

TRADE IN SERVICES, INVESTMENT AND E-COMMERCE

DISCLAIMER: Without prejudice.

Chapter I General provisions

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CHAPTER I GENERAL PROVISIONS

Article (...)

Objectives, coverage and definitions

1. The Parties, reaffirming their respective commitments under the WTO Agreement and their commitment to create a better climate for the development of trade and investment between the Parties, hereby lay down the necessary arrangements for the progressive liberalisation of trade in services and investment and for cooperation on e-commerce
2. Consistent with the provisions of this Title, each Party retains the right to adopt, maintain and enforce measures necessary to pursue legitimate policy objectives such as the protection of society, the environment and public health, the integrity and stability of the financial system, the promotion of security and safety, and the promotion and protection of cultural diversity.
3. This Title shall not apply to measures affecting natural persons seeking access to the employment market of a Party, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.

Nothing in this Title shall prevent a Party from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits¹ accruing to any Party under the terms of a specific commitment in this Chapter and its Annexes.

4. For purposes of this Title:
 - (a) a ‘natural person of the EU’ means a national of one of the Member States of the European Union in accordance with its legislation and a ‘natural person of Viet Nam’ means a national of Viet Nam in accordance with its legislation;
 - (b) ‘juridical person’ means any legal entity duly constituted or otherwise organised under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association;
 - (c) a ‘juridical person of the EU’ or a ‘juridical person of Viet Nam’ means a juridical person set up in accordance with the laws of a Member State of the European Union or of Viet Nam respectively, and engaged in substantive business operations² in the territory of the EU or of Viet Nam, respectively;

¹ The sole fact of requiring a visa for natural persons of certain countries and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitment.

² In line with its notification of the Treaty establishing the European Community to the WTO (WT/REG39/1), the EU-Party understands that the concept of “effective and continuous link” with the economy of a Member State of the European Union enshrined in Article 54 of the TFEU is equivalent to the concept of “substantive business operations”. Accordingly, for a juridical person set up in accordance with the laws of Viet Nam and having only its registered office or central administration in the territory of Viet Nam, the EU Party shall only extend the benefits of this agreement if that juridical person possesses an effective and continuous economic link with the territory of Viet Nam.

- (d) Notwithstanding the preceding paragraph, shipping companies established outside the EU or Viet Nam and controlled by nationals of a Member State of the EU or of Viet Nam, respectively, shall also be covered by the provisions of this Title, with the exception of Section 2 (Investment Protection) and of Section 3 (Resolution of Investment Disputes), if their vessels are registered in accordance with their respective legislation, in that Member State or in Viet Nam and fly the flag of a Member State or of Viet Nam;
- (...) A juridical person is:
 - (i) "owned" by natural or juridical persons of one of the Member States of the EU or of Viet Nam if more than 50 per cent of the equity interest in it is beneficially owned by persons of that/a Member State of the EU or of Viet Nam respectively;
 - (ii) "controlled" by natural or juridical persons of one of the Member States of the EU or of Viet Nam if such persons have the power to name a majority of its directors or otherwise to legally direct its actions.
- (e) an 'enterprise' means a juridical person, branch³ or representative office set up through establishment, as defined under this article;
- (f) 'subsidiary' of a juridical person of a Party means a juridical person which is controlled by another juridical person of that Party in accordance with its domestic laws⁴;
- (g) 'establishment'⁵ means the setting up, including the acquisition of, a juridical person and/or creation of a branch or a representative office in Viet Nam or in the EU respectively;
- (h) 'economic activities' include activities of an industrial, commercial and professional character and activities of craftsmen, but do not include activities performed in the exercise of governmental authority;
- (i) the 'operation'⁶ of an investment includes the conduct, management, maintenance, use, enjoyment, sale or other form of disposal of the investment;
- (j) 'services' include any service in any sector except services supplied in the exercise of governmental authority;

³ For greater certainty, a branch of a legal entity of a non-Party shall not be considered as an enterprise of a Party

⁴ For further clarity, a subsidiary of a juridical person of a Party may also refer to a juridical person which is a subsidiary of another subsidiary of a juridical person of that Party.

⁵ For greater certainty, this does not include operation of investment as defined in (i)

⁶ For greater certainty, this does not include steps taking place at the time of or before the procedures required for making the related investment are completed in accordance with the applicable laws.

- (k) ‘services supplied and activities performed in the exercise of governmental authority’ means services supplied or activities performed neither on a commercial basis nor in competition with one or more economic operators;
- (l) cross-border supply of services means the supply of a service:
 - (i) from the territory of a Party into the territory of the other Party
 - (ii) in the territory of a Party to the service consumer of the other Party;
- (m) a ‘service supplier’ of a Party means any natural or juridical person of a Party that supplies a service;
- (n) a ‘measure’ means any measure by a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form;
- (o) ‘measures adopted or maintained by a Party’ means measures taken by:
 - (i) central, regional or local governments and authorities; and
 - (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;
- (p) ‘investment’⁷ means every kind of asset which is owned or controlled, directly or indirectly, by investors of one Party in the territory⁸ of the other Party, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk and for a certain duration. Forms that an investment may take include:
 - (i) tangible or intangible, movable or immovable property, as well as any other property rights, such as leases, mortgages, liens, and pledges;
 - (ii) an enterprise, shares, stocks and other forms of equity participation in an enterprise including rights derived therefrom;
 - (iii) bonds, debentures, and loans and other debt instruments, including rights derived therefrom;
 - (iv) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
 - (v) claims to money, or to other assets or any contractual performance having an economic value;

For greater certainty, “claim to money” does not include claims to money that arise solely from commercial contracts for the sale of goods or services by a natural or juridical person in the territory of a Party to a natural or juridical person in the territory of the other Party, or financing of such contract other than a loan covered by subparagraph (iii), or any related order, judgement, or arbitral award.

⁷ For the purpose of the definition of investment, enterprise does not include representative office. For greater certainty, the fact that a representative office is established in the territory of a Party is not in itself considered that there is an investment.

⁸ For greater certainty, territory shall include exclusive economic zone and continental shelf, as provided in the United Nations Convention on the Law of the Sea (UNCLOS)

- (vii) intellectual property rights as defined in Chapter Y of this Agreement [Intellectual Property] and goodwill;

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

- (q) an 'investor' means a natural person or a juridical person of a Party that seeks to make⁹, is making or has already made an investment in the territory of the other Party.
- (r) 'returns' means all amounts yielded by or derived from an investment or reinvestment, including profits, dividends, capital gains, royalties, interest, payments in connection with intellectual property rights, payments in kind and all other lawful income.
- (s) With the exception of Chapter II, Section 2 on Investment Protection, government procurement is dealt with by Chapter on public procurement and nothing in this Title shall be construed to limit the obligations of the Parties under Chapter X on public procurement or to impose any additional obligation with respect to government procurement. For greater certainty, measures with respect to government procurement that are in compliance with Public Procurement Chapter shall not be considered a breach of the provisions in Section II on Investment Protection.
- (t) Subsidies are dealt with by Chapter on competition and state aid. The provisions of this Title, except for Article (Performance Requirements) and Chapter II, Section 2 on Investment Protection, do not apply to subsidies granted by the Parties¹⁰.

For greater certainty, a Party's decision not to issue, renew or maintain a subsidy or grant,

(i) in the absence of any the Party's specific commitment to the investor under law or contract to issue, renew, or maintain that subsidy or grant; or

(ii) in accordance with any terms or conditions attached to the issuance, renewal or maintenance of the subsidy or grant

shall not constitute a breach of Article (Performance Requirements) or a provision of Chapter II, Section 2 on Investment Protection.

⁹ For greater certainty, the Parties understand that an investor that "seeks to make" an investment refers to an investor of any other Party that has taken active steps to make an investment, such as channelling resources or capital in order to set up a business, or applying for permits or license.

¹⁰ The Parties understand that in the case of the EU, "subsidy" includes "state aid" as defined in the EU law and for Viet Nam, subsidy includes investment incentives, and investment assistance such as production site assistance, human resources training and competitiveness strengthening activities, such as assistance for technology, research and development, legal aids, market information and promotion.

CHAPTER II INVESTMENT

SECTION 1 LIBERALISATION OF INVESTMENTS

Article 1 Scope and definitions

1. This Section applies to measures adopted or maintained by a Party affecting the establishment of an enterprise or the operation of an investment by an investor of the other Party in the territory of the former Party.
2. The provisions of this Section shall not apply to:
 - (a) audio-visual services;
 - (b) mining, manufacturing and processing¹¹ of nuclear materials;
 - (c) production of or trade in arms, munitions and war material;
 - (d) national maritime cabotage¹² and
 - (e) domestic and international air transport services, whether scheduled or non-scheduled, and services directly related to the exercise of traffic rights, other than:
 - (i) aircraft repair and maintenance services during which an aircraft is withdrawn from service;

‘aircraft repair and maintenance services during which an aircraft is withdrawn from service’ mean such activities when undertaken on an aircraft or a part thereof while it is withdrawn from service and do not include so-called line maintenance.
 - (ii) the selling and marketing of air transport services;

‘selling and marketing of air transport services’ mean opportunities for the air carrier concerned to sell and market freely its air transport services including all aspects of marketing such as market research, advertising and distribution. These activities do not include the pricing of air transport services nor the applicable conditions.
 - (iii) computer reservation system (CRS) services;

¹¹ For greater certainty, processing of nuclear materials includes all the activities contained in UN ISIC Rev.3.1 code 2330.

¹² Without prejudice to the scope of activities which may be considered as cabotage under the relevant national legislation, national maritime cabotage under this chapter covers transportation of passengers or goods between a port or point located in Viet Nam or a Member State of the European Union and another port or point located in Viet Nam or that same Member State of the European Union, including on its continental shelf, as provided in the UN Convention on the Law of the Sea, and traffic originating and terminating in the same port or point located in Viet Nam or Member State of the European Union.

‘computer reservation system (CRS) services’ mean services provided by computerised systems that contain information about air carriers’ schedules, availability, fares and fare rules, through which reservations can be made or tickets may be issued.

- (iv) groundhandling services;

‘ground handling services’ mean the supply at an airport of the following services: airline representation, administration and supervision; passenger handling; baggage handling; ramp services; catering; air cargo and mail handling; fuelling of an aircraft, aircraft servicing and cleaning; surface transport; flight operation, crew administration and flight planning.

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

- (v) airport operation services;

‘airport operation services’ mean the supply of air terminal, airfield and other airport infrastructure operation services on a fee or contract basis.

Airport operation services do not include air navigation services.

Article 2

Market Access

1. With respect to market access through establishment and maintenance, each Party shall accord treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in the schedule of specific commitments contained in Annexes [...] (lists of commitments on liberalisation of investments).
2. In sectors where market access commitments are undertaken, the measures which a Party shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its schedule of specific commitments contained in Annexes [...] (lists of commitments on liberalisation of investments) are defined as:
 - (a) limitations on the number of enterprises that may perform a specific economic activity, whether in the form of numerical quotas, monopolies, exclusive rights or the requirements of an economic needs test;
 - (b) limitations on the total value of transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
 - (c) limitations on the total number of operations or on the total quantity of output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;

- (d) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment;
- (e) measures which restrict or require specific types of legal entity or joint ventures through which an investor of the other Party may perform an economic activity.
- (f) limitations on the total number of natural persons that may be employed in a particular sector or that an investor may employ and who are necessary for, and directly related to, the performance of the economic activity in the form of numerical quotas or the requirement of an economic needs test.

Article 3

National Treatment

1. In the sectors inscribed in the schedule of specific commitments in Annexes [...] (lists of commitments on liberalisation of investments of both Parties) and subject to any conditions and qualifications set out therein, each Party shall accord to investors of the other Party and to their investments, with respect to establishment in its territory, treatment no less favourable than that accorded, in like situations, to its own investors and to their investments.

2. A Party shall accord, to investors of the other Party referred to in Article 13.1. (i) [(Section 2- Investment Protection, Art. Scope] and to their investments referred to in Article 13.1 (ii) [(Section 2- Investment Protection, Art. Scope], with respect to the operation of the investments, treatment no less favourable than that accorded in like situations to its own investors and to their investments.

3. Notwithstanding paragraph 2, and subject to the Annex X (Annex on National Treatment) in the case of Viet Nam, a Party may adopt or maintain any measure with respect to the operation, management, conduct, maintenance, use, enjoyment and sale or other disposal of an investment referred to Article 13.1. (ii) [(Section 2- Investment Protection, Art. Scope] that is not inconsistent with the commitments inscribed in Annexes [...] (lists of commitments on liberalisation of investments of both Parties), where such measure is:

- (a) a measure that is adopted on or before the entry into force of this Agreement;
- (b) a measure referred to in sub-paragraph (a) that is being continued, replaced or amended after the entry into force of this Agreement, provided the measure is no less consistent with paragraph 2 after being continued, replaced or amended than the measure as it existed prior to its continuation, replacement or amendment; or
- (c) a measure not falling within sub-paragraph (a) or (b), provided it is not applied in respect of, or in a way that causes loss or damage¹³ to, investments made in the territory of the Party before the entry into force of such measure.

¹³ For the purposes of sub-paragraph c), it is understood that factors like the fact that a Party has provided for a reasonable phase in period for the implementation of a measure or has made any other attempt to address the effects of the measure on investments made before its entry into force, shall be taken into account in determining whether the measure causes loss or damage to investments made before its entry into force.

Article 4

Most Favoured Nation Treatment

1. Each Party shall accord to investors of the other Party and to their investments as regards the establishment of an enterprise in its territory, treatment no less favourable than the treatment it accords, in like situations, to investors and their investments under free trade agreement the former Party is negotiating on [17 July 2015].
2. Each Party shall accord to investors of the other Party and to their investments as regards their operation in its territory, treatment no less favourable than the treatment it accords, in like situations, to investors and investments of any non-Party
3. Paragraph 1 and 2 shall not apply to the following sectors:
 - Communication services, except for Postal services (CPC...) and Telecommunication services (CPC..);
 - Cultural, Sports and Recreational services;
 - Fishery and aquaculture;
 - Forestry and hunting;
 - Mining, including oil and gas.
4. Paragraph 2 shall not be construed to oblige a Party to extend to the investors of the other Party or their investments the benefit of any treatment granted pursuant to any bilateral, regional and/or international agreements that entered into force before the entry into force of this Agreement
5. Paragraphs 1 and 2 shall not be construed to oblige a Party to extend to the investors of the other Party or their investments the benefit of:
 - (a) any treatment granted as part of a process of economic integration, which includes commitments to abolish substantially all barriers to investment among the parties to such a process, together with the approximation of legislation of the parties on a broad range of matters within the purview of this Agreement¹⁴ .
 - (b) any treatment resulting from any international agreement for the avoidance of double taxation or other international agreement or arrangement relating wholly or mainly to taxation.
 - (c) any treatment resulting from measures providing for the recognition of qualifications, licences or prudential measures in accordance with Article VII of the General Agreement on Trade in Services or its Annex on Financial Services
6. "For greater certainty, the 'treatment' referred to in paragraphs 1 and 2 does not include international dispute resolution procedures or mechanism, such as those included in Section 3, provided for in any other bilateral, regional and/or international agreements. Substantive

¹⁴ Within this paragraph and for greater certainty, the ASEAN Economic Community and the European Union are falling within this concept of "a process of economic integration".

obligations in such agreements do not in themselves constitute 'treatment' and thus cannot be taken into account when assessing a breach of this Article. Measures by a Party pursuant to those substantive obligations shall be considered treatment. This Article shall be interpreted in accordance with Annex XX (MFN)

Article 5

Schedule of specific commitments

The sectors liberalised by each of the Parties pursuant to this Section and the terms, limitations, conditions and qualifications referred to in Articles 3 and 4 are set out in the schedules of commitments included in Annexes [lists of commitments on liberalisation of investments].

Article 6

Performance Requirements

1. In the sectors inscribed in its schedule of specific commitments in Annexes [lists of commitments on liberalisation of investments of both Parties] and subject to any conditions and qualifications set out therein, neither Party may impose, or enforce any of the following requirements, mandatory or enforceable under domestic law or under administrative rulings, in connection with the establishment or operation of any investment of an investor of a Party or of a non-Party in its territory:
 - (a) to export a given level or percentage of goods or services;
 - (b) to achieve a given level or percentage of domestic content;
 - (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from natural persons or enterprises in its territory;
 - (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
 - (e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
 - (f) to transfer technology, a production process or other proprietary knowledge to a natural person or enterprises in its territory; or
 - (g) to supply exclusively from the territory of the Party a good produced or a service provided by the investment to a specific regional or world market.
2. In the sectors inscribed in its schedule of specific commitments in Annexes [lists of commitments on liberalisation of investments of both Parties] and subject to any conditions and qualifications set out therein, neither Party may condition the receipt or continued receipt of an advantage, in connection with the establishment or operation of an investment of an investor of a Party or of a non-Party in its territory, on compliance with any of the following requirements:

- (a) to achieve a given level or percentage of domestic content;
 - (b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from producers in its territory;
 - (c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
 - (d) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.
3. The provisions of paragraph 1 shall not be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage in connection with any investment in its territory on compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development in its territory.
- The provisions of paragraph 1 (f) shall not be construed to prevent the application of a requirement imposed or a commitment or undertaking enforced by a court, administrative tribunal or competition authority, in order to remedy an alleged violation of competition laws.
3. The provisions of paragraph 1 subparagraphs (a), (b) and (c) and 2 (a) and (b), do not apply to qualification requirements for goods or services with respect to participation in export promotion and foreign aid programmes.
4. For greater certainty, subparagraphs 2(a) and 2 (b) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.
5. For greater certainty, paragraph 1 does not apply to any requirement other than the requirements set out in that paragraph.
6. The provisions of this article shall not apply to measures adopted or maintained by a party in accordance with Art. III. 8 (b)) of the GATT”

SECTION 2

INVESTMENT PROTECTION

Article 13 Scope

1. The provisions in this Section shall apply to:
- (i) investments by investors of a Party in existence in the territory the other Party as of the date of entry into force of this Agreement or made or acquired thereafter, made in accordance with applicable law¹⁵ .

¹⁵ For greater certainty, in the case that the investment is made in the territory of Viet Nam, “applicable law” refers to the laws and regulations of Viet Nam

(ii) investors of a Party that have already made an investment covered under (i) in the territory of the other Party, with respect to the operation of such investment.

Article 13bis

Investment and regulatory measures/objectives

1. The Parties reaffirm the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity
2. For greater certainty, the provisions of this section shall not be interpreted as a commitment from a Party that it will not change the legal and regulatory framework, including in a manner that may negatively affect the operation of covered investments or the investor's expectations of profits.
3. For greater certainty, nothing in this Section shall be construed as preventing a Party from discontinuing the granting of a subsidy¹⁶ and/or requesting its reimbursement, or as requiring that Party to compensate the investor therefor, where such action has been ordered by one of its competent authorities listed in Annex x.

Article 14

Treatment of Investment

1. Each Party shall accord fair and equitable treatment and full protection and security to investments and investors of the other Party in its territory in accordance with paragraphs 2 to 7.
2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or series of measures constitutes:
 - a. Denial of justice in criminal, civil or administrative proceedings; or
 - b. Fundamental breach of due process in judicial and administrative proceedings;
 - c. Manifest arbitrariness; or

¹⁶ In the case of the EU, "subsidy" includes "state aid" as defined in the EU law. For Viet Nam, subsidy includes investment incentives, and investment assistance such as production site assistance, human resources training and competitiveness strengthening activities, such as assistance for technology, research and development, legal aids, market information and promotion.

- d. Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or
- e. abusive treatment such as coercion, abuse of power or similar bad faith conduct. or
- f. A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.

3. Treatment not listed in paragraph 2 can also constitute a breach of fair and equitable treatment where the Parties have so agreed in accordance with the procedures provided in Article X.6 (Amendments).

4. For greater certainty, ‘full protection and security’ refers to the Party’s obligations to act as may be reasonably necessary to protect physical security of investors and covered investments.

5. Where a Party has entered into a written agreement with investors of the other Party or their investments referred to in Article 13 [Scope of section II Investment Protection] that satisfies all of the following conditions, that Party shall not breach the said agreement through the exercise of governmental authority. The conditions are:

- (i) the written agreement is concluded and takes effect after the date of entry into force of this Agreement¹⁷;
- (ii) the investor relies on that written agreement in deciding to make or maintain an investment referred to in article in Article 13. 1 (i) [Scope of section II Investment Protection] other than the written agreement itself and the breach causes actual damages to that investment;
- (iii) the written agreement¹⁸ creates an exchange of rights and obligations in connection to the said investment, binding on both parties; and
- (iv) the written agreement does not contain a clause on the settlement of disputes between the parties to that agreement by international arbitration.

6. When applying the above fair and equitable provisions, a Tribunal will take into account whether a Party made a specific representation to an investor to induce an investment referred to in Article 13. 1 (i) [Scope of section II Investment Protection], that created a legitimate

¹⁷ For greater certainty, a written agreement that is concluded and takes effect after the entry into force of this Agreement does not include the renewal or extension of an agreement in accordance with the provisions of the original agreement, and on the same or substantially the same terms and conditions as the original agreement, which has been concluded and entered into force prior to the entry into force of this Agreement.

¹⁸ Written agreement means an agreement in writing, entered into by a Party with an investor of the other Party or their investment, referred to in Article 13 [Scope of section II Investment Protection], and negotiated and executed by both Parties, whether in a single instrument or multiple instruments.

expectation, and upon which the investor relied in deciding to make or maintain that investment, but that Party subsequently frustrated.

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

Article 15

Compensation for losses

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

2. Without prejudice to paragraph 1 of this Article, investors of a Party who, in any of the situations referred to in that paragraph, suffer losses in the territory of the other Party resulting from:

(a) requisitioning of their investment or a part thereof by the latter's armed forces or authorities, or

(b) destruction of their investment or a part thereof by the latter's armed forces or authorities,

which was not required by the necessity of the situation;

shall be accorded prompt, adequate and effective restitution or compensation by the other Party.

Article 16

Expropriation

1. Neither Party shall directly or indirectly nationalise, expropriate or subject to measures having an effect equivalent to nationalisation or expropriation (hereinafter referred to as 'expropriation') the investments of investors of the other Party except:

(a) for a public purpose;

(b) under due process of law;

(c) on a non-discriminatory basis; and

(d) against payment of prompt, adequate and effective compensation.

For greater certainty, this paragraph shall be interpreted in accordance with Annex X on Expropriation.

2. Such compensation shall amount to the fair market value of the investment at the time immediately before the expropriation or the impending expropriation became public knowledge, whichever is earlier, plus interest at a reasonable rate established on a commercial basis, from the date of expropriation until the date of payment. Such compensation shall be

effectively realisable, freely transferable in accordance with Article 17 (Transfers) and made without delay.

3. Notwithstanding Paragraphs 1 and 2, in the case the Socialist Republic of Viet Nam is the expropriating Party, any measure of direct expropriation relating to land shall be: i) for a purpose in accordance with the applicable domestic legislation¹⁹ and ii) upon payment of compensation equivalent to the market value, while recognising the applicable domestic legislation

4. The issuance of compulsory licenses in relation to intellectual property rights, to the extent that such issuance is consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights in Annex 1C to the WTO Agreements ('TRIPS Agreement'), does not constitute expropriation for the purposes of paragraph 1) of this Article.

5. An affected investor shall have a right, under the law of the expropriating Party, to prompt review of its claim and of the valuation of its investment, by a judicial or other independent authority of that Party.

Article 17

Transfer

Each Party shall permit all transfers relating to an investment to be made in a freely convertible currency, without restriction or delay and at the market rate of exchange applicable on the date of transfer. Such transfers include:

- (a) contributions to capital, such as principal and additional funds to maintain, develop or increase the investment;
- b) profits, dividends, capital gains and other returns, proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;
- c) interest, royalty payments, management fees, and technical assistance and other fees;
- (d) payments made under a contract entered into by the investor, or its investment, including payments made pursuant to a loan agreement;
- (e) earnings and other remuneration of personnel engaged from abroad and working in connection with an investment.
- (f) payments made pursuant to art. X ['Expropriation'] and Y ['Compensation for Losses'].
- g) payments of damages pursuant to an award issued by a tribunal under Chapter X Investor to State Dispute Settlement.

Article 18

Subrogation

If a Party, or an agency thereof, makes a payment under an indemnity, guarantee or contract of insurance it has entered into in respect of an investment made by one of its investors in the territory of the other Party, the other Party shall recognise the subrogation or transfer of any right or title or the assignment of any claim in respect of such investment. The Party or the agency shall have the right to exercise the subrogated or assigned right or claim to the same

¹⁹ The applicable domestic legislation is Viet Nam's Land Law no. 45/2013/QH13 and Decree 44/2014/ND-CP Regulating Land Prices, as at the date of entry into force of this Agreement.

extent as the original right or claim of the investor. Such rights may be exercised by the Party or an agency thereof, or by the investor only if the Party or an agency thereof so authorises.

Article 19

Termination

In the event that the present Agreement is terminated pursuant to Article X [16-Duration] in Chapter [Final Provisions]], the provisions of this Section and those of Chapter II Section 3 (Resolution of Investment Disputes) shall continue to be effective for a further period of 15 years from the date of termination, with respect to investments made before the date of termination of the present Agreement, unless the Parties agree otherwise.

Article 20

Relationship with other Agreements

1. Upon the entry into force of this Agreement, including this Chapter, the agreements between Member States of the European Union and Viet Nam listed in Annex (Y) (Parties to prepare a list of BITs and survival clauses) including the rights and obligations derived therefrom, shall cease to have effect and shall be replaced and superseded by this Agreement²⁰.

2. In the event of the provisional application in accordance with paragraph 4 of Article X. 15 (Entry into Force) of this Agreement, including this Chapter, the application of the provisions of the agreements listed in Annex (Y), as well as the rights and obligations derived therefrom, shall be suspended as of the date of provisional application. In the event the provisional application of this Agreement is terminated and this Agreement does not enter into force, the suspension shall cease and the agreements listed in Annex Y shall have effect.

3. Notwithstanding paragraphs 1 and 2, a claim may be submitted pursuant to the provisions of an agreement listed in Annex (Y), in accordance with the rules and procedures established in the agreement, provided that:

- (i) the claim arises from an alleged breach of provisions of that agreement that took place prior to date of suspension of the agreement pursuant to paragraph 2 or, if the agreement is not suspended pursuant to paragraph 2, prior to the date of entry into force of this Agreement, and
- (ii) no more than three (3) years have elapsed from the date of suspension of the agreement pursuant to paragraph 2 or, if the agreement is not suspended pursuant to paragraph 2, from the date of entry into force of this Agreement until the date of submission of the claim.

4. Notwithstanding paragraphs 1 and 2, if the provisional application of this Agreement, including this Chapter, is terminated and this Agreement, including this Chapter, does not enter into force, a claim may be submitted pursuant to the provisions of this Agreement, in accordance with the rules and procedures established in this Agreement, provided that:

²⁰ For greater certainty, the Parties share the understanding that the “survival clauses” listed in Annex Z of the Agreements listed in Annex Y shall also cease to have effect.

- (i) the claim arises from an alleged breach of provisions of this Agreement that took place during the period of the provisional application of this Agreement, and
- (ii) no more than three (3) years have elapsed from the date of termination of the provisional application until the date of submission of the claim.

5. For greater certainty, no claim may be submitted pursuant to the provisions of this Agreement, in accordance with the rules and procedures established in this Agreement if, (i) the claim arises from an alleged breach of provisions of this Agreement that took place before the date of entry into force of this Agreement, or (ii) in the event of the provisional application of this Agreement, if the claim arises from an alleged breach of provisions of this Agreement that took place before the provisional application of this Agreement.

6. For the purposes of this Article, the definition of “entry into force of this Agreement” provided for in paragraph 4(d) of Article X.15 (Entry into Force) shall not apply.

ANNEXES

Annex []

National Treatment

Notwithstanding paragraph 2 and 3 of Article(National Treatment), in sectors, subsectors, or activities listed below, Viet Nam may adopt or maintain any measure with respect to the operation, management, conduct, maintenance, use, enjoyment and sale or other disposal of an investment referred to Article 13.1. (ii) [(Section 2- Investment Protection, Art. Scope)] that is not in conformity with paragraph 2, provided that such measure is not inconsistent with the commitments inscribed in Annexes [...] (lists of commitments on liberalisation of investments of both Parties). Viet Nam may not, under any measure adopted after the date of entry into force of this Agreement and covered by this Annex, require an investor of the EU, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

1. Newspapers and news-gathering agencies, printing, publishing, radio and television broadcasting, in any form
2. Production and distribution of cultural products, including video records
3. Production, distribution, and projection of television programmes and cinematographic works
4. Investigation and security
5. Geodesy and cartography
6. Secondary and primary education services
7. Oil and gas, Mineral and natural resources exploration, prospecting and exploitation
8. Hydroelectricity and nuclear power; power transmission and/or distribution
9. Cabotage transport services
10. Fishery and aquaculture
11. Forestry and hunting
12. Lottery, betting and gambling
13. Judicial administration services, including but not limited to services relating to nationality
14. Civil enforcement
15. Production of military materials or equipment
16. River ports, sea ports and airports operation and management
17. Subsidies

Note for legal scrubbing: List to be reviewed, with the presence of investment negotiators, in order to avoid overlaps with exclusions in the text.

Annex []

Most Favoured Nation Treatment

Article ...(MFN) shall be interpreted in accordance with Article ...(Scope and Definitions) and the principle of ejusdem generis.

Annex []

Annex on competent authorities mentioned in article 13bis (Investment and Regulatory Measures/Objectives) paragraph 4

In the case of the EU, the competent authorities entitled to order the actions mentioned in article 13 bis paragraph 3 are the European Commission or a court or tribunal of a Member State when applying EU law on state aid. In the case of Viet Nam, the competent authorities entitled to order the actions mentioned in article 13 bis paragraph 3 are Government of Viet Nam or the Prime Minister of Viet Nam or a competent court

Annex []

Understanding on the application of paragraph 5 of the article x [Treatment of Investment]

1. Notwithstanding the condition set forth in paragraph 5(i) of the article 14 [Treatment of Investment], an investor referred to in paragraph 3(a)(i) who has a dispute that falls into the scope of Section 3 with the Party with whom it has entered into the written agreement that is concluded and has taken effect before the entry into force of this Agreement can claim the benefit of paragraph 5 of Article 14 [Treatment of Investment] in accordance with the procedures and conditions set forth in this annex.

2. Written agreements that are concluded and have taken effect before the entry into force of this Agreement and fulfill the conditions set out in this paragraph can be notified within 1 year from the date of the entry into force of this Agreement:

a. Such written agreements must satisfy all conditions set forth under ii) - iv) in paragraph 5 of Article 14 [Treatment of Investment]; and

b. Such written agreements were entered into either:

(i) by Viet Nam with investors of the EU Member States specified under paragraph 8 or their investments, referred to in Article 13. [Scope of section II Investment Protection]; or

(ii) by one of the EU Member States specified under paragraph 8 with investors of Viet Nam or their investments, referred to in Article 13. [Scope of section II Investment Protection].

3. The procedure for notifying the written agreements referred to in paragraph 1 shall be as follows:

a. Notification shall include:

(i) the name, nationality and address of the investor who is a party to the written agreement referred in paragraph 1 being notified and the nature of the investment of that investor, and, where the written agreement is entered into by the investment of that investor, the name, address and place of incorporation of the investment;

(ii) a copy of the written agreement, including all of its instruments.

b. The written agreements shall be notified in writing to the competent authority designated below:

(i) in the case of Viet Nam: the Ministry of Planning and Investment of Viet Nam.

(ii) in the case of the EU: the European Commission.

4. The notification referred to in paragraph 1 does not create any substantive rights to the investor who is a party to that notified written agreement or their investment.

5. The competent authorities will compile in a list the written agreements that have been notified in accordance with the above procedure.

6. Should a dispute arise in connection with one of the above notified written agreements, the relevant competent authority shall verify if the agreement satisfies all conditions set forth under ii) - iv) in paragraph 5 of the article 14 [Treatment of Investment] and procedures set forth in this Annex.

7. On the basis of that verification, should those requirements referred to in paragraph 6 of this Annex not be met, the claim that paragraph 5 of Article 14 applies to the written agreement shall not be admissible.

8. The EU Member States referred to in this understanding are NL, RO, UK, AT, DE, ES

Annex []

Expropriation

The Parties confirm their shared understanding that:

1. Expropriation referred to in Article 16.1 may be either direct or indirect:

a) direct expropriation occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure.

b) indirect expropriation occurs where a measure or series of measures by a Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.

2. The determination of whether a measure or series of measures by a Party, in a specific factual situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, amongst other factors:

- a) the economic impact of the measure or series of measures, although the fact that a measure or series of measures by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that such an expropriation has occurred;
- b) the duration of the measure or series of measures by a Party or of its effects;
- c) the character of the measure or series of measures, notably their object, context and intent.

3. For greater certainty, except in the rare circumstances where the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures or series of measures by a Party that are designed to protect legitimate public policy objectives do not constitute indirect expropriation.

Annex []

Public debt

1. No claim that a restructuring of debt of a Party breaches an obligation under Section 2 [Investment Protection] may be submitted to, or if already submitted, be pursued under Section 3 [Resolution of Investment Disputes and Investment Court System] if the restructuring is a negotiated restructuring at the time of submission, or becomes a negotiated restructuring after such submission.
2. Notwithstanding [Article 6 Submission of a Claim, Section on Resolution of Investment Disputes and Investment Court System], and subject to paragraph 1 of this Annex, an investor may not submit a claim under Section 3 [Resolution of Investment Disputes and Investment Court System] that a restructuring of debt of a Party breaches Articles X [National Treatment] or X [Most-Favoured Nation] of Section 1 [Liberalisation of Investments]²¹ or an obligation under Section 2 [Investment Protection], unless 270 days have elapsed from the date of submission by the claimant of the written request for consultations pursuant to [Article 4 Consultations].
3. For the purposes of this Annex:
 - ‘negotiated restructuring’ means the restructuring or rescheduling of debt of a Party that has been effected through (i) a modification or amendment of debt instruments, as provided for under their terms, including their governing law, or (ii) a debt exchange or other similar process in which the holders of no less than 66% of the aggregate principal amount of the outstanding debt subject to restructuring, excluding debt held by that Party or by entities owned or controlled by it, have consented to such debt exchange or other process.
 - "governing law" of a debt instrument means a country's legal and regulatory framework applicable to that debt instrument.
4. For greater certainty, “debt of a Party” includes, in the case of the European Union, debt of a government of a Member State, or of a Government in a Member State, at the central, regional or local level.

²¹ For greater certainty, a breach of the Article [National Treatment] or Article [Most-Favoured Nation] does not occur merely by virtue of a different treatment provided by a Party to certain categories of investors or investments on grounds of a different macroeconomic impact, for instance to avoid systemic risks or spillover effects, or on grounds of eligibility for debt restructuring.

Annex []

Agreements between Member States of the European Union and Viet Nam

Section 3. Resolution of Investment Disputes

SUB-SECTION 1: SCOPE AND DEFINITIONS

Article 1 Scope

1. This Section shall apply to a dispute between, on the one hand, a claimant of one Party and, on the other hand, the other Party concerning any measure²² alleged to breach the provisions of:

(a) Section 2 (Investment protection),

(b) Article 3 paragraph 2 (national treatment as regards the operation of investments) and Article 4 paragraph 2 (most favoured nation treatment as regards the operation of investments) of Section 1 with respect to the operation of investments as referred to in Article 13(1)(i) (Scope) of Section 2 (Investment Protection),

which allegedly causes loss or damage to the claimant or, where the claim is brought on behalf of a locally established company owned or controlled by the claimant, to the locally established company.

2. 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.

3. The Tribunal may not decide claims that fall outside of the scope of this Article.

Article 2 Definitions

The definitions contained in Chapter 1, Article X (Objectives, coverage and definitions) apply to this Section.

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

"disputing parties" means the claimant and respondent;

"claimant of a Party" means:

(a) an "investor" of a Party, as defined in Article 13 (ii) of Section 2 (Scope) acting on its own

²² The Parties understand that the term "measure" may include failures to act.

behalf; or

(b) an “investor” of a Party acting on behalf of a locally established company, which it owns or controls. For greater certainty, a claim submitted under (b) shall be deemed to relate to a dispute between a Contracting State and a national of another Contracting State for the purpose of Article 25(1) of the ICSID Convention.

"non-disputing Party" means Viet Nam when the respondent is the European Union or a Member State of the European Union, and the European Union when Viet Nam is the respondent.

"respondent" means either Viet Nam or, in the case of the European Union, either the European Union or the Member State concerned as notified pursuant to Article 6.

“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.

“Third Party funding” means any funding provided by a natural or juridical 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.

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

SUB-SECTION 2: ALTERNATIVE DISPUTE RESOLUTION AND CONSULTATIONS

Article 3 Amicable Resolution

Any dispute should as far as possible be settled amicably through negotiations or mediation and, where possible, before the submission of a request for consultations pursuant to Article 4. Such settlement may be agreed at any time, including after proceedings under this Section have been commenced.

Article 4 Consultations

1. Where a dispute cannot be resolved as provided for in Article 3 (Amicable Resolution), a claimant of one Party alleging a breach of the provisions referred to in Article 1(1) (Scope) shall submit a request for consultations to the other Party. The request shall contain the following information:

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

(b) the provisions referred to in Article 1(1) (Scope) alleged to have been breached;

(c) the legal and factual basis of the claim, including the measures alleged to breach the provisions referred to in Article 1(1) (Scope).

(d) the relief sought and the estimated amount of damages claimed, and

(e) evidence establishing that the claimant is an investor of the other Party and that it owns or controls the investment including the locally established company where applicable, in respect of which it has submitted a request for consultations.

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) above shall be submitted for each claimant or locally established company, as the case may be.

2. A request for consultations must be submitted within:

(a) 3 years after the date on which the claimant or, as applicable, the locally established company, first acquired, or should have first acquired, knowledge of the measure alleged to be inconsistent with the provisions referred to in Article 1(1) (Scope) and knowledge that the claimant (for claims brought by an investor acting on its own behalf) or the locally established company (for claims brought by an investor acting on behalf of a locally established company) has incurred loss or damage thereby; or

(b) two years after the date on which the claimant or, as applicable, the locally established company, ceases to pursue claims or proceedings before a tribunal or court under domestic law and, in any event, no later than seven years after the date on which the claimant first acquired, or should have first acquired knowledge of the measure alleged to be inconsistent with the provisions referred to in Article 1(1) (Scope) and knowledge that the claimant (for claims brought by an investor acting on its own behalf) or the locally established company (for claims brought by an investor acting on behalf of a locally established company) has incurred loss or damage thereby.²³

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

- a. Hanoi where the consultations concern measures of Viet Nam; or
- b. Brussels where the consultations concern measures of the European Union; or
- c. the capital of the Member State of the European Union concerned, where the request for consultations concerns exclusively measures of that Member State.

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

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

5. In the event that the claimant has not submitted a claim pursuant to Article 7 within 18 months of submitting the request for consultations, the claimant shall be deemed to have withdrawn from proceedings under this Section and may not submit a claim under this

²³ Subparagraph (2) (b) does not apply where Annex III applies.

Section. This period may be extended by agreement between the parties involved in the consultations.

6. The time periods in paragraphs 2 and 5 shall not render claims inadmissible where the claimant can demonstrate that the failure to request consultations or submit a claim is due to the claimant's inability to act as a result of actions deliberately 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. Where measures of a Member State of the European Union are identified, it shall also be sent to the Member State concerned.

Article 5

Mediation

1. The disputing parties may at any time agree to have recourse to mediation.

2. Recourse to mediation is voluntary and without prejudice to the legal position of either disputing party.

3. Recourse to mediation may 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.

4. The mediator is appointed by agreement of the disputing parties. Such appointment may include appointing a mediator from among the Members of the Tribunal appointed pursuant to Article 12(2) (Tribunal) or the Members of the Appeal Tribunal appointed pursuant to Article 13(3) (Appeal Tribunal). The disputing parties may also request the President of the Tribunal to appoint a mediator from among the Members of the Tribunal which are neither nationals of the European Union, nor of Vietnam.

5. Once the disputing parties agree to have recourse to mediation, the time limits set out in Article 4(2), 4(5), 27(6) and 28(5) shall be suspended between the date on which it was agreed to have recourse to mediation and the date on which either party to the dispute decides to terminate the mediation, by way of a letter to the mediator and the other disputing party. Upon request of both disputing parties, where a division of the Tribunal has been established pursuant to Article 12 (Tribunal), the division shall stay its proceedings until the date on which either party to the dispute decides to terminate the mediation, by way of a letter to the mediator and the other disputing party.

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

Article 6

Notice of intent to submit a claim

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 which shall specify in writing the

claimant's intention to submit the claim to dispute settlement under this Section and contain the following information:

- (a) the name and address of the claimant and, where such request is submitted on behalf of a locally established company, the name, address and place of incorporation of the locally established company;
- (b) the provisions referred to in Article 1(1) (Scope) alleged to have been breached;
- (c) the legal and factual basis of the claim, including the measures alleged to breach the provisions referred to in Article 1(1) (Scope);
- (d) the relief sought and the estimated amount of damages claimed.

The notice of intent shall be sent to the EU or to Viet Nam, as the case may be. Where a measure of a Member State of the European Union is identified, it shall also be sent to the Member State concerned.

2. Where a notice of intent has been sent to the European Union, the European Union shall make a determination of the respondent and, after having made such a determination, inform the claimant within 60 days of the receipt of the notice of intent as to whether the European Union or a Member State of the European Union shall be the respondent.

3. The claimant may submit a claim pursuant to Article 7 on the basis of such determination.

4. Where either the European Union or the Member State is respondent 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 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. 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 rules on dispute settlement shall prevent the exchange of all information relating to a dispute between the European Union and the Member State concerned.

Article 7

Submission of a claim

1. If the dispute cannot be settled within 6 months from the submission of the request for consultations and at least 3 months have elapsed from the submission of the notice of intent to submit a claim pursuant to Article 6 (Notice of intent to submit a claim) the claimant, provided that it satisfies the requirements set out in Article 9 (Procedural and Other Requirements for the Submission of a Claim), may submit a claim to the Tribunal established pursuant to Article 12.

2. A claim may be submitted to the Tribunal under one of the following sets of rules on dispute settlement:

(a) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID);

(b) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID) in accordance with the Rules on the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre, where the conditions for proceedings pursuant to paragraph (a) do not apply;

(c) the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL); or,

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

3. All the claims identified by the claimant in the submission of its claim pursuant to this Article must be based on measures identified in its request for consultations pursuant to Article 4(1)(c).

4. The rules on dispute settlement referred to in paragraph 2 shall apply subject to the rules set out in this Chapter, as supplemented by any rules adopted by the Trade Committee, by the Tribunal or by the Appeal Tribunal.

5. A claim shall be deemed submitted under this Article when the claimant has initiated proceedings under the applicable rules on dispute settlement.

6. Claims submitted in the name of a class composed of a number of unidentified claimants, or submitted by a representative intending to conduct the proceedings in the interests of a number of identified or unidentified claimants that delegate all decisions relating to the proceedings on their behalf, shall not be admissible.

Article 8

Other Claims

1. A claimant may not submit a claim to the Tribunal if the claimant has a pending claim before any other domestic or international court or tribunal concerning the same measure as that alleged to be inconsistent with the provisions referred to in Article 1(1) (Scope) and the same loss or damage, unless the claimant withdraws such pending claim.

2. A claimant acting on its own behalf may not submit a claim to the Tribunal if any person who, directly or indirectly, has an ownership interest in or is controlled by the claimant has a pending claim before this Tribunal or any other domestic or international court or tribunal concerning the same measure as that alleged to be inconsistent with the provisions referred to

in Article 1(1) (Scope) and the same loss or damage, unless that person withdraws such pending claim.

3. A claimant acting on behalf of a locally established company may not submit a claim to the Tribunal if any person who, directly or indirectly, has an ownership interest in or is controlled by the locally established company has a pending claim before this Tribunal or any other domestic or international court or tribunal concerning the same measure as that alleged to be inconsistent with the provisions referred to in Article 1(1) (Scope) and the same loss or damage, unless that person withdraws such pending claim.

4. Before submitting a claim the claimant shall provide:

(a) evidence that it and, where relevant pursuant to paragraphs 2 and 3, any person who, directly or indirectly, has an ownership interest in or is controlled by the claimant or the locally established company, has withdrawn any pending claim referred to in paragraphs 1, 2, and 3.

(b) a waiver of its right, and where applicable, of the locally established company, to initiate any claim referred to in paragraph 1.

5. This Article shall apply in conjunction with Annex III.

6. The waiver provided pursuant to paragraph 4(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.

7. Paragraphs 1 to 4 of this Article, including Annex III, shall not apply where claims submitted to a domestic court or tribunal are initiated for the sole purpose of seeking interim injunctive or declaratory relief and do not involve the payment of monetary damages.

8. Where claims are brought both pursuant to this Section and Section XX [State to State dispute settlement] or another international agreement concerning the same treatment as that alleged to be inconsistent with the provisions referred to in Article 1(1) (Scope), a division of the Tribunal constituted under this Section shall, as soon as possible after hearing the disputing parties, take into account proceedings pursuant to Section X [State to State dispute settlement] or another international agreement in its decision, order or award. To this end, it may also, if it considers necessary, stay its proceedings. In acting pursuant to this provision the Tribunal shall respect Article 27(6) (Provisional award).

Article 9

Procedural and Other Requirements for the Submission of a Claim

1. A claim may be submitted to the Tribunal under this Section only if:

(a) The submission of the claim is accompanied by claimant's consent in writing to the settlement of the dispute by the Tribunal in accordance with the procedures set out in this Section and the claimant's designation of one of the set of rules on dispute settlement referred to in Article 7(2) (Submission of a Claim) as the applicable dispute settlement rules;

(b) At least 6 months have elapsed since the submission of the Request for Consultations under Article 4 (Consultations) and at least 3 months have elapsed since the submission of the Notice of Intent to Submit a Claim under Article 6 (Notice of Intent to submit a claim);

(c) The Request for Consultations and the Notice of Intent fulfilled the requirements set out in Article 4 (Consultations) paragraphs 1 and 2, and Article 6 (Notice of Intent to submit a claim) paragraph 1, respectively;

(d) The legal and factual basis of the dispute was subject to prior consultations pursuant to Article 4 (Consultations);

(e) All the claims identified in the submission of the claim to the Tribunal made pursuant to Article 7 (Submission of a claim) are based on the measure or measures identified in the Notice of intent to submit a claim made pursuant to Article 6 (Notice of Intent to submit a claim);

(f) The conditions foreseen in Article 8 (Other claims) are fulfilled.

2. This Article is without prejudice to other jurisdictional requirements arising from the relevant dispute settlement rules.

Article 10

Consent

1. The Respondent consents to the submission of a claim under this Section.

2. The claimant shall deliver its consent in accordance with the procedures provided for in this Section at the time of submitting a claim pursuant to Article 7.

3. The consent under paragraphs 1 and 2 implies:

(a) the disputing parties shall refrain from enforcing an award rendered pursuant to this Section before such award has become final pursuant to Article 29; and

(b) the disputing parties shall 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.²⁴

4. The consent under paragraph 1 and the submission of a claim under this Section shall satisfy the requirements of:

²⁴ Article 10(3)(b) shall apply in conjunction with Article 31(3) (Enforcement of awards).

(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”.

Article 11

Third party funding

1. Where there is third party funding, the disputing party benefiting from it shall notify to the other disputing party and to the division of the Tribunal, or where the division of the Tribunal is not established, to the President of the Tribunal the existence and nature of the funding arrangement, and the name and address of the third party funder.

2. Such notification shall be made at the time of submission of a claim, or, where the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement concluded or the donation or grant is made.

3. When applying Article 22 (Security for Cost), the Tribunal shall take into account whether there is third party funding. When deciding on the cost of proceedings pursuant to Article 27(4) (Provisional Award) the Tribunal shall take into account whether the requirements provided for in paragraphs 1 and 2 have been respected.

SUB-SECTION 4: INVESTMENT TRIBUNAL SYSTEM

Article 12

Tribunal

1. A Tribunal is hereby established to hear claims submitted pursuant to Article 7 (Submission of a claim).

2. Pursuant to Article 34(2)(a), the Trade Committee shall, upon the entry into force of this Agreement, appoint nine Members of the Tribunal. Three of the Members shall be nationals of a Member State of the European Union, three shall be nationals of Vietnam and three shall be nationals of third countries.²⁵

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

²⁵ Instead of proposing the appointment of three Members who have its nationality or citizenship, either Party may propose to appoint up to three Members who have another nationality or citizenship. In this case, such Members shall be considered to be nationals or citizens of the Party that proposed his or her appointment for the purposes of this Article.

4. The Members of the Tribunal shall possess the qualifications required in their respective countries for appointment to 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 particular, in international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements.

5. The Members of the Tribunal appointed pursuant to this Section shall be appointed for a four-year term, renewable once. However, the terms of five of the nine persons appointed immediately after the entry into force of the Agreement, to be determined by lot, shall extend to six years. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term. A person who is serving on a division of the Tribunal when his or her term expires may, with the authorization of the President of the Tribunal, continue to serve on the division until the closure of the proceedings of that division and shall, for that purpose only, be deemed to continue to be a Member of the Tribunal.

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

7. Within 90 days of the submission of a claim pursuant to Article 7, the President of the Tribunal shall appoint the Members composing the division of the Tribunal hearing the case on a rotation basis, ensuring that the composition of the divisions is random and unpredictable, while giving equal opportunity to all Members to 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 Members who are nationals of third countries. They shall serve on the basis of a rotation drawn by lot by the Chair of the Trade 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 Member 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 7.

10. The Tribunal may draw up its own working procedures. Such Working Procedures shall be compatible with the applicable dispute settlement rules and the provisions of this Section. If it decides to do so, the President of the Tribunal shall draw up draft Working Procedures in consultation with the other Members of the Tribunal and present the draft Working Procedures to the Committee on Services, Investment and Government Procurement. The Working Procedures shall be adopted by the Trade Committee on agreement of the Parties. If the draft Working Procedures are not adopted by the Trade Committee within three months

after their presentation to the Committee on Services, Investment and Government Procurement, the President of the Tribunal shall make the necessary revision to the draft Working Procedures, taking into consideration the views expressed by the Parties. The President of the Tribunal shall subsequently present the revised version of the Working Procedures to the Committee on Services, Investment and Government Procurement. The Working procedures shall be considered adopted, unless the Parties, through a decision of the Trade Committee, reject the draft Working Procedures within three months after their presentation to the Committee on Services, Investment and Government Procurement.

11. Where a procedural question arises that is not covered by this Section, any supplemental rules adopted by the Trade Committee or by the Working Procedures drawn up by the Tribunal, the relevant division of the Tribunal may adopt an appropriate procedure that is compatible with those provisions.

12. A division of the Tribunal shall make every effort to make any decision by consensus. Where, nevertheless, a decision cannot be arrived at by consensus, a division of the Tribunal shall render its decision by a majority of votes of all its Members. Opinions expressed by individual Members of a division of the Tribunal shall be anonymous.

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

14. In order to ensure their availability, the Members shall be paid a monthly retainer fee to be fixed by decision of the Trade Committee. The President of the Tribunal and, where applicable, the Vice-President, shall receive a daily fee equivalent to the fee determined pursuant to Article 13(16) for each day worked in fulfilling the functions of President of the Tribunal pursuant to this Section.

15. The retainer fee and the daily fees for the President or Vice President of the Tribunal when working in fulfilling the functions of President of the Tribunal pursuant to this Section shall be paid by both Parties taking into account their respective levels of development into an account managed by the [Secretariat of ICSID/ Permanent Court of Arbitration] [Negotiators' note: to be decided during legal scrubbing]. 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.

16. Unless the Trade Committee adopts a decision pursuant to paragraph 17, the amount of the other fees and expenses of the Members 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 27(4).

17. Upon a decision by the Trade Committee, the retainer fee and other fees and expenses may be permanently transformed into a regular salary. In such an event, the Members shall serve on a full-time basis and the Trade Committee shall fix their remuneration and related organisational matters. In that event, the Members of the Tribunal shall not be permitted to

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

18. The [Secretariat of ICSID/Permanent Court of Arbitration] [Negotiators' note: to be decided during legal scrubbing] shall act as Secretariat for the Tribunal and provide it with appropriate support. The expenses for such support shall be allocated by the Tribunal among the disputing parties in accordance with Article 27(4).

Article 13

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 Vietnam and two shall be nationals of third countries.

3. Pursuant to Article 34(2)(a), the Trade 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 shall be nationals of that Party and one shall be a non-national, for the Trade Committee to thereafter jointly appoint the Members.²⁶

4. The Trade 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 paragraphs 2 and 3.

5. The Appeal Tribunal Members shall be appointed for a four-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 six years. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.

6. The Appeal Tribunal shall have a President and Vice-President who shall be selected by lot for a two-year term and shall be selected from among the Members who are nationals of third countries. They shall serve on the basis of a rotation drawn by lot by the Chair of the Trade Committee. The Vice-President shall replace the President when the President is unavailable.

7. The Members of the Appeal Tribunal shall have demonstrated expertise in public international law, and possess the qualifications required in their respective countries for appointment to the highest judicial offices or be jurists of recognised competence. It is

²⁶ Instead of proposing the appointment of two Members who have its nationality or citizenship, either Party may propose to appoint up to two Members who have another nationality or citizenship. In this case, such Members shall be considered to be nationals or citizens of the Party that proposed his or her appointment for the purposes of this Article.

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

10. The Appeal Tribunal shall draw up its own working procedures. Such working procedures shall be compatible with the provisions of this Section and the instructions provided in Annex IV. The President of the Appeal Tribunal shall draw up draft Working Procedures in consultation with the other Members of the Appeal Tribunal. The President of the Appeal Tribunal shall present the draft Working Procedures to the Committee on Services, Investment and Government Procurement within one year after the entry into force of the Agreement. The Working Procedures shall be adopted by the Trade Committee on agreement of the Parties. If the draft Working Procedures are not adopted by the Trade Committee within three months after their presentation to the Committee on Services, Investment and Government Procurement, the President of the Appeal Tribunal shall make the necessary revision to the draft Working Procedures, taking into consideration the views expressed by the Parties. The President of the Appeal Tribunal shall subsequently present the revised version of the Working Procedures to the Committee on Services, Investment and Government Procurement. The Working procedures shall be considered adopted, unless the Parties, through a decision of the Trade Committee, reject the draft Working Procedures within three months after their presentation to the Committee on Services, Investment and Government Procurement.

11. Where a procedural question arises that is not covered by this Section, any supplemental rules adopted by the Trade Committee or by the Working Procedures drawn up by the Appeal Tribunal, the relevant division of the Appeal Tribunal may adopt an appropriate procedure that is compatible with those provisions.

12. A division of the Appeal Tribunal shall make every effort to make any decision by consensus. Where, nevertheless, a decision cannot be arrived at by consensus, a division of the Appeal Tribunal shall render its decision by a majority of votes of all its Members. Opinions expressed by individual Members of a division of Appeal Tribunal shall be anonymous.

13. 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.

14. The Members of the Appeal Tribunal shall be paid a monthly retainer fee to be determined by decision of the Trade Committee. The President of the Appeal Tribunal and, where applicable, the Vice-President, shall receive a daily fee equivalent to the fee determined pursuant to paragraph 16 for each day worked in fulfilling the functions of President of the Appeal Tribunal pursuant to this Section.

15. The retainer fee of the Members of the Appeal Tribunal and the daily fees for the President or Vice President of the Appeal Tribunal when working in fulfilling the functions of President of the Appeal Tribunal pursuant to this Section shall be paid by both Parties taking into account their respective levels of development into an account managed by [the Secretariat of ICSID/Permanent Court of Arbitration] [Negotiators' note: to be decided during legal scrubbing]. 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.

16. Upon entry into force of the Agreement, the Trade Committee shall adopt a decision determining the amount of the other fees and expenses of the Members of a division of the Appeal Tribunal. Such fees and expenses shall be allocated by the Tribunal among the disputing parties in accordance with Article 27(4).

17. Upon a decision by the Trade 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 Trade 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.

18. The [Secretariat of ICSID/Permanent Court of Arbitration] [Negotiators' note: to be decided during legal scrubbing] shall act as Secretariat for the Appeal Tribunal and provide it with appropriate support. The expenses for such support shall be allocated by the Appeal Tribunal among the disputing parties in accordance with Article 27(4).

Article 14

Ethics

1. The Members of the Tribunal and of the Appeal Tribunal shall be chosen from persons whose independence is beyond doubt. They shall not be affiliated with any government.²⁷ 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

²⁷ For greater certainty, the fact that a person receives an income from the government, or was formerly employed by the government, or has family relationship with a person who receives an income from the government, does not in itself render that person ineligible.

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

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

5. Upon a reasoned recommendation from the President of the Appeal Tribunal, or on their joint initiative, the Parties, by decision of the Trade Committee, may decide to remove a Member 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 shall submit the reasoned recommendation. Articles 12(2) and 13(3) shall apply *mutatis mutandis* for filling vacancies that may arise pursuant to this paragraph.

Article 15

Multilateral dispute settlement mechanisms

The Parties shall enter into negotiations for an international agreement providing for a multilateral investment tribunal in combination with, or separate from, a multilateral appellate mechanism applicable to disputes under this Agreement. The Parties may consequently agree on the non-application of relevant parts of this Section. The Trade Committee may adopt a decision specifying any necessary transitional arrangements.

SUB-SECTION 5: CONDUCT OF PROCEEDINGS

Article 16

Applicable law and rules of Interpretation

1. The Tribunal shall determine whether the measures in question are inconsistent with the provisions referred to in Article 1(1) (Scope).
2. When rendering its decisions, the Tribunal shall apply the provisions referred to in Article 1(1) (Scope) and other provisions of this agreement as applicable, as well as other rules or principles of international law applicable between the Parties, and take into consideration, as matter of fact, any relevant domestic law of the disputing Party. For greater certainty, the Tribunal shall be bound by the interpretation given to the domestic law by the courts or authorities who are competent to interpret the relevant domestic law, and any meaning given to the relevant domestic law made by the Tribunal shall not be binding upon the courts and the authorities of either Party. The Tribunal does 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.
3. In making its determination, the Tribunal shall interpret the 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.
4. Where serious concerns arise as regards issues of interpretation which may affect matters relating this Chapter, the Trade Committee may adopt interpretations of provisions of this Agreement. Any such interpretation shall be binding upon the Tribunal and the Appeal Tribunal. The Trade Committee may decide that an interpretation shall have binding effect from a specific date.

Article 17

Anti-Circumvention

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

Article 18

Preliminary Objections

1. The respondent may, no later than 30 days after the constitution of the division of Tribunal pursuant to Article 12, and in any event before the first session of the division of the Tribunal,

or 30 days after the respondent became aware of the facts on which the objection is based, file an objection that a claim is manifestly without legal merit.

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

3. The Tribunal, after giving the disputing parties an opportunity to present their observations on the objection, shall, at 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 provisional 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 the tribunal shall be without prejudice to the right of a disputing party to object, pursuant to article 19 (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 a Tribunal's authority to address other objections as a preliminary question. For greater certainty, such objection may include an objection that the dispute or any ancillary claim is not within the jurisdiction of the Tribunal or, for other reasons, is not within the competence of the Tribunal.

Article 19

Claims Unfounded as a Matter of Law

1. Without prejudice to the Tribunal's authority to address other objections as a preliminary question, such as an objection that the dispute or any ancillary claim is not within the jurisdiction of the Tribunal or, for other reasons, is not within the competence of the Tribunal 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 27 (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 division of the Tribunal is constituted, and in no event later than the date the Tribunal fixes for the respondent to submit its counter-memorial or statement of defence 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 18 (Preliminary objections) are pending, unless the Tribunal grants leave to file an objection under this article, after having taken due account of the circumstances of the case.

3. On receipt of an objection under paragraph 1, and unless it considers the objection manifestly unfounded, the Tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for

considering any other preliminary question, and issue a decision or provisional award on the objection, stating the grounds therefor.

Article 20

Transparency of proceedings

1. The UNCITRAL Rules on Transparency in treaty-based Investor-State Arbitration (the “UNCITRAL Transparency Rules”) shall apply to disputes under this Section, subject to the following rules:

2. The request for consultations under Article 4, the notice of intent and the notice of determination under Article 6, the notice of challenge and the decision on challenge under Article 14, and the request for consolidation under Article 33 shall be included in the list of documents referred to in Article 3(1) of the UNCITRAL Transparency Rules.

3. Subject to Article 7 of the UNCITRAL Transparency Rules, the Tribunal may decide, on its own initiative or upon request from any person, and after consultation with the disputing parties, whether and how to make available any other documents provided to, or issued by, the Tribunal not falling within Article 3(1) and 3(2) of the UNCITRAL Transparency Rules. This may include exhibits when the respondent so agrees.

4. Notwithstanding Article 2 of the UNCITRAL Transparency Rules, the European Union or Viet Nam as the case may be shall, after receiving the relevant documents pursuant to paragraph 2, promptly transmit them to the non-disputing Party and make them publicly available, subject to the redaction of confidential or protected information²⁸.

5. Documents referred to in paragraphs 2, 3 and 4 may be made publicly available by communication to the repository referred to in the UNCITRAL Transparency Rules or otherwise.

6. No later than three years after the entry into force of this Agreement, the Trade Committee shall review the operation of paragraph 3 above. Upon request of either Party, the Trade Committee may adopt a decision pursuant to Article 34(2)(d) stipulating that Article 3(3) of the UNCITRAL transparency rules will apply instead of paragraph 3.

7. Subject to any decision by the Tribunal on an objection regarding the designation of information claimed to be confidential or protected information, neither the disputing parties nor the Tribunal shall disclose to any non-disputing Party or to the public any protected information where the disputing party that provided the information clearly designates it as such²⁹.

²⁸ For greater certainty, confidential or protected information, as defined in Article 7(2) of the UNCITRAL Transparency Rules, includes classified government information.

²⁹ For greater certainty, where a disputing party that submitted the information decides to withdraw all or parts of its submission containing such information in accordance with Article 7(4) of the UNCITRAL Transparency Rules, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which

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

Article 21

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. For the purpose of this paragraph, an order includes a recommendation.

Article 22

Security for costs

1. For greater certainty, upon request, the Tribunal may order the claimant to post security for all or a part of the costs if there are reasonable grounds to believe that the claimant risks not being able to honour a possible decision on costs issued against the claimant.
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 23

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, in an order take note of the discontinuance. 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 24

Language of the Proceedings

1. The disputing parties shall agree on the language to be used in the proceedings.

either remove the information withdrawn by the disputing party that first submitted the information or redesignate the information consistent with the designation of the disputing party that first submitted the information.

2. If the disputing parties have not reached an agreement pursuant to paragraph 1 within 30 days of the constitution of the division of the Tribunal pursuant to Article 12(7), the Tribunal shall determine the language to be used in the proceedings. The Tribunal shall make its determination after consulting the disputing parties with a view to ensure the economic efficiency of the proceedings and ensure that its determination does not impose any unnecessary burden on the resources of the disputing parties and of the Tribunal.³⁰

Article 25

The non-disputing Party

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

a) a request for consultations referred to in Article 4 (Consultations), a notice of intent and a notice requesting a determination referred to in Article 6 (Notice of intent to submit a claim) and a claim referred to in Article 7 (Submission of a Claim);

b) on request any documents that are made available to the public in accordance with Article 20 (Transparency of Proceedings).

2. The non-disputing Party has the right to attend a hearing held under this Section and to make oral representations relating to the interpretation of this Agreement.

Article 26

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 27

Provisional Award

1. Where the Tribunal concludes that a measure in dispute breaches any of the provisions referred to in Article 1(1) (Scope), 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 and any applicable interest in lieu of restitution, determined in a manner consistent with the relevant provisions of Section II (Investment Protection).

³⁰ In considering the economic efficiency of the proceedings, the Tribunal should take into account the costs of the disputing parties and of the Tribunal in processing case-law and legal writings which will potentially be submitted by the disputing parties.

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 of the treatment concerned.

2. Monetary damages shall not be greater than the loss suffered by the claimant or, as applicable by 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 Party concerned. For greater certainty, when an investor submits a claim on its own behalf, it may recover only loss or damage that it has incurred with regards to its investment as referred to in Article (Scope) of Section II (Investment Protection).

3. The Tribunal may not award punitive damages.

4. The Tribunal shall order that the costs of proceedings³¹ 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 reasonable costs of legal representation and assistance, shall be borne by the unsuccessful disputing party, unless the Tribunal determines that such apportionment is unreasonable in the circumstances of the 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. The Trade Committee may adopt supplemental rules on fees for the purpose of determining the maximum amount of costs of legal representation and assistance that may be borne by specific categories of unsuccessful disputing parties. Such supplemental rules shall take into account the financial resources of a claimant which is a natural person or a small or medium-sized enterprise. The Trade Committee shall endeavour to adopt such supplemental rules no later than one year after the entry into force of this Agreement.

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.

7. 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.

³¹ For greater certainty, the term “costs of proceedings” includes (a) the reasonable costs of expert advice and of other assistance required by the Tribunal, and (b) the reasonable travel and other expenses of witnesses to the extent such expenses are approved by the Tribunal.

Article 28

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. The Appeal Tribunal shall reject the appeal where it finds that the appeal is unfounded. It may also dismiss the appeal on an expedited basis where it is clear that the appeal is manifestly unfounded.

3. If the Appeal Tribunal finds that the appeal is well founded, the decision of 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.

4. Where the facts established by the Tribunal so permit, the Appeal Tribunal shall apply its own legal findings and conclusions to such facts and render a final decision on the matter. Where this is not possible, it shall refer the matter back to the Tribunal.

5. 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.

6. A disputing party lodging an appeal shall provide security, including the costs of appeal, as well as a reasonable amount determined by the Appeal Tribunal in light of the circumstances of the case.

7. The provisions of Articles 11 [Third-Party Funding], 20 [Transparency], 21 [Interim decisions], 23 [Discontinuance] and 25 [The non-disputing Party] shall apply *mutatis mutandis* in respect of the appeal procedure.

Article 29

Final Award

1. A provisional award issued pursuant to this Section shall become final if neither disputing party has appealed the provisional award pursuant to Article 28 (1).
2. Where a provisional award has been appealed and the Appeal Tribunal has rejected or dismissed the appeal pursuant to Article 28(2), the provisional award shall become final on the date of rejection or dismissal of the appeal by the Appeal Tribunal.
3. Where a provisional award has been appealed and the Appeal Tribunal has rendered a final decision on the matter, the provisional award as modified or reversed by the Appeal Tribunal shall become final on the date of the issuance of the final decision of the Appeal Tribunal.
4. Where a provisional award has been appealed and the Appeal Tribunal has modified or reversed the legal findings and conclusions of the provisional award and referred the matter back to the Tribunal, 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 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. The revised provisional award will become final 90 days after its issuance.
5. For the purposes of this Section, the term "final award" shall include any final decision of the Appeal Tribunal rendered pursuant to Article 28 (4).

Article 30

Indemnification or Other Compensation

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

Article 31

Enforcement of awards

1. Final awards issued pursuant to this Section:
 - (a) shall be binding between the disputing parties and in respect of that particular case; and
 - (b) 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. Notwithstanding paragraphs 1 and 2, during the period mentioned in paragraph 4, the recognition and enforcement of a final award in respect of a dispute where Viet Nam is the respondent shall be conducted pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June, 1958 (New York Convention). During this time, paragraph 1(b) of this Article and paragraph 3(b) of Article 10 (Consent) do not apply to disputes where Viet Nam is a respondent.
4. Upon completion of a period of 5 years after the entry into force of this Agreement, or a longer period fixed by the Trade Committee should the conditions warrant, the recognition and enforcement of a final award in respect of disputes where Viet Nam is the respondent shall be in accordance with paragraphs 1 and 2.
5. Execution of the award shall be governed by the laws concerning the execution of judgments or awards in force where such execution is sought.
6. 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.
7. 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.
8. For greater certainty and subject to paragraph 1, where a claim has been submitted to dispute settlement pursuant to Article 7(2)(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 32

Role of the Parties to the Agreement

1. No Party shall give diplomatic protection, or bring an international claim, in respect of a dispute submitted under this Section, unless the other Party has failed to abide by and comply with the award rendered in such dispute. Diplomatic protection, for the purpose of this paragraph, shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.
2. Paragraph 1 shall not exclude the possibility of dispute settlement under [Chapter X state-to-state dispute settlement] in respect of a measure of general application even if that measure is alleged to have breached the agreement as regards a specific investment in respect of which a dispute has been initiated pursuant to Article 7 and is without prejudice to Article 25 of this Section or Article 5 of the UNICTRAL Transparency Rules.

Article 33 Consolidation

1. In the event that two or more claims submitted under this Section have a question of law or fact in common and arise out of the same events and circumstances, the respondent may submit to the President of the Tribunal a request for the consolidation of such claims or part of them. The request shall stipulate:

- (a) the names and addresses of the disputing parties to the claims sought to be consolidated;
- (b) the scope of the consolidation sought; and
- (c) the grounds for the request.

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

2. In the event that all disputing parties to the claims sought to be consolidated agree to the consolidation of the claims, the disputing parties shall submit a joint request to the President of the Tribunal pursuant to paragraph 1. The President of the Tribunal shall, after receipt of such joint request, constitute a new division (the “consolidating division”) of the Tribunal pursuant to Article 12 which shall have jurisdiction over all or part of the claims which are subject to the joint consolidation request.

3. In the event that the disputing parties referred to in paragraph 2 have not reached an agreement on consolidation within thirty days of the receipt of the request for consolidation referred to in paragraph 1 by the last claimant to receive it, the President of the Tribunal shall constitute a consolidating division of the Tribunal pursuant to Article 12. The consolidating division shall assume jurisdiction over all or part of the claims, if, after considering the views of the disputing parties, it decides that to do so would best serve the interest of fair and efficient resolution of the claims, including the interest of consistency of awards.

4. The consolidating division shall conduct its proceedings under the dispute settlement rules chosen by agreement of the claimants from those referred to in Article 7(2).

5. If the claimants have not agreed upon the dispute settlement rules within 30 days of the date of receipt of the request for consolidation by the last claimant to receive it, the consolidating division shall conduct its proceedings under application of the UNCITRAL arbitration rules.

6. Divisions of the Tribunal constituted under Article 12 shall cede jurisdiction in relation to the claims, or parts thereof, over which the consolidating division has jurisdiction and the proceedings of such divisions shall be stayed or adjourned, as appropriate. The award of the consolidating division of the Tribunal in relation to the parts of the claims over which it has assumed jurisdiction shall be binding on the divisions which have jurisdiction over the remainder of the claims, as of the date the award becomes final pursuant to Article 29.

7. A claimant may withdraw the claim or the part thereof subject to consolidation from dispute settlement proceedings under this Article and such claim or part thereof may not be resubmitted under Article 7.

8. At the request of the respondent, the consolidating division of the Tribunal, on the same basis and with the same effect as paragraph 3 and 6 above, may decide whether to assume jurisdiction over all or part of a claim falling within the scope of paragraph 1 above, which is submitted after the initiation of consolidation proceedings.

9. At the request of one of the claimants, the consolidating division of the Tribunal may take such measures as it sees fit in order to preserve the confidentiality of protected information of that claimant vis-à-vis other claimants. Such measures may include the submission of redacted versions of documents containing protected information to the other claimants or arrangements to hold parts of the hearing in private.

Article 34 **Roles of Committees**

1. The Committee on Services, Investment and Government Procurement 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;
- (c) upon request of either Party, the implementation of any mutually agreed solution as regards a dispute under this Section;
- (d) draft Working Procedures drawn up by the President of the Tribunal or Appeal Tribunal pursuant to Articles 12(10) and 13(10).

2. The Trade Committee may, upon recommendation of the Committee on Services, Investment and Government Procurement, and after completion of the respective legal requirements and procedures of the Parties, adopt decisions to:

- (a) appoint the Members of the Tribunal and the Members of the Appeal Tribunal pursuant to Articles 12(2) and 13(3), to increase or decrease the number of the Members pursuant to Articles 12(3) and 13(4), and to remove a Member from the Tribunal or Appeal Tribunal pursuant to Article 14(5);
- (b) adopt interpretations of the agreement pursuant to Article 16(4);
- (c) adopt and subsequently amend rules supplementing the applicable dispute settlement rules. Such rules and amendments are binding on the Tribunal and Appeal Tribunal;
- (d) adopt a decision stipulating that that Article 3(3) of the UNCITRAL transparency rules will apply instead of paragraph 3 of Article 20 (Transparency of Proceedings);

- (e) fix the monthly retainer fee of the Members of the Tribunal and of the Appeal Tribunal pursuant to Articles 12(14) and 13(14) and the amount of the other fees and expenses of the Members of a division of the Appeal Tribunal and of the Presidents of the Tribunal and Appeal Tribunal pursuant to Articles 13(16), 12(14) and 13(14);
- (f) transform the retainer fee and other fees and expenses of the Members of the Tribunal and Appeal Tribunal into a regular salary pursuant to Articles 12(17) and 13(17);
- (g) adopt or reject the draft Working Procedures of the Tribunal or Appeal Tribunal pursuant to Articles 12(10) and 13(10);
- (h) specify any necessary transitional arrangements pursuant to Article 15 (Multilateral dispute settlement mechanism);
- (i) adopt supplemental rules on fees pursuant to Article 27(5).

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.
2. 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 it shall be addressed to the respondent as determined pursuant to Article 6 (Notice of Intent to submit a claim) of Section 3 (Resolution of Investment Disputes). Where no respondent has been determined, it shall be addressed to the European Union. Where the request is accepted, it shall specify whether the European Union or the Member State concerned will be a party to the mediation³².

³² 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 concern 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.

3. The party to which such request is addressed shall give sympathetic consideration to the request and accept or reject it in writing within 45 days, or where such request is submitted after a request for consultation has been submitted pursuant to Article 4 of Section 3 (Resolution of Investment Disputes), within 30 working days of its receipt.

4. The request shall contain: (a) a summary of the differences or disputes, including, where appropriate, an identification of relevant legal instruments sufficient to identify the matter giving rise to the request, (b) the names and contact details of the requesting party and its representative(s); (c) either a reference to the agreement to mediate or invitation to the other party or parties to mediate under this Mediation Mechanism.

Article 3

Selection of the Mediator

1. If both disputing parties agree to a mediation procedure, the disputing parties shall endeavour to agree on a mediator within 15 working days from the receipt of the reply to the request.

2. If the disputing parties cannot agree on the mediator within the established time frame, either disputing party may request the President of the Tribunal to draw by lot and appoint a mediator from among the Members of the Tribunal which are neither nationals of the European Union, nor of Vietnam.

3. The President of the Tribunal shall appoint the mediator within five working days of the request referred to in paragraph 2 by either disputing party.

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

Article 4

Rules of the Mediation Procedure

1. As soon as practicable following the mediator's designation, the mediator shall discuss with the parties, whether in person, by telephone or by any other means of telecommunication:

- (a) the conduct of the mediation, in particular any outstanding procedural issues such as the languages and location of the mediation sessions;
- (b) a provisional timetable for the conduct of the mediation;
- (c) any legal disclosure obligation that may be relevant to the conduct of the mediation;
- (d) whether the parties wish to agree in writing not to commence or not to continue any other dispute settlement proceedings relating to the differences or disputes that are subject of the mediation while mediation is pending;
- (e) whether special arrangements for the approval of a settlement agreement need to be made; and

- (f) the financial arrangements, such as the calculation and payment of the mediator's fees and expenses in accordance with Article 8.

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. Subject to Article 4 paragraph 1 (b), 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. Either Viet Nam, the EU or a Member State of the European Union, when acting as a party to a mediation procedure, may make publicly available mutually agreed solutions, subject to the redaction of any information designated as confidential or protected.

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 endeavour to 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 adjudicate 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. Subject to any agreement pursuant to Article 4.1(d), the mediation mechanism is without prejudice to the rights and obligations of the Parties and the disputing parties under the provisions on Resolution of Investment Disputes and 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 the Members of the Tribunal under Article 12(16) of the Section 3 [Resolution of Investment Disputes].

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 Members of the Tribunal or a Member of the Appeal Tribunal established pursuant to Section 3 (Resolution of Investment Disputes);

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

"candidate" means an individual who is under consideration for selection as a Member of the Tribunal or a Member of the 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.

Article 2 Responsibilities to the process

Every candidate and member shall avoid impropriety and the appearance of impropriety, shall be independent and impartial and shall avoid direct and indirect conflicts of interest.

Article 3 Disclosure obligations

1. Prior to their appointment, candidates shall disclose to the Parties 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. 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.

3. Member 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. The member shall disclose such interests, relationships or matters by informing the disputing parties.³³

Article 4

Duties of Members

1. Members 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 ruling 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 discuss any aspect of the subject matter of the proceedings with a disputing party or the disputing parties in the absence of the other members of the division of the Tribunal or Appeal Tribunal.

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, 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 as a member 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 his or her impartiality or that might reasonably create an appearance of impropriety or bias.³⁴

³³ For greater certainty, Article 3 paragraph 1 does not extend to information which is already in the public domain or was known, or should have reasonably been known, by all disputing parties.

³⁴ For greater certainty, the fact that a member receives an income from a government or has a family relationship with a person who receives an income from the government shall not in itself be considered to be inconsistent with paragraph 2 and 5.

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 3 [Resolution of Investment Disputes].
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.

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.

ANNEX III

1. Notwithstanding paragraph 1 of Article 8 (Other claims), an investor of the EU may not submit to the Tribunal under Section 3 a claim that Viet Nam has breached a provision under Article 1.1 (Scope) if the investor has submitted a claim alleging a breach of the same provision under Article 1.1 (Scope) in proceedings before a court or administrative tribunal of Viet Nam or any international arbitration.³⁵

2. Notwithstanding paragraphs 2 and 3 of Article 8 (Other claims), in the case that Viet Nam is the respondent, an investor of the EU may not submit a claim to the Tribunal under Section 3 alleging a measure to be inconsistent with the provisions referred to in Article 1(1) (Scope) if any person who directly or indirectly controls or is directly or indirectly controlled by the investor (hereafter referred to as related person) has submitted a claim to the Tribunal or any other domestic or international court or tribunal alleging a breach of the same provision under Article 1.1 (Scope), with respect to the same investment and:

- (i) the claim of that related person was addressed by an award, judgement, decision or other settlement; or
- (ii) the claim of that related person is pending and that person has not withdrawn such pending claim.

3. For greater certainty, claims that do not fall into the scope of paragraph 1 or 2 shall be subject to the provisions of Article 8 (Other claims).

³⁵ The Parties understand that the fact that an investor has submitted a claim that Viet Nam has breached a provision under Article 1.1 (Scope) in proceedings before a court or administrative tribunal of Viet Nam or any international arbitration with respect to one of its investments does not prevent the same investor from submitting a claim alleging a breach of the same provision under Article 1.1 (Scope) to the Tribunal under Section 3 with respect to its other investments where such other investment is allegedly affected by the same measure.

ANNEX IV

Working Procedures for the Appeal Tribunal

1. The Working Procedures of the Appeal Tribunal drawn up in accordance with Article 13 (10) of this Section shall, among other relevant aspects, include and address:

- (a) Practical arrangements relating to the deliberations of the divisions of the Appeal Tribunal and to the communication between the Members of the Appeal Tribunal;
- (b) Arrangements for the service of documents and of supporting documentation, including rules on the correction of clerical errors in such documents;
- (c) Procedural aspects relating to the temporary suspension of proceedings in the event of death, resignation, incapacity or removal of a Member from a division or from the Appeal Tribunal;
- (d) Modalities for the rectification of clerical errors in decisions of the divisions of the Appeal Tribunal;
- (e) The joinder of two or more appeals relating to the same provisional award;
- (f) The language of the appeal procedure which shall in principle be conducted in the same language as the proceedings before the Tribunal which has rendered the provisional award subject to appeal.

2. The Working Procedures may also include guiding principles with regard to the following aspects which may be subsequently addressed through procedural orders of the divisions of the Appeal Tribunal:

- (a) Indicative timelines and the sequencing of submissions to and hearings of the divisions of the Appeal Tribunal;
- (b) Logistical aspects relating the conduct of the proceedings, such as to the places of deliberation and of the hearings of divisions and the modalities of representation of the disputing parties;
- (c) Preliminary procedural consultations and possible pre-hearing conferences between a division and the disputing parties.