

**[EU: Section X - Resolution of Investment Disputes and Investment Court System**

**Sub-Section 1: Scope and Definitions]**

**Article 1  
Scope and Definitions**

1. This [Section] shall apply to a dispute between a Party and [EU: a claimant] [JP: an investor] of the other Party concerning a measure alleged to breach the provisions of [EU: Articles x.4, paragraph 2 [national treatment as regards operation of an investment], x.5 [most favoured nation as regards operation of an investment], and section 2 [investment protection] [JP: this Chapter (Investment)] [EU: , which breach allegedly causes loss or damage to the claimant or its locally established company] [where the claimant claims to have suffered loss or damage as a result of the alleged breach (hereinafter referred to as `investment dispute`)].

1. [JP: A tribunal] [EU: The Tribunal] established under Article 8 may not decide claims that fall outside of the scope of this [section] as defined in paragraph 1.

For the purpose of this [Section]:

"disputing parties" means the claimant and respondent;

[EU: "claimant" means an investor of a Party, as defined in Article (Definitions) of Chapter (Investment & Services) which seeks to submit or has submitted a claim pursuant to this (Section), either:

(a) acting on its own behalf; or

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

“locally established company” means a juridical person, established in the territory of one Party, and owned and controlled by an investor of the other Party.]

[JP: “claimant” means an investor of a Party that is a party to an investment dispute with the other Party.]

[A juridical person is:

(i) owned by natural or juridical persons of the other Party if more than 50 per cent of the equity interest in it is beneficially owned by natural or juridical persons of that Party;

(ii) controlled by natural or juridical persons of the other Party if such natural or juridical persons have the power to name a majority of its directors or otherwise to legally direct its actions.]

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

"respondent" means either Japan or, in the case of the European Union, either the European Union or the Member State concerned as notified pursuant to Article 4.

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

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

"Investment dispute settlement" means a method of dispute resolution of an investment dispute under this [Chapter/Section] other than consultations provided for in Article 2 and mediation provided for in Article 3.

### **Article 1 Anti-Circumvention**

For greater certainty, [JP: a tribunal] [EU: 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 [JP: a tribunal] [EU: 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 to arbitration under this section. The possibility to decline jurisdiction in such circumstances is without prejudice to other jurisdictional objections which could be entertained [JP: a tribunal] [EU: the Tribunal].

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

### **Article 2 Consultations**

1. Any dispute should, as far as possible, be settled amicably, where possible, before the submission of a request for consultations. For greater certainty, such a settlement may be agreed at any time, including after a claim has been submitted to investment dispute settlement pursuant to Article 5. [EU: A mutually agreed solution between the disputing parties shall be notified to the non-disputing Party within 15 days of the mutually agreed solution being agreed. The [...] Committee shall keep under surveillance the implementation of such mutually agreed solutions and the Party to the mutually agreed solution shall regularly report to the [...] Committee on the implementation of such solution.]

Unless the disputing parties agree to a longer time period, consultations shall be held within 60 days of the submission of the request for consultations pursuant to paragraph 2.

2. A [claimant] [investor] of one Party alleging a breach of the [EU: provisions referred to in Article 1 paragraph 1] [JP: provisions of this Chapter] may submit a request for consultations to the other Party. The request shall contain the following information:

(a) the name and address of the [claimant] [investor] [EU: and, where such request is submitted on behalf of a locally established company, the name, address and place of incorporation of the locally established company;]

(b) the provisions [of this Chapter] [referred to in Article 1 paragraph 1] alleged to have been breached;

(c) the legal and the factual basis for the claim including the measures alleged to be inconsistent with the provisions [of this Chapter] [referred to in Article 1 paragraph 1].

(d) the relief sought and the amount of damages claimed.

[EU: (e) evidence establishing that the claimant is an investor of the other Party and that it owns or controls the investment and, where it acts on behalf of a locally established company, that it owns or controls the locally established company.

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

3. Unless the disputing parties agree otherwise, the place of consultation shall be:

(a) Tokyo where the consultations concern measure[s] by Japan;

(b) Brussels where the [measures subject to the request for consultations include a measure] by the European Union; or

(c) the capital of the Member State of the European Union concerned, where the consultations concern exclusively measure[s] by that Member State.

Consultations may also take place by videoconference or other means [EU: particularly where a small or medium sized enterprise is involved].

4. A request for consultations must be submitted within the later of:

(a) 3 years after the date on which the claimant, [EU: or, as applicable, the locally established company] becomes or should have become aware of the measures alleged to be inconsistent with the [provisions referred to in Article 1 paragraph 1] and of the loss or damage alleged to have been incurred thereby or;

(b) [2 or 3] years after the claimant, [EU: or, as applicable, the locally established company [EU: ceases to pursue] [JP: has withdrawn] any claim before any court or tribunal under the domestic law of a Party with respect to the measures alleged to constitute a breach referred to in Article 1 and, in any event, no later than 10 years after the date on which the claimant [EU: or, as applicable, its locally established company,] becomes or should have become aware of the measures alleged to be inconsistent with the provisions [EU: referred to in Article 1(1) ] [JP: of this Chapter] and of the loss or damage alleged to have been incurred thereby.

5. In the event that the claimant has not submitted a claim to investment dispute settlement pursuant to Article 5 within 18 months of submitting the request for consultations, the claimant shall be deemed to have withdrawn from proceedings under this section and to have waived its rights to bring a claim under this section. This period may be extended by agreement between the claimant and the Party concerned.

6. The time periods in paragraphs 4 and 5 shall not render claims inadmissible where the claimant can demonstrate that the failure to request consultations or submit a claim to investment dispute

settlement is due to the claimant's inability to act as a result of actions taken by [the party concerned], provided that the claimant acts as soon as reasonably possible after it is able to act.

7. In the event that the request for consultations concerns an alleged breach of the agreement by the European Union, or by a Member State of the European Union, it shall be sent to the European Union. [JP: Where the measures referred to in the request for consultation include those of a Member State of the European Union, the European Union shall notify the [claimant][investor] of the fact.] [EU: Where treatment of a Member State of the European Union is identified, it shall also be sent to the Member State concerned.]

### **Article 3 Mediation**

1. The disputing parties may at any time agree to have recourse to mediation.
2. Recourse to mediation is voluntary and without prejudice to the legal position of either disputing party.

[EU: 3. Recourse to mediation shall be governed by the rules set out in Annex I. Any time limit mentioned in Annex I may be modified by mutual agreement between the disputing parties.]

[EU: 4. The [...] Committee shall, upon the entry into force of this Agreement, establish a list of six individuals, of high moral character and recognised competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment and who are willing and able to serve as mediators.

5. The mediator shall be appointed by agreement of the disputing parties. The disputing parties may jointly request the President of the Tribunal to appoint a mediator from the list established pursuant to this Article, or, in the absence of a list, from individuals proposed by either Party]

6. Once the disputing parties agree to have recourse to mediation, the period of limitation referred to in Articles 2(4) and 2(5) shall be suspended between the date on which it was agreed to have recourse to mediation and the date on which a disputing party or the mediator, whichever is earlier, receives written notice of the decision to terminate the mediation by the other disputing party. [EU: At the request of both parties, the Tribunal or the Appeal Tribunal shall stay the proceedings.]

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

#### **Article 4 Notice of intent to submit a claim to investment dispute settlement**

1. If the dispute cannot be settled within 90 days of the submission of the request for consultations, the claimant may deliver a notice of intent to submit a claim to investment dispute settlement.

The notice shall contain the following information:

- (a) the name and address of the [EU: claimant] [JP: investor];

(b) the provisions [JP: of this Chapter] [EU: referred to in Article 1 paragraph 1] alleged to have been breached;

(c) the legal and the factual basis for the claim including the JPN: measures alleged to be inconsistent with the provisions [JP: of this Chapter] [EU: referred to in Article 1 paragraph 1].

(d) the relief sought and the amount of damages claimed.

[EU: (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.]

The notice shall be delivered to the European Union where the measures referred in the notice include those of either the European Union or a Member States of European Union. [EU: Where treatment of a Member State of the European Union is identified in the notice of intent to submit a claim to arbitration, such notice shall also be sent to the Member State concerned.] The notice shall be delivered to Japan where the measures referred in the notice are those of Japan.

2. Where a notice of intent referred to in paragraph 1 has been delivered to the European Union, the European Union shall, after having made a determination, inform the claimant within 60 days of the notice referred to in paragraph 1 as to whether the European Union or a Member State of the European Union shall be the respondent, on the basis of which the claimant may submit a claim pursuant to Article [5].

[JP: 3. Where the claimant has not been informed of the determination within the time period provided in paragraph 2, the claimant may submit a notice of arbitration pursuant to Article [5] on the basis of the application of the following criteria:

- (a) in the event that the notice of intent exclusively identifies the measure by a Member State, that Member State shall act as respondent; and
- (b) in the event that the notice of intent identifies any measure by an institution, body or agency of the European Union, the European Union shall act as respondent.]

4. Where either the European Union or a Member State is respondent [JP: pursuant to paragraphs 2 or 3] [EU: following a determination made pursuant to paragraph 2], neither the European Union nor the Member State concerned may assert the inadmissibility of the claim, lack of jurisdiction of [JP: a tribunal] [EU: the Tribunal] or otherwise assert that the claim or award is unfounded or invalid on the ground that the proper respondent should be the European Union rather than the Member State or vice versa.]

5. [JP: A tribunal] [EU: The Tribunal and the Appeal Tribunal] shall be bound by the determination made pursuant to paragraph 2.]

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

## Article 5 Submission of claim to investment dispute settlement

1. If the investment dispute cannot be settled through consultations within three months of the submission of the notice of intent to submit a claim to investment dispute settlement, the claimant, provided that it satisfies the requirements set out in Article 6, may submit the investment dispute to [EU: the Tribunal] [JP: a tribunal] under one of the following dispute settlement rules:

(a) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington, March 18, 1965 (hereinafter referred to in this Section as “the ICSID Convention”);

(b) Rules Governing the Additional Facilities for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (hereinafter referred to in this Section as “the ICSID Additional Facilities Rules”);

(c) the Arbitration rules of the United Nations Commission on International Trade Law (hereinafter referred to in this Section as “UNCITRAL”), in their most recent form as of the date of the submission of a claim to arbitration; or

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

2. In the event that the investor proposes a specific set of dispute settlement rules pursuant to subparagraph 1(d) and if the disputing parties have not agreed in writing on such arbitration rules, or the respondent has not replied to the investor, within 30 days of receipt of the proposal, the investor may submit a claim under the investment dispute settlement rules provided for in subparagraphs 1(a), (b) and (c).

[JP: 3. The claimant may, when submitting its claim, propose that a sole arbitrator should hear the case. The respondent shall give sympathetic consideration to such a request, in particular where the claimant is a small or medium-sized enterprise or the compensation or damages claimed are relatively low.]

The investment dispute settlement rules applicable pursuant to paragraph 1 shall govern the proceedings subject to the specific rules set out in this [Chapter] [Section] [EU: as supplemented by any rules adopted by the [...] Committee, by the Tribunal or by the Appeal Tribunal].

4. Claims submitted in the name of a class composed of a number of unidentified claimants, or submitted by a representative intending to conduct the proceedings in the interest of a number of identified or unidentified claimants that designate the representatives to make on its own discretion, any decisions and conducts relating to the proceedings on their behalf shall not be admissible, [where] [provided that] those proceedings are initiated [by] [at] the initiative of that representative and that representative is not included in the claimants.

[EU: 5. For greater certainty, a claimant may not submit a claim under this Section if its investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.]

## **Article 6**

### **Other claims**

1. No claim may be submitted to investment dispute settlement under this Section unless:

(a) a claimant withdraws any pending claims submitted to any [domestic or international court or tribunal] with respect to any measure alleged to constitute a breach referred to in Article 1 [EU: and the submission of the claim pursuant to Article 5 is accompanied by evidence of any such withdrawal], and

(b) the submission of the claim pursuant to Article 5 is accompanied by the claimant's written waiver of its right to initiate before any [domestic or international court or tribunal], any proceeding with respect to any measure alleged to constitute a breach referred to in Article 1.

2. Notwithstanding paragraph 1, the claimant may initiate or continue [an action] that seeks interim injunctive [or declaratory] relief and [does not involve the payment of monetary damages] before a court or tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or [EU: its locally established company's] [JP: the enterprise's] rights and interests during the pendency of the investment dispute settlement proceedings.

[JP: The waiver provided pursuant to [paragraph 1 (b)] shall cease to apply:

i. where the claim is rejected on the basis of a failure to meet the requirements of Article 2(2) or on any other procedural or jurisdictional grounds;

ii. where a claim is dismissed pursuant to Article 10 (Preliminary objections) or Article 10bis (Claims unfounded as a matter of law); or

iii. where a claim is withdrawn in conformity with applicable arbitration rules within 12 months of the constitution of the Tribunal.]

[EU: The declaration provided pursuant to paragraph 1(b) shall cease to apply where the claim is rejected on the basis of a failure to meet the nationality requirements to bring an action under this Agreement.]

[EU: 3. For the purposes of this Article, the term "claimant" includes the investor and, where applicable, the locally established company. In addition, for the purposes of paragraphs 1 and 2(a), the term "claimant" also includes:

(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 investor or locally established company.<sup>1]</sup>

4. [EU: Where claims are brought both pursuant to this Section and Section X (State to State Dispute Settlement) or another international agreement] [JP: Where a Party has initiated a dispute settlement procedure und Chapter X (Dispute Settlement)] with respect to the measure alleged to be inconsistent with any of the provisions [JP: of this Chapter] [EU: referred to in Article 1(1)], [JP: a tribunal should] [EU: a division of the Tribunal constituted under this Section shall], where relevant [EU: after hearing the disputing parties,] take into account [EU: proceedings pursuant to Section X (State to State dispute settlement) or another international agreement in its decision, order or award] [JP:

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[EU: <sup>1</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).]

decisions made in that dispute settlement procedure, including the Final Report as referred to Article 10] of Chapter X (Dispute Settlement)]. [EU: To this end, it may also, if it considers necessary, stay its proceedings. In acting pursuant to this provision the Tribunal shall respect Article 12(6).]

### **Article 7 Consent**

1. [EU: The respondent] [JP: Each Party hereby] consents to the submission of [an investment dispute by a claimant to investment dispute settlement under Article 5 paragraph 1] [~~chosen by the claimant~~] [in accordance with this Agreement].

2. The consent under paragraph 1 and the submission of a claim under this Section shall [be deemed to] satisfy the requirements of:

(a) Article 25 of the ICSID Convention and the ICSID Additional Facility Rules for written consent of the disputing parties; and,

(b) Article II of the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards for an “agreement in writing”.

[EU: 3. [For greater certainty], The claimant is deemed to give consent in accordance with the procedures provided for in this Section at the time of submitting a claim pursuant to Article 5.

4. For greater certainty, the consent provided pursuant to this Article requires that:

(a) the disputing parties refrain from enforcing an award rendered pursuant to this Section before such award has become final pursuant to Articles 12(6) or 12(7); and

(b) the disputing parties refrain from seeking 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.]

### **Article 7 Third-Party Funding**

1. Where there is a third party funding, the disputing party benefiting from it shall notify to the other disputing party and to [JP: a tribunal where applicable] [EU: the division of the Tribunal, or where the division of the Tribunal is not established, to the President of the Tribunal], the name and address of the third party funder.

2. Such notification shall be made at the time of submission of a claim, or, where [the [EU: agreement] [JP: contract] for a third party funding is concluded or such funding] is made after the submission of a claim, without delay [EU: as soon as the agreement is concluded or the donation or grant is made].

[JP: 3. For greater certainty, the tribunal shall not draw any adverse inference against the claimant from the fact that it benefits from third party funding.]

### **Article 8 Constitution of the Tribunal**

*Note: At the 14<sup>th</sup> round, EU submitted revised text proposals including articles on "Tribunal of First*



*Instance", "Appeal Tribunal", "Ethics" and "Multilateral Dispute Settlement Mechanisms" which are intended to replace the current Article 8 (Constitution of the Tribunal).*

1. Unless the disputing parties have agreed to appoint a sole arbitrator, the tribunal shall comprise three arbitrators, one appointed by each of the disputing parties and the third, who shall be the chairperson, appointed by agreement of the disputing parties.
2. If the disputing parties agree to appoint a sole arbitrator, the disputing parties shall seek to agree on the sole arbitrator. If they fail to do so within 90 days of the day on which the respondent gave its agreement to submitting the dispute to a sole arbitrator, the sole arbitrator shall be drawn by the Secretary General of ICSID on the request of a disputing party [EU: from the list of chairpersons established pursuant to paragraph 5 below].
3. [If the disputing parties have not agreed to appoint a sole arbitrator and] if the tribunal has not been constituted within 90 days from the date on which a claim pursuant to Article 5 has been submitted, the Secretary General of ICSID shall, on the request of a disputing party, appoint the [arbitrator or arbitrators not yet appointed] [EU: from the list established pursuant to paragraph 5.
4. The Committee for the Settlement of Investor-State Disputes shall, no later than the earliest of the provisional application or entry into force of this Agreement, establish a list of individuals who are willing and able to serve as arbitrators. The Committee for Investor-State Dispute Settlement shall ensure that at all times the list includes at least [15] individuals.
5. Each Party shall propose at least [seven] individuals to serve as arbitrators. The Parties shall also select at least [five] individuals who are not nationals of either Party to act as chairperson of the tribunals. In case one party wishes to appoint more than [seven] individuals, the other Party may propose the same number of additional arbitrators and the Parties may agree to increase the number of chairpersons accordingly.]
6. All arbitrators appointed pursuant to this Section shall have [EU: specialised] knowledge [EU: expertise or experience] of [EU: international law, in particular] public international law [JP: , such as / including] [EU: and] international investment law. [EU: They shall be independent, serve in their individual capacities and not take instructions from any organisation or government with regard to matters related to the dispute, or is affiliated with the government of any Party or any disputing party, and shall comply with Annex II [Code of Conduct]. Arbitrators who serve on the list established pursuant to paragraph 5 shall not, for that reason alone, be deemed to be affiliated with the government of any Party.]
7. If a disputing party considers that an arbitrator does not meet the requirements [EU: set out in paragraph 6], it shall send a notice of its intent to challenge the arbitrator within 15 days after:
  - a) the appointment of the arbitrator has been notified to the challenging party; or,
  - b) the disputing party became aware of the facts giving rise to the alleged failure to meet such requirements.
8. The notice of an intention to challenge shall be promptly communicated to the other disputing party, to the arbitrator or arbitrators, as applicable, and to the Secretary General of ICSID. The notice of challenge shall state the reasons for the challenge.
9. When an arbitrator has been challenged by a disputing party, the disputing parties may agree to the challenge, in which case the disputing parties may request the challenged arbitrator to resign. The arbitrator may also, after the challenge, elect to resign. In neither case does this imply acceptance of the validity of the grounds for the challenge.

10. If, within 15 days from the date of the notice of challenge, the challenged arbitrator has elected not to resign, the Secretary General of ICSID shall, after hearing the disputing parties and after providing the arbitrator 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 arbitrators, as applicable.

11. Unless the disputing parties agree otherwise, the arbitration shall be held in a country that is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 (hereinafter referred to in this Article as “the New York Convention”).

**EU proposal 14<sup>th</sup> round:****SUB-SECTION 4: INVESTMENT COURT SYSTEM****Article 8****Tribunal of First Instance (Tribunal)**

1. A Tribunal of First Instance ('Tribunal') is hereby established to hear claims submitted pursuant to Article 5.

2. The [...] Committee shall, upon the entry into force of this Agreement, appoint fifteen Judges to the Tribunal. Five of the Judges shall be nationals of a Member State of the European Union, five shall be nationals of Japan and five shall be nationals of third countries.

3. The [...] Committee may decide to increase or to decrease the number of the Judges by multiples of three. Additional appointments shall be made on the same basis as provided for in paragraph 2.

4. The Judges shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence. They shall have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements.

5. The Judges appointed pursuant to this Section shall be appointed for a six-year term, renewable once. However, the terms of seven of the fifteen persons appointed immediately after the entry into force of the Agreement, to be determined by lot, shall extend to nine years. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.

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

7. Within 90 days of the submission of a claim pursuant to Article 6, the President of the Tribunal shall appoint the Judges composing the division of the Tribunal hearing the case on a rotation basis, ensuring that the composition of the divisions is random and unpredictable, while giving equal opportunity to all Judges to serve.

8. The President and Vice-President of the Tribunal shall be responsible for organisational issues and will be appointed for a two-year term and shall be drawn by lot from among the Judges who are nationals of third countries. They shall serve on the basis of a rotation drawn by lot by the Chair of the [...] Committee. The Vice-President shall replace the President when the President is unavailable.

9. Notwithstanding paragraph 6, the disputing parties may agree that a case be heard by a sole Judge who is a national of a third country, to be selected by the President of the Tribunal. The respondent shall give sympathetic consideration to such a request from the claimant, in particular where the claimant is a small or medium-sized enterprise or the compensation or damages claimed are relatively low. Such a request should be made at the same time as the filing of the claim pursuant to Article 6.

10. The Tribunal shall draw up its own working procedures.

11. The Judges shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities under this Agreement.

12. In order to ensure their availability, the Judges shall be paid a monthly retainer fee to be fixed by decision of the [...] Committee. [Note: the retainer fee suggested by the EU would be around 1/3<sup>rd</sup> of the retainer fee for WTO Appellate Body members (i.e. around € 2,000 per month)]. The President of the Tribunal and, where applicable, the Vice-President, shall receive a fee equivalent to the fee determined pursuant to Article 8 (12) for each day worked in fulfilling the functions of President of the Tribunal pursuant to this Section.

13. The retainer fee shall be paid equally by both Parties into an account managed by the Secretariat of [ICSID/the Permanent Court of Arbitration]. In the event that one Party fails to pay the retainer fee the other Party may elect to pay. Any such arrears will remain payable, with appropriate interest.

14. Unless the [...] Committee adopts a decision pursuant to paragraph 15, the amount of the other fees and expenses of the Judges on a division of the Investment Tribunal shall be those determined pursuant to Regulation 14(1) of the Administrative and Financial Regulations of the ICSID Convention in force on the date of the submission of the claim and allocated by the Tribunal among the disputing parties in accordance with Article 12(4).

15. Upon a decision by the [...] Committee, the retainer fee and other fees and expenses may be permanently transformed into a regular salary. In such an event, the Judges shall serve on a full-time basis and the [...] Committee shall fix their remuneration and related organisational matters. In that event, the Judges shall not be permitted to engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the President of the Tribunal.

16. The Secretariat of [ICSID/the Permanent Court of Arbitration] shall act as Secretariat for the Tribunal and provide it with appropriate support. The expenses for such support shall be met by the Parties to the Agreement equally.

### **Article 8** **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 Japan 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 six-year term, renewable once. However, the terms of three of the six persons appointed immediately after the entry into force of the agreement, to be determined by lot, shall extend to nine years. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.

6. The Appeal Tribunal shall have a President and Vice-President 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. They shall serve on the basis of a rotation drawn by lot by the Chair of the [...] Committee. The Vice-President shall replace the President when the President is unavailable.

7. The Members of the Appeal Tribunal shall possess the qualifications required in their respective countries for appointment to the highest judicial offices, or be jurists of recognised competence. They shall have demonstrated expertise in public international law. It is desirable that they have expertise in international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements.

8. The Appeal Tribunal shall hear appeals in divisions consisting of three Members, of whom one shall be a national of a Member State of the European Union, one a national of Japan 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 on a rotation basis, ensuring that the composition of each division is random and unpredictable, while giving equal opportunity to all Members to serve.

10. The Appeal Tribunal shall draw up its own working procedures.

11. All persons serving on the Appeal Tribunal shall be available at all times and on short notice and shall stay abreast of other dispute settlement activities under this agreement.

12. The Members of the Appeal Tribunal shall be paid a monthly retainer fee and receive a fee for each day worked as a Member, to be determined by decision of the [...] Committee. [Note: the retainer and daily fee suggested by the EU would be around the same as for WTO Appeal Tribunal members (i.e. a retainer fee of around € 7,000 per month)]. The President of the Appeal Tribunal and, where applicable, the Vice-President, 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 equally by both Parties into an account managed by the Secretariat of [ICSID/the Permanent Court of Arbitration]. In the event that one Party fails to pay the retainer fee the other Party may elect to pay. Any such arrears will remain payable, with appropriate interest

14. Upon a decision by the [...] Committee, the retainer fee and the fees for days worked may be permanently transformed into a regular salary. In such an event, the Members of the Appeal Tribunal shall serve on a full-time basis and the [...] Committee shall fix their remuneration and related organisational matters. In that event, the Members shall not be permitted to engage in any

occupation, whether gainful or not, unless exemption is exceptionally granted by the President of the Appeal Tribunal.

15. The Secretariat [ICSID/the Permanent Court of Arbitration] shall act as Secretariat for the Appeal Tribunal and provide it with appropriate support. The expenses for such support shall be met by the Parties to the Agreement equally.

#### **Article 8** **Ethics**

1. The Judges of the Tribunal and the Members of the Appeal Tribunal shall be chosen from persons whose independence is beyond doubt. They shall not be affiliated with any government.<sup>2</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 II (Code of Conduct). 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 Judge or a Member has conflict of interest, it shall send a notice of challenge to the appointment to the President of the Tribunal or to the President of the Appeal Tribunal, respectively. The notice of challenge shall be sent within 15 days of the date on which the composition of the division of the Tribunal or of the Appeal Tribunal has been communicated to the disputing party, or within 15 days of the date on which the relevant facts came to its knowledge, if they could not have reasonably been known at the time of composition of the division. The notice of challenge shall state the grounds for the challenge.

3. If, within 15 days from the date of the notice of challenge, the challenged Judge or Member has elected not to resign from that division, the President of the Tribunal or the President of the Appeal Tribunal, respectively, shall, after hearing the disputing parties and after providing the Judge or the Member an opportunity to submit any observations, issue a decision within 45 days of receipt of the notice of challenge and forthwith notify the disputing parties and other Judges or Members of the division.

4. Challenges against the appointment to a division of the President of the Tribunal shall be decided by the President of the Appeal Tribunal and vice-versa.

5. Upon a reasoned recommendation from the President of the Appeal Tribunal, the Parties, by decision of the [...] Committee, may decide to remove a Judge from the Tribunal or a Member from the Appeal Tribunal where his behaviour is inconsistent with the obligations set out in paragraph 1 and incompatible with his 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 of First Instance shall submit the reasoned recommendation. Articles 8(2) and 8 *bis* (3) shall apply *mutatis mutandis* for filling vacancies that may arise pursuant to this paragraph.

#### **Article 8** **Multilateral Dispute Settlement Mechanisms**

Upon the entry into force between the Parties of an international agreement providing for a

<sup>2</sup> For greater certainty, this does not imply that persons who are employed by a government or receive an income from the government, but who are otherwise independent of the government, are ineligible.

multilateral investment tribunal and/or a multilateral appellate mechanism applicable to disputes under this Agreement, the relevant parts of this section shall cease to apply. The [ ] Committee may adopt a decision specifying any necessary transitional arrangements.

## [EU: SUB-SECTION 5: CONDUCT OF PROCEEDINGS]

### Article 9

#### Applicable law and rules of Interpretation

[EU: 1. The Tribunal shall determine whether the treatment subject to the claim is inconsistent with any of the provisions referred to in Article 1(1) alleged by the claimant.]

When rendering its decision, [EU: the Tribunal] [JP: a tribunal] shall apply this [Chapter] and other provisions of this Agreement as applicable, and other rules and principles of international law applicable between the Parties.

2. [EU: The Tribunal] [JP: a tribunal] shall interpret the relevant provisions of this Agreement in accordance with customary rules of interpretation of public international law, as codified in the Vienna Convention on the Law of Treaties. For greater certainty, the tribunal may, where relevant, take into account generally and internationally accepted principles of public or administrative law in interpreting this Agreement.

[EU: 3. For greater certainty, pursuant to paragraph 1, the domestic law of the Parties shall not be part of the applicable law. Where the Tribunal is required to ascertain the meaning of a provision of the domestic law of one of the Parties as a matter of fact, it shall follow the prevailing interpretation of that provision made by the courts or authorities of that Party.]

4. For greater certainty, the meaning given to the relevant domestic law made by the Tribunal shall not be binding upon the courts or the authorities of either Party. The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of the disputing Party.]

5. [Where serious concerns arise as regards matters of interpretation [EU: which may affect investment], the [Joint Committee] may adopt decisions interpreting a provision of [EU: this agreement] [JP: this Chapter]]. Any such interpretation shall be binding on [EU: the Tribunal and the Appeal Tribunal] [JP: a tribunal] hearing a claim submitted in accordance with Article 5 [EU: The [institutional body] may decide that an interpretation shall have binding effect from a specific date] [JP: where the measure on which the claim is based occurred after the date on which the interpretation was adopted by the Committee].

### Article 10

#### Claims Manifestly without Legal Merit

1. The respondent may, no later than 30 days after the constitution of the [EU: division of the Tribunal] [JP: tribunal] pursuant to Article 8, and in any event before the first session of the [EU: division of the Tribunal] [JP: tribunal], [EU: or 30 days after the respondent became aware of the facts on which the objection is based], file an objection that a claim is manifestly without legal merit.

2. The respondent shall specify as precisely as possible the basis for the objection.
3. The Tribunal, after giving the disputing parties the opportunity to present their observations on the objection, shall, [EU: at the first meeting of the division of the Tribunal or promptly thereafter, issue a decision or provisional award on the objection, stating the grounds therefor. In the event that the objection is received after the first meeting of the division of the Tribunal, the] Tribunal shall issue such decision or award as soon as possible, and no later than [120] days after the objection was filed. [In doing so, the Tribunal shall assume the alleged facts to be true, and may also consider any relevant facts not in dispute.]
4. The decision of [EU: the Tribunal] [JP: a tribunal] shall be without prejudice to the right of a disputing party to object, [pursuant to Article 10bis (Claims unfounded as a matter of law)] or in the course of the proceeding, to the legal merits of a claim and without prejudice to the Tribunal's authority to address other objections as a preliminary question.

#### **EU: Article 10bis Claims Unfounded as a Matter of Law**

1. Without prejudice to [EU: the Tribunal's] [JP: a tribunal's] authority to address other objections as a preliminary question or to a respondent's right to raise any such objections at any appropriate time, the Tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim, or any part thereof, submitted under this section is not a claim for which an award in favour of the claimant may be made under Article 12 (Provisional Award), even if the facts alleged were assumed to be true. The Tribunal may also consider any relevant facts not in dispute.
2. An objection under paragraph 1 shall be submitted to the Tribunal as soon as possible after the [EU: division of the Tribunal] [JP: the tribunal] is constituted, and in no event later than the date the Tribunal fixes for the respondent to submit its counter-memorial or statement of defence or, in the case of an amendment to the [claim], the date the Tribunal fixes for the respondent to submit its response to the amendment. An objection may not be submitted under paragraph 1 as long as proceedings under Article 10 (Claims manifestly without legal merit) are pending, unless the Tribunal grants leave to file an objection under this article, after having taken due account of the circumstances of the case.
3. On receipt of an objection under paragraph 1, and unless it considers the objection manifestly unfounded, the Tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or [EU: provisional] award on the objection, stating the grounds therefore.

#### **Article 11 Transparency**

1. The UNCITRAL Rules on Transparency in treaty-based Investor-State Arbitration (the "UNCITRAL Transparency Rules") shall apply to investment disputes [EU: under this Section, with the following additional obligations] [JP: subject to paragraphs 2 to [4]].
2. The [EU: request for consultations under Article 2, the] notice of intent to submit a claim to investment dispute settlement [EU: and the determination of the respondent] under Article 4 [EU: ,

the agreement to mediate under Article 3, the notice of challenge and the decision on challenge under Article 8 *ter* and the request for consolidation under Article 17 and all documents submitted to and issued by the Appeal Tribunal] shall be included in the list of documents referred to in Article 3(1) of the UNCITRAL Transparency Rules.

[EU: 3. Exhibits shall be included in the list of documents mentioned in Article 3(2) of the UNCITRAL Transparency Rules.]

4. Notwithstanding Article 2 of the UNCITRAL Transparency Rules, the [JP: respondent] [EU: European Union or Japan as the case may be] shall make available to the public in a timely manner [EU: prior to the constitution of the division of the Tribunal], relevant documents pursuant to paragraph 2, subject to [JP: Article 7 of the UNCITRAL Transparency Rules] [EU: the redaction of confidential or protected information]. Such documents may be made publicly available by communication to the repository referred to in the UNCITRAL Transparency Rules.

[EU: 5. A disputing party may disclose to other persons in connection with proceedings, including witnesses and experts, such unredacted documents as it considers necessary in the course of proceedings under this Section. However, the disputing party shall ensure that those persons protect the confidential or protected information in those documents.]

#### **EU proposal 14<sup>th</sup> round:**

##### **[EU: Article 11 *bis* The non-disputing Party to the Agreement**

1. The respondent shall, within 30 days after receipt or promptly after any dispute concerning confidential or protected information has been resolved,<sup>3</sup> deliver to the non-disputing Party:

(a) a request for consultations referred to in Article 2, a notice of intent to submit a claim to dispute settlement and the determination of the respondent referred to in Article 4, a claim referred to in Article 5 and any other documents that are appended to such documents;

(b) on request:

- a. pleadings, memorials, briefs, requests and other submissions made to the Tribunal by a disputing party;
- b. written submissions made to the Tribunal by a third person;
- c. minutes or transcripts of hearings of the Tribunal, where available; and
- d. orders, awards and decisions of the Tribunal.

(c) on request and at the cost of the non-disputing Party, all or part of the evidence that has been tendered to the Tribunal.

2. The non-disputing Party has the right to attend a hearing held under this Section.

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<sup>3</sup> For greater certainty, the term confidential or protected information shall be understood as defined in and determined pursuant to Article 7 of the UNCITRAL Transparency Rules.



3. The Tribunal shall accept or, after consultation with the disputes parties, may invite written or oral submissions on issues relating to the interpretation of this Agreement from the non-disputing Party. The Tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by the non-disputing Party.

### **Article 11 *ter*** **Intervention by third parties**

1. The Tribunal shall permit any natural or legal person which can establish a direct and present interest in the result of the dispute (the intervener) to intervene as a third party. The intervention shall be limited to supporting, in whole or in part, the award sought by one of the disputing parties.

2. An application to intervene must be lodged within 90 days of the publication of submission of the claim pursuant to Article 5. The Tribunal shall rule on the application within 90 days, after giving the disputing parties an opportunity to submit their observations.

3. If the application to intervene is granted, the intervener shall receive a copy of every procedural document served on the disputing parties, save, where applicable, confidential documents. The intervener may submit a statement in intervention within a time period set by the Tribunal after the communication of the procedural documents. The disputing parties shall have an opportunity to reply to the statement in intervention. The intervener shall be permitted to attend the hearings held under this Chapter and to make an oral statement.

4. In the event of an appeal, a natural or legal person who has intervened before the Tribunal shall be entitled to intervene before the Appeal Tribunal. Paragraph 3 shall apply *mutatis mutandis*.

5. The right of intervention conferred by this Article is without prejudice to the possibility for the Tribunal to accept *amicus curiae* briefs from third parties in accordance with Article 11.

6. For greater certainty, the fact that a natural or legal person is a creditor of the claimant shall not be considered as sufficient in itself to establish that it has a direct and present interest in result of the dispute.

### **Article 11** **Expert Reports**

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

### **Article 12** **Final Award**

*Note: At the 14<sup>th</sup> round, EU submitted a revised text proposal for Article 12 (Provisional Award) which is intended to replace the current Article 12 (Final Award).*

1. Where the arbitral tribunal finds that there has been a breach by the [EU: respondent] [JP: disputing Party] of any obligation [EU: of the Investment Protection Chapter] [JPN: under this Agreement], the arbitral tribunal may, on the basis of a request from the [EU: claimant] [JP: disputing investor] and after hearing the disputing parties, award only one or both of the following remedies:

**JP's proposal on 11th round**

**Article 12: Final Award**

1. Where the arbitral tribunal finds that there has been a breach by the [respondent/disputing Party] of any obligation [EU: of the Investment Protection Chapter/JPN: under this Chapter or an investment agreement], the arbitral tribunal may, on the basis of a request from the [claimant/disputing investor] and after hearing the disputing parties, award only one or both of the following remedies:

(a) monetary damages and any applicable interest; and

(b) restitution of property [which has been expropriated, nationalized or requisitioned], in which case the award shall provide that the [EU: respondent] [JP: disputing Party] may pay monetary damages [EU: representing the fair market value of the property before the [expropriation, nationalization or requisition] became known] [determined in accordance with [Section on investment protection]] and any applicable interest, in lieu of restitution.

2. [Monetary damages] [The remedies awarded in accordance with paragraph 1] shall not be greater than the loss suffered by the investor [or, as applicable, its locally established company,] [as a result of the breach of the relevant provisions of the Agreement], reduced by any prior damages or compensation already provided by the [EU: Party concerned] [JP: disputing Party].

3. The tribunal shall specify these amounts in its award.

[EU: 3bis. Where the claim is submitted on behalf of a locally established company, the arbitral award shall be made to the locally established company.]

[JP: 3bis. Where the claim is submitted on behalf of [a locally established company,

(a) an award of monetary damages and any applicable interest shall provide that the sum be paid to the [locally established company];

(b) an award of restitution of property shall provide that restitution be made to the [locally established company]; and

(c) the award shall provide that it is made without prejudice to any right that any person may have under applicable domestic law in the relief provided in the award.]

4. The arbitral tribunal shall order that the costs of arbitration be borne by the unsuccessful disputing party. In exceptional circumstances, a tribunal may apportion costs between the disputing parties if it determines that apportionment is appropriate in the circumstance of the case. Other reasonable costs, including 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 case. Where only parts of the claims have been successful the costs shall be adjusted, [JP: taking into account the totality of the circumstances of the case including] [EU: proportionately, to] the number or extent of the successful parts of the claims.

## Article.12

4. The arbitral tribunal shall order that the costs of arbitration be borne by the unsuccessful disputing party. In exceptional circumstances, a tribunal may apportion costs between the disputing parties if it determines that apportionment is appropriate in the circumstance of the case. Other reasonable costs, including 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 case. Where only parts of the claims have been successful the costs shall be adjusted, [JP: based on the number and the extent of the successful parts of the claims. If the tribunal determines that such

~~adjustment is unreasonable in the circumstances of the case, it may also take into account other circumstances in adjusting the cost]., [JP: taking into account the totality of the circumstances of the case including] [EU: proportionately, to] the number or extent of the successful parts of the claims.–~~

**EU proposal 14<sup>th</sup> round:****Article 12  
Provisional award**

1. Where the Tribunal concludes that the treatment in dispute is inconsistent with the provisions referred to in Article 1(1) alleged by the claimant, the Tribunal may, on the basis of a request from the claimant, and after hearing the disputing parties, award only:

- (a) monetary damages and any applicable interest;
- (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages representing the fair market value of the property at the time immediately before the expropriation or impending expropriation became known, whichever is earlier, and any applicable interest in lieu of restitution, determined in a manner consistent with Article X of Chapter Y (Expropriation).

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

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

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

2. Monetary damages shall not be greater than the loss suffered by the claimant or, as applicable, the locally established company, as a result of the breach of the relevant provisions of the agreement, reduced by any prior damages or compensation already provided by the Party concerned.

3. The Tribunal may not award punitive damages.

4. The Tribunal shall order that the costs of the proceedings be borne by the unsuccessful disputing party. In exceptional circumstances, the Tribunal may apportion costs between the disputing parties if it determines that apportionment is appropriate in the circumstance of the case. Other reasonable costs, including 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 case. Where only some parts of the claims have been successful the costs shall be adjusted, proportionately, to the number or extent of the successful parts of the claims. The Appeal Tribunal shall deal with costs in accordance with this article.

5. 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 an unsuccessful claimant which is a natural person or a small or medium-sized enterprise. Such supplemental rules shall, in particular, take into account the financial resources of such claimants and the amounts of compensation sought.

6. The Tribunal shall issue a provisional award within 18 months of the date of submission of the claim. If that deadline cannot be respected, the Tribunal shall adopt a decision to that effect, which

will specify the reasons for such delay. A provisional award shall become final if 90 days have elapsed after it has been issued and neither disputing party has appealed the award to the Appeal Tribunal.

7. Either disputing party may appeal the provisional award, pursuant to Article 14. 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 13 Indemnification or Other Compensation**

In proceedings under this Section, the respondent may not assert, and the Tribunal shall not accept, as a valid defence, counterclaim, right of set-off or otherwise, that the claimant or the locally established company has received or will receive indemnification or other compensation pursuant to an insurance or guarantee contract in respect of all or part of the damages sought in an investment dispute under this [Agreement/Chapter/Section].

#### **EU proposal 14<sup>th</sup> round:**

#### **Article 13 bis Interim decisions**

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

#### **Article 13 ter Discontinuance**

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

#### **Article 13 Security for Costs**

1. For greater certainty, upon request, the Tribunal may order the claimant to post security for all or a part of the costs if there are reasonable grounds to believe that the claimant risks not being able to honour a possible decision on costs issued against it.

2. If the security for costs is not posted in full within 30 days after the Tribunal's order or within any other time period set by the Tribunal, the Tribunal shall so inform the disputing parties. The Tribunal

may order the suspension or termination of the proceedings.

#### **Article 14** **Arbitration costs**

*Note: Under the revised text proposal submitted by the EU at the 14<sup>th</sup> round, costs are addressed within Article 8.*

The fees and expenses of the arbitrators appointed pursuant to Article 8 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 submission of the claim to arbitration.

#### **EU proposal 14<sup>th</sup> round:**

#### **Article 14** **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. A disputing party lodging an appeal shall provide security for the costs of appeal and for any amount awarded against it in the provisional award.
5. The provisions of Articles 7bis [Third-Party Funding], 11 [Transparency], 13 *bis* [Interim decisions], 13 *ter* [Discontinuance], 11 *bis* [The non-disputing party to the proceeding] shall apply *mutatis mutandis* in respect of the appeal procedure.

**Article 15**  
**Enforcement of awards**

*Note: At the 14<sup>th</sup> round, EU submitted a revised text proposal for Article 15 (Enforcement of awards) which is intended to replace the current Article 15 (Enforcement of awards).*

1. An award rendered by an arbitral tribunal established pursuant to Article 8 shall be [final and] binding between the disputing parties.
2. Recognition and enforcement of an award shall be governed by the applicable laws and regulations, as well as applicable international agreements such as, where applicable, the ICSID Convention and the New York Convention.
3. A claim that is submitted to arbitration under this Section shall be deemed to arise out of a commercial relationship or transaction for the purposes of Article 1 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
4. A disputing party may not seek enforcement of a final award until:
  - (a) in the case of a final award made under the ICSID Convention:
    - i. 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award, or
    - ii. where enforcement of the award has been stayed, revision or annulment proceedings have been completed; and
  - (b) in the case of a final award under the ICSID Additional Facility Rules the UNCITRAL Arbitration Rules, or any other rules applicable pursuant to Article 5 (Submission of a Claim to Arbitration):
    - i. 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award, or
    - ii. where enforcement of the award has been stayed, a court has dismissed or allowed an application to revise set aside or annul the award and there is no further appeal.

**EU proposal for new Article 15, 14<sup>th</sup> round:**

**Article 15**

**Enforcement of awards**

1. 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.
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 concerning the execution of judgments in force where such execution is sought.
4. For greater certainty, Article X (Rights and obligations of natural or juridical persons under this Agreement, Chapter X) shall not prevent the recognition, execution and enforcement of awards rendered pursuant to this Section.
5. For the purposes of Article 1 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, final awards issued pursuant to this Section shall be deemed to be arbitral awards and to relate to claims arising 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 5(1) (a), a final award issued pursuant to this Section shall qualify as an award under Section 6 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID).

**Article 16**

**Role of the Parties to the Agreement**

1. No Party shall give diplomatic protection, or bring an international claim, in respect of [EU: a] [JP: an investment] dispute submitted pursuant to Article 5 [EU: or in respect of treatment covered by this Section and subject to mediation pursuant to Article 3], unless the other Party has failed to abide by and comply with the award rendered in such dispute. Diplomatic protection, for the purposes of this paragraph, shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the [JP: investment] dispute. This shall not exclude the possibility of dispute settlement under [chapter on state-to-state dispute settlement] in respect of a measure of general application even if that measure is alleged to have violated the agreement as regards a specific investment in respect of which a dispute has been initiated pursuant to Article 5 and is without prejudice to Article 12.

**Article 17**

**Consolidation**

*Note: EU will provide proposals for adjustments to Article 17 (Consolidation) at a later stage, building on the new EU proposal for an Investment Court System submitted by the EU at the 14<sup>th</sup> round.*

1. Where two or more claims that have been submitted separately to arbitration under Article 5 (Submission of Claim to Arbitration) have a question of law or fact in common and arise out of the

same events or circumstances, a disputing party may seek the establishment of a separate tribunal and request that such tribunal issue a consolidation order in accordance with:

- (a) the agreement of all the disputing parties sought to be covered by the order, in which case the disputing parties shall submit a joint request in accordance with paragraph 3; or
  - (b) paragraphs 2 through 14 provided that only one respondent is sought to be covered by the order.
2. A disputing party seeking a consolidation order shall first deliver a notice to the other disputing parties sought to be covered by the order. This notice shall specify:
- (a) the names and addresses of all the disputing parties sought to be covered by the order;
  - (b) the claims, or parts thereof, sought to be covered by the order; and
  - (c) the grounds for the order sought.

[EU: The disputing parties shall endeavour to agree on the consolidation order sought, the applicable arbitration rules and the composition of the consolidating tribunal.]

3. Where the disputing parties referred to in paragraph 2 have not reached an agreement on consolidation within thirty days of the notice, a disputing party may make a request for a consolidation order under paragraph 7. The request shall be delivered, in writing, to the Secretary-General of ICSID and all the disputing parties sought to be covered by the order. Such a request shall specify:
- (a) the names and addresses of all the disputing parties sought to be covered by the order;
  - (b) the claims, or parts thereof, sought to be covered by the order; and
  - (c) the grounds for the order sought.

Where the disputing parties have reached an agreement on consolidation of the claims, they shall submit a joint request to the Secretary-General of ICSID in accordance with this paragraph.

4. Unless the Secretary-General of ICSID finds within thirty days after receiving a request under paragraph 3 that the request is manifestly unfounded, a tribunal shall be established in accordance with paragraphs 6 and 7.

[EU: 5. The tribunal shall conduct its proceedings in the following manner:

- (a) unless all disputing parties otherwise agree, where all the claims for which a consolidation order is sought have been submitted to arbitration under the same dispute settlement mechanism, the consolidating tribunal shall proceed under the same dispute settlement mechanism;
- (b) where the claims for which a consolidation order is sought have not been submitted to arbitration under the same dispute settlement mechanism:
  - (i) the disputing parties may agree on the applicable dispute settlement mechanism available under Article 5 (Submission of Claim to Arbitration) which shall apply to the consolidation proceedings; or



(ii) if the disputing parties cannot agree on the same dispute settlement mechanism within thirty days from the request made pursuant to paragraph 3, the UNCITRAL arbitration rules shall apply to the consolidation proceedings.]

[JP: 5. The arbitration rules applicable to the proceedings under this Article shall be determined as follows:

(a) when all of the claims for which a consolidation order is sought have been submitted to arbitration under the same arbitration rules pursuant to Article 5 (Submission of Claim to Arbitration), these arbitration rules shall apply;

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

(i) the claimants may collectively agree on the arbitration rules available under Article 5 (Submission of Claim to Arbitration) paragraph 1 (a)(b) and (c); or

(ii) if the claimants cannot agree on the arbitration rules within 30 days of the Secretary - General of ICSID receiving the request for consolidation, the UNCITRAL Arbitration Rules shall apply.]

6. Unless the disputing parties sought to be covered by the order otherwise agree, a tribunal established under this Article shall comprise three arbitrators:

(a) one arbitrator appointed by agreement of the claimants;

(b) one arbitrator appointed by the respondent; and

(c) the presiding arbitrator appointed by the Secretary-General of ICSID, provided, however, that the presiding arbitrator shall not be a national of [either Party].

7. If, within sixty days after the Secretary-General of ICSID receives a request made under paragraph 3, the respondent fails or the claimants fail to appoint an arbitrator in accordance with paragraph 6 [EU: or the disputing parties fail to agree on the presiding arbitrator], the Secretary-General of ICSID, on the request of any disputing party sought to be covered by the order, shall appoint the arbitrator or arbitrators pursuant to the procedure set out in paragraph 3 of Article 8 (Constitution of the Tribunal).

8. Where the tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration under Article 5 (Submission of Claim to Arbitration) have a question of law or fact in common, and arise out of the same events or circumstances, the tribunal may, in the interest of fair and efficient resolution of the claims, including the consistency of arbitral awards, and after hearing the disputing parties, by order:

(a) assume jurisdiction over, and hear and determine together, all or part of the claims; [EU: or]

(b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others [EU:][JP:or]

[ (c) instruct a tribunal previously established under Article 8 (Constitution of the Tribunal) to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that

(i) that tribunal, at the request of any claimant not previously a disputing party before that tribunal, shall be reconstituted with its original members, except that the arbitrator for the claimants shall be appointed pursuant to paragraphs 6(a) and 7; and

(ii) that tribunal shall decide whether any prior hearing shall be repeated.]

9. Where a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration under Article 5 (Submission of Claim to Arbitration) and that has not been named in a

- request made under paragraph 3 may make a written request to the tribunal that it be included in any order made under paragraph 8. Such request shall comply with the requirements set out in paragraph 3.
10. On application of a disputing party, the tribunal established under this Article, pending its decision under paragraph 8, may order that the proceedings of a tribunal established under Article 8 (Constitution of the Tribunal) be stayed, unless the latter tribunal has already adjourned its proceedings.
11. A tribunal established under Article 8 (Constitution of the Tribunal) shall cease to have jurisdiction to decide a claim, or parts of a claim, over which a tribunal established under this Article has assumed jurisdiction, and the proceedings of the former tribunal shall be stayed or adjourned accordingly.
12. The award of the tribunal established under this Article in relation to claims, or parts of claims, over which it has assumed jurisdiction, shall be binding on the tribunals established under Article 8 (Constitution of the Tribunal) in respect of these claims [, or parts thereof, once the conditions of paragraph 4 of Article 15 (Enforcement of Awards) have been fulfilled.]~~[EU: , except to the extent that the award has been stayed in accordance with this Agreement, or the relevant provisions of the dispute settlement mechanism to which the request for consolidation was submitted in accordance with paragraph 5].~~
13. A claimant may withdraw its claim or part thereof subject to consolidation from arbitration under this Article, provided that such claim or part thereof may not thereafter be resubmitted to arbitration under Article 5 (Submission of Claim to Arbitration). ~~[EU: If it does so no later than 15 days after the decision of the consolidating tribunals to assume jurisdiction over its claim, its earlier submission of the claim to that arbitration shall not prevent the claimant's recourse to dispute settlement other than under this Section].~~
14. At the request of one of the disputing parties, the tribunal established under this Article may take such measures as it sees fit in order to preserve the confidentiality of protected information of that disputing party vis-à-vis other disputing parties. Such measures may include allowing the submission of redacted versions of documents containing protected information to the other disputing parties or arrangements to hold parts of the hearing in private.

**Article 18**  
**[Institutional body]**

*Note: Placement, functioning and role of Committees to be revisited taking into account outcomes of negotiations on investment and investment dispute resolution.*

[EU: 1. The [Institutional body] shall examine:

- (a) difficulties which may arise in the implementation of this section;
- (b) possible improvements of this section, in particular in the light of experience and developments in other international fora; and,
- (c) the implementation of any mutually agreed solution as regards a dispute under this Section

pursuant to Article 2.

2. The [Institutional body] may, on agreement of the Parties, and after completion of the respective legal requirements and procedures of the Parties, adopt decisions to:

- (a) appoint the Judges to the Tribunal and the Members of the Appeal Tribunal pursuant to Articles 8 and *8bis*;
- (b) adopt interpretations of the agreement pursuant to Article 9(5);
- (c) adopt and amend rules supplementing the applicable dispute settlement rules and amend the applicable rules on transparency. Such rules and amendments are binding on the Tribunal and Appeal Tribunal.]

**[EU: ANNEX I**

**Mediation Mechanism for investment disputes**

**Article 1  
Objective and scope**

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

**Section A  
Procedure under the Mediation Mechanism**

**Article 2  
Initiation of the Procedure**

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

Where the request concerns an alleged breach of the agreement by the authorities of the European Union or by the authorities of the Member States of the European Union, and no respondent has been determined pursuant to Article 4 (Notice of intent to submit a claim and determination of the Respondent), it shall be addressed to the European Union.] Where the request concerns [EU: treatment] [JP: a measure] adopted by a Member State of the European Union, and the European Union accepts the request, the response shall specify whether the European Union or the Member State concerned will be a party to the mediation.<sup>4</sup>

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

**Article 3  
Selection of the Mediator**

1. If both disputing parties agree to a mediation procedure, a mediator shall be selected in accordance with the procedure set out in Article 3 of Section X (Resolution of Investment Disputes and Investment Court System). The disputing parties shall endeavour to agree on a mediator within 15 working days from the receipt of the reply to the request.

2. A mediator shall not be a national of either Party to the Agreement, unless the disputing parties agree otherwise.

3. The mediator shall assist, in an impartial and transparent manner, the disputing parties in reaching a mutually agreed solution.

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<sup>4</sup> For greater certainty, where the request concerns treatment by the European Union, the party to the mediation shall be the European Union and any Member State concerned shall be fully associated in the mediation. Where the request concerns exclusively treatment by a Member State, the party to the mediation shall be the Member State concerned, unless it requests the European Union to be party.

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

1. Within 10 working days after the appointment of the mediator, the disputing party having invoked the mediation procedure shall present, in writing, a detailed description of the problem to the mediator and to the other disputing party. Within 20 working days after the date of delivery of this submission, the other disputing party may provide, in writing, its comments to the description of the problem. Either disputing party may include in its description or comments any information that it deems relevant.

2. The mediator may decide on the most appropriate way of bringing clarity to the measure concerned. In particular, the mediator may organise meetings between the disputing parties, consult the disputing parties jointly or individually, seek the assistance of or consult with relevant experts and stakeholders and provide any additional support requested by the disputing parties. However, before seeking the assistance of or consulting with relevant experts and stakeholders, the mediator shall consult with the disputing parties.

3. The mediator may offer advice and propose a solution for the consideration of the disputing parties which may accept or reject the proposed solution or may agree on a different solution. However, the mediator shall not advise or give comments on the consistency of the measure at issue with this Agreement.

4. The procedure shall take place in the territory of the Party concerned, or by mutual agreement in any other location or by any other means.

5. The disputing parties shall endeavour to reach a mutually agreed solution within 60 days from the appointment of the mediator. Pending a final agreement, the disputing parties may consider possible interim solutions.

6. Mutually agreed solutions shall be made publicly available. However, the version disclosed to the public may not contain any information that a disputing party has designated as confidential.

7. The procedure shall be terminated:

(a) by the adoption of a mutually agreed solution by the disputing parties, on the date of adoption;

(b) by a written declaration of the mediator, after consultation with the disputing parties, that further efforts at mediation would be to no avail;

(c) by written notice of a disputing party.

**Section B**  
**Implementation**

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

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

2. The implementing disputing party shall inform the other disputing party in writing of any steps or measures taken to implement the mutually agreed solution.

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

## **Section C General Provisions**

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

1. The procedure under this mediation mechanism is not intended to serve as a basis for dispute settlement procedures under this Agreement or another agreement. A disputing party shall not rely on or introduce as evidence in such dispute settlement procedures, nor shall any adjudicatory body take into consideration:

- (a) positions taken by a disputing party in the course of the mediation procedure;
- (b) the fact that a disputing party has indicated its willingness to accept a solution to the measure subject to mediation; or
- (c) advice given or proposals made by the mediator.

2. The mediation mechanism is without prejudice to the rights and obligations of the Parties and the disputing parties under Section X (Resolution of Investment Disputes and Investment Court System) and Chapter Y (State to state Dispute Settlement).

3. Unless the disputing parties agree otherwise, and without prejudice to Article 4(6), all steps of the procedure, including any advice or proposed solution, shall be confidential. However, any disputing party may disclose to the public that mediation is taking place.

### **Article 7 Time Limits**

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

### **Article 8 Costs**

1. Each disputing party shall bear its own expenses derived from the participation in the mediation procedure.

2. The disputing parties shall share jointly and equally the expenses derived from organisational matters, including the remuneration and expenses of the mediator. Remuneration of the mediator shall be in accordance with that foreseen for Judges of the Tribunal under Article 8 of Section X (Resolution of Investment Disputes and Investment Court System)].

**[EU: ANNEX II**

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

**Article 1  
Definitions**

**Article 1: Definitions**

1. In this Code of Conduct:

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

"mediator" means a person who conducts mediation in accordance with Article 3 of Section X (Resolution of Investment Disputes and Investment Court System);

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

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

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

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

**Article 2  
Responsibilities to the process**

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

**Article 3  
Disclosure obligations**

1. Prior to their appointment candidates shall disclose any past and present 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 bias in the proceeding. To this end, a candidate shall make all reasonable efforts to become aware of any such interests, relationships or matters.

2. Members shall communicate matters concerning actual or potential violations of this Code of Conduct in writing, to the disputing parties and Parties.

3. 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. Members shall disclose such interests, relationships or matters by informing the disputing parties.

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

1. A member shall perform his or her duties thoroughly and expeditiously throughout the course of the proceeding and shall do so with fairness and diligence.
2. A member 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. A member shall take all appropriate steps to ensure that his or her assistant and staff are aware of, and comply with, Articles 2, 3, 5 and 7 of this Code of Conduct.
4. A member shall not engage in *ex parte* contacts concerning the proceeding.

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

1. A member must be independent and impartial and avoid creating an appearance of bias or impropriety and shall not be influenced by self-interest, outside pressure, political considerations, and public clamour, loyalty to a Party or disputing party or fear of criticism.
2. A member 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 his or her duties.
3. A member may not use his or her position on the arbitral tribunal to advance any personal or private interests and shall avoid actions that may create the impression that others are in a special position to influence him or her.
4. A member may not allow financial, business, professional, family or social relationships or responsibilities to influence his or her conduct or judgment.
5. A member must avoid entering into any relationship or acquiring any financial interest that is likely to affect him or her impartiality or that might reasonably create an appearance of impropriety or bias.

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

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

#### **Article 7** **Confidentiality**

1. No member or former member 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 member shall disclose a decision or award or parts thereof prior to its publication in accordance with the transparency provisions of Section X (Resolution of Investment Disputes and Investment Court System).

3. No member or former member shall at any time disclose the deliberations of the Tribunal or Appeal Tribunal, or any member's views, whatever they may be.

### **Article 8 Expenses**

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

### **Article 9 Mediators**

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