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Brussels, 13 February 2017

WK 1627/2017 INIT

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MEETING DOCUMENT

From:	European Commission
To:	Trade Policy Committee (Deputies)
Subject:	Consolidated texts of the EU-Japan FTA Investment chapter

These texts replace the versions circulated on 31/01/2017 for the chapter 8 Investment (WK 1097 2017 INIT).



EUROPEAN COMMISSION
Directorate-General for Trade
Directorate C- Asia and Latin America

Brussels, 13 February 2017
TRADE/C.1/

Limited¹

NOTE FOR THE ATTENTION OF THE TRADE POLICY COMMITTEE

SUBJECT: Consolidated texts of the EU-Japan FTA Investment chapter

ORIGIN: Commission, DG Trade

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OBJECTIVE: For information

REMARKS: In advance of the informal technical meeting scheduled on 23 February, Delegations will find attached the consolidated texts of the Investment chapter of the EU-Japan FTA. These texts replace the versions circulated on 31/01/2017 for the chapter 8 Investment.

¹ This document is only for use within the European institutions and Member States' public administrations:

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Colour codes:**TEXT= proposal made by Japan****TEXT = proposal made by EU***TEXT= negotiators' notes that contain clarifications and/or follow-up items (but that do not form part of the negotiated text)*

CHAPTER [X] INVESTMENT
SECTION X SCOPE
Article [X1] Scope
<p>1. This Chapter shall apply to measures adopted or maintained by a Party with regard to the establishment or operation of economic activities by:</p> <ul style="list-style-type: none"> (a) investors of the other Party; and (b) covered investments; and (c) for the purposes of Article [x7], [any] investments in the [territory] [Area] of the Party adopting or maintaining the measure. <p>2. The Section on liberalization of Investments with regard to the establishment of a covered investment, does not apply to measures relating to:</p> <ul style="list-style-type: none"> (a) air services or related services in support of air services other than the following: <ul style="list-style-type: none"> (i) Aircraft repair and maintenance services during which an aircraft is withdrawn from service; (ii) The selling and marketing of air transport services; (iii) Computer reservation system (CRS) services; (iv) Ground handling services; (v) Airport operation services. (b) [Cabotage] <p>[2. The section on Liberalisation of Investments shall not apply to audio-visual services.]</p>

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

[Note 09/01/2017:

The Parties agree that there is no risk of inconsistency with services, procurement, subsidies, SOEs, IPRs chapters. Japan to confirm the deletion of para 3.]

**Article [x2]
Review**

Note: Moved to Chapter 1 (general provisions) if needed can be further adapted to cover ISDS/ICS.

**SECTION X
LIBERALISATION OF INVESTMENTS**

Article [X3]
Market Access

Neither party shall maintain or adopt with regard to market access through establishment or operation by an investor of a Party or by an enterprise constituting a covered investment , either on the basis of its entire [territory] [Area] or on the basis of entire territory or territorial subdivision measures that:

a) impose limitations on:

- i) the number of enterprises, whether in the form of numerical quotas, monopolies, exclusive rights or the requirements of an economic needs test;
- (ii) the total value of transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
- (iii) the total number of operations or on the total quantity of output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
- (iv) the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment;
- (v) the total number of natural persons that may be employed in a particular sector or that an enterprise may employ and who are necessary for, and directly related to, the performance of the economic activity in the form of numerical quotas or the requirement of an economic needs test.

b) restrict or require specific types of legal entity or joint ventures through which an investor of the other Party may perform an economic activity.

Article [x4]
National Treatment

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

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

3. For greater certainty, the provisions of paragraphs 1 and 2 shall not be construed as to prevent a Party from prescribing statistical formalities or information requirements, in connection with the covered investments in its [territory] [Area], provided that those formalities or requirements do not constitute a means to circumvent the obligations of that Party pursuant to this Article.

Article [x5]
Most-Favoured-Nation Treatment

1. Each Party shall accord to investors of [the other Party] and to covered investments treatment no less favourable than the treatment it accords, in like situations, to investors of a non-Party and to their investments with respect to establishment in its [Area] [territory].

Provisional Note: This paragraph will be accepted after the agreement on the offers.

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

~~[3. For greater certainty, the treatment accorded to investors of a non-Party or to their investments in like circumstances, referred to in paragraphs 1 and 2 of this Article, covers the treatment which such investors or investments would be entitled to receive even in the absence of an existing investment at the time when the comparison is made.]~~

Note 09/02/2017: Japan to confirm deletion of para 3.

4. The provisions of paragraph 1 and 2 shall not be construed to oblige a Party to extend to investors and investments of the other Party the benefit of any treatment resulting from:

(a) an international agreement for the avoidance of double taxation or other international agreement or arrangement relating wholly or mainly to taxation.

(b) existing or future measures providing for recognition of qualifications, licences or prudential measures as referred to in Article VII of the General Agreement on Trade in Services or its Annex on Financial Services.

Note: EU to include REIO in the annexes on NCM.

5. For greater certainty, the "treatment" referred to in Paragraphs 1 and 2 does not include investor-to-state 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 non-Party do not in themselves constitute "treatment" under [paragraph 2 of] this Article. Substantive provisions in other international agreements can constitute treatment and thus give rise to establishing a breach of [paragraph 2 of] this Article only to the extent that they are applied through measures.^{1]}

Article [x6] Senior management and board of directors

Neither Party shall require an enterprise of a Party that is a covered investment to appoint, as executives, managers or members of boards of directors, individuals of any particular nationality.

Article [x7]

⁶ W x z s z q z s - z z z s y q p z q z x s p z
s y z s z s z 2

Prohibition of Performance Requirements

1. Neither Party shall impose or enforce any of the following requirements or enforce any commitment or undertaking in connection with the establishment or operation of any investments in its [Area] [territory]²:

- (a) to export a given level or percentage of goods or services;
 - (b) to achieve a given level or percentage of domestic content;
 - (c) to purchase, use or accord a preference to goods produced or services supplied in its [Area][territory], or to purchase goods or services from natural or juridical persons or any other entity in its [Area][territory];
 - (d) 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;
 - (e) to restrict sales of goods or services in its [Area][territory] that such investments produce or supply by relating such sales in any way to the volume or value of its exports or foreign exchange inflows;
 - (f) to restrict the exportation or sale for export;
 - (h) to transfer technology, a production process or other proprietary knowledge to a natural or juridical person or any other entity in its [Area] [territory];
 - (i) to locate the headquarters of that investor for a specific region or the world market in its Area;
- [Note 12.2016: EU shall update its schedules accordingly.]
- (j) to hire a given number or percentage of its nationals;
 - (k) to achieve a given level or value of research and development in its Area; or
 - (l) to supply one or more of the goods produced or services provided by the investment to a specific region or to the world market, exclusively from its own [Area][territory].
- (m) to adopt

- (i) a rate or amount of royalty below a certain level ; or
- (ii) a given duration of the term of a license contract³,

² For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 2 does not constitute a “requirement” or a “commitment or undertaking” for the purpose of paragraph 1.

³ A “license contract” referred to in this subparagraph means any contract concerning the licensing of technology, a production process, or other proprietary knowledge.

with regard to any license contract in existence at the time the requirement is imposed or enforced, or any commitment or undertaking is enforced, or with regard to any future license contract freely entered into between the investor and a natural or juridical person or any other entity in its Area, provided that the requirement is imposed or the commitment or undertaking is enforced, in a manner that constitutes a direct interference with that licence contract by an exercise of non-judicial governmental authority of a Party. For greater certainty, paragraph (m) does not apply when the license contract is concluded between the investor and a Party;

2. Neither Party may condition the receipt or continued receipt of an advantage, in connection with the establishment or operation of any investments in its [Area] [territory], 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 [Area][territory], or to purchase goods from natural or juridical persons or any other entity in its [Area][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;
- (d) to restrict sales of goods or services in its [Area][territory] that such investments produce or supply by relating such sales in any way to the volume or value of its exports or foreign exchange inflows;
- (e) to restrict the exportation or sale for export;

3.(a) Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with the establishment or operation of any investment in its [Area][territory], 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 [Area][territory].

(b) Subparagraphs 1(a), 1(b), 1(c) , 2(a) and 2(b) shall not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programmes.

(c) Subparagraph 1(h) and (m) shall not apply when

- (i) the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority in order to remedy a violation of competition laws and regulations; or
- (ii) a Party authorizes use of an intellectual property right in accordance with Article 31 of the TRIPS Agreement, or measures requiring the disclosure of data/proprietary information that fall within the scope of, and are consistent with, paragraph 3 of Article 39 of the TRIPS Agreement.

(d) Paragraph (m) shall not apply if the requirement is imposed or the commitment or undertaking is enforced by a tribunal as equitable remuneration under the Party's

copyright laws.

(e) Subparagraphs 2(a) and 2(b) shall not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

4. This article is without prejudice to the obligations of a Party under the WTO Agreement.

Article [x8]

Non-Conforming Measures and Exceptions

1. Articles [xx](MA), [x3](NT), [x4](MFN) and [x7](PPR) do not apply to:
 - (a) any existing non-conforming measure that is maintained by [a Party] at a level of:
 - (i) with respect to the European Union [or an EU Member State]:
 - (A) the European Union, as set out in its Schedule in Annex [XI];
 - (B) the national government of an EU Member State, as set out in its Schedule in Annex [XI];
 - (C) a provincial, territorial or regional government of an EU Member State, as set out in its Schedule in Annex [XI]; or
 - (D) a local government, other than government referred to in (i)(C); and
 - (ii) with respect to Japan:
 - (A) the central government, as set out in its Schedule in Annex [XI];
 - (B) a prefecture, as set out in its Schedule in Annex [XI];
 - (C) a local government other than a prefecture;
 - (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraphs (a); or
 - (c) an amendment or modification to any non-conforming measure referred to in subparagraphs (a) and (b), provided that the amendment or modification does not decrease the conformity of the measure as it existed immediately before the amendment or modification, with Articles [xx](MA), [x3](NT), [x4](MFN) and [x7](PPR).
2. Articles [x3](MA), [x4](NT), [x5](MFN) and [x7](PPR) do not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors or activities set out in its Schedule in Annex [XII].
3. Neither Party shall, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule in Annex [XII], require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment that exists at the time the measure becomes effective.
4. Articles [x4](NT), [x5](MFN) shall not apply to any measure that constitutes an exception

to, or a derogation from, Articles 3 or 4 of the TRIPS Agreement, as specifically provided in Articles 3 through 5 of the TRIPS Agreement.

5. Articles [x3](MA), [x4](NT), [x5](MFN) and [x7](PPR) shall not apply to any measure that a Party adopts or maintains with respect to government procurement.
6. Articles [x3](MA), [x4](NT), [x5](MFN) do not apply to subsidies granted by the Parties.

SECTION 2

INVESTMENT PROTECTION

Article 13

Investment and regulatory measures

1. Article 1 Paragraph 2 [Right to regulate] of Chapter 1 of this Title applies to this Section in accordance with the following paragraphs.
2. For greater certainty, the mere fact that a Party takes or fails to take an action including through a modification to its laws that may negatively affect an investment or an investor's expectations, including expectations of profits, does not amount to a breach of an obligation under this Section, as applicable. This includes a Party's decision not to issue or renew a subsidy or to modify or withdraw it.
3. For greater certainty, the provisions of this Section, as applicable, shall not be construed to require a Party to act inconsistently with the decision to discontinue a subsidy⁴ or to request its reimbursement, ordered by a competent court, administrative tribunal or other competent authority based on the rules set out in Annex [X].

Note: The Annex [X will refer to Article 107 to 109 of the Treaty on the Functioning of the European Union.

Article [X14]

General Treatment of Investment

1. In accordance with international law, Each Party shall accord to covered investment and to investors of the other Party, with respect to their covered investments, fair and equitable treatment and full protection and security in its [Area][territory].
2. A Party breaches the obligation to grant fair and equitable treatment if a measure or series of measures constitute:
 - (a) denial of justice in criminal, civil or administrative proceedings;
 - (b) disregard of the fundamental principles of due process including through lack of transparency, in any administrative or judicial proceedings;

- (c) Manifest arbitrariness;
- (d) discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
- (e) abusive treatment, including coercion, duress and harassment;

3. For greater certainty, full protection and security refers to the physical security of covered investments and of investors with respect to their covered investments.

4. When applying the above fair and equitable treatment obligation, 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, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.

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

Article [x14] Compensation for losses

1. Each Party shall accord to investors of the other Party that have suffered loss or damage relating to their investments in the [Area][territory] of the former Party due to armed conflict or a state of emergency such as revolution, insurrection or civil disturbance in the [Area][territory] of that former Party, treatment no less favourable than the treatment it accords to its own investors or to investors of a non-Party, whichever is more favourable to the investor, with respect to restitution, indemnification, compensation or any other form of settlement.

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] [Area] of the other Party resulting from:

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

shall be accorded adequate and effective restitution or compensation by the other Party without undue delay.

Article 16 Expropriation and Compensation

1. Neither Party shall expropriate or nationalise, either directly or indirectly through a measure having an effect equivalent to expropriation or nationalisation (hereinafter referred to as "expropriation"), the investments of investors of the other Party in its [Area][territory] except:

- (a) for a public purpose;
- (b) in a non-discriminatory manner;
- (c) upon payment of prompt, adequate and effective compensation in accordance with paragraph 2 through 4 of this article; and
- (d) in accordance with due process of law.

For greater certainty, this paragraph shall be interpreted in accordance with Annex X on Expropriation.

2. The compensation referred to in paragraph 1 (c) shall be equivalent to the fair market value of the expropriated investment at the time when the expropriation was publicly announced or when the expropriation took place, whichever is earlier. The fair market value shall not reflect any change in value occurring because the expropriation had become publicly known earlier.
3. Such compensation shall be paid without delay and shall include interest at a normal commercial rate, accrued from the date of expropriation until the date of payment. It shall be effectively realisable and freely transferable in accordance with Article 17 (Transfers) and shall be paid in a freely convertible currency accepted by the investor⁵, at the market exchange rate prevailing on the date of expropriation.
4. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the Agreement on the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such revocation, limitation, or creation is consistent with Chapter XX (Chapter on the Intellectual Property) and the TRIPS Agreement⁶.

Article [x15] Transfers

1. Each Party shall allow all transfers relating to a covered investment to be made in a freely convertible currency without restriction or delay into and out of its [Area] [territory]. Such transfers shall include:
 - (a) contributions to capital [such as principal and additional funds] to maintain, develop or increase the investment;
 - (b) profits, capital gains, dividends, and other returns, interest, royalty payments, fees

⁵ For greater certainty, a Party may not impose on an investor to accept compensation in a given currency.

⁹ W x z s z qz s - z z z qs y z zq s z x q pz z
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 x q pz z qz z x 2

including management fees and technical assistance fees, and other incomes accruing from the investment;

- (c) payments made under a contract entered into by the investor, or the covered investment, including loan payments in connection with the investment;
- (d) proceeds of the sale or liquidation of all or any part of the investment;
- (e) earnings and other remuneration of personnel engaged from abroad and working in connection with the investment;
- (f) payments made in accordance with Articles [x14](Compensation for losses) and [x16] (Expropriation and Compensation); and
- (g) payments arising out of the settlement of a dispute including payments arising under Article [X](final award in ISDS provisions).

2. Transfers shall be made at the market rate of exchange prevailing on the date of transfer.

Article 18 Subrogation

If a Party, or its designated agency thereof, makes a payment to any investor of that Party under an indemnity, guarantee or insurance contract pertaining to an investment of such investor in the [Area][Territory] of the other Party, the other Party shall recognise the assignment to the former Party or its designated agency of any right or claim of such investor under this Chapter but for the subrogation, on account of which such payment is made, and shall recognise the right of the former Party or its designated agency to exercise by virtue of subrogation any such right or claim to the same extent as the original right or claim of the investor. The investor may not pursue these rights to the extent of the subrogation.

Article [x21] Denial of Benefits

A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of the other Party and to its investments if the enterprise is owned or controlled by a natural or juridical person of a non-Party and the denying Party adopts or maintains measures with respect to the non-Party that: (i) are related to the maintenance of international peace and security, including the protection of human rights; and (ii) prohibit transactions with the enterprise or would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.

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 fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:

(a) the economic impact of the measure or series of measures and its duration, although the fact that a measure or a series of measures by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(b) whether the expectations of the investor arising out of the investment were distinct and reasonable;

(c) the character of the measure or series of measures, including its object and context.

3. For greater certainty, except in rare circumstances where they are manifestly excessive in the light of their purpose, non-discriminatory measures that are designed and applied by a Party to protect legitimate public policy objectives⁷ such as health, safety and the environment do not constitute indirect expropriation.

⁸ W z z y O z - pz p s 3p q s zS z s s z
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y s qz- zS z s s z s r s rs zp rsp ys 2

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 42 O z z s y p x y s qs ysq s s z z z zp r z R W z z
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□

Annex [X] : Public debt

1. No claim that a restructuring of debt issued by a Party breaches an obligation under this [Chapter] may be submitted to, or if already submitted, continue in, arbitration under Section [Investor-State Dispute Settlement] if the restructuring is a negotiated restructuring at the time of submission, or becomes a negotiated restructuring after such submission, except for a claim that the restructuring violates Article X (National Treatment) or Article X (Most-Favoured-Nation Treatment)¹.
2. Notwithstanding Article X [Submission of a Claim, Section on Investor-State Dispute Settlement], and subject to paragraph 1 of this Annex, an investor of a Party may not submit a claim under Section [Investor-State Dispute Settlement] that a restructuring of debt issued by the other Party breaches an obligation under this [Chapter], other than Articles X [National Treatment] or X [Most-Favoured Nation], unless 270 days have elapsed from the date of submission by the claimant of the written request for consultations pursuant to Article X [Consultations].
3. For the purposes of this Annex:
 - 'Negotiated restructuring' means the restructuring or rescheduling of debt issued by 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 under the debt instruments that are subject to restructuring have consented to that debt exchange or other process.
 - "Governing law" of a debt instrument means a jurisdiction's legal and regulatory framework applicable to that debt instrument.
4. For greater certainty, debt issued by a Party includes all forms of debt of Japan or of the European Union, or of a Member State of the European Union, at the central, regional or local level.

¹ For the purpose of this Annex, the mere fact that the relevant treatment distinguishes between investors or investments on the basis of legitimate public policy objectives in the context of a debt crisis or threat thereof does not amount to a breach of Article X [National Treatment] or Article X [Most-Favoured Nation]

Japan-EU EPA/FTA Negotiation
Consolidated Text
(Status 9 February 2017)

CHAPTER I
GENERAL PROVISIONS

Article 1

Objectives, coverage and definitions

1. The Parties, reaffirming their respective commitments under the WTO Agreement and their commitment to create a better climate for the development of trade and investment between the Parties, hereby lay down the necessary arrangements for the progressive and reciprocal liberalisation of trade in services and investment and for cooperation on e-commerce.
2. For the purpose of this Title, the Parties reaffirm their right to adopt within their territories regulatory measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.
3. This [Title] shall not apply to measures affecting natural persons of a Party seeking access to the employment market of the other Party, nor to measures regarding nationality or citizenship, residence or employment on a permanent basis.
4. This [Title] shall not prevent a Party from applying measures to regulate the entry of natural persons into, or their temporary stay in, the Party, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to the other Party under the terms of this [Title]. The sole fact of requiring a visa for natural persons of a certain country and not for those of others shall not be regarded as nullifying or impairing benefits under the terms of this [Title].
5. For the purpose of this [Title]:
 - (a) “aircraft repair and maintenance services during which an aircraft is withdrawn from service” mean such activities when undertaken on an aircraft or a part thereof while it is withdrawn from services and does not include so-called line maintenance;

- (b) “airport operation services” means the supply of air terminal, airfield and other airport infrastructure operation services on a fee or contract basis. Airport operation services do not include air navigation services;
- (c) “computer reservation system (CRS) services” mean services provided by computerized systems that contain information about air carriers’ schedules, availability, fares and fare rules, through which reservations can be made or tickets may be issued
- (d) “Covered investment” means an investment in the [territory] [Area] of a Party owned or controlled, directly or indirectly, by an investor of the other Party, made before or after the date of entry into force of this agreement in accordance with the applicable law .
- (e) “cross-border trade in services” means the supply of a service:
- (i) from the [Area][territory] of a Party into the [Area][territory] of the other Party;
 - (ii) in the [Area][territory] of a Party to the service consumer of the other Party;
- (f) “direct taxes” comprises all taxes on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of property, taxes on estates, inheritances and gifts, and taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation;
- (g) ‘economic activity’ means any service or activity of an industrial, commercial or professional character or activities of craftsmen, except for services or activities performed in the exercise of governmental authority;
- (h) an ‘enterprise’ means a juridical person or branch or representative office [JP: of a juridical person];
- (i) “establishment” means the setting up or the acquisition¹ of a juridical person or the creation of a branch or representative office in Japan or in the EU respectively².
- (j) “existing” means in effect on the date of entry into force of this Agreement;
- (k) “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

¹ The term “acquisition” shall be understood as including capital participation in a juridical person with a view to establishing or maintaining lasting economic links.

² Expansion is understood by the Parties as being covered through the definition of establishment in the form of establishment by an enterprise that is a covered investment.’

international transactions³

(l) “ground handling services” means the supply at an airport, on a fee or contract basis, of the following services: airline representation, administration and supervision; passenger handling; baggage handling; ramp services; catering , except the preparation of the food; air cargo and mail handling; fuelling of an aircraft; aircraft servicing and cleaning; surface transport; and flight operations, crew administration and flight planning. Ground handling services do not include: self-handling; security; line maintenance; aircraft repair and maintenance; or management or operation of essential centralised airport infrastructure, such as de-icing facilities, fuel distribution systems, baggage handling systems and fixed intra-airport transport systems;

(m) “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:

- (i) an enterprise;
- (ii) shares, stocks or other forms of equity participation in an enterprise, including rights derived therefrom;
- (iii) bonds, debentures, loans and other forms of debt, including rights derived therefrom;
- (iv) futures, options and other derivatives;
- (v) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- (vi) claims to money and to any performance under contract having a financial value;
- (vii) intellectual property and goodwill;
- (viii) licenses, authorisations, permits, concessions and similar rights conferred pursuant to applicable domestic law; and
- (ix) any other tangible or intangible, movable or immovable property, and related property

³ Currencies that are widely traded in international foreign exchange markets and widely used in international transactions include freely usable currencies as designated by the International Monetary Fund in accordance with the Articles of Agreement of the International Monetary Fund.

rights, such as leases, mortgages, liens and pledges as well as returns⁴ that are invested [FN];

For greater certainty, an order or judgement entered in a judicial or administrative action does not constitute an investment.

(n) “investor of a Party” means:

- (i) a natural person of a Party; or
- (ii) a juridical person of a Party

that seeks to make, is making or has made an investment in the [Area][territory] of the other Party;

(o) ‘juridical person’ means any legal entity duly constituted or otherwise organised under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association;

(o1) a juridical person is:

- (i) ‘owned’ by natural or juridical persons of a Party if more than 50 percent of the equity interest in it is beneficially owned by natural or juridical persons of that Party;
- (ii) ‘controlled’ by natural or juridical persons of a Party if such natural or juridical persons have the power to name a majority of its directors or otherwise to legally direct its actions;

(p) a ‘juridical person of the EU’ or a ‘juridical person of Japan’ means a juridical person constituted or organised under the laws of a Member State of the EU or of Japan and engaged in substantive business operations⁵ in the [Area][territory] of the EU or of Japan, respectively;

(p1) Notwithstanding the preceding paragraph, shipping companies established outside the EU or Japan and controlled by nationals of a Member State of the EU or of Japan, respectively, shall also be

⁴ Such returns may include any amounts yielded by or derived from an investment or reinvestment, in particular, profits, interest, capital gains, dividends, royalties or fees, and payments in kind. A change in the form in which assets are invested or reinvested does not in itself affect their character as investment.

⁵ In line with its notification of the Treaty establishing the European Community to the WTO (WT/REG39/1), the EU understands that the concept of “effective and continuous link” with the economy of a Member State of the European Union enshrined in Article 54 of the TFEU is equivalent to the concept of “substantive business operations”.

beneficiaries of the provisions of this Title, with the exception of Chapter [chapter on Investment Protection] and of Chapter [chapter on investor-to-state dispute settlement], if their vessels are registered in accordance with their respective legislation, in that Member State or in Japan and fly the flag of a Member State or of Japan;

(q) a “measure” means any measure by a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form;

(r) “measures adopted or maintained by a Party” means measures taken by:

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

(s) a “natural person of the EU” means a national of one of the Member States of the EU in accordance with its applicable laws and regulations and a “natural person of Japan” means a national of Japan in accordance with its applicable laws and regulations⁶;

(t) “operation” , means conduct, management, maintenance, use, enjoyment and sale or other form of disposal of the investment.

(u) “selling and marketing of air transport services” means opportunities for the air carrier concerned to sell and market freely its air transport services including all aspects of marketing such as market research, advertising and distribution. These activities do not include the pricing of air transport services nor the applicable conditions;

(v) ‘services’ means any service in any sector except services supplied in the exercise of governmental authority;

(w) ‘services supplied or activities performed in the exercise of governmental authority’ means services or activities which are supplied or performed neither on a commercial basis nor in competition with one or more economic operators;

(x) a ‘service supplier’ of a Party means any natural or juridical person of a Party that seeks to supply or supplies a service;

⁶ The definition of natural person also includes natural persons permanently residing in the Republic of Latvia who are not citizens of the Republic of Latvia or any other state but who are entitled, under the laws and regulations of the Republic of Latvia, to receive a non-citizen passport.

(a) [“Area”][“territory of a Party] means:

(i) with respect to the EU, []; and

(ii) with respect to Japan, the territory of Japan, and all the area beyond its territorial sea, including the sea-bed and subsoil thereof, over which Japan exercises sovereign rights or jurisdiction in accordance with international law and the laws and regulations of Japan;]

[the exclusive economic zones and continental shelf, to the extent that the Party has sovereign rights in respect of those zones pursuant to international law;]

[Note: Nothing in this subparagraph shall affect the rights and obligations of the Parties under international law, including those under the United Nations Convention on the Law of the Sea, done at Montego Bay, December 10, 1982.]

[Drafting Note: Parties agree that the definition of “territory” or “area” should be placed in the institutional chapter]

Article 2

Specialized Committee on Trade in Services, Investment and E-commerce

1. For the purposes of the effective implementation and operation of this [Title], the Parties hereby establish a Specialized Committee on Trade in Services, Investment and E-commerce (hereinafter referred to in this Article as “the Specialized-Committee”).

2. The functions of the Specialized Committee shall be:

(a) reviewing and monitoring the implementation and operation of this [Title] and the non-conforming measures set out in each Party’s Schedules in Annexes [X] (Existing Measures) and [Y] (Future Measures);

(b) exchanging information on any matters related to this [Title];

(c) examining possible improvements of this [Title];

(d) discussing any issue related to this [Title] as may be agreed upon;

(e) reporting the findings of the Specialized Committee to the Joint Committee; and

(f) carrying out other functions as may be delegated by the Joint Committee.

[(g) examining whether, and if so, under what conditions, an appellate mechanism to review, on points of law, awards rendered under section (ISDS) could be created under this Agreement or whether awards rendered under section (ISDS) could be subject to such an appellate mechanism developed pursuant to other institutional arrangement

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

(a) appoint the list of arbitrators pursuant to Article 8(4);

(b) adopt interpretations of the Agreement pursuant to Article 9(3).]

4. The Specialized Committee shall be composed of representatives of the Parties including officials of relevant Ministries or Agencies in charge of the issues to be addressed. The Specialized Committee may invite representatives of relevant entities other than [the Governments of the Parties] with

the necessary expertise relevant to the issues to be addressed.

[Drafting Note: The content of this article may be reviewed for consistency with similar articles elsewhere in the Agreement.]

Article 3

Review

1. Each Party shall endeavour, where appropriate, to reduce or eliminate the non-conforming measures set out in its Schedules in Annexes [X] and [Y] respectively.
2. With a view to introducing possible improvements to the provisions of this [Title], and consistent with their commitments under international agreements, the Parties shall review their legal framework relating to trade in services, investment and e-commerce, and the investment environment in accordance with the procedure set out in Article 2 (Specialized Committee on Trade in Services, Investment and E-commerce).

CHAPTER VII EXCEPTIONS

Article (...)

General exceptions

1. 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 establishment or trade in services, nothing in Chapter [investment] section [liberalization of investment], Chapter [Cross-border trade in services], Chapter[Entry and temporary stay of natural persons for business purposes], Chapter [Regulatory framework] and Chapter [Electronic commerce] shall be construed to prevent the adoption or enforcement by any Party of measures:
 - (a) necessary to protect [public security or] public morals or to maintain public order;
 - (b) necessary to protect human, animal or plant life or health;
 - (c) [relating to the conservation of exhaustible natural resources if such measures are applied in conjunction with restrictions on domestic investors or on the domestic supply or consumption of services;
 - (d) necessary for the protection of national treasures of artistic, historic or archaeological value;]
 - (e) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Title 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;
 - (f) inconsistent with Articles 4 paragraph 1 and [X] paragraph 1 on National Treatment, provided that the difference in treatment is aimed at ensuring the effective or equitable

imposition or collection of direct taxes in respect of economic activities, investors, services or services suppliers of the other Party²⁴.

Placeholder: JPN to propose a paragraph on elements that apply in the context of services and e-commerce. This paragraph aims at excluding (c) and (d).

[Drafting Note (12/2016): Para 1(f) to be decided depending on the horizontal exception on taxation.]

²⁴ Measures that are aimed at ensuring the equitable or effective imposition or collection of direct taxes include measures taken by a Party under its taxation system which:

- (i) apply to non-resident investors and services suppliers in recognition of the fact that the tax obligation of non-residents is determined with respect to taxable items sourced or located in the Party's territory; or
- (ii) apply to non-residents in order to ensure the imposition or collection of taxes in the Party's territory; or
- (iii) apply to non-residents or residents in order to prevent the avoidance or evasion of taxes, including compliance measures; or
- (iv) apply to consumers of services supplied in or from the territory of another Party in order to ensure the imposition or collection of taxes on such consumers derived from sources in the Party's territory; or
- (v) distinguish investors and service suppliers subject to tax on worldwide taxable items from other investors and service suppliers, in recognition of the difference in the nature of the tax base between them; or
- (vi) determine, allocate or apportion income, profit, gain, loss, deduction or credit of resident persons or branches, or between related persons or branches of the same person, in order to safeguard the Party's tax base.

Tax terms or concepts in paragraph (f) of this provision and in this footnote are determined according to tax definitions and concepts, or equivalent or similar definitions and concepts, under the domestic law of the Party taking the measure.