Annotations to the Model Clauses for negotiation or re-negotiation of Member States' Bilateral Investment Agreements with third countries

(…)

RECOGNISING the importance of strengthening their investment relations, in accordance with the objective of sustainable development in the economic, social and environmental dimensions, and of promoting investment between them, mindful of the needs of the business communities of each Party, in particular small and medium-sized enterprises, and of high levels of environmental and labour protection through relevant internationally recognised standards and international agreements, to which both Parties are party;

REAFFIRMING their commitment to the principles of sustainable development and transparency;

SEEKING to establish an investment framework based on mutually advantageous rules to govern investment between the Parties that would enhance the competitiveness of their economies, make their markets more efficient and vibrant, and ensure predictable legal environment for further expansion of investment between them;

REAFFIRMING their commitment to the Charter of the United Nations and having regard to the principles articulated in the Universal Declaration of Human Rights;

[For agreements with third countries that have a status of 'EU (potential) candidate country':

BEARING IN MIND that, in light of the judgment of the Court of Justice of the European Union in Achmea (C-284/16), this Agreement should be terminated in the event of the [XX country] accession to the European Union;

(…)

Commentary:

Preambles typically define the purposes and considerations that led the parties to conclude an agreement, as well as the foundation of their past, present, and future relations in so far as it relates to the agreement. Preambles can play an important role in the interpretation of Bilateral Investment Agreements ('BIAs'): the motives and aims mentioned in a preamble can be used to help to understand and interpret the provisions contained in the operative part. The interpretative function of a preamble is recognised in the Vienna Convention on the Law of Treaties (1969) ('VCLT') which notes that, along with the text and other components of a treaty, the preamble may be relied upon for interpretative purposes (see Art. 31 (2) VCLT: 'The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes…').

The preamble at hand enshrines the principles that permeate the EU investment policy: it stresses the contribution of foreign investment to a country's competitiveness and development, while highlighting that the pursuance of foreign investment should be in accordance with the objective and principles of sustainable development. Moreover, in case the BIA is to be concluded with a candidate or potential candidate State, the Preamble warns the counterparts that the BIA will need to be explicitly terminated at the moment of the (potential) candidate's accession to the EU, in line with the Court of Justice of the EU's ruling in Achmea (C-284/16), according to which investor-state arbitration clauses in international agreements that Member States concluded inter se are incompatible with EU law.

HAVE AGREED AS FOLLOWS:

Article Objectives

The objective of this Agreement is to enhance the investment climate between the Parties, in accordance with the following provisions.

Commentary:

A clause that sets out the objective or purpose is common in international agreements. It sets out the main goals of the Parties to an agreement. Like a preamble, it informs the interpretative process when the Parties to the agreement and dispute settlement bodies try to interpret or apply a particular provision of the agreement. Being in the operative part, the objective has added weight in the interpretative process compared to a preamble.

Article Definitions

For the purpose of this Agreement:

“covered investment” means an investment in the territory of a Party owned or controlled, directly or indirectly, by an investor of the other Party, made in accordance with the law of the Party in whose territory the investment is made before or after the date of entry into force of this agreement;

“freely convertible currency” means a currency that can be freely exchanged against currencies that are widely traded in international foreign exchange markets and widely used in international transactions;

“investment” means every kind of asset that has the characteristics of an investment, including such characteristics as a certain duration, the commitment of capital or other resources, the assumption of risk, or the expectation of gain or profit. Forms that an investment may take include:

a) an enterprise;

b) shares, stocks and other forms of equity participation in an enterprise; c) bonds, debentures, loans and other financial instruments of an enterprise; d) interests arising from:

i) concessions conferred pursuant to domestic law or under a contract, including to search for, cultivate, extract or exploit

natural resources,

ii) turnkey, construction, production, or revenue-sharing contracts, or other similar contracts;

e) intellectual property rights;

f) claims to money or claims to performance under a contract;

g) any other moveable or immovable, tangible or intangible property, and related rights.

For greater certainty:

(a) returns that are invested shall be treated as investment;

(b) Any alteration of the form in which assets are invested or reinvested shall not affect their qualification as investments, provided that the form taken by the investment or reinvestment maintains its compliance with the definition of investment.

(c) “claims to money” does not include claims to money that arise solely from commercial transactions for the sale of goods or services by a natural person or an enterprise in the territory of a Party to a natural person or an enterprise in the territory of the other Party, or the extension of credit in relation to such transactions; and

(d) an order or judgment entered in a judicial or administrative action or an arbitral award shall not in itself constitute an investment.

“investor of a Party” means:

(i) a natural person of a Party; or

(ii) a juridical person duly constituted or otherwise organised under the law of the relevant Party, and engaged in the substantive business operations in the territory of a Party,

that has made a covered investment in the territory of the other Party.

"measure of a Party"; means any measure, whether in the form of a law, regulation, rule, procedure, decision, practice, administrative action, or any other form (1), which is adopted or maintained by (2):

(i) central, regional or local governments or authorities; and

(ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities

"operation"; means conduct, management, maintenance, use, enjoyment and sale or other form of disposal of an investment;

“returns” means any amounts yielded by or derived from an investment or reinvestment, including profits, dividends, capital gains, royalties, interest, revenues from intellectual property rights, returns in kind and other lawful income.

(1) For greater certainty, "measure" includes failure to act.

(2) For greater certainty, "measures of a Party" covers measures by entities listed under sub-paragraphs (o) (i) and (o) (ii), which are adopted or maintained by instructing, directing or controlling, either directly or indirectly, the conduct of other entities with regard to those measures.

Commentary:

Definitions ensure that the Parties to a BIA have a common understanding of key concepts that appear in the agreement. They are important as they determine the extent and the manner in which other provisions are to be applied.

Investment, covered investment

The definitions of ‘investment’ and ‘covered investment’ should be read together. Investment can take a wide variety of forms. Establishing an enterprise is a common way of making an investment. The term ‘enterprise’ is not defined separately but it normally covers all types of legal entities constituted or organised under the law of the host State. Other forms that an investment may take include equity and debt interests in a company, intellectual property rights, other forms of tangible or intangible property etc. The list is non-exhaustive. For a certain asset to be protected under the agreement it should have the ‘characteristics of investment’. The characteristics set out in the chapeau are distilled from jurisprudence of investment tribunals and are intended to ensure that only genuine investments will be protected under the agreement.

It is further clarified that ‘investment’, as defined by the treaty, does not include claims to money that arise solely from commercial transactions for the sale of goods or services; and that an order or judgment entered in a judicial or administrative action or an arbitral award shall not in itself constitute an investment, as these elements are not understood to meet the characteristics of investment.

An investment in the territory of a Party may be owned, directly or indirectly, by an investor of the other Party, i.e., ownership or control may be exercised through subsidiaries or affiliates, wherever located, so long as ownership and control can be traced to the investor of that other Party. Moreover, an investment should have been made in accordance with the law of the host State. As long as the above requirements are present, an investment will be a ‘covered investment’ under the Agreement and would, therefore, fall within the scope of its application (see ‘Scope’ Article).

Investor of a Party

Investors can be either natural or juridical persons. Normally a natural person will be considered ‘natural person of a Party’ if it is a national of that Party according to its laws. For a juridical person to qualify as ‘investor of a Party’, it must be duly constituted or otherwise organised under the law of that Party and have substantive business operations in that Party. This is to exclude from the protection of the agreement ‘shell/mailbox’ companies which are not genuine investors but are usually established to hide a person’s or another company’s activities; or are established for the purpose of gaining access to favourable investment protection treaties (practice known as ‘treaty shopping’).

Measure of a Party

A measure may take the form of action and/or failure to act. This is consistent with the rules set forth in the International Law Commission's 2001 Draft articles on Responsibility of States for internationally wrongful acts (‘ILC Draft articles’) that address the criteria for, and consequences of, State responsibility for internationally wrongful acts, and which are deemed to reflect customary international law. It is clarified in the commentaries of the ILC Draft articles that ‘[a]n internationally wrongful act of a State may consist in one or more actions or omissions or a combination of both.’ As such, a measure can manifest itself through various forms. Moreover, a measure may not just be limited to stipulations in legislation. A State is held responsible for the conduct of its organs at all levels. It may be the case that the authorities of a Party delegate certain actions to non-governmental bodies, hence why it is necessary to indicate in the definition that such measures are still considered ‘measures of a Party’. This reflects the rules on attribution of certain wrongful conduct to a State under the ILC Draft articles (Article 4, 5 and 8).

Article Scope

This Agreement shall apply to measures adopted or maintained by a Party affecting: (a) covered investments; and

(b) investors of a Party in respect of a covered investment.

For greater certainty, this Agreement provides only post-establishment protection and does not cover the pre-establishment phase or matters of market access.

Commentary:

Article 'Scope' must be read together with the definitions of 'investment', 'covered investment', 'investor of a Party' and 'measure of a Party'. It sets out the limits of application of the agreement. The Agreement shall apply to measures affecting covered investments and investors of a Party in respect of a covered investment.

It is further clarified that the Agreement applies at the post-establishment stage i.e., it does not cover pre-establishment issues (e.g., market access, non-discrimination at the preestablishment stage)

Article Regional Economic Integration Organisation Clause

Nothing in this Agreement shall prevent a Party from exercising its rights and fulfilling its obligations deriving from their membership in any existing or future economic integration agreement, such as free trade area, customs union, common market economic and monetary union, including the European Union, or as to oblige a Party to extend to the investors of the other Party and to their covered investments, the benefits of any treatment, preference or privilege by virtue of its membership or participation in such economic integration agreement.

Commentary:

Article 'Regional Economic Integration Organisation', also known as the 'REIO' clause, ensures: i) that the Agreement does not prevent a Party from exercising its rights and fulfilling its obligations deriving from its membership in FTAs, custom unions and regional economic integration organisations; and ii) that the Parties to the Agreement are not obliged to extend to the investor of the other Party and their covered investments the better treatment the former confers to investors and their investments of countries that are members to the same FTA, customs union or REIO. That the Agreement shall not prevent a Party from exercising its rights and fulfilling its obligations as a member of the EU is stipulated in jurisprudence of the Court of Justice of the EU (See CJEU Opinion 1/17 on CETA, and C-205/06, C-249/06 or 118/07, where the Court ruled that a BIA is incompatible with the provisions of the EU Treaties, if it does not "contain a provision allowing the Member State concerned to exercise its rights and to fulfil its obligations as a member of the Community…".).

Article Investment and Regulatory Measures

1. The Parties reaffirm the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, the environment including climate change, public morals, social or consumer protection, privacy and data protection, or the promotion and protection of cultural diversity.

2. For greater certainty, the provisions of this Agreement shall not be interpreted as a commitment from a Party that it will not change the legal and regulatory framework, including in a manner that may negatively affect the operation of covered investments or the investor's expectations of profits.

3. For greater certainty and subject to paragraph 4, a Party's decision not to issue, renew or maintain a subsidy

(a) in the absence of any specific commitment under law or contract to issue, renew, or maintain that subsidy; or

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

shall not constitute a breach of the provisions of this Agreement.

4. For greater certainty, nothing in this Agreement shall be construed as preventing a Party from discontinuing the granting of a subsidy or requesting its reimbursement, where such action has been ordered by the competent authorities, or as requiring that Party to compensate the investor therefor.

Commentary:

Article 'Investment and Regulatory Measures' contains a reaffirmation of the Parties' right to regulate within their territories

to achieve legitimate policy objectives, and corollaries of such right. A non-exhaustive, illustrative list of such objectives is provided in the Article. As the body of investment treaty awards grew over time, a public debate arose on whether investment treaties, or the interpretation thereof by arbitral tribunals, unduly restrict the State's regulatory space or even cause a 'regulatory' chill on the enactment and enforcement of laws, regulations, and policies that are in the public interest. For the avoidance of any doubt, it was deemed necessary to devise a clause whereby Parties would reaffirm their right to regulate in the public interest.

Paragraph 1 essentially confirms that the Parties can continue to pursue measures that are aimed for public policy aims. This is an inherent right of the States. It, being a standalone component of the Agreement and placed typically in the investment protection section of EU agreements, informs the interpretative analysis of the investment protection standards.

Paragraph 2 (the so-called 'non-stabilisation clause') clarifies that the investment protection provisions should not be interpreted as a commitment from Parties that the regulatory environment for investment would not change, even if such change may have a negative impact on the operation of covered investments or the investor's expectations of profits. In other words, there is no general duty on the Parties to compensate for changes in the regulatory framework that negatively affect the investors' economic interests or expectations associated with their investments.

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Paragraph 3 clarifies what naturally flows from paragraph 2 in the field of subsidies. In the absence of a specific commitment to the contrary, a Party's decision not to issue, renew or maintain a subsidy cannot be regarded as a breach of the Agreement.

Paragraph 4 addresses situations when a requirement to discontinue the granting of a subsidy, or to reimburse a subsidy, is imposed by competent authorities. Under EU law, for instance, State aid is considered unlawful when put into effect without prior notification, or before a decision of compatibility has been taken by the European Commission. Unlawful State aid is challengeable in that the European Commission or a national court may order the discontinuance or reimbursement of such State aid at any time (subject to certain conditions). The clause, accordingly, clarifies that the Agreement does not limit a Party's right to do so.

Article Non-discriminatory Treatment

1. Each Party shall accord to investors of the other Party and to covered investments treatment no less favourable than that it accords, in like situations, to its own investors and to their investments, with respect to operation in its territory.

2. Each Party shall accord to investors of the other Party and to covered investments treatment no less favourable than that it accords, in like situations, to investors of a third country and to their investments, with respect to operation in its territory.

3. Paragraph 2 shall not be construed as obliging a Party to extend to investors of the other Party or to covered investment the benefit of any treatment resulting from measures providing for recognition, including of the standards or criteria for the authorisation, licencing, or certification of a natural person or enterprise to carry out an economic activity, or of prudential measures.

4. Paragraphs 1 and 2 shall not apply to:

(a) public procurement, or

(b) subsidies or grants provided by the Parties, including government-supported loans, guarantees and insurance.

5. For greater certainty, the "treatment" referred to in paragraph 2 does not include dispute settlement procedures provided for in other international agreements.

6. For greater certainty, substantive provisions in other international agreements concluded by a Party with a third country do not in themselves constitute the "treatment" referred to in paragraph 2. Measures of a Party pursuant to those provisions (3) may constitute such treatment and thus give rise to a breach of this Article.

(3) For greater certainty, the mere transposition of those provisions into domestic law, to the extent that it is necessary in order to incorporate them into the domestic legal order, does not in itself qualify as a measure.

Commentary:

Paragraph 1 and 2 ensures national and most-favoured-nation ('MFN') treatment to investors of the other Party and to covered investments at the post-establishment stage of the investment (see definition of 'operation' which encompasses the various angles of the post establishment stage). What is a 'like situation' is a matter to be determined in the light of the facts of the case.

Paragraph 3 states that a Party is not required to extend to investors of the other Party or to covered investments the benefit of any treatment resulting from double taxation agreements and measures providing for recognition, including of the standards or criteria for the authorisation, licencing, or certification of a natural person or enterprise to carry out an economic activity, or of prudential measures (usually found in mutual recognition agreements). Double taxation agreements and mutual recognition agreements are special types of agreements which are based on reciprocity arrangements. Extending such treatment on an MFN basis to other third countries would be contrary to their very purpose, because the benefits they entail are conditional on similar benefits granted in exchange.

Paragraph 4 excludes public procurement, and subsidies or grants provided by the Parties, (including government-supported loans, guarantees and insurance) from the scope of the national treatment and MFN commitments. This follows the approach taken in EU agreements both on liberalisation and protection, whereby subsidies and public procurement are subject to separate chapters with their own set of disciplines.

Paragraph 5 clarifies that dispute settlement procedures in other international agreements do not form 'treatment' for the purposes of the MFN obligation. The clause at hand clarifies that the MFN clause was never intended and should not be read as allowing to import dispute settlement procedures or to dispense with requirements in the dispute settlement mechanism of the BIA at issue on the grounds that such requirements are not present in other treaties (see Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7 where the Tribunal allowed the investor, who brought the case under the Argentina-Spain BIA, to rely on what was deemed to be a 'more favourable' dispute settlement mechanism in the Chile Spain BIA).

Paragraph 6 equally clarifies that substantive provisions in other international agreements concluded by a Party with a third country do not in themselves constitute the "treatment" referred ton in paragraph 2. Accordingly, for a breach of MFN to be established, an investor cannot invoke a provision in another international agreement; it has to be an actual measure (e.g. law, regulation, decision etc.) that provides some better treatment to other foreign investors.

Article Treatment of Investors and of Covered Investments

1. Each Party shall accord in its territory to covered investments and to investors of the other Party with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 to 5.

2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 through measures or series or measures that constitute:

(a) denial of justice in judicial or administrative proceedings; or

(b) fundamental breach of due process, including a fundamental breach of transparency in judicial and administrative proceedings; or

(c) manifest arbitrariness; or

(d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or

(e) abusive treatment such as harassment, duress or coercion.

3. When determining a breach of paragraph 2, a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment that created a legitimate expectation, upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.

4. For greater certainty, "full protection and security" refers to the Party's obligations to ensure the physical security of investors and covered investments.

5. For greater certainty, a breach of another provision of this Agreement, or of any other international agreement, does not constitute a breach of this Article.

Commentary:

Paragraph 1 establishes a Party's obligation to accord to covered investments and to investors of the other Party with respect to their covered investments fair and equitable treatment ('FET') and full protection and security ('FPS'). Paragraphs 2-5 provide guidance and clarifications about the two standards of protection.

To begin with, paragraph 2 provides a closed list of improper and reprehensible State conduct that would constitute a violation of the standard. Element (a)-(e) have been distilled from arbitral jurisprudence and are widely regarded by tribunals, at this point of development of the FET obligation, to form its content.

Paragraph 3 provides that, in determining a breach of paragraph 2, a tribunal may consider whether a Party made a specific representation to induce investments that created a legitimate expectation, upon which the investor relied in deciding to make or maintain the covered investment, and which the Party subsequently frustrated. It follows that legitimate expectations may only be treated as a relevant consideration when assessing an allegation of violation of the FET standard through any of the (a)-(e) elements, and not as a standalone element that in itself would give rise to a violation of the FET standard.

Paragraph 4 clarifies that the obligation to provide 'full protection and security' only refers to the duty to protect the physical integrity of an investor and a covered investment against interference by use of force. This allows to draw a meaningful distinction from the FET standard, avoiding other forms of protection and security (e.g., legal) being read into the FPS standard.

Paragraph 5 clarifies that a breach of another provision of this Agreement, or of any other international agreement, does not constitute a breach of this Article. This is to prevent tribunals from automatically finding a breach of the FET standard when another provision in the BIA has been breached, or when violations of other international instruments occur, with FET (and the investor-State dispute settlement mechanism of the Agreement) serving as a 'trojan horse' for the enforcement of obligations in other international agreements.

Article Compensation for Losses

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

2. Without prejudice to paragraph 1 of this Article, investors of a Party who, in any of the situations referred to in that paragraph, suffer losses in the territory of the other Party shall be accorded prompt, adequate and effective restitution or compensation by the other Party, if these losses result from:

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

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

The amount of such compensation shall be determined in accordance with the provisions of paragraph 2 of Article [Expropriation], from the date of requisitioning or destruction until the date of actual payment.

Commentary:

Article 'Compensation for Losses' (colloquially called 'war clause') regulates questions of compensation for losses suffered by foreign investors in war-type situations, or situations of major civil and political unrest/upheaval.

Paragraph 1 entitles investments covered by the BIA to the better of national or MFN treatment with respect to restitution, indemnification, compensation, or other forms of settlement relating to losses suffered in a Party's territory owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot.

Paragraph 2 creates an unconditional obligation to pay compensation for such losses only when these result from requisitioning of the investors' covered investment (or part thereof) by the host State's armed forces or authorities, or from destruction not required by the necessity of the situation.

Article Expropriation

1. Neither Party shall nationalise or expropriate a covered investment either directly or indirectly through measures having an effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") except:

(a) for a public purpose;

(b) under due process of law;

(c) in a non-discriminatory manner; and

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

For greater certainty, this paragraph shall be interpreted in accordance with Annex I (Expropriation).

2. The compensation referred to in paragraph 1 shall amount to the fair market value of the investment at the time immediately before the expropriation or the impending expropriation became publicly known or when the expropriation took place, whichever is earlier. Valuation criteria shall include going concern value, asset value including the declared tax value of tangible property, and other criteria, as appropriate.

3. The compensation shall include interest at a normal commercial rate from the date of expropriation until the date of payment. It shall be freely transferable in accordance with Article [Transfers].

4. The investor affected shall have a right, under the law of the expropriating Party, to prompt review of its claim and of the valuation of its investment, by a judicial or other independent authority of that Party, in accordance with the principles set out in this Article.

5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, to the extent that such issuance is consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights in Annex 1C to the WTO Agreements ("TRIPS Agreement").

Commentary:

Article 'Expropriation' incorporates into the agreement international law standards for expropriation and compensation.

Paragraph 1 bars all expropriations or nationalisations except those that are for a public purpose, in accordance with due process of law; carried out in a non-discriminatory manner; and subject to prompt, adequate and effective compensation.

Paragraphs 2 and 3 explain the meaning of 'prompt, adequate and effective compensation'. It is stipulated that the measure of such compensation is the 'fair market value' of the investment immediately before the expropriation took place or became known (whichever is earlier), plus interest at a normal commercial rate from the date of expropriation until the date of payment. Such compensation should be freely transferrable in accordance with the Article on Transfers.

Paragraph 4 requires that the expropriating Party maintains laws that allow the prompt review of an investor's claim and valuation of its investment by a judicial or other independent authority of that Party.

Paragraph 5 stipulates that the obligations on expropriation do not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, to the extent that this is consistent with the TRIPs Agreement. This is in recognition of the sensitivity around compulsory licencing, notably the fact that it is a legitimate limitation of the patent holders' rights when the requirements under the TRIPS are met. Therefore, a TRIPS-compliant compulsory licencing should not give rise to expropriation claims; otherwise the very rationale of legitimising it would be nullified.

Article Transfers

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

(a) contributions to capital to maintain, develop or increase the investment;

(b) profits, dividends, capital gains, interest, royalty payments, management fees, technical assistance and other fees or returns derived from the covered investment;

(c) proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the

investment;

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

(e) earnings and other remuneration of personnel engaged from abroad and working in connection with an investment;

(f) payments made pursuant to Articles X (Compensation for Losses) and X (Expropriation);

(g) payments of damages pursuant to an award issued by a tribunal under Article X XXX (ISDS).

2. Neither Party may require its investors to transfer, or penalise its investors for failing to transfer, the income, earnings, profits or other amounts derived from, or attributable to, their covered investments in the territory of the other Party.

3. Notwithstanding paragraphs 1 and 2, this Article shall not be construed as preventing a Party from applying in an equitable and non-discriminatory manner, and not in a way that would constitute a disguised restriction on trade and investment, its laws and regulations relating to:

(a) bankruptcy, insolvency, bank recovery and resolution, or the protection of the rights of creditors;

(b) issuing, trading, or dealing in financial instruments;

(c) financial reporting or record keeping of transfers where necessary to assist law enforcement or financial regulatory authorities;

(d) criminal or penal offenses, deceptive or fraudulent practices;

(e) ensuring compliance with orders or judgments in administrative or judicial proceedings;

(f) social security, public retirement or compulsory savings schemes.

Commentary:

Article 'Transfers' protects investors from certain government measures that limit current and capital account transfers. The rationale of this article is to avoid that the protection afforded by the agreement is not nullified by unjustified limitations to the transfer of funds, which is an essential element for investing abroad.

In Paragraph 1, each Party agrees to permit all transfers relating to a covered investment to be made in a freely convertible currency, without restriction or delay, and at the market rate of exchange prevailing on the date of transfer with regard to the currency to be transferred. 'Freely convertible currency' is defined in the definitions section as a currency that can be freely exchanged against currencies that are widely traded in international foreign exchange markets and widely used in international transactions. Paragraph 1 also provides a non exhaustive list of transfers that must be allowed.

Paragraph 2 applies to host-country measures that may force investors of that country, who invest in the territory of the other Party, to transfer the income, earnings, profits or other amounts derived from, or attributable to, their covered investments in the territory of the other Party. Such measures are prohibited.

Paragraph 3 recognises that, notwithstanding the guarantees of paragraphs 1 and 2, a Party may prevent a transfer through the equitable and non-discriminatory application of its laws and regulations relating to specific areas such as bankruptcy, criminal offenses in which such limitations are necessary for public policy reasons. In applying such laws and regulations a Party must ensure that this is not done in a way that would constitute a disguised restriction on trade and investment. Paragraph 3 provides an exhaustive list of the concerned areas.

Article Observance of Written Commitments

Where a Party has entered into any written commitment with investors of the other Party or with their covered investments, that Party shall not breach the said commitment through the exercise of governmental authority.

Commentary:

Article 'Observance of Written Commitments' stipulates that a breach of a written commitment that the host country has entered into with investors of the other Party, or their covered investments, would be a violation of the Agreement only when such breach has occurred through the exercise of governmental authority. Accordingly, the clause is activated when the host State has used its sovereign power to breach a written commitment, i.e., powers that lie outside of the contractual relationship (e.g., by passing legislation) and not when acting within the powers of any ordinary commercial actor (e.g., non-

payment of invoices, delayed or no delivery of agreed good and services).

Article Article

Subrogation

If a Party, or its designated agency, makes a payment under an indemnity, guarantee or contract of insurance it has entered into in respect of a covered investment:

(a) The other Party shall recognize that the Party or its agency shall be entitled in all circumstances to the same rights under this Agreement as those of the investor in respect of the covered investment, but for the subrogation. Such rights may be exercised by the Party or an agency thereof, or by the investor if the Party or an agency thereof so authorises.

(b) The investor may not pursue these rights to the extent of the subrogation.

Commentary:

Article 'Subrogation' provides for the transfer of rights that foreign investors might have visà-vis the host country to the insurance agency of the home State which indemnifies the foreign investor under an investment insurance or guarantee. The host party is obliged to recognise assignment of all the rights and claims to the indemnifying party. The indemnifying party shall receive the same treatment and the same payments due, pursuant to those rights and claims, as the investor was entitled to receive under the Agreement in respect of the investment concerned under all the circumstances. An investor may not pursue these rights and claims to the extent pursued by the indemnifying party.

Article Transparency

1. Each Party shall publish, or otherwise make publicly available, its laws and regulations of general application, as well as international agreements which may affect investors of the other Party and their covered investments in its territory, including any measures aimed at protecting the environment and labour conditions or that may be affecting the protection of the environment or labour conditions, thereby ensuring awareness and providing reasonable opportunities for interested persons and stakeholders to submit views.

2. Nothing in this Article shall require the Party to furnish or allow access to any confidential or proprietary information, including information concerning particular investors or their covered investments, the disclosure of which would impede law enforcement or be contrary to domestic laws protecting confidentiality, or would prejudice legitimate commercial interests of investors and their covered investments.

Commentary:

Paragraph 1 requires that Parties to the Agreement make relevant laws and regulations publicly available, so that investors are aware of the regulatory framework that is in force at any given time and that are given reasonable opportunities to be consulted in the law- or decision-making process.

Paragraph 2 is modelled after Article III bis of the GATS ('Disclosure of Confidential Information') and ensures the protection of confidential or proprietary information where the disclosure would impede law enforcement, be contrary to domestic laws protecting confidentiality, or would harm the legitimate commercial interests of investors and their covered investments.

Article Taxation

1. Nothing in this Agreement shall affect the rights and obligations of either Party under any tax convention. In the event of any inconsistency between this Agreement and any such tax convention, the tax convention shall prevail to the extent of the inconsistency.

2. Article [Non-Discriminatory Treatment] and Article [Transfers] shall not apply to an advantage accorded by a Party pursuant to a tax convention.

3. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade and investment, nothing in this Agreement shall be construed to prevent the adoption, maintenance or enforcement by a Party of any measure aimed at ensuring the equitable or effective imposition or collection of direct taxes that:

(a) distinguishes between taxpayers, who are not in the same situation, in particular with regard to their place of residence

or with regard to the place where their capital is invested; or

(b) aims at preventing the avoidance or evasion of taxes pursuant to the provisions of any tax convention or domestic fiscal legislation.

4. For the purpose of this Article:

(a) "residence"; means residence for tax purposes;

(b) "tax convention"; means a convention for the avoidance of double taxation or any other international agreement or arrangement relating wholly or mainly to taxation that either Party to this Agreement is party to.

Commentary:

Paragraphs 1 and 2 regulate the relation between the BIA and tax conventions. The definition of tax convention is set out in paragraph 4(b) and refers to conventions for the avoidance of double taxation or any other international agreement or arrangement relating wholly or mainly to taxation. Double taxation treaties are designed primarily to prevent instances of double taxation which is thought to distort investment inflows, but may also play some ancillary roles, such as helping to combat tax evasion. Paragraph 1 provides that, in the event of any inconsistency between the BIA and any tax convention, the tax convention shall prevail to the extent of the inconsistency. Paragraph 2 stipulates that Article 'Non-Discriminatory Treatment' and Article 'Transfers' shall not apply to an advantage accorded by a Party pursuant to a tax convention.

Paragraph 3 is modelled after Article XIV (d) 'General Exceptions' of the GATS which introduces exceptions on taxation. It represents a combined drafting of the chapeau of GATS Article XIV and its element (d), including the relevant parts of footnote 6.

Article Prudential Carve-Out

1. Nothing in this Agreement shall prevent a Party from adopting or maintaining measures for prudential reasons, such as:

(a) the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier;

(b) ensuring the integrity and stability of a Party's financial system.

2. Where such measures do not conform with this Agreement, they shall not be used as a means of avoiding the Party's obligations under this Agreement.

3. Nothing in this Agreement shall be construed to require a Party to disclose information relating to the affairs and accounts of individual consumers or any confidential or proprietary information in the possession of public entities.

Commentary:

Article 'Prudential Carve-Out' is modelled after paragraph 2 of the GATS Annex on Financial Services. Paragraph 1 allows Parties to a BIA to adopt or maintain measures for prudential reasons and provides an indicative list of what such measures may be. Paragraph 2 stipulates that such measures shall not be used as a means of avoiding the Party's obligations under the BIA. Finally, Paragraph 3 establishes the Parties' right not to disclose information relating to the affairs and accounts of individual consumers or any confidential or proprietary information in the possession of public entities.

Article General Exceptions

Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, Articles [Non-Discriminatory Treatment] and [Transfers] shall not be construed to prevent a Party from adopting or enforcing measures necessary:

(a) to protect public security or public morals or to maintain public order (4);

(b) to protect human, animal or plant life or health (5);

(c) to ensure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:

(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contracts;

(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the

protection of confidentiality of individual records and accounts;

(iii) safety.

(4) The public security and public order exceptions may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

(5) The Parties understand that the measures referred to in subparagraph (b) include environmental measures necessary to protect human, animal or plant life or health.

Commentary:

Article 'General Exceptions' is modelled after Article XIV of the GATS. The underlying rationale is that since mode 3, which is about investment ('commercial presence') in services is subject to specific general exceptions under the GATS, there is no reason why disciplines under an investment agreement should be subject to different types of exceptions (or should not be subject to any exceptions whatsoever). This also ensures consistency with the trade and investment agreements concluded at EU level. Since the overlap between investment agreements and the GATS or investment liberalisation chapters under EU FTAs is limited to non-discrimination commitments, it was first deemed that general exceptions should, in principle, only apply to non-discrimination. Following the issuance of CETA Opinion 1/17, the application of general exceptions has been extended to the transfers clause too. The said Opinion highlighted the importance of general exceptions in EU agreements when it comes to the impact of FTAs (and CETA specifically in the context of that Opinion) on the autonomy of the EU legal order. The remaining standards of protection, notably FET and expropriation, which should be read together with the Article on the right to regulate, are not subject to this clause on general exceptions, as they are drafted in such way to ensure that a State's policy space to enact measures on public policy grounds is not reduced. In this regard, general exceptions are 'in-built' in those standards of protection.

Article Security Exceptions

Nothing in this Agreement shall be construed:

(a) to require a Party to furnish or allow access to any information the disclosure of which it considers contrary to its essential security interests;

(b) to prevent a Party from taking an action which it considers necessary for the protection of its essential security interests;

(i) connected to the production of or traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods and materials, services and technology, and to economic activities, carried out directly or indirectly for the purpose of supplying a military establishment;

(ii) relating to fissionable and fusionable materials or the materials from which they are derived; or

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent a Party from taking any action in pursuance of its obligations under the Charter of the United Nations for the maintenance of international peace and security.

Commentary:

Article 'Security Exceptions' is modelled after GATS Article XIV bis. It follows the same logic as other exceptions drawn from the WTO rulebook, in that investment encompasses mode 3 of the GATS. This also ensures consistency with the trade and investment agreements concluded at EU level.

Article Temporary Safeguard Measures

1. In exceptional circumstances of serious difficulties for the operation of the Union's economic and monetary union, or threat thereof, the Union may adopt or maintain safeguard measures with regard to transfers for a period not exceeding six months. The measures referred to in this paragraph shall be limited to the extent that is strictly necessary.

2. Where a Party experiences serious balance of payments or external financial difficulties, or threat thereof, it may adopt or maintain restrictive measures with regard to transfers. Such measures shall:

(a) be consistent with other international obligations of the Party, and with the Articles of Agreement of the International Monetary Fund;

(b) not exceed those necessary to deal with the difficulties addressed under this paragraph;

(c) be temporary and phased out progressively;

(d) avoid unnecessary damage to the commercial, economic and financial interests of the other Party;

(e) be non-discriminatory compared to third countries in like situations.

A Party maintaining or having adopted measures referred to in this paragraph shall promptly notify them to the other Party.

Commentary:

Paragraph 1 is modelled after Article 66 TFEU. It allows for restrictions on transfers in exceptional situations of serious difficulties for the operation of the EU's economic and monetary union, or threat thereof. Such measures cannot exceed 6 months and should be limited to the extent that is strictly necessary. The Court of Justice of the EU has ruled that the absence of a provision on such safeguard measures rendered certain BIAs of Member States incompatible with EU law (C-205/06, C-118/07, C-249/06).

Paragraph 2 is modelled after Article XII of the GATS. It allows a Party to adopt or maintain restrictive measures on transfers when it experiences (or there is a threat of) serious balance of payments or external financial difficulties, or threat thereof. Paragraph 2 further stipulates a list of conditions that such measures need to comply with and creates an obligation of prompt notification of such measures.

Article Denial of Benefits

A Party may deny the benefits of this Agreement to an investor of the other Party or to a covered investment, if the denying Party adopts, implements, maintains or enforces measures related to the maintenance of international peace and security, including the protection of human rights, which:

a. prohibit transactions with investors of the other Party or their covered investments, or

b. would be violated or circumvented, if the benefits of this Agreement were accorded to investors of the other Party or their covered investments, including where the measures prohibit transactions with a natural or juridical person who owns or controls either of them.

For greater certainty, a Party may deny such benefits pursuant to this Article without any prior publicity or other additional formality related to its intention to exercise the right conferred by this Article.

Commentary:

Article 'Denial of Benefits' allows a Party to the BIA to deny the benefits of the Agreement in circumstances where it has adopted measures related to the maintenance of international peace and security, including the protection of human rights, when such measures either require the prohibition of transactions with investors or covered investments of the other Party or to avoid the circumvention of such measures. Such measures are, for instance, those prescribed in the EU Global Human Rights Sanction Regime (see Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses), which enables the freezing of funds and economic resources belonging to, owed, held or controlled by any natural or legal person, entity, or body that has been found to commit serious human rights violations and abuses, as defined in the Regulation.

It is further clarified that a Party does not need to observe any formality or give prior notice about its intent to deny the rights of the Agreement pursuant to this Article.

Article Corporate Social Responsibility and Responsible Business Conduct

1. The Parties recognise the importance of investors implementing due diligence in order to identify and address adverse impacts, such as on the environment and labour conditions, in their operations, their supply chains and other business relationships, The Parties shall promote the uptake by enterprises and investors of corporate social responsibility or responsible business practices with a view to contributing to sustainable development and responsible investment.

2. The Parties shall support the dissemination and use of relevant internationally agreed instruments that have been endorsed or are supported by the Parties, such as the UN Global Compact, the UN Guiding Principles on Business and

Human Rights, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and the OECD Guidelines for Multinational Enterprises and related due diligence guidance.

3. The Parties agree to exchange information as well as best practices on issues covered by this article, including on possible ways to facilitate the uptake by enterprises and investors of corporate social responsibility, responsible practices.

Commentary:

Sustainable development provisions overall

The provisions on trade and sustainable development ('TSD') are an essential part of EU investment policy. In 2015, the 'Trade for All' strategy strongly affirmed the importance of sustainable development, including human rights and labour rights, in the EU's trade agenda. More recently, the TSD review (2022) further expressed the EU's strong commitment to fostering sustainable development in all its forms through its trade and investment agreements. Sustainability is one of the key three pillars of the EU trade policy, which is open, sustainable and assertive.

From the specific angle of EU investment policy, TSD provisions not only reinforce the Parties' existing obligations to effectively implement relevant international agreements, but further seek to ensure that Parties do not weaken or reduce the levels of environmental and labour protection afforded in their laws, or otherwise waive or derogate from relevant legislation, in order to encourage investment.

The EU approach includes provisions on Investment and Environment, Investment and Climate Change, Investment and Labour, and Corporate Social Responsibility.

Specific remarks to Article 'Corporate social responsibility and responsible business conduct'

Paragraph 1 creates an obligation upon the Parties to the Agreement to promote the uptake by enterprises and investors of corporate social responsibility or responsible business practices with a view to contributing to sustainable development and responsible investment. This follows from a recognition that the actions of business actors have significant impacts on the lives of citizens in the territory of the Party they operate in terms of working conditions, human rights, health, the environment, innovation, education and training; and that States have an important role in supporting and encouraging companies to conduct their business responsibly.

Paragraph 2 provides a non-exhaustive list of internationally agreed instruments that set out corporate social responsibility standards and responsible business practices, whose dissemination and use the Parties to the Agreement incur an obligation to support.

Paragraph 3 addresses the cooperation angle between the Parties, as far as the exchange of information and best practices is concerned, on issues relating to corporate social responsibility and responsible business conduct.

Article Investment and Environment

1. The Parties recognise the right of each Party to determine its sustainable development policies and priorities, to establish the levels of domestic environmental protection it deems appropriate, and to adopt or modify its environmental laws and policies. Such levels, laws and policies shall be consistent with each Party's commitments to internationally recognised standards and agreements on environmental protection.

2. A Party shall not weaken or reduce the levels of protection afforded in its environmental laws in order to encourage investment.

3. A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from such legislation in order to encourage investment in its territory.

4. Each Party shall effectively implement the multilateral environmental agreements (MEAs), protocols and amendments that it has ratified.

Commentary:

Paragraph 1 recognises that each Party may determine for itself the sustainable development policies and priorities; may establish the levels of domestic environmental protection it deems appropriate and adopt or modify its environmental laws and policies. In doing so, each Party must ensure that such levels, laws and policies are consistent with its commitments to internationally recognised standards and agreements on environmental protection. This requirement introduces a floor on the level of ambition of such policies while reserving a State's right to be more ambitious.

Paragraphs 2 and 3 introduce non-regression clauses which are intended to secure a level playing field by preventing situations of conscious lowering of environmental standards by a State to increase investment, which could thus result in an unfair competitive advantage. They address weakening of levels of protection as a result of a) weakening laws (paragraph 2) and b) waiver or derogation (paragraph 3).

Paragraph 4 requires that each Party to the Agreement effectively implements the multilateral environments agreements (MEAs) it has ratified. This reflects the position that the interplay between investment and sustainable development must be addressed comprehensively, putting investment policy in the wider context of other tools supporting sustainability. In this comprehensive approach, Member States BIAs, together with EU trade and investment agreements, promote the global governance framework, including by upholding the effective implementation of the MEAs they have ratified.

Article Investment and Climate Change

1. The Parties recognise the importance of taking urgent action to combat climate change and its impacts, and the role of investment in pursuing this objective, consistent with the United Nations Framework Convention on Climate Change (UNFCCC), the purpose and goals of the Paris Agreement adopted by the Conference of the Parties to the UNFCCC at its 21st session (the Paris Agreement), and with other MEAs and multilateral instruments in the area of climate change.

2. Each Party shall:

a. effectively implement the UNFCCC and the Paris Agreement adopted thereunder, including its commitments with regard to its Nationally Determined Contributions;

b. promote investment of relevance for climate change mitigation and adaptation; including investment concerning climate friendly goods and services, such as renewable energy, low-carbon technologies and energy efficient products and services, and by adopting policy frameworks conducive to deployment of climate friendly technologies;

3. The Parties shall work together to strengthen their cooperation on investment-related aspects of climate change policies and measures bilaterally, regionally and in international fora, as appropriate.

Commentary:

Paragraph 1 stresses the importance of urgent action to combat climate change and its impacts against the background of the major instruments that have been pursued at the multilateral level to combat climate change, notably the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement.

Paragraph 2, in the same spirit as the equivalent provisions on environment, requires the effective implementation of the UNFCCC and the Paris Agreement by each Party to the Agreement, as well as the promotion of investment of relevance for climate change mitigation and adaptation.

Paragraph 3 highlights the importance of cooperation in the field of climate change by requiring Parties to a BIA to work together on investment-related aspects of climate change – not only at the bilateral level, but also at the regional and multilateral level.

Article Investment and Labour

1. The Parties recognise the right of each Party to determine its sustainable development policies and priorities, to establish the levels of domestic labour protection it deems appropriate and to adopt or modify its labour laws and policies. Such levels, laws and policies shall be consistent with each Party's commitments to internationally recognised labour standards and agreements.

2. A Party shall not weaken or reduce the levels of protection afforded in its labour legislation in order to encourage investment.

3 A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from such legislation in order to encourage investment in its territory.

4. In accordance with the ILO Constitution and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, as amended in 2022, each Party shall respect, promote and effectively implement throughout its territory the internationally recognised core labour standards as defined in the fundamental ILO Conventions.

5. Each Party shall effectively implement the ILO Conventions it has ratified [and to make sustained efforts towards ratifying, to the extent that it has not yet done so, the fundamental ILO Conventions].

6. Each Party is committed to promote investment policies which further the objectives of the Decent Work Agenda, in accordance with the 2008 ILO Declaration on Social Justice for a Fair Globalisation and the 2019 ILO Centenary Declaration for the Future of Work, including a human-centred approach to the future of work, adequate minimum wages, social protection and safety and health at work.

Commentary:

Article 'Investment and Labour' signals the importance of labour in investment-related sustainable development policies. Its structure is largely identical to that of Article 'Investment and Environment', in that it replicates the same principles and tenets in the field of labour.

Accordingly, paragraph 1 introduces the right to regulate in the field of labour policies.

Paragraphs 2 and 3 are non-regression clauses modelled upon those in the Article 'Investment and Environment'.

In paragraph 4, each Party undertakes the obligation to respect, promote and effectively implement throughout its territory the internationally recognised core labour standards as defined in the fundamental ILO Conventions.

In paragraph 5, the obligation upon each Party to effectively implement the ILO Conventions it has ratified further extends to making sustained efforts towards ratifying, to the extent not yet done so, the fundamental ILO Conventions. The fundamental ILO Conventions are considered key for the rights of those working, hence why they benefit from increased commitments.

Finally, paragraph 6 introduces each Party's commitment to promote investment policies which further the objectives of the Decent Work Agenda, in accordance with the 2008 ILO Declaration on Social Justice for a Fair Globalisation and the 2019 ILO Centenary Declaration for the Future of Work.

Article Dialogue and Cooperation on Investment-related Sustainable Development Issues

The Parties agree to engage in dialogue and cooperate as appropriate on investment-related labour, environmental and climate change issues of mutual interest arising under this Agreement in a manner complementary to the efforts under existing bilateral and multilateral mechanisms.

Commentary:

This is an umbrella provision regarding cooperation on investment-related sustainable development issues that cuts across all aspects of sustainability policies covered under the Agreement. Parties agree to exchange and cooperate on such issues in a manner complementary to any steps taken under existing bilateral and multilateral mechanisms.

ISDS-related provisions

Article Scope

This [section] applies to a dispute between, on the one hand, an investor of a Party and, on the other hand, the other Party arising from an alleged breach of investment protection standards provided in [section X], which allegedly caused loss or damage to the claimant or its locally established enterprise.

Commentary:

Article 'Scope' delineates the scope of application of the investor-State dispute settlement section in a BIA. Accordingly, such mechanism may be triggered when there is a dispute between an investor of a Party and the other Party (host State) arising from an alleged breach of the investment protection standards in the agreement and which has allegedly caused loss or damage to the claimant or its locally established enterprise.

Article Transparency of Proceedings

1. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, as adopted by the United Nations Commission on International Trade Law on 11 July 2013 shall apply to international arbitration proceedings initiated pursuant to this article / articles X XXX.

2. Nothing in this Agreement or the applicable arbitration rules shall prevent the exchange of information between the European Union and [Member State], or vice versa, which relates to international arbitration proceedings initiated pursuant

to this article / articles X-XXX.

Commentary:

Transparency in arbitral proceedings is important as it enables the public scrutiny of the arbitral process and promotes the accountability of all actors involved.

Paragraph 1 stipulates that the arbitration proceedings in the agreement should be subject to the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ('UNCITRAL Rules on Transparency'), as adopted by the United Nations Commission on International Trade Law on 11 July 2013. The UNCITRAL Rules on Transparency provide for the publication of information on treaty-based investor-State cases, the parties' and non

disputing parties' submissions, witness statements, expert reports, transcripts, and all decisions rendered by the tribunal, as well as for public hearings. They, moreover, account for exceptions to transparency. They recognise that 'confidential or protected information', deemed as such by the tribunal after consultation with the disputing parties, 'shall not be made available to the public'. This is the case for confidential business information, information that, if disclosed, would impede law enforcement, or information that is protected against disclosure either by the relevant investment treaty, by the law of the respondent State, or by any law or rules deemed applicable by the tribunal. To that end, tribunals may arrange for the redaction of the information at issue, and/or hold non-public sessions of hearings, when said information is discussed. The UNCITRAL Rules on Transparency also preclude the publication of information that could jeopardise the integrity of the proceedings by, inter alia, hampering the collection or production of evidence, or leading to the intimidation of witnesses or party representatives. Nor do they permit the publication of information that the State considers contrary to its essential security interests.

Paragraph 2 ensures that the exchange of information between the European Union and its Member States in relation to arbitration proceedings brought against Member States parties to an investment agreement is not precluded. This is so the case, as Member States incur an obligation to inform the EU of disputes that have been filed against them or before activating any relevant mechanisms for dispute settlement against a third country (see Article 13 of Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries).

Article Multilateral Dispute Settlement Mechanism

1. The Parties shall pursue with each other and other interested trading partners the establishment of a permanent multilateral investment court which includes an appellate mechanism.

2. Upon the entry into force between Parties of an international agreement providing for such a multilateral investment court, the relevant parts of this Agreement shall cease to apply.

Commentary:

Paragraph 1 requires that the parties to the Agreement pursue with each other and other interested State partners the establishment of a permanent multilateral investment court which includes an appellate mechanism. This clause essentially refers to the on-going negotiations in Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) on investor-State dispute settlement reform where the European Union and its Member States are pursuing the establishment of a two-tier multilateral investment court.

Paragraph 2 stipulates that upon accession to such multilateral investment court, this mechanism will supersede the relevant provisions of the investor-State dispute settlement mechanism in the BIA.

Article Applicable Law and Rules of Interpretation

1. The tribunal shall apply 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. For greater certainty, the domestic law of the Contracting Parties shall not constitute part of the applicable law. In case of [Member State], "domestic law" includes the law of the European Union.

2. The tribunal shall not have jurisdiction to determine the legality of a measure under the domestic law of a Party. For greater certainty, in determining the consistency of a measure with this Agreement, the tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party.

Commentary:

Applicable law denotes the substantive law which an arbitral tribunal applies when deciding on an alleged breach of the Agreement.

Paragraph 1 stipulates that the tribunal should apply the 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. It is further clarified that the domestic law of the Contracting Parties does not constitute part of the applicable law. The Court of Justice of the EU observed to that end in its Opinion 1/17 that, for EU-level investment agreements to be compatible with EU law, the power of investment tribunals, them standing outside of the EU judicial system, should be confined to the interpretation of the international Agreement and not the interpretation or application of EU law.

Paragraph 2 stipulates that a tribunal may not determine the legality of a measure under domestic law. However, it may often be the case that a tribunal needs to consider domestic law when determining the consistency of a measure with a given BIA. In that case, the tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party.

Article Ethics

1. 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. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. In so doing, they shall comply with Annex X (Code of Conduct). In addition, upon appointment, they shall refrain from acting as counsel in any pending or new investment protection dispute under this or any other agreement or domestic law.

2. If a disputing party considers that an arbitrator does not meet the requirements set out in paragraph 1 or in Annex X (Code of Conduct), it shall send a notice of challenge to [outside party], who shall transmit it to the arbitrator concerned. The notice of challenge shall be sent within 15 days after the constitution of the tribunal was communicated to the disputing party, or within 15 days after the date on which the relevant facts came to its knowledge, if they could not have reasonably been known at the time of constitution of the tribunal. The notice of challenge shall state the grounds for the challenge.

3. If, within 15 days after the date of the notice of challenge, the challenged arbitrator has elected not to resign from the tribunal, the [outside party] shall, after hearing the disputing parties and after providing the arbitrator an opportunity to submit any observations, issue a decision within 45 days after receipt of the notice of challenge and forthwith notify the disputing parties and other arbitrators of the tribunal.

Commentary:

Regulating the arbitrators' conduct and ethics is important for preserving the legitimacy of the investor-State dispute settlement mechanism. Moreover, the breach of procedural fairness and perceived bias of a tribunal could be grounds for the setting aside or annulment of an arbitral award.

Paragraph 1 establishes the principle of independence of arbitrators, setting out types of conduct that arbitrators should abstain from and pointing to the Code of Conduct, which prescribes in more detail what types of conduct should be avoided.

Paragraph 2 sets out the procedure for filing a notice of challenge against an arbitrator that is considered by a disputing party not to meet the requirements set out in paragraph 1 or the Code of Conduct. The Parties to the Agreement should agree who the outside party should be for taking a final decision on the challenge. It is often a highly esteemed and well-respected personality that is reputable for its independence and impartiality (e.g. the President of the International Court of Justice).

Paragraph 3 sets out the procedure and timelines for the issuance of a decision, unless the challenged arbitrator has elected to resign from the tribunal in the meantime, in which case such decision is not required.

Article Multiple Proceedings

1. A tribunal shall dismiss a claim by a claimant who has submitted a claim to the tribunal or to any domestic or international court or tribunal concerning the same treatment as that alleged to breach the provisions of this Agreement, unless the claimant withdraws such pending claim.

[This paragraph does not apply if the claimant submits a claim to a domestic court or tribunal seeking interim injunctive or declaratory relief.]

2. Together with the submission of a claim the claimant shall provide:

(a) evidence that it has withdrawn any pending proceedings before any domestic or international court or tribunal under domestic or international law concerning the same treatment as that alleged to breach the provisions of this Agreement; and

(b) a declaration that it will not initiate any proceeding before any domestic or international court or tribunal under domestic or international law concerning the same treatment as that alleged to breach the provisions of this Agreement.

3. For the purposes of [paragraphs 1 and 2 above][this Article], the term "claimant" includes the investor and, if applicable, its [locally established enterprise]. In addition, for the purposes of paragraphs 1 and 2(a), the term "claimant" also includes all persons who, directly or indirectly, have an ownership interest in or are controlled by the investor or its [locally established enterprise], as applicable, and claim to have suffered the same loss or damage as the investor or the [locally established enterprise], as applicable.

Commentary:

Multiple or parallel proceedings can result in double recovery, and thus raise issues of procedural justice.

Paragraph 1 requires that a tribunal dismisses a claim where a claimant, who has brought a dispute under the Agreement, has in parallel submitted a claim falling under the Agreement to any domestic or international court or tribunal concerning the same treatment.

Paragraph 2 sets out the type of evidence that a claimant must provide when submitting a claim in order to prove that there are no parallel proceedings pending.

To avoid that parallel disputes are brought for the same loss or damage by different claimants in the ownership chain of the investment, paragraph 3 stipulates that the term "claimant" also includes all persons who, directly or indirectly, have an ownership interest in or are controlled by the investor (or its locally established enterprise), as applicable, and claim to have suffered the same loss or damage as the investor/locally established enterprise.

Article Claims Manifestly without Legal Merit

The respondent may, no later than 30 days after the establishment of the tribunal, or 30 days after it became aware of the facts on which the objection is based, file an objection that a claim is manifestly without legal merit. The respondent shall specify as precisely as possible the basis for the objection. The tribunal, after giving the parties to the dispute 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. In the event that the objection is received after the first session of the tribunal, the tribunal shall issue such decision 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. The decision of the tribunal shall be without prejudice to the right of a party to object, pursuant to paragraph [X - next paragraph] or in the course of the proceeding, to the legal merits of a claim and without prejudice to the tribunal's authority to address other objections as a preliminary question.

Commentary:

Article ‘Claims Manifestly without Legal Merit’ allows claims that manifestly lack legal merit to be dismissed early in the process before they unnecessarily consume the parties’ resources. The respondent is expected to file such objection no later than 30 days after the constitution of the Tribunal, or 30 days after it became aware of the facts on which the objection is based. The Article also sets out the timeframe within which the tribunal should issue a decision or award on the objection, which depends on the timing of the filing of the objection.

Article Claims Unfounded as a Matter of Law

Without prejudice to the tribunal’s authority to address other objections as a preliminary question or to the right of a respondent 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, is not a claim for which an award in favour of the Investor may be made, even if the facts alleged were assumed to be true. The tribunal may also consider any relevant facts not in dispute. Such an objection shall be submitted to the tribunal as early as possible, and in

any event not later than the expiration of the time limit fixed for the filing of the counter-memorial or statement of defence, unless the facts on which the objection is based are unknown to the party at that time. On receipt of an objection under this paragraph, 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 on the objection, stating the grounds therefor.

Commentary:

Article 'Claims Unfounded as a Matter of Law' enables a tribunal to address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim, or any part thereof, is not a claim for which an award in favour of the Investor may be made, even if the facts alleged were assumed to be true. The Article empowers the tribunal to suspend any proceedings on the merits and decide expeditiously on the matter.

Such an objection shall be submitted to the tribunal as early as possible, and in any event not later than the expiration of the time limit fixed for the filing of the counter-memorial or statement of defence, unless the facts on which the objection is based are unknown to the party at that time. The tribunal may either reject the objection as manifestly unfounded, in which case it need not suspend the proceedings on the merits; or suspend any proceedings on the merits and decide on the objection.

Article Relation with other Agreements

1. Upon the entry into force of this Agreement, the agreement ..... [provide the title of the relevant BIT], including the rights and obligations derived therefrom, shall cease to have any legal effect, and shall be replaced and superseded by this Agreement.

2. Notwithstanding paragraph 1, a claim may be submitted pursuant to an agreement referred to in paragraph 1, in accordance with the rules and procedures established in that agreement, provided that:

(a) the claim arises from an alleged breach of that agreement that took place prior to the date of entry into force of this Agreement; and

(b) on the date of the submission of the claim, no more than three years have elapsed from the date of entry into force of this Agreement.

Commentary:

Article 'Relation with other Agreements' typically features in the final provisions of a BIA. It regulates the relationship between the new BIA and any BIA that had been negotiated previously between the Parties and has been in place ever since. Accordingly, the older agreement is replaced and superseded by the newer one.

Paragraph 2 explains under what cumulative conditions a claim may still be submitted under the earlier agreement. This is to ensure the continuity of protection of those covered investments for which claims arose near the time, but in any event, before the conclusion of the newer agreement.

Article Entry Into Force, Duration and Termination

1. This Agreement shall enter into force [x] days after the date of exchange of instruments of ratification. It shall remain in force unless terminated pursuant to paragraph 2 of this Article.

2. Either Party may notify in writing the other Party of its intention to terminate this Agreement. The termination shall take effect [....] months after the date of receipt by the other Party of the notification, unless the Parties otherwise agree.

3. In the event that the present Agreement is terminated pursuant to paragraph 2 of this Article, its provisions shall continue to be effective for a further period of [....] years from the date of termination, with respect to covered investments made before the date of termination.

[For agreements with third countries that have a status of 'EU (potential) candidate country':

4. This Agreement shall, in any event, be automatically terminated as a whole and cease its effects if and on the date [third country] becomes a Member State of the European Union.]

Commentary:

Article 'Duration and Termination' typically features in the final provisions of a BIA. Paragraph 1 sets out when the

Agreement enters into force (i.e. [...] days after the date of exchange of instruments of ratification between the Partis). It also stipulates that the Agreement remains in force unless terminated as per paragraph 2.

If the BIA is terminated per the terms of paragraph 2, i.e., unilaterally by request of one Party, all investments that qualified as covered investments on the date of termination (i.e. [...] months after the date of receipt by the other Party of the notification) continue to be protected for a further period of [...] years from that date, per the agreement of the Parties in the treaty.

Paragraph 4 should feature when an agreement is negotiated with a third country that has the status of 'EU candidate country'. It stipulates that the Agreement will automatically be terminated and no longer produce any effects if and on the date when the third country became a Member State of the European Union.

ANNEX. 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.

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

2. The determination of whether a measure or series of measures by a Party, in a specific 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 character of the measure or series of measures, notably their object and context.

3. For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures by a Party that are designed and applied to protect legitimate policy objectives, such as the protection of public health, social services, public education, safety, environment including climate change, public morals, social or consumer protection, privacy and data protection, or the promotion and protection of cultural diversity do not constitute indirect expropriations.

Commentary:

The Annex on Expropriation complements Article 'Expropriation'.

Paragraph 1 introduces the distinction between direct and indirect expropriation. Direct expropriation means a mandatory legal transfer of the title to the property or its outright physical seizure. Today, large-scale direct expropriations (nationalisations) are less common, giving way to indirect expropriations. Under the latter, the investor's legal title to its investment often remains unaffected but the investor is substantially deprived of the fundamental attributes of property in its investment, including the right to use, enjoy, and dispose of its investment.

Paragraph 2 provides additional guidance on how to ascertain whether indirect expropriation has occurred in a certain case. This should involve a case-by-case, fact-based inquiry that considers various factors. The list enumerates such actors that may inform such decision, namely the economic impact, duration and character of a measure, however the list is not exhaustive.

Paragraph 3 reflects the police powers doctrine which is a manifestation of the State's right to regulate. It is a fundamental principle of international law that regulatory activity aimed at achieving legitimate public welfare objectives is not compensable. It is only when the measures are manifestly excessive in light of their objective that a finding of indirect expropriation can be made.

ANNEX. PUBLIC DEBT

1. No claim that a restructuring of debt of a Party breaches an obligation under this Agreement may be submitted to, or if already submitted, be pursued under Article(s) X (ISDS) if the restructuring is a negotiated restructuring at the time of submission, or becomes a negotiated restructuring after such submission.

2. Notwithstanding Article X (ISDS - Submission of a Claim), and subject to paragraph 1 of this Annex, an investor may not submit a claim that a restructuring of debt of a Party breaches an obligation under this Agreement (6), unless 270 days have elapsed from the date of submission by the claimant of the written request for consultations pursuant to Article X (ISDS - Consultations).

3. For the purposes of this Annex:

(a) "negotiated restructuring" means the restructuring or rescheduling of debt of a Party that has been effected through (i) a modification or amendment of debt instruments, as provided for under their terms, including their governing law, or (ii) a debt exchange or other similar process in which the holders of no less than 75% of the aggregate principal amount of the outstanding debt subject to restructuring, have consented to such debt exchange or other process.

(b) "governing law" of a debt instrument means a jurisdiction's legal and regulatory framework applicable to that debt instrument.

(6) For greater certainty, a breach of Article (Non-discriminatory Treatment) does not occur merely by virtue of a different treatment provided by a Party to certain categories of investors or investments on grounds of a different macroeconomic impact, for instance to avoid systemic risks or spillover effects, or on grounds of eligibility for debt restructuring.

Commentary:

A separate annex has been devised that introduces specific disciplines when a dispute involves sovereign debt restructurings. The rationale behind such dedicated disciplines is to enable the creation of a 'safe space' for consensual debt crisis resolution processes.

Paragraph 1 ensures that investors cannot sue host countries for debt restructurings which have been negotiated and agreed with a significant majority of the bondholders. In the opposite case, the very purpose of the negotiated debt restructuring would be negated if the State would still have to 'compensate' investors for the less favourable terms agreed under the restructuring.

Paragraph 2 institutes a cooling-off period of 270 days in case of claims against debt restructuring. Such cooling-off period is intended to give more time for the State to negotiate debt restructuring with bondholders. When the restructuring favours domestic or third-country investors, the footnote acknowledges that a different treatment for domestic or third country investors may be justified for economic reasons (e.g., some investors may be "too big to fail"), thus their situations may not be comparable.

Paragraph 3 defines what qualifies as 'negotiated restructuring'. The threshold of 75% of the aggregate principal amount of the outstanding debt is a common threshold found in collective action clauses which essentially allows a supermajority of bondholders (i.e., those holding 75%) to agree to a debt restructuring that is legally binding on all holders of the bond, including those who voted against the restructuring.

ANNEX. CODE OF CONDUCT FOR MEMBERS OF TRIBUNALS AND MEDIATORS

Commentary:

This Annex provides for a binding Code of Conduct with rules applicable throughout the proceedings and regulating inter alia disclosure obligations, the practice of double-hatting, confidentiality and expenses, and provide for high standards of integrity and diligence, in order to secure independence and impartiality, diligence and efficiency in adjudicating cases.

An essential aspect of these rules that must feature in the Code of Conduct is the existence of an independent outside person in charge of deciding challenges in case of breach of the ethic rules. This outside person could be for example the President of the International Court of Justice. Any agreed outside party must be seen by the Contracting parties as neutral and independent. In case a disputing party considers that an arbitrator does not meet the requirements set out in the Code of Conduct, it can send a notice of challenge to this third

party, which will be in charge of addressing and processing the challenge. In order to provide for better safeguards of independence and impartiality, the assessment of challenges shall not be left to the appointed arbitrators but should rather be assessed by a neutral and independent party.

1. Definitions

For the purpose of this Code of Conduct, the following definitions apply:

− “member” means a person who has been appointed to serve as a member of a tribunal established pursuant to [reference to relevant article/section/chapter] of [name of the agreement] (the “Agreement”).

− “assistant” means a person who, under the terms of appointment of a member, assists the member, conducts research, or supports him or her in his or her duties;

− “candidate” means a person who is under consideration for appointment as member;

− “mediator” means a person who conducts a mediation in accordance with [article or section] of this Agreement.

2. Governing Principles

Any candidate or member shall avoid impropriety and the appearance of impropriety, and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement proceeding is preserved.

3. Disclosure Obligations

1. Prior to confirmation of their appointment as members under [Article x] of this Agreement, candidates shall disclose to the disputing parties any past or present interest, relationship or matter that is likely to affect their independence or impartiality, or that might reasonably be seen as creating a direct or indirect conflict of interest, or that creates or might reasonably be seen as creating an appearance of impropriety or bias. To this end, candidates shall make all reasonable efforts to become aware of any such interests, relationships or matters. The disclosure of past interests, relationships or matters shall cover at least the last [x] years prior to a candidate becoming aware that he or she is under consideration for appointment as member in a dispute under this Agreement.

2. Following their appointment, members shall at all times continue to make all reasonable efforts to become aware of any interests, relationships or matters referred to in Article 3(1) of this Code of Conduct. Members shall at all times disclose such interests, relationships or matters throughout the performance of their duties by informing the disputing parties and the Parties. They shall also communicate matters concerning actual or potential violations of this Code of Conduct to the disputing parties and the Parties.

4. Independence, Impartiality and other Obligations of Members

1. In addition to the obligations established pursuant to Articles 2 and 3 of this Code of Conduct, members shall:

a. get acquainted with this Code of Conduct;

b. be and appear to be, independent and impartial, and avoid any direct or indirect conflicts of interest;

c. not take instructions from any organisation or government with regard to matters before the tribunal for which they are appointed;

d. avoid creating an appearance of bias and not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a Party, disputing party or any other person involved or participating in the proceeding, fear of criticism or financial, business, professional, family or social relationships or responsibilities;

e. not, directly or indirectly, incur any obligation, or accept any benefit, enter into any relationship, or acquire any financial interest that would in any way interfere, or appear to interfere, with the proper performance of their duties, or that is likely to affect their impartiality;

f. not use their position as a member to advance any personal or private interests and avoid actions that may create the impression that others are in a special position to influence them;

g. perform their duties thoroughly and expeditiously throughout the course of the proceeding, and with fairness and

diligence;

h. avoid engaging in ex parte contacts concerning the proceeding;

i. consider only those issues raised in the proceeding and which are necessary for a decision or award and not delegate this duty to any other person;

2. Members shall take all appropriate steps to ensure that their assistants are aware of, and comply with, Articles 2, 3, 4(1), 5 and 6 of this Code of Conduct mutatis mutandis.

5. Obligations of Former Members

1. Former members shall avoid actions that may create the appearance that they were biased in carrying out their duties or derived advantage from the decisions or awards of the tribunal.

2. Former members shall undertake that for a period of [x] years after the end of their duties in relation to a dispute settlement proceeding under this Agreement they shall not:

a. become involved in any manner whatsoever in investment disputes directly and clearly connected with disputes, including concluded disputes, that they have dealt with as members of a tribunal established under this Agreement;

b. [option 1: act as party-appointed member, legal counsel or party-appointed witness or expert of any of the disputing parties, in relation to investment disputes under this or other bilateral or multilateral investment treaties.]

[option 2: as legal counsel or party-appointed witness or expert of any of the disputing parties, in relation to investment disputes under this or other bilateral or multilateral investment treaties.]

3. If the [independent outside person in charge of deciding on challenges] is informed or becomes otherwise aware that a former member is alleged to have acted inconsistently with the obligations established in Article 5(1) an (2), or any other part of this Code of Conduct while performing the duties of member of a tribunal in an investment dispute under this Agreement, it shall examine the matter, provide the opportunity to the former member to be heard, and after verification, inform:

a. the professional body or other such institution with which the former member is affiliated;

b. the Parties;

c. the disputing parties in the specific dispute;

d. any other relevant international court or tribunal.

4. The [independent outside person in charge of deciding on challenges] shall make public its decision to take the actions referred in paragraphs 3(a) to 3(d) above, together with the reasons thereof.

6. Confidentiality

1. No member or former member shall at any time disclose or use any non-public information concerning a proceeding or acquired during a proceeding, except for the purposes of that proceeding, and shall not, in any case, disclose or use any such information to gain personal advantage or advantage for others or to adversely affect the interest of others.

2. Members shall not disclose an order, decision, or award or parts thereof prior to adoption or publication.

3. Members or former members shall not at any time disclose the deliberations of the tribunal, or any views of other members forming part of the tribunal, except in an order, decision or award.

7. Expenses

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

8. Mediators

The rules set out in this Code of Conduct apply, mutatis mutandis, to mediators.