their economic, trade, and investment relations in accordance with the objective of sustainable development, in its economic, social and environmental dimensions, and to promote investment in a manner mindful of high levels of environmental and labour protection and relevant internationally-recognised standards and agreements to which they are parties; REAFFIRMING their commitment to the principles of sustainable development and transparency as reflected in the EUSFTA; **REAFFIRMING each Party's right to adopt and enforce measures necessary to pursue legitimate policy objectives such as social, environmental, security, public health and safety, promotion and protection of cultural diversity;** REAFFIRMING their commitment to the Charter of the United Nations signed in San Francisco on 26 June 1945 and having regard to the principles articulated in The Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948; RECOGNISING the importance of transparency in international trade and investment to the benefit of all stakeholders; BUILDING on their respective rights and obligations under the WTO Agreement and other multilateral, regional and bilateral agreements and arrangements to which they are party, in particular, the EUSFTA,

Table 2 – National Treatment

ASEAN -CIA	CETA	CPTPP	EU-Vietnam	EU-Singapore
Article 5 National Treatment	Article 8.6 National treatment	Article 9.4: National Treatment	Article 2.3 National Treatment	Article 2.3 National Treatment
1. Each Member State shall accord **to investors** of any other Member State **treatment no less favourable than that it accords, in like circumstances**, to its own investors with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory. 2. Each Member State shall accord to **investments of investors** of any other Member State **treatment no less favourable than that it accords, in like circumstances**, to investments in its territory of its own investors with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.	1. Each Party shall accord **to an investor of the other Party and to a covered investment**, **treatment no less favourable than the treatment it accords, in like situations** to its own investors and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory. 2. The treatment accorded by a Party under paragraph 1 means, with respect to a government in Canada other than at the federal level, or, with respect to a government of or in a Member State of the European Union, **treatment no less favourable than the most favourable treatment accorded**, **in like situations**, **by that government to investors of that Party in its territory and to investments of such investors**.	1. Each Party shall accord **to investors** of another Party **treatment no less favourable than that it accords, in like circumstances**, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. 2. Each Party shall accord **to covered investments treatment no less favourable** than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.	1. Each Party shall accord **to investors of the other Party and to covered investments**, with respect to the **operation** of the covered investments, **treatment no less favourable than that it accords, in like situations**, to its own investors and to their investments. 2. Notwithstanding paragraph 1 and, in the case of Viet Nam subject to Annex 2 (Exemption for Viet Nam on National Treatment), a Party may adopt or maintain any measure with respect to the operation of a covered investment provided that such measure is not inconsistent with the commitments set out in Annex 8-A (The Union's Schedule of Specific Commitments) or Annex 8-B (Viet Nam's Schedule of Specific Commitments) of the Free Trade Agreement, respectively, where such measure is: (a) a measure that is adopted on or before the date of entry into force of this Agreement; (b) a measure referred to in subparagraph (a) that is being continued, replaced or amended after the date of entry into force of this Agreement, provided the measure is no less consistent with paragraph 1 after it is continued, replaced or amended than the measure as it existed prior to its continuation, replacement or amendment; or (c) a measure not falling within subparagraph (a) or (b), provided it is not applied in respect of, or in a way that causes loss or damage to, investments made in the territory of the Party before the date of entry into force of such measure.	1. Each Party shall accord **to covered investors of the other Party and to their covered investments**, **treatment in its territory no less favourable than the treatment it accords, in like situations**, to its own investors and their investments with respect to the operation, management, conduct, maintenance, use, enjoyment and sale or other disposal of their investments. 2. Notwithstanding paragraph 1, each Party may adopt or maintain any measure with respect to the operation, management, conduct, maintenance, use, enjoyment and sale or other disposal of an establishment that is not inconsistent with commitments inscribed in its Schedule of Specific Commitments in Annex 8-A and 8-B of Chapter 8 (Services, Establishment and Electronic Commerce) of the EUSFTA respectively4, where such measure is: (a) a measure that is adopted on or before the entry into force of this Agreement; (b) a measure referred to in subparagraph (a) that is being continued, replaced or amended after the entry into force of this Agreement, provided the measure is no less consistent with paragraph 1 after being continued, replaced or amended than the measure as it existed prior to its continuation, replacement or amendment; or (c) a measure not falling within subparagraphs (a) or (b), provided it is not applied in respect of, or in a way that causes loss or damage to, covered investments made in the territory of the Party before the entry into force of such measure. 3. [Refer to Table X]

Table 3 – Most Favored Nation

ASEAN -CIA	CETA	CPTPP	EU-Vietnam
Article 6 Most - Favoured - Nation Treatment	Article 8.7 Most-favoured-nation treatment	Article 9.5 Most-Favoured-Nation Treatment	Article 2.4 Most-Favoured-Nation Treatment
1. Each Member State shall accord to investors of another Member State treatment no less favourable than that it accords, in like circumstances, to investors of any other Member State or a non - Member State with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments. 2. Each Member State shall accord to investments of investor s of another Member State treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any other Member State or a non - Member State with respect to the admission, establishment, acquisi tion, expansion, management, conduct, operation and sale or other disposition of investments. 3. Paragraphs 1 and 2 shall not be construed so as to oblige a Member State to extend to investors or investments of other Member States the benefit of any treat ment, preference or privilege resulting from: 11 (a) any sub - regional arrangements between and among Member States; 5 or	1. Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords in like situations, to investors of a third country and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory. 2. For greater certainty, the treatment accorded by a Party under paragraph 1 means, with respect to a government in Canada other than at the federal level, or, with respect to a government of or in a Member State of the European Union, treatment accorded, in like situations, by that government to investors in its territory, and to investments of such investors, of a third country. 3. Paragraph 1 does not apply to treatment accorded by a Party providing for recognition, including through an arrangement or agreement with a third country that recognises the accreditation of testing and analysis services and service suppliers, the accreditation of repair and maintenance services and service suppliers, as well as the certification of the qualifications of or	1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. 2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. 3. For greater certainty, the treatment referred to in this Article does not encompass international dispute resolution procedures or mechanisms, such as those included in Section B (Investor-State Dispute Settlement).	1. Each Party shall accord to investors of the other Party and to covered investments, with respect to the operation of the covered investments, treatment no less favourable than the treatment it accords, in like situations, to investors of a third country and their investments. 2. Paragraph 1 does not apply to the following sectors: (a) communication services, except for postal services and telecommunication services; (b) recreational, cultural and sporting services; (c) fishery and aquaculture; (d) forestry and hunting; and (e) mining, including oil and gas. 3. Paragraph 1 shall not be construed as obliging a Party to extend to investors of the other Party or covered investments the benefit of any treatment granted pursuant to any bilateral, regional or international agreement that entered into force before the date of entry into force of this Agreement. 4. Paragraph 1 shall not be construed as obliging a Party to extend to investors of the other Party or covered investments the benefit of: (a) any treatment granted pursuant to any bilateral, regional or multilateral agreement which includes commitments to abolish

(b) any existing agreement notified by Member States to the AIA Council pursuant to Article 8(3) of the AIA Agreement	the results of or work done by those accredited services and service suppliers. 4. For greater certainty, the "treatment" referred to in paragraphs 1 and 2 does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment", and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations.		substantially all barriers to investment among the parties or requires the approximation of legislation of the parties in one or more economic sectors; (b) any treatment resulting from any international agreement for the avoidance of double taxation or other international agreement or arrangement relating wholly or mainly to taxation; or (c) any treatment resulting from measures providing for the recognition of qualifications, licences or prudential measures in accordance with Article VII of the *General Agreement on Trade in Services***1** or its Annex on Financial Services. 5. For greater certainty, the term "treatment" referred to in paragraph 1 does not include dispute resolution procedures or mechanisms, such as those included in Section B (Resolution of Disputes between Investors and Parties) of Chapter 3 (Dispute Resolution), provided for in any other bilateral, regional or international agreements. Substantive obligations in such agreements do not in themselves constitute "treatment" and thus cannot be taken into account when assessing a breach of this Article. Measures by a Party pursuant to those substantive obligations shall be considered "treatment". 6. This Article shall be interpreted in accordance with the principle of *ejusdem generis*

Table 4 – Fair and Equitable Treatment

ASEAN -CIA	CETA	CPTPP	EU-Vietnam	EU-Singapore
Article 11 Treatment of Investment	Article 8.10 Treatment of investors and of covered investments	Article 9.6 Minimum Standard of Treatment	Article 2.5 Treatment of Investment	Article 2.4 Standards of treatment
1. Each Member State shall accord to covered investments of investors of any other Member State, fair and equitable treatment and full protection and security. 2. For greater certainty: (a) **fair and equitable treatment** requires each Member State not to deny justice in any legal or administrative proceedings in accordance with the principle of due process (b) **full protection and security** requires each Member State to take such measures as may be reasonably necessary to ensure the protection and security of the covered investments. 3. **A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article**.	1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 6. 2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes: (a) denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process , including a fundamental breach of transparency, in judicial and administrative proceedings; (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (e) abusive treatment of investors, such as coercion, duress and harassment; or (f) a breach of any further elements of the fair an d equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.	1. Each Party shall accord to covered investments treatment in accordance with applicable customary international law principles, including fair and equitable treatment and full protection and security. 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligations in paragraph 1 to provide: (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law. 3. **A determination that there has been a breach of another provision of this Agreement, or**	1. Each Party shall accord fair and equitable treatment and full protection and security to investors of the other Party and covered investments in accordance with paragraphs 2 to 7 and Annex 3 (Understanding on the Treatment of Investments). 2. A Party breaches the obligation of fair and equitable treatment referred to in paragraph 1 where a measure or series of measures constitutes: (a) a denial of justice in criminal, civil or administrative proceedings; (b) a fundamental breach of due process in judicial and administrative proceedings; (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (e) abusive treatment such as coercion, abuse of power or similar bad faith conduct; or (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3. 3. Treatment not listed in paragraph 2 may constitute a breach of fair and equitable treatment where the Parties have so agreed in accordance with the procedures provided for in Article 4.3 (Amendments). 4. When applying paragraphs 1 to 3, a dispute settlement body under Chapter 3 (Dispute Settlement) may take into account whether a Party made a specific representation to an investor of the other Party to induce a covered investment that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain that investment, but that the Party subsequently frustrated.	1. Each Party shall accord in its territory to covered investments of the other Party fair and equitable treatment8 and full protection and security in accordance with paragraphs 2 to 6. 2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if its measure or series of measures constitute: (e) denial of justice in criminal, civil and administrative proceedings; (f) a fundamental breach of due process; (g) manifestly arbitrary conduct; (h) harassment, coercion, abuse of power or similar bad faith conduct. 3. In determining whether the fair and equitable treatment obligation, as set out in paragraph 2, has been breached, a Tribunal may take into account, where applicable, whether a Party made specific or unambiguous representations to an investor so as to induce the investment, that created legitimate expectations of a covered investor and which were reasonably relied upon by the covered investor, but that the Party subsequently frustrated. 4. The Parties shall, upon request of a Party or recommendations by the Committee, review the content of the obligation to provide fair and equitable treatment, pursuant to the procedure for amendments set out in Article 4.3 (Amendments), in particular, whether treatment other than those listed in paragraph 2 can also constitute a breach of fair and equitable treatment. 5. For greater certainty, "full protection and security" only refers to a Party's obligation relating to physical security of covered investors and investments. 6. Where a Party, itself or through any entity mentioned in paragraph 7 of Article 1.2 (Definitions), had given a specific and clearly

		of a separate international agreement, does not establish that there has been a breach of this Article. 4. For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result. 5. *For greater certainty, the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result*.	5. For greater certainty, the term "full protection and security" referred to in paragraph 1 refers to a Party's obligations to act as may be **reasonably necessary** to protect physical security of the investors and the covered investments. 6. Where a Party has entered into a written agreement with investors of the other Party or covered investments that satisfies all of the following conditions, that Party shall not breach that agreement through the exercise of governmental authority. The conditions are: (a) the written agreement is concluded and takes effect after the date of entry into force of this Agreement; (b) the investor relies on the written agreement in deciding to make or maintain the covered investment other than the written agreement itself and the breach causes actual damages to that investment; (c) the written agreement creates an exchange of rights and obligations in connection to the said investment, binding on both parties; and (d) the written agreement does not contain a clause on the settlement of disputes between the parties to that agreement by international arbitration. 7. **A breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article**.	spelt out commitment in a contractual written obligation towards a covered investor of the other Party with respect to the covered investor's investment or towards such covered investment, that Party shall not frustrate or undermine the said commitment through the exercise of its governmental authority13 either: (a) deliberately; or (b) in a way which substantially alters the balance of rights and obligation in the contractual written obligation unless the Party provides reasonable compensation to restore the covered investor or investment to a position which it would have been in had the frustration or undermining not occurred. **7. A breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.**

Table 5 – Expropriation (part 1)

ASEAN -CIA	CETA	CPTPP	EU-Vietnam	EU-Singapore
Article 14 Expropriation and Compensation*	Article 8.1 Expropriation	Article 9.8 Expropriation and Compensation	Article 2.7 Expropriation	Article 2.6 Expropriation
1. A Member State shall not expropriate or nationalise a covered investment either directly or through measures equivalent to expropriation or nationalisation ("expropriation")**, except: (a) for a public purpose; (b) in a non - discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law. *This Article shall be read with Annex 2 (Expropriation and Compensation). **For the avoidance of doubt, any measure of expropriation relating to land shall be as defined in the Member States' respective existing domestic laws and regulations and any amendments thereto, and shall be for the purposes of and upon payment of compensation in accordance with the aforesaid laws and regulations. Member States understand that there may be legal and administrative processes that need to be observed before payment can be made.	1. A Party shall not nationalise or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalisation or expropriation ("expropriation"), except: (a) for a public purpose; (b) under due process of law; (c) in a non - discriminatory manner; and (d) on payment of prompt, adequate and effective compensation. […] For greater certainty, this paragraph shall be interpreted in accordance with Annex 8 - A .2.	1. No Party shall expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation (expropriation), except: (a) for a public purpose* (b) in a non-discriminatory manner; (c) on payment of prompt, adequate and effective compensation in accordance with paragraphs 2, 3 and 4; and (d) in accordance with due process of law. [17] For greater certainty, for the purposes of this Article, the term "public purpose" refers to a concept in customary international law. Domestic law may express this or a similar concept by using different terms, such as "public necessity", "public interest" or "public use".	1. A Party shall not nationalise or expropriate the covered investments of investors of the other Party either directly, or indirectly through measures having an effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation"), 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. […] 6. This Article shall be interpreted in accordance with Annex 4	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 covered investments of covered investors of the other Party except: (a) for a public purpose; (b) in accordance with due process of law; (c) on a non-discriminatory basis; and (d) against payment of prompt, adequate and effective compensation in accordance with paragraph 2. 2.

Table 6 – Expropriation (part 2)

ASEAN -CIA	CETA	CPTPP	EU-Vietnam	EU-Singapore
Annex 2 Expropriation and Compensation	Annex 8 - A.	Annex 9-b Expropriation	Annex 4 Expropriation	Annex 1 Expropriation
1. An action or a series of related actions by a Member State cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in a covered investment. 2. Article 14(1) addresses two situations: (a) the first situation is where an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and (b) the second situation is where an action or series of related actions by a Member State has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.	The Parties confirm their shared understanding that: 1. Expropriation may be direct or indirect: (a) direct expropriation occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and (b) indirect expropriation occurs if a measure or series of measures of 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.	The Parties confirm their shared understanding that: 1. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment. 2. Article 9.8.1 (Expropriation and Compensation) addresses two situations. The first is direct expropriation, in which an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure. 3. The second situation addressed by Article 9.8.1 (Expropriation and Compensation) is indirect expropriation, in which an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.	The Parties confirm their common understanding on expropriation: 1. Expropriation as referred to in paragraph 1 of Article 2.7 (Expropriation) may be either direct or indirect as follows: (a) direct expropriation occurs if an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and (b) indirect expropriation occurs if 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.	The Parties confirm their shared understanding that: 1. Article 2.6 (Expropriation) addresses two situations. The first is direct expropriation where a covered investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure. The second is indirect expropriation where a measure or series of measures by a Party has an effect equivalent to direct expropriation in that it substantially deprives the covered investor of the fundamental attributes of property in its covered investment, including the right to use, enjoy and dispose of its covered investment, without formal transfer of title or outright seizure.

Table 7 – Expropriation (part 3)

ASEAN -CIA	CETA	CPTPP	EU-Vietnam	EU-Singapore
Annex 2 Expropriation and Compensation	Annex 8 - A.	ANNEX 9-B EXPROPRIATION	Annex 4 Expropriation	Annex 1 Expropriation
3. The determination of whether an action or series of actions by a Member State, in a specific fact situation, constitutes an expropriation of the type referred to in sub- paragraph 2(b), requires a case-by-case, fact-based inquiry that considers, among other factors: (a) the **economic impact** of the government action, although the fact that an action or series of actions by a Member State has an adverse effect on the economic value of an investment, standing alone, does not establish that such an expropriation has occurred; (b) whether the government action breaches the government's prior binding written commitment to the investor whether by contract, licence or other legal document; and (c) the character of the government action, including, its objective and whether the action is disproportionate to the public purpose referred to in Article 14(1).	2. The determination of whether a measure or series of measures of a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that takes into consideration, among other factors: (a) the **economic impact** of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred; (b) the duration of the measure or series of measures of a Party; (c) the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations; and (d) the character of the measure or series of measures, notably their object, context and intent.	(a) The determination of whether an action or series of actions 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: (i) the **economic impact** of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations;36 and (iii) the character of the government action.	2. The determination of whether a measure or series of measures by a Party, in a specific factual situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, inter alia: (a) the **economic impact** of the measure or series of measures, although the fact that a measure or series of measures by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that such an expropriation has occurred; (b) the duration of the measure or series of measures or of its effects; and (c) the character of the measure or series of measures, in particular its object, context and intent.	2. The determination of whether a measure or series of measures by a Party, in a specific 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 and its duration, although the fact that a measure or a series of measures by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; (b) the extent to which the measure or series of measures interferes with the possibility to use, enjoy or dispose of the property; and (c) the character of the measure or series of measures, notably its object, context and intent.

Table 8 – Expropriation (part 4)

ASEAN -CIA	CETA	CPTPP	EU-Vietnam	EU-Singapore
Annex 2 Expropriation and Compensation	Annex 8 - A.	Annex 9-b Expropriation	Annex 4 Expropriation	Annex 1 Expropriation
4. Non-discriminatory measures of a Member State that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an expropriation of the type referred to in sub-paragraph 2(b).	3. For greater certainty, except in the rare circumstance **when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive**, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.	(b) Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health*, safety and the environment, do not constitute indirect expropriations, except in rare circumstances. *For greater certainty and without limiting the scope of this subparagraph, regulatory actions to protect public health include, among others, such measures with respect to the regulation, pricing and supply of, and reimbursement for, pharmaceuticals (including biological products), diagnostics, vaccines, medical devices, gene therapies and technologies, health-related aids and appliances and blood and blood-related products. [See also annex 9-C – Expropriation relating to land]	3. Non-discriminatory measures or series of measures by a Party that are designed to protect legitimate public policy objectives do not constitute indirect expropriation, except in the rare circumstances **where the impact of such measure or series of measures is so severe in light of its purpose that it appears manifestly excessive**.	For greater certainty, except in the rare circumstance **where the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive**, non-discriminatory measure or series of measures by a Party that are designed and applied to protect legitimate public policy objectives such as public health, safety and the environment, do not constitute indirect expropriation.

Table 9 – General Exceptions

ASEAN - CIA	CETA	CPTPP	EU-Vietnam IPA	EU-Singapore IPA
Article 17	Article 28.3 General Exceptions	Article 29.1 General Exceptions	Article 4.6 General Exceptions	Article 2.3. National Treatment
1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of **arbitrary or unjustifiable discrimination** between Member States or their investors **where like conditions prevail**, **or a disguised restriction on investors of any other Member State and their investments**, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member State of measures: (a) **necessary** to protect public morals or to maintain public order*; (b) **necessary** to protect human, animal or plant life or health; (c) **necessary** to secure compliance with laws or regulations which are not inconsistent with this Agreement, including those **relating to**: (i) the prevention of deceptive and fraudulent practices to deal with the effects of a default on a contract; (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; (d) **aimed at** ensuring the equitable or effective**	For the purposes of [list of trade chapters] and Sections B (Establishment of investment) and C (Non-discriminatory treatment) of Chapter Eight (Investment), Article XX of the GATT 1994 is incorporated into and made part of this Agreement. The Parties understand that the measures referred to in Article XX (b) of the GATT 1994 include environmental measures necessary to protect human, animal or plant life or health. The Parties understand that Article XX(g) of the GATT 1994 applies to measures for the conservation of living and non-living exhaustible natural resources. 2. For the purposes of [list of services chapters] and Sections B (Establishment of investments) and C (Non-discriminatory treatment) of Chapter Eight (Investment), subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Party of measures necessary: (a) to protect public security or public morals or to maintain public order;33 (b) to protect human, animal or plant life or health; or	1. For the purposes of [list of trade chapters], Article XX of GATT 1994 and its interpretative notes are incorporated into and made part of this Agreement, mutatis mutandis. 2. The Parties understand that the measures referred to in Article XX(b) of GATT 1994 include environmental measures necessary to protect human, animal or plant life or health, and that Article XX(g) of GATT 1994 applies to measures relating to the conservation of living and non - living exhaustible natural resources. 3 . For the purposes of [list of trade in services chapters], paragraphs (a), (b) and (c) of Article XIV of GATS are incorporated into and made part of this Agreement, mutatis mutandis. 3 The Parties understand that the measures referred to in Article XIV(b) of GATS include environmental measures necessary to protect human, animal or plant life or health.	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 covered investment**, nothing in Articles 2.3 (National Treatment) and 2.4 (Most-Favoured-Nation Treatment) shall be construed as preventing the adoption or enforcement by any Party of measures: (a) **necessary** to protect public security or public morals or to maintain public order; (b) **necessary** to protect human, animal or plant life or health; (c) **relating to** the conservation of exhaustible natural resources if such measures are applied in conjunction with restrictions on domestic investors or on the domestic supply or consumption of services; (d) **necessary** for the protection of national treasures of artistic, historic or archaeological value; (e) **necessary** to secure compliance with laws or regulations which are not inconsistent with Articles 2.3 (National Treatment) and 2.4 (Most-Favoured-Nation Treatment) including those **relating to:** (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contracts; (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual	Notwithstanding paragraphs 1 and 2, a Party may adopt or enforce measures that accord to covered investors and investments of the other Party less favourable treatment than that accorded to its own investors and their investments, in like situations, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the covered investors or investments of the other Party in the territory of a Party, or is a disguised restriction on covered investments, where the measures are: (a) necessary to protect public security, 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 investments; (d) necessary for the protection of national treasures of artistic, historic or archaeological value; (e) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Chapter including those relating to: (i) the prevention of deceptive or fraudulent practices or to deal with the effects of a default on a contract; (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidential of individual records and accounts;

imposition or collection of direct taxes in respect of investments or investors of any Member State; (e) **imposed for the protection of national treasures of artistic, historic or archaeological value**; (f) **relating to** the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. 2. Insofar as measures affecting the supply of financial services are concerned, paragraph 2 (Domestic Regulation) of the Annex on Financial Services of the General Agreement on Trade in Services in Annex 1B to the WTO Agreement ("GATS") shall be incorporated into and form an integral part of this Agreement, *mutatis mutandis*. * The public order exception may be invoked by a Member State only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society. **For the purpose of this sub-paragraph, footnote 6 of Article XIV of the General Agreement on Trade in Services in Annex 1B to the WTO Agreement (GATS) is incorporated into and forms an integral part of this Agreement, mutatis mutandis.	(c) to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to: (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contracts; (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; or (iii) safety.		records and accounts; (iii) safety; or (f) inconsistent with paragraph 1 of Article 2.3 (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 or investors of the other Party	(iii) safety; (iv) aimed at ensuring the effective or equitable7 imposition or collection of direct taxes in respect of investors or investments of the other Party.
		Article 9.10 Performance Requirements		
		Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), 1(c), 1(f), 2(a) and 2(b) shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures: (i) necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement; (ii) necessary to protect human, animal or plant life or health; or (iii) related to the conservation of living or non-living exhaustible natural resources.		

Table 10 – Security Exceptions

ASEAN -CIA	CETA	CPTPP	EU-Vietnam	EU-Singapore
Article 18 Security Exceptions	Article 28.6 National security	Article 29.2 Security Exceptions	Article 4.8 Security Exceptions	Article 4.5 Security Exceptions
Nothing in this Agreement shall be construed: (a) to require any Member State to furnish any information, the disclosure of **which it considers** contrary to its essential security interests; or (b) to prevent any Member State from taking any action which **it considers** necessary for the protection of its essential security interests, including but not limited to: (i) action relating to fissionable and fusionable materials or the materials from which they derived; (ii) action relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) action taken in time of war or other emergency in domestic or international relations; (iv) action taken so as to protect critical public infrastructure, including communication, power and water infrastructures, from deliberate attempts intended to disable or degrade such infrastructure; or (c) to prevent any Member State	Nothing in this Agreement shall be construed: (i) to require a Party to furnish or allow access to information if that Party determines that the disclosure of this information would be contrary to its essential security interests; or to prevent a Party from taking an action that **it considers** necessary to protect its essential security interests: (i) connected to the production of or traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods and materials, services and technology undertaken, and to economic activities, carried out directly or indirectly for the purpose of supplying a military or other security establishment; (ii) taken in time of war or other emergency in international relations; or (iii) relating to fissionable and fusionable materials or the materials from which they are derived; or prevent a Party from taking any action in order to carry out	Nothing in this Agreement shall be construed to: (a) require a Party to furnish or allow access to any information the disclosure of which **it determines** to be contrary to its essential security interests; or (b) preclude a Party from applying measures that **it considers** necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	Nothing in this Agreement shall be construed as: (a) requiring a Party to furnish information, the disclosure of which **it considers** contrary to its essential security interests; (b) preventing a Party from taking any action which **it considers** necessary for the protection of its essential security interests: (i) connected with the production of or trade in arms, munitions and war materials and relating to traffic in other goods and materials and to economic activities carried out directly or indirectly for the purpose of provisioning a military establishment; (ii) relating to the supply of services carried out directly or indirectly for the purpose of provisioning a military establishment; (iii) relating to fissionable and fusionable materials or the materials from which they are derived; or (iv) taken in time of war or other emergency in international relations; (c) preventing a Party from taking any action in pursuance of its obligations under the *Charter of the United Nations*, done at San Francisco on 26 June 1945, for the	Nothing in this Agreement shall be construed to: (a) require either Party to furnish any information, the disclosure of which **it considers** contrary to its essential security interests; (b) prevent either Party from taking any action which **it considers** necessary for the protection of its essential security interests: (i) connected with the production of or trade in arms, munitions and war materials and related to traffic in other goods and materials and to economic activities carried out directly or indirectly for the purpose of provisioning a military establishment; (ii) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment; (iii) relating to fissionable and fusionable materials or the materials from which they are derived; or (iv) taken in time of war or other emergency in international relations, or to protect critical public infrastructure (this relates to communications, power or water infrastructure providing essential goods or services to the general public) from deliberate attempts to disable or disrupt it; (c) prevent either Party from taking any action for the purpose of maintaining international peace and security.

from taking any action pursuant to its obligations under the United Nations Charter for the maintenance of international peace and security.	its international obligations for the purpose of maintaining international peace and security.		purpose of maintaining international peace and security.	

Table 11 – Non-precluded Measures

CETA - Article 8.1 5 Reservations and exceptions
1. Articles 8 .4 through 8 .8 do not apply to: (a) an existing non - conforming measure that is maintained by a Party at the level of: (i) the European Union , as set out in its Schedule to Annex I; (ii) a national government, as set out by that Party in its Schedule to Annex I; (iii) a provincial, territorial, or regional government, as set out by that Party in its Schedule to Annex I; or (iv) a local government. (b) the continuation or prompt renewal of a non - conforming measure referred to in subparagraph (a); or (c) an amendment to a non - conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 8.4 through 8.8. 2. Articles 8.4 through 8.8 do not apply to a measure that a Party adopts or maintains with respect to a sector, subsector or activity, as set out in its Schedule to Annex II. 3. Without prejudice to Articles 8. 10 and 8. 12, a Party shall not adopt a measure or series of measures after the date of entry into force of this Agreement and covered by its Schedule to Annex II, that require, directly or indirectly an investor of the other Party, by reason of nationality, to sell or otherwise dispose of an investment existing at the time the measure or series of measures become effective. 4. In respect of intellectual property rights, a Party may derogate from Articles 8.5.1(f), 8.6, and 8.7 if permitted by the TRIPS Agreement, including any amendments to the TRIPS Agreement in force for both Parties, and waivers to the TRIPS Agreement adopted pursuant to Article IX of the WTO Agreement. 5. Articles 8.4, 8.6, 8 .7 and 8.8 do not apply to: (a) procurement by a Party of a good or service purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of a good or service for commercial sale, whether or not that procurement is "covered procurement" within the meaning of Article 19.2 (Scope and coverage); or (b) subsidies, or government support relating to trade in services, provided by a Party.
Article 9.12 - Non-Conforming Measures
1. Article 9.4 (National Treatment), Article 9.5 (Most-Favoured-Nation Treatment), Article 9.10 (Performance Requirements) and Article 9.11 (Senior Management and Boards of Directors) shall not apply to: (a) any existing non-conforming measure that is maintained by a Party at: (i) the central level of government, as set out by that Party in its Schedule to Annex I; (ii) a regional level of government, as set out by that Party in its Schedule to Annex I; or (iii) a local level of government; (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or (c) an amendment to any non-conforming measure referred to in subparagraph (a), to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Article 9.4 (National Treatment), Article 9.5 (Most-Favoured-Nation Treatment), Article 9.10 (Performance Requirements) or Article 9.11 (Senior Management and Boards of Directors).29 2. Article 9.4 (National Treatment), Article 9.5 (Most-Favoured-Nation Treatment), Article 9.10 (Performance Requirements) and Article 9.11 (Senior Management and Boards of Directors) shall not apply to any measure that a Party

adopts or maintains with respect to sectors, subsectors or activities, as set out by that Party in its Schedule to Annex II. (a) Article 9.4 (National Treatment) shall not apply to any measure that falls within an exception to, or derogation from, the obligations which are imposed by: (i) Article 18.8 (National Treatment); or (ii) Article 3 of the TRIPS Agreement, if the exception or derogation relates to matters not addressed by Chapter 18 (Intellectual Property). (b) Article 9.5 (Most-Favoured-Nation Treatment) shall not apply to any measure that falls within Article 5 of the TRIPS Agreement, or an exception to, or derogation from, the obligations which are imposed by: (i) Article 18.8 (National Treatment); or (ii) Article 4 of the TRIPS Agreement. 6. Article 9.4 (National Treatment), Article 9.5 (Most-Favoured-Nation Treatment) and Article 9.11 (Senior Management and Boards of Directors) shall not apply to: (a) government procurement; or subsidies or grants provided by a Party, including government supported loans, guarantees and insurance.
EU-Vietnam - - Annex 2 - Exemption for Viet Nam on national treatment
1. In the following sectors, subsectors or activities, Viet Nam may adopt or maintain any measure with respect to the operation of a covered investment that is not in conformity with Article 2.3 (National Treatment), provided that such measure is not inconsistent with the commitments set out in Annex 8-B (Viet Nam's Schedule of Specific Commitments) to the Free Trade Agreement: (a) newspapers and news-gathering agencies, printing, publishing, radio and television broadcasting, in any form; (b) production and distribution of cultural products, including video records; (c) production, distribution, and projection of television programmes and cinematographic works; (d) investigation and security; (e) geodesy and cartography; (f) secondary and primary education services; (g) oil and gas, mineral and natural resources exploration, prospecting and exploitation; (h) hydroelectricity and nuclear power; power transmission and/or distribution; (i) cabotage transport services; (j) fishery and aquaculture; (k) forestry and hunting; (l) lottery, betting and gambling; (m) judicial administration services, including but not limited to services relating to nationality; (n) civil enforcement; (o) production of military materials or equipment; (p) operation and management of river ports, sea ports and airports; and (q) subsidies. 2. If Viet Nam adopts or maintains such a measure after the date of entry into force of this Agreement, it shall not require an investor of the EU Party, by reason of its nationality, to sell or otherwise dispose of an investment existing when that measure enters into effect.
EU-Singapore - Article 2.1. Scope

Article 2.3 (National Treatment) shall not apply to:
(a) the procurement by governmental agencies of goods and services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of goods or the supply of services for commercial sale; or
(b) audio-visual services;
(c) activities performed in the exercise of governmental authority within the respective territories of the Parties. For the purposes of this Agreement, an activity performed in the exercise of governmental authority means any activity, except an activity which is supplied on a commercial basis or in competition with one or more suppliers.

Table 12 – Right to Regulate

ASEAN -CIA	CETA	CPTPP	EU-Vietnam	EU-Singapore
N/A	Article 8.9 Investment and regulatory measures	Article 9.16 Investment and environmental, health and other regulatory objectives	Article 2.2 Investment and regulatory measures and objectives	Article 2.2 Investment and regulatory measures
	1. For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity. 2. For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section.	Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure **otherwise consistent with this Chapter** that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.	1. The Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection, or promotion and protection of cultural diversity.	1. The Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, environment or public morals, social or consumer protection privacy and data protection and the promotion and protection of cultural diversity.