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Section 6: Investor-State Dispute Settlement

Article X.17: Scope of a Claim to Arbitration

1. Without prejudice to the rights and obligations of the Parties under Chapter [XY](Dispute Settlement), an investor of a Party may submit to arbitration under this Section a claim that the respondent has breached an obligation under:
 - (a) Section 3 (Non-Discriminatory Treatment) of this Chapter, with respect to the expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of its covered investment; or
 - (b) Section 4 (Investment Protection) of this Chapter; andwhere the investor claims to have suffered loss or damage as a result of the alleged breach.
2. Claims under subparagraph 1(a) with respect to the expansion of a covered investment may be submitted only to the extent the measure relates to the existing business operations of a covered investment and the investor has, as a result, incurred loss or damage with respect to the covered investment.
3. For greater certainty, an investor may not submit a claim to arbitration under this Section where the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.
4. A tribunal constituted under this Section may not decide claims that fall outside of the scope of this Article.

Article X.18: Consultations

1. Any dispute should as far as possible be settled amicably. Such a settlement may be agreed at any time, including after the arbitration has been commenced. Unless the disputing parties agree to a longer period, consultations shall be held within 60 days of the submission of the request for consultations pursuant to paragraph 3.
2. Unless the disputing parties agree otherwise, the place of consultation shall be:
 - (a) Ottawa, where the measures challenged are measures of Canada;
 - (b) Brussels, where the measures challenged include a measure of the European Union; or
 - (c) the capital of the Member State of the European Union, where the measures challenged are exclusively measures of that Member State.
3. The investor shall submit to the other Party a request for consultations containing:
 - (a) the following information:

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- (i) the name and address of the investor and, where such request is submitted on behalf of a locally established enterprise, the name, address and place of incorporation of the locally established enterprise;
 - (ii) where there is more than one investor, the name and address of each investor and, where there is more than one locally established enterprise, the name, address and place of incorporation of each locally established enterprise;
 - (iii) the provisions of this Agreement alleged to have been breached;
 - (iv) the legal and the factual basis for the claim, including the measures at issue; and
 - (v) the relief sought and the estimated amount of damages claimed; and
- (b) evidence establishing that the investor is an investor of the other Party and that it owns or controls the investment, including the locally established enterprise where applicable, in respect of which it has submitted a request.
4. The requirements of the request for consultations set out in paragraph 3 shall be met in a manner that does not materially affect the ability of the respondent to effectively engage in consultations or to prepare its defence.
5. A request for consultations must be submitted within:
- (a) 3 years after the date on which the investor or, as applicable, the locally established enterprise, first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor or, as applicable, the locally established enterprise, has incurred loss or damage thereby; or
 - (b) two years after the investor or, as applicable, the locally established enterprise, exhausts or ceases to pursue claims or proceedings before a tribunal or court under the law of a Party and, in any event, no later than 10 years after the date on which the investor or, as applicable, the locally established enterprise, first acquired, or should have first acquired knowledge of the alleged breach and knowledge that the investor has incurred loss or damage thereby
6. In the event that the request for consultations concerns an alleged breach by the European Union, or a Member State of the European Union, it shall be sent to the European Union.
7. In the event that the investor has not submitted a claim to arbitration pursuant to Article X.22 (Submission of a claim to arbitration) within 18 months of submitting the request for consultations, the investor shall be deemed to have withdrawn its request for consultations and any notice requesting a determination of the respondent and may not submit a claim under this Section. This period may be extended by agreement between the disputing parties.

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Article X.19: Mediation

1. The disputing parties may at any time agree to have recourse to mediation.
2. Recourse to mediation is without prejudice to the legal position or rights of either disputing party under this Chapter and shall be governed by the rules agreed to by the disputing parties including, if available, the rules established by the Services and Investment Committee pursuant to Article X.42(3)(c).
3. The mediator is appointed by agreement of the disputing parties. Such appointment may include appointing a mediator from the roster established pursuant to Article X.25 (Constitution of the Tribunal) or requesting the Secretary-General of ICSID to appoint a mediator from the list of chairpersons established pursuant to Article X.25 (Constitution of the Tribunal).
4. Disputing parties shall endeavour to reach a resolution to the dispute within 60 days from the appointment of the mediator.
5. If the disputing parties agree to have recourse to mediation, Articles X.18(5) and X.18(7) (Consultations) shall not apply from the date on which the disputing parties agreed to have recourse to mediation to the date on which either disputing party decides to terminate the mediation, by way of a letter to the mediator and the other disputing party.

Article X.20: Determination of the respondent for disputes with the European Union or its Member States

1. If the dispute cannot be settled within 90 days of the submission of the request for consultations, the request concerns an alleged breach of the Agreement by the European Union or a Member State of the European Union and the investor intends to initiate arbitration proceedings pursuant to Article X.22 (Submission of a claim to arbitration), the investor shall deliver to the European Union a notice requesting a determination of the respondent.
2. The notice shall identify the measures in respect of which the investor intends to initiate arbitration proceedings.
3. The European Union shall, after having made a determination, inform the investor as to whether the European Union or a Member State of the European Union shall be the respondent.
4. If the investor has not been informed of the determination within 50 days of the notice referred to in paragraph 1:

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- (a) where the measures identified in the notice are exclusively measures of a Member State of the European Union, the Member State shall be respondent.
 - (b) where the measures identified in the notice include measures of the European Union, the European Union shall be respondent.
5. The investor may submit a claim to arbitration on the basis of the determination made pursuant to paragraph 3, and, if no such determination has been communicated, on the basis of the application of paragraph 4.
6. Where either the European Union or the Member State is the respondent, pursuant to paragraph 3 or 4, neither the European Union, nor the Member State may assert the inadmissibility of the claim, lack of jurisdiction of the tribunal or otherwise object to the claim or award on the ground that the respondent was not properly determined pursuant to paragraph 3 or identified on the basis of the application of paragraph 4.
7. The tribunal shall be bound by the determination made pursuant to paragraph 3 and, if no such determination has been communicated, the application of paragraph 4.

Article X.21: Procedural and Other Requirements for the Submission of a Claim to Arbitration

1. An investor may submit a claim to arbitration under Article X.22 (Submission of a Claim to Arbitration) only if the investor:
 - (a) delivers to the respondent, with the submission of a claim to arbitration, its consent to arbitration in accordance with the procedures set out in this Chapter;
 - (b) allows at least 180 days to elapse from the submission of the request for consultations and, where applicable, at least 90 days to elapse from the submission of the notice requesting a determination of the respondent;
 - (c) fulfils the requirements of the notice requesting a determination of the respondent;
 - (d) fulfils the requirements related to the request for consultations;
 - (e) does not identify measures in its claim to arbitration that were not identified in its request for consultations;
 - (f) where it has initiated a claim or proceeding seeking compensation or damages before a tribunal or court under domestic or international law with respect to any measure alleged to constitute a breach referred to in its claim to arbitration, provides a declaration that:
 - (i) a final award, judgment or decision has been made; or
 - (ii) it has withdrawn any such claim or proceeding;

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

- (g) waives its right to initiate any claim or proceeding seeking compensation or damages before a tribunal or court under domestic or international law with respect to any measure alleged to constitute a breach referred to in its claim to arbitration.
2. Where the submission of a claim to arbitration is for loss or damage to a locally established enterprise or to an interest in a locally established enterprise that the investor owns or controls directly or indirectly, both the investor and the locally established enterprise shall provide a declaration pursuant to subparagraph 1(f) and a waiver pursuant to subparagraph 1(g).
 3. The requirements of subparagraphs 1(f), (g) and paragraph 2 do not apply in respect of a locally established enterprise where the respondent or the investor's host State has deprived an investor of control of the locally established enterprise, or has otherwise prevented the locally established enterprise from fulfilling such requirements.
 4. Upon request of the respondent, the Tribunal shall decline jurisdiction where the investor or, as applicable, the locally established enterprise fails to fulfil any of the requirements of paragraphs 1 and 2.
 5. The waiver provided pursuant to subparagraph 1(g) or paragraph 2 as applicable shall cease to apply:
 - (a) where the Tribunal rejects the claim on the basis of a failure to meet the requirements of paragraphs 1 or 2 or on any other procedural or jurisdictional grounds;
 - (b) where the Tribunal dismisses the claim pursuant to Article X.29 (Claim manifestly without legal merit) or Article X.30 (Claims Unfounded as a Matter of Law); or
 - (c) where the investor withdraws its claim, in conformity with applicable arbitration rules, within 12 months of the constitution of the tribunal.

Article X.22: Submission of a Claim to Arbitration

1. If a dispute has not been resolved through consultations, a claim may be submitted to arbitration under this Section by:
 - (a) an investor of the other Party on its own behalf; or
 - (b) an investor of the other Party, on behalf of a locally established enterprise which it owns or controls directly or indirectly.

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2. A claim may be submitted under the following arbitration rules:
 - (a) the ICSID Convention;
 - (b) the ICSID Additional Facility Rules where the conditions for proceedings pursuant to paragraph (a) do not apply;
 - (c) the UNCITRAL Arbitration Rules; or
 - (d) any other arbitration rules on agreement of the disputing parties.
3. In the event that the investor proposes arbitration rules pursuant to sub-paragraph 2(d), the respondent shall reply to the investor's proposal within 20 days of receipt. If the disputing parties have not agreed on such arbitration rules within 30 days of receipt, the investor may submit a claim under the arbitration rules provided for in subparagraphs 2(a), (b) or (c).
4. For greater certainty, a claim submitted under subparagraph 1(b) shall satisfy the requirements of Article 25(1) of the ICSID Convention.
5. The investor may, when submitting its claim, propose that a sole arbitrator should hear the claim. The respondent shall give sympathetic consideration to such a request, in particular where the investor is a small or medium-sized enterprise or the compensation or damages claimed are relatively low.
6. The arbitration is governed by the arbitration rules applicable under paragraph 2 that are in effect on the date that the claim or claims are submitted to arbitration under this Section, subject to the specific rules set out in this Section and supplemented by rules adopted pursuant to Article X.42(3)(b) (Committee).
7. A claim is submitted to arbitration under this Section 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;
 - (c) the notice of arbitration under Article 3 of the UNCITRAL Arbitration Rules is received by the respondent; or
 - (d) the request or notice of arbitration pursuant to other arbitration rules is received by the respondent in accordance with subparagraph 2(d).
8. Each Party shall notify the other Party of the place of delivery of notices and other documents by the investors relating to this Section. Each Party shall ensure this information is made publicly available.

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[Note to Scrub: please ensure that “relating to this Section” covers also ISDS on Financial Services]

Article X.23: Proceedings under different international agreements

Where claims related to the same measure are brought both pursuant to this Section and another international agreement and:

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

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

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

Article X.24: Consent to Arbitration

1. The respondent consents to the submission of a claim to arbitration under this Section in accordance with the procedures set out under this Agreement.
2. The consent under paragraph 1 and the submission of a claim to arbitration under this Chapter shall satisfy the requirements of:
 - (a) Article 25 of the ICSID Convention and Chapter II (Institution of Proceedings) of the ICSID Additional Facility Rules for written consent of the disputing parties; and,
 - (b) Article II of the New York Convention for an agreement in writing.

Article X.25: Constitution of the Tribunal

1. Unless the disputing parties have agreed to appoint a sole arbitrator, the Tribunal shall comprise three arbitrators. One arbitrator shall be appointed by each of the disputing parties and the third, who will be the presiding arbitrator, shall be appointed by agreement of the disputing parties. If the disputing parties agree to appoint a sole arbitrator, the disputing parties shall seek to agree on the sole arbitrator.
2. If a Tribunal has not been constituted within 90 days from the date that a claim is submitted to arbitration, or where the disputing parties have agreed to appoint a sole arbitrator and have failed to do so within 90 days from the date the respondent agreed to submit the dispute to a sole arbitrator, the Secretary-General of ICSID shall appoint the arbitrator or arbitrators not yet appointed in accordance with paragraph 3.
3. The Secretary-General of ICSID shall, upon request of a disputing party, appoint the remaining arbitrators from the list established pursuant to paragraph 4. In the event that such list has not been established on the date a claim is submitted to arbitration, the Secretary-General of ICSID shall make the appointment at his or her discretion taking into

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consideration nominations made by either Party and, to the extent practicable, in consultation with the disputing parties. The Secretary-General of ICSID may not appoint as presiding arbitrator a national of either Canada or a Member State of the European Union unless all disputing parties agree otherwise.

4. Pursuant to Article X.42(2)(a), the Committee on Services and Investment shall establish, and thereafter maintain, a list of individuals who are willing and able to serve as arbitrators and who meet the qualifications set out in paragraph 5. It shall ensure that the list includes at least 15 individuals but may agree to increase the number of individuals. The list shall be composed of three sub-lists each comprising at least five individuals: one sub-list for each Party, and one sub-list of individuals who are neither nationals of Canada nor the Member States of the European Union to act as presiding arbitrators.
5. Arbitrators appointed pursuant to this Section shall have expertise or experience in public international law, in particular international investment law. It is desirable that they have expertise or experience in international trade law and the resolution of disputes arising under international investment or international trade agreements.
6. Arbitrators shall be independent of, and not be affiliated with or take instructions from, a disputing party or the government of a Party with regard to trade and investment matters. Arbitrators shall not take instructions from any organisation, government or disputing party with regard to matters related to the dispute. Arbitrators shall comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration or any supplemental rules adopted pursuant to Article X.42(2)(b) (Committee on Services and Investment). Arbitrators who serve on the list established pursuant to paragraph 3 shall not, for that reason alone, be deemed to be affiliated with the government of a Party.
7. If a disputing party considers that an arbitrator does not meet the requirements set out in paragraph 6, it shall send a notice of its intent to challenge the arbitrator within 15 days after:
 - (a) the appointment of the arbitrator has been notified to the challenging party; or,
 - (b) the disputing party became aware of the facts giving rise to the alleged failure to meet such requirements.
8. The notice of an intention to challenge shall be promptly communicated to the other disputing party, to the arbitrator or arbitrators, as applicable, and to the Secretary-General of ICSID. The notice of challenge shall state the reasons for the challenge.
9. When an arbitrator has been challenged by a disputing party, the disputing parties may agree to the challenge, in which case the disputing parties may request the challenged arbitrator to resign. The arbitrator may, after the challenge, elect to resign. A decision to resign does not imply acceptance of the validity of the grounds for the challenge.
10. If, within 15 days from the date of the notice of challenge, the challenged arbitrator has elected not to resign, the Secretary-General of ICSID shall, after hearing the disputing parties

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and after providing the arbitrator an opportunity to submit any observations, issue a decision within 45 days of receipt of the notice of challenge and forthwith notify the disputing parties and other arbitrators, as applicable.

11. A vacancy resulting from the disqualification or resignation of an arbitrator shall be filled promptly pursuant to the procedure provided for in this Article.

Article X.26: Agreement to the Appointment of Arbitrators

1. For 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 agrees to the appointment of each individual member of a Tribunal established under the ICSID Convention or the ICSID Additional Facility Rules; and
 - (b) an investor may submit a claim to arbitration or continue a claim under the ICSID Convention or, as the case may be, the ICSID Additional Facility Rules only if the investor agrees in writing to the appointment of each member of the Tribunal.

Article X.27: Applicable Law and Interpretation

1. A Tribunal established under this Chapter shall render its decision consistent with this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties.
2. Where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may, pursuant to Article X.42(3)(a), recommend to the Trade Committee the adoption of interpretations of the Agreement. An interpretation adopted by the Trade Committee shall be binding on a Tribunal established under this Chapter. The Trade Committee may decide that an interpretation shall have binding effect from a specific date.

Article X.28: Place of Arbitration

The disputing parties may agree on the place of arbitration under the applicable arbitration rules provided it is in the territory of a party to the New York Convention. If the disputing parties fail to agree on the place of arbitration, the Tribunal shall determine the place of arbitration in accordance with the applicable arbitration rules, provided that it shall be in the territory of either Party or of a third state that is a party to the New York Convention.

Article X.29: Claims Manifestly Without Legal Merit

1. The respondent may, no later than 30 days after the constitution of the tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit.

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2. An objection may not be submitted under paragraph 1 if the respondent has filed an objection pursuant to Article X.30 (Claims Unfounded as a Matter of Law).
3. The respondent shall specify as precisely as possible the basis for the objection.
4. On receipt of an objection pursuant to this Article, the Tribunal shall suspend the proceedings on the merits and establish a schedule for considering any objections consistent with its schedule for considering any other preliminary question.
5. The Tribunal, after giving the disputing parties an opportunity to present their observations, shall at its first session or promptly thereafter, issue a decision or award, stating the grounds therefor. In doing so, the Tribunal shall assume the alleged facts to be true.
6. This Article shall be without prejudice to the Tribunal's authority to address other objections as a preliminary question or to the right of the respondent to object, in the course of the proceeding, that a claim lacks legal merit.

Article X.30: Claims Unfounded as a Matter of Law

1. Without prejudice to a tribunal's authority to address other objections as a preliminary question or to a respondent's right to raise any such objections at any appropriate time, the Tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim, or any part thereof, submitted pursuant to Article X.22 (Submission of a Claim to Arbitration) is not a claim for which an award in favour of the claimant may be made under this Section, even if the facts alleged were assumed to be true.
2. An objection under paragraph 1 shall be submitted to the Tribunal no later than the date the Tribunal fixes for the respondent to submit its counter-memorial.
3. If an objection has been submitted pursuant to Article X.29 (Claims Manifestly Without Legal Merit), the Tribunal may, taking into account the circumstances of that objection, decline to address, under the procedures set out in this Article, an objection submitted pursuant to paragraph 1.
4. On receipt of an objection under paragraph 1, and, where appropriate, after having taken a decision pursuant to paragraph 3, the Tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.

Article X.31: Interim Measures of Protection

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.

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A Tribunal may not order attachment nor may it enjoin the application of the measure alleged to constitute a breach referred to in Article X.22 (Submission of a Claim to Arbitration). For the purposes of this Article, an order includes a recommendation.

Article X.32: Discontinuance

If, following the submission of a claim to arbitration under this Section, the investor fails to take any steps in the proceeding during 180 consecutive days or such periods as the disputing parties may agree, the investor shall be deemed to have withdrawn its claim and to have discontinued the proceedings. The Tribunal, or if no tribunal has been established, the Secretary-General of ICSID shall, at the request of the respondent, and after notice to the disputing parties, in an order take note of the discontinuance. After such an order has been rendered the authority of the tribunal shall lapse.

Article X.33: Transparency of Proceedings

1. The UNCITRAL Transparency Rules shall apply to the disclosure of information to the public concerning disputes under this Section as modified by this Chapter.
2. The request for consultations, the notice requesting a determination of the respondent, the notice of determination of the respondent, the agreement to mediate, the notice of intent to challenge, the decision on an arbitrator challenge and the request for consolidation shall be included in the list of documents referred to in Article 3(1) of the UNCITRAL Transparency Rules.
3. Exhibits shall be included in the list of documents mentioned in Article 3(2) of the UNCITRAL Transparency Rules.
4. Notwithstanding Article 2 of the UNCITRAL Transparency Rules, prior to the constitution of the tribunal, Canada or the European Union as the case may be shall make publicly available in a timely manner relevant documents pursuant to paragraph 2, subject to the redaction of confidential or protected information. Such documents may be made publicly available by communication to the repository.
5. 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 such hearings. Where 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 such protection.
6. Nothing in this Chapter requires a respondent to withhold from the public information required to be disclosed by its laws. The respondent should endeavour to apply such laws in a manner sensitive to protecting from disclosure information that has been designated as confidential or protected information.

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Article X.34: Sharing of Information

1. A disputing party may disclose to other persons in connection with proceedings, including witnesses and experts, such unredacted documents as it considers necessary in the course of proceedings under this Section. However, the disputing party shall ensure that those persons protect the confidential or protected information contained in those documents.
2. Nothing in this agreement shall be construed to prevent a respondent from disclosing to officials of, as applicable, the European Union, Member States of the European Union and sub-national governments, such unredacted documents as it considers necessary in the course of proceedings under this Section. However, the respondent shall ensure that those officials protect the confidential or protected information contained in those documents.

Article X.35: The non-disputing Party to the Agreement

1. The respondent shall, within 30 days after receipt or promptly after any dispute concerning confidential or protected information has been resolved, deliver to the non-disputing Party:
 - (a) a request for consultations, a notice requesting a determination of the respondent, a notice of determination of the respondent, a claim to arbitration, a request for consolidation, and any other documents that are appended to such documents;
 - (b) on request:
 - (i) pleadings, memorials, briefs, requests and other submissions made to the tribunal by a disputing party;
 - (ii) written submissions made to the tribunal pursuant to Article 4 (Submission by a third person) of the UNCITRAL Transparency Rules;
 - (iii) minutes or transcripts of hearings of the tribunal, where available; and
 - (iv) orders, awards and decisions of the tribunal.
 - (c) on request and at the cost of the non-disputing Party, all or part of the evidence that has been tendered to the Tribunal unless publicly available.
2. 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 the Agreement. The non-disputing Party may attend a hearing held under this Section.
3. The Tribunal shall not draw any inference from the absence of a submission pursuant to paragraph 2.
4. 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 to the Agreement.

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Article X.36: Final Award

1. Where a Tribunal makes a final award against the respondent the Tribunal may award, separately or in combination, only:
 - (a) monetary damages and any applicable interest;
 - (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages representing the fair market value of the property at the time immediately before the expropriation, or impending expropriation became known, whichever is earlier and any applicable interest in lieu of restitution, determined in a manner consistent with Article X.11 (Expropriation).
[Note to scrub: subject to final check of the expropriation article]
2. Subject to paragraphs 1 and 5, where a claim is made under paragraph 1(b) of Article X.22 (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 locally established enterprise;
 - (b) an award of restitution of property shall provide that restitution be made to the locally established enterprise;
 - (c) an award of costs in favour of the investor shall provide that it is to be made 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 X.21 (Procedural and Other Requirements for the Submission of a Claim to Arbitration), may have in monetary damages or property awarded under a Party's domestic law.
3. Monetary damages shall not be greater than the loss suffered by the investor or, as applicable, the locally established enterprise, reduced by any prior damages or compensation already provided. For the calculation of monetary damages, the Tribunal shall also reduce the damages to take into account any restitution of property or repeal or modification of the measure.
4. A Tribunal may not award punitive damages.
5. A tribunal shall order that the costs of arbitration be borne by the unsuccessful disputing party. In exceptional circumstances, a tribunal may apportion costs between the disputing parties if it determines that apportionment is appropriate in the circumstances of the claim. Other reasonable costs, including costs of legal representation and assistance, shall be borne by the unsuccessful disputing party, unless the tribunal determines that such apportionment is unreasonable in the circumstances of the claim. Where only parts of the claims have been

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successful the costs shall be adjusted, proportionately, to the number or extent of the successful parts of the claims.

Article X.37: Indemnification or Other Compensation

A respondent shall not assert, and a tribunal shall not accept a defence, counterclaim, right of setoff, or similar assertion, that an investor or, as applicable, the locally established enterprise, has received, or will receive, indemnification or other compensation pursuant to an insurance or guarantee contract in respect of all or part of the compensation sought in a dispute initiated pursuant to this Section.

Article X.38: Fees and Expenses of the Arbitrators

The fees and expenses of the arbitrators pursuant to Regulation 14(1) of the Administrative and Financial Regulations of the ICSID Convention in force on the date of initiation of the arbitration shall apply.

Article X.39: Enforcement of Awards

1. An award issued by a Tribunal pursuant to this Section shall be binding 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 recognize and comply with an award without delay.
3. A disputing party may not seek enforcement of a final award until:
 - (a) in the case of a final award made under the ICSID Convention:
 - (i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award, or
 - (ii) enforcement of the award has been stayed and revision or annulment proceedings have been completed; and
 - (b) in the case of a final award under the ICSID Additional Facility Rules the UNCITRAL Arbitration Rules, or any other rules applicable pursuant to Article X.22(2)(d) (Submission of a Claim to Arbitration):
 - (i) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award, or
 - (ii) enforcement of the award has been stayed and a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.

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4. Execution of the award shall be governed by the laws concerning the execution of judgments in force where such execution is sought.
5. A claim that is submitted to arbitration under this Chapter shall be deemed to arise out of a commercial relationship or transaction for the purposes of Article I of the New York Convention.

Article X.40: Role of the Parties to the Agreement

1. No Party shall bring an international claim, in respect of a dispute submitted pursuant to Article X.22 (Submission of a Claim to Arbitration), unless the other Party has failed to abide by and comply with the award rendered in such dispute. This shall not exclude the possibility of dispute settlement under the Dispute Settlement Chapter in respect of a measure of general application even if that measure is alleged to have violated the agreement as regards a specific investment in respect of which a dispute has been initiated pursuant to Article X.22 (Submission of a Claim to Arbitration) and is without prejudice to Article X.35 (The non-disputing Party to the Agreement).
2. Paragraph 1 does not preclude informal exchanges for the sole purpose of facilitating a settlement of the dispute.

Article X.41: Consolidation

1. When two or more claims that have been submitted separately to arbitration under Article X.22 (Submission of a Claim to Arbitration) have a question of law or fact in common and arise out of the same events or circumstances, a disputing party or the disputing parties, jointly, may seek the establishment of a separate Tribunal pursuant to this Article and request that such Tribunal issue a consolidation order.
2. The disputing party seeking a consolidation order shall first deliver a notice to the disputing parties it seeks to be covered by this order.
3. Where the disputing parties which have been notified pursuant to paragraph 2 have reached an agreement on the consolidation order to be sought, they may make a joint request for the establishment of a separate Tribunal and a consolidation order pursuant to this Article. Where the disputing parties which have been notified pursuant to paragraph 2 have not reached agreement on the consolidation order to be sought within 30 days of the notice, a disputing party may make a request for the establishment of a separate Tribunal and a consolidation order pursuant to this Article. The request shall be delivered, in writing, to the Secretary-General of ICSID and to all the disputing parties sought to be covered by the order, and shall specify:
 - (a) the names and addresses of the disputing parties sought to be covered by the order;
 - (b) the claims, or parts thereof, sought to be covered by the order; and

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- (c) the grounds for the order sought.

A request for consolidation involving more than one respondent shall require the agreement of all such respondents.

4. The arbitration rules applicable to the proceedings under this Article shall be determined as follows:
- (a) when all of the claims for which a consolidation order is sought have been submitted to arbitration under the same arbitration rules pursuant to Article X.22 (Submission of a Claim to Arbitration), these arbitration rules shall apply;
 - (b) when the claims for which a consolidation order is sought have not been submitted to arbitration under the same arbitration rules:
 - (i) the investors may collectively agree on the arbitration rules pursuant to paragraph 2 of Article X.22 (Submission of a Claim to Arbitration); or
 - (ii) if the investors cannot agree on the arbitration rules within 30 days of the Secretary-General of ICSID receiving the request for consolidation, the UNCITRAL Arbitration Rules shall apply.
5. A Tribunal established under this Article shall comprise three arbitrators: one arbitrator appointed by the respondent, one arbitrator appointed by agreement of the investors, and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties. If the respondent or the investors fail to appoint an arbitrator within 45 days after the Secretary-General of ICSID receives a request for consolidation, or if the disputing parties have not agreed to a presiding arbitrator within 60 days after the Secretary-General of ICSID receives a request for consolidation, a disputing party may request the Secretary-General of ICSID to appoint the arbitrator or arbitrators not yet appointed in accordance with paragraph 3 of Article X.25 (Constitution of the Tribunal).
6. If, after hearing the disputing parties, a Tribunal established under this Article is satisfied that claims submitted to arbitration under Article X.22 (Submission of a Claim to Arbitration) have a question of law or fact in common and arise out of the same events or circumstances, and consolidation would best serve the interests of fair and efficient resolution of the claims including the interest of consistency of arbitral awards, the tribunal may, by order, assume jurisdiction over some or all of the claims, in whole or in part.
7. Where a Tribunal has been established under this Article and has assumed jurisdiction pursuant to paragraph 6, an investor that has submitted a claim to arbitration under Article X.22 (Submission of a Claim to Arbitration) and whose claim has not been consolidated may make a written request to the Tribunal that it be included in such order provided that the request complies with the requirements set out in paragraph 3. The Tribunal shall grant such order where it is satisfied that the conditions of paragraph 6 are met and that granting such a request would not unduly burden or unfairly prejudice the disputing parties or unduly disrupt

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the proceedings. Before a Tribunal issues such an order, it shall consult with the disputing parties.

8. 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 X.22 (Submission of a Claim to Arbitration) be stayed unless the latter Tribunal has already adjourned its proceedings.
9. A Tribunal established under Article X.22 (Submission of a Claim to Arbitration) shall cede jurisdiction in relation to the claims, or parts thereof, over which a tribunal established under this Article has assumed jurisdiction.
10. The award of the Tribunal established under this Article in relation to those claims, or parts thereof, over which it has assumed jurisdiction shall become binding on the tribunals established pursuant to Article X.22 (Submission of a Claim to Arbitration) as regards those claims, or parts thereof, once the conditions of Article 39(3) (Enforcement of Awards) have been fulfilled.
11. An investor may withdraw a claim from arbitration under this Section that is subject to consolidation and such claim may not be resubmitted to arbitration under Article X.22 (Submission of a Claim to Arbitration). If it does so no later than 15 days after receipt of the notice of consolidation, its earlier submission of the claim to arbitration shall not prevent the investor's recourse to dispute settlement other than under this Chapter.
12. At the request of an investor, the Tribunal established under this Article may take such measures as it sees fit in order to preserve the confidential or protected information of that investor vis-à-vis other investors. Such measures may include the submission of redacted versions of documents containing confidential or protected information to the other investors or arrangements to hold parts of the hearing in private.

Article X.42: Committee

1. The Committee on Services and Investment shall provide a forum for the Parties to consult on issues related to this Section, including:
 - (a) difficulties which may arise in the implementation of this Chapter;
 - (b) possible improvements of this Chapter, in particular in the light of experience and developments in other international fora; and,
 - (c) whether, and if so, under what conditions, an appellate mechanism could be created under the Agreement to review, on points of law, awards rendered by a tribunal under this Section, or whether awards rendered under this Section could be subject to such an appellate mechanism developed pursuant to other institutional arrangements. Such consultations shall take into account the following issues, among others:

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- (i) the nature and composition of an appellate mechanism;
- (ii) the applicable scope and standard of review;
- (iii) transparency of proceedings of an appellate mechanism;
- (iv) the effect of decisions by an appellate mechanism;
- (v) the relationship of review by an appellate mechanism to the arbitration rules that may be selected under Article X.22 (Submission of a Claim to Arbitration); and
- (vi) the relationship of review by an appellate mechanism to domestic laws and international law on the enforcement of arbitral awards.

2. The Committee shall, on agreement of the Parties, and after completion of the respective legal requirements and procedures of the Parties:

- (a) establish and maintain the list of arbitrators pursuant to Article X.25(3) (Constitution of the Tribunal);
- (b) adopt a code of conduct for arbitrators to be applied in disputes arising out of this Chapter, which may replace or supplement the rules in application, and that may address topics including:
 - (i) disclosure obligations;
 - (ii) the independence and impartiality of arbitrators; and
 - (iii) confidentiality.

The Parties shall make best efforts to ensure that the list of arbitrators is established and the code of conduct adopted no later than the entry into force of the Agreement, and in any event no later than two years after the entry into force of the Agreement.

[Note to scrub: agreed in principle that the time periods run from provisional application, if any. Drafting to be checked in the light of the general and final provisions of CETA]

3. The Committee may, on agreement of the Parties, and after completion of the respective legal requirements and procedures of the Parties:

- (a) recommend to the Trade Committee the adoption of interpretations of the agreement pursuant to Article X.27(2) (Applicable Law and Interpretation);

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- (b) adopt and amend rules supplementing the applicable arbitration rules, and amend the applicable rules on transparency. Such rules and amendments are binding on the members of a Tribunal established under this Section;
- (c) adopt rules for mediation for use by disputing parties as referred to in Article X.19 (Mediation); and
- (d) recommend to the Trade Committee the adoption of any further elements of the fair and equitable treatment obligation pursuant to Section 5, Article X.9(4) (Treatment of Investors and of Covered Investments).

Article X.43: Exclusion

The dispute settlement provisions of this Section and of Chapter x (Dispute Settlement) do not apply to the matters referred to in Annex X. 43.1 (Exclusions from Dispute Settlement).

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Annex X.43.1 - Exclusions from Dispute Settlement

A decision by Canada following a review under the *Investment Canada Act*, with respect to whether or not to permit an investment that is subject to review, is not subject to the dispute settlement provisions under Sections 6 (Investor-to-State Dispute Settlement) of this Chapter, or to Chapter X (Dispute Settlement) of this Agreement. For greater certainty, this exclusion is without prejudice to the right of any Party to have recourse to Chapter X (Dispute Settlement) with respect to the consistency of a measure with a Party's reservations.

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Annex X.11: Expropriation

The Parties confirm their shared understanding that:

1. Expropriation may be either direct or indirect:
 - (a) direct expropriation occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and
 - (b) indirect expropriation occurs where a measure or series of measures of a Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.
2. The determination of whether a measure or series of measures of a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:
 - (a) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;
 - (b) the duration of the measure or series of measures by a Party;
 - (c) the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations; and
 - (d) the character of the measure or series of measures, notably their object, context and intent.
3. For greater certainty, except in the rare circumstance where the impact of the measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.

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