

Investor-to-State Dispute Settlement

NB: (1) square bracketed blue text indicates EU draft text not provisionally agreed by Canada; (2) square bracketed red text indicates Canadian draft text not provisionally agreed by the EU; and (3) square bracketed black text indicates text provisionally agreed but subject to further examination. Shaded text is being worked on in separate documents.

Article x-1: [Purpose] CAN

~~1. Without prejudice to the rights and obligations of the Parties under Chapter [XY](Dispute Settlement), this Section establishes a mechanism for the settlement of disputes between a claimant and a respondent concerning an alleged breach of an obligation under [Section 3 or Section 4 of this Chapter] where the claimant claims to have suffered loss or damage as a result of the alleged breach.~~

[Canada Note: Canada proposes to replace the above "Purpose" article with the "Scope of a Claim to Arbitration" article below.]

[Note: the expression "under Sections 3 or 4 of this Chapter" shall be reviewed throughout the text in order to account for the fact that ISDS only covers post-establishment and in light of the final version of the provision on Scope]

Article x-1: [Scope of a Claim to Arbitration]

[1. Without prejudice to the rights and obligations of the Parties under Chapter [XY](Dispute Settlement), a claimant 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;

where the claimant claims to have suffered loss or damage as a result of the alleged breach.]

[1BIS. A Tribunal established under this chapter shall determine whether the EU [treatment] CAN [measure] in question is inconsistent with [Section 3 or Section 4 of this chapter].]

[Note: Parties agree on substance. EU to propose alternative drafting/location]

CAN [2. With respect to a measure relating to the 'expansion' of an investment, an investor may submit to arbitration a claim that another Party has breached an obligation under Section 3 (Non-Discriminatory Treatment), only to the extent that the measure is alleged to incur loss or damage to the investor by reason of, or arising out of, its impact on a covered investment. For greater certainty, such claims would be subject to any reservation or exception taken by a Party pursuant to Section 5 (Reservations and Exceptions).]

[3. For the purpose of this Section and without prejudice to Article x-(subrogation), an investor EU [claimant] does not include a Party.]

Article x-3: Definitions

[Note: Parties have agreed to move the following definitions into the consolidated investment chapter when all brackets have been removed subject to a review of the definitions currently in the consolidated investment chapter and subject to a review of the general definitions.]

attachment means the seizure of the property of a disputing party to secure or ensure the satisfaction of an award

claimant means an investor or, where applicable, a locally established company that has taken any of the steps referred to in Section 6;

[Confidential or protected information means:

- a) confidential business information;
- b) information which is protected against being made available to the public, in the case of the information of the respondent, under the law of the respondent, and in the case of other information, under any law or rules determined to be applicable to the disclosure of such information by the tribunal.]

[Note: Parties to review references to Confidential or protected information]

disputing party means either the claimant or the respondent;

disputing parties means both the claimant and the respondent;

enjoin means an order to prohibit or restrain an action

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

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

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

[Note to scrub: Negotiators understand that this reference captures amendments to the Convention]

EU [For the purposes of this section,] “**locally established [company]**” means CAN [an company that is a **juridical person**]/ EU [juridical person] which has the nationality of the respondent and which is owned or controlled, CAN [directly or indirectly,] by an investor of the other Party EU [and which engages in substantive business operations in the territory of the Respondent at the time the treatment being complained of is afforded and at the time of submission of the claim [pursuant to Article x], Such entity shall for the purposes of this [section], be deemed to be an investor of the other Party, and shall, for the purposes of Article 25(2)(b) of the ICSID Convention, be treated as a “national of another Contracting State”.]

[Note: Negotiators checking necessity of reference to Article 25(2)(b) ICSID in light of the drafting of Article x-8(1)(b).]

[Canada Note: CAN is prepared to use the term “locally established company” in return for EU’s flexibility elsewhere]

[Note: For the purposes of this definition, the term “territory” refers to operations in any Member State of the European Union. Note to EU: Perhaps this could be a footnote to the definition.]

EU [(y) A **juridical person** is:

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

have the power to name a majority of its directors or otherwise to legally direct its actions.]

[Canada Note: At the Rules table it was decided not to do define ownership and control. Indeed, the definition of investment's chapeau uses our preferred "directly or indirectly" in respect of ownership and control. Furthermore, CAN considers a specific definition of ownership and control for a juridical person to be unnecessary.]

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

[Note to scrub: Negotiators understand that this reference captures amendments to the Convention]

non-disputing Party means the Party to the Agreement which is not the respondent;

respondent means either Canada or, in the case of the European Union, either the respondent pursuant to Article x- (Notice Requesting a Determination of the Respondent) or, prior to a request for determination the [alleged respondent identified by the claimant for purposes of mediation or in the request for consultation] EU [European Union where the measures identified include measures adopted by the European Union, and the Member State concerned where the measures identified are exclusively those of the Member State];

Tribunal means an arbitration tribunal established under Article x- (Submission of a Claim to Arbitration) or x- (Consolidation);

UNCITRAL Arbitration Rules means the arbitration rules of the United Nations Commission on International Trade Law.

CAN [UNCITRAL Transparency Rules means the *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*.]

Article x-4: 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 under paragraph 2.
2. Unless the disputing parties agree otherwise, the place of consultation shall be:
 - a. Ottawa where the consultations concern treatment afforded/measures adopted by Canada;
 - b. Brussels where the consultations concern treatment afforded/measures adopted by the European Union; or
 - c. the capital of the Member State of the European Union concerned, where the request for consultations concerns measures taken exclusively by that Member State.
3. The claimant or claimants shall submit to the other Party a request for consultations containing:
 - (a) the following information:
 - i. the name and address of the claimant and, where such request is submitted by or on behalf of a locally established [company], the name, address and place of incorporation of the locally established [company];
 - ii. where there is more than one claimant, the name and address of each claimant and, where such request is submitted by or on behalf of more than one locally established [company], the name, address and place of incorporation of each locally established

- [company];
- iii. the provisions alleged to have been breached;
 - iv. the legal and the factual basis for the claim, including the [measures/treatment] at issue; and
 - v. the relief sought and the estimated amount of damages claimed
- (b) evidence establishing that the claimant or, where applicable, each claimant, is an investor of the other Party.

3. A request for consultations must be submitted within:

- (a) 3 years after the date on which the claimant first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the claimant has incurred loss or damage thereby; or
- (b) two years after the claimant exhausts or ceases to pursue claims or proceedings before a tribunal or court under domestic law and, in any event, no later than 15 years after the date on which the claimant first acquired, or should have first acquired knowledge of the alleged breach and knowledge that the claimant has incurred loss or damage thereby.

4. EU [The time periods in paragraphs 3 and 4 shall not render claims inadmissible where the claimant can demonstrate that the failure to request consultations or submit a claim to arbitration is due to the claimants' inability to act as a result of actions taken by the respondent, provided that the claimant acts as soon as reasonably possible after it is able to act.]

[Canada Note: EU has acknowledged that this is not directed at Canada. As such we would propose that it be removed. We have not adjusted paragraph numbers to avoid confusion.]

5. 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. EU [Where measures of a Member State of the European Union are identified, it shall also be sent to the Member State concerned.]

6. In the event that the claimant has not submitted a claim to arbitration pursuant to Article x- (Submission of a claim to arbitration) within 18 months of submitting the request for consultations, the claimant shall be deemed to have withdrawn from proceedings under this Section and CAN [may not submit a claim under this Section] to have waived its rights EU [renounced the possibility] to bring a claim. This period may be extended by agreement between the disputing parties.

Article x-5: Mediation

- 1.** The disputing parties may at any time agree to have recourse to mediation.
- 2.** Recourse to mediation is voluntary and without prejudice to the legal position 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-26(5)(d).
- 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-10 (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-10 (Constitution of the Tribunal).

4. Disputing parties shall endeavour to reach a mutually agreed solution within 60 days from the appointment of the mediator.

5. If the disputing parties agree to have recourse to mediation, Articles x-4(3) and x-4(6) 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-6: Notice Requesting a Determination of the Respondent

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 claimant intends to initiate arbitration proceedings, pursuant to Article x- (Submission of a claim to arbitration) the claimant shall deliver a notice requesting a determination of the respondent. Such notice shall be sent to the European Union.

2. Where the dispute concerns [treatment] afforded by an institution of the European Union, the European Union will act as respondent. Where the dispute concerns [treatment] afforded by a Member State of the European Union, the Member State shall act as respondent unless [the EU informs the claimant within 60 days from the date of submission of the notice pursuant to paragraph 1 that a determination has been made that the EU shall act as respondent.] The claimant may submit a notice of arbitration pursuant to Article x- (Submission of a claim to arbitration) on the basis of such determination.

3. Where either the European Union or the Member State is respondent, pursuant to paragraph 2, neither the European Union, nor the Member State concerned may assert the inadmissibility of the claim or otherwise assert that the claim EU [or award] is unfounded on the ground that the proper respondent should be the European Union rather than the Member State or vice versa.

5. The tribunal shall be bound by the determination made pursuant to this article.]

[Note Parties working on possible alternative text to the above (see below).]

CAN [

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 claimant intends to initiate arbitration proceedings, pursuant to Article x- (Submission of a claim to arbitration) the claimant shall deliver a notice requesting a determination of the respondent. Such notice shall be sent to the European Union.

2. The European Union shall inform the claimant as to whether the European Union or a Member State of the European Union shall be the respondent. Where a determination is made that a Member State of the European Union shall be the respondent, the Member State shall provide, along with the determination, confirmation in writing that it consents to arbitration. If the claimant has not been informed of the determination within 60 days of the notice referred to in paragraph 1, the European Union shall be the respondent. The claimant may submit a notice of arbitration pursuant to Article x- (Submission of a claim to arbitration) in conformity with this paragraph.

3. Where either the European Union or the Member State is respondent, pursuant to paragraph 2, neither the European Union, nor the Member State concerned may assert the inadmissibility of the claim or otherwise assert that the claim or award is unfounded on the ground that the proper respondent

should be the European Union rather than the Member State or vice versa.

4. The tribunal shall be bound by the determination made pursuant to this article.]

EU [

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 claimant intends to initiate arbitration proceedings, pursuant to Article x- (Submission of a claim to arbitration) the claimant shall deliver a notice requesting a determination of the respondent.

2. The notice shall identify the measures in respect of which the claimant intends to initiate arbitration proceedings. Such notice shall be sent to the European Union, and where measures of a Member State of the European Union are identified, shall also be sent to the Member State concerned.

3. The European Union shall inform the claimant within 60 days as to whether the European Union or a Member State of the European Union shall be the respondent.

4. If no determination has been communicated to the claimant within 60 days of the notice referred to in paragraph 1:

- a) where the measures identified in the notice include measures adopted by an institution or other body of the European Union, the European Union will act as respondent.
- b) where the measures identified in the notice are exclusively measures of a Member State of the European Union, the Member State shall act as respondent.

5. The claimant may submit a notice of arbitration pursuant to Article x- (Submission of a claim to arbitration) on the basis of such determination, and, if no determination has been communicated, on the basis of paragraph 4.

6. Where either the European Union or the Member State is respondent, pursuant to paragraph 3 or 4, neither the European Union, nor the Member State concerned may assert the inadmissibility of the claim, lack of jurisdiction of the tribunal or otherwise assert that the claim EU or award is unfounded on the ground that the proper respondent should be the European Union rather than the Member State or vice versa.

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

[Article x-7 : Procedural and Other Requirements to Submit a Claim to Arbitration

1. A claimant may submit a claim to arbitration under Article x (Submission of a Claim to Arbitration) only if the claimant:

- 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;
- c) fulfils the requirements of the notice requesting a determination and request for consultations including Article x-4(2) whose requirements 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;

- d) does not identify additional measures in its claim to arbitration as compared to those identified in its request for consultations;
- e) provides an attestation, 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, that:
 - i. a final award, judgment or decision has been made; or
 - ii. it has withdrawn any such claim or proceeding;

The attestation 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

- f) provides a waiver of 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 company or to an interest in a locally established company, both the investor and the locally established company shall provide an attestation pursuant to subparagraph 1(e) and a waiver pursuant to subparagraph 1(f).

[2BIS. Where claims are brought [against the respondent] both pursuant to this Section and another international agreement and:

- a) there is a potential for [double] redress; 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.]

3. The requirements of paragraphs 1(e), (f) and 2 do not apply in respect of a locally established company where the respondent or the investor's host State has deprived an investor of control of the locally established company, or has otherwise prevented the locally established company from fulfilling the requirements in subparagraph 1(e), (f) or 2.

4. Upon the request of the respondent, the Tribunal shall decline jurisdiction where the claimant fails to fulfil any of the requirements of paragraphs 1 and 2.

5. The waiver provided pursuant to subparagraph 1(f) or paragraph 2 as applicable shall cease to apply:

- i. where the claim is rejected on the basis of a failure to meet the requirements of paragraphs 1 or 2 or on any other procedural or jurisdictional grounds;
- ii. where a claim is dismissed pursuant to Article x (Claim manifestly without legal merit) or Article x (Claims Unfounded as a Matter of Law); or
- iii. where a claim is withdrawn, [in conformity with applicable arbitration rules], within 12 months of the constitution of the tribunal.

[Note: Parties to check whether reference to "in conformity with applicable arbitration rules" is necessary.]

EU [6. For greater certainty, a tribunal shall decline jurisdiction where the dispute had arisen, or was foreseeable on the basis of a high degree of probability, at the time when the claimant acquired ownership or control of the investment subject to the dispute and the tribunal determines, on the basis of the facts of the case, that the claimant has acquired ownership or control of the investment for the main purpose of submitting the claim to arbitration under this section. The possibility to decline jurisdiction in such circumstances is without prejudice to other jurisdictional objections which could be entertained by the tribunal.]

Article x-8 : Submission of a Claim to Arbitration

1. If a dispute has not been resolved through consultations, a claim against a respondent may be submitted to arbitration under this section by:
 - a) an investor of the other Party on its own behalf, under any of the arbitration rules specified in paragraph 2;
 - b) a locally established [company], on its own behalf, under the arbitration rules specified in subparagraph 2(a), or
 - c) an investor of the other Party, on behalf of a locally established [company], under the arbitration rules specified in subparagraphs 2(b), 2(c) and 2(d).
 2. A claim may be submitted under the following arbitration rules:
 - a) the ICSID Convention EU [, for which a locally established company shall, for the purposes of Article 25(2)(b) of the Convention, be treated as a “national of another Contracting State”];
[Note: Negotiators checking necessity of reference to Article 25(2)(b) ICSID in light of the drafting of Article x-8(1)(b).]
 - 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 proposed by the claimant on agreement of the disputing parties. The respondent shall reply to the claimant’s request within 20 days of receipt. If the disputing parties have not agreed on such arbitration rules within 30 days, the claimant may submit a claim under one of the dispute settlement mechanisms provided for in subparagraphs (a), (b) or (c).
- CAN [2BIS. For the purposes of sub-paragraph 1(b) of this Article and Article 25(2)(b) of the ICSID Convention, a locally established company shall be treated as a “national of another Contracting State”.]**
3. The claimant may, when submitting its claim, propose that a sole arbitrator should hear the case. The respondent shall give sympathetic consideration to such a request, in particular where the claimant is a small or medium-sized enterprise or the compensation or damages claimed are relatively low.
 4. If a determination pursuant to Article x (Notice Requesting a Determination) identifies a different respondent from that identified in a request for consultations pursuant to Article x (Request for Consultations):
 - a) an investor, who owns or controls a locally established company which has submitted the Request for Consultations shall not be prevented from submitting a claim to arbitration under

subparagraphs 1(a) or 1(c); and

- b) a locally established company that is owned or controlled by an investor which has submitted the request for consultations shall not be prevented from submitting a claim to arbitration under subparagraph 1(b).

5. 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 26(5)(c).

6. A claim is submitted to arbitration under this chapter 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).

7. Each Party shall notify the other Party of the place of delivery of notices and other documents by the claimants bringing a claim. Each Party shall ensure this information is made publicly available.

EU [8. Paragraph 1 of this Article shall constitute the consent of the respondent to the submission of a claim to arbitration under this Section. The consent under paragraph 1 of this Article 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-9: Consent to Arbitration

1. CAN [Each Party] consents to the submission of a claim to arbitration CAN [under this Section] in accordance with the procedures set out under this Agreement.

2. EU [Paragraph 1 of this Article shall constitute the consent of the Respondent to the submission of a claim to arbitration under this Section.] The consent under paragraph 1 and the submission of a claim to arbitration under this chapter shall satisfy the requirements of:

[EU Note: EU proposes this text which would entail deletion of paragraph 1 and merger of this article with the previous article. See above.]

- (b) 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,
- (c) Article II of the New York Convention for an agreement in writing.]

Article x-10: 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, a disputing party may request the Secretary-General of ICSID to appoint the arbitrator or arbitrators not yet appointed. The Secretary General of ICSID shall appoint the remaining arbitrators from the list established pursuant to paragraph 3. 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 own discretion taking into 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 a Party, such as a national of any Member State where a Member State is a disputing party, unless all disputing parties agree otherwise.

3. Pursuant to Article x-26(2), 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. The Committee on Services and Investment shall ensure that the list includes at least 15 individuals.

4. The list established in paragraph 3 shall be composed of three sub-lists: 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. Each sub-list shall include at least five individuals. The Committee on Services and Investment may agree to increase the number of arbitrators for the list.

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 any 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-26 [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.

EU [6 bis. In the event that a disputing party considers that an arbitrator does not meet the requirements set out in paragraph 6, the disputing party may request the Secretary General of ICSID to issue a ruling. That request must be made within 20 days of:

- a) the appointment of the arbitrator; or,
- b) the disputing party becoming aware of the facts giving rise to the alleged failure to meet the requirements.

6 ter. The Secretary General of ICSID shall, after hearing the disputing parties and giving the arbitrator the possibility to submit any observations, issue a decision within 30 days of receipt of the request.]

Article x-11: 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) a claimant 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 claimant agrees in writing to the appointment of each member of the Tribunal.

[Note: Parties to look at incorporating or cross-referencing the substantive content of Article x-7(3) [Procedural Requirements...]]

Article x-12. Applicable Law and Rules of Interpretation

1. ~~[In making its determination under paragraph/Article X, the tribunal shall apply].~~ 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 recommend to the CETA Trade Committee the adoption of interpretations of the Agreement. An interpretation adopted by the CETA Trade Committee shall be binding on a Tribunal established under this chapter. The [CETA Trade Committee] may decide that an interpretation shall have binding effect from a specific date.

Article x-13: Place of Arbitration

The disputing parties may agree on the place of arbitration under the arbitration rules applicable pursuant to Article x- (Submission of a Claim to Arbitration) or, where applicable, Article x- (Consolidation), 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 in accordance with the applicable arbitration rules, provided that the place shall be in the territory of either Party or of a third state that is a party to the New York Convention.

Article x-14: Claims Manifestly Without Legal Merit

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

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

3. The Tribunal, after giving the disputing parties an opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, issue a decision or award on the objection, stating the grounds therefor. **EU [In the event that the objection is received after the first session of the Tribunal, the Tribunal shall issue such decision or award as soon as possible, and no later than 120 days after the objection was filed.]** In doing so, the Tribunal shall assume the alleged facts to be true, and

may also consider any relevant facts not in dispute.

4. This procedure and any decision of the Tribunal shall be without prejudice to the right of a respondent to object, pursuant to article x-15 (Claims unfounded as a Matter law Law) or in the course of the proceeding, to the legal merits of a claim and without prejudice to a Tribunal's authority to address other objections as a preliminary question.

[Canada Note: The phrase "or 30 days after the respondent became aware of the facts on which the objection is based" does not work with paragraph 3 in that it is envisaged that a decision will be rendered only at or shortly after the first procedural meeting. In addition, since the Parties have agreed to include the companion Article x-15, it appears to be unnecessary. As such, we propose to remove it.]

Article x-15: 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 under this section is not a claim for which an award in favour of the claimant may be made under Article (Submission of a Claim to Arbitration), even if the facts alleged were assumed to be true. The Tribunal may also consider any relevant facts not in dispute.

2. An objection under paragraph 1 shall be submitted to the Tribunal as soon as possible after the Tribunal is constituted, and in no event later than the date the Tribunal fixes for the respondent to submit its counter-memorial [or, in the case of an amendment to the notice of arbitration,] *[EU Note: is this language necessary?]* the date the Tribunal fixes for the respondent to submit its response to the amendment. An objection may not be submitted under paragraph 1 as long as proceedings under Article x-14 (Claim manifestly without legal merit) are pending, unless the Tribunal grants leave to file an objection under this article, after having taken due account of the circumstances of the case.

3. On receipt of an objection under paragraph 1, EU *[and unless it considers the objection manifestly unfounded,]* the Tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.

[Canada Note: we propose to remove "and unless it [i.e. the tribunal] considers the objection manifestly unfounded". If the goal is dissuade frivolous objections by respondents, Canada would be willing to consider inserting a specific costs provision similar to Article 28(6) of the 2012 US Model BIT which states: "When it decides a respondent's objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment."]

[Note: the EU wishes for the Tribunal to have a say; the EU to further consult internally concerning the expression in brackets]

Article x-16: 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. 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- (Submission of a Claim to Arbitration). For the purposes of this paragraph, an

order includes a recommendation.

Article x-17: Discontinuance

If, following the submission of a claim to arbitration under this section, the claimant fails to take any steps in the proceeding during 180 consecutive days or such periods as the disputing parties may agree, the claimant shall be deemed to have withdrawn its claim and to have discontinued the proceedings. The Tribunal, 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-18: [Transparency of Proceedings]

CAN [

1. [The provisions in Annex I on “Rules on transparency” or FULL TITLE] ALT [Cross reference to UNCITRAL rules] shall apply to the disclosure of information to the public concerning disputes under this [Section].
2. 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.]

EU [

1. Subject to paragraph 2, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration shall apply to the disclosure of information to the public concerning disputes under this [Section].
2. The following provisions of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration shall be adjusted:
 - a) Article 5 shall not apply.
 - b) In addition to Article 2, the request for consultations, request for determination [...] shall be communicated by the respondent to the repository.
3. 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.]

Article x-18 BIS: [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 in those documents.
2. EU [For greater certainty, a]A respondent may disclose 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 in those documents.

Article x-19: 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 referred to in Article 4 (Consultations), a notice requesting a determination referred to in Article 6 (Notice requesting a determination, a claim referred to in Article x- (Submission of a Claim to Arbitration) 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 Rules on Transparency ;
 - 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 has the right to attend a hearing held under this Section.

3. The tribunal shall not draw any inference from the absence of a submission or response to an invitation pursuant to paragraphs 1 or 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.

Article x-20: 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: subject to final check of the expropriation article]

2. [Subject to paragraphs 1 and 5], where a claim is made under paragraph 1(c) of Article x- (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 [company];
- b) an award of restitution of property shall provide that restitution be made to the locally

<p>established [company];</p> <p>c) an award of costs in favour of the claimant shall provide that it is to be made to the claimant; and</p> <p>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- (Procedural Requirements), may have in monetary damages or property awarded under a Party's domestic law.]</p> <p>3. Monetary damages shall not be greater than the loss suffered by the claimant, 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.</p> <p>4. A Tribunal may not award punitive damages.</p> <p>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 reasonable [appropriate] [in the circumstance of the case]. Other reasonable costs, including costs of legal representation and assistance, shall be borne by the unsuccessful disputing party, unless the tribunal determines that such apportionment is unreasonable in the circumstances of the case. Where only some parts of the claims have been successful the costs shall be adjusted, proportionately, to the number or extent of the successful parts of the claims.</p>
<p>Article x-21:- Indemnification or Other Compensation</p> <p>A respondent shall not assert, and a tribunal shall not accept a defence, counterclaim, right of setoff, or similar assertion that a claimant 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.</p>
<p>Article x-22: Fees and Expenses of the Arbitrators</p> <p>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.</p>
<p>Article x-23: Enforcement of Awards</p> <p>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.</p> <p>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 [undue] delay.</p> <p><i>[Note: parties to examine alternate language such as: "any award other than the final award"]</i></p> <p><i>[Note: parties respectively to look into how a Party is to organise in terms of budget when an award against it requires payment of damages]</i></p> <p>3. A disputing party may not seek enforcement of a final award until:</p> <p>(a) in the case of a final award made under the ICSID Convention:</p> <ol style="list-style-type: none">i. 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award, orii. 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- 8(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.

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-24: 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- (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- (Submission of a Claim to Arbitration) and is without prejudice to Article x- (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-25: Consolidation

1. When two or more claims that have been submitted separately to arbitration under Article x- (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 that 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, EU [and there is not more than one respondent identified in 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) EU [the claims in respect of which the consolidation order is sought] CAN [the claims, or part thereof, sought to be covered by the order] CAN [nature]; and

c) the grounds for the order sought.

4. A Tribunal established under this Article shall conduct its proceedings in the following manner:

- 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- (Submission of a Claim to Arbitration), the Tribunal shall proceed under the same arbitration rules;
- b) when the claims for which a consolidation order is sought have not been submitted to arbitration under the same arbitration rules:
 - i. the claimants may collectively agree on the arbitration rules pursuant to paragraph 1 of Article x- (Submission of a Claim to Arbitration) which shall apply to the consolidation proceedings; or
 - ii. if the claimants cannot agree on the arbitration rules within 30 days of the Secretary of General of ICSID receiving the request for consolidation, the UNCITRAL Arbitration Rules shall apply to the consolidation proceedings.

5. A Tribunal established under this Article shall comprise three arbitrators: one arbitrator appointed by the respondent, one arbitrator appointed by agreement of the claimants, and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties. The presiding arbitrator may not be a national of a Party, such as a national of any Member State where a Member State is a disputing party, unless all disputing parties agree otherwise.

If, within 45 days after the Secretary General of ICSID receives a request for consolidation, the respondent or the claimants fail to appoint an arbitrator, the Secretary-General of ICSID, at the request of a disputing party, shall appoint the arbitrator or arbitrators not yet appointed from the list referred to in paragraph 4 of Article x-10 (Constitution of the Tribunal). In the event that such list has not been established, the Secretary General shall appoint the arbitrator or arbitrators in accordance with paragraph 3 of Article x-10 (Constitution of the Tribunal).

If, within 60 days after the Secretary General of ICSID receives a request for consolidation, the disputing parties have not agreed to a presiding arbitrator, the Secretary-General of ICSID shall appoint the presiding arbitrator from the list referred to in paragraph 4 of Article x-10 (Constitution of the Tribunal). In the event that such list has not been established, the Secretary General shall appoint the presiding arbitrator in accordance with paragraph 3 of Article x-10 (Constitution of the Tribunal). The presiding arbitrator may not be a national of a Party, such as a national of any Member State where a Member State is a disputing party, unless all disputing parties agree otherwise.

6. If, after hearing the disputing parties, a Tribunal established under this Article is satisfied that claims submitted to arbitration under Article x- (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, a claimant that has submitted a claim to arbitration under Article x- (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 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- (Submission of a Claim to Arbitration) be stayed unless the latter Tribunal has already adjourned its proceedings.
9. A Tribunal established under Article x- (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 under Article x- as regards those claims, or parts thereof, once the conditions of Article 23(3) have been fulfilled.
11. A claimant may withdraw the claim or part thereof subject to consolidation from arbitration under this Article and such claim or part thereof may not be resubmitted to arbitration under Article x- (Submission of a Claim to Arbitration). If it does so no later than 15 days after receipt of notice of consolidation, its earlier submission of the claim to that arbitration shall not prevent the claimant's recourse to dispute settlement other than under this Chapter.
12. At the request of a claimant, the Tribunal established under this Article may take such measures as it sees fit in order to preserve the confidentiality of protected information of that claimant vis-à-vis other claimants. Such measures may include the submission of redacted versions of documents containing confidential or protected information to the other claimants or arrangements to hold parts of the hearing in private.

Article x-26: 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:
 - 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- (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, decide to:
- a) establish and maintain the list of arbitrators pursuant to Article x- 10(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 decisions referred to in (a) and (b) are adopted no later than the entry into [application/force] of the Agreement, and in any event no later than two years after the entry into [application/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, decide to:
- a) recommend **CAN [to the CETA Trade Committee]** the adoption of interpretations of the agreement pursuant to Article x-12(2) (Applicable Law and Rules of Interpretation);
[Note: articulation with institutional provisions to be reviewed]
 - 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; and,
 - c) adopt rules for mediation for use by disputing parties as referred to in Article x-5 (Mediation).

CAN [Article x-27: Exclusion

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

CAN [ANNEX II - 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.]