

# Transatlantic Trade and Investment Partnership

## TRADE IN SERVICES, INVESTMENT AND E-COMMERCE

### CHAPTER II - INVESTMENT

*This is not a formal text proposal to the United States in the TTIP negotiations but an internal document of the European Union. The Commission will consult the EU's Member States in the Council and will discuss the proposal with the European Parliament before presenting a formal text proposal to the United States.*

**NOTE:**

*This is a draft text on provisions on investment protection and resolution of investment disputes and investment court system, to be included in the Title on trade in services, investment and e-commerce which is publically available [here](#).*

#### ***Definitions specific to investment protection***

For purposes of this Title:

- (x1) **'covered investment'** means an investment which is owned, directly or indirectly, or controlled, directly or indirectly, by investors of one Party in the territory<sup>1</sup> of the other Party made in accordance with applicable laws, whether made before or after the entry into force of this Agreement.
- (x2) **'investment'** means every kind of asset which has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:
  - a) an enterprise;
  - b) shares, stocks and other forms of equity participation in an enterprise;
  - c) bonds, debentures and other debt instruments of an enterprise;
  - d) a loan to an enterprise;
  - e) any other kinds of interest in an enterprise;
  - f) an interest arising from:

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<sup>1</sup> For greater certainty, territory shall include exclusive economic zone and continental shelf, as provided in the United Nations Convention on the Law of the Sea (UNCLOS).

- i) a concession conferred pursuant to domestic law or under a contract, including to search for, cultivate, extract or exploit natural resources,
  - ii) a turnkey, construction, production, or revenue-sharing contract, or
  - iii) other similar contracts;
- g) intellectual property rights;
- h) any other moveable property, tangible or intangible, or immovable property and related rights;
- i) claims to money or claims to performance under a contract;

For greater certainty, 'claims to money' does not include claims to money that arise solely from commercial contracts for the sale of goods or services by a natural person or enterprise in the territory of a Party to a natural person or enterprise in the territory of the other Party, domestic financing of such contracts, or any related order, judgment, or arbitral award.

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

- (x3) 'freely convertible currency' means a currency which is widely traded in international foreign exchange markets and widely used in international transactions.
- (x4) 'returns' means all amounts yielded by or derived from an investment or reinvestment, including profits, dividends, capital gains, royalties, interest, payments in connection with intellectual property rights, payments in kind and all other lawful income.

**Section 2**  
**Investment Protection**

**Article 1**  
**Scope**

The provisions in this Section shall apply to:

- (i) covered investments;
- (ii) investors of a Party in respect of a covered investment as regards any treatment that may affect the operation of such investment.

**Article 2**  
**Investment and regulatory measures/objectives**

1. The provisions of this section shall not affect the right of the Parties to regulate within their territories through measures necessary 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.
2. For greater certainty, the provisions of this section shall not be interpreted as a commitment from a Party that it will not change the legal and regulatory framework, including in a manner that may negatively affect the operation of covered investments or the investor's expectations of profits.
3. For greater certainty and subject to paragraph 4, a Party's decision not to issue, renew or maintain a subsidy
  - (a) in the absence of any specific commitment under law or contract to issue, renew, or maintain that subsidy; or
  - (b) in accordance with any terms or conditions attached to the issuance, renewal or maintenance of the subsidy,shall not constitute a breach of the provisions of this Section.
4. For greater certainty, nothing in this Section shall be construed as preventing a Party from discontinuing the granting of a subsidy<sup>2</sup> and/or requesting its reimbursement, or as requiring that Party to compensate the investor therefor, where such action has been ordered by one of its competent authorities listed in Annex III.

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<sup>2</sup> In the case of the EU, "subsidy" includes "state aid" as defined in the EU law.

**Article 3**  
**Treatment of Investors and of covered investments**

1. Each Party shall accord in its territory to covered investments of the other Party and investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 to 5.
2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or a series of measures constitutes:
  - (a) denial of justice in criminal, civil or administrative proceedings; or
  - (b) fundamental breach of due process, including a fundamental breach of transparency and obstacles to effective access to justice, in judicial and administrative proceedings; or
  - (c) manifest arbitrariness; or
  - (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or
  - (e) harassment, 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 of this Article.
3. The Parties shall, upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The [...] Committee (reference to article on Services and Investment Committee) may develop recommendations in this regard and submit them to the [...] Committee (reference to article on Trade Committee). The [...] Committee (reference to article on Trade Committee) shall consider whether to recommend that the Agreement is amended, in accordance with Article [relevant procedures for the amendment of the Agreement].
4. When applying the above fair and equitable treatment obligation, a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.
5. For greater certainty, 'full protection and security' refers to the Party's obligations relating to physical security of investors and covered investments.
6. For greater certainty, a breach of another provision of this Agreement, or of any other international agreement, does not constitute a breach of this Article.

**Article 4**  
**Compensation for losses**

1. Investors of a Party whose covered investments suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the other Party shall be accorded by the latter Party, with respect to restitution, indemnification, compensation or other form of settlement, treatment no less favourable

than that accorded by the latter Party to its own investors or to the investors of any non-Party, whichever is more favourable to the investor.

2. Without prejudice to paragraph 1 of this Article, investors of a Party who, in any of the situations referred to in that paragraph, suffer losses in the territory of the other Party resulting from:
  - (a) requisitioning of their covered investment or a part thereof by the latter's armed forces or authorities; or
  - (b) destruction of their covered investment or a part thereof by the latter's armed forces or authorities, which was not required by the necessity of the situation;

shall be accorded prompt, adequate and effective restitution or compensation by the other Party. The amount of such compensation shall be determined in accordance with the provisions of paragraph 3 of Article 5 [Expropriation], from the date of requisitioning or destruction until the date of actual payment.

## **Article 5 Expropriation**

1. Neither Party shall nationalize or expropriate a covered investment 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) in a non-discriminatory manner; and
  - (d) against payment of prompt, adequate and effective compensation.
2. For greater certainty, this paragraph shall be interpreted in accordance with Annex I [on expropriation].
3. Such compensation shall amount to the fair market value of the investment at the time immediately before the expropriation or the impending expropriation became public knowledge, whichever is earlier, plus interest at a normal commercial rate, from the date of expropriation until the date of payment.
4. Such compensation shall be effectively realisable, freely transferable in accordance with Article 6 [Transfers] and made without delay.
5. The investor affected shall have a right, under the law of the expropriating Party, to prompt review of its claim and of the valuation of its investment, by a judicial or other independent authority of that Party, in accordance with the principles set out in this Article.
6. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, to the extent that such issuance is consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights in Annex 1C to the WTO Agreements ('TRIPS Agreement').

7. For greater certainty, the revocation, limitation or creation of intellectual property rights to the extent that these measures are consistent with TRIPS and Chapter X (Intellectual Property) of this Agreement, do not constitute expropriation. Moreover, a determination that these actions are inconsistent with the TRIPS Agreement or Chapter X (Intellectual Property) of this Agreement does not establish that there has been an expropriation.

## **Article 6**

### **Transfer**

1. Each Party shall permit all transfers relating to a covered investment to be made in a freely convertible currency, without restriction or delay and at the prevailing market rate of exchange applicable on the date of transfer to the currency to be transferred. Such transfers include:
  - (a) contributions to capital, such as principal and additional funds to maintain, develop or increase the investment;
  - (b) profits, dividends, capital gains and other returns, proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;
  - (c) interest, royalty payments, management fees, and technical assistance and other fees;
  - (d) payments made under a contract entered into by the investor, or its investment, including payments made pursuant to a loan agreement;
  - (e) earnings and other remuneration of personnel engaged from abroad and working in connection with an investment;
  - (f) payments made pursuant to Articles 5 [Compensation for Losses] and 6 [Expropriation];
  - (g) payments of damages pursuant to an award issued by a tribunal under Section [Resolution of Investment Disputes and Investment Court System].
2. Neither Party may require its investors to transfer, or penalise its investors for failing to transfer, the income, earnings, profits or other amounts derived from, or attributable to, investments in the territory of the other Party.
3. Notwithstanding paragraphs 1 and 2, nothing in this article shall be construed to prevent a Party from applying in an equitable and non-discriminatory manner, and not in a way that would constitute a disguised restriction on trade and investment, its laws relating to:
  - (a) bankruptcy, insolvency, bank recovery and resolution, or the protection of the rights of creditors, and the prudential supervision of financial institutions;
  - (b) issuing, trading, or dealing in financial instruments;
  - (c) financial reporting or record keeping of transfers where necessary to assist law enforcement or financial regulatory authorities;
  - (d) criminal or penal offenses, deceptive or fraudulent practices;
  - (e) ensuring the satisfaction of judgments in adjudicatory proceedings.
  - (f) social security, public retirement or compulsory savings schemes.

*Note:*

*Additional provisions, e.g. on restrictions in case of balance of payments and external financial difficulties or for the operation of the economic and monetary union, in the case of the European Union will be inserted in the general/horizontal part of the Agreement and will apply to this article.*

*Paragraph 3 might be reviewed /deleted if it overlaps with provisions to be inserted in the general/horizontal part of the Agreement and to be applied to this article.*

## **Article 7**

### **Observance of written commitments**

Where a Party either itself or through any entity mentioned in Article X [Definition of ‘measures adopted or maintained by a Party’] has entered into any contractual written commitment<sup>3</sup> with investors of the other Party or with their covered investments, that Party shall not, either itself or through any such entity breach the said commitment through the exercise of governmental authority.

## **Article 8**

### **Subrogation**

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

## **Article 9**

### **Denial of benefits**

A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of that Party and to investments of that investor if:

- (a) the investors of a non-Party owns or controls the enterprise; and
- (b) the denying Party adopts or maintains a measures with respect to the non-Party that:
  - (i) are related to the maintenance of international peace and security; and

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<sup>3</sup> For the purposes of this paragraph, a “contractual written commitment” means an agreement in writing, entered into by a Party, itself or through any entity mentioned in Article X [Definition of ‘measures adopted or maintained by a Party’], with an investor or a covered investment, whether in a single instrument or multiple instruments, that creates an exchange of rights and obligations, binding on both Parties”.

- (j) prohibit transactions with the enterprise or would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.

NOTE:

*Additional provisions, e.g. Territorial application, Taxation, Security Exceptions, Termination or Relation to other Agreements will be inserted in the general/horizontal part of the Agreement and will apply to this Section.*

## **ANNEX I: Expropriation**

The Parties confirm their shared understanding that:

1. Expropriation may be either direct or indirect:
  - (a) direct expropriation occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure.
  - (b) indirect expropriation occurs where a measure or series of measures by a Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.
2. The determination of whether a measure or series of measures by a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:
  - (a) the economic impact of the measure or series of measures, 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 by a Party;
  - (c) the character of the measure or series of measures, notably their object and content.
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 the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity do not constitute indirect expropriations.

## **ANNEX II: Public debt**

1. No claim that a restructuring of debt issued by a Party breaches an obligation under Section 2 [Investment Protection] may be submitted to, or if already submitted continue in, arbitration under Section 3 [Resolution of Investment Disputes and Investment Court System] if the restructuring is a negotiated restructuring at the time of submission, or becomes a negotiated restructuring after such submission.
2. Notwithstanding [Article 6 Submission of a Claim, Section on Resolution of Investment Disputes and Investment Court System], and subject to paragraph 1 of this Annex, an investor of another Party may not submit a claim under Section 3 [Resolution of Investment Disputes and Investment Court System] that a restructuring of debt issued by a Party breaches Articles X [National Treatment] or X [Most-Favoured Nation] of Section 1 [Liberalisation of Investments] or an obligation under Section 2 [Investment Protection], unless 270 days have elapsed from the date of receipt by the respondent of the written request for consultations pursuant to [Article 4 Consultations].
3. For the purposes of this Annex, ‘negotiated restructuring’ means the restructuring or rescheduling of debt instruments issued by a Party that has been effected through (i) a

modification or amendment of such debt instruments, as provided for under their terms and governing law, or (ii) a debt exchange or other similar process in which the holders of no less than 66% of the aggregate principal amount of the outstanding debt under such debt instruments subject to restructuring, excluding debt held by that Party or by entities owned or controlled by it, have consented to such debt exchange or other process. For greater certainty, debt issued by a Party means debt issued by any administrative level of a Party including with respect to the European Union a government of or in a European Member State or its sub-federal level.

**ANNEX III: Competent authorities mentioned in article 2 paragraph 4**

In the case of the EU, the competent authorities entitled to order the actions mentioned in article 2 paragraph 4 are the European Commission or a court or tribunal of a Member State when applying EU law on state aid.

## Section 3 - Resolution of Investment Disputes and Investment Court System

### SUB-SECTION 1: SCOPE AND DEFINITIONS

#### Article 1 Scope and Definitions

1. This Section shall apply to a dispute between, on the one hand, a claimant of one Party and, on the other hand, the other Party concerning treatment alleged to breach [investment protection provisions, i.e. the investment protection section and the national treatment and the most-favoured nation treatment provisions concerning post-establishment], which breach allegedly causes loss or damage to the claimant or its locally established company.

2. For the purposes of this Section:

"proceeding", unless otherwise specified, means a proceeding before the Tribunal or Appeal Tribunal under this Section;

"disputing parties" means the claimant and the respondent;

"claimant " means an investor of a Party, as defined in Article 1 of Chapter X (General Provisions), which seeks to submit or has submitted a claim pursuant to this section, either

(a) acting on its own behalf; or

(b) acting on behalf of a locally established company which it owns or controls.

The locally established company shall be treated as a national of another Contracting State for the purposes of Article 25 (2) (b) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID-Convention).

"non-disputing Party" means either the United States, when the respondent is the European Union or a Member State of the European Union; or the European Union, when the United States is the respondent.

"respondent" means either the United States; or in the case of the European Union, either the European Union or the Member State of the European Union concerned as notified pursuant to Article 5.

"locally established company" means a juridical person established in the territory of one Party, and owned or controlled by an investor of the other Party.<sup>4</sup>

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<sup>4</sup> A juridical person is: (i) owned by natural or juridical persons of the other Party if more than 50 per cent of the equity interest in it is beneficially owned by natural or juridical persons of that Party; (ii) controlled by natural or juridical persons of the other Party if such natural or juridical persons have the power to name a majority of its directors or otherwise to legally direct its actions.

“UNCITRAL Transparency Rules” means the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

"Third Party funding" means any funding provided by a natural or legal person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings in return for a remuneration dependent on the outcome of the dispute or in the form of a donation or grant.

## **SUB-SECTION 2: ALTERNATIVE DISPUTE RESOLUTION AND CONSULTATIONS**

### **Article 2 Amicable Resolution**

1. Any dispute should, as far as possible, be settled amicably through negotiations or mediation and, where possible, before the submission of a request for consultations pursuant to Article 3. Such settlement may be agreed at any time, including after proceedings under this Section have been commenced.
2. A mutually agreed solution between the disputing parties shall be notified to the non-disputing Party within 15 days of the mutually agreed solution being agreed. The [...] Committee shall keep under surveillance the implementation of such mutually agreed solutions and the Party to the mutually agreed solution shall regularly report to the [...] Committee on the implementation of such solution.

### **Article 3 Mediation**

1. The disputing parties may at any time agree to have recourse to mediation.
2. Recourse to mediation is voluntary and without prejudice to the legal position of either disputing party.
3. Recourse to mediation shall be governed by the rules set out in Annex I. Any time limit mentioned in Annex I may be modified by agreement between the disputing parties.
4. The [...] Committee shall, upon the entry into force of this Agreement, establish a list of six individuals, of high moral character and recognised competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment and who are willing and able to serve as mediators.
5. The mediator shall be appointed by agreement of the disputing parties. The disputing parties may jointly request the President of the Tribunal to appoint a mediator from the list established pursuant to this Article, or, in the absence of a list, from individuals proposed by either Party.

6. Once the disputing parties agree to have recourse to mediation, the time-limits set out in Articles 4(3), 4(5), 28(5) and 29(3) shall be extended by the amount of time from the date on which it was agreed to have recourse to mediation to the date on which either disputing party decides to terminate the mediation, by way of written notice to the mediator and the other disputing party. At the request of both parties, the Tribunal or the Appeal Tribunal shall stay the proceedings.

#### **Article 4 Consultations**

1. Where a dispute cannot be resolved as provided for under Article 2, a claimant of a Party alleging a breach of the provisions referred to in Article 1(1) may submit a request for consultations to the other Party.
2. The request shall contain the following information:
  - (a) the name and address of the claimant and, where such request is submitted on behalf of a locally established company, the name, address and place of incorporation of the locally established company;
  - (b) the provisions referred to in Article 1(1) alleged to have been breached;
  - (c) the legal and factual basis for the claim, including the treatment alleged to be inconsistent with the provisions in Article 1(1);
  - (d) the relief sought and the estimated amount of damages claimed;
  - (e) evidence establishing that the claimant is an investor of the other Party and that it owns or controls the investment and, where it acts on behalf of a locally established company, that it owns or controls the locally established company.

Where a request for consultations is submitted by more than one claimant or on behalf of more than one locally established company, the information in (a) and (e) shall be submitted for each claimant or each locally established company, as the case may be.

3. Unless the disputing parties agree to a longer period, consultations shall be held within 60 days of the submission of the request for consultations under paragraph 5.
4. Unless the disputing parties agree otherwise, the place of consultation shall be:
  - (a) Washington DC where the consultations concern treatment afforded by the United States;
  - (b) Brussels where the consultations concern treatment afforded by the European Union; or
  - (c) the capital of the Member State of the European Union concerned, where the consultations concern treatment afforded exclusively by that Member State.
5. The request for consultations must be submitted:
  - (a) within three years of the date on which the claimant or, as applicable, the locally established company first acquired, or should have first acquired, knowledge of

- the treatment alleged to be inconsistent with the provisions referred to in Article 1(1) and of the loss or damage alleged to have been incurred thereby; or
- (b) within two years of the date on which the claimant or, as applicable, the locally established company, exhausts or ceases to pursue claims or proceedings before a tribunal or court under the domestic law of a Party; and, in any event, no later than 10 years after the date on which the claimant or, as applicable, its locally established company, first acquired, or should have first acquired knowledge, of the treatment alleged to be inconsistent with the provisions referred to in Article 1(1) and of the loss or damage alleged to have been incurred thereby.
6. In the event that the claimant has not submitted a claim pursuant to Article 6 within 18 months of submitting the request for consultations, the claimant shall be deemed to have withdrawn its request for consultations and, where applicable, the notice requesting a determination of the respondent pursuant to Article 5 and may not submit a claim under this Section. This period may be extended by agreement between the parties involved in the consultations.
  7. The time periods in paragraphs 5 and 6 shall not render a claim inadmissible where the claimant can demonstrate that the failure to request consultations or submit a claim is due to the claimant's inability to act as a result of actions taken by the other Party, provided that the claimant acts as soon as reasonably possible after it is able to act.
  8. In the event that the request for consultations concerns an alleged breach of the agreement by the European Union, or by a Member State of the European Union, it shall be sent to the European Union. Where measures of a Member State of the European Union are identified, it shall also be sent to the Member State concerned.

### **SUB -SECTION 3: SUBMISSION OF A CLAIM AND CONDITIONS PRECEDENT**

#### **Article 5 Request for determination of the respondent**

1. If the dispute cannot be settled within 90 days of the submission of the request for consultations, the request concerns an alleged breach of the agreement by the European Union or a Member State of the European Union and the claimant intends to initiate proceedings pursuant to Article 6, the claimant shall deliver a notice to the European Union requesting a determination of the respondent.
2. The notice shall identify the treatment in respect of which the claimant intends to initiate proceedings. Where treatment of a Member State of the European Union is identified, such notice shall also be sent to the Member State concerned.
3. The European Union shall, after having made a determination, inform the claimant within 60 days of the receipt of the notice referred to in paragraph 1 as to whether the European Union or a Member State of the European Union shall be the respondent.

4. The claimant may submit a notice pursuant to Article 6 on the basis of such determination.
5. Where either the European Union or a Member State of the European Union acts as respondent following a determination made pursuant to paragraph 3, neither the European Union nor the Member State concerned may assert the inadmissibility of the claim, lack of jurisdiction of the Tribunal or otherwise assert that the claim or award is unfounded or invalid on the ground that the proper respondent should be or should have been the European Union rather than the Member State or vice versa.
6. The Tribunal and the Appeal Tribunal shall be bound by the determination made pursuant to paragraph 3.
7. Nothing in this Agreement or the applicable arbitration rules shall prevent the exchange of all information relating to a dispute between the European Union and the Member State concerned.

#### **Article 6** **Submission of a claim**

1. If the dispute cannot be settled within six months of the submission of the request for consultations and, where applicable, at least three months have elapsed from the submission of the notice requesting a determination of the respondent pursuant to Article 5 (Request for determination of the respondent), the claimant, provided that it satisfies the requirements set out in this Article and in Article 7, may submit a claim to the Tribunal established pursuant to Article 9.
2. A claim may be submitted to the Tribunal under one of the following sets of rules on dispute settlement:
  - (a) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID);
  - (b) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID) in accordance with the Rules on the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre, where the conditions for proceedings pursuant to paragraph (a) do not apply;
  - (c) the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL); or,
  - (d) any other rules agreed by the disputing parties at the request of the claimant. The respondent shall be deemed to have agreed to the rules proposed by the claimant when making the claim unless it objects, in writing, within twenty days of the submission of the dispute, in which case the claimant may submit a claim under one of the set of rules provided for in paragraphs (a), (b) or (c);

3. The rules on dispute settlement referred to in paragraph 2 shall apply subject to the rules set out in this Chapter, as supplemented by any rules adopted by the [...] Committee, by the Tribunal or by the Appeal Tribunal.
4. All the claims identified by the claimant in the submission of its claim pursuant to this Article must be based on treatment identified in its request for consultations pursuant to Article 4(2)(c).
5. Claims submitted in the name of a class composed of a number of unidentified claimants, or submitted by a representative intending to conduct the proceedings in the interests of a number of identified or unidentified claimants that delegate all decisions relating to the proceedings on their behalf, shall not be admissible.

### **Article 7 Consent**

1. The respondent consents to the submission of a claim under this Section.
2. The consent under paragraph 1 and the submission of a claim under this Section shall be deemed to satisfy the requirements of:
  - (a) Article 25 of the ICSID Convention and the ICSID Additional Facility Rules for written consent of the disputing parties; and,
  - (b) Article II of the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards for an “agreement in writing”.
3. The claimant is deemed to give consent in accordance with the procedures provided for in this Section at the time of submitting a claim pursuant to Article 6.

### **Article 8 Third party funding**

1. Where there is a third party funding, the disputing party benefiting from it shall notify to the other disputing party and to the Tribunal, or where the division of the Tribunal is not established, to the President of the Tribunal, the name and address of the third party funder.
2. Such notification shall be made at the time of submission of a claim, or, where the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded or the donation or grant is made.

## **SUB-SECTION 4: INVESTMENT COURT SYSTEM**

## **Article 9**

### **Tribunal of First Instance ('Tribunal')**

1. A Tribunal of First Instance ('Tribunal') is hereby established to hear claims submitted pursuant to Article 6.
2. The [...] Committee shall, upon the entry into force of this Agreement, appoint fifteen Judges to the Tribunal. Five of the Judges shall be nationals of a Member State of the European Union, five shall be nationals of the United States and five shall be nationals of third countries.
3. The [...] Committee may decide to increase or to decrease the number of the Judges by multiples of three. Additional appointments shall be made on the same basis as provided for in paragraph 2.
4. The Judges shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence. They shall have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements.
5. The Judges appointed pursuant to this Section shall be appointed for a six-year term, renewable once. However, the terms of seven of the fifteen persons appointed immediately after the entry into force of the Agreement, to be determined by lot, shall extend to nine years. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.
6. The Tribunal shall hear cases in divisions consisting of three Judges, of whom one shall be a national of a Member State of the European Union, one a national of the United States and one a national of a third country. The division shall be chaired by the Judge who is a national of a third country.
7. Within 90 days of the submission of a claim pursuant to Article 6, the President of the Tribunal shall appoint the Judges composing the division of the Tribunal hearing the case on a rotation basis, ensuring that the composition of the divisions is random and unpredictable, while giving equal opportunity to all Judges to serve.
8. The President and Vice-President of the Tribunal shall be responsible for organisational issues and will be appointed for a two-year term and shall be drawn by lot from among the Judges who are nationals of third countries. They shall serve on the basis of a rotation drawn by lot by the Chair of the [...] Committee. The Vice-President shall replace the President when the President is unavailable.
9. Notwithstanding paragraph 6, the disputing parties may agree that a case be heard by a sole Judge who is a national of a third country, to be selected by the President of the Tribunal. The respondent shall give sympathetic consideration to such a request from the claimant, in particular where the claimant is a small or medium-sized enterprise or the compensation or damages claimed are relatively low. Such a request should be made at the same time as the filing of the claim pursuant to Article 6.

10. The Tribunal shall draw up its own working procedures.
11. The Judges shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities under this Agreement.
12. In order to ensure their availability, the Judges shall be paid a monthly retainer fee to be fixed by decision of the [...] Committee. [Note: the retainer fee suggested by the EU would be around 1/3<sup>rd</sup> of the retainer fee for WTO Appellate Body members (i.e. around € 2,000 per month)] The President of the Tribunal and, where applicable, the Vice-President, shall receive a fee equivalent to the fee determined pursuant to Article 10(12) for each day worked in fulfilling the functions of President of the Tribunal pursuant to this Section.
13. The retainer fee shall be paid equally by both Parties into an account managed by the Secretariat of [ICSID/the Permanent Court of Arbitration]. In the event that one Party fails to pay the retainer fee the other Party may elect to pay. Any such arrears will remain payable, with appropriate interest.
14. Unless the [...] Committee adopts a decision pursuant to paragraph 15, the amount of the other fees and expenses of the Judges on a division of the Investment Tribunal shall be those determined pursuant to Regulation 14(1) of the Administrative and Financial Regulations of the ICSID Convention in force on the date of the submission of the claim and allocated by the Tribunal among the disputing parties in accordance with Article 28(4).
15. Upon a decision by the [...] Committee, the retainer fee and other fees and expenses may be permanently transformed into a regular salary. In such an event, the Judges shall serve on a full-time basis and the [...] Committee shall fix their remuneration and related organisational matters. In that event, the Judges shall not be permitted to engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the President of the Tribunal.
16. The Secretariat of [ICSID/the Permanent Court of Arbitration] shall act as Secretariat for the Tribunal and provide it with appropriate support. The expenses for such support shall be met by the Parties to the Agreement equally.

## **Article 10**

### **Appeal Tribunal**

1. A permanent Appeal Tribunal is hereby established to hear appeals from the awards issued by the Tribunal.
2. The Appeal Tribunal shall be composed of six Members, of whom two shall be nationals of a Member State of the European Union, two shall be nationals of the United States and two shall be nationals of third countries.

3. The Parties, by decision of the [...] Committee, shall, upon the entry into force of this Agreement, appoint the members of the Appeal Tribunal. For this purpose, each Party shall propose three candidates, two of which may be nationals of that Party and one shall be a non-national, for the [...] Committee to thereafter jointly appoint the Members.
4. The Committee may agree to increase the number of the Members of the Appeal Tribunal by multiples of three. Additional appointments shall be made on the same basis as provided for in paragraph 3.
5. The Appeal Tribunal Members shall be appointed for a six-year term, renewable once. However, the terms of three of the six persons appointed immediately after the entry into force of the agreement, to be determined by lot, shall extend to nine years. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.
6. The Appeal Tribunal shall have a President and Vice-President who shall be selected by lot for a two-year term and shall be selected from among the Members who are nationals of third countries. They shall serve on the basis of a rotation drawn by lot by the Chair of the [...] Committee. The Vice-President shall replace the President when the President is unavailable.
7. The Members of the Appeal Tribunal shall possess the qualifications required in their respective countries for appointment to the highest judicial offices, or be jurists of recognised competence. They shall have demonstrated expertise in public international law. It is desirable that they have expertise in international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements.
8. The Appeal Tribunal shall hear appeals in divisions consisting of three Members. The division shall be chaired by the Member who is a national of a third country.
9. The composition of the division hearing each appeal shall be established in each case by the President of the Appeal Tribunal on a rotation basis, ensuring that the composition of each division is random and unpredictable, while giving equal opportunity to all Members to serve.
10. The Appeal Tribunal shall draw up its own working procedures.
11. All persons serving on the Appeal Tribunal shall be available at all times and on short notice and shall stay abreast of other dispute settlement activities under this agreement.
12. The Members of the Appeal Tribunal shall be paid a monthly retainer fee and receive a fee for each day worked as a Member, to be determined by decision of the [...] Committee. [Note: the retainer and daily fee suggested by the EU would be around the same as for WTO Appeal Tribunal members (i.e. a retainer fee of around € 7,000 per month)].
13. The remuneration of the Members shall be paid equally by both Parties into an account managed by the Secretariat of [ICSID/the Permanent Court of Arbitration]. In

the event that one Party fails to pay the retainer fee the other Party may elect to pay. Any such arrears will remain payable, with appropriate interest

14. Upon a decision by the [...] Committee, the retainer fee and the fees for days worked may be permanently transformed into a regular salary. In such an event, the Members of the Appeal Tribunal shall serve on a full-time basis and the [...] Committee shall fix their remuneration and related organisational matters. In that event, the Members shall not be permitted to engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the President of the Appeal Tribunal.
15. The Secretariat [ICSID/the Permanent Court of Arbitration] shall act as Secretariat for the Appeal Tribunal and provide it with appropriate support. The expenses for such support shall be met by the Parties to the Agreement equally.

## **Article 11**

### **Ethics**

1. The Judges of the Tribunal and the Members of the Appeal Tribunal shall be chosen from persons whose independence is beyond doubt. They shall not be affiliated with any government. They shall not take instructions from any government or organisation with regard to matters related to the dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. In so doing they shall comply with Annex II (Code of Conduct). In addition, upon appointment, they shall refrain from acting as counsel in any pending or new investment protection dispute under this or any other agreement or domestic law.
2. If a disputing party considers that a Judge or a Member has conflict of interest, it shall send a notice of challenge to the appointment to the President of the Tribunal or to the President of the Appeal Tribunal, respectively. The notice of challenge shall be sent within 15 days of the date on which the composition of the division of the Tribunal or of the Appeal Tribunal has been communicated to the disputing party, or within 15 days of the date on which the relevant facts came to its knowledge, if they could not have reasonably been known at the time of composition of the division. The notice of challenge shall state the grounds for the challenge.
3. If, within 15 days from the date of the notice of challenge, the challenged Judge or Member has elected not to resign from that division, the President of the Tribunal or the President of the Appeal Tribunal, respectively, shall, after hearing the disputing parties and after providing the Judge or the Member an opportunity to submit any observations, issue a decision within 45 days of receipt of the notice of challenge and forthwith notify the disputing parties and other Judges or Members of the division.
4. Challenges against the appointment to a division of the President of the Tribunal shall be decided by the President of the Appeal Tribunal and vice-versa.

## **Article 12**

### **Multilateral dispute settlement mechanisms**

Upon the entry into force between the Parties of an international agreement providing for a multilateral investment tribunal and/or a multilateral appellate mechanism applicable to disputes under this Agreement, the relevant parts of this section shall cease to apply. The [] Committee may adopt a decision specifying any necessary transitional arrangements

## **SUB-SECTION 5: CONDUCT OF PROCEEDINGS**

### **Article 13**

#### **Applicable law and rules of interpretation**

1. The Tribunal shall determine whether the treatment subject to the claim is inconsistent with any of the provisions referred to in Article 1(1) alleged by the claimant.
2. In making its determination, the Tribunal shall apply the provisions of this Agreement and other rules of international law applicable between the Parties. It shall interpret this Agreement in accordance with customary rules of interpretation of public international law, as codified in the Vienna Convention on the Law of Treaties.
3. For greater certainty, pursuant to paragraph 1, the domestic law of the Parties shall not be part of the applicable law. Where the Tribunal is required to ascertain the meaning of a provision of the domestic law of one of the Parties as a matter of fact, it shall follow the prevailing interpretation of that provision made by the courts or authorities of that Party.
4. For greater certainty, the meaning given to the relevant domestic law made by the Tribunal shall not be binding upon the courts or the authorities of either Party. The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of the disputing Party
5. Where serious concerns arise as regards matters of interpretation relating to [the Investment Protection<sup>5</sup> or the Resolution of Investment Disputes and Investment Court System Section of this Agreement], the [] Committee may adopt decisions interpreting those provisions. Any such interpretation shall be binding on the Tribunal and the Appeal Tribunal. The [] Committee may decide that an interpretation shall have binding effect from a specific date.

### **Article 14**

#### **Other claims**

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<sup>5</sup> As referred to in Article 1(1).

1. The Tribunal shall dismiss a claim by a claimant who has submitted a claim to a domestic court or tribunal concerning the same treatment as that alleged to be inconsistent with the provisions referred to in Article 1(1) unless:
  - (a) the claimant withdraws such claim before a final judgment, award or decision has been delivered; or
  - (b) a final judgment, award or decision has been delivered on such claim by the domestic court or tribunal.

This paragraph shall not apply where the claimant submits a claim to a domestic court seeking interim injunctive or declaratory relief.

2. The Tribunal shall dismiss a claim by a claimant who has already submitted a claim to the Tribunal under this Agreement, or to another international tribunal pursuant to any other agreement, contract or law, concerning the same treatment as that alleged to be inconsistent with the provisions referred to in Article 1(1) unless
  - (a) the Tribunal or other international tribunal has not delivered a final award thereon; and
  - (b) the claimant withdraws such claim before a final award has been delivered thereon.

3. Before submitting a claim the claimant shall provide:

- (a) evidence that, where it has initiated a claim or proceeding, before the Tribunal or another domestic or international tribunal or court under domestic or international law concerning the same treatment as that alleged to be inconsistent with the provisions referred to in Article 1(1):
  - i. as regards a claim or proceeding before a domestic court or tribunal only, a final award, judgment or decision has been made; or
  - ii. it has withdrawn any such claim or proceeding;

The evidence shall contain, as applicable, proof that a final award, judgment or decision has been made or proof of the withdrawal of any such claim or proceeding.

- (b) a waiver of its right to initiate any claim or proceeding seeking compensation or damages before a domestic or international tribunal or court under domestic or international law with respect to the same treatment as that alleged in its claim pursuant to Article 6 to be inconsistent with any of the provisions referred to in Article 1(1).
4. For the purposes of this Article, the term "claimant" includes the investor and, where applicable, the locally established company. For the purposes of paragraphs 1, 2 and 3(a), it also includes all persons who, directly or indirectly, have an ownership interest

in or are controlled by the locally established company or investor and claim to have suffered the same loss or damage as the investor or locally established company.<sup>6</sup>

5. The waiver provided pursuant to paragraph 3(b) shall cease to apply where the claim is rejected on the basis of a failure to meet the nationality requirements to bring an action under this Agreement.
6. Where claims are brought both pursuant to this Section and Section [State to State dispute settlement] or another international agreement concerning the same treatment as alleged to be inconsistent with any of the provisions referred to in Article 1(1), a Tribunal constituted under this Section shall, where relevant, after hearing the disputing parties, take into account proceedings pursuant to Section [State to State dispute settlement] or another international agreement in its decision, order or award. To this end, it may also, if it considers necessary, stay its proceedings. In acting pursuant to this provision the Tribunal shall respect Article 28(5).

### **Article 15 Anti-circumvention**

For greater certainty, the Tribunal shall decline jurisdiction where the dispute had arisen, or was foreseeable on the basis of a high degree of probability, at the time when the claimant acquired ownership or control of the investment subject to the dispute and the Tribunal determines, on the basis of the facts of the case, that the claimant has acquired ownership or control of the investment for the main purpose of submitting the claim under this Section. The possibility to decline jurisdiction in such circumstances is without prejudice to other jurisdictional objections which could be entertained by the Tribunal.

### **Article 16 Preliminary Objections**

1. The respondent may, no later than 30 days after the constitution of the division of the Tribunal pursuant to Article 9(4), and in any event before the first session of the division of the Tribunal, or 30 days after the respondent became aware of the facts on which the objection is based, file an objection that a claim is manifestly without legal merit.
2. The respondent shall specify as precisely as possible the basis for the objection.
3. The Tribunal, after giving the disputing parties an opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, issue a decision or award on the objection, stating the grounds therefor. In the event that the objection is received after the first session of the Tribunal, the Tribunal shall issue such decision or award as soon as possible, and no later than 120 days after the

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<sup>6</sup> For greater certainty, the same loss or damage means loss or damage flowing from the same treatment which the person seeks to recover in the same capacity as the claimant (e.g. if the claimant sues as a shareholder, this provision would cover a related person also pursuing recovery as a shareholder).

objection was filed. In doing so, the Tribunal shall assume the alleged facts to be true, and may also consider any relevant facts not in dispute.

4. The decision of the Tribunal shall be without prejudice to the right of a disputing party to object, pursuant to Article 17 (Claims unfounded as a matter of law) or in the course of the proceeding, to the legal merits of a claim and without prejudice to the Tribunal's authority to address other objections as a preliminary question.

### **Article 17**

#### **Claims unfounded as a matter of law**

1. Without prejudice to the Tribunal's authority to address other objections as a preliminary question or to a respondent's right to raise any such objections at any appropriate time, the Tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim, or any part thereof, submitted under this section is not a claim for which an award in favour of the claimant may be made under Article 6, even if the facts alleged were assumed to be true. The Tribunal may also consider any relevant facts not in dispute.
2. An objection under paragraph 1 shall be submitted to the Tribunal as soon as possible after the division of the Tribunal is constituted, and in no event later than the date the Tribunal fixes for the respondent to submit its counter-memorial or statement of defence. An objection may not be submitted under paragraph 1 as long as proceedings under Article 16 (Preliminary Objections) are pending, unless the Tribunal grants leave to file an objection under this article, after having taken due account of the circumstances of the case.
3. On receipt of an objection under paragraph 1, and unless it considers the objection manifestly unfounded, the Tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.

### **Article 18**

#### **Transparency**

1. The "UNCITRAL Transparency Rules" shall apply to disputes under this Section, with the following additional obligations.
2. The request for consultations under Article 4, the request for a determination and the notice of determination under Article 5, the agreement to mediate under Article 3, the notice of challenge and the decision on challenge under Article 11 the request for consolidation under Article 27 and all document submitted to and issued by the Appeal Tribunal shall be included in the list of documents referred to in Article 3(1) of the UNCITRAL Transparency Rules.
3. Exhibits shall be included in the list of documents mentioned in Article 3(2) of the UNCITRAL Transparency Rules.

4. Notwithstanding Article 2 of the UNCITRAL Transparency Rules, the European Union or the United States as the case may be shall make publicly available in a timely manner prior to the constitution of the division, relevant documents pursuant to paragraph 2, subject to the redaction of confidential or protected information. Such documents may be made publicly available by communication to the repository referred to in the UNCITRAL Transparency Rules.
5. A disputing party may disclose to other persons in connection with proceedings, including witnesses and experts, such unredacted documents as it considers necessary in the course of proceedings under this Section. However, the disputing party shall ensure that those persons protect the confidential or protected information in those documents.

#### **Article 19** **Interim decisions**

The Tribunal may order an interim measure of protection to preserve the rights of a disputing party or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. The Tribunal may not order the seizure of assets nor may it prevent the application of the treatment alleged to constitute a breach.

#### **Article 20** **Discontinuance**

If, following the submission of a claim under this section, the claimant fails to take any steps in the proceeding during 180 consecutive days or such periods as the disputing parties may agree, the claimant shall be deemed to have withdrawn its claim and to have discontinued the proceedings. The Tribunal shall, at the request of the respondent, and after notice to the disputing parties, take note of the discontinuance in an order. After such an order has been rendered the authority of the Tribunal shall lapse. The claimant may not subsequently submit a claim on the same matter.

#### **Article 21** **Security for costs**

1. For greater certainty, upon request, the Tribunal may order the claimant to post security for all or a part of the costs if there are reasonable grounds to believe that the claimant risks not being able to honour a possible decision on costs issued against it.
2. If the security for costs is not posted in full within 30 days after the Tribunal's order or within any other time period set by the Tribunal, the Tribunal shall so inform the disputing parties. The Tribunal may order the suspension or termination of the proceedings.

**Article 22**  
**The non-disputing Party to the Agreement**

1. The respondent shall, within 30 days after receipt or promptly after any dispute concerning confidential or protected information has been resolved, deliver to the non-disputing Party:
  - (a) a request for consultations referred to in Article 4, a notice requesting a determination referred to in Article 5, a claim referred to in Article 6 and any other documents that are appended to such documents;
  - (b) on request:
    - a. pleadings, memorials, briefs, requests and other submissions made to the Tribunal by a disputing party;
    - b. written submissions made to the Tribunal by a third person;
    - c. minutes or transcripts of hearings of the Tribunal, where available; and
    - d. orders, awards and decisions of the Tribunal.
  - (c) on request and at the cost of the non-disputing Party, all or part of the evidence that has been tendered to the Tribunal.
2. The non-disputing Party has the right to attend a hearing held under this Section.
3. The Tribunal shall accept or, after consultation with the disputes parties, may invite written or oral submissions on issues relating to the interpretation of this Agreement from the non-disputing Party. The Tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by the non-disputing Party.

**Article 23**  
**Intervention by third parties**

1. The Tribunal shall permit any natural or legal person which can establish a direct and present interest in the result of the dispute (the intervener) to intervene as a third party. The intervention shall be limited to supporting, in whole or in part, the award sought by one of the disputing parties.
2. An application to intervene must be lodged within 90 days of the publication of submission of the claim pursuant to Article 6. The Tribunal shall rule on the application within 90 days, after giving the disputing parties an opportunity to submit their observations.
3. If the application to intervene is granted, the intervener shall receive a copy of every procedural document served on the disputing parties, save, where applicable, confidential documents. The intervener may submit a statement in intervention within a time period set by the Tribunal after the communication of the procedural documents. The disputing parties shall have an opportunity to reply to the statement in intervention. The intervener shall be permitted to attend the hearings held under this Chapter and to make an oral statement.

4. In the event of an appeal, a natural or legal person who has intervened before the Tribunal shall be entitled to intervene before the Appeal Tribunal. Paragraph 3 shall apply *mutatis mutandis*.
5. The right of intervention conferred by this Article is without prejudice to the possibility for the Tribunal to accept *amicus curiae* briefs from third parties in accordance with Article 19.
6. For greater certainty, the fact that a natural or legal person is a creditor of the claimant shall not be considered as sufficient in itself to establish that it has a direct and present interest in result of the dispute.

#### **Article 24** **Expert Reports**

The Tribunal, at the request of a disputing party or, after consulting the disputing parties, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety, or other matters raised by a disputing party in a proceeding.

#### **Article 25** **Indemnification and other Compensation**

The Tribunal shall not accept as a valid defence, counterclaim, set-off or similar claim the fact that the claimant or the locally established company has received, or will receive indemnification or other compensation pursuant to an insurance or guarantee contract in respect of all or part of the compensation sought in a dispute initiated pursuant to this Section.

#### **Article 26** **Role of the Parties to the Agreement**

1. No Party shall bring an international claim, in respect of a dispute submitted pursuant to Article 6 or in respect of treatment covered by this Section and subject to mediation pursuant to Article 3, unless the other Party has failed to abide by and comply with the award rendered in such dispute. This shall not exclude the possibility of dispute settlement under Section [state-to-state dispute settlement] in respect of a measure of general application even if that measure is alleged to have violated the agreement as regards a specific investment in respect of which a dispute has been initiated pursuant to Article 6. This is without prejudice to Article 22 of this Section or Article 5 of the UNICTRAL Transparency Rules.
2. Paragraph 1 does not preclude informal exchanges for the sole purpose of facilitating a settlement of the dispute.

**Article 27**  
**Consolidation**

1. In the event that two or more claims submitted under this Section have a question of law or fact in common and arise out of the same events and circumstances, the respondent may submit to the President of the Tribunal a request for the consolidated consideration of all such claims or part of them. The request shall stipulate:
  - (a) the names and addresses of the disputing parties to the claims sought to be consolidated;
  - (b) the scope of the consolidation sought; and
  - (c) the grounds for the request.

The respondent shall also deliver the request to each claimant in a claim which the respondent seeks to consolidate.

2. In the event that all disputing parties to the claims sought to be consolidated agree on the consolidated consideration of the claims, the disputing parties shall submit a joint request to the President of the Tribunal pursuant to paragraph 1. The President of the Tribunal shall, after receipt of such joint request, constitute a new division (the “consolidating division”) of the Tribunal pursuant to Article 9 which shall have jurisdiction over all or part of the claims which are subject to the joint consolidation request.
3. In the event that the disputing parties referred to in paragraph 2 have not reached an agreement on consolidation within thirty days of the receipt of the request for consolidation referred to in paragraph 1 by the last claimant to receive it, the President of the Tribunal shall constitute a consolidating division of the Tribunal pursuant to Article 9. The consolidating division shall assume jurisdiction over all or part of the claims, if, after considering the views of the disputing parties, it decides that to do so would best serve the interest of fair and efficient resolution of the claims, including the interest of consistency of awards.
4. The consolidated consideration of the claims shall be submitted to the consolidating division of the Tribunal under application of the dispute settlement rules chosen by agreement of the claimants from the list contained in Article 6.
5. If the claimants have not agreed upon the dispute settlement rules within 30 days after the date of receipt of the request for consolidated consideration by the last claimant to receive it, the consolidated consideration of the claims shall be submitted to the consolidating division of the Tribunal under application of the UNCITRAL arbitration rules;
6. Divisions of the Tribunal constituted under Article 9 shall cede jurisdiction in relation to the claims, or parts thereof, over which the consolidating division has jurisdiction and the proceedings of such divisions shall be stayed or adjourned, as appropriate. The award of the consolidating division of the Tribunal in relation to the parts of the claims over which it has assumed jurisdiction shall be binding on the divisions which have jurisdiction over the remainder of the claims, unless the award is stayed pursuant to the relevant dispute settlement rules to which the claim was submitted in accordance

with Article 6. If the award has been stayed, it will become binding on the completion of the relevant procedures.

7. A claimant whose claim is subject to consolidation may withdraw its claim or the part thereof subject to consolidation from dispute settlement proceedings under this Article and such claim or part thereof may not be resubmitted under Article 6.
8. At the request of the respondent, the consolidating division of the Tribunal, on the same basis and with the same effect as paragraphs 3 and 6 above, may decide whether it shall have jurisdiction over all or part of a claim falling within the scope of paragraph 1 above, which is submitted after the initiation of the consolidation proceedings.
9. At the request of one of the claimants, the consolidating division of the Tribunal may take such measures as it sees fit in order to preserve the confidentiality of protected information of that claimant vis-à-vis other claimants. Such measures may include the submission of redacted versions of documents containing protected information to the other claimants or arrangements to hold parts of the hearing in private.

### **Article 28 Provisional Award**

1. Where the Tribunal concludes that the treatment in dispute is inconsistent with the provisions referred to in Article 1(1) alleged by the claimant, the Tribunal may, on the basis of a request from the claimant, and after hearing the disputing parties, award only:
  - (a) monetary damages and any applicable interest;
  - (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages representing the fair market value of the property at the time immediately before the expropriation or impending expropriation became known, whichever is earlier, and any applicable interest in lieu of restitution, determined in a manner consistent with Article 2.5 of Section 2 of Chapter II (Expropriation).

Where the claim was submitted on behalf of a locally-established company, any award under this paragraph shall provide that:

- (a) any monetary damages and interest shall be paid to the locally established company;
- (b) any restitution shall be made to the locally established company.

The Tribunal may not order the repeal, cessation or modification of the treatment concerned.

2. Monetary damages shall not be greater than the loss suffered by the claimant or, as applicable, the locally established company, as a result of the breach of the relevant

provisions of the agreement, reduced by any prior damages or compensation already provided by the Party concerned.

3. A Tribunal may not award punitive damages.
4. The Tribunal shall order that reasonable costs incurred by the successful disputing party shall be borne by the unsuccessful disputing party, unless the Tribunal determines that such apportionment is unreasonable in the circumstances of the case. Such a determination may also take into account whether the successful disputing party has acted improperly, for example by raising manifestly frivolous objections or improperly using Articles 16 and 17. Where only some parts of the claims have been successful the costs shall be adjusted, proportionately, to the number or extent of the successful parts of the claims.
5. The Tribunal shall issue a provisional award within 18 months of the date of submission of the claim. If that deadline cannot be respected, the Tribunal shall adopt a decision to that effect, which will specify the reasons for such delay. A provisional award shall become final if 90 days have elapsed after it has been issued and neither disputing party has appealed the award to the Appeal Tribunal.
6. Either disputing party may appeal the provisional award, pursuant to Article 29. In such an event, if the Appeal Tribunal modifies or reverses the provisional award of the Tribunal then the Tribunal shall, after hearing the disputing parties if appropriate, revise its provisional award to reflect the findings and conclusions of the Appeal Tribunal. The provisional award will become final 90 days after its issuance. The Tribunal shall be bound by the findings made by the Appeal Tribunal. The Tribunal shall seek to issue its revised award within 90 days of receiving the report of the Appeal Tribunal.

### **Article 29 Appeal procedure**

1. Either disputing party may appeal before the Appeal Tribunal a provisional award, within 90 days of its issuance. The grounds for appeal are:
  - (a) that the Tribunal has erred in the interpretation or application of the applicable law;
  - (b) that the Tribunal has manifestly erred in the appreciation of the facts, including the appreciation of relevant domestic law; or,
  - (c) those provided for in Article 52 of the ICSID Convention, in so far as they are not covered by (a) and (b).
2. If the Appeal Tribunal rejects the appeal, the provisional award shall become final. If the appeal is well founded, the Appeal Tribunal shall modify or reverse the legal findings and conclusions in the provisional award in whole or part. The Appeal Tribunal may also dismiss the appeal on an expedited basis where it is clear that the appeal is manifestly unfounded, in which case the provisional award shall become

final. Its decision shall specify precisely how it has modified or reversed the relevant findings and conclusions of the Tribunal.

3. As a general rule, the appeal proceedings shall not exceed 180 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appeal Tribunal issues its decision. When the Appeal Tribunal considers that it cannot issue its decision within 180 days, it shall inform the disputing parties in writing of the reasons for the delay together with an estimate of the period within which it will issue its decision. In no case should the proceedings exceed 270 days.
4. A disputing party lodging an appeal shall provide security for the costs of appeal and for the amount provided for in the provisional award.
5. The provisions of Articles 18 [Transparency], 19 [Interim decisions], 20 [Discontinuance], 21 [The non-disputing party to the proceeding] shall apply *mutatis mutandis* in respect of the appeal procedure.

### **Article 30** **Enforcement of awards**

1. Final awards issued pursuant to this Chapter by the Tribunal or the Appeal Tribunal shall be binding between the disputing parties and shall not be subject to appeal, review, set aside, annulment or any other remedy.
2. Each Party shall recognize an award rendered pursuant to this Agreement as binding enforce the pecuniary obligation within its territory as if it were a final judgement of a court in that Party.
3. Execution of the award shall be governed by the laws concerning the execution of judgments in force where such execution is sought.
4. For greater certainty, Article X (Rights and obligations of natural or juridical persons under this Agreement, Chapter X) shall not prevent the recognition, execution and enforcement of awards rendered pursuant to this Section.

[*Note: Relevant Committee provisions to be developed in horizontal institutional discussions.*]

## ANNEX I

### Mediation Mechanism for investor-to-state disputes

#### Article 1 Objective and scope

The objective of the mediation mechanism is to facilitate the finding of a mutually agreed solution through a comprehensive and expeditious procedure with the assistance of a mediator.

#### Article 2 Initiation of the Procedure

1. Either disputing party may request, at any time, the commencement of a mediation procedure. Such request shall be addressed to the other party in writing.

Where the request concerns an alleged breach of the agreement by the authorities of the European Union or by the authorities of the Member States of the European Union, and no respondent has been determined pursuant to Article 5 (Request for determination of the respondent), it shall be addressed to the European Union. Where the request is accepted, the response shall specify whether the European Union or the Member State concerned will be a party to the mediation<sup>7</sup>.

2. The party to which such request is addressed shall give sympathetic consideration to the request and accept or reject it in writing within 10 working days of its receipt.

#### Article 3 Selection of the Mediator

1. If both disputing parties agree to a mediation procedure, a mediator shall be selected in accordance with the procedure set out in Article 4 of Section X (Resolution of Investment Disputes and Investment Court System). The disputing parties shall endeavour to agree on a mediator within 15 working days from the receipt of the reply to the request.
2. A mediator shall not be a national of either Party to the Agreement, unless the disputing parties agree otherwise.
3. The mediator shall assist, in an impartial and transparent manner, the disputing parties in reaching a mutually agreed solution.

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<sup>7</sup> For greater certainty, where the request concerns treatment by the European Union, the party to the mediation shall be the European Union and any Member State concerned shall be fully associated in the mediation. Where the request concerns exclusively treatment by a Member State, the party to the mediation shall be the Member State concerned, unless it requests the European Union to be party.

**Article 4**  
**Rules of the Mediation Procedure**

1. Within 10 working days after the appointment of the mediator, the disputing party having invoked the mediation procedure shall present, in writing, a detailed description of the problem to the mediator and to the other disputing party. Within 20 working days after the date of delivery of this submission, the other disputing party may provide, in writing, its comments to the description of the problem. Either disputing party may include in its description or comments any information that it deems relevant.
2. The mediator may decide on the most appropriate way of bringing clarity to the measure concerned. In particular, the mediator may organise meetings between the disputing parties, consult the disputing parties jointly or individually, seek the assistance of or consult with relevant experts and stakeholders and provide any additional support requested by the disputing parties. However, before seeking the assistance of or consulting with relevant experts and stakeholders, the mediator shall consult with the disputing parties.
3. The mediator may offer advice and propose a solution for the consideration of the disputing parties which may accept or reject the proposed solution or may agree on a different solution. However, the mediator shall not advise or give comments on the consistency of the measure at issue with this Agreement.
4. The procedure shall take place in the territory of the Party concerned, or by mutual agreement in any other location or by any other means.
5. The disputing parties shall endeavour to reach a mutually agreed solution within 60 days from the appointment of the mediator. Pending a final agreement, the disputing parties may consider possible interim solutions.
6. Mutually agreed solutions shall be made publicly available. However, the version disclosed to the public may not contain any information that a disputing party has designated as confidential.
7. The procedure shall be terminated:
  - (a) by the adoption of a mutually agreed solution by the disputing parties, on the date of adoption;
  - (b) by a written declaration of the mediator, after consultation with the disputing parties, that further efforts at mediation would be to no avail;
  - (c) by written notice of a disputing party.

**Article 5**  
**Implementation of a Mutually Agreed Solution**

1. Where a solution has been agreed, each disputing party shall take the measures necessary to implement the mutually agreed solution within the agreed timeframe.

2. The implementing disputing party shall inform the other disputing party in writing of any steps or measures taken to implement the mutually agreed solution.
3. On request of the disputing parties, the mediator shall issue to the disputing parties, in writing, a draft factual report, providing a brief summary of (1) the measure at issue in these procedures; (2) the procedures followed; and (3) any mutually agreed solution reached as the final outcome of these procedures, including possible interim solutions. The mediator shall provide the disputing parties 15 working days to comment on the draft report. After considering the comments of the disputing parties submitted within the period, the mediator shall submit, in writing, a final factual report to the disputing parties within 15 working days. The factual report shall not include any interpretation of this Agreement.

### **Article 6 Relationship to Dispute Settlement**

1. The procedure under this mediation mechanism is not intended to serve as a basis for dispute settlement procedures under this Agreement or another agreement. A disputing party shall not rely on or introduce as evidence in such dispute settlement procedures, nor shall any adjudicative body take into consideration:
  - (a) positions taken by a disputing party in the course of the mediation procedure;
  - (b) the fact that a disputing party has indicated its willingness to accept a solution to the measure subject to mediation; or
  - (c) advice given or proposals made by the mediator.
2. The mediation mechanism is without prejudice to the rights and obligations of the Parties and the disputing parties under Section X (Resolution of Investment Disputes and Investment Court System) and Chapter Y (State to state Dispute Settlement).
3. Unless the disputing parties agree otherwise, and without prejudice to Article 4(6), all steps of the procedure, including any advice or proposed solution, shall be confidential. However, any disputing party may disclose to the public that mediation is taking place.

### **Article 7 Time Limits**

Any time limit referred to in this Annex may be modified by mutual agreement between the disputing parties.

### **Article 8 Costs**

1. Each disputing party shall bear its own expenses derived from the participation in the mediation procedure.
2. The disputing parties shall share jointly and equally the expenses derived from organisational matters, including the remuneration and expenses of the mediator.

Remuneration of the mediator shall be in accordance with that foreseen for Members under Article 9 of Section X (Resolution of Investment Disputes and Investment Court System).

## **ANNEX II**

### **Code of Conduct for Members of the Tribunal, the Appeal Tribunal and Mediators**

#### **Article 1 Definitions**

In this Code of Conduct:

"member" means a member of the Tribunal or Appeal Tribunal established pursuant to Section X (Resolution of Investment Disputes and Investment Court System);

"mediator" means a person who conducts mediation in accordance with Article 4 of Section X (Resolution of Investment Disputes and Investment Court System);

"candidate" means an individual who is under consideration for selection as a member of the Tribunal or Appeal Tribunal;

"assistant" means a person who, under the terms of appointment of a member, assists the member in his research or supports him in his duties;

"staff", in respect of a member, means persons under the direction and control of the member, other than assistants;

"party" means a disputing party under Section X (Resolution of Investment Disputes and Investment Court System).

#### **Article 2 Responsibilities to the process**

Candidates and members shall avoid impropriety and the appearance of impropriety, shall be independent and impartial, shall avoid direct and indirect conflicts of interest and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement mechanism is preserved. Former members must comply with the obligations established in Articles 6 and 7 of this Code of Conduct

#### **Article 3 Disclosure obligations**

1. Prior to confirmation of their selection as members candidates shall disclose any past and present interest, relationship or matter that is likely to affect their independence or impartiality or that might reasonably create an appearance of impropriety or bias in the proceeding. To this end, candidates shall make all reasonable efforts to become aware of any such interests, relationships or matters.

2. Candidates or members shall communicate matters concerning actual or potential violations of this Code of Conduct in writing, to the Parties and, if applicable, to the disputing parties.
3. Once selected, members shall during all stages of the proceeding, continue to make all efforts to become aware of any interests, relationships or matters referred to in paragraph 1 of this Article. Members shall disclose such interests, relationships or matters by informing the Parties and, if applicable, the disputing parties.

**Article 4**  
**Duties of Members**

1. Upon selection, members shall perform their duties thoroughly and expeditiously throughout the course of the proceeding and shall do so with fairness and diligence.
2. Members shall consider only those issues raised in the proceeding and which are necessary for a decision or award and shall not delegate this duty to any other person.
3. Members shall take all appropriate steps to ensure that their assistant and staff are aware of, and comply with, Articles 2, 3, 5 and 7 of this Code of Conduct.
4. Members shall not engage in *ex parte* contacts concerning the proceeding.

**Article 5**  
**Independence and Impartiality of Members**

1. Members must be independent and impartial and avoid creating an appearance of bias or impropriety and shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a Party or disputing party or fear of criticism.
2. Members shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere or appear to interfere, with the proper performance of their duties.
3. Members may not use their position to advance any personal or private interests and shall avoid actions that may create the impression that they are in a position to be influenced by others.
4. Members may not allow financial, business, professional, family or social relationships or responsibilities to influence their conduct or judgment.
5. Members must avoid entering into any relationship or acquiring any financial interest that is likely to affect their impartiality or that might reasonably create an appearance of impropriety or bias.

**Article 6**  
**Obligations of former members**

All former members must avoid actions that may create the appearance that they were biased in carrying out their duties or derived advantage from the decision or award of the tribunal or Appeal Tribunal.

**Article 7**  
**Confidentiality**

1. No members or former members shall at any time disclose or use any non-public information concerning a proceeding or acquired during a proceeding, except for the purposes of the proceeding, and shall not, in any case, disclose or use any such information to gain personal advantage or advantage for others or to adversely affect the interest of others.
2. No members shall disclose a decision or award or parts thereof prior to its publication in accordance with the transparency provisions of Article 19 of Section X (Resolution of Investment Disputes and Investment Court System) as applicable.
3. No members or former members shall at any time disclose the deliberations of a Tribunal or Appeal Tribunal, or any member's views, whatever they may be.

**Article 8**  
**Expenses**

Each member shall keep a record and render a final account of the time devoted to the procedure and of the expenses incurred, as well as the time and expenses of their assistant and staff.

**Article 9**  
**Mediators**

The rules set out in this Code of Conduct as applying to members or former members shall apply, *mutatis mutandis*, to mediators.