

## **CHAPTER EIGHT**

### **INVESTMENT**

#### **Section A – Investment**

##### **Article 801: Scope and Coverage**

1. This Chapter shall apply to measures adopted or maintained by a Party relating to:
  - (a) investors of the other Party;
  - (b) covered investments; and
  - (c) with respect to Articles 807, 815 and 816, all investments in the territory of the Party.
2. For greater certainty, the provisions of this Chapter do not bind a Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.
3. Consistent with Articles 1305 (Competition Policy, Monopolies and State Enterprises – Designated Monopolies) and 1306 (Competition Policy, Monopolies and State Enterprises State Enterprises) the Parties confirm their understanding that nothing in this Chapter shall be construed to prevent a Party from designating a monopoly, or from maintaining or establishing a state enterprise.

##### **Article 802: Relation to Other Chapters**

1. In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.

2. A requirement by a Party that a service supplier of the other Party post a bond or other form of financial security as a condition of the cross-border supply of a service into its territory does not of itself make this Chapter applicable to measures adopted or maintained by the Party relating to the cross-border supply of the service. This Chapter applies to measures adopted or maintained by the Party relating to the posted bond or financial security, to the extent that such bond or financial security is a covered investment.

3. This Chapter shall not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Eleven (Financial Services).

4. Articles 904 (Cross-Border Trade in Services – Market Access) and 907 (Cross-Border Trade in Services – Domestic Regulation) are hereby incorporated into and made a part of this Chapter and apply to measures adopted or maintained by a Party affecting the supply of a service in its territory by a covered investment.<sup>1</sup>

### **Article 803: National Treatment**

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

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

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a sub-national government, treatment no less favourable than the most favourable treatment accorded, in like circumstances, by that sub-national government to investors, and to investments of investors, of the Party of which it forms a part.

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<sup>1</sup> It is understood by the Parties that any reservation taken by a Party pursuant to Article 906 (Cross-Border Trade in Services – Non-Conforming Measures) against Article 904 (Cross-Border Trade in Services – Market Access) applies to measures of that Party covered under paragraph 4.

#### **Article 804: Most-Favoured-Nation Treatment**

1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.
2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments of investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.
3. For greater clarity, treatment “with respect to establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments” referred to in paragraphs 1 and 2 does not encompass dispute resolution mechanisms, such as those in Section B of this Chapter, that are provided for in international treaties or trade agreements.
4. For greater certainty, the treatment accorded by a Party under this Article means, with respect to a sub-national government, treatment accorded, in like circumstances, by that sub-national government to investors, and to investments of investors, of a non-Party.

#### **Article 805: Minimum Standard of Treatment**

1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.<sup>2</sup> The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

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<sup>2</sup> It is understood that the term “customary international law” refers to international custom, as evidence of a general practice accepted as law, in accordance with subparagraph 1(b) of Article 38 of the Statute of the International Court of Justice.

2. The obligation in paragraph 1 to provide “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process.

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

#### **Article 806: Compensation for Losses**

1. Notwithstanding subparagraph 3(b) of Article 809, each Party shall accord to investors of the other Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

2. Paragraph 1 shall not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 803, but for subparagraph 3(b) of Article 809.

#### **Article 807: Performance Requirements**

1. Neither Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of the other Party or of a non-Party in its territory to:<sup>3</sup>

- (a) export a given level or percentage of goods or services;
- (b) achieve a given level or percentage of domestic content;
- (c) purchase, use or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;

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<sup>3</sup> For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 3 does not constitute a “commitment or undertaking” for the purposes of paragraph 1.

- (d) relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
- (e) restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
- (f) transfer technology, a production process or other proprietary knowledge to a person in its territory;<sup>4</sup> or
- (g) supply exclusively from the territory of the Party the goods that such investment produces or the services it supplies to a specific regional market or to the world market.

2. A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent with subparagraph 1(f). For greater certainty, Articles 803 and 804 apply to the measure.

3. Neither Party may condition the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of the other Party or of a non-Party, on compliance with any of the following requirements:

- (a) to achieve a given level or percentage of domestic content;
- (b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from producers in its territory;
- (c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or

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<sup>4</sup> For greater certainty, nothing in paragraph 1 shall be construed to prevent a Party, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory, from imposing or enforcing a requirement or enforcing a commitment or undertaking to train workers in its territory, provided that such training does not require the transfer of technology, a production process, or other proprietary knowledge to a person in its territory.

- (d) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.
- 4.
  - (a) Nothing in paragraph 3 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of the other Party or of a non-Party, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.
  - (b) Subparagraph 1(f) does not apply when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement<sup>5</sup> (c) For greater certainty, the Parties confirm their understanding that the exceptions in paragraph 3 of Article 2201 (Exceptions - General Exceptions) apply to performance requirements under this Article, including the exceptions concerning the protection of human animal or plant life or health, and the conservation of living or non-living exhaustible natural resources.
- 5. Paragraphs 1 and 3 do not apply to any commitment, undertaking, or requirement other than those set out in those paragraphs.
- 6. This Article does not preclude enforcement of any commitment, undertaking, or requirement between private parties.

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<sup>5</sup> The Parties recognize that a patent does not necessarily confer market power.

7. The provisions of:
- (a) subparagraphs 1(a), (b) and (c), and 3(a) and (b), do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs;
  - (b) subparagraphs 1(b), (c), (f) and (g), and 3(a) and (b), do not apply to procurement by a Party or a state enterprise; and
  - (c) subparagraphs 3(a) and (b) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

#### **Article 808: Senior Management and Boards of Directors**

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

#### **Article 809: Non-Conforming Measures**

1. Articles 803, 804, 807 and 808 do not apply to:
  - (a) any existing non-conforming measure that is maintained by
    - (i) a national government, as set out in its Schedule to Annex I, or

- (ii) a sub-national government,<sup>6</sup> as set out by Canada in its Schedule to Annex I, or
    - (iii) a local government;
  - (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
  - (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 803, 804, 807 and 808.
2. Articles 803, 804, 807 and 808 do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors or activities, as set out in its Schedule to Annex II.
3. Articles 803, 804 and 808 do not apply to:
- (a) procurement by a Party or a state enterprise; or
  - (b) subsidies or grants provided by a Party or a state enterprise, including government-supported loans, guarantees, and insurance.
4. With respect to intellectual property rights, a Party may derogate from Articles 803, 804 and subparagraph 1(f) of Article 807 in a manner that is consistent with the TRIPS Agreement, including any amendments to the TRIPS Agreement in force for both Parties, or waivers to the TRIPS Agreement made pursuant to Article IX of the WTO Agreement.

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<sup>6</sup> For purposes of this Article, sub-national government does not include local government.

## **Article 810: Transfers**

1. Except as provided for in Annex 810, each Party shall permit all transfers relating to a covered investment to be made freely, and without delay, into and out of its territory.

Such transfers include:

- (a) contributions to capital;
- (b) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance and other fees, returns in kind and other amounts derived from the investment;
- (c) proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;
- (d) payments made under a contract entered into by the investor, or the covered investment, including payments made pursuant to a loan agreement;
- (e) payments made pursuant to Articles 806 and 811; and
- (f) payments arising under Section B.

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

3. Notwithstanding paragraphs 1 and 2, a Party may prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:

- (a) bankruptcy, insolvency or the protection of the rights of creditors;
- (b) issuing, trading or dealing in securities, including futures, options or derivatives thereof;
- (c) criminal or penal offences;

- (d) reports of transfers of currency or other monetary instruments; or
- (e) ensuring compliance with orders or judgments in judicial, administrative or adjudicatory proceedings.

4. Neither Party may require its investors to transfer, or penalize its investors for failing to transfer, the income, earnings, profits or other amounts derived from, or attributable to, investments in the territory of the other Party, provided that the investor is seeking to make, is making or maintains an investment in the territory of the other Party.

5. Paragraph 4 shall not be construed to prevent a Party from imposing any measure through the equitable, non-discriminatory and good faith application of its laws relating to the matters in subparagraphs (a) through (e) of paragraph 3.

6. Notwithstanding paragraph 1, a Party may restrict transfers of returns in kind in circumstances where it could otherwise restrict transfers under the WTO Agreement and as set out in paragraph 3.

#### **Article 811: Expropriation**

1. Neither Party may nationalize or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as “expropriation”), except:

- (a) for a public purpose;<sup>7</sup>
- (b) in a non-discriminatory manner;
- (c) on prompt, adequate, and effective compensation in accordance with paragraphs 2 to 4; and
- (d) in accordance with due process of law.

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<sup>7</sup> The term “public purpose” is a concept of public international law and shall be interpreted in accordance with international law. Domestic law may express this or similar concepts using different terms, such as “social interest”, “public necessity” or “public use”.

2. Such compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“date of expropriation”), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. To determine fair market value a Tribunal shall use appropriate valuation criteria, which may include going concern value, asset value including the declared tax value of tangible property, and other criteria.

3. Compensation shall be paid without delay and shall be fully realizable and freely transferable. Compensation shall be payable in a freely convertible currency and shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of payment.

4. The investor affected shall have a right under the law of the expropriating Party, to prompt review of its case 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 shall not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the WTO Agreement.

#### **Article 812: Special Formalities and Information Requirements**

1. Nothing in Article 803 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with the establishment of covered investments, such as a requirement that agents of investors be residents of the Party or that covered investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not materially impair the protections afforded by a Party to investors of the other Party and covered investments pursuant to this Chapter.

2. Notwithstanding Articles 803 and 804, a Party may require an investor of the other Party, or its covered investment, to provide routine information concerning that investment solely for informational or statistical purposes. The Party shall protect any confidential information from any disclosure that would prejudice the competitive position of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.

### **Article 813: Subrogation**

1. If a Party or any agency thereof makes a payment to any of its investors under a guarantee or a contract of insurance against non-commercial risks it has entered into in respect of an investment, the other Party shall recognize the validity of the subrogation in favour of the Party or agency thereof to any right or title held by the investor.

2. A Party or any agency thereof, which is subrogated to the rights of an investor in accordance with paragraph 1 of this Article, shall be entitled in all circumstances to the same rights as those of the investor in respect of the investment. Such rights may be exercised by the Party or any agency thereof, or by the investor if the Party or any agency thereof so authorizes.

3. For greater certainty, paragraphs 1 and 2 shall be without prejudice to any right to subrogation that a Party or any agency thereof may have under applicable domestic law of the other Party.

### **Article 814: Denial of Benefits**

1. A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such Party and to investments of that investor if investors of a non-Party own or control the enterprise and the denying Party adopts or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.

2. A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such Party and to investments of that investor if investors of a non-Party or of the denying Party own or control the enterprise and the enterprise has no substantial business activities in the territory of the Party under whose law it is constituted or organized.

#### **Article 815: Health, Safety and Environmental Measures**

The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party. The Parties shall make every attempt through consultations and exchange of information to address the matter.

#### **Article 816: Corporate Social Responsibility**

Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption. The Parties remind those enterprises of the importance of incorporating such corporate social responsibility standards in their internal policies.

## **Article 817: Committee on Investment**

1. The Parties hereby establish a Committee on Investment, comprising representatives of each Party.
2. The Committee shall provide a forum for the Parties to consult on issues related to this Chapter that are referred to it by a Party.
3. The Committee shall meet at such times as agreed by the Parties and should work to promote cooperation and facilitate joint initiatives, which may address issues such as:
  - (a) capacity building, to the extent resources are available, in legal expertise on investor-State dispute settlement, investment negotiations and related advisory matters;
  - (b) promoting corporate social responsibility; and
  - (c) other investment-related issues identified as a priority by the Parties.

## **Section B – Settlement of Disputes between an Investor and the Host Party**

### **Article 818: Purpose**

Without prejudice to the rights and obligations of the Parties under Chapter Twenty-One (Dispute Settlement), this Section establishes a mechanism for the settlement of investment disputes.

### **Article 819: Claim by an Investor of a Party on Its Own Behalf**

An investor of a Party may submit to arbitration under this Section a claim that the other Party has breached:

- (a) an obligation under Section A, other than an obligation under paragraph 4 of Article 802, Articles 812, 815 or 816; or
- (b) an obligation under subparagraph 3(a) of Article 1305 (Competition Policy, Monopolies and State Enterprises – Designated Monopolies) or paragraph 2 of Article 1306 (Competition Policy, Monopolies and State Enterprises – State Enterprises), only to the extent that a designated monopoly or state enterprise has acted in a manner inconsistent with the Party's obligations under Section A, other than an obligation under paragraph 4 of Article 802, Articles 812, 815 or 816,

and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

## **Article 820: Claim by an Investor of a Party on Behalf of an Enterprise**

1. An investor of a Party, on behalf of an enterprise of the other Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached:

- (a) an obligation under Section A, other than an obligation under paragraph 4 of Article 802, Articles 812, 815 or 816; or
- (b) an obligation under subparagraph 3(a) of Article 1305 (Competition Policy, Monopolies and State Enterprises – Designated Monopolies) or paragraph 2 of Article 1306 (Competition Policy, Monopolies and State Enterprises – State Enterprises), only to the extent that a designated monopoly or state enterprise has acted in a manner inconsistent with the Party's obligations under Section A, other than an obligation under paragraph 4 of Article 802, Articles 812, 815 or 816,

and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

2. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 819 arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 822, the claims should be heard together by a Tribunal established under Article 826, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.

3. An investment may not make a claim under this Section.

## **Article 821: Conditions Precedent to Submission of a Claim to Arbitration**

1. The disputing parties shall hold consultations and negotiations in an attempt to settle a claim amicably before a disputing investor may submit a claim to arbitration. Consultations shall be held within 30 days of the submission of the Notice of Intent to Submit a Claim to Arbitration under subparagraph 2(c), unless the disputing parties otherwise agree. Consultations and negotiations may include the use of non-binding, third-party procedures. The place of consultations shall be the capital of the disputing Party, unless the disputing parties otherwise agree.

2. A disputing investor may submit a claim to arbitration under Article 819 or Article 820 only if:

- (a) the disputing investor and, where a claim is made under Article 820, the enterprise, consent to arbitration in accordance with the procedures set out in this Section;
- (b) at least six months have elapsed since the events giving rise to the claim;
- (c) the disputing investor has delivered to the disputing Party a written notice of its intent to submit a claim to arbitration (Notice of Intent) at least six months<sup>8</sup> prior to submitting the claim. The Notice of Intent shall specify:
  - (i) the name and address of the disputing investor and, where a claim is made under Article 820, the name and address of the enterprise,
  - (ii) the provisions of this Agreement alleged to have been breached and any other relevant provisions,

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<sup>8</sup> With a view to encouraging the review, confirmation or modification of administrative acts prior to such acts becoming final, the Parties recognize that disputing investors should make every effort to exhaust administrative recourse under Colombian law. A disputing investor that fails to exhaust administrative recourse, where applicable, shall submit its Notice of Intent nine months prior to submitting a claim to arbitration.

- (iii) the legal and the factual basis for the claim, including the measures at issue, and
  - (iv) the relief sought and the approximate amount of damages claimed;
- (d) the disputing investor has delivered evidence establishing that it is an investor of the other Party with its Notice of Intent;
- (e) in the case of a claim submitted under Article 819:
  - (i) not more than 39 months have elapsed from the date on which the disputing investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the disputing investor has incurred loss or damage thereby, and
  - (ii) the disputing investor and, where the claim is for loss or damage to an interest in an enterprise of the other Party that is a juridical person that the disputing investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 819, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the applicable law of the disputing Party, provided that the action is brought for the sole purpose of preserving the disputing investor's or the enterprise's rights and interests during the pendency of the arbitration; and

- (f) in the case of a claim submitted under Article 820:
  - (i) not more than 39 months have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage thereby, and
  - (ii) both the disputing investor and the enterprise waive their right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 820, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the applicable law of the disputing Party, provided that the action is brought for the sole purpose of preserving the disputing investor's or the enterprise's rights and interests during the pendency of the arbitration.

3. A consent and waiver required by this Article shall be in the form provided in Annex 821, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration. Where a disputing Party has deprived a disputing investor of control of an enterprise, a waiver from the enterprise under subparagraphs 2(e)(ii) or 2(f)(ii) shall not be required.

4. An investor may submit a claim relating to taxation measures covered by this Chapter to arbitration under this Section only if the taxation authorities of the Parties fail to reach the joint determinations specified in Article 2204 (Exceptions – Taxation) within six months of being notified in accordance with those provisions.

5. An investor of a Party who is also a national of a non-Party may not initiate or continue a proceeding under this Article if, as a national of the non-Party, it submits or has submitted, directly or indirectly, an investment claim with respect to the same measure or series of measures under any agreement between the other Party and that non-Party.

## **Article 822: Submission of a Claim to Arbitration**

1. Except as provided in Annex 822, a disputing investor who meets the conditions precedent in Article 821 may submit the claim to arbitration under:

- (a) the ICSID Convention and the ICSID Rules of Procedures for Arbitration Proceedings, provided that both the disputing Party and the Party of the disputing investor are parties to the ICSID Convention;
- (b) the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the disputing investor, but not both, is a party to the ICSID Convention; or
- (c) the UNCITRAL Arbitration Rules.

2. The Commission shall have the power to make rules supplementing the applicable arbitral rules and may amend any supplemental rules of its own making.<sup>9</sup> Such rules shall be binding on a Tribunal established under this Section, and on individual arbitrators serving on such a Tribunal.

3. The arbitration rules applicable under paragraph 1, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Section and supplemented by any rules adopted by the Commission under paragraph 2.

4. A claim is submitted to arbitration under this Section when:

- (a) the request for arbitration under paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General;
- (b) the notice of arbitration under Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General; or

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<sup>9</sup> These supplemental rules shall further develop the existing arbitral rules referred to in paragraph 1.

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

5. Delivery of notice and other documents on a Party shall be made to:

For Canada:

Office of the Deputy Attorney General of Canada  
Justice Building  
284 Wellington Street  
Ottawa, Ontario  
K1A 0H8, CANADA

For Colombia:

*Dirección de Inversión Extranjera y Servicios*  
*Ministerio de Comercio, Industria y Turismo*  
Calle 28 # 13A – 15, Piso 3  
Bogotá D.C. – COLOMBIA

6. The disputing investor shall provide with the request for arbitration or the notice of arbitration referred in paragraph 4:

- (a) the name of the arbitrator that the disputing investor appoints; or
- (b) the disputing investor's written consent for the Secretary-General to appoint that arbitrator.

### **Article 823: Consent to Arbitration**

1. Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Section. For greater certainty, failure to meet any of the conditions precedent listed in Article 821 shall nullify that consent.

2. The consent given in paragraph 1 and the submission of a claim to arbitration under this Section shall satisfy the requirement of:

- (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute;
- (b) Article II of the New York Convention for an agreement in writing; and
- (c) Article I of the Inter-American Convention for an agreement.

#### **Article 824: Arbitrators**

1. Except in respect of a Tribunal established under Article 826, and unless the disputing parties agree otherwise, the Tribunal shall comprise three arbitrators. One arbitrator shall be appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, shall be appointed by agreement of the disputing parties.

2. The Secretary-General shall serve as appointing authority for an arbitration under this Section.

3. If a Tribunal, other than a Tribunal established under Article 826, has not been constituted within 90 days after the date that a claim is submitted to arbitration, either disputing party may ask the Secretary-General to appoint, in his or her discretion and, to the extent practicable, in consultation with the disputing parties, the arbitrator or arbitrators not yet appointed, except that the presiding arbitrator shall not be a national of either Party.

4. Arbitrators shall have expertise or experience in public international law, international investment or international trade rules, or the resolution of disputes arising under international trade or international investment agreements. Arbitrators shall be independent of, and not be affiliated with or take instructions from, either Party or the disputing investor.

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

#### **Article 825: Agreement to Appointment of Arbitrators**

For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator based on paragraph 4 of Article 824 or on a ground other than citizenship or permanent residence:

- (a) the disputing Party agrees to the appointment of each individual member of a Tribunal established under the ICSID Convention or the ICSID Additional Facility Rules;
- (b) a disputing investor referred to in Article 819 may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only if the disputing investor agrees in writing to the appointment of each member of the Tribunal; and
- (c) a disputing investor referred to in Article 820 may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only if the disputing investor and the enterprise agree in writing to the appointment of each member of the Tribunal.

#### **Article 826: Consolidation**

1. Where two or more claims have been submitted separately to arbitration under Article 822 and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the terms of paragraphs 2 through 10 or with the agreement of all the disputing parties sought to be covered by the order.

2. A disputing party that seeks a consolidation order under this Article shall deliver, in writing, a request to the Secretary-General and to all the disputing parties sought to be covered by the order and shall specify in the request:

- (a) the names and addresses of all the disputing parties sought to be covered by the order;
- (b) the nature of the order sought; and
- (c) the grounds on which the order is sought.

3. Unless the Secretary-General finds within 30 days after receiving a request under paragraph 2 that the request is manifestly unfounded, a Tribunal shall be established under this Article.

4. Unless all the disputing parties sought to be covered by the order otherwise agree, a Tribunal established under this Article shall comprise three arbitrators:

- (a) one arbitrator appointed by agreement of the disputing investors;
- (b) one arbitrator appointed by the disputing Party; and
- (c) the presiding arbitrator appointed by the Secretary-General, provided, however, that the presiding arbitrator shall not be a national of either Party.

5. If, within 60 days after the Secretary-General receives a request made under paragraph 2, the disputing Party fails or the disputing investors fail to appoint an arbitrator in accordance with paragraph 4, the Secretary-General, on the request of any disputing party sought to be covered by the order, shall appoint the arbitrator or arbitrators not yet appointed. If the disputing Party fails to appoint an arbitrator, the Secretary-General shall appoint a national of the disputing Party, and if the disputing investors fail to appoint an arbitrator, the Secretary-General shall appoint a national of the non-disputing Party.

6. Where a Tribunal established under this Article is satisfied that two or more claims submitted to arbitration under Article 822 have a question of law or fact in common, and arise out of the same events or circumstances, the Tribunal may, in the interest of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

- (a) assume jurisdiction over, and hear and determine together, all or part of the claims;
- (b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others; or
- (c) instruct a Tribunal previously established under Articles 822 through 825 to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that:
  - (i) that Tribunal, at the request of any disputing investor not previously a disputing party before that Tribunal, shall be reconstituted with its original members, except that the arbitrator for the disputing investors shall be appointed pursuant to subparagraph 4(a) and paragraph 5, and
  - (ii) that Tribunal shall decide whether any prior hearing shall be repeated.

7. Where a Tribunal has been established under this Article, a disputing investor that has submitted a claim to arbitration under Article 822 and that has not been named in a request made under paragraph 2 may make a written request to the Tribunal that it be included in any order made under paragraph 6, and shall specify in the request:

- (a) the name and address of the disputing investor;
- (b) the nature of the order sought; and

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

The disputing investor shall deliver a copy of its request to the Secretary-General.

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

9. A Tribunal established under Articles 822 through 825 shall not have jurisdiction to decide a claim, or a part of a claim, over which a Tribunal established or instructed under this Article has assumed jurisdiction.

10. On application of a disputing party, a Tribunal established under this Article, pending its decision under paragraph 6, may order that the proceedings of a Tribunal established under Articles 822 through 825 be stayed, unless the latter Tribunal has already adjourned its proceedings.

#### **Article 827: Documents to, and Participation of, the Other Party**

1. A disputing Party shall deliver to the other Party a copy of the notice of intent referred in subparagraph 2(c) of Article 821, the notice of arbitration referred in paragraph 4 of Article 822, and any other documents that are appended to such notices, no later than 30 days after the date that such documents have been delivered to the disputing Party. The other Party shall be entitled, at its cost, to receive from the disputing Party:

- (a) pleadings, memorials and briefs submitted to the Tribunal by a disputing party and any written submissions submitted pursuant to Article 826 and Article 831;
- (b) minutes or transcripts of hearings of the Tribunal, where available; and
- (c) orders, awards and decisions of the Tribunal.

The Party receiving such information shall treat the information as if it were a disputing Party.

2. The other Party shall have the right to attend any hearings held under this Section. Upon written notice to the disputing parties, the other Party may make oral and written submissions to a Tribunal on a question of interpretation of this Agreement.

#### **Article 828: Place of Arbitration**

Unless the disputing parties agree otherwise, a Tribunal shall hold an arbitration in the territory of a country that is a party to the New York Convention, selected in accordance with:

- (a) the ICSID Additional Facility Rules, if the arbitration is under those Rules or the ICSID Convention; or
- (b) the UNCITRAL Arbitration Rules, if the arbitration is under those Rules.

#### **Article 829: Preliminary Objections**

1. The Tribunal shall have the power to rule on preliminary objections to jurisdiction and admissibility.
2. Any preliminary objection that the dispute should not be admitted or registered, is not within the jurisdiction of the Tribunal or, for other reasons, is not within the competence of the Tribunal, shall be made in accordance with the applicable arbitration rules as early as possible.

#### **Article 830: Public Access to Hearings and Documents**

1. Any Tribunal award under this Section shall be publicly available, subject to the deletion of confidential information. All other documents submitted to, or issued by, the Tribunal shall be publicly available, unless the disputing parties otherwise agree, subject to the deletion of confidential information. A disputing party providing information that it claims is confidential has the burden of designating it as confidential.

2. Hearings held under this Section shall be open to the public. The Tribunal may hold portions of hearings *in camera* to the extent necessary to ensure the protection of confidential information. The Tribunal shall establish procedures for the protection of confidential information and appropriate logistical arrangements for open hearings, in consultation with the disputing parties.

3. A disputing party may disclose to other persons in connection with the arbitral proceedings such unredacted documents as it considers necessary for the preparation of its case, but it shall ensure that those persons protect the confidential information in such documents.

4. The Parties may share with officials of their respective national and sub-national governments all relevant unredacted documents in the course of dispute settlement under this Agreement, but they shall ensure that those persons protect any confidential information in such documents.

5. To the extent that a Tribunal's confidentiality order designates information as confidential and a Party's law on access to information requires public access to that information, the Party's law on access to information shall prevail. However, a Party should endeavour to apply its law on access to information so as to protect information designated confidential by the Tribunal.

6. Nothing in this Section requires a disputing Party to disclose, furnish or allow access to information that it may withhold in accordance with Article 2202 (Exceptions – National Security) or Article 2205 (Exceptions – Disclosure of Information).

#### **Article 831: Submissions by a Non-Disputing Party**

1. A Tribunal shall have the authority to consider and accept written submissions from a person or entity that is not a disputing party and that has a significant interest in the arbitration. The Tribunal shall ensure that any non-disputing party submission does not disrupt the proceedings and that neither disputing party is unduly burdened or unfairly prejudiced by it.

2. An application to the Tribunal for leave to file a non-disputing party submission, and the filing of a submission, if allowed by the Tribunal, shall be made in accordance with Annex 831.

### **Article 832: Governing Law**

1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.<sup>10</sup> An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section, and any award or other ruling under this Section shall be consistent with the interpretation.

2. Where a disputing Party asserts as a defence that the measure alleged to be a breach is within the scope of a reservation set out in Annex I or Annex II, on request of the disputing Party, the Tribunal shall request the interpretation of the Commission on the issue. The Commission shall submit in writing its interpretation to the Tribunal. Further to paragraph 1, a Commission interpretation shall be binding on the Tribunal. If the Commission fails to submit its interpretation within 60 days of the delivery of the request, the Tribunal shall decide the issue.

### **Article 833: Expert Reports**

Without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, a Tribunal, at the request of a disputing party, or on its own initiative unless the disputing parties disapprove, may appoint experts to report to it in writing on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing party, subject to such terms and conditions as the disputing parties may agree.

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<sup>10</sup> In accordance with international law, and where relevant and as appropriate, a Tribunal may take into consideration the law of the disputing Party. However, a Tribunal does not have jurisdiction to determine the legality of a measure, alleged to be in breach of this Agreement, under the domestic law of the disputing Party.

## **Article 834: Interim Measures of Protection and Final Award**

1. A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 819 and Article 820. For purposes of this paragraph, an order includes a recommendation.

2. Where a Tribunal makes a final award against the disputing Party, the Tribunal may award, separately or in combination, only:

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

The Tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules.

3. Subject to paragraph 2, where a claim is made under Article 820:

- (a) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise;
- (b) an award of restitution of property shall provide that restitution be made to the enterprise; and
- (c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.

4. A Tribunal may not order a disputing Party to pay punitive damages.

### **Article 835: Finality and Enforcement of an Award**

1. An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of that particular case.
2. Subject to paragraph 3 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.
3. A disputing party may not seek enforcement of a final award until:
  - (a) in the case of a final award made under the ICSID Convention:
    - (i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award, or
    - (ii) revision or annulment proceedings have been completed; and
  - (b) in the case of a final award under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules:
    - (i) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award, or
    - (ii) a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.
4. Each Party shall provide for the enforcement of an award in its territory.

5. If the disputing Party fails to abide by or comply with a final award, on delivery of a request by the Party of the disputing investor a panel shall be established under Article 2106 (Dispute Settlement – Establishment of a Panel). The requesting Party may seek in such proceedings:

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

6. A disputing investor may seek enforcement of an arbitration award under the ICSID Convention, the New York Convention or the Inter-American Convention regardless of whether proceedings have been taken under paragraph 5.

7. A claim that is submitted to arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention and Article I of the Inter-American Convention.

#### **Article 836: Receipts under Insurance or Guarantee Contracts**

In an arbitration under this Section, a disputing Party shall not assert as a defence, counterclaim, right of setoff or for any other reason that the disputing investor has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.

#### **Article 837: Exclusions**

The dispute settlement provisions of this Section and of Chapter Twenty-One (Dispute Settlement) shall not apply to the matters referred to in Annex 837.

## Section C - Definitions

### Article 838: Definitions

For purposes of this Chapter:

**administrative recourse** means administrative recourse under *Colombia's Código Contencioso Administrativo* or other similar provisions of Colombian administrative law, including *Ley 142 de 1994* and *Ley 1150 de 2007*;

**confidential information** means:

- (a) confidential business information; and
- (b) information that is privileged or otherwise protected from disclosure under the law of a Party;

**covered investment** means, with respect to a Party, an investment in its territory of an investor of the other Party existing on the date of entry into force of this Agreement, as well as investments made or acquired thereafter;

**disputing investor** means an investor that makes a claim under Section B;

**disputing Party** means a Party against which a claim is made under Section B;

**disputing party** means the disputing investor or the disputing Party;

**enterprise** means an enterprise as defined in Article 105 (Initial Provisions and General Definitions – Definitions of General Application), and a branch of any such entity;

**enterprise of a Party** means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there;

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

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

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

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

**Inter-American Convention** means the *Inter-American Convention on International Commercial Arbitration*, done at Panama on 30 January 1975;

**investment** means:

- (a) an enterprise;
- (b) shares, stocks and other forms of equity participation in an enterprise;
- (c) bonds, debentures and other debt instruments of an enterprise, but does not include a debt instrument of a state enterprise;
- (d) a loan to an enterprise, but does not include a loan to a state enterprise;
- (e) an interest in an enterprise that entitles the owner to a share in income or profits of the enterprise;
- (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution;
- (g) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
  - (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or

- (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;
- (h) intellectual property rights; and
- (i) any other tangible or intangible property, moveable or immovable property, and related property rights acquired in the expectation or used for the purpose of economic benefit or other business purposes;

but **investment does not mean**,<sup>11</sup>

- (j) claims to money arising solely from
  - (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to a national or an enterprise in the territory of the other Party, or
  - (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or
- (k) any other claims to money,

that do not involve the kinds of interests set out in subparagraphs (a) to (i);

**investment of an investor of a Party** means an investment owned or controlled directly or indirectly by an investor of such Party;

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<sup>11</sup> For greater certainty, the following are not investments:

- (a) an order or judgment obtained in a judicial or administrative action;
- (b) a loan issued by one Party to the other Party; and
- (c) public debt operations of a Party or a state enterprise.

**investor of a Party** means a Party or state enterprise thereof, or an enterprise or national of a Party, that seeks to make,<sup>12</sup> is making or has made an investment. A natural person who is a dual citizen shall be deemed to be exclusively a citizen of the State of his or her dominant and effective citizenship. A natural person who is a citizen of a Party and a permanent resident of the other Party shall be deemed to be exclusively a national of the Party of which he or she is a citizen.

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

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

**Secretary-General** means the Secretary-General of ICSID;

**Statute of the International Court of Justice** means the *Statute of the International Court of Justice*, done at San Francisco on 26 June 1945;

**Tribunal** means an arbitration tribunal established under Articles 822 through 825 or Article 826;

**TRIPS Agreement** means the *WTO Agreement on Trade-Related Aspects of Intellectual Property Rights*; and

**UNCITRAL Arbitration Rules** means the arbitration rules of the United Nations Commission on International Trade Law, approved by the United Nations General Assembly on 15 December, 1976.

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<sup>12</sup> For greater certainty, it is understood that an investor “seeks to make an investment” only when the investor has taken concrete steps necessary to make said investment, such as when the investor has duly filed an application for a permit or license required to make an investment and has obtained the financing providing it with the funds to set up the investment.

## **Section D: Dispute Settlement for Juridical Stability Contracts**

### **Article 839: Dispute Settlement for Juridical Stability Contracts**

1. Subject to paragraph 2, a Canadian investor may submit an arbitration claim concerning the interpretation of, or compliance by the Colombian Government with, a Juridical Stability Contract only in accordance with Colombian law and paragraph 3 of this Annex.
2. Paragraph 1 is without prejudice to the right of a Canadian investor to make a claim under Section B of this Chapter that a measure taken by Colombia in connection with a Juridical Stability Contract breaches an obligation under Section A of this Chapter.
3. In the case of an arbitration under Colombian law in accordance with paragraph 1:
  - (a) the Tribunal shall have its seat in Bogotá, Colombia;
  - (b) the Tribunal shall consist of three arbitrators, one appointed by each disputing party and the third, who shall be the President of the Tribunal, appointed by the two disputing party-appointed arbitrators;
  - (c) an arbitrator shall be independent of, and not affiliated with, or take instructions from, either Party or the disputing investor;
  - (d) an arbitrator may be of any nationality, except the President of the Tribunal who may not be a national of a Party;
  - (e) unless otherwise agreed by the disputing parties, the Tribunal shall conduct the arbitration in accordance with the UNCITRAL Arbitration Rules, except to the extent modified by this paragraph;

- (f) where a Tribunal has not been constituted within 90 days from the date that a claim is submitted to arbitration, the appointing authority under the UNCITRAL Arbitration Rules, on the request of either disputing party, shall appoint, in his or her discretion and, to the extent practicable, in consultation with the disputing parties, the arbitrator or arbitrators not yet appointed, consistent with the criteria set out in this provision; and
- (g) the Tribunal shall decide the issues in dispute in accordance with Colombian law and such rules of international law as may be applicable.

4. For the purpose of this Annex, “Juridical Stability Contract” means a contract between the Colombian Government and a Canadian investor in accordance with *Ley 963 de 2005*, *Decreto 2950 de 2005* and their amendments, where the Colombian Government undertakes the obligation to maintain over the length of the contract those provisions and binding administrative interpretations - including tax provisions - which are considered as decisive for the investment. Such contracts may cover laws, decrees, administrative acts of general application and binding administrative interpretations, subject to the limitations of *Ley 963 de 2005*, *Decreto 2950 de 2005* and their amendments.

## Annex 810

### Capital Controls

1. Colombia reserves the right to maintain or adopt measures to maintain or preserve the stability of its currency, in accordance with Colombian domestic legislation, including *Law 9 of 1991* and *Law 31 of 1992*. These measures shall not affect outward transfers or foreign direct investment transfers. For transparency purposes, Colombia maintains the following measure as of the date of entry into force of this Agreement:

- (a) pursuant to *Resolution 8 of 2000*, a non-interest bearing deposit requirement on foreign credits relating to an investment equivalent to zero per cent of the credit.

Deposits under this paragraph may be reimbursed before the due date subject to a financial penalty.

2. Colombia shall have the right to adopt any reasonable measure that is necessary to prevent the circumvention of measures taken pursuant to paragraph 1.

3. Any measure maintained or adopted by Colombia pursuant to paragraph 1 or 2 shall:

- (a) be temporary and be eliminated as soon as the circumstances leading to their imposition no longer exist;
- (b) be of general application;
- (c) be imposed and be applied in good faith;
- (d) be consistent with Articles 803 and 804; and
- (e) not impose, with respect to deposits of investors of Canada, any terms or conditions that are more restrictive than those applied at the time such deposits were made.

4. Upon adopting a measure pursuant to paragraph 1 or 2, Colombia shall provide to Canada the reasons for the adoption of the measure as well as any relevant information.

5. For the purposes of this Annex:

**foreign credit** means any type of foreign debt financing whatever its nature, form or maturity period; and

**foreign direct investment** means an investment of an investor of Canada, other than a foreign credit, made in order to:

- (a) establish a Colombian enterprise or increase the capital of an existing Colombian enterprise; or
- (b) acquire equity of an existing Colombian enterprise, but excludes such an investment that is of a purely financial character and is designed only to gain indirect access to the financial market of Colombia.

## **Annex 811**

### **Indirect Expropriation**

The Parties confirm their shared understanding that:

1. Paragraph 1 of Article 811 addresses two situations. The first situation is direct expropriation, where an investment is nationalized or otherwise directly expropriated as provided for under international law.
2. The second situation is indirect expropriation, which results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
  - (a) The determination of whether a measure or series of measures of a Party constitute an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:
    - (i) 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,
    - (ii) the extent to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations, and
    - (iii) the character of the measure or series of measures;
  - (b) Except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted in good faith, non-discriminatory measures by a Party that are designed and applied to protect legitimate public welfare objectives, for example health, safety and the protection of the environment, do not constitute indirect expropriation.

## **Annex 821**

### **Standard Waiver and Consent In Accordance with Article 821 of this Agreement**

In the interest of facilitating the filing of waivers as required by Article 821 of this Agreement, and to facilitate the orderly conduct of the dispute resolution procedures set out in Section B, the following standard waiver forms shall be used, depending on the type of claim.

Claims filed under Article 819 must be accompanied by either Form 1, where the investor is a national of a Party, or Form 2, where the investor is a Party, a state enterprise thereof, or an enterprise of such Party.

Where the claim is based on loss or damage to an interest in an enterprise of the other Party that is a juridical person that the investor owns or controls directly or indirectly, either Form 1 or 2 must be accompanied by Form 3.

Claims made under Article 820 must be accompanied by either Form 1, where the investor is a national of a Party, or Form 2, where the investor is a Party, a state enterprise thereof, or an enterprise of such Party, and Form 4.

### **Form 1**

**Consent and waiver for an investor bringing a claim under Article 819 or Article 820 (where the investor is a national of a Party) of the *Free Trade Agreement between Canada and the Republic of Colombia* done on (date of signature):**

I, \_\_\_\_\_ (Name of investor), consent to arbitration in accordance with the procedures set out in this Agreement, and waive my right to initiate or continue before any administrative tribunal or court under the law of either Party to the Agreement, or other dispute settlement procedures, any proceedings with respect to the measure of (Name of disputing Party) that is alleged to be a breach referred to in Article 819, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of \_\_\_\_\_ (Name of disputing Party).

(To be signed and dated)

### **Form 2**

**Consent and waiver for an investor bringing a claim under Article 819 or Article 820 (where the investor is a Party, a state enterprise thereof, or an enterprise of such Party) of the *Free Trade Agreement between Canada and the Republic of Colombia* done on (date of signature):**

I, (Name of declarant), on behalf of (Name of investor), consent to arbitration in accordance with the procedures set out in this Agreement, and waive the right of (Name of investor) to initiate or continue before any administrative tribunal or court under the law of either Party to the Agreement, or other dispute settlement procedures, any proceedings with respect to the measure of (Name of disputing Party) that is alleged to be a breach referred to in Article 819 or Article 820, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages before an administrative tribunal or court under the law of (Name of disputing Party). I hereby solemnly declare that I am duly authorised to execute this consent and waiver on behalf of (Name of investor) .

(To be signed and dated)

### **Form 3**

**Waiver of an enterprise that is the subject of a claim by an investor under Article 819 of the *Free Trade Agreement between Canada and the Republic of Colombia* done on (date of signature):**

I, (Name of declarant), waive the right of (Name of the enterprise) to initiate or continue before any administrative tribunal or court under the law of either Party to this Agreement, or other dispute settlement procedures, any proceedings with respect to the measure of (Name of disputing Party) that is alleged by (Name of investor) to be a breach referred to in Article 819, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of (Name of disputing Party). I hereby solemnly declare that I am duly authorised to execute this waiver on behalf of (Name of the enterprise) .

(To be signed and dated)

### **Form 4**

**Consent and waiver of an enterprise that is the subject of a claim by an investor under Article 820 of the *Free Trade Agreement between Canada and the Republic of Colombia* done on (date of signature):**

I, (Name of declarant), on behalf of (Name of enterprise), consent to arbitration in accordance with the procedures set out in this Agreement, and waive the right of (Name of enterprise) to initiate or continue before any administrative tribunal or court under the law of either Party to the Agreement, or other dispute settlement procedures, any proceedings with respect to the measure of (Name of disputing Party) that is alleged by (Name of investor) to be a breach referred to in Article 820, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages before an administrative tribunal or court under the law of (Name of disputing Party). I hereby solemnly declare that I am duly authorised to execute this consent and waiver on behalf of (Name of the enterprise) .

(To be signed and dated)

## **Annex 822**

### **Submission of a Claim to Arbitration**

1. An investor of Canada may not submit to arbitration under Section B a claim that Colombia has breached an obligation under Section A either:

- (a) on its own behalf under paragraph 1 of Article 819; or
- (b) on behalf of an enterprise of Colombia that is a juridical person that the investor owns or controls directly or indirectly under paragraph 1 of Article 820,

if the investor or the enterprise, respectively, has alleged the breach of the obligation under Section A in proceedings before a court or administrative tribunal of Colombia, or to any other binding dispute settlement proceeding agreed by the disputing parties.

2. For greater certainty, if an investor of Canada elects to submit a claim of the type described in paragraph 1 to a court or administrative tribunal of Colombia, or to any other binding dispute settlement proceeding agreed by the disputing parties, that election shall be definitive, and the investor may not thereafter submit the claim to arbitration under Section B.

3. The forms in Annex 821 that require an investor to waive the right to continue certain proceedings, do not refer to investors that have elected to submit a claim referred to in paragraph 1, and shall not be construed to allow such investors to circumvent paragraphs 1 and 2 and to bring a claim to arbitration under Section B.

4. Paragraphs 1 and 2 do not apply to an investor of Canada exhausting administrative recourse under Colombian law.

## **Annex 831**

### **Submissions by Non-Disputing Parties**

1. The application for leave to file a non-disputing party submission shall:
  - (a) be made in writing, dated and signed by the applicant, and include the applicant's address and other contact details;
  - (b) be no longer than five typed pages;
  - (c) describe the applicant, including, where relevant, its membership and legal status (e.g., company, trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the applicant);
  - (d) disclose whether the applicant has any affiliation, direct or indirect, with any disputing party;
  - (e) identify any government, person or organization that has provided any financial or other assistance in preparing the submission;
  - (f) demonstrate that the applicant has a significant interest and specify the nature of this interest in the arbitration;
  - (g) identify the specific issues of fact or law in the arbitration that the applicant will address in its written submission;
  - (h) explain why the Tribunal should accept the submission; and
  - (i) be made in a language of the arbitration.

2. The submission filed by a non-disputing party shall:
  - (a) be dated and signed by the person filing the submission;
  - (b) be concise, and in no case longer than 20 typed pages, including any appendices;
  - (c) set out a precise statement supporting the applicant's position on the issues; and
  - (d) only address matters within the scope of the dispute.

## **Annex 837**

### **Exclusions from Dispute Settlement**

1. A decision by Canada following a review under the *Investment Canada Act* (1985, c.28, 1<sup>st</sup> supp.), with respect to whether or not to permit an acquisition that is subject to review, shall not be subject to the dispute settlement provisions of Section B of this Chapter or of Chapter Twenty-One (Dispute Settlement).
  
2. A decision by a Party to prohibit or restrict the acquisition of an investment in its territory by an investor of the other Party, or its investment, pursuant to Article 2202 (Exceptions –National Security) shall not be subject to the dispute settlement provisions of Section B of this Chapter or of Chapter Twenty-One (Dispute Settlement).
  
3. Article 815 shall not be subject to the dispute settlement provisions of Section B of this Chapter or of Chapter Twenty-One (Dispute Settlement).