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> Chapter 17: Investment – Text of the 2023 Canada - Ukraine Free Trade Agreement

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**i** The 2017 CUFTA will remain in force until entry into force of the 2023 modernized agreement. Until such time, please refer to the [2017 CUFTA text](#) for information on the existing trade agreement between Canada and Ukraine.

## Section A – Definitions

### Article 17.1: Definitions

For the purpose of this Chapter:

**algorithm** means a defined sequence of steps taken to solve a problem or obtain a result;

**claimant** means an investor of a Party that makes a claim under Article 17.23 (Submission of a Claim to Arbitration);

**confidential information** means confidential business information or

information that is privileged or otherwise protected from disclosure under the law of a Party;

**covered investment** means, with respect to a Party, an investment:

- (a) in its territory;
- (b) made in accordance with the applicable domestic law of the Party at the time the investment is made;
- (c) directly or indirectly owned or controlled by an investor of the other Party; and
- (d) existing on the date of entry into force of this Agreement, or made or acquired thereafter;

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

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

**enterprise** means an enterprise as defined in Article 1.5 (Definitions of General Application) and a branch of an enterprise;

**existing** means in effect on the date of entry into force of this Agreement;

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

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

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

**intellectual property rights** means copyright and related rights, trademark rights, rights in geographical indications, rights in industrial designs, patent rights, rights in layout designs of integrated circuits, rights in relation to protection of undisclosed information, and plant breeders' rights;

**investment** means:

(a) any of the following:

(i) an enterprise;

(ii) a share, stock, or other form of equity participation in an enterprise;

(iii) a bond, debenture, or other debt instrument of an enterprise;

(iv) a loan to an enterprise;

(v) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;

(vi) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution;

(vii) an interest arising from the commitment of capital or other resources in the territory of a Party to economic activity in that territory, such as under:

(A) a contract involving the presence of an investor's property in the territory of the Party, including a turnkey or construction contract, or a concession; or

(B) a contract under which remuneration depends substantially on the production, revenues, or profits of an

enterprise;

(viii) intellectual property rights; and

(ix) any other tangible or intangible, moveable or immovable, property and related property rights acquired in the expectation of or used for the purpose of economic benefit or other business purpose;

(b) in each case, shall involve the commitment of capital or other resources, the expectation of gain or profit, contribution to the host Party's economy, a certain duration, or the assumption of risk <sup>1</sup>; and

(c) for the purpose of this definition, investment does not mean:

(i) a claim to money that arises solely from:

(A) a commercial contract for the sale of a good or service by a national or enterprise in the territory of a Party to an enterprise in the territory of the other Party; or

(B) the extension of credit in connection with a commercial transaction, such as trade financing;

(ii) an order or judgment in a judicial or administrative action; or

(iii) any other claim to money that does not involve the kinds of interests set out in subparagraphs (a)(i) through (a)(ix);

**investor of a Party** means a national or an enterprise of a Party that seeks to make, is making, or has made an investment. For the purpose of this definition:

**enterprise of a Party** means:

(a) an enterprise that is constituted or organized under the law of

that Party and that has substantial business activities in the territory of that Party. A determination of whether an enterprise has substantial business activities in the territory of a Party requires a case-by-case, fact-based inquiry; or

(b) an enterprise that is constituted or organised under the law of that Party, and is directly or indirectly owned or controlled by a national of that Party or by an enterprise mentioned under subparagraph (a);

**national** means a national as defined in Article 1.5 (Definitions of General Application), except that a natural person who is a dual citizen of Canada and Ukraine shall be deemed to be exclusively a national of the Party of his or her dominant and effective nationality;

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

**non-disputing Party** means a Party that is not a disputing party to an investment dispute;

**respondent Party** means a Party against which a claim is made under Article 17.23 (Submission of a Claim to Arbitration);

**third party funding** means any funding or other equivalent support provided by a person who is not a disputing party in order to finance part or all of the cost of the proceedings including through a donation or grant, or in return for remuneration dependent on the outcome of the dispute;

**Tribunal** means an arbitration tribunal established under Section D (Investor-State Dispute Settlement) or Section E (Expedited Arbitration);

**UNCITRAL Arbitration Rules** means the arbitration rules of the United Nations Commission on International Trade Law; and

**UNCITRAL Transparency Rules** means the *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, done at New York on 10 December 2014.

## Section B – Investment Protections

### Article 17.2: Scope

1. This Chapter applies to measures adopted or maintained by a Party relating to:

- (a) an investor of the other Party;
- (b) a covered investment; and
- (c) with respect to Articles 17.5 (Non-Derogation), 17.12 (Performance Requirements), and 17.15 (Responsible Business Conduct), an investment in its territory.

2. A Party's obligations under this Chapter apply to measures adopted or maintained by:

- (a) the central, regional, or other governments of that Party; and
- (b) any person, including a state enterprise or any other body, when it exercises any governmental authority delegated to it by central, regional, or other governments of that Party.

3. This Chapter does not bind a Party in relation to an act or fact that took place or a situation that ceased to exist before the date of entry into force of this Agreement for that Party.

## **Article 17.3: Relation to Other Chapters**

1. In the event of any inconsistency between this Chapter and any other Chapter of this Agreement, the other Chapter shall prevail to the extent of the inconsistency.
2. A requirement of a Party that a service supplier of another Party post a bond or other form of financial security as a condition for the cross-border supply of a service does not, in and of itself, make this Chapter applicable to measures adopted or maintained by the Party relating to such cross-border supply of the service. This Chapter applies to measures adopted or maintained by the Party relating to the posted bond or financial security to the extent that the bond or financial security is a covered investment.
3. This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter 20 (Financial Services).
4. Article 18.5 (Market Access) <sup>2</sup> is incorporated into and made part of this Chapter and applies to measures adopted or maintained by a Party relating to the supply of a service in its territory by a covered investment.

## **Article 17.4: Right to Regulate**

The Parties reaffirm the right of each Party to regulate within its territory to achieve legitimate policy objectives, such as with respect to: the protection of the environment and addressing climate change; national security and territorial integrity; the enforcement of domestic law; social or consumer protection; or the promotion and protection of health, safety, rights of Indigenous peoples, gender equality, or cultural diversity.

## **Article 17.5: Non-Derogation**

The Parties recognize that it is not appropriate to encourage investment by relaxing domestic measures relating to health, safety, the environment, other regulatory objectives, or the rights of Indigenous peoples. Accordingly, a Party shall not relax, waive, or otherwise derogate from, or offer to relax, waive, or otherwise derogate from, such measures in order to encourage the establishment, acquisition, expansion, or management of the investment of an investor in its territory. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding the encouragement.

## **Article 17.6: National Treatment**

1. Each Party shall accord to an investor of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory.
2. Each Party shall accord to a covered investment treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory.
3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a government other than at the central level, treatment accorded, in like circumstances, by that government to investors, and to investments of investors, of the Party of which it forms a part.



4. Whether treatment accorded by a Party under paragraphs 1 and 2 is accorded in like circumstances depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public policy objectives.

5. Paragraphs 1 and 2 prohibit discrimination based on nationality. A difference in treatment accorded to an investor or covered investment and a Party's own investors or investments of its own investors does not, in and of itself, establish discrimination based on nationality.

### **Article 17.7: Most-Favoured-Nation Treatment**

1. Each Party shall accord to an investor of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory.

2. Each Party shall accord to a covered investment treatment no less favourable than that it accords, in like circumstances, to investments of investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory.

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a government other than at the central level, treatment accorded, in like circumstances, by that government to investors, and to investments of investors, of a non-Party.

4. Whether treatment accorded by a Party under paragraphs 1 and 2 is accorded in like circumstances depends on the totality of the

circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public policy objectives.

5. Paragraphs 1 and 2 prohibit discrimination based on nationality. A difference in treatment accorded to an investor or covered investment and a non-Party's investors or investments of a non-Party's investors does not, in and of itself, establish discrimination based on nationality.

6. The treatment referred to in paragraphs 1 and 2 does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements.

7. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute treatment, and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations.

## **Article 17.8: Treatment in Case of Armed Conflict, Civil Strife, or Natural Disaster**

1. Notwithstanding Article 17.18(5)(b) (Non-Conforming Measures), each Party shall accord to an investor of the other Party and to a covered investment treatment no less favourable than it accords to its own investors or investments, or to the investors or investments of a non-Party, whichever is more favourable to the investors or investments concerned, with respect to measures it adopts or maintains relating to restitution, indemnification, compensation, or other settlement for losses incurred by investments in its territory as a result of armed conflict, civil strife, or a natural disaster.

2. Notwithstanding paragraph 1, if an investor of a Party, in a situation referred to in paragraph 1, suffers a loss in the territory of the other Party resulting from:

- (a) requisitioning of its covered investment or part thereof by the latter's forces or authorities; or
- (b) destruction of its covered investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation;

the latter Party shall provide the investor restitution, compensation, or both, as appropriate, for that loss.

3. Paragraph 1 does not apply to an existing subsidy or grant provided by a Party, including a government supported loan, a guarantee, or insurance, that would be inconsistent with Article 17.6 (National Treatment) but for Article 17.18(5)(b) (Non-Conforming Measures).

## **Article 17.9: Minimum Standard of Treatment**

1. Each Party shall accord in its territory to a covered investment of the other Party and to an investor with respect to their covered investment treatment in accordance with the customary international law minimum standard of treatment of aliens. A Party breaches this obligation only if a measure constitutes:

- (a) denial of justice in criminal, civil, or administrative proceedings;
- (b) fundamental breach of due process in judicial or administrative proceedings;
- (c) manifest arbitrariness <sup>3</sup>;
- (d) targeted discrimination on manifestly wrongful grounds such as

gender, race, or religious beliefs;

(e) abusive treatment of investors, such as physical coercion, duress, and harassment; or

(f) a failure to provide full protection and security. <sup>4</sup>

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

3. The fact that a measure breaches domestic law does not establish a breach of this Article.

### **Article 17.10: Expropriation**

1. A Party shall not expropriate a covered investment either directly or indirectly, except:

(a) for a public purpose <sup>5</sup>;

(b) in accordance with due process of law;

(c) in a non-discriminatory manner; and

(d) on payment of compensation in accordance with paragraph 5.

2. A direct expropriation under paragraph 1 occurs only when a covered investment is taken by a Party through formal transfer of title or outright seizure.

3. An indirect expropriation under paragraph 1 may occur when a measure or a series of measures of a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure. A non-discriminatory measure of a Party that is adopted and maintained in good faith to protect legitimate public welfare objectives, such as health,

safety, or the environment, does not constitute an indirect expropriation, even if it has an effect equivalent to direct expropriation. The determination of whether a measure or a series of measures of a Party has an effect equivalent to direct expropriation requires a case-by-case, fact-based inquiry that shall consider:

- (a) the economic impact of the measure or the series of measures, although the sole fact that a measure or a series of measures of a Party has an adverse effect on the economic value of a covered investment does not establish that an indirect expropriation has occurred;
- (b) the duration of the measure or the series of measures of a Party;
- (c) the extent to which the measure or the series of measures interferes with distinct, reasonable investment-backed expectations; and
- (d) the character of the measure or the series of measures.

4. A measure of a Party cannot violate this Article unless it expropriates a covered investment that is a tangible or intangible property right under the domestic law of the Party in which the investment was made. This determination requires the consideration of relevant factors, such as the nature and scope of the tangible or intangible property right under the applicable domestic law of the Party in which the investment was made.

5. The compensation referred to in paragraph 1 shall:

- (a) be paid without delay in a freely convertible currency;
- (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (the "date of expropriation"). Appropriate valuation criteria include going

concern value, asset value including the declared tax value of tangible property, and other criteria that may be appropriate or relevant under the circumstances to determine fair market value;

(c) not reflect any change in value occurring because the intended expropriation had become known earlier;

(d) include interest at a commercially reasonable rate for that currency from the date of the expropriation until the date of payment; and

(e) be freely transferable.

6. A measure of a Party that would otherwise constitute an expropriation of an intellectual property right under this Article does not constitute a breach of this Article if it is consistent with the Chapter 12 (Intellectual Property) and the TRIPS Agreement and any waiver or amendment of the TRIPS Agreement accepted by that Party.

## **Article 17.11: Transfer of Funds**

1. Each Party shall permit all transfers of funds relating to a covered investment to be made freely, and without delay, into and out of its territory. Those transfers include:

(a) contributions to capital;

(b) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance, and other fees;

(c) proceeds from the sale or liquidation of the whole or part of the covered investment;

(d) payments made under a contract entered into by the investor or the covered investment, including payments made pursuant to a

loan agreement;

(e) payments of funds made under Articles 17.8 (Treatment in Case of Armed Conflict, Civil Strife, or Natural Disaster) and 17.10 (Expropriation);

(f) earnings and other remuneration of foreign personnel working in connection with an investment; and

(g) payments arising out of a dispute.

2. Each Party shall permit transfers of funds relating to a covered investment to be made in a freely convertible currency at the market rate of exchange in effect at the time of transfer.

3. Each Party shall permit transfers of returns in kind relating to a covered investment to be made as authorized or specified in a written agreement between the Party and an investor of another Party or a covered investment.

4. A Party shall not require its investors to transfer, or penalize one of its investors for failing to transfer, the income, earnings, profits, or other amounts derived from, or attributable to, an investment in the territory of the other Party.

5. Notwithstanding paragraphs 1 through 4 of this Article, a Party may prevent or limit a transfer through the equitable, non-discriminatory, and good faith application of its domestic law relating to:

(a) bankruptcy, insolvency, or the protection of the rights of a creditor;

(b) issuing, trading, or dealing in securities;

(c) criminal or penal offences;

- (d) financial reporting or record keeping of transfers if necessary to assist law enforcement or financial regulatory authorities;
- (e) ensuring compliance with an order or judgment in judicial or administrative proceedings; or
- (f) social security, public retirement, or compulsory savings programmes.

6. Notwithstanding paragraph 3, a Party may restrict transfers of returns in kind in circumstances in which it could otherwise restrict those transfers under the WTO Agreement or as set out in paragraph 5.

## **Article 17.12: Performance Requirements**

1. A Party shall not, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory, impose or enforce a requirement, or enforce a commitment or undertaking:

- (a) to export a given level or percentage of a good or service;
- (b) to achieve a given level or percentage of domestic content;
- (c) to purchase, use, or accord a preference to a good produced or service provided in its territory, or to purchase a good or service from a person in its territory;
- (d) to relate the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with that investment;
- (e) to restrict sales of a good or service in its territory that the investment produces or provides by relating those sales to the volume or value of its exports or foreign exchange earnings;



(f) to transfer technology, a production process, source code of software, or other proprietary knowledge to a person in its territory;

(g)

(i) to purchase, use, or accord a preference to, in its territory, technology of the Party or of a person of the Party <sup>6</sup>, or

(ii) that prevents the purchase or use of, or the according of a preference to, in its territory, a technology;

(h) to supply exclusively from the territory of the Party a good that the investment produces, or a service it provides, to a specific regional market or to the world market.

2. A Party shall not condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory, on compliance with a requirement:

(a) to achieve a given level or percentage of domestic content;

(b) to purchase, use, or accord a preference to a good produced in its territory, or to purchase a good from a producer in its territory;

(c) to relate the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with that investment; or

(d) to restrict sales of a good or service in its territory that the investment produces or provides by relating those sales to the volume or value of its exports or foreign exchange earnings.

3. The provisions of:

(a) paragraph 2 do not prevent a Party from conditioning the receipt

or continued receipt of an advantage, in connection with any investments, 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;

(b) paragraphs 1(a), 1(b), 1(c), 2(a), and 2(b) do not apply to a qualification requirement for a good or service with respect to export promotion and foreign aid programs;

(c) paragraphs 1(b), 1(c), 1(f), 1(g), 1(h), 2(a), and 2(b) do not apply to procurement by a Party;

(d) paragraphs 2(a) and 2(b) do not apply to a requirement imposed by an importing Party relating to the content of a good necessary to qualify for a preferential tariff or preferential quota;

(e) paragraphs 1(f) and 1(g) do not apply:

(i) if a Party authorizes use of an intellectual property right in accordance with Article 31 <sup>7</sup> of the TRIPS Agreement, or to a measure requiring the disclosure of proprietary information that falls within the scope of, and is consistent with, Article 39 of the TRIPS Agreement; or

(ii) if the requirement is imposed or the requirement, commitment, or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy an alleged violation of domestic competition law;

(f) paragraphs 1(b), 1(c), 1(f), 1(g), 2(a), and 2(b) shall not prevent a Party from adopting or maintaining a measure to achieve a legitimate public policy objective, provided that the measure:

(i) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and

(ii) does not impose restrictions greater than are required to achieve the objective;

(g) paragraph 1(f) do not preclude a regulatory body or judicial authority of a Party from requiring a person of the other Party to preserve and make available the source code of software, or an algorithm expressed in that source code, to the regulatory body for a specific investigation, inspection, examination, enforcement action, or judicial proceeding <sup>8</sup>, subject to safeguards against unauthorized disclosure.

### **Article 17.13: Senior Management and Boards of Directors**

1. A Party shall not require that an enterprise of that Party that is a covered investment appoint to a senior management position an individual of any particular nationality.

2. A Party may require that up to a majority of the board of directors, or a committee thereof, of an enterprise of that Party that is a covered investment be of a particular nationality or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

3. A Party should encourage enterprises to consider greater diversity in senior management positions or on their board of directors, which may include a requirement to nominate women.

### **Article 17.14: Subrogation**

1. If a Party or an agency of a Party makes a payment to one of its investors under a guarantee or a contract of insurance, or other form of indemnity it has entered into in respect of a covered investment:

(a) the other Party in whose territory the covered investment was made shall recognize the validity of the subrogation or transfer of any rights the investor would have possessed with respect to the covered investment but for the subrogation or transfer; and

(b) the investor shall be precluded from pursuing these rights to the extent of the subrogation or transfer, unless a Party or an agency of a Party authorizes the investor to act on its behalf.

## **Article 17.15: Responsible Business Conduct**

1. The Parties reaffirm that investors and their investments shall comply with domestic laws and regulations of the host state, including laws and regulations on human rights, the rights of Indigenous peoples, gender equality, environmental protection, labour, anti-corruption, and taxation.

2. Each Party reaffirms the importance of internationally recognized standards, guidelines, and principles of responsible business conduct that have been endorsed or are supported by that Party, including the *OECD Guidelines for Multinational Enterprises* and the *United Nations Guiding Principles on Business and Human Rights*, and shall encourage investors and enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate these standards, guidelines, and principles into their business practices and internal policies. These standards, guidelines, and principles address areas such as labour, environment, gender equality, human rights, community relations, and anti-corruption.

3. Each Party should encourage investors or enterprises operating within its territory to undertake and maintain meaningful engagement and dialogue, in accordance with international responsible business conduct standards, guidelines, and principles that have been endorsed or are supported by that Party, with Indigenous peoples and local communities.

### **Article 17.16: Denial of Benefits**

1. A Party may, within a reasonable time and no later than its principal submission on the merits, such as the counter-memorial, in an arbitration under this Chapter, deny the benefits of this Chapter to an investor of the other Party that is an enterprise of that Party and to investments of that investor if:

- (a) an investor of a non-Party owns or controls the enterprise; and
- (b) the denying Party adopts or maintains a measure with respect to the non-Party or investors of the non-Party that prohibits transactions with the enterprise or would be violated or circumvented if the benefits of this Agreement were accorded to the enterprise or to its investment.

### **Article 17.17: Special Formalities and Information Requirements**

1. Article 17.6 (National Treatment) shall not be construed to prevent a Party from adopting or maintaining any measure that prescribes special formalities in connection with covered investments, such as a requirement that investors be residents of the Party, that an investor register or otherwise notify the appropriate authorities of its covered investment, or that covered investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not materially impair the protection afforded by a Party to investors of

another Party and covered investments pursuant to this Chapter.

2. Notwithstanding Articles 17.6 (National Treatment) and 17.7 (Most-Favoured-Nation Treatment), a Party may require an investor of another Party or a covered investment to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect such information that is confidential from any disclosure that would prejudice the competitive position of the investor or the covered investment. This paragraph shall not be construed to prevent a Party from obtaining or disclosing information in connection with the equitable and good faith application of its law.

## **Section C – Reservations, Exceptions, Exclusions**

### **Article 17.18: Non-Conforming Measures**

1. Articles 17.6 (National Treatment), 17.7 (Most-Favoured-Nation Treatment), 17.12 (Performance Requirements), and 17.13 (Senior Management and Boards of Directors) shall not apply to:

- (a) any existing non-conforming measure maintained in the territory of a Party at:
  - (i) the central level of government, as set out by that Party in its Schedule to Annex I;
  - (ii) the regional level of government, as set out by that Party in its Schedule to Annex I; or
  - (iii) the level of government other than the central or regional levels;

(b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or

(c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 17.6 (National Treatment), 17.7 (Most-Favoured-Nation Treatment), 17.12 (Performance Requirements), and 17.13 (Senior Management and Boards of Directors).

2. Articles 17.6 (National Treatment), 17.7 (Most-Favoured-Nation Treatment), 17.12 (Performance Requirements), and 17.13 (Senior Management and Boards of Directors) shall not apply to a measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II (Reservations for Future Measures).

3. A Party shall not, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to Annex II (Reservations for Future Measures), require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

4. Articles 17.6 (National Treatment) and 17.7 (Most-Favoured-Nation Treatment) do not apply to a measure that relates to the protection of intellectual property rights <sup>9</sup> that is consistent with the TRIPS agreement, including any amendment of or waiver to the TRIPS Agreement that is in force for both Parties.

5. Articles 17.6 (National Treatment), 17.7 (Most-Favoured-Nation Treatment), and 17.13 (Senior Management and Boards of Directors) do

not apply to:

- (a) procurement by a Party; or
- (b) a subsidy or grant provided by a Party, including a government-supported loan, a guarantee, or insurance.

## **Article 17.19: Exclusions**

Section D (Investor-State Dispute Settlement), Section E (Expedited Arbitration), and Chapter 28 (Dispute Settlement) do not apply to the matters set out in Annex 17-A (Exclusions from Dispute Settlement).

# **Section D – Investor-State Dispute Settlement**

## **Article 17.20: Scope and Purpose**

1. Without prejudice to the rights and obligations of the Parties under Chapter 28 (Dispute Settlement), the Parties establish in this Section a mechanism for the settlement of investment disputes.
2. Under this Section, an investor of a Party may submit a claim that the other Party has breached an obligation under Section B (Investment Protections), other than Articles 17.3(4) (Relation to Other Chapters), 17.5 (Non-Derogation), 17.12 (Performance Requirements), 17.13(3) (Senior Management and Boards of Directors), or 17.15 (Responsible Business Conduct).
3. For greater certainty, an investor may not submit a claim under this Section if the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an



abuse of process.

## **Article 17.21: Request for Consultations**

1. In the event of an investment dispute under this Agreement, an investor of a Party shall seek to resolve the dispute through consultations, which may include the use of non-binding, third party procedures, such as good offices, conciliation, or mediation.

2. An investor of a Party shall deliver to the other Party a written request for consultations, which shall specify:

(a) whether the investor intends to claim under Articles 17.23(1) or 17.23(2) (Submission of a Claim to Arbitration);

(b) the name and address of the investor and evidence to establish that the investor is an investor of the other Party;

(c) the investment at issue and evidence to establish that the investor owns or controls the investment, including, if the investment is an enterprise, the name, address, and place of incorporation of the enterprise;

(d) if the investor is an enterprise, the corporate structure up to, and information on, any natural person that has ultimate ownership or control of that investor;

(e) for each claim:

(i) the provision of this Agreement alleged to have been breached; and

(ii) the factual basis for the alleged breach, including the measure at issue; and

(f) the relief sought and the approximate amount of damages

claimed.

3. An investor of a Party may, when submitting a request for consultations, propose to hold the consultations by videoconference, telephone, or similar means of communication as appropriate. The other Party should give sympathetic consideration to that request, in particular if the investor is a micro, small, or medium-sized enterprise.

4. The request for consultations shall be submitted to the other Party under this Article no later than:

(a) three years from the date on which the investor or, as applicable, the enterprise referred to in Article 17.23(2) (Submission of a Claim to Arbitration), first acquired or should have first acquired knowledge of the alleged breach and knowledge that the investor or, as applicable, the enterprise, has incurred loss or damage by reason of, or arising out of, that breach; or

(b) if the investor or, as applicable, the enterprise, has initiated a claim or proceeding before an administrative tribunal or court under the law of a Party with respect to the measure at issue in the investor's request for consultations delivered pursuant to paragraph 2, two years after:

(i) the investor or, as applicable, the enterprise, ceases to pursue that claim; or

(ii) when that proceeding has otherwise ended;

provided that it is no later than seven years after the date on which the investor or, as applicable, the enterprise, first acquired or should have first acquired knowledge of the alleged breach and knowledge that the investor or, as applicable, the enterprise, has incurred loss or damage by

reason of, or arising out of, that breach.

5. Neither a continuing breach nor the occurrence of similar or related acts or omissions may renew or interrupt the periods set out in paragraphs 4(a) and 4(b).

6. Unless otherwise agreed, consultations shall be held within 90 days of the delivery of the request for consultations pursuant to paragraph 2.

7. Unless otherwise agreed, the place of consultations shall be the capital city of the other Party.

8. If the investor has not submitted a claim under Article 17.23 (Submission of a Claim to Arbitration) within one year of the delivery of the request for consultations, the investor is deemed to have withdrawn its request for consultations and shall not submit a claim under this Section with respect to the same measure. This period may be extended by agreement between the investor of a Party and the other Party.

## **Article 17.22: Mediation**

The disputing parties may at any time agree to have recourse to mediation. A respondent shall give sympathetic consideration to a request for mediation made by a micro, small, or medium-sized enterprise. Recourse to mediation is without prejudice to the legal position or rights of the disputing parties under this Section and is governed by the rules agreed to by the disputing parties, including any applicable rules for mediation adopted by the Joint Commission. If the disputing parties agree to have recourse to mediation, paragraphs 4, 5, and 8 of Article 17.21 (Request for Consultations) and all timelines pursuant to an arbitration under this section are suspended from the date on which the disputing parties agreed to have recourse to

mediation, and shall resume on the date on which either disputing party decides to terminate the mediation. A decision by a disputing party to terminate the mediation shall be transmitted by way of letter to the mediator and the other disputing party.

### **Article 17.23: Submission of a Claim to Arbitration**

1. An investor of a Party may make a claim that the other Party has breached an obligation in accordance with Article 17.20 (Scope and Purpose), and that the investor has incurred loss or damage by reason of, or arising out of, that breach, only if:

- (a) the investor has fulfilled the requirements of Article 17.21 (Request for Consultations);
- (b) 180 days have elapsed since the receipt by the other Party of a request for consultations under Article 17.21 (Request for Consultations);
- (c) the claim relates to measures identified in the investor's request for consultations under Article 17.21 (Request for Consultations);
- (d) the investor consents to dispute settlement in accordance with the procedures set out in this Agreement; and
- (e) the investor and, if the claim is for loss or damage to an interest in an enterprise of the other Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waives its right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedure, any proceeding with respect to the measure of the other Party that is alleged to be a breach referred to in Article 17.21(2) (Request for Consultations), except for a proceeding for injunctive,

declaratory, or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the other Party.

2. An investor of a Party, on behalf of an enterprise of the other Party that is a juridical person that the investor owns or controls directly or indirectly, may make a claim that the other Party has breached an obligation in accordance with Article 17.20 (Scope and Purpose), and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach, only if:

(a) the investor has fulfilled the requirements of Article 17.21 (Request for Consultations);

(b) 180 days have elapsed since the receipt by the other Party of a request for consultations under Article 17.21 (Request for Consultations);

(c) the claim relates to measures identified in the investor's request for consultations under Article 17.21 (Request for Consultations);

(d) the investor consents to dispute settlement in accordance with the procedures set out in this Agreement; and

(e) both the investor and the enterprise waive their right to initiate or continue before an administrative tribunal or court under the law of any Party, or other dispute settlement procedure, any proceeding with respect to the measure of the other Party that is alleged to be a breach referred to in Article 17.21(2) (Request for Consultations), except for a proceeding for injunctive, declaratory, or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the other Party.

3. A consent and waiver required by this Article shall be in writing, shall be delivered to the respondent Party, and shall be included in the submission of a claim to arbitration.
4. Notwithstanding paragraph 3, a waiver from the enterprise under paragraph 1(e) or 2(e) is not required if the other Party has deprived the investor of control of the enterprise.
5. If an investor of a Party makes a claim under paragraph 2 and the investor or a non-controlling investor in the enterprise makes a claim under paragraph 1 arising out of the same events or circumstances, and two or more of the claims are submitted to dispute settlement under this Article, the claims should be heard together by a Tribunal constituted under Article 17.30 (Consolidation), unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.
6. An investor of a Party may submit a claim to dispute settlement under:
  - (a) the ICSID Convention, provided that both Parties are parties to the ICSID Convention;
  - (b) the ICSID Additional Facility Rules, if only one Party is a party to the ICSID Convention;
  - (c) the UNCITRAL Arbitration Rules; or
  - (d) any other rules on agreement of the disputing parties.
7. Except to the extent modified by this Agreement, the arbitration shall be governed by the existing version of the arbitration rules applicable under paragraph 6, unless otherwise agreed by both disputing parties.
8. If the claimant proposes rules pursuant to paragraph 6(d), the respondent Party shall reply to the claimant's proposal within 45 days of receipt of the proposal. If the disputing parties have not agreed on those

rules within 60 days of receipt, the claimant may submit a claim under the rules provided for in paragraph 6(a), 6(b), or 6(c).

9. An investor of a Party may, when submitting a claim under this Article, propose that a sole member of a Tribunal should hear the claim. The respondent Party may give sympathetic consideration to that request, in particular if the investor is a micro, small, or medium-sized enterprise or the compensation or damages claimed are relatively low.

10. A claim is submitted to arbitration under this Article when:

(a) the request for arbitration under Article 36(1) of the ICSID Convention is received by the Secretary-General of ICSID;

(b) the request for arbitration under Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretariat of ICSID;  
or

(c) the notice of arbitration under Article 3 of the UNCITRAL Arbitration Rules is received by the respondent Party.

## **Article 17.24: Consent to Arbitration**

1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with the provisions of this Agreement, including the requirements of Articles 17.21 (Request for Consultations) and 17.23 (Submission of a Claim to Arbitration).

2. The consent under paragraph 1 and the submission of a claim to arbitration under Article 17.23 (Submission of a Claim to Arbitration) shall satisfy the requirement of:

(a) Chapter II of the ICSID Convention and the ICSID Additional Facility Rules for written consent of the parties to the dispute; and

(b) Article II of the New York Convention for an "agreement in writing".

## **Article 17.25: Discontinuance**

If the claimant fails to take a step in the proceeding within 180 days of the submission of a claim to arbitration under Article 17.23 (Submission of a Claim to Arbitration), or such other time period as agreed to by the disputing parties, the claimant is deemed to have withdrawn its claim and to have discontinued the proceeding. The Tribunal, if constituted, shall, at the request of the respondent Party, and after notice to the disputing parties, in an order take note of the discontinuance. After the order has been rendered the authority of the Tribunal shall cease.

## **Article 17. 26: Arbitrators**

1. Except in respect of a Tribunal established under Article 17.30 (Consolidation), and unless the disputing parties agree otherwise, the Tribunal shall be composed of three arbitrators. Each disputing party shall appoint one arbitrator, and the third arbitrator, who will be the presiding arbitrator, shall be appointed by agreement of, or pursuant to an appointment process agreed to by, the disputing parties. The disputing parties are encouraged to consider greater diversity in arbitrator appointments, including through the appointment of women.
2. Arbitrators should have expertise or experience in public international law, international investment law, international trade law, or dispute resolution arising under international investment or international trade agreements.
3. Arbitrators shall be independent of, and not be affiliated with or take instructions from, a Party or the disputing investor.



4. If the disputing parties do not agree on the remuneration of the arbitrators before the Tribunal is constituted, the prevailing ICSID rate for arbitrators shall apply.

5. If a Tribunal, other than a Tribunal established under Article 17.30 (Consolidation), has not been constituted within 90 days of the submission of a claim to arbitration, a disputing party may ask the Secretary-General of ICSID to appoint the arbitrator or arbitrators not yet appointed. In accordance with this Article, the Secretary-General of ICSID shall make the appointment at his or her own discretion and, to the extent practicable, shall make this appointment in consultation with the disputing parties. The Secretary-General of ICSID shall not appoint as presiding arbitrator a national of a Party.

6. Arbitrators shall abide by the Arbitrator Code of Conduct for Investor-State Dispute Settlement set out in Annex 17-B.

### **Article 17.27: Agreement to Appointment of Arbitrators by ICSID**

1. For the purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator based on a ground other than nationality:

(a) the respondent Party agrees to the appointment of each individual member of a Tribunal established under the ICSID Convention or the ICSID Additional Facility Rules;

(b) an investor of a Party referred to in Article 17.23(1) (Submission of a Claim to Arbitration) may submit a claim to arbitration or continue a claim under the ICSID Convention or the ICSID Additional Facility Rules only if the investor agrees in writing to the

appointment of each member of the Tribunal; and

(c) an investor of a Party referred to in Article 17.23(2) (Submission of a Claim to Arbitration) may submit a claim to arbitration or continue a claim under the ICSID Convention or the ICSID Additional Facility Rules only if the investor and the enterprise agree in writing to the appointment of each member of the Tribunal.

## **Article 17.28: Applicable Law and Interpretation**

1. A Tribunal constituted under this Section shall apply this Agreement as interpreted in accordance with the *Vienna Convention on the Law of Treaties*, done at Vienna on 23 May 1969, and other rules and principles of international law applicable between the Parties.

2. If serious concerns arise as regards matters of interpretation, the Committee on Services and Investment may recommend to the Joint Commission to adopt an interpretation of this Agreement. An interpretation adopted by the Joint Commission shall be binding on a Tribunal established under this Section. The Joint Commission may decide that an interpretation shall have binding effect from a specific date.

3. A Tribunal has no jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party. In determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party, and any meaning given to domestic law by the Tribunal is not binding on the courts or authorities of that Party.

4. If an investor of a Party submits a claim to arbitration under Article 17.23 (Submission of a Claim to Arbitration), including a claim that a Party breached Article 17.9 (Minimum Standard of Treatment), the investor has the burden of proving all elements of its claim, consistent with the general principles of international law applicable to international arbitration.

## **Article 17.29: Preliminary Objections**

1. Without prejudice to a Tribunal's authority to address other questions as a preliminary objection, a Tribunal shall address and decide as a preliminary question an objection by the respondent Party that, as a matter of law, a claim submitted is not a claim for which an award in favour of the investor may be made under this Agreement, including that a dispute is not within the competence of the Tribunal, or that a claim is manifestly without legal merit.

2. An objection under paragraph 1 shall be submitted to the Tribunal within 60 days of constitution of the Tribunal. The Tribunal shall suspend any proceeding on the merits and issue a decision or award on the objection, stating the grounds therefor, within 180 days of the objection. However, if a disputing party requests a hearing, the Tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a disputing party requests a hearing, a Tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

3. When deciding an objection under paragraph 1, the Tribunal shall assume to be true the factual allegations in the claim to arbitration under Article 17.23 (Submission of a Claim to Arbitration), or any amendment to that claim. The Tribunal may also consider relevant facts not in dispute.

4. Whether or not a respondent Party raises an objection under paragraph 1 concerning the competence of the Tribunal, the respondent Party shall have the right to raise, and the Tribunal the authority to address and decide, a question pertaining to its competence in the course of the proceedings.

5. The provisions on costs in Article 17.36 (Final Award) shall apply to decisions or awards issued under this Article.

### **Article 17.30: Consolidation**

1. If two or more claims have been submitted separately to arbitration under Article 17.23 (Submission of a Claim to Arbitration) and the claims have a question of law or fact in common and arise out of the same events or circumstances, a disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 2 through 10.

2. A disputing party that seeks a consolidation order under this Article shall deliver, in writing, a request to the Secretary-General of ICSID to establish a Tribunal and shall specify in the request:

- (a) the name of the respondent Party, or the investors, against which the order is sought;
- (b) the nature of the order sought; and
- (c) the grounds for the order sought.

3. The disputing party shall deliver a copy of the request to the respondent Party, or the investors, against which the order is sought.

4. Unless the disputing parties sought to be covered by the order agree

to a different appointment process, the Secretary-General of ICSID shall, within 60 days of receiving the request, establish a Tribunal composed of three arbitrators. The Secretary-General of ICSID shall appoint one member who is a national of the respondent Party, one member who is a national of the Party of the investors that submitted the claims, and a presiding arbitrator who is not a national of a Party.

5. A Tribunal established under this Article shall be established under the UNCITRAL Arbitration Rules and shall conduct its proceedings in accordance with the UNCITRAL Arbitration Rules, except as modified by this Section.

6. If a Tribunal established under this Article is satisfied that the claims submitted to arbitration under Article 17.23 (Submission of a Claim to Arbitration) have a question of law or fact in common, the Tribunal may, in the interest of fair and efficient resolution of the claims and after hearing the disputing parties, by order:

- (a) assume jurisdiction over, and hear and determine together, all or part of the claims; or
- (b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in resolving the other claims.

7. If a Tribunal has been established under this Article, an investor that has submitted a claim to arbitration under Article 17.23 (Submission of a Claim to Arbitration) and that has not been named in a request made under paragraph 2 may make a written request to the Tribunal that it be included in an order made under paragraph 4. The request shall specify:

- (a) the name and address of the investor;

(b) the nature of the order sought; and

(c) the grounds on which the order is sought.

8. An investor referred to in paragraph 7 shall deliver a copy of its request to the disputing parties named in a request under paragraph 1.

9. A Tribunal established under Article 17.23 (Submission of a Claim to Arbitration) does not have jurisdiction to decide a claim, or a part of a claim, over which a Tribunal established under this Article has assumed jurisdiction.

10. On application of a disputing party, a Tribunal established under this Article, pending its decision under paragraph 6, may order that the proceedings of a Tribunal established under Article 17.23 (Submission of a Claim to Arbitration) be stayed unless the latter Tribunal has already adjourned its proceedings.

### **Article 17.31: Seat of Arbitration**

The disputing parties may agree on the seat of arbitration under the arbitration rules applicable under Articles 17.23 (Submission of a Claim to Arbitration) or 17.30 (Consolidation). If the disputing parties fail to agree, the Tribunal shall determine the seat of arbitration in accordance with the applicable arbitration rules, provided that the legal seat of arbitration shall be in the territory of a State that is a party to the New York Convention.

### **Article 17.32: Transparency of Proceedings**

1. The UNCITRAL Transparency Rules, as modified by this Agreement, shall apply in connection with proceedings under this Section.

2. The agreement to mediate, the notice of intent to challenge a member

of the Tribunal, the decision on challenge to a member of the Tribunal, and the request for consolidation shall be included in the list of documents to be made available to the public under Article 3(1) of the UNCITRAL Transparency Rules.

3. Exhibits shall be included in the list of documents to be made available to the public under Article 3(2) of the UNCITRAL Transparency Rules.

4. Prior to the constitution of the Tribunal, the respondent Party shall make publicly available in a timely manner relevant documents pursuant to paragraph 2, subject to the redaction of confidential or protected information. That documentation may be made publicly available by communication to the repository referred to in paragraph 9.

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

6. A Party may disclose to government officials and officials of a government other than at the federal level, if applicable, unredacted documents that it considers necessary to disclose in the course of proceedings under this Section. However, that Party shall ensure that those persons protect the confidential information in those documents as directed by the Tribunal.

7. Hearings shall be open to the public. The Tribunal shall determine, in consultation with the disputing parties, the appropriate logistical arrangements to facilitate public access to the hearings. If the Tribunal determines that there is a need to protect confidential or protected

information, it shall make the appropriate arrangements to hold in private that part of the hearing requiring that protection.

8. This Agreement does not require a respondent Party to withhold from the public information required to be disclosed by the respondent Party's law. To the extent that a Tribunal's confidentiality order designates information as confidential and a Party's law on access to information requires public access to that information, the Party's law on access to information prevails. The respondent Party should apply those laws in a manner sensitive to protecting from disclosure information that has been designated as confidential or protected information.

9. The administering authority to which a claim is submitted under this Section shall be the repository of information published pursuant to this Article.

### **Article 17.33: Participation of a Non-Disputing Party**

1. The UNCITRAL Transparency Rules shall apply with respect to the participation of a non-disputing Party in proceedings under this Section, except as modified by this Agreement.

2. The respondent Party shall deliver to the non-disputing Party:

(a) a claim submitted pursuant to Article 17.23 (Submission of a Claim to Arbitration), a request for consolidation, and any document that is appended to such documents;

(b) on request:

(i) a request for consultations;

(ii) pleadings, memorials, briefs, requests, and other submissions made to the Tribunal by a disputing party;



(iii) written submissions made to the Tribunal pursuant to Article 4 of the UNCITRAL Transparency Rules;

(iv) minutes or transcripts of hearings of the Tribunal, if available;

(v) orders, awards, and decisions of the Tribunal; and

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

3. The non-disputing Party receiving materials pursuant to paragraph 2 shall treat the information as if it were the respondent Party.

4. The Tribunal shall accept or, after consultation with the disputing parties, may invite, oral or written submissions from the non-disputing Party regarding the interpretation of this Agreement. The non-disputing Party may attend a hearing held under this Section.

5. The Tribunal shall not draw any inference from the absence of a submission pursuant to paragraph 4.

6. The Tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on a submission by the non-disputing Party.

### **Article 17.34: Expert Reports**

Without prejudice to the appointment of other kinds of experts if authorized by the applicable arbitration rules, the Tribunal may, at the request of a disputing party or, unless the disputing parties disapprove, on its own initiative, appoint one or more experts to report to it in writing on any factual issue, including the rights of Indigenous peoples or

scientific matters raised by a disputing party in a proceeding, subject to any terms and conditions agreed on by the disputing parties.

### **Article 17.35: Interim Measures of Protection**

1. A 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. A Tribunal shall not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 17.23 (Submission of a Claim to Arbitration). For the purposes of this paragraph, an order includes a recommendation.

2. At the request of a disputing party, the Tribunal may order the other disputing party to provide security for all or part of the costs, if there are reasonable grounds to believe that there is a risk the disputing party may not be able to honour a potential costs award against it. In considering that request, the Tribunal may take into account evidence of third party funding. If the security for costs is not posted in full within 30 days of the Tribunal's order, or within any other time period set by the Tribunal, the Tribunal shall so inform the disputing parties and may order the suspension or termination of the proceedings.

### **Article 17.36: Final Award**

1. If a Tribunal makes a final award against the respondent Party, in respect of its finding of liability, the Tribunal may award, separately or in combination, only:

- (a) monetary damages and any applicable interest; and

(b) restitution of property, in which case the award shall provide that the respondent Party may pay monetary damages and any applicable interest in lieu of restitution.

2. Subject to paragraph 1, if a claim is made under Article 17.23(2) (Submission of a Claim to Arbitration):

(a) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise;

(b) an award of restitution of property shall provide that restitution be made to the enterprise;

(c) an award of costs in favour of the investor shall provide that the sum be paid to the investor; and

(d) the award shall provide that it is made without prejudice to a right that a person, other than a person which has provided a waiver pursuant to Article 17.23 (Submission of a Claim to Arbitration), may have in monetary damages or property awarded under a Party's domestic law.

3. The Tribunal shall make an order with respect to the costs of the arbitration, which shall in principle be borne by the unsuccessful disputing party or parties. In determining the appropriate apportionment of costs, the Tribunal shall consider all relevant circumstances, including:

(a) the outcome of any part of the proceeding, including the number or extent of the successful parts of the claims or defenses;

(b) the disputing parties' conduct during the proceeding, including the extent to which they acted in an expeditious and cost-effective manner;

(c) the complexity of the issues; and

(d) the reasonableness of the costs claimed.

4. The Tribunal and the disputing parties shall make every effort to ensure the dispute settlement process is carried out in a timely manner. The Tribunal shall issue its final award within 12 months of the final date of the hearing on the merits. A Tribunal may, with good cause and notice to the disputing parties, delay issuing its final award by an additional brief period.

5. Monetary damages in an award:

(a) shall not be greater than the loss or damage incurred by the investor, or, as applicable, by the enterprise referred to in Article 17.23(2) (Submission of a Claim to Arbitration), as valued on the date of the breach <sup>10</sup> ;

(b) shall only reflect loss or damage incurred by reason of, or arising out of, the breach; and

(c) shall be determined with reasonable certainty, and shall not be speculative or hypothetical.

6. In making an award under paragraph 5, the Tribunal shall calculate monetary damages based only on the submissions of the disputing parties, and shall consider, as applicable:

(a) contributory fault, whether deliberate or negligent;

(b) failure to mitigate damages;

(c) prior damages or compensation received for the same loss; or

(d) restitution of property, or repeal or modification of the measure.

7. The Tribunal may award monetary damages for lost future profits only

insofar as such damages satisfy the requirements under paragraph 5. Such determination requires a case-by-case, fact-based inquiry that takes into consideration, among other factors, whether a covered investment has been in operation in the territory of the respondent Party for a sufficient period of time to establish a performance record of profitability.

8. The Tribunal may award pre-award and post-award interest at a reasonable rate of return compounded annually.

9. The Tribunal shall not award punitive damages.

10. The Tribunal shall not award monetary damages under Article 17.23(1) (Submission of a Claim to Arbitration) for loss or damage incurred by the investment.

### **Article 17.37: Finality and Enforcement of an Award**

1. An award made by a Tribunal has no binding force except between the disputing parties and in respect of that particular case.

2. Subject to paragraph 3 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.

3. A disputing party shall not seek enforcement of a final award until:

(a) in the case of a final award made under the ICSID Convention:

(i) 120 days have elapsed from the date the award was rendered, provided that a disputing party has not requested the award be revised or annulled; or

(ii) revision or annulment proceedings have been completed; or

(b) in the case of a final award under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules:

- (i) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside, or annul the award; or
- (ii) a court has dismissed or allowed an application to revise, set aside, or annul the award, and there is no further appeal.

4. Each Party shall provide for the enforcement of an award in its territory.

5. If a respondent Party fails to abide by or comply with a final award, the Joint Commission, on delivery of a request by a Party whose investor was a disputing party to the arbitration, shall establish a panel under Article 28.7 (Establishment of a Panel). The requesting Party may seek in those proceedings:

- (a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Agreement; and
- (b) a recommendation that the Party abide by or comply with the final award.

6. A claim submitted to arbitration under Article 17.23 (Submission of a Claim to Arbitration) shall be considered to arise out of a commercial relationship or transaction for the purposes of Article I of the New York Convention.

### **Article 17.38: Third Party Funding**

1. A claimant benefiting from a third party funding arrangement shall

disclose to the respondent Party and to the Tribunal the name and address of the third party funder.

2. The claimant shall make the disclosure under paragraph 1 at the time of the submission of a claim to arbitration under Article 17.23

(Submission of a Claim to Arbitration), or, if the third party funding is arranged after the submission of a claim, within 10 days of the date on which the third party funding was arranged.

3. The claimant shall have a continuing obligation to disclose any changes to the information referred to in paragraph 1 occurring after its initial disclosure, including termination of the third party funding arrangement.

### **Article 17.39: Service of Documents**

Each Party shall promptly make publicly available, and notify the other Party by diplomatic note, the location for delivery of notice and other documents, including any subsequent change to the location for delivery. Investors shall ensure that service of documents to a Party is made to the appropriate location.

### **Article 17.40: Establishment of a First Instance Investment Tribunal or an Appellate Mechanism for Investor-State Dispute Settlement**

If an investor-state dispute settlement mechanism, consisting of a first instance investment tribunal or an appellate mechanism, is developed under other institutional arrangements and is open to the Parties for acceptance, the Parties shall consider whether, and to what extent, a dispute under this Section should be decided pursuant to that investor-state dispute settlement mechanism.

## Section E – Expedited Arbitration

### Article 17.41: Consent to Expedited Arbitration

1. The disputing parties to an arbitration under Section D (Investor-State Dispute Settlement) may consent to expedite the arbitration in accordance with this Section, when the damages claimed do not exceed CAD 10 million, by following the procedure in paragraph 2.
2. The disputing parties shall jointly notify the ICSID Secretariat in writing of their consent to an expedited arbitration in accordance with this Section. The notice must be received within 20 days of the submission of a claim to arbitration under Articles 17.23(6)(a) or 17.23(6)(b) (Submission of a Claim to Arbitration).
3. Section D (Investor-State Dispute Settlement), as modified by this Section, applies to the investment dispute, except for Article 17.29 (Preliminary Objections), which does not apply.

### Article 17.42: Mediation

1. The disputing parties may consent to have recourse to mediation in accordance with this Section. Recourse to mediation is without prejudice to the legal position or rights of a disputing party under this Section.
2. If the disputing parties jointly agree to have recourse to mediation, the disputing parties shall appoint a mediator to facilitate the resolution of the dispute within 20 days of the notification provided under Article 17.41(2) (Consent to Expedited Arbitration).
3. If the disputing parties do not select a mediator within the time period provided for in paragraph 2, the Secretary-General of ICSID shall select the mediator within 20 days of the expiration of that time period.



4. The disputing parties may hold mediation sessions by videoconference, telephone, or similar means of communication as appropriate.

5. If the disputing parties fail to reach a resolution of the dispute within 60 days of the appointment of the mediator, the dispute shall proceed to arbitration in accordance with this Section.

### **Article 17.43: Constitution of the Tribunal**

1. The Tribunal in an expedited arbitration shall consist of a sole arbitrator appointed pursuant to Article 17.44 (Method of Appointing the Sole Arbitrator).

2. An appointment under Article 17.44 (Method of Appointing the Sole Arbitrator) shall be deemed an appointment in accordance with a method agreed by the parties pursuant to Article 37(2)(a) of the ICSID Convention.

### **Article 17.44: Method of Appointing the Sole Arbitrator**

1. The disputing parties shall jointly appoint the sole arbitrator within 30 days of the notification delivered under Article 17.41(2) (Consent to Expedited Arbitration).

2. If the disputing parties do not appoint the sole arbitrator within the time period under paragraph 1, the Secretary-General of ICSID shall appoint the sole arbitrator in the following manner:

(a) the Secretary-General shall transmit a list of five candidates for appointment as the sole arbitrator to the disputing parties within 30 days of the expiration of the time period under paragraph 1;

(b) each disputing party may strike one candidate from the list, and

shall rank the remaining candidates in order of preference and transmit such ranking to the Secretary-General within 14 days of receipt of the list;

(c) the Secretary-General shall inform the disputing parties of the result of the rankings on the next business day after receipt of the rankings, and shall appoint the candidate with the best ranking. If two or more candidates share the best ranking, the Secretary-General shall select one of them;

(d) the Secretary-General shall immediately send the request for acceptance of the appointment to the selected candidate, and shall request a reply within 10 days of receipt; and

(e) if the selected candidate does not accept the appointment, the Secretary-General shall select the next highest-ranked candidate.

3. The sole arbitrator shall have expertise or experience as an arbitrator of investor-State disputes arising under international investment agreements. The sole arbitrator shall not have the nationality of either disputing party and shall otherwise be independent of, and not be affiliated with or take instructions from, either disputing party.

4. The sole arbitrator shall be prepared to meet the shorter timeframes provided for in this Section.

5. The sole arbitrator's fees shall be fixed according to the scales of administrative expenses and arbitrator's fees for the expedited procedure set out in Appendix III of the Arbitration Rules of the International Chamber of Commerce.

6. The sole arbitrator shall abide by the Arbitrator Code of Conduct for Investor-State Dispute Settlement set out in Annex 17-B.

## **Article 17.45: First Session in Expedited Arbitration**

1. The sole arbitrator shall hold a first session within 30 days of the constitution of the Tribunal under Article 17.43 (Constitution of the Tribunal).
2. The sole arbitrator shall hold the first session by videoconference, telephone, or similar means of communication, unless both disputing parties and the sole arbitrator agree it shall be held in person.

## **Article 17.46: Procedural Schedule for Expedited Arbitration**

1. The following schedule for written submissions and the hearing applies in the expedited arbitration:
  - (a) the claimant shall file, within 90 days of the first session, a principal submission on the merits, such as a memorial, of no more than 150 pages;
  - (b) the respondent Party shall file, within 90 days of the claimant's filing of its principal submission on the merits pursuant to subparagraph (a), a principal submission on the merits, such as a counter-memorial, of no more than 150 pages;
  - (c) the claimant shall file, within 90 days of the respondent Party's filing of its principal submission on the merits pursuant to subparagraph (b), a reply of no more than 100 pages;
  - (d) the respondent Party shall file, within 90 days of the claimant's filing of the reply pursuant to subparagraph (c), a rejoinder of no more than 100 pages;
  - (e) a non-disputing Party may file, within 60 days of the respondent Party's filing of the rejoinder pursuant to subparagraph (d), a written

submission regarding the interpretation of this Agreement pursuant to Article 17.33 (Participation of a Non-Disputing Party);

(f) the sole arbitrator shall hold the hearing within 120 days of the respondent Party's filing of the rejoinder pursuant to subparagraph (d);

(g) each disputing party shall file a statement of costs within 30 days of the last day of the hearing referred to in subparagraph (f); and

(h) the sole arbitrator shall render the award as soon as possible, and in any event within 180 days of the last day of the hearing referred to in subparagraph (f).

2. The sole arbitrator may grant a claimant in default a grace period not exceeding 30 days, otherwise the claimant is deemed to have withdrawn its claim and to have discontinued the proceedings. The sole arbitrator, if appointed, shall, at the request of the respondent Party, and after notice to the disputing parties, in an order take note of the discontinuance. After the order has been rendered, the authority of the Tribunal shall cease.

3. The sole arbitrator may grant a respondent Party in default a grace period not exceeding 30 days, otherwise the claimant may request that the sole arbitrator address the questions submitted to it and render an award.

4. At the request of a disputing party, the sole arbitrator may grant limited requests for specifically identifiable documents that the requesting disputing party knows, or has good cause to believe, exist and are in the possession, custody, or control of the other disputing party, and shall adjust the schedule under paragraph 1 as appropriate.

5. The sole arbitrator may, after consulting the disputing parties, limit the number, length, or scope of written submissions or written witness evidence (both fact witnesses and experts).

6. The sole arbitrator may, following a joint request by the disputing parties, decide the dispute solely on the basis of the documents submitted by the disputing parties, with no hearing and no or a limited examination of witnesses or experts. If the sole arbitrator holds a hearing under paragraph 1(f), the sole arbitrator may conduct the hearing by videoconference, telephone, or similar means of communication.

7. The sole arbitrator shall, following a joint request by the disputing parties, but no later than the date of filing of the respondent Party's principal submission on the merits referred to in paragraph 1(b), decide that this Section shall no longer apply to the case.

8. The sole arbitrator may, at the request of a disputing party, but no later than the date of filing of the respondent Party's principal submission on the merits referred to in paragraph 1(b), decide that this Section shall no longer apply to the case. The disputing party that has made the request shall bear the costs of the expedited arbitration.

9. If, pursuant to paragraph 7 or 8, the sole arbitrator decides that this Section no longer applies to the case, and unless the disputing parties agree otherwise, the sole arbitrator appointed pursuant to Articles 17.43 (Constitution of the Tribunal) and 17.44 (Method of Appointing the Sole Arbitrator) shall be appointed as presiding arbitrator of the Tribunal constituted under Section D (Investor-State Dispute Settlement).

10. In all matters concerning an expedited arbitration procedure not expressly provided for in this Agreement, the disputing parties shall

endeavour to agree on the applicable procedural rules. If the disputing parties do not agree on the applicable procedural rules, the sole arbitrator, if appointed, may decide the matter.

### **Article 17.47: Consolidation**

When two or more claims falling under Article 17.41 (Consent to Expedited Arbitration) have a question of law or fact in common and arise out of the same events or circumstances, Article 17.30 (Consolidation) applies.

## **Annex 17-A: Exclusions from Dispute Settlement**

1. Sections D (Investor-State Dispute Settlement) and E (Expedited Arbitration), and Chapter 28 (Dispute Settlement) do not apply to a measure adopted or maintained relating to a review under the *Investment Canada Act*, R.S.C. 1985, c. 28, as amended, with respect to whether or not to permit an **investment** that is subject to review.

2. Sections D (Investor-State Dispute Settlement) and E (Expedited Arbitration) do not apply to a tobacco control measure adopted or maintained by a Party. A tobacco control measure means a measure of a Party related to the production or consumption of manufactured tobacco products (including products made or derived from tobacco), their distribution, labelling, packaging, advertising, marketing, promotion, sale, purchase, or use, as well as enforcement measures, such as inspection, recordkeeping, and reporting requirements. A measure with respect to tobacco leaf that is not in the possession of a manufacturer of tobacco products, or that is not part of a manufactured tobacco product,

is not a tobacco control measure.

# Annex 17-B : Arbitrator Code of Conduct for Investor-State Dispute Settlement

## 1. Definitions

For the purposes of this Code of Conduct:

**arbitrator** means a member of a Tribunal constituted pursuant to Article 17.26 (Arbitrators);

**assistant** means a person who, under the terms of appointment of an arbitrator, conducts research or provides support for the arbitrator;

**candidate** means a person who is under consideration for selection as an arbitrator pursuant to Articles 17.26 (Arbitrators) or 17.44 (Method of Appointing the Sole Arbitrator);

**expert** means a person appointed pursuant to Article 17.34 (Expert Reports) or applicable arbitration rules;

**family member** means the spouse or partner of an arbitrator or candidate; the parent, child, grandparent, grandchild, sister, brother, aunt, uncle, niece, or nephew of the arbitrator or candidate or spouse or partner of the arbitrator or candidate (including whole and half-blood relatives and step relatives), or the spouse or partner of such a person; or a resident of the arbitrator's or candidate's household whom the arbitrator or candidate treats as a member of his or her family;

**Rules** means applicable rules pursuant to Article 17.23 (Submission of a Claim to Arbitration); and

**staff**, in respect of an arbitrator, means individuals under the direction and control of the arbitrator other than assistants.

## 2. Responsibilities to the Dispute Settlement Process

Each candidate, arbitrator, and former arbitrator shall avoid impropriety and the appearance of impropriety, and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement process is preserved.

## 3. Governing Principles

1. Each arbitrator shall be independent and impartial, and shall avoid direct or indirect conflicts of interest.
2. Each arbitrator and former arbitrator shall respect the confidentiality of tribunal proceedings.
3. Each candidate or arbitrator shall disclose the existence of any interest, relationship, or matter that is likely to affect the candidate's or arbitrator's independence or impartiality, or that might reasonably create an appearance of impropriety or an apprehension of bias. An appearance of impropriety or an apprehension of bias is created when a reasonable person, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, would conclude that a candidate's or arbitrator's ability to carry out the duties with integrity, impartiality, and competence is impaired.
4. Upon appointment, an arbitrator shall refrain, for the duration of the proceeding, from acting as counsel or party-appointed expert or witness in any pending or new investment dispute under this Agreement or any other international investment treaty.



5. This Code of Conduct shall be interpreted in a manner consistent with other internationally recognized standards or guidelines regarding direct or indirect conflicts of interest, such as the International Bar Association Guidelines on Conflicts of Interest in International Arbitration.

6. In the event of an alleged breach of this Code of Conduct, the Rules governing the arbitration shall apply to any challenge, disqualification, or replacement of an arbitrator.

#### **4. Disclosure Obligations**

1. Throughout the tribunal proceeding, each candidate or arbitrator has a continuing obligation to disclose any interest, relationship, or matter that may bear on the integrity or impartiality of the dispute settlement process.

2. The disputing parties or the Secretary-General of ICSID, as the appointing authority for a Tribunal referred to in Article 17.26 (Arbitrators), shall provide a candidate a copy of this Code of Conduct and the Initial Disclosure Statement set out in the Appendix to this Code of Conduct.

3. A candidate shall submit the Initial Disclosure Statement set out in the Appendix to this Code of Conduct to the disputing parties or the Secretary-General of ICSID, as the appointing authority, as soon as possible and no later than seven days from receipt of that Initial Disclosure Statement.

4. A candidate shall disclose any interest, relationship, or matter that is likely to affect his or her independence or impartiality or that might reasonably create an appearance of impropriety or an apprehension of bias in the tribunal proceeding. To this end, a candidate shall make all

reasonable efforts to become aware of any such interest, relationship, or matter. Therefore, a candidate shall disclose, at a minimum, the following interests, relationships, and matters:

(a) any financial or personal interest of the candidate in:

(i) the tribunal proceeding or its outcome; and

(ii) an administrative proceeding, a domestic judicial proceeding, or any other international dispute settlement proceeding that involves issues that may be decided in the tribunal proceeding for which the candidate is under consideration;

(b) any financial interest of the candidate's employer, business partner, business associate, or family member in:

(i) the tribunal proceeding or its outcome; and

(ii) an administrative proceeding, a domestic judicial proceeding, or any other international dispute settlement proceeding that involves issues that may be decided in the tribunal proceeding for which the candidate is under consideration;

(c) any past or current financial, business, professional, family, or social relationship with any interested parties <sup>11</sup> in the tribunal proceeding or their counsel, or any such relationship involving a candidate's employer, business partner, business associate, or family member; and

(d) any public advocacy or legal or other representation concerning an issue in dispute in the tribunal proceeding or involving the same investment.

5. Once appointed, an arbitrator shall continue to make all reasonable efforts to become aware of any interest, relationship, or matter referred

to in subparagraph 4, and shall disclose them. The obligation to disclose is a continuing duty that requires an arbitrator to disclose any such interest, relationship, or matter that may arise during any stage of the tribunal proceeding.

6. In the event of any uncertainty regarding whether an interest, relationship, or matter must be disclosed under subparagraph 4 or 5, a candidate or arbitrator should err in favour of disclosure. Disclosure of an interest, relationship, or matter is without prejudice as to whether the interest, relationship, or matter is covered by subparagraph 4 or 5, or whether it warrants recusal, amelioration, or disqualification.

7. The disclosure obligations set out in subparagraphs 1 through 6 should not be interpreted so that the burden of detailed disclosure makes it impractical for individuals in the legal or business community to serve as arbitrators, thereby depriving the disputing parties of the services of those who might be best qualified to serve as arbitrators. Accordingly, a candidate or arbitrator should not be called upon to disclose an interest, relationship, or matter whose bearing on the candidate's or arbitrator's role in the tribunal proceeding would be trivial.

## **5. Performance of Duties by Candidates and Arbitrators**

1. A candidate who accepts an appointment as an arbitrator shall be available to perform, and shall perform, once the arbitrator is appointed pursuant to Article 17.26 (Arbitrators), an arbitrator's duties thoroughly, fairly, diligently, and expeditiously throughout the course of the tribunal proceeding.

2. An arbitrator shall ensure that he or she is contactable, at all

reasonable times, by the Secretary-General of ICSID, disputing parties, arbitration institution in charge of the proceeding, and other arbitrators of the Tribunal in order to conduct tribunal work.

3. An arbitrator shall comply with the provisions of Sections D (Investor-State Dispute Settlement) and E (Expedited Arbitration), as applicable, and the Rules.

4. An arbitrator shall not deny other arbitrators the opportunity to participate in all aspects of the tribunal proceeding.

5. An arbitrator shall consider only those issues raised in the tribunal proceeding and necessary to make a decision, order, or award.

6. An arbitrator shall not delegate the duty to make a decision, order, or award to any other person.

7. An arbitrator shall take all reasonable steps to ensure that his or her assistants and staff comply with paragraph 2 (Responsibilities to the Dispute Settlement Process), subparagraphs 1, 4 through 7 of paragraph 4 (Disclosure Obligations), subparagraphs 3, 8 and 9 of this paragraph, and paragraph 8 (Maintenance of Confidentiality) of this Code of Conduct.

8. An arbitrator shall not engage in any ex parte contact concerning the tribunal proceeding.

9. A candidate or arbitrator shall only communicate matters concerning actual or potential violations of this Code of Conduct, or if necessary to ascertain whether that candidate or arbitrator has violated or may violate this Code of Conduct, to the Secretary-General of ICSID, the disputing parties, and arbitration institution in charge of the proceedings.

10. Each arbitrator shall keep a record and render a final account of the

time devoted to the tribunal proceeding and of his or her expenses, as well as the time and expenses of his or her staff and assistants.

## **6. Independence and Impartiality of Arbitrators**

1. An arbitrator shall be independent and impartial. An arbitrator shall act in a fair manner and shall not create an appearance of impropriety or an apprehension of bias.

2. An arbitrator shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a disputing party or a non-disputing Party, or fear of criticism.

3. An arbitrator 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.

4. An arbitrator shall not use his or her position on the Tribunal to advance any personal or private interests. An arbitrator shall avoid actions that may create the impression that others are in a special position to influence the arbitrator. An arbitrator shall make every effort to prevent or discourage others from representing themselves as being in such a position.

5. An arbitrator shall not allow past or ongoing financial, business, professional, family, or social relationships or responsibilities to influence his or her conduct or judgment.

6. An arbitrator shall 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 an apprehension of bias.

7. If an interest, relationship, or matter of a candidate or arbitrator is inconsistent with subparagraphs 1 through 6, the candidate may accept appointment to a tribunal, and an arbitrator may continue to serve on a tribunal, if the disputing parties waive the violation or if, after the candidate or arbitrator has taken steps to ameliorate the violation, the disputing parties determine that the inconsistency has ceased.

## **7. Duties of Former Arbitrators**

A former arbitrator shall avoid actions that may create the appearance that the arbitrator was biased in carrying out his or her duties or would benefit from the decision, order, or award of the tribunal.

## **8. Maintenance of Confidentiality**

1. An arbitrator or former arbitrator shall not at any time disclose or use any non-public information concerning the tribunal proceeding or acquired during the tribunal proceeding, except for the purposes of the tribunal proceeding, and shall not, in any case, disclose or use any such information to gain a personal advantage, or an advantage for another person, or to adversely affect the interest of another person.

2. An arbitrator shall not disclose a decision, order, or award, or a part thereof, prior to its publication in accordance with Section D (Investor-State Dispute Settlement).

3. An arbitrator or former arbitrator shall not at any time disclose the deliberations of the Tribunal, or any arbitrator's view. <sup>12</sup>

4. An arbitrator shall not make a public statement regarding the merits of a pending tribunal proceeding.

## **9. Responsibilities of Experts, Assistants and Staff**

Paragraph 2 (Responsibilities to the Dispute Settlement Process), subparagraphs 1, 4, 5, 6 and 7 of paragraph 4 (Disclosure Obligations), subparagraphs 3, 8 and 9 of paragraph 5 (Performance of Duties by Candidates and Arbitrators), paragraph 7 (Duties of Former Arbitrators), and paragraph 8 (Maintenance of Confidentiality) of this Code of Conduct shall also apply to experts, assistants, and staff.

## **10. Review**

A Party may request to review and amend this Code of Conduct to take into account, as appropriate, relevant developments concerning investor-State dispute settlement.

# **Appendix to the Arbitrator Code of Conduct for Investor-State Dispute Settlement: Initial Disclosure Statement Form**

1. I acknowledge having received a copy of the Arbitrator Code of Conduct for Investor-State Dispute Settlement (the "Code of Conduct").
2. I acknowledge having read and understood the Code of Conduct.
3. I understand that I have a continuing obligation, while participating in the tribunal proceeding, to disclose any interest, relationship, or matter that may bear on the integrity or impartiality of the dispute settlement process. As a part of this continuing obligation, I am making the following initial disclosures:
  - (a) My financial interest in the tribunal proceeding for which I am under consideration or in its outcome is as follows:

(b) My financial interest in any administrative proceeding, domestic judicial proceeding, or other international dispute settlement proceeding that involves issues that may be decided in the tribunal proceeding is as follows:

(c) The financial interests that any employer, business partner, business associate, or family member of mine may have in the tribunal proceeding or in its outcome are as follows:

(d) The financial interests that any employer, business partner, business associate, or family member of mine may have in any administrative proceeding, domestic judicial proceeding or other international dispute settlement proceeding that involves issues that may be decided in the tribunal proceeding are as follows:

(e) My past or current financial, business, professional, family, and social relationships with any interested party in the tribunal proceeding, or their counsel, are as follows:

(f) The past or current financial, business, professional, family, and social relationships with any interested party in the tribunal proceeding, or their counsel, involving any employer, business partner, business associate, or family member of mine are as follows:

(g) My public advocacy or legal or other representation concerning an issue in dispute in the tribunal proceeding or involving the same investment is as follows:

(h) My other interests, relationships, and matters that may bear on the integrity or impartiality of the dispute settlement process and that are not disclosed in subparagraphs (a) through (g) above are as follows:



**SIGNED** on this                      day of                      20\_\_.

By:

**SIGNATURE** \_\_\_\_\_

**NAME** \_\_\_\_\_

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## Footnotes

- 1        A determination of whether one or more of these criteria are met requires a case-by-case, fact-based analysis.
  
- 2        The Parties understand that any reservation taken by a Party pursuant to Annex I (Cross-Border Trade in Services and Investment Non-Conforming Measures) against Article 18.5 (Market Access) applies to measures of that Party covered under paragraph 4.
  
- 3        A measure is manifestly arbitrary when it is evident that the measure is not rationally connected to a legitimate policy objective, such as when a measure is based on prejudice or bias rather than on reason or fact.
  
- 4        For greater certainty, full protection and security refers only to the physical security of an investor and their covered investment.
  
- 5        The Parties recognize that the meaning of “public purpose” may apply differently for the purposes of an Indigenous government.

- 6 For the purposes of this Article, the term “technology of the Party or of a person of the Party” includes technology that is owned by the Party or a person of the Party, and technology for which the Party or a person of the Party holds an exclusive license.
- 7 The reference to “Article 31” includes any waiver or amendment to the TRIPS Agreement implementing paragraph 6 of the *Doha Declaration on the TRIPS Agreement and Public Health* (WT/MIN(01)/DEC/2).
- 8 This disclosure shall not be construed to negatively affect the software source code’s status as a trade secret, if such status is claimed by the trade secret owner.
- 9 For the purpose of this paragraph, “protection of intellectual property rights” shall include matters affecting the availability, acquisition, scope, maintenance, use, and enforcement of intellectual property rights.
- 10 In the case of a breach of Article 17.10 (Expropriation), the valuation of the loss or damage incurred by the investor, or, as applicable, by the enterprise referred to in Article 17.23(2) (Submission of a Claim to Arbitration), as valued on the date the breach, shall be made in accordance with Article 17.10(5) (Expropriation).
- 11 For greater certainty, “interested parties” includes the home State of the investor.

12 For greater certainty, this paragraph does not apply to the arbitrator's view in a decision, order, award, or opinion.

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