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**MEETING DOCUMENT**

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From:	European Commission
To:	Trade Policy Committee (Services and Investment)
Subject:	EU-Mexico Global Agreement – Draft consolidated text on Investment Liberalisation, Protection and Dispute Resolution

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## EUROPEAN COMMISSION

Directorate-General for Trade  
Directorate B - Services and Investment, Intellectual Property, and Public Procurement  
**Services and Investment**  
Directorate F - WTO, Legal Affairs and Trade in Goods  
**Dispute Settlement and Legal Aspects of Trade Policy**

Brussels, 27 February 2018  
Trade B1/B2/F2/cg/1192170

*Limited<sup>1</sup>*

### NOTE FOR THE ATTENTION OF THE TRADE POLICY COMMITTEE (SERVICES AND INVESTMENT)

**SUBJECT:** EU-Mexico Global Agreement – Draft consolidated text on Investment Liberalisation, Protection and Dispute Resolution

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**FOR:** Information

**REMARKS:**

Delegations will find attached the current text of Investment Chapter pertaining to investment liberalisation, protection, and dispute resolution of the EU-Mexico Global Agreement following the most recent round of negotiations from 12 to 20 February in Mexico.

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## CHAPTER XX

### INVESTMENT Section A

#### GENERAL PROVISIONS

##### Right to regulate

1. The Parties affirm the 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, the promotion and protection of cultural diversity, or competition.

##### Scope

This Chapter applies to measures adopted or maintained by<sup>[EU:1]</sup>:

- (a) the central, regional, or local governments and authorities of that Party; and
- (b) any person, including a state enterprise or any other non-governmental body in the exercise of powers delegated by central, regional, or local governments or authorities.

##### Definitions

For the purpose of this Chapter:

**aircraft repair and maintenance services during which an aircraft is withdrawn from service** mean such activities when undertaken on an aircraft or a part thereof while it is withdrawn from service and do not include so-called line maintenance.

**ground handling services** means the supply at an airport, on a fee or contract basis, of the following services: airline representation, administration and supervision; passenger handling; baggage handling; ramp services; catering, except the preparation of the food; air cargo and mail handling; fuelling of an aircraft; aircraft servicing and cleaning; surface transport; and flight operations, crew administration and flight planning.

Ground handling services do not include: self-handling; security; line maintenance; aircraft repair and maintenance; or management or operation of essential centralised airport infrastructure, such as de-icing facilities, fuel distribution systems, baggage handling systems and fixed intra-airport transport systems;

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<sup>1</sup> [EU: For greater certainty, this Chapter covers measures by entities listed under paragraph (a) and (b), which are adopted or maintained either directly, or indirectly by instructing, directing or controlling other entities with regard to those measures]

“**natural person of the EU**” means a national of one of the Member States of the European Union according to its legislation<sup>2</sup> and a “**natural person of Mexico**” means a national of Mexico according to its legislation. A natural person who is a national of Mexico and has the nationality of one of the Member States of the European Union is deemed to be exclusively a natural person of the Party of his or her dominant and effective nationality;

“**enterprise**” means any legal entity duly constituted or otherwise organised under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association;

**Drafter’s note:** The Parties agree that the above definition of enterprise should be inserted within the “General Definitions” of the Agreement.

“**enterprise**” means an enterprise as defined in Article XX (General definitions), or a branch [EU: or a representative office] of an enterprise;

“**enterprise of the EU**” or an “**enterprise of Mexico**” means an enterprise set up in accordance with the laws of a Member State of the European Union or of Mexico and engaged in substantive business operations<sup>3</sup> in the territory of the EU or of Mexico, respectively<sup>4</sup>;

Notwithstanding the paragraph (c) of this Article, shipping companies established outside the European Union or Mexico and controlled by nationals of a Member State of the European Union or of Mexico, respectively, shall also be beneficiaries of the provisions of this Title, with the exception of Chapter II (Investment) Section B (Investment Protection) and of Section C (Resolution of Investment Disputes and Investment Court System), if their vessels are registered in accordance with their respective legislation, in that Member State or in Mexico and fly the flag of a Member State or of Mexico;

“**establishment**” means the setting up, including the acquisition<sup>5</sup> of, an enterprise in Mexico or in the EU;

“**economic activities**” means activities of an industrial, commercial or professional character, and activities of craftsmen, including the supply of services, except activities performed in the exercise of governmental authority;

“**operation**” means the conduct, management, maintenance, use, enjoyment, sale or other disposal of an investment by an investor of one Party, in the territory of the other Party;

<sup>2</sup> The definition of natural persons of the EU also includes natural persons permanently residing in the Republic of Latvia who are not citizens of the Republic of Latvia or any other state but who are entitled, under laws and regulations of the Republic of Latvia, to receive a non-citizen’s passport.

<sup>3</sup> In line with its notification of the Treaty establishing the European Community to the WTO (WT/REG39/1), the EU understands that the concept of “effective and continuous link” with the economy of a Member State of the European Union enshrined in Article 54 of the TFEU is equivalent to the concept of “substantive business operations”.

<sup>4</sup> For greater certainty, a branch [EU: or a representative office] of a legal entity of a non-Party shall not be considered as an enterprise of the EU or an enterprise of Mexico.

<sup>5</sup> The term “acquisition” shall be understood as including capital participation in an enterprise with a view to establishing or maintaining lasting economic links.

“**activities performed in the exercise of governmental authority**” means activities performed neither on a commercial basis nor in competition with one or more economic operators;

“**measure**” includes any measure by a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action, requirement, practice or any other form<sup>6</sup>;

“**investor of a Party**” means a Party or natural person or an enterprise of a Party, other than a branch [EU: or representative office] that seeks to make, is making, or has already made an investment in the territory of the other Party.

**Where a Party is an investor, the intention of both parties is to exclude a Party to be a claimant under ISDS, and only be subject to state to state mechanism. Parties to analyse the placement of this exclusion.**

“**investor of a non-Party**” means, with respect to a Party, an investor that seeks to make, is making, or has made an investment in the territory of that Party, that is not an investor of Mexico or of the EU;

“**covered investment**” means an investment which is owned, directly or indirectly, or controlled, directly or indirectly, by investors of one Party in the territory of the other Party, made in accordance with applicable laws, in existence as of the date of entry into force of this Agreement or established thereafter;

“**investment**” means [EU: every kind of asset which][MX: the following assets], owned or controlled, directly or indirectly, by an investor [and acquired in the expectation of, or used for the purpose of, economic benefit or other business purposes] and that has the characteristics of an investment, including such characteristics as a certain duration, the commitment of capital or other resources, the expectation of gain or profit or the assumption of risk [EU: Forms that an investment may take include]:

- a) an enterprise;
- b) shares, stock and other forms of equity participation in an enterprise;
- (c) bonds, debentures, loans, and other debt instruments of an enterprise;<sup>7</sup>
  - (i) where the enterprise is an affiliate of the investor, or
  - (ii) where the original maturity of the debt security is at least [EU: one] [MX:three] years.
- (d) interests arising from:
  - i) concessions, licenses, authorisations, permits, and similar rights conferred pursuant to domestic law
  - ii) turnkey, construction, management, production, concession, or revenue-sharing contracts, and other similar contracts;
- (d) intellectual property rights;
- (e) other tangible or intangible, movable or immovable property, and related property rights, such as leases, [mortgages,] liens and pledges<sup>8</sup>;

<sup>6</sup> For greater certainty, “measure” includes failures to act.

<sup>7</sup> [MX: Some forms of debt such as bonds, debentures and long term notes, are more likely to have characteristics of an investment, while other forms of debt are less likely have such characteristics.]

- (f) claims to money involving the kind of interests set out in subparagraphs (a) to (e) above, but no claims to money that arise solely from:
  - (i) 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, or
  - (ii) The extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (c) above;

Investment does not include an order or judgment entered in a judicial or administrative action.

Any alteration of the form in which assets are invested or reinvested shall not affect their character as investments provided that the form taken by any investment or reinvestment maintains its compliance with the definition of investment.

**"freely convertible currency"** means a currency which is widely traded in international foreign exchange markets and widely used in international transactions.

**"returns"** means the amounts yielded by an investment and includes in particular, though not exclusively, profits, interest, dividends, capital gains, royalties, payments in connection with intellectual property rights, payments in kind management fees and other fees derived from the investment. For the purposes of the definition of investment, returns that are reinvested shall be treated as investments.<sup>9</sup>

**"TRIPS Agreement"** means the Agreement on Trade-related Aspects of Intellectual Property Rights and related issues in the WTO.

#### **Relation to Other Chapters**

1. In the event of any inconsistency between this Chapter and the Financial Services Chapter, the latter shall prevail to the extent of the inconsistency.
2. A requirement by a Party that a service supplier of the other Party post a bond or other form of financial security as a condition of the cross-border supply of a service does not of itself make this Chapter applicable to measures adopted or maintained by the Party relating to such cross-border supply of the service. This Chapter applies to measures adopted or maintained by the Party relating to the posted bond or financial security, to the extent that such bond or financial security is a covered investment.

### **SECTION A**

## **LIBERALISATION OF INVESTMENTS**

### **Scope**

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<sup>8</sup> For greater certainty, market share, market access, expected gains, and opportunities for profit-making are not, by themselves, investments.

<sup>9</sup> For greater certainty reinvested returns under this paragraph shall be treated as investments as long as they comply with the definition of investment under this article.

1. This Section applies to measures adopted or maintained by a Party affecting the establishment of an enterprise or the operation of an investment of an investor of the other Party in its territory.
2. This Section shall not apply to:
  - (a) activities performed in the exercise of governmental authority within the territory of the respective Party;
  - [(b) Government procurement 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 19.2.2 (Scope and coverage);]
  - (c) measures adopted or maintained by a Party to the extent that they are covered by Chapter XX (Financial Services);
  - (d) audio-visual services;
  - (e) national maritime cabotage<sup>10</sup>; and
- (d) Air services, or related services in support of air services, other than the following:
  - i. aircraft repair and maintenance services during which an aircraft is withdrawn from service;
  - ii. selling and marketing of air transport services;
  - iii. computer reservation system services; and
  - iv. ground handling services.
3. Subsidies shall be dealt with by Chapter [YY (on Competition and Subsidies)]. Articles 2.2 [Market Access], 2.3 [National Treatment] and 2.4 [Most Favoured Nation] shall not apply to subsidies or grants provided by the Parties, including government-supported loans, guarantees, and insurance.

[MX: 4. For greater certainty, this Agreement does not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.]

***Drafters note: This provision to be negotiated together with the provisions on the termination of BITs and investor-state dispute settlement.***

## Market Access

<sup>10</sup> [For the EU, without prejudice to the scope of activities which may be considered as cabotage under the relevant national legislation, national maritime cabotage under this Chapter covers transportation of passengers or goods between a port or point located in a Member State of the European Union and another port or point located in that same Member State of the European Union, including on its continental shelf, as provided in the UN Convention on the Law of the Sea, and traffic originating and terminating in the same port or point located in a Member State of the European Union. For Mexico, national maritime cabotage under this Chapter covers the navigation that any vessel performs by sea, between ports or places located within the Mexican marine zones and Mexican shores.]

1. In the sectors or subsectors where market access commitments are undertaken, neither Party shall adopt or maintain, with respect to market access through establishment or operation by investors of the other Party or by enterprises constituting covered investments, either on the basis of its entire territory or on the basis of a territorial subdivision, a measure that:
  - (a) limits the number of enterprises that may carry out a specific economic activity, whether in the form of numerical quotas, monopolies, exclusive rights or the requirements of an economic needs test;
  - (b) limits the total value of transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
  - (c) limits the total number of operations or on the total quantity of output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;<sup>11</sup>
  - (d) restricts or requires specific types of legal entity or joint venture through which an investor of the other Party may carry out an economic activity;
  - (e) limits the total number of natural persons that may be employed in a particular sector or that an enterprise may employ and who are necessary for, and directly related to, the performance of economic activity in the form of numerical quotas or the requirement of an economic needs test.

#### **National Treatment**

1. Each Party shall accord to investors of the other Party and to their covered investments treatment no less favourable than the treatment it accords, in like situations, to its own investors and to their enterprises, respectively, with respect to their establishment in its territory.
2. Each Party shall accord to investors of the other Party and to their covered investments, treatment no less favourable than the treatment it accords, in like situations, to its own investors and to their investments, respectively, with respect to their operation in its territory.
3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government of Mexico, treatment no less favourable than the most favourable treatment accorded, in like situations, by that regional level of government of Mexico to investors, and to investments of investors, the Party of which it forms a part.

The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a government of or in a Member State of the EU, treatment no less favourable than the most favourable treatment accorded, in like situations, by that government to its own investors, and to investments of such investors, in its territory.

#### **Most-Favoured-Nation Treatment**

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<sup>11</sup> [EU: Subparagraphs 2 (a), (b), and (c) do not cover measures taken in order to limit the production of an agricultural or fishery product.]

1. Each Party shall accord to investors of the other Party and to their covered investments treatment no less favourable than the treatment it accords, in like situations, to investors and enterprises, respectively, of any non-Party with respect to their establishment in its territory.
2. Each Party shall accord to investors of the other Party and to their covered investments treatment no less favourable than the treatment it accords, in like situations, to investors and investments, respectively, of any non-Party with respect to the operation of investments in its territory.
3. Paragraphs 1 and 2 shall not be construed to oblige a Party to extend to the investors of the other Party the benefit of any treatment resulting from measures providing for recognition, including of the standards or criteria for the authorisation, licencing, or certification of a natural person or enterprise to carry out an economic activity, [or of prudential measures.
4. For greater certainty, Most-Favoured-Nation Treatment referred to in this Article does not include treatment accorded to investors of a non-Party and their investments by provisions concerning the settlement of investment disputes provided for in this or other international agreements concluded between a Party and a non-Party. The substantive provisions in other international investment or trade agreements do not in themselves constitute "treatment" as referred to in paragraphs 1 and 2, and thus cannot give rise to a breach of this Article. Measures applied pursuant to such provisions may constitute "treatment" under this Article.

#### **Performance Requirements**

1. Neither Party may, in connection with the establishment of any enterprise or the operation of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement or enforce any commitment or undertaking<sup>12</sup>:
  - (a) export a given level or percentage of goods or services;
  - (b) achieve a given level or percentage of domestic content;
  - (c) purchase, use, or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from natural persons or enterprises in its territory;
  - (d) relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
  - (e) restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
  - (f) [provide access to or] transfer a particular technology, a production process, or other proprietary knowledge to a natural person or enterprise in its territory; or

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<sup>12</sup> For greater certainty a condition for the receipt or continued receipt of an advantage referred to in paragraph 2 does not constitute a "commitment or undertaking" for the purpose of paragraph 1.

- (g) supply exclusively from the territory of the Party to a specific regional market or to the world market, goods or services that such investment produces.
- (h) locate the headquarters of that investor for a specific region or the world market in its territory;
- (i) [EU: hire a given number or percentage of its nationals;
- (j) achieve a given level or value of research and development in its territory;]
- (k) restrict the exportation or sale for export.

2. Neither Party may condition the receipt or continued receipt of an advantage, in connection with the establishment of any enterprise or the operation of an investment of an investor of a Party or of a non-Party in its territory, on compliance with any requirement to:

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

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

4. Paragraph 1 (f) does not apply when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be a violation of the Party's competition laws.

5. Paragraph 1(f) does not apply when a Party authorises use of an intellectual property right in accordance with Article 31 [and 31Bis] of the TRIPS Agreement, or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement.

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

7. Paragraphs 2 (a) and (b) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

8. For greater certainty, paragraphs 1 and 2 do not apply to any commitment, undertaking, or requirement other than those set out in those paragraphs.
9. This Article does not preclude enforcement of any commitment, undertaking, or requirement between private parties [other than a Party], where a Party did not impose or require the commitment, undertaking, or requirement.
11. This Article is without prejudice to World Trade Organization commitments of a Party.

#### **Senior Management and Board of Directors**

1. Neither Party may require that an enterprise of that Party that is a covered investment appoint to senior management positions natural persons of any particular nationality.
2. No Party may require that the Board of Directors of an enterprise of the other Party be composed of nationals or residents in the territory of the Party, or a combination thereof.

#### **[EU: Formal requirements] [MX: Special Formalities and Information Requirements]**

1. Nothing in Article 4 (National Treatment) shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as residency requirements for registration or a requirement that covered investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not materially impair the protections afforded by a Party to investors of the other Party and covered investments pursuant to this Chapter.]
2. Notwithstanding Articles 4 (National Treatment) and 5 (Most-Favoured-Nation Treatment), a Party may require an investor of the other Party or its covered investment to provide routine information concerning that investment solely for informational or statistical purposes. The Party shall protect such information that is confidential from any disclosure that would prejudice the competitive position of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.

#### **Non-Conforming Measures and Exceptions**

1. Articles X (National Treatment), X (Most-Favoured-Nation Treatment), X (Performance Requirements) and X (Senior Management and Board of Directors) do not apply to:
  - (a) any 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) 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 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 Articles X (National Treatment), X (Most Favoured Nation Treatment) and X (Performance Requirements) and X (Senior Management and Board of Directors).

2. Articles X (National Treatment), X (Most-Favoured-Nation Treatment), X (Performance Requirements) and X (Senior Management and Board of Directors) do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II.

3. [EU: Notwithstanding paragraph 2 of Article X (National Treatment), a Party may adopt or maintain a non-conforming measure affecting the operation of an enterprise that is consistent with its Annex I or Annex II, where such measure is:

- (a) a non-conforming measure that is adopted before the entry into force of this Agreement;
- (b) a non-conforming measure referred to in sub-paragraph (a) that is being continued, renewed or amended after the entry into force of this Agreement, provided the measure is no less consistent with paragraph 2 of Article X after being continued, renewed or amended than the measure as it existed prior to its continuation, renewal or amendment; or
- (c) a non-conforming measure covered under its Annex II that is adopted after the entry into force of this agreement and does not fall within sub-paragraph (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 entry into force of such measure.

[MX: 3. No Party may, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to Annex II, require [directly or indirectly] an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

4. Article X (Market Access) does not apply to any measure that a Party adopts or maintains with respect to committed sectors or subsectors as set out in its Annex III.

5. Articles 4 (National Treatment) and 5 (Most-Favoured-Nation Treatment) do not apply to any measure that constitutes an exception, exemption or waiver [from Articles 3 or 4 of the TRIPS, as specifically provided in Articles 3 through 5 of the TRIPS] [under the TRIPS Agreement.]

6. Within five years of the date of entry into force of this Agreement, Mexico shall:
- a) set out in its Schedule to Annex I and Annex III any existing non-conforming measures maintained at the sub-federal level of government; and,
  - b) set out in its Schedule to Annex I and Annex II a list relating to its performance requirements.

## **SECTION B**

### **INVESTMENT PROTECTION**

#### **Scope**

This Section applies to:

- (a) covered investments;
- (b) investors of a Party in respect of a covered investment with respect to any measure adopted or maintained by a Party affecting the operation of such investment.

#### **Investment and Regulatory Objectives and Measures**

1. 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.
2. For greater certainty, nothing in this Section shall be construed as preventing a Party from discontinuing the granting of a subsidy<sup>13</sup> or requesting its reimbursement, where such action has been ordered by a competent court, administrative tribunal or other competent authority, or as requiring that Party to compensate the investor therefor.
3. For greater certainty, a Party's decision not to issue, renew or maintain a subsidy or grant
  - (a) in the absence of any specific commitment under law or contract to issue, renew, or maintain that subsidy or grant; or
  - (b) in accordance with any terms or conditions attached to the issuance, renewal or maintenance of the subsidy or grant, or
  - (c) in accordance with paragraph 2;does not constitute a breach of the provisions of this Section.

#### **Treatment of Investors and of Covered Investments**

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 the following paragraphs.

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<sup>13</sup> [EU: In the case of the EU, "subsidy" includes any aid granted by a Member State of the EU or through State resources of such Member State, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and affects trade between the Member States of the EU.]

2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes<sup>14</sup>:

- (a) denial of justice in criminal, civil or administrative proceedings; or
- (b) fundamental breach of due process; or
- (c) manifest arbitrariness, including targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or
- (d) harassment, coercion, or abuse of power; or
- (e) a breach of any additional elements of the fair and equitable treatment obligation which have been adopted by the Parties in accordance with paragraph 10 of this Article.

3. A Party breaches the obligation of full protection and security if a measure or series of measures constitutes a failure to provide physical security to investors and their covered investments.

4. When assessing a breach under this Article, 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. However, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's legitimate expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.

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

6. The fact that a measure breaches domestic law does not, in and of itself, establish a breach of the obligations referred to in this Article. In order to ascertain whether the measure breaches this Article, the Tribunal must consider whether a Party has acted inconsistently with paragraphs 1 to 4.

7. The Parties shall, at the 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 respect and submit them to the [...] Committee (*reference to Article on Trade Committee*). The [...] Committee

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<sup>14</sup> For greater certainty, in determining whether a measure or series of measures amounts to a breach of fair and equitable treatment, a tribunal shall take into account, inter alia, the following:

(i) With regard to the subparagraphs 2 (a) and 2 (b), whether the measure or series of measures involves gross misconduct that offends judicial propriety. The mere fact that an investor's challenge of the impugned measure in domestic proceeding has been rejected or dismissed or has otherwise failed does not in itself constitute a denial of justice as referred to in the subparagraph 2 (a).

(ii) With regard to the subparagraph 2 (c), whether the measure or series of measures were patently not founded on reason or fact, or were patently founded on illegitimate grounds such as prejudice or bias. The mere illegality, or a merely inconsistent or questionable application of a policy or procedure, does not in itself constitute manifest arbitrariness as referred to in the subparagraph 2 (c), while a total and unjustified repudiation of a law or regulation, or a measure without reason, or a conduct that is specifically targeted to the investor or its covered investment with the purpose of causing damage are likely to constitute manifest arbitrariness as referred to in the subparagraph 2 (c).

(iii) With regard to the subparagraph 2 (d), whether a Party acted ultra vires, whether the episodes of alleged harassment or coercion were repeated and sustained.

(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).

### Transfers

1. Each Party shall permit all transfers relating to a covered investment to be made freely without restriction or delay into and out of its territory. Such transfers include:
  - (a) contributions to capital, such as the principal and additional amounts to maintain develop or increase the investment;
  - (b) profits, dividends, capital gains, interest, royalty payments, management fees, and other returns;
  - (c) proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;
  - (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 X (Compensation for Losses) and Y (Expropriation and Compensation);
  - (g) payments of damages pursuant to an award issued by a tribunal under Section XXX .
2. Each Party shall permit returns in kind relating to a covered investment to be made as authorised or specified in a written agreement between the Party and a covered investment or an investor of another Party.
3. Each Party shall permit transfers relating to a covered investment to be made in a freely convertible currency at the market rate of exchange prevailing for that currency on the date of transfer.
4. Notwithstanding paragraph 2, a Party may restrict transfers of returns in kind in circumstances where it could otherwise restrict such transfers under this Agreement, including as set out in paragraph 5.
5. Notwithstanding paragraphs 1, 2 and 3, this Article shall not be construed as precluding a Party from preventing or delaying a transfer through the equitable, non-discriminatory, and good faith application of, 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) ensuring compliance with orders or judgments in judicial or administrative proceedings;
- (c) issuing, trading, or dealing in financial instruments such as securities, futures, options, or derivatives;
- (d) criminal or penal offences, deceptive or fraudulent practices; or
- (e) financial reporting or record keeping of transfers where necessary to assist law enforcement or financial regulatory authorities;
- (g) social security, public retirement or compulsory savings schemes;

provided that such laws pursue legitimate policy objectives and do not aim to restrict trade and investment.

#### **Compensation for Losses**

1. Each Party shall accord to investors of the other Party, whose covered investments suffer losses owing to war, or other armed conflict, revolution, a state of national emergency, insurrection, riot or any other similar event, with respect to restitution, indemnification, compensation or other form of settlements, treatment no less favourable than the treatment that it accords to its own investors or investors of any non-Party, whichever is the most favourable.

2. Without prejudice to paragraph 1 of this Article, investors of one 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 its forces or authorities; or
- (b) destruction of their covered investment or a part thereof by its forces or authorities, which was not required by the necessity of the situation,

shall be accorded adequate and effective restitution or compensation. Resulting payments shall be freely convertible and transferable.

#### **Expropriation and Compensation**

1. Neither Party may expropriate or nationalise a covered investment either directly or indirectly through measures having an effect equivalent to expropriation or nationalisation (hereinafter referred to as “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 through 4; and

- (d) in accordance with due process of law.

For greater certainty, this paragraph shall be interpreted in accordance with Annex I (Expropriation).

2. The compensation referred to in paragraph 1 shall:
  - (a) be paid without delay;
  - (b) be equivalent to the fair market value of the expropriated investment at the time immediately before the expropriation took place (“the date of expropriation”)
  - (c) not reflect any change in value occurring because the intended expropriation had become known earlier;
  - (d) be fully realisable and freely transferable without delay [to the country designated by the investor;] and
  - (e) include interest at a commercially reasonable rate from the date of expropriation until the date of payment.

- [3. 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.]

Valuation criteria shall include going concern value, asset value including the declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

4. The compensation shall be paid in the currency of the country of which the investor is a national or in any freely convertible currency.

5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with Chapter X (Chapter on Intellectual Property) and the TRIPS Agreement<sup>15</sup>.

#### **[EU: Observance of Written Commitments**

Where a Party either itself or through any entity mentioned in Article 1.2 (Coverage) has entered into any contractual written commitment<sup>16</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.]

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<sup>15</sup> For greater certainty, the term “revocation” of intellectual property rights includes the cancellation or nullification of such rights, and the term “limitation” of intellectual property rights includes exceptions to such rights.

<sup>16</sup> [EU: For the purposes of this paragraph, a “contractual written commitment” means an agreement in writing whether in a single instrument or multiple instruments, that creates an exchange of rights and obligations, binding on both Parties.]

### Subrogation

1. If a Party or its designated agency makes a payment under a guarantee, contract of insurance or other form of indemnity it has entered into in respect of a covered investment made by one of its investors in the territory of the other Party, the other Party shall recognise the subrogation or transfer of any right or claim of the investor under the Section in respect of such covered investment. The Party or its designated Agency is entitled by virtue of subrogation to exercise the rights and enforce the claims of that investor. The subrogated or transferred right or claim shall not be greater than the original right or claim of the investor.
2. Where a Party or the agency authorised by the Party has made a payment to its investor and has taken over rights and claims of the investor, that investor shall not, unless authorised to act on behalf of the Party or the agency authorised by the Party making the payment, pursue those rights and claims against the other Party.

### 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) an investor of a non-Party owns or controls the enterprise; and
- (b) the denying Party adopts or maintains a measure with respect to the non-Party, or with respect to enterprises or natural persons of the non-Party, that prohibits transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to that investor or to its investments.

### JMXEU: Termination

1. In the event that this Agreement is terminated pursuant to Article [X.X] (Duration and Termination), this Section and Section C (Resolution of Investment Disputes and Investment Court System) shall ~~continue to be effective~~ apply for a further period of 20-3 years from the date of termination, with respect to investments made before at least one year before the date of termination of the present Agreement. This Article shall not apply in the case where the provisional application of this Agreement is terminated and this Agreement does not enter into force.

2. The period referred to in paragraph 1 shall be extended for a single additional period of 3 years provided that no other investment protection agreement between the Parties is in force.

3. If Mexico and a Member State of the European Union conclude an investment protection agreement, any period applicable in accordance with paragraphs 1 or 2 shall not be applied from the date of entry into force of that agreement.

4. If a Member State of the European Union decides to withdraw from the Union, this Section and Section C (Resolution of Investment Disputes and Investment Court System) shall apply

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*mutatis mutandis* between that Member State and Mexico for a period of 3 years from the date of entry into force of the withdrawal.

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### **[EU: Termination]**

In the event that this Agreement is terminated pursuant to Article [X.X] (Duration and Termination), this Section and Section C (Resolution of Investment Disputes and Investment Court System) shall continue to be effective for a further period of 20 years from the date of termination, with respect to investments made before the date of termination of the present Agreement. This Article shall not apply in the case where the provisional application of this Agreement is terminated and this Agreement does not enter into force.]

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### **[EU: Relationship with Other Agreements]**

1. Upon the entry into force of this Agreement, the agreements between Member States of the European Union and Mexico listed in Annex YY (Agreements between the Member States of the European Union and Mexico) including the rights and obligations derived therefrom, shall cease to have effect and shall be replaced and superseded by this Agreement.
2. In the event of the provisional application in accordance with paragraph 4 of Article [X.X] (Entry into Force), including this Chapter, the application of the agreements listed in Annex [YY] (Agreements between the Member States of the European Union and Mexico), as well as the rights and obligations derived therefrom, shall be suspended as of the date of provisional application. In the event that the provisional application of this Agreement is terminated and this Agreement does not enter into force, the suspension shall cease and the agreements listed in Annex [YY] (Agreements between the Member States of the European Union and Mexico) shall have effect.
3. Notwithstanding paragraphs 1 and 2, a claim may be submitted pursuant to an agreement listed in Annex Y (Agreements between the Member States of the European Union and Mexico), in accordance with the rules and procedures established in that agreement, provided that:
  - (a) the claim arises from an alleged breach of that agreement that took place prior to the date of suspension of the agreement pursuant to paragraph 2 or, if the agreement is not suspended pursuant to paragraph 2, prior to the date of entry into force of this Agreement; and
  - (b) no more than three years have elapsed from the date of suspension of the agreement pursuant to paragraph 2 or, if the agreement is not suspended pursuant to paragraph 2, from the date of entry into force of this Agreement until the date of submission of the claim.
4. Notwithstanding paragraphs 1 and 2, if the provisional application of this Agreement, including this Chapter, is terminated and this Agreement does not enter into force, a claim may be submitted pursuant to this Agreement, in accordance with the rules and procedures established in this Agreement, provided that:

- (a) the claim arises from an alleged breach of this Agreement that took place during the period of provisional application of this Agreement; and
  - (b) no more than three years have elapsed from the date of termination of the provisional application until the date of submission of the claim.
5. For the purposes of this Article, the definition of “entry into force of this Agreement” provided for in paragraph 7 of Article [X.X] (Entry into Force) shall not apply.]

## **SECTION [X]: RESOLUTION OF INVESTMENT DISPUTES**

### **Article 1 - Definitions**

For the purpose of this Section:

**disputing parties** means the claimant and the respondent;

**disputing party** means either the claimant or the respondent;

**claimant** means a natural person or an enterprise of a Party, other than a branch or representative office, that has made a covered investment in the territory of the other Party, and seeks to submit or has submitted a claim under this Section, either

(i) acting on its own behalf; or

(ii) acting on behalf of a locally established company which it owns or controls.<sup>17</sup>

**non-disputing Party** means either Mexico when the respondent is the European Union or a Member State of the European Union; or the European Union when Mexico is the respondent;

**respondent** means either Mexico, or in the case of the European Union, either the European Union or the Member State of the European Union concerned as determined pursuant to Article 5 (Request for Determination of the Respondent for Disputes with the European Union or its Member States);

**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;

**ICSID** means the International Centre for Settlement of Investment Disputes established by the ICSID Convention;

**ICSID Additional Facility Rules** means the *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes*;

**ICSID Convention** means the *Convention on the Settlement of Investment Disputes between States and Nationals of other States*, done at Washington, March 18, 1965;

**New York Convention** means the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958;

**UNCITRAL Arbitration Rules** means the Arbitration Rules of the United Nations Commission on International Trade Law, approved by the United Nations General Assembly on December 15, 1976, as revised in 2010;

**“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

<sup>17</sup> For greater certainty, a claim submitted under (ii) shall be deemed to relate to a dispute between a Contracting State and a national of another Contracting State for the purpose of Article 25, paragraph 1, of the ICSID Convention.

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.

## **Section X: Resolution of investment disputes**

### **Article 2 - Scope**

1. This Section shall apply to disputes between a Party and a claimant of the other Party arising from an alleged breach of Article XX(X) (National Treatment / Post-establishment) or Article XX(X) (Most Favoured Nation Treatment / Post-establishment) of Section A (Liberalisation of Investments) or Section B (Investment Protection) which allegedly causes loss or damage to the claimant or its locally established company.
2. A claim with respect to the restructuring of debt of a Party shall be decided in accordance with Annex [XX] (Annex on Public Debt) to Section B (Investment Protection).
3. For greater certainty, an investor may not submit a claim under this Section if the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.
4. The Tribunal constituted under this Section shall not decide claims that fall outside of the scope of this Article.

### **Article 3 – Consultations**

1. A dispute should as far as possible be settled amicably. Such a settlement may be agreed at any time, including after the claim has been submitted pursuant to Article 7 (Submission of a Claim to the Tribunal). Unless the disputing parties agree to a longer period, consultations shall be held within 60 days of the submission of the request for consultations pursuant to paragraph 4.
2. Unless the disputing parties agree otherwise, the place of consultation shall be:
  - (a) Mexico City, if the measures challenged are measures of Mexico;
  - (b) Brussels, if the measures challenged include a measure of the European Union; or
  - (c) the capital of the Member State of the European Union, if the measures challenged are exclusively measures of that Member State.
3. The disputing parties may agree to hold the consultations through videoconference or other means where appropriate.
4. The claimant shall submit to the other Party a request for consultations setting out:
  - (a) the name and address of the claimant and, if 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 2 (Scope) alleged to have been breached;

- (c) the legal and the factual basis for each claim, including the measure or measures alleged to be inconsistent with the provisions referred to in Article 2 (Scope);
- (d) the relief sought and the estimated amount of damages claimed; and
- (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 subparagraphs a) and e) shall be submitted for each claimant or each locally established company, as the case may be.

5. The requirements of the request for consultations set out in paragraph 4 shall be met with sufficient specificity to allow the respondent to effectively engage in consultations and to prepare its defense.

6. A request for consultations must be submitted within three years after the date on which the claimant or, as applicable, the locally established company, first acquired or should have first acquired, knowledge of the alleged breach and knowledge that the claimant or, as applicable, the locally established company, has incurred loss or damage thereby.

7. Notwithstanding paragraph 6, in the event that the request for consultations concerns a measure or measures of the European Union or a Member State of the European Union and the time period referred to in paragraph 6 has elapsed while the claimant or, as applicable, the locally established company pursued claims or proceedings relating to the same measure or measures before a tribunal or court under the domestic law of a Party, the request for consultations must be submitted:

- (a) within two years of the date on which the claimant or, as applicable, the locally established company ceases to pursue such claims or proceedings before a tribunal or court under the domestic law of a Party; and
- (b) 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 measures or measures alleged to be inconsistent with the provisions referred to in Article 2 paragraph 1 (Scope) and of the loss or damage alleged to have been incurred thereby.

8. A request for consultations concerning an alleged breach by the European Union or a Member State of the European Union shall be sent to the European Union. Where the claimant identifies treatment afforded by a Member State of the European Union within its request for consultations, it shall also be sent to the Member State concerned.

9. In the event that the investor has not submitted a claim pursuant to Article 7 (Submission of a Claim to the Tribunal) within 18 months of submitting the request for consultations, the investor is deemed to have withdrawn its request for consultations and, if applicable, its notice requesting a determination of the respondent pursuant to Article 5 (Request for Determination of the Respondent for Disputes with the European Union or its Member States), and shall not submit a claim under this Section with respect to the same measures. This period may be extended by agreement of the parties involved in the consultations.

#### **Article 4 – Mediation**

1. The disputing parties may at any time agree to have recourse to mediation.
2. Recourse to mediation is without prejudice to the legal position or rights of either disputing party under this Chapter and is governed by the rules agreed to by the disputing parties including, if available, the rules for mediation adopted by the [XX] Committee.
3. The mediator is appointed by agreement of the disputing parties. The disputing parties may also jointly request the President of the Tribunal to appoint the mediator.
4. The disputing parties shall endeavour to reach a resolution of the dispute within 60 days from the appointment of the mediator.
5. If the disputing parties agree to have recourse to mediation, the time limits set out in Article 3, paragraphs 6 and 7 (Consultations), 29 paragraph 7 (Award) and 30, paragraph 3 (Appeal Procedure) shall be suspended from the date on which the disputing parties agreed to have recourse to mediation to the date on which either disputing party decides to terminate the mediation. A decision by a disputing party to terminate the mediation shall be transmitted by way of a letter to the mediator and the other disputing party.

#### **Article 5 – Determination of the Respondent for Disputes with the European Union or its Member States**

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 this Agreement by the European Union or a Member State of the European Union and the claimant intends to submit a claim pursuant to Article 7 (Submission of a Claim to the Tribunal), the claimant shall deliver to the European Union a notice requesting a determination of the respondent.
2. The notice under paragraph 1 shall identify the measures in respect of which the claimant intends to submit a claim. Where a measure of a Member State of the European Union is identified, the 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 notices referred to in paragraph 2 as to whether the European Union or a Member State of the European Union shall be the respondent.
4. In the event that the investor has not been informed of the determination within 60 days of delivering its notice requesting such determination:
  - (a) if the measures identified in the notice are exclusively measures of a Member State of the European Union, the Member State shall be the respondent;
  - (b) if the measures identified in the notice include measures of the European Union, the European Union shall be the respondent.
5. The claimant may submit a claim pursuant to Article 7 (Submission of a Claim to the Tribunal) on the basis of the determination made pursuant to paragraph 3, and, if no such determination has been communicated to the investor, on the basis of the application of paragraph 4.

6. If the European Union or a Member State of the European Union is the respondent, pursuant to paragraph 3 or 4, neither the European Union, nor the Member State of the European Union may assert the inadmissibility of the claim, lack of jurisdiction of the Tribunal or otherwise object to the claim or award on the ground that the respondent was not properly determined pursuant to paragraph 3 or identified on the basis of the application of paragraph 4.

7. The Tribunal and the Appeal Tribunal shall be bound by the determination made pursuant to paragraph 3 and, if no such determination has been communicated to the claimant, the application of paragraph 4.

8. Nothing in this Agreement or the applicable rules on dispute settlement shall prevent the exchange of all information relating to a dispute between the European Union and the Member State concerned.

#### **Article 6 – Procedural and Other Requirements for the Submission of a Claim to the Tribunal**

1. A claimant may only submit a claim pursuant to Article 7 (Submission of a Claim to the Tribunal) if the claimant:
  - (a) delivers to the respondent, with the submission of a claim, its written consent to the settlement of the dispute by the Tribunal in accordance with the procedures set out in this Section;
  - (b) allows at least 180 days to elapse from the submission of the request for consultations and, if applicable, at least 90 days to elapse from the submission of the notice requesting a determination of the respondent;
  - (c) has fulfilled the requirements of the notice requesting a determination of the respondent;
  - (d) has fulfilled the requirements related to the request for consultations;
  - (e) does not identify a measure in its claim that was not identified in its request for consultations;
  - (f) withdraws or discontinues any existing proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim;
  - (g) waives in writing its right to initiate any claim or proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim; and
  - (h) declares that it will not enforce any award rendered pursuant to this Section before such award has become final pursuant to Articles 29 paragraph 8 or 9 (Award) or 30 paragraph 2 (Appeal Procedure), and will not seek to appeal, review, set aside, annul, revise or initiate any other similar procedure before an international or domestic court or tribunal, as regards an award pursuant to this Section.

2. If the claim submitted pursuant to Article 7 (Submission of a Claim to the Tribunal) is for loss or damage to a locally established company or to an interest in a locally established company that the claimant owns or controls directly or indirectly, the requirements in subparagraphs 1(f) and (g) apply both to the investor and the locally established enterprise.

The requirement to withdraw or discontinue existing proceedings pursuant to subparagraph 1 (f) above shall also apply to:

(a) where the claim is submitted by an investor acting on its own behalf, all persons who, directly or indirectly, have an ownership interest in or are controlled by the investor; or

(b) where the claim is submitted by an investor acting on behalf of a locally established company, all persons who, directly or indirectly, have an ownership interest in or are controlled by the locally established company,

and claim to have suffered the same loss or damage as the claimant or locally established company.<sup>18</sup>

3. The requirements of subparagraphs 1(f) and (g) and paragraph 2 do not apply in respect of a locally established company if the respondent or the claimant's host state has deprived the claimant of control of the locally established company, or has otherwise prevented the locally established company from fulfilling those requirements.

4. Upon request of the respondent, the Tribunal shall decline jurisdiction if the claimant or, as applicable, the locally established company fails to fulfil any of the requirements of paragraphs 1 and 2.

5. The declaration provided pursuant to paragraph 1(g) shall cease to apply where the claim is rejected on the basis of the failure to meet the nationality requirements to bring an action under this Agreement.

6. Where the European Union or a Member State of the Union is the respondent, subparagraph 1(f) and (g) shall not prevent the claimant from seeking interim measures of protection before the domestic courts or tribunals of the respondent. Where Mexico is the respondent, subparagraph 1(f) and (g) shall not prevent the claimant from seeking interim measures of protection, or from initiating or continuing proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the Mexican Law.

#### **Article 7 – Submission of a Claim to the Tribunal**

1. If a dispute has not been resolved through consultations, a claim may be submitted under this Section by:

(a) an investor of a Party on its own behalf; or

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<sup>18</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).

(b) an investor of a Party, on behalf of a locally established company which it owns or controls directly or indirectly.

2. A claim may be submitted under the following rules:

(a) the ICSID Convention and Rules of Procedure for Arbitration Proceedings;

(b) the ICSID Additional Facility Rules if the conditions for proceedings pursuant to paragraph (a) do not apply;

(c) the UNCITRAL Arbitration Rules; or

(d) any other rules on agreement of the disputing parties.

3. In the event that the investor proposes rules pursuant to subparagraph 2(d), the respondent shall reply to the investor's proposal within 20 days of receipt. If the disputing parties have not agreed on such rules within 30 days of receipt, the investor may submit a claim under the rules provided for in subparagraph 2(a), (b) or (c).

4. Where a claim is submitted pursuant to subparagraphs 2(b), (c) or (d), the disputing parties may agree on the legal place of the proceedings. If the disputing parties fail to reach an agreement, the division of the Tribunal hearing the claim shall determine the place in accordance with the applicable dispute settlement rules, provided that the place shall be in the territory of a State that is a Party to the New York Convention.

5. The rules applicable under paragraph 2 are those that are in effect on the date that the claim or claims are submitted to the Tribunal under this Section, subject to the specific rules set out in this Section and supplemented by rules adopted pursuant to Article XX (Committee).

6. A claim is submitted for dispute settlement under this Section when the request or notice initiating proceedings is received in accordance with the applicable dispute settlement rules.

7. Each Party shall notify the other Party of the place of delivery of notices and other documents by the investors pursuant to this Section. Each Party shall ensure this information is made publicly available.

#### **Article 8 – Concurrent Proceedings**

Where a claim is brought pursuant to this Section and Section X (State to State Dispute Settlement) or another international agreement and:

(a) there is a potential for overlapping compensation; or

(b) the other international claim could have a significant impact on the resolution of the claim brought pursuant to this Section.

The Tribunal shall, as soon as possible after hearing the disputing parties, stay its proceedings or otherwise ensure that proceedings brought pursuant to another international agreement are taken into account in its decision, order or award.

### **Article 9 – Consent to the Settlement of the Dispute by the Tribunal**

1. The respondent consents to the settlement of the dispute by the Tribunal in accordance with the procedures set out in this Section.
2. The consent under paragraph 1 and the submission of a claim to the Tribunal under this Section shall be deemed to satisfy the requirements of:
  - (a) Article 25 of the ICSID Convention and Chapter II of Schedule C of the ICSID Additional Facility Rules regarding written consent of the disputing parties; and
  - (b) Article II of the New York Convention for an agreement in writing.

### **Article 10 - Third Party Funding**

1. Where there is third party funding, the disputing party benefiting from it shall notify to the other disputing party and to the division of the Tribunal, or where the division of the Tribunal is not composed, 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.

### **Article 11 - Tribunal**

1. A Tribunal is hereby established to hear claims submitted pursuant to Article 7 (Submission of a Claim to the Tribunal).
2. The [...] Committee shall, upon the entry into force of this Agreement, appoint nine Members to the Tribunal. Three of the Members shall be nationals of a Member State of the European Union, three shall be nationals of Mexico and three shall be nationals of third countries.<sup>19</sup>
3. The [...] Committee may decide to increase or to decrease the number of the Members by multiples of three. Additional appointments shall be made on the same basis as provided for in paragraph 2.
4. The Members shall have demonstrated expertise in public international law and possess the qualifications required for appointment as a judge to the International Court of Justice, or be jurists of recognised competence. 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, or trade negotiations.
5. The Members appointed pursuant to this Section shall be appointed for a five-year term. However, the terms of four of the nine persons appointed immediately after the entry into force of the Agreement, to be determined by lot, shall extend to seven years. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has

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<sup>19</sup> The Parties shall endeavor to appoint Members representative of diverse socioeconomic conditions and legal traditions.

not expired shall hold office for the remainder of the predecessor's term. A person who is serving on a division of the Tribunal when his or her term expires may, with the authorization of the President of the Tribunal after consulting with the other Members of the division, continue to serve on the division until the closure of the proceedings of that division and shall, for that purpose only, be deemed to continue to be a Member of the Tribunal.

6. The Tribunal shall hear cases in divisions consisting of three Members, of whom one shall be a national of a Member State of the European Union, one a national of Mexico and one a national of a third country. The division shall be chaired by the Member who is a national of a third country.

7. The disputing parties may also agree that a case be heard by a sole Member who is a national of a third country, to be selected by the President of the Tribunal.

8. Within 90 days of the submission of a claim pursuant to Article 7 (Submission of a Claim to the Tribunal), the President of the Tribunal, in accordance with the Working Procedures adopted pursuant to paragraph 10, shall appoint the Members or Member 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 Members to be selected.

9. The 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 Members who are nationals of third countries. The Presidents shall serve on the basis of a rotation drawn by lot by the Chair of the [...] Committee. The Working Procedures adopted pursuant to paragraph 10 shall foresee the necessary rules for addressing a temporary unavailability of the President.

10. The Tribunal shall draw up its own working procedures, after consulting with the Parties.

11. The Members 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 Members shall be paid a monthly retainer fee to be fixed by decision of the [...] Committee. The President of the Tribunal shall receive a fee equivalent to the fee determined pursuant to Article 12, paragraph 12 (Appeal Tribunal) for each day worked in fulfilling the functions of President of the Tribunal pursuant to this Section.

13. The retainer fee shall be paid by both Parties taking into account their respective levels of development into an account managed by the Secretariat of ICSID. 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 Members on a division of the 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 29, paragraph 5 (Award).

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 Members 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 Tribunal.

17. The Secretariat of ICSID shall act as Secretariat for the Tribunal and provide it with appropriate support. The expenses for such support shall be allocated among the disputing parties in accordance with Article 29, paragraph 5 (Award).

#### **Article 12 - 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 Mexico and two shall be nationals of third countries.

3. 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 five-year term. 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 seven 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. A person who is serving on a division of the Appeal Tribunal when his or her term expires may, with the authorization of the President of the Appeal Tribunal, continue to serve on the division until the closure of the proceedings of that division and shall, for that purpose only, be deemed to continue to be a Member of the Appeal Tribunal.

6. The Appeal Tribunal shall have a President responsible for organisational issues, 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. The Presidents shall serve on the basis of a rotation drawn by lot by the Chair of the [...] Committee. The Working procedures adopted pursuant to paragraph 10 shall foresee the necessary rules for addressing a temporary unavailability of the President.

7. The Members of the Appeal Tribunal shall possess the qualifications required for appointment as a judge to the International Court of Justice, or be jurists of recognised competence. They shall have demonstrated expertise in public international law and in the subject matter covered by this Chapter. It is desirable that they have expertise in 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, of whom one shall be a national of a Member State of the European Union, one a national of Mexico and one a national of a third country. 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, in accordance with the Working Procedures adopted pursuant to paragraph 10, on a rotation basis, ensuring that the composition of each division is random and unpredictable, while giving equal opportunity to all Members to be selected.

10. The Appeal Tribunal shall draw up its own working procedures, after consulting with the Parties.

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. The President of the Appeal Tribunal shall receive a fee for each day worked in fulfilling the functions of President of the Appeal Tribunal pursuant to this Section.

13. The remuneration of the Members shall be paid by both Parties taking into account their respective levels of development into an account managed by the Secretariat of ICSID. 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.

16. The Secretariat of ICSID shall act as Secretariat for the Appeal Tribunal and provide it with appropriate support. The expenses for such support shall be allocated among the disputing parties in accordance with Article 29, paragraph 5 (Award).

### **Article 13 - Ethics**

1. The Members 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.<sup>20</sup> 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 I (Code of Conduct for Members of the Tribunal, the Appeal Tribunal and Mediators). In addition, upon appointment, they shall refrain from acting as counsel or as party-appointed expert or witness 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 Member appointed to a division has a conflict of interest, it shall send a notice of challenge 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

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<sup>20</sup> For greater certainty, the mere fact that a person is employed by a public university, or that a former government employee is receiving a pension from the government, or has a family relationship with a government official is not in itself a reason to be considered as affiliated with a government.

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 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 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 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*.

5. Upon a reasoned recommendation from the President of the Appeal Tribunal, or on their joint initiative, the Parties, by decision of the [...] Committee, may decide to remove a Member from the Tribunal or from the Appeal Tribunal where his or her behaviour is inconsistent with the obligations set out in paragraph 1 and incompatible with his or her continued membership of the Tribunal or Appeal Tribunal. If the behaviour in question is alleged to be that of the President of the Appeal Tribunal then the President of the Tribunal shall submit the reasoned recommendation. Articles 11, paragraph 2 (Tribunal) and 12, paragraph 3 (Appeal Tribunal) shall apply *mutatis mutandis* for filling vacancies that may arise pursuant to this paragraph.

#### **Article 14 - Multilateral Dispute Settlement Mechanisms**

1. The Parties should cooperate for the establishment of a multilateral mechanism for the resolution of investment disputes.

2. Upon the entry into force between the Parties of an international agreement providing for such a multilateral mechanism applicable to disputes under this Agreement, the relevant parts of this Section shall be suspended and the [...] Committee may adopt a decision specifying any transitional arrangements.

#### **Article 15 - Applicable Law**

1. The Tribunal shall determine whether the measure subject to the claim is inconsistent with any of the provisions referred to in Article 2 (Scope) alleged by the claimant.

2. In making its determination, the Tribunal shall apply the provisions of this Agreement, and, when relevant, other rules and principles 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, in determining the consistency of a measure with this Agreement, the Tribunal shall consider, when relevant, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.

4. For greater certainty, 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. If a Party has concerns as regards matters of interpretation relating to this Chapter, it may request the [X] Committee to consider the issue. The Committee may adopt decisions interpreting any provision of this Agreement. 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.

[MX: 6. If a respondent asserts as a defence that the measure alleged to be a breach is within the scope of a non-conforming measure set out in Annex I or Annex II, the Tribunal shall, on request of the respondent, request the interpretation of the [X] Committee on the issue. The [X] Committee shall submit in writing any decision on its interpretation under Article XX (Functions of the [X] Committee) to the Tribunal within 90 days of delivery of the request.

7. A decision issued by the [X] Committee under paragraph 6 shall be binding on the Tribunal, and any decision or award issued by the Tribunal must be consistent with that decision. If the [X] Committee fails to issue such a decision within 90 days, the Tribunal shall decide the issue.]

#### **Article 16 - 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 17 – Claims Manifestly Without Legal Merit**

1. The respondent may, no later than 30 days after the constitution of the division of the Tribunal, and in any event before its first session, 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. An objection shall not be submitted under paragraph 1 if the respondent has filed an objection pursuant to Article 18 (Claims Unfounded as a Matter of Law).

3. The respondent shall specify as precisely as possible the basis for the objection.

4. On receipt of an objection pursuant to this Article, the Tribunal shall suspend the proceedings on the merits and establish a schedule for considering such an objection consistent with its schedule for considering any other preliminary question.

5. The Tribunal, after giving the disputing parties an opportunity to present their observations, shall at its first session or promptly thereafter, issue a decision or award stating the grounds therefor. In doing so, the Tribunal shall assume the alleged facts to be true.

6. This Article shall be without prejudice to the Tribunal's authority to address other objections as a preliminary question or to the right of the respondent to object, in the course of the proceeding, that a claim lacks legal merit.

#### **Article 18 – 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 an 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 pursuant to Article 7 (Submission of a Claim to the Tribunal) is not a claim for which an award in favour of the claimant may be made under this Section, even if the facts alleged were assumed to be true.

2. An objection under paragraph 1 shall be submitted to the Tribunal no later than the date the Tribunal fixes for the respondent to submit its counter-memorial or statement of defense.

3. If an objection has been submitted pursuant to Article 17 (Claims Manifestly Without Legal Merit), the Tribunal may, taking into account the circumstances of that objection, decline to address, under the procedures set out in this Article, an objection submitted pursuant to paragraph 1.

4. On receipt of an objection under paragraph 1, and, if appropriate, after rendering a decision pursuant to paragraph 3 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 19 - Transparency of the Proceedings**

1. The Tribunal shall promptly make available to the public all written submissions submitted by the disputing parties to the Tribunal as well as all procedural orders, decisions and awards issued or rendered by the Tribunal, or, where applicable, by the President of the Tribunal, with the exception of protected information consisting of:

- (a) confidential business information<sup>21</sup>;
- (b) privileged information that is protected from disclosure by law; or
- (c) information the disclosure of which would impede law enforcement.

2. The Tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. If a disputing party intends to use information in a hearing that is designated as protected information, it shall so advise the Tribunal. The Tribunal shall make appropriate arrangements to protect

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<sup>21</sup> For greater certainty, confidential business information includes information that is not in the public domain and which describes, contains or otherwise reveals trade secrets or financial, commercial, scientific or technical information that has been consistently treated as confidential information by the disputing party to whom it is related, including but not limited to information on prices, costs, strategic and marketing plans, market share data, and accounting or financial records.

such information from disclosure, which may include closing the hearing for the duration of the discussion of that information.

3. The submissions mentioned in paragraph 1 include the memorial, the counter-memorial, the reply, the rejoinder and any other submission made by a disputing party during the proceedings, such as a notice of challenge pursuant to Article 13, paragraph 2 (Ethics) or the request for consolidation under Article 28 (Consolidation).

4. Minutes or transcripts of the hearings, if available, shall be made available to the public subject to the redaction of protected information pursuant to paragraph 1.

5. The Parties shall make publicly available in a timely manner and prior to the composition of a division of the Tribunal the request for consultations referred to in Article 3 (Consultations), the request for determination of the Respondent and the determination of the Respondent referred to in Article 5 (Determination of the Respondent for Disputes with the European Union or its Member States), subject to the redaction of protected information. To that effect the claimant shall submit a public version of its request for consultation and request for determination of the Respondent preferably at the same time but no later than 15 days after submitting the non-public version. If the claimant does not provide such public versions, it shall be deemed to have consented to make available the submitted documents.

6. The Tribunal may make available to the public all the exhibits upon request and after consulting with the relevant disputing party in order to prevent from disclosure protected information and allowing a reasonable period of time to redact, if needed, the pertinent portions of the exhibits.

7. For the purpose of paragraph 1, each disputing party shall be responsible for providing the Tribunal with redacted versions of its written submissions within 30 days after their submission or within any other time limit set by the Tribunal. The Tribunal may review the redacted versions of the disputing parties and may assess whether the redacted information should be protected. The Tribunal shall, after consulting the disputing parties, decide any objection regarding the designation of information claimed to be protected information. Where the Tribunal determines that information should not be redacted from a document, or that a document should not be prevented from being made available to the public, any disputing party that voluntarily introduced the document into the record shall be permitted to withdraw all or parts of the document from the record of the proceedings.

8. The Tribunal shall consult with the disputing parties whether an order, decision or award rendered by the Tribunal contains protected information pursuant to paragraph 1(a), (b) or (c) before its publication.

9. If a disputing party does not provide the Tribunal a request to preserve confidentiality over protected information in a particular submission, procedural order, decision or award within 30 days of the submission or the consultation of the disputing party pursuant to paragraphs 6 and 8, or within any other time limits set by the Tribunal, that party shall be deemed to have consented to make available to the public such submission, procedural order, decision or award.

10. The Tribunal may make publicly available the information and documents referred to in this Article by communication to the repository referred to in the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

11. Nothing in this Section shall require a respondent to withhold from the public information required to be disclosed by its laws.

#### **Article 20 – Interim Measures of Protection**

1. 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.
2. The Tribunal may not order the seizure of assets nor may it prevent the application of a measure alleged to constitute a breach referred to in Article 7 (Submission of a Claim to the Tribunal). For purposes of this paragraph, an order includes a recommendation.

#### **Article 21 - 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 and issue an award on costs. 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 arising from the same measure or measures.

#### **Article 22 - 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 may be unable to comply with an award on costs issued against it.
2. If the security for costs is not posted in full within 30 days after the issuance of an order under paragraph 1 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 23 - The Non-Disputing Party to the Agreement**

1. The Respondent shall, within 30 days after receipt or promptly after any dispute concerning protected information has been resolved,<sup>22</sup> deliver to the non-disputing Party:
  - (a) a request for consultations referred to in Article 3 (Consultations), a notice requesting a determination referred to in Article 4 (Determination of the Respondent for Disputes with the European Union or its Member States), a claim referred to in Article 7 (Submission of a Claim to the Tribunal);
  - (b) on request:
    - (i) pleadings, memorials, briefs, requests and other submissions made to the Tribunal by a disputing party;

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<sup>22</sup> For greater certainty, the term confidential or protected information shall be understood as defined in and determined pursuant to Article 19 (Transparency of the Proceedings).

- (ii) written submissions made to the Tribunal by third persons pursuant to Article 24 (Intervention by Third Persons);
- (iii) minutes or transcripts of hearings of the Tribunal, where available; and
- (iv) 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, including exhibits appended to the document referred to in paragraphs (a) and (b).

2. The non-disputing Party has the right to attend a hearing held under this Section, and may make oral and written submissions to the Tribunal regarding the interpretation of this Agreement. 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 24 - Interventions by Third Persons**

1. After consultation with the disputing parties, the Tribunal may accept and consider written *amicus curiae* submissions regarding a matter of fact or law within the scope of the dispute.

2. Each submission shall be in writing and in the language of the proceedings, unless the disputing parties agree otherwise. Each submission shall identify the author, disclose any affiliation, direct or indirect, with any disputing party, and identify any person, government, or other entity that has provided, or will provide, any financial or other assistance in preparing the submission. In addition, the author of the communication will prove if he/she has any affiliation, direct or indirect, with any of the disputing parties, and shall specify the nature of the interest in the dispute.

3. When communications pursuant to paragraphs 1 through 2 are admitted by the Tribunal, it shall provide the disputing parties with an opportunity to respond to such submissions.

#### **Article 25 – Expert Reports**

Without prejudice to the appointment of other kinds of experts where authorised by the applicable rules referred to in Article 7 (Submission of a Claim to the Tribunal), 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 scientific factual issue, such as environmental, health or safety matters, or other matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

#### **Article 26 - Indemnification or Other Compensation**

A respondent may not assert, and the Tribunal shall not accept as a defence, counterclaim, right of set-off, or for any other reason that the claimant or the locally established company on behalf of which the claim is submitted, has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract.

#### **Article 27 – Role of the Parties**

1. A Party shall not bring an international claim in respect of a claim submitted pursuant to Article 7 (Submission of a Claim to the Tribunal) unless the other Party has failed to abide by and comply with the award rendered in that dispute.
2. Paragraph 1 shall not exclude the possibility of dispute settlement under Chapter XXX (Dispute Settlement) in respect of a measure of general application even if that measure is alleged to have breached this Agreement as regards a specific investment in respect of which a claim has been submitted pursuant to Article 7 (Submission of a Claim to the Tribunal) and is without prejudice to Article 23 (The Non-Disputing Party to the Agreement).
3. Paragraph 1 does not preclude informal exchanges for the sole purpose of facilitating a settlement of the dispute.

#### **Article 28 – Consolidation**

1. When two or more claims that have been submitted separately pursuant to Article 7 (Submission of a Claim to the Tribunal) have a question of law or fact in common and arise out of the same events or circumstances, a disputing party or the disputing parties jointly may seek the establishment of a separate division of the Tribunal pursuant to this Article and request that such division issue a consolidation order ("request for consolidation").
2. The disputing party seeking a consolidation order shall first deliver a notice to the disputing parties it seeks to be covered by this order.
3. If the disputing parties notified pursuant to paragraph 2 have reached an agreement on the consolidation order to be sought, they may make a joint request for the establishment of a separate division of the Tribunal and a consolidation order pursuant to this Article. If the disputing parties notified pursuant to paragraph 2 have not reached agreement on the consolidation order to be sought within 30 days of the notice, a disputing party may make a request for the establishment of a separate division of the Tribunal and a consolidation order pursuant to this Article.
4. The request shall be delivered, in writing, to the President of the Tribunal and to all the disputing parties sought to be covered by the order, and shall specify:
  - (a) the names and addresses of the disputing parties sought to be covered by the order;
  - (b) the scope of the consolidation sought; and
  - (c) the grounds for the order sought.
5. A request for consolidation involving more than one respondent shall require the agreement of all such respondents.
6. The rules applicable to the proceedings under this Article are determined as follows:
  - (a) if all of the claims for which a consolidation order is sought have been submitted to dispute settlement under the same rules pursuant to Article 7 (Submission of a Claim to the Tribunal), these rules shall apply;

(b) if the claims for which a consolidation order is sought have not been submitted to dispute settlement under the same rules:

(i) the claimants may collectively agree on the applicable rules referred to in Article 7, paragraph 2 (Submission of a Claim to the Tribunal); or

(ii) if the claimants cannot agree on the applicable rules within 30 days of the President of the Tribunal receiving the request for consolidation, the UNCITRAL Arbitration Rules shall apply except as modified by this Section.

7. The President of the Tribunal shall, after receipt of a consolidation request and in accordance with the requirements of Article 11, paragraph 8 (Tribunal) constitute a new division ("consolidating division") of the Tribunal which shall have jurisdiction over some or all of the claims, in whole or in part, which are the subject of the joint consolidation request.

8. If, after hearing the disputing parties, a consolidating division is satisfied that claims submitted pursuant to Article 7 (Submission of a Claim to the Tribunal) have a question of law or fact in common and arise out of the same events or circumstances, and consolidation would best serve the interests of fair and efficient resolution of the claims including the interest of consistency of awards, the consolidating division of the Tribunal may, by order, assume jurisdiction over some or all of the claims, in whole or in part.

9. If a consolidating division of the Tribunal has assumed jurisdiction pursuant to paragraph 8, a claimant that has submitted a claim pursuant to Article 7 (Submission of a Claim to the Tribunal) and whose claim has not been consolidated may make a written request to the Tribunal that it be included in such order provided that the request complies with the requirements set out in paragraph 4. The consolidating division of the Tribunal shall grant such order where it is satisfied that the conditions of paragraph 8 are met and that granting such a request would not unduly burden or unfairly prejudice the disputing parties or unduly disrupt the proceedings.

10. On application of a disputing party, a consolidating division of the Tribunal established under this Article, pending its decision under paragraph 8, may order that the proceedings of the division of the Tribunal appointed under Article 11 (Tribunal) be stayed unless the latter Tribunal has already adjourned its proceedings.

11. A division of the Tribunal appointed under Article 11 (Tribunal) shall cede jurisdiction in relation to the claims, or parts thereof, over which a consolidating division of the Tribunal established under this Article has assumed jurisdiction.

12. The award of a consolidating division of the Tribunal established under this Article in relation to those claims, or parts thereof, over which it has assumed jurisdiction is binding on the division of the Tribunal appointed under Article 11 (Tribunal) as regards those claims, or parts thereof.

13. A claimant may withdraw a claim under this Section that is subject to consolidation and such claim shall not be resubmitted pursuant to Article 7 (Submission of a Claim to the Tribunal).

14. At the request of a claimant, a consolidating division of the Tribunal may take measures in order to preserve any confidential or protected information of that claimant in relation to other claimants. Those measures may include the submission of redacted versions of documents containing confidential or protected information to the other investors or arrangements to hold parts of the hearing in private.

### Article 29 - Award

1. Where the Tribunal, concludes that the respondent has breached any of the provisions referred to in Article 2, paragraph 1 (Scope) alleged by the claimant, the Tribunal, upon a request by the claimant and after hearing the disputing parties, may award separately or in combination, only:
  - (a) monetary damages and any applicable interest; and
  - (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution, determined in a manner consistent with Article XX (Expropriation) of Section B (Investment Protection) of Chapter II (Investment).
2. Subject to paragraph 1, where a claim is submitted on behalf of a locally-established company, and an award is made in favour of the locally-established company an award shall provide that:
  - (a) any restitution of property shall be made to the locally established company;
  - (b) any monetary damages and applicable interest shall be paid to the locally established company; and
  - (c) the award is made without prejudice to any right that any person may have under applicable domestic law in the relief provided in the award.
3. For greater certainty, the Tribunal may not award other remedies than those referred to in paragraph 1.
4. The Tribunal may not award punitive damages.
5. The Tribunal shall order that the costs of the proceedings be borne by the unsuccessful disputing party. In exceptional circumstances, the Tribunal may apportion such costs between the disputing parties if it determines that apportionment is appropriate in the circumstances of the case. Other reasonable costs, including the reasonable costs of legal representation and assistance, shall be borne by the unsuccessful disputing party, unless the Tribunal determines that such apportionment is unreasonable in the circumstances of the claim. When considering the reasonableness of the costs or of their apportionment, the Tribunal may also take into account whether the costs to be reimbursed to the prevailing disputing party would excessively exceed the costs incurred by the unsuccessful disputing party. Where only some parts of the claims have been successful the costs of the proceedings and other reasonable costs shall be adjusted, proportionately, to the number or extent of the successful parts of the claims. The Appeal Tribunal shall deal with costs in accordance with this Article.
6. No later than one year after the entry into force of this Agreement, the [...] Committee shall adopt supplemental rules on fees for the purpose of determining the maximum amount of costs of legal representation and assistance that may be borne by specific categories of unsuccessful disputing parties, taking into account their financial resources.
7. The Tribunal and the disputing parties shall make every effort to ensure that the dispute settlement process is carried out in a timely manner. The Tribunal should issue its final award within 30 months of the date the claim is submitted pursuant to Article 7

(Submission of a Claim to the Tribunal). If the Tribunal requires additional time to issue its final award, it shall provide the disputing parties the reasons for the delay.

8. 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.

9. Either disputing party may appeal the provisional award pursuant to Article 30 (Appeal Procedure). 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 30 – 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. 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. 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. 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. The Appeal Tribunal may order the disputing party lodging an appeal to post security for all or a part of the costs of the appeal proceedings.

5. The provisions of Articles 10 (Third Party Funding), 19 (Transparency of the Proceedings), 20 (Interim Measures of Protection), 21 (Discontinuance), 23 (The Non-Disputing Party to the Agreement) shall apply *mutatis mutandis* in respect of the appeal procedure.

### **Article 31 - Enforcement of Awards**

1. An award rendered pursuant to this Section shall not be enforceable until it has become final pursuant to Articles 29 paragraph 8 or 9 (Award), or 30 paragraph 2 (Appeal Procedure). Final awards issued pursuant to this Section by the Tribunal shall be binding between the disputing parties and shall not be subject to appeal, review, set aside, annulment or any other remedy.<sup>23</sup>
2. Each Party shall recognize an award rendered pursuant to this Agreement as binding and 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 and international commitments concerning the execution of judgments or awards 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 Y)] shall not prevent the recognition, execution and enforcement of awards rendered pursuant to this Section.
5. For the purposes of Article 1 of the New York Convention, final awards issued pursuant to this Section are arbitral awards relating to claims that are considered to arise out of a commercial relationship or transaction.
6. For greater certainty and subject to paragraph 1, where a claim has been submitted to dispute settlement pursuant to Article 7, paragraph 2(a) (Submission of a Claim to the Tribunal), a final award issued pursuant to this Section shall qualify as an award under Chapter IV, Section 6 of the ICSID Convention.

#### **Article 32 – Service of Documents**

Delivery of requests for consultations, notices and other documents to a Party shall be made to the places named for that Party in Annex II (Service of Documents) or its respective successors. A Party shall promptly make publicly available and notify the other Party of any change to the place referred in that Annex.

#### **[EU: Article 33 – Sub-Committee on [Services and Investment]**

1. The Sub-Committee on [Services and Investment] shall provide a forum for the Parties to consult on issues related to this Chapter, including:
  - (a) difficulties which may arise in the implementation of this Chapter;
  - (b) possible improvements of this Chapter, in particular in the light of experience and developments in other international *fora* and under the Parties' other agreements; and
  - (c) upon request of either Party, the implementation of any mutually agreed solution as regards a dispute under this Section.

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<sup>23</sup> For greater certainty, this does not prevent a disputing party from requesting the Tribunal to revise an award or to interpret an award in accordance with the applicable rules on dispute settlement where this possibility is available under the applicable rules.

2. The Sub-Committee [Services and Investment] may, [on agreement of the Parties, and after completion of their respective internal requirements and procedures]:

- (a) recommend to the Joint Committee the adoption of interpretations of this Agreement pursuant to Article 15 (Applicable Law);
- (b) adopt and amend rules supplementing the applicable dispute settlement rules [and the Working Procedures of the Tribunal and the Appeal Tribunal]. These rules and amendments are binding on the Tribunal and Appeal Tribunal established under this Section;
- (c) recommend to the Joint Committee the adoption of rules providing guidance to the Appeal Tribunal on how to address and conduct the appeal proceedings in case of bifurcation of the proceedings before the Tribunal;
- (d) adopt rules for mediation for use by disputing parties as referred to in Article 4 (Mediation); and
- (e) recommend to the Joint Committee the adoption of any further elements of the fair and equitable treatment obligation pursuant to Article XX of Section B Section B (Investment Protection) of Chapter II (Investment).

[**Note:** the content and placement of this Article to be reviewed at final stage taking into account the overall institutional aspects.]

## *ANNEX [I]*

### **CODE OF CONDUCT FOR MEMBERS OF THE TRIBUNAL, THE APPEAL TRIBUNAL AND MEDIATORS**

#### *Article 1*

##### **Definitions**

In this Code of Conduct:

- (a) **member** means a Member of the Tribunal or a Member of the Appeal Tribunal established pursuant to [Section [X] (Resolution of Investment Disputes and Investment Court System)];
- (b) **mediator** means a person who conducts mediation in accordance with Article 4 (Mediation) of [Section C (Resolution of Investment Disputes)];
- (c) **candidate** means an individual who is under consideration for selection as a Member of the Tribunal or Appeal Tribunal;
- (d) **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;

#### *Article 2*

##### **Independence and Impartiality of Members**

1. Members must be independent and impartial and avoid impropriety and the appearance of impropriety or bias. They shall avoid direct and indirect conflicts of interest and observe high standards of conduct so that the integrity and impartiality of the dispute settlement mechanism is preserved. They 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 shall 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 shall 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 3*

#### **Disclosure Obligations**

1. Prior to their appointment as a Member to the Tribunal or Appeal Tribunal, candidates shall receive a copy of this Code of Conduct and disclose to the Parties 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. To this end, candidates shall make all reasonable efforts to become aware of any such interests, relationships or matters.
2. [Upon her or his appointment to a division of the Tribunal or of the Appeal Tribunal, the Secretariat of the Tribunal or of the Appeal Tribunal, respectively, shall provide a Member with the Disclosure Statement form set out in the Appendix to this Code of Conduct. A Member shall make his or her best efforts to submit the Disclosure Statement to the Secretariat [within x days], for transmission to the Parties, the disputing parties and the President of the Tribunal or Appeal Tribunal, as the case may be.]
3. Pursuant to paragraph 2, a Member appointed to a division shall disclose any interest, relationship or matter that is likely to affect his or her independence or impartiality or that might reasonably create an appearance of impropriety or an apprehension of bias in the proceeding. To this end, that Member shall make all reasonable efforts to become aware of any such interests, relationships and matters. Therefore, that Member shall disclose, at a minimum and to the best of his knowledge, the following interests, relationships and matters:
  - (a) any financial or personal interest of the Member in:
    - (i) the proceeding or its outcome; and
    - (ii) an administrative proceeding, a domestic judicial proceeding or another international dispute settlement proceeding that involves issues that may be decided in the proceeding for which the Member is under consideration;
  - (b) any financial interest of the Member's employer, or professional partner or associate, or close family member<sup>24</sup> in:
    - (i) the proceeding or its outcome; and

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<sup>24</sup> For the purpose of this Code of Conduct the term "close family member" refers to a spouse, sibling, parent or life partner, in addition to any other family member with whom a close relationship exists.

- (ii) an administrative proceeding, a domestic judicial proceeding or another international dispute settlement proceeding that involves issues that may be decided in the proceeding for which the candidate is under consideration;
  - (c) any past or current financial, business, professional, family or social relationship with any interested parties in the proceeding, or their counsel; and
  - (d) public advocacy or legal or other representation concerning an issue in dispute in the proceeding or involving the same investors or investments.
- 4. Throughout their term of office, Members shall at all times continue to make all efforts to become aware of any interests, relationships or matters referred to in paragraph 1 of this Article and disclose such interests, relationships or matters by informing the Parties.
- 5. Throughout the proceedings, Members appointed to a division have a continuing obligation to disclose interests, relationships and matters that may bear on the integrity or impartiality of the dispute settlement process and shall communicate matters concerning actual or potential violations of this Code of Conduct in writing to the Parties and the disputing parties.
- 6. Any doubt as to whether a Member should disclose certain interest, relationship or matter should be resolved in favour of disclosure. Disclosure of an interest, relationship or matter is without prejudice as to whether the interest, relationship or matter is covered by this Code of Conduct, or whether it is inconsistent with Article 13, paragraph 1 (Ethics).

#### *Article 4*

##### **Duties of Members**

1. Members shall perform their duties thoroughly and expeditiously throughout the course of the proceeding and shall do so with fairness and diligence towards the disputing parties and other Members.
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. Experts and assistants shall comply with the obligations incurred by Members pursuant to paragraphs 1 and 2, Article 2 (Independence and Impartiality of Members), paragraph 5 of Article 3 (Disclosure Obligations) and Article 6 (Confidentiality) of this Code of Conduct. In this regard, a Member shall take all reasonable measures and necessary steps to ensure that they are aware of, and comply with, such obligations.
4. Members shall not engage in ex parte contacts concerning the proceeding.

*Article 5*

**Obligations of Former Members**

1. Former Members shall avoid actions that may create the appearance that they were biased in carrying out their duties or derived advantage from the decisions or awards of the Tribunal or the Appeal Tribunal.
2. Without prejudice to Articles 11, paragraph 5 (Tribunal) and 12, paragraph 5 (Appeal Tribunal), Members shall undertake that after the end of their term, they shall not become involved:
  - (a) in any manner whatsoever in investment disputes which were pending before the Tribunal or the Appeal Tribunal before the end of their term; [and/or]
  - (b) in any manner whatsoever in investment disputes directly and clearly connected with disputes, including concluded disputes, which they have dealt with as Members of the Tribunal or the Appeal Tribunal.
3. Members shall undertake that for a period of three years after the end of their term, they shall not act as representatives of one of the disputing parties in investment disputes before the Tribunal or the Appeal Tribunal.
4. If the President of the Tribunal or of the Appeal Tribunal is informed or otherwise becomes aware that a former Member of the Tribunal or of the Appeal Tribunal, respectively, is alleged to have acted inconsistently with the obligations set up in paragraphs 1 through 3, he shall examine the matter, provide the opportunity to the former Member to be heard, and, after verification, inform thereof:
  - (a) the professional body or other such institution with which that former Member is affiliated;
  - (b) the Contracting Parties; and
  - (c) the President of any other relevant Investment Tribunal or Appeal Tribunal in view of the initiation of appropriate measures.

The President of the Tribunal or of the Appeal Tribunal shall make public its decision to take the actions referred to in subparagraphs (a), b and (c) above, together with the reasons therefor.

*Article 6*

**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 (Transparency of the Proceedings) of [Section [X] (Resolution of Investment Disputes)] as applicable.
3. No Members or former Members shall at any time disclose the deliberations of the Tribunal or Appeal Tribunal, or any Member's views, whatever they may be. A Member shall not make a public statement regarding the merits of a pending proceeding.

*Article 7*

**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.

*Article 8*

**Mediators**

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

*Article 9*

**Consultative Committee**

1. The President of the Tribunal and the President of the Appeal Tribunal shall be assisted by a Consultative Committee for ensuring the proper application of this Code of Conduct, Article 13 (Ethics) and for the execution of any other task, where so provided.
2. The President of the Tribunal and the President of the Appeal Tribunal shall be assisted by Consultative Committees composed of the two most senior Members of the Tribunal or of the Appeal Tribunal.

**Annex 2**  
**Service of Documents on a Party under Section XX**  
**(Resolution of Investment Disputes)**

**Mexico**

Requests for consultations, notices and other documents in disputes under Section XX (Resolution of investment disputes) shall be served on Mexico by delivery to:

Dirección General de Consultoría Jurídica de Comercio Internacional  
Secretaría de Economía  
Alfonso Reyes # [XX] piso [17]  
Col. Hipódromo Condesa  
Del. Cuauhtémoc  
Ciudad de México  
C.P.: 06140

**European Union**

Requests for consultations, [notices and other documents] in disputes under Section XX (Resolution of Investment Disputes) shall be served on the European Union by delivery to:

European Commission  
Directorate-General for Trade  
Unit F2 – Dispute Settlement and Legal Aspects of Trade Policy  
Rue de la Loi 170  
1040, Brussels  
Belgium

**[Member States of the European Union**

Requests for consultations, [notices and other documents] in disputes under Section XX (Resolution of investment disputes) shall be served on a Member State of the European Union by delivery to the place made publicly available on the website of the Directorate General for Trade of the European Commission:

[insert link] ]

## ANNEX ON EXPROPRIATION

The Parties confirm their shared understanding that:

1. A measure or series of measures 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 12(1) (Expropriation and Compensation) addresses two situations. The first is direct expropriation, which occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure.
3. The second situation addressed by Article 12(1) (Expropriation and Compensation) is indirect expropriation, which occurs when 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.
4. 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:
  - (i) 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 an indirect expropriation has occurred;
  - (ii) the duration of the measure or series of measures by a Party;
  - (iii) the extent to which the government measure interferes with the distinct and reasonable expectations of the investor arising out of the investment; and
  - (iv) the character of the the measure or series of measures, notably their object and context.
3. For greater certainty, non-discriminatory measures by a Party that are designed and applied to protect legitimate policy objectives, such as the protection of public health, social services, public education, safety, and the environment, or public morals, social or consumer protection, privacy and data protection, or the promotion and protection of cultural diversity do not constitute indirect expropriations, except in the rare circumstance when the impact of a measure or series of measures is manifestly excessive in light of its purpose.

## ANNEX ON PUBLIC DEBT

1. The parties recognise that the purchase of debt of a Party entails commercial risk. For greater certainty, no award shall be made in favour of a claimant for a claim under Section C (Resolution of Investment Disputes and Investment Court System) with respect to a default or non-payment of debt of a Party unless the claimant meets its burden of proving that such default or non-payment constitutes a breach of an obligation under Section B (Investment Protection).
2. No claim that a restructuring of debt of a Party breaches an obligation under this Chapter may be submitted to, or if already submitted, be pursued under Section C (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, except for a claim that a negotiated restructuring falling under paragraph 4 a) ii) of this Annex breaches Articles XX (National Treatment) or XX (Most Favoured Nation Treatment) of Section A (Liberalisation of Investments) <sup>[EU: 25]</sup>.
3. Notwithstanding Article XX (Submission of a Claim) of Section C (Resolution of Investment Disputes and Investment Court System), and subject to **[MX: paragraphs 1 and]** <sup>[EU: paragraph]</sup> 2 of this Annex, an investor may not submit a claim under Section C (Resolution of Investment Disputes and Investment Court System) that a restructuring of debt of a Party breaches Articles XX (National Treatment) or XX (Most Favoured Nation Treatment) of Section A (Liberalisation of Investments) <sup>[MX: 1]</sup> <sup>[EU: or an obligation under Section B (Investment Protection)]</sup> unless 270 days have elapsed from the date of submission by the claimant of the written request for consultations pursuant to Article XX (Consultations) of Sub-Section 1 (Scope and Definitions) of Section C (Resolution of Investment Disputes and Investment Court System).
4. For the purposes of this Annex:
  - (a) “negotiated restructuring” means <sup>[EU: the restructuring or rescheduling of debt of a Party that has been effected through (i) a modification or amendment of debt instruments, as provided for under their terms, including their governing law, or (ii) a debt exchange or other similar process in which the holders of no less than 75% of the aggregate principal amount of the outstanding debt subject to restructuring have consented to such debt exchange or other process.]</sup> **[MX: (a) “negotiated restructuring” means a restructuring of any debt of a Party that has been effected through a modification, amendment, rescheduling, debt exchange or other similar process (i) made under the terms of the debt subject to restructuring, including their governing law, or (ii) where the holders of no less than 75% of the aggregate principal amount of the outstanding debt subject to restructuring have consented to restructuring.]**

<sup>25</sup> For greater certainty, a breach of Article 2.3 (National Treatment) or Article 2.4 (Most Favoured Nation Treatment) of Section A (Liberalisation of Investments) does not occur merely by virtue of a different treatment provided by a Party to certain categories of investors or investments on grounds of a different macroeconomic impact, for instance to avoid systemic risks or spill over effects, or on grounds of eligibility for debt restructuring **[MX: or differences in characteristics of debt instruments issued in different markets].**

- (b) “governing law” of a debt instrument means a jurisdiction’s legal and regulatory framework applicable to that debt instrument.
5. For greater certainty, “debt of a Party” includes, in the case of Mexico, any form of debt of Mexico [in accordance with its domestic law,] and in the case of the European Union any form of debt of the European Union, or of a government of a Member State of the European Union at the central, regional or local level.

[EU: ANNEX

**AGREEMENTS BETWEEN MEMBER STATES OF THE EUROPEAN UNION AND MEXICO]**

**[MX: Annex to Section B (Investor-State Dispute Settlement)]**

A decision by the National Commission on Foreign Investment (Comisión Nacional de Inversiones Extranjeras) following a review pursuant to the entry at Annex I – Mexico – XX with respect to whether or not to permit an acquisition that is subject to review, shall not be subject to the dispute settlement provisions of Section B (Investor-State Dispute Settlement) or Chapter XX (Dispute Settlement).]