

FTAA – Free Trade Area of the Americas

Draft Agreement

Chapter XVII Investment

CHAPTER XVII Investment

Section A General Aspects

Article 1. Definitions

1.1. For the purposes of this Chapter:

Investment

[Investment means [every kind of asset and rights of any nature acquired with resources transferred to the territory of a Party or reinvested therein by investors of another Party, and shall include, in particular, although not exclusively:]

- [a) an enterprise;]
- b) the shares of an enterprise [include share with or without voting rights];
- c) the debt instruments of an enterprise [include bonds or convertible debt instruments, stock options and warrants];
 - i) where the enterprise is an affiliate of the investor, or
 - ii) where the original maturity of the debt instrument is at least three (3) years,but does not include a debt instrument of a State enterprise, regardless of original maturity;
- d) a loan to an enterprise:
 - i) where the enterprise is an affiliate of the investor, or
 - ii) where the original maturity of the loan is at least three (3) years,but does not include a loan, regardless of original maturity, to a State enterprise;
- e) an interest in an enterprise that entitles the owner to 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, other than a debt instrument or a loan excluded under subparagraphs c) or d) supra;
- g) real estate or other property, tangible or intangible, acquired or used for the purpose of economic benefit or other business purposes; and
- h) interests arising from the commitment of capital or other resources to the development of economic activity in the territory of another Party, such as under:
 - i) contracts involving the presence of an investor's property in the territory of another Party, including concessions, or construction or turnkey contracts, or

- ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;

but investment does not mean:

- i) a debt instrument of the State;
- j) claims to money that arise solely from:
 - i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another 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) supra; or
- k) any other claims to money, that do not involve the kinds of interests set out in subparagraphs a) through h) supra;]

[Investment means every kind of asset and rights of any nature acquired with resources transferred to the territory of a Party, or reinvested therein [, by investors of another Party,] such as [but no limited to]:

- a) shares and [any] other form of participation in the capital stock of firms constituted or organized pursuant to the legislation of another Party;
- b) rights derived from [any type of] contributions made for the purpose of creating economic value (or bonds, claims to money and claims to performance having economic value);
- c) movable and immovable property and other property rights such as mortgages, lien, usufruct, and [similar rights];
- d) intellectual property rights; and,
- e) rights conferred by law or contract to carry out economic and commercial activities;

[but does not include:

- a) a payment obligation of the State or a State enterprise and the granting of such credit to the State or a State enterprise; nor
- b) claims to money derived exclusively from:
 - i) commercial contracts for the sale of goods and services by a national or enterprise in the territory of a Party to a national or enterprise in the territory of another Party, or
 - ii) the granting of credit in relation to a commercial transaction, whose period of maturity is less than three (3) years, such as financing of trade;]]¹

¹ [One delegation considers that the definition of investment should be broad, comprehensive, and in accordance with bilateral investment agreements in the Hemisphere. This definition should include foreign direct investment and portfolio investment. Any investment whose equity capital is constituted by domestic and foreign partners, with the foreign portion representing the majority, maybe considered foreign investment. Tangible and intangible property for the personal use of the investor are not considered foreign investment.]

[Investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

- a) an enterprise;
- b) shares, stock, and other forms of equity participation in an enterprise;
- c) bonds, debentures, other debt instruments, and loans;²
- d) futures, options, and other derivatives;
- e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- f) intellectual property rights;
- g) licenses, authorizations, permits, and similar rights conferred pursuant to applicable domestic law;^{3 4} and
- h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges;]

[Investment means assets acquired with resources transferred to the territory of a Party, or reinvested therein by investors of another Party for the purpose of obtaining economic benefits, such as:

- a) shares or any other type of equity ownership in a company and any other type of joint venture that exists under the legislation of the Party in which the investment is being made;
- b) supplementary contributions to the capital assigned to branches by the head office;
- c) movable and immovable property, property rights, and other property rights, such as mortgages, liens, usufructs, and easements (servitudes);
- d) intellectual property rights such as copyrights and related rights, patents, trademarks, trade names, appellations of origin, geographical indications, industrial designs, utility models, layout designs (topographies) of integrated circuits, trade secrets, and protection of plant varieties;⁵

² [Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.]

³ [Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the domestic law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment.]

⁴ [The term "investment" does not include an order or judgment entered in a judicial or administrative action.]

⁵ [Subparagraph d) is without prejudice to the provisions of Chapter XX (Intellectual Property Rights).]

- e) licenses, permits and other rights obtained under public law, including concessions granted by law, administrative act or contract to carry out an economic activity, such as the exploration and exploitation of natural resources, or the construction, conservation and maintenance of works;
- f) the reinvestment of profits, which refers to the investment of same in the enterprise that generates them;
- g) investments made with local currency which may be transferred abroad;

This definition does not include:

- a) assets not directly linked to a productive activity; and
- b) loans and other operations resulting in debt, as well as flows of capital related strictly to a commercial transaction;

Any change in the form of the investment does not affect its character as such, provided said change is not a loan or other operation resulting in debt, and is in compliance with the legislation of the Party in whose territory it has been made;]

[The term **“investment”** means any kind of asset substantially owned or effectively controlled by an investor of one Party in the territory of the other Party in accordance with the latter’s laws, and, in particular, though not exclusively, includes: moveable and immovable property as well as any other property rights such as mortgages, liens and pledges; rights in companies; goodwill; monetary claims and claims to performance; intellectual property rights; concessions and other similar rights;

The term **“investment”** does not mean real estate or other property, tangible or intangible, not acquired in the expectation or used for the purpose of economic benefit or other business purposes. The term also does not imply stocks or shares (portfolio investment) of companies in one Party acquired for speculative purposes and held for a short-term by nationals of the other Party;]

[The term **“investment”** means every kind of asset or related rights, provided it has been made pursuant to all the laws and regulations of the Party in whose territory it was done, and shall include, in particular, although not exclusively:

- a) movable and immovable property and any related property rights, as well as all other property rights such as easement (servitudes), mortgages, usufruct and liens;
- b) shares, and any other kind of economic participation in companies;
- c) monetary claims or any other benefit of economic value;
- d) intellectual property rights, including copyright, industrial property rights, such as patents, technical processes, trademarks; trade names, industrial designs, know-how, corporate names, and turnkey;
- e) concessions conferred by law, an administrative act or under a contract, including concessions to explore, cultivate, extract or exploit natural resources;

Any change relative in the way assets are reinvested shall not affect their nature as an investment, provided such modification is made pursuant to the legislation of the Party in whose territory the investment was made;

Investment shall not be construed to mean external public debt instruments;]

[The term “**investment**” means every kind of asset invested directly or indirectly by investors from one of the Parties in the territory of another Party, in accordance with the laws and regulations of the latter.⁶ In particular, the following shall be included:

- a) movable and immovable property, as well as other property rights such as mortgages, liens and pledges;
- b) shares, stock, and any other form of participation in a company;
- c) claims to money and claims to performance having an economic value; loans shall be included only when they are directly linked to a specific investment;
- d) intellectual or intangible property rights, including in particular, copyrights, patents, industrial designs, trademarks, trade names, technical procedures, know-how and goodwill;
- e) state economic concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources;

The Parties may establish exceptions and reservations with respect to sectors and regulations of the investment policy that will be included in an annex and will be part of this Agreement;]

[**Investment** means every kind of asset and rights of any nature, other than foreign loans, acquired or used for the purpose of:

- a) establishing an enterprise of another Party, or to increase the capital of an existing enterprise of another Party, for the purpose of producing an additional flow of goods and services, not including merely financial flows; or
- b) participating in the ownership of an enterprise of another Party, and for the purpose of participating in its management, not including investments of a merely financial nature intended only to gain indirect access to the financial market of the other Party;]

[**Investment** means assets acquired or used by an investor of one Party, for the purpose of establishing lasting economic relations, in the territory of another Party⁷, through:

- a) the creation or acquisition of the total ownership of an enterprise;

⁶ [One delegation does not recognize the phases preceding the effective realization of an investment as giving rise to rights and obligations under the terms of this Agreement.]

⁷ The concept of lasting economic relations is taken from the definition of foreign direct investment, contained in the International Monetary Fund “Chapter XVIII Balance of Payments Manual” 1993, 5th ed. OECD, Code of Liberalization on Capital Movements and OECD, *Benchmark Definition of Foreign Direct Investment*, Paris, 1996.

- b) the participation in the ownership of an enterprise which gives a significant grade of influence to the investor in the management of the enterprise;
- c) the acquisition of debt instruments of an enterprise:
 - i) where the enterprise is an affiliate of the investor, or
 - ii) where the original maturity of the debt instrument is at least five (5) years,⁸

But does not include a debt instrument of a Party or of a State enterprise regardless of original maturity;

- d) a loan to an enterprise:
 - i) where the enterprise is an affiliate of the investor, or
 - ii) where the original maturity of the debt instrument is at least five (5) years⁹,

But does not include a loan to a Party or to a State enterprise regardless of original maturity;

- e) The acquisition or use of movable and immovable property tangible or intangible, destined exclusively for the purpose of obtaining economic benefit derived from business activities;

But investment does not mean:

- f) merely financial flows, such as, those destined only to gain indirect access to the financial market of the other Party;
- g) claims to money that arise solely from:
 - i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another 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) supra; or
- h) any other claims to money, that do not involve the kinds of interests set out in subparagraphs a) through e) supra;]

Investor

[investor of a Party means a Party or an enterprise of a Party [or a natural or juridical person] [or a national or an enterprise] of this Party, [that carries out juridical acts designed to make an investment, [being in the process of committing a [major] amount of capital] [involving a commitment of capital] [[or else] is making or has made an investment in the territory of another Party] [that seeks to make, is making or has made an investment];]

[investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his/her dominant and effective nationality;]

⁸ Concept referred to in the OECD Code of Liberalization on Capital Movements.

⁹ Term referred in the OECD Code of Liberalization on Capital Movements.

[For the purposes of this Agreement, an **investor** is:

- a) the natural person who, in compliance with domestic legislation, is considered a citizen of a Party and has made investments in the territory of another Party; and
- b) the public or private, non-profit or for profit, juridical person, enterprise or entity constituted, established or domiciled, in compliance with the domestic legislation of a Party, which has made investments in the territory of another Party;

This Agreement shall not apply to the investments made by natural persons who, simultaneously, have the nationality of the Party in which the investment is made and the nationality of the other Party;]

[**“Investor”** means any natural person who is a national of a Party, in accordance with its laws. **“Investor”** means any legal person constituted in accordance with the laws and regulations of a Party, and having its seat in the territory of that Party.]

[The term **“investor”** shall refer to the following subjects that have made investments in the territory of a Party, pursuant to this Chapter:

- a) a natural person or individual who, under the legislation of the Party, are considered nationals of that country;
- b) legal entities, including companies, corporations, commercial associations or any other entity constituted under the legislation of that Party, that has its seat, as well as effective economic activities, in the territory of the Party;
- c) the legal entities constituted under the legislation of any country, that are directly or indirectly controlled by nationals of a Party, in the territory of the Party where the legal entity conducts effective economic activities;]

[The term **“investor”** means:

- a) any natural person who is a citizen of one of the Parties, is a permanent resident thereof, or is domiciled in the territory of same, in accordance with its legislation. The provisions of the Agreement shall not apply to investments made by natural persons who are citizens of one of the Parties in the territory of another Party, if said persons, at the time of the investment, are permanent residents of or are domiciled in the latter Party, unless it is proven that the resources connected with these investments originate abroad.
- b) any juridical person constituted under the laws and regulations of a Party, and having its seat in the territory of said Party;
- c) those juridical persons constituted in the territory of the host country, and effectively controlled by natural or juridical persons as defined in a) and b);]

[Other Terms]

[capital shares or obligations means shares with or without voting rights, bonds or convertible debt instruments, stock options and guarantees;]

[central level of government means:

- a) for the United States, the federal level of government; and
- b) for (insert appropriate information for other FTAA countries);]

[Centre means the International Centre for Settlement of Investment Disputes (ICSID) established by the ICSID Convention;]

[claim means a petition submitted by a disputing investor against a Party on the basis of a presumed violation of the provisions of this Chapter;]

[claimant means an investor of a Party that is a party to an investment dispute with another Party;]

[consolidation tribunal means an arbitration tribunal established pursuant to Article 36 (Consolidation);]

[covered investment means, with respect to a Party, an investment in its territory of an investor of another Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter;]

[disputing investor means an investor who makes a claim under [Subsection C.2.b. (Dispute Settlement between a Party and an Investor of Another Party) of this Chapter];]

[disputing Party means a Party against which a claim is made under [Section C (Procedures and Institutions)] [Subsection C.2.b (Dispute Settlement between a Party and an Investor of Another Party)] of this Chapter];]

[disputing party means [either the claimant or the respondent] [the disputing investor or the disputing Party];]

[disputing parties means [the claimant and the respondent] [the disputing investor and the disputing Party];]

[[The term **[Earnings]** means the sums [obtained from or] produced by an investment, such as profits, income, dividends, [interest,] royalties and [any other net income] [other current incomes];]

[enterprise means [any] [an] entity constituted or organized under applicable legislation [or legislation in force] in one of the Parties, whether or not for profit, and whether privately-owned or governmentally-owned, including foundations, companies, [branches], trusts, partnerships, sole proprietorships, joint ventures or other associations;]

[enterprise means any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization; and a branch of an enterprise;]

[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 [that carries out business activities in that territory] [and carrying out business activities there];]

[existing means in effect [on the date of entry into force of this Agreement][on April 19, 1998];]

[freely usable currency means a currency that the International Monetary Fund has determined is widely used to make payments for international transactions and widely traded in the principal exchange markets;]

[freely usable currency means “freely usable currency” as determined by the International Monetary Fund under its *Articles of Agreement*;]

[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 means International Centre for the 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, March 18, 1965;]

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

[investment agreement means (definition to be tabled at a later negotiating round);]

[investment authorization¹⁰ means an authorization that the foreign investment authority of a Party grants to a covered investment or an investor of another Party;]

[investment of an investor of a Party means the investment owned or directly or indirectly controlled by an investor of a Party [undertaken] in the territory of another Party;]

[investor of a non-Party means an investor other than an investor of a Party [that seeks to make, is making or has made an investment];]

[investor of a non-Party means, with respect to a Party, an investor that attempts to make, is making, or has made an investment in the territory of that Party, that is not an investor of a Party;]

[monopoly means “monopoly” as defined in Article XX (Definitions) of Chapter XX (Competition);]

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

[non-disputing Party means a Party that is not a party to an investment dispute;]

¹⁰ [Actions taken by an agency of a Party to enforce laws of general application such as competition law do not come within this definition.]

[**protected information** means confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law;]

[**respondent** means the Party that is a party to an investment dispute;]

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

[**transfers** means international [transfers] [remittances] and payments;]

[**tribunal** means [an arbitration tribunal established under Article XX (Selection of Arbitrators) or Article 36 (Consolidation)] [an arbitration tribunal established pursuant to Article XX [(Subsection C.2.b. (Dispute Settlement between a Party and an Investor of Another Party)); or an arbitration tribunal established pursuant to Article XX (Subsection C.2.b (Dispute Settlement between a Party and an Investor of Another Party))];]

[**UNCITRAL Arbitration Rules** means [the *Arbitration Rules of the United Nations Commission on International Trade Law*] [the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), approved by the United Nations General Assembly on December 15, 1976];]

Definitions of a Cross-Cutting Nature Sent to the FTAA Technical Committee on Institutional Issues (TCI)¹¹

[**national** means a natural person who is a citizen of a Party under its law;]

[**national** means:

- a) for the United States, a natural person who is a national of the United States as defined in Title III of the Immigration and Nationality Act; and
- b) for (insert appropriate information for other FTAA countries);

A natural person who is a dual national shall be deemed to be exclusively a national of the State of his/her dominant and effective nationality;]

[**“National” of a Party** means a natural person who is a national or permanent resident of that Party under its applicable law;]

[**Party** means FTAA member country;]

[**person** means a national or an enterprise;]

[**regional level of government** means:

- a) for the United States, each of the fifty (50) states, the District of Columbia, or Puerto Rico; and

¹¹ Other definitions relevant to this Chapter will be found in the Chapter on General Definitions. [The Negotiating Group on Investment (NGIN) considers that once the proposals sent to TCI will have been analyzed they should be sent back to the NGIN to assess whether these proposals cover the Chapter on Investment.]

b) for (insert appropriate information for other FTAA countries);]

[**state enterprise** means an enterprise owned, or controlled through ownership interests, by a Party;]

[**state enterprise** means a juridical person owned or directly controlled by a Party;]

[**Territory** means the land, maritime or air space of each Party, as well as its exclusive economic zone and its continental shelf, over which it exercises sovereign rights and jurisdiction, in accordance with its legislation and international law;]

[The term “**territory**” comprises, in addition to the land, maritime and air space over which each Party has sovereignty, the marine and submarine zones over which they exercise sovereign rights and jurisdiction, in accordance with their respective legislation and international law;]

[The term “**territory**” comprises to the national territory of each Party, including those maritime zones adjacent to the outer limit of its territorial waters over which the Party involved can, under international law, enforce sovereign rights and exercise jurisdiction;]

[**Others**]

[**Commission** means the Commission established pursuant to Article XX;]

[**existing measure** means any law, regulation, rule, procedure, provision or administrative practice in effect as of the date of the entry into force of this Agreement;] and

[**measure** means any law, regulation, rule, procedure, provision or administrative practice, among others;]

Article 2. Scope

[2.1. This Chapter applies to [measures adopted or maintained by a Party relating to]:

- a) investors of another Party [with respect to all aspects of its investment];
- b) [investments of investors of another Party in the territory of the Party] [covered investments]; and,
- c) [all investments [of the investors of any Party] in the territory of the Party with regard to Article XX (Performance Requirements).] [with respect to Articles 10 (Performance Requirements), 18 (Commitment Not To Relax Domestic Labor Laws To Attract Investment), and 19 (Commitment Not To Relax Domestic Environmental Laws To Attract Investment), all investments in the territory of the Party.]

[[2.1bis] [2.2]. This Chapter shall apply to investments [made] [existing] [acquired] [admitted] [prior to or after] [after] the entry into force of the Agreement by investors of a Party in the territory of another Party[, in accordance with the [rules], [national] laws and regulations of the host Party].]

[2.3. A Party's obligations under Section B (Substantive Obligations) of this Chapter shall apply to a state enterprise or other person when exercising any regulatory, administrative, or other governmental authority delegated to it by that Party.]

[2.4. A Party has the right to perform exclusively the economic activities set out in Annex XX and to refuse to authorize the establishment of investment in such activities.]

[2.5. This Chapter does not apply to:

- a) [the reservations of the Parties set out in Annex XX to this Chapter;]
- b) [measures adopted or maintained by a Party [in relation to financial services] [, pursuant to Chapter XX (Financial Services)] [to the extent they are covered by Chapter XX (Financial Services)];]
- c) [measures adopted by a Party to limit the participation of the investments of investors of another Party in its territory for reasons of national security or public order;]
- d) [disputes or claims arising or resolved before the entry into force of this Agreement or relating to acts or facts that occurred or that ceased to exist before it entered into force[, even if their effects persist thereafter];]
- e) [investments made with capital or assets of illicit origin.]]

[2.6. Parties may exclude investment in certain sectors from the provisions of this Agreement. Smaller economies will be specifically facilitated in this regard.]

[2.7. Nothing in this Chapter shall be construed to prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income or unemployment insurance or social security services, social welfare, public education, public training, health, and child care[, when performed in a manner not inconsistent with this Chapter].]

[2.8. Notwithstanding paragraph 2.7, if an investor of a duly authorized Party provides services or performs functions of correctional services, income insurance or unemployment insurance or social security services, social welfare, public education, public training, health, and child care, the investments of that investor shall be protected by the provisions of this Chapter.]

[2.9. This Chapter applies to the entire territory of the Parties and to any level or order of government regardless of any inconsistent measure that may exist in legislation at those levels or orders of government.]

[2.10. Whatever the scope of the Agreement reached with respect to pre-FTAA investments, smaller economies will have the right to negotiate coverage of such investments on a case-by-case basis.]

[Article 3. Chapter on Investment and Its Relationship with Other Chapters

3.1. In the event of inconsistency between this Chapter and another Chapter, the latter shall prevail to the extent of the inconsistency.]

Section B Substantive Provisions

Article 4. National Treatment¹²

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

[4.1. Each Party shall accord to the investments of the investors of other Parties made in its territory treatment no less favorable than that accorded[, in like circumstances,] to investments by its own investors. [National treatment shall be granted in accordance with the laws of the host State].]

[4.2. The treatment accorded by a Party, under paragraph 4.1 above, means, with respect to a [state or province] [regional level of government], treatment no less favorable than the most favorable treatment accorded by that [state or province] [regional level of government], in like circumstances, to the investors and investments of investors of the Party to which it belongs.]

[4.2. The treatment to be accorded by a Party under paragraph 4.1 means, with respect to a regional level of government, treatment no less favorable than the treatment accorded, in like circumstances, by that regional level of government to natural persons resident in and enterprises constituted under the laws of other regional levels of government of the Party of which it forms a part, and to their respective investments.]

Article 5. Most-Favored-Nation Treatment¹³

[5.1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory. Each Party shall accord [to covered investments] [to investments of investors of another Party] treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.]

¹² [Note: One delegation proposes the following footnote to be included in the negotiating history as a reflection of the Parties' shared understanding regarding the interpretation of the most-favored-nation and national treatment obligations. This footnote would be deleted in the final text of the Agreement:

The Parties agree that each Party shall accord to investors of another Party and to covered investments the better of most-favored-nation or national treatment. However, the Parties believe that a specific provision stating this principle is unnecessary. Each Party must comply with both Article 4 (National Treatment) and Article 5 (Most-Favored-Nation Treatment) independently, and one Article should not be interpreted to limit the other. A specific provision stating that each Party shall accord to investors of another Party and to covered investments the better of most-favored-nation or national treatment would be duplicative.]

¹³ [Note: One delegation proposes the following footnote to be included in the negotiating history as a reflection of the Parties' shared understanding of the Most-Favored-Nation Article and the Maffezini case. This footnote would be deleted in the final text of the Agreement:

The Parties note the recent decision of the arbitral tribunal in Maffezini (Arg.) v. Kingdom of Spain, which found an unusually broad most favored nation clause in an Argentina-Spain agreement to encompass international dispute resolution procedures. See Decision on Jurisdiction §§ 38-64 (January 25, 2000), reprinted in 16 ICSID Rev. – F.I.L.J. 212 (2002). By contrast, the Most-Favored-Nation Article of this Agreement is expressly limited in its scope to matters "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section C.2.b. (Dispute Settlement between a Party and an Investor of Another Party) of this Chapter, and therefore could not reasonably lead to a conclusion similar to that of the Maffezini case.]

[5.1. Each Party shall accord to the investments of investors of the other Parties made in its territory treatment which is no less favorable than that accorded[, in like circumstances,] to investments by investors of a non-Party.]

[5.2. While recognizing the generality of the MFN principle, a smaller economy may be exempted from same in those circumstances where it extends more favourable treatment to investors/investments from other smaller economies in the Hemisphere.]

[5.3. The treatment accorded by a Party under paragraph 5.1 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of any other Party or of a non-Party.]

Article 6. Standard of Treatment

[6.1. Each Party shall accord [to investors of another Party] [and] [to the investments of investors of another Party] the better of national treatment or most-favored-nation treatment.]

[6.2. While each Party shall be expected to accord to investors/investments of another Party the better of national treatment or most-favored-nation treatment, exceptions can be made with respect to treatment favouring small domestic enterprises.]

Article 7. Denial of Benefits

[7.1. A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if investors of a non-Party own or control the enterprise and the denying Party:

- a) does not maintain diplomatic relations with the non-Party; or
- b) adopts or maintains measures with respect to the non-Party or an investor of 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.

7.2. [Subject to prior notification and consultation and in accordance with Article XX of Chapter XX (Administration and Dispute Settlement-Consultation),] [A] [a] Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of any Party, other than the denying Party, and investors of a non-Party, or of the denying Party, own or control the enterprise.]

[Article 8. Extra-Territorial Application of Laws on Investment-Related Issues

8.1. None of the Parties shall adopt or maintain any measure which:

- a) imposes or seeks to impose an obligation or responsibility on the investors of another Party or on its investments; or,
- b) prohibits or imposes sanctions for establishing trade or investment relations with investors of another Party or its investments;

because of the investments that an investor of another Party makes, has or controls, be it directly or indirectly, in a third country in accordance with the domestic laws of that country.]

Article 9. [Fair and Equitable Treatment] [Minimum Standard of Treatment]¹⁴

[9.1. Each Party [shall accord] [shall at all times ensure] [to the investments of investors of another Party [made in its territory]] [to the investors of another Party and their investments] [treatment in accordance with international law, including] fair and equitable treatment [as well as full protection and security] in accordance with the [norms and] principles of international law [and shall not impair their management, maintenance, use, enjoyment or disposal through unjustified or discriminatory measures].]¹⁵

[9.1. Each Party shall accord to [investments of investors of another Party] [covered investments] treatment in accordance with [the] customary international law [standard of treatment of aliens], including fair and equitable treatment and full protection and security.

9.2. [For greater certainty, paragraph 9.1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments.] The concepts of “fair and equitable treatment” and “full protection and security” [in paragraph 9.1] do not require treatment in addition to or beyond that which is required by [the customary international law minimum standard of treatment of aliens] [that standard, and do not create additional substantive rights]. [The obligation in paragraph 9.1 to provide:

- a) “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 embodied in the principal legal systems of the world; and
- b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.]

9.3. 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.]

[9.4. While a smaller economy shall extend fair and equitable treatment to foreign investors at all times, any treatment less favourable than that extended to investors of other smaller economies shall not constitute [an abrogation] [a violation] of this principle.]

Article 10. Performance Requirements

[10.1. No Party shall establish performance requirements through the adoption of investment-related measures that are incompatible with the prevailing disciplines in the framework of the WTO Agreement on Trade-Related Investment Measures and any subsequent developments of those disciplines.]

[[10.1. [Mandatory] Performance Requirements:

No Party may impose or enforce any of the following requirements or [enforce any] commitments [or undertaking], in connection with the establishment, acquisition, expansion, management, conduct or

¹⁴ [Article 9 (Minimum Standard of Treatment) is to be interpreted in accordance with Annex XX (Customary International Law).]

¹⁵ [One delegation considers that commitments should be undertaken to guarantee fair and equitable treatment, however, this issue should be studied in depth, pursuant to international law. Particular attention should be given to the phrases: “fair and equitable,” and “full security.”]

operation [or sale or other disposition] of an investment of an investor of a Party [or of a non Party] in its territory:] [None of the Parties shall impose, or demand, unless otherwise provided for in that Party's legislation, any of the following requirements, with respect to permission to establish, expand, maintain or acquire an investment:]

- 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 provided] in its territory, or to purchase goods from [producers] [persons] [or services from service providers] in its 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 territory that such investment produces or [provides] [supplies] by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;]
- f) [to transfer [a particular] technology, [a] production process[,], or other proprietary knowledge to a person in its territory [, except when the requirement is imposed [or the commitment is enforced] by a court, administrative tribunal or [competent] [competition] authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement]; or]
- g) [[to act as the exclusive supplier of] [to supply exclusively from the territory of the Party] the goods that it produces or the services that it [provides] [supplies] to a specific regional market or to the world market.]]

[10.2. [A measure of general application which requires an investment to use a technology to meet health, environment and safety requirements shall not be inconsistent with subparagraph 10.1.f).] [A measure that requires an investment to use a technology to meet generally applicable health, environmental, or safety requirements shall not be construed to be inconsistent with subparagraph 10.1.f).] For greater certainty, Articles 4 (National Treatment) and 5 (Most-Favored-Nation Treatment) shall apply to the measure.]

[10.3. Performance Incentives:

No Party may condition the receipt or continued receipt of [an incentive or] an advantage [a benefit], in connection with the establishment, acquisition, expansion, management, conduct, [or] operation, [sale or other disposition] of an investment in its territory of an investor of a Party [or of a non-Party,] on compliance with any of the following requirements:

- a) to purchase, use or accord a preference to goods produced [or services provided] in its territory, or to purchase goods from [producers] [persons] [or services from service providers] in its territory;
- b) to achieve a given level or percentage of domestic content; [or,]

- 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]
- [d) to restrict sales of goods or services in its territory that such investment produces or [provides] [supplies] by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.]]

[10.3. This Article shall not apply, however, to those performance requirements contingent upon the granting of an advantage or benefit by the Party receiving the investment.]

[10.4. Exceptions and Exclusions:¹⁶

- a)
 - i) subparagraphs 10.1.a), 10.1.b) and 10.1.c), and subparagraphs 10.3.a) and 10.3.b) do not apply [in relation] to qualification requirements for goods [or services] with respect to export promotion [such as foreign trade zones] and [domestic] [foreign] aid programs,
 - ii) subparagraphs 10.1.b) and 10.1.c) [10.1.f), and 10.1.g)] and subparagraphs 10.3. a) and 10.3.b) do not apply [in relation] to [government procurement] [procurement by a Party or a state enterprise], and
 - iii) subparagraphs 10.3.a) and 10.3.b) do not apply [in relation] to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas;
- [b) Subparagraph 10.1.f) does not apply:
 - i) when a Party authorizes use of an intellectual property right in accordance with the provisions of Article XX on use of the subject matter of a patent without the authorization of the right holder (Subsection B.2.e. (Patents)), and of Article XX on measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement, in Subsection B.2.j. (Undisclosed Information) of Chapter XX (Intellectual Property Rights), or
 - ii) when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under the Party's competition laws;^{17]}
- c) Nothing in paragraph 10.3 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an [incentive or] advantage [or benefit] in connection with an investment in its territory of an investor of a Party [or of a non-Party], on [compliance with] a requirement to locate production, [supply][provide] a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory;

¹⁶ [Some delegations consider that subparagraph 10.4.a) may be more appropriately placed in Article 16 ([Reservations] [Non-Conforming Measures]).]

¹⁷ [The Parties recognize that a patent does not necessarily confer market power.]

- d) Nothing in [subparagraphs 10.1.b), 10.1.c) [and 10.1.f)] and 10.3.a) and 10.3.b)] [this Article] shall be construed to prevent a Party from adopting or maintaining measures, [including environmental measures]:
- i) necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement,
 - ii) necessary to protect human, animal or plant life or health, or
 - iii) [related to] [necessary for] the conservation of living or not living exhaustible natural resources;

provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investment.]

[10.5. For greater certainty, paragraphs 10.1 and 10.3 do not apply to any requirement other than the requirements set out in those paragraphs.]

[10.6. This Article does not preclude the enforcement of any commitment, undertaking or requirement between private parties[, where a Party did not impose or require the commitment, undertaking, or requirement].]

[10.7. If, in the opinion of a Party, the imposition by another Party of any other requirement not established in paragraph 10.1 adversely affects the trade flow, or represents a significant barrier to the investment, the matter shall be considered by the Investment Committee, to be provided for in this Agreement. If the Committee considers that the requirement in question adversely affects the trade flow, it shall recommend to the Commission that practice in question be suspended.]

[10.8. Smaller economies may exercise the right to impose certain development-related performance requirements, provided these are WTO compatible.]

Article 11. [Key Personnel] [Senior Management and Boards of Directors]

[11.1. No Party may require that an enterprise of that Party that is [an investment of an investor of another Party] [a covered investment] appoint to senior management positions individuals of any particular nationality.]

[11.1. For the purposes of this Agreement, key personnel shall mean senior management staff or staff with specialized technical expertise considered indispensable to guarantee the proper control, administration and operation of an investment. [The Parties shall not require investors of another Party to appoint key personnel of a specific nationality.] The temporary entry permits to such key personnel shall be subject to its laws, regulations and policies on entry of foreign personnel, in particular the labor and migration laws. All the legal requirements shall be met for the practice of a profession regulated in the Party receiving the investment.]

[11.2. A Party may require that a majority of the board of directors, or any committee thereof, of an enterprise of that Party, that is [an investment of an investor of another Party] [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.]

[11.3. Smaller economies should be able to require in appropriate circumstances, that a certain percentage of key personnel at the executive and managerial levels be hired locally, since this could act as a form of technical training and transfer of know-how and organizational technology.]

Article 12. Transfers¹⁸

12.1. Each Party shall permit investors of another Party the free transfer of investments and income.

12.2. Transfers shall be made without delay, in freely convertible currency, at the market rate of exchange applicable on the date on transfer, subject to compliance with tax law and pursuant to the requirements stipulated in the laws of the Party in whose territory the investment was made.

12.3. The provisions of this Chapter shall not prevent Parties from enforcing [in a manner that is equitable, non-discriminatory and in good faith] [in exceptional or grave balance of payment situations] [where severe balance-of-payment disequilibria or difficulties exist or are impending], measures that temporarily restrict transfers consistent with International Agreements.

12.4. Without prejudice to the provisions set out in previous paragraphs, a Party may prevent a transfer in order to protect [, in particular but not exclusively,] rights arising from administrative, judicial or arbitration proceedings:

- a) bankruptcy, insolvency or the protection of the rights of creditors;
- b) criminal or penal offenses;
- c) ensuring the satisfaction of warrants, or court orders in judicial or administrative proceedings;
- d) non-fulfillment of tax obligations;
- e) non-fulfillment of labor obligations;
- f) social security.]

[12.1. Each Party shall permit all transfers relating to [an investment of an investor of another Party in the territory of the Party] [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 investment or from the partial or complete liquidation of the investment;
- d) payments made under a contract entered into by an investor, or its investment, including payments made pursuant to a loan agreement; and

¹⁸ [One delegation advises that a provision will be included to protect the faculty of central banks to restrict transfer rights.]

- e) payments made pursuant to Article 13 (Expropriation and Compensation) [and Article 14 (Compensation for Losses)]; and
- f) payments arising out of [a dispute][Article XX (Dispute Settlement)] [the application of the provisions of Subsection C.2.b. (Dispute Settlement between a Party and an Investor of Another Party)].

12.2. Each Party shall permit transfers relating to [a covered investment] [an investment of an investor of another Party in the territory of the Party] to be made in a freely [convertible] [usable] currency at the market rate of exchange prevailing [on the date] [at the time] of transfer [with respect to spot transactions in the currency to be transferred].

[12.3. Each Party shall permit returns in kind relating to a covered investment to be made as authorized or specified in an investment authorization, investment agreement, or other written agreement between the Party and a covered investment or an investor of another Party.]

[12.4. For purposes of this Chapter, a transfer shall be considered to have been made without delay when it has been made within the time period normally necessary for complying with transfer formalities.]

[12.5. No Party may require its investors to transfer, or penalize its investors that fail to transfer, the income, earnings, profits or other amounts derived from, or attributable to, investments in the territory of another Party.]

12.6. Notwithstanding paragraphs [12.1 and 12.2], [and 12.3] a Party may prevent a transfer through the equitable and non-discriminatory [and good faith] application of its laws [in the following cases] [relating to]:

- a) bankruptcy, insolvency or the protection of the rights of creditors;
- b) issuing, trading or dealing in securities, [futures, options, or derivatives;] [related to the enforcement of laws and regulations:
 - i) for issuing, trading or dealing in securities, futures or similar instruments,
 - ii) concerning reports or records of transfers;]
- c) criminal or penal offenses [or administrative offenses];
- d) [reports of transfers of currency or other monetary instruments; or] [failure to comply with the requirement of presenting reports of transfers of currency or other monetary instruments;] [financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;]
- e) ensuring [the satisfaction of] [compliance with] [orders or] [judgments] [or awards] in [adjudicatory] [judicial] [or administrative] proceedings; [or]

- f) [the establishment of the instruments or mechanisms necessary for ensuring payment of income tax by means including the withholding of the amount corresponding to dividends or other items.]

[12.7. Paragraph 12.5 shall not be construed to prevent a Party, through the equitable, non-discriminatory and good faith application of its legislation, to impose any measure related to subparagraphs 12.6.a) through e).]

[12.8. Notwithstanding the provisions of paragraph 12.1, a Party may restrict transfers of returns in kind, in circumstances where it otherwise could restrict such transfers in accordance with this Agreement, including as provided for in paragraph 12.6.]

[12.9. [Notwithstanding the provisions of this Article, each Party shall have the right, under circumstances of exceptional or grave difficulty in the balance of payments, to temporarily limit transfers, in an equitable and non-discriminatory manner, pursuant to internationally accepted criteria. Each Party shall give prompt notification to the other Party of the limitations adopted, maintained or eliminated pursuant to this paragraph.] [Notwithstanding the provisions of this Article, each Party may establish temporary limits on exchange operations, provided that the balance of payments of that Party is in serious imbalance and the Party implements a program in accordance with internationally accepted criteria.]]

[12.9. Without prejudice to this Article, each Party may limit transfer in accordance with the provisions contained in this Agreement relating to the Balance of Payments.]]

[12.1. Each Party shall permit all transfers relating to an investment of an investor of another Party in the territory of the Party to be made freely and without delay. Such transfers include:

- a) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance and other fees, returns in kind and other amounts derived from the investment;
- b) proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;
- c) payments made under a contract entered into by the investor, or its investment, including payments made pursuant to a loan agreement;
- d) payments made in accordance with the Article on Expropriation; and
- e) payments resulting from the implementation of the provisions in Subsection C.2.b. (Dispute Settlement between a Party and an Investor of Another Party).

12.2. With respect to spot transactions in the currency to be transferred, each Party shall permit transfers to be made in a freely usable currency at the market rate of exchange in force on the date of transfer.

12.3. No Party may require its investors to transfer their income, earnings, profits or other amounts derived from, or attributable to, investments in the territory of another Party, nor shall any Party penalize its investors in the event of a violation.

12.4. Notwithstanding the provisions of paragraphs 12.1 and 12.2, the Parties may prevent a transfer through the equitable, non-discriminatory and good faith enforcement of its laws in the following cases:

- a) bankruptcy, insolvency or the protection of the rights of creditors;
- b) issuing, trading or dealing in securities;
- c) criminal or penal offenses;
- d) reports of transfers of currency or other monetary instruments; or
- e) ensuring the satisfaction of judgments or orders in adjudicatory proceedings.

12.5. Paragraph 12.3 shall not be construed to prevent a Party, through the equitable, non-discriminatory and good faith application of its legislation, to impose any measure related to subparagraphs 12.4.a) through 12.4.e).

12.6. Notwithstanding the provisions of paragraph 12.1, a Party may restrict transfers of returns in kind, in circumstances where it otherwise could restrict such transfers in accordance with this Agreement, including as provided for in paragraph 12.4.]

[12.1. Parties shall guarantee to an investor of another Party with respect to an investment covered by this Agreement the free transfer of investments and returns on an investment. The investor may also transfer:

- a) funds in repayment of loans related to an investment;
- b) the proceeds of the total or partial liquidation of any investment;
- c) wages and other remuneration accruing to a citizen of another Party who was permitted to work in the territory of the Party receiving the investment in connection with an investment;
- d) any compensation owed to an investor by virtue of matters related to expropriation and compensation for losses.

12.2. Transfers shall be effected without delay in the convertible currency in which the capital was originally invested or in any other convertible currency agreed by the investor and the Party concerned. Unless otherwise agreed, transfers shall be effected at the applicable rate on the date of transfer, in accordance with regulations in effect with respect to foreign exchange.

12.3. In relation to transfers, Parties may implement in an equitable, non-discriminatory manner their laws relating to:

- a) bankruptcy, insolvency or the protection of the rights of creditors;
- b) issuing, trading or dealing in securities;
- c) criminal or penal offenses;

- d) reports of transfers of currency or other monetary instruments; or
- e) ensuring the satisfaction of judgments in adjudicatory proceedings or court orders.

12.4. No Party shall require its investors to transfer, or penalize its investors for failing to transfer, the returns attributable to investments in the territory of the other Party.

12.5. Small economies may also restrict transfers in cases of severe balance of payments difficulties given the volatility and vulnerability of their economies.

12.6. In addition to the usual restrictions on free transfers of capital to take account of non-payment of taxation, findings of adjudicatory proceedings, and protection of the rights of creditors, smaller economies, which are susceptible to export income volatility, would be allowed to exercise flexibility with respect to the provision that such transfers be made without delay. This would be effected on a case-by-case negotiations basis with the investor, and be influenced by any existing foreign exchange control laws and the potential for exchange rate movement when the reserves situation is significantly impacted.]

Article 13. Expropriation and Compensation

[13.1. No Party may nationalize or expropriate¹⁹ [directly or indirectly] a[n] [covered] investment [of an investor of the other Party in its territory or take a] [either directly or indirectly through] measure[s] equivalent to nationalization or expropriation [of such an investment] (“expropriation”), except:

- a) for a public purpose [such as for reasons of public order or social interest] [, as provided in the annex to this Article] [in accordance with the national legislation of the Parties];
- b) on a non-discriminatory basis;
- c) in accordance with [the principle of legality and] due process of law and Article 9 (Minimum Standard of Treatment); and
- d) on payment of compensation in accordance with paragraphs 13.2, 13.3 and 13.4.

13.2. Compensation shall:

- a) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“ the date of expropriation”);
- b) not reflect any change in value occurring because the intended expropriation had become known earlier. [Valuation criteria may include going concern value, asset value, including declared tax value of tangible property and other criteria, as appropriate, to determine fair market value];
- c) be paid without delay; and
- d) be fully realizable and freely transferable as provided in Article 12 (Transfers).

¹⁹ [Article 13 (Expropriation and Compensation) is to be interpreted in accordance with [Annex XX (Customary International Law) and] Annex XX (Expropriation).]

[13.3. The amount paid as compensation shall be no less than the equivalent amount that, according to the rate of exchange prevailing on the date of the determination of the fair market value, would have been paid on such date to the investor subject to the expropriation, in a freely convertible currency in the international financial market. Compensation shall include payment of interest from the date on which the investor has been dispossessed of the expropriated investment until the date of payment, which shall be based on an average deposit rate of interest in the national banking system of the Party where the expropriation is carried out.]

[13.3. If the fair market value is denominated in a freely usable currency [or G7 currency], the compensation paid shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate [based on an average deposit rate of interest in the national banking system of the Party where the expropriation is carried out] for that currency, accrued from the date of expropriation until the date of payment.]

[13.4. If the fair market value is denominated in a currency that is not freely usable [or a G7 currency], the compensation paid – converted into the currency of payment at the market rate of exchange prevailing on the date of payment – shall be no less than:

- a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date; plus
- b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.]

[13.5. For purposes of this Article and for greater certainty, a non-discriminatory measure of general application shall not be considered a measure equivalent to an expropriation of a debt security or loan covered by this Chapter solely on the ground that the measure imposes costs on the debtor that results in default on the debt.]

[13.6. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights [in accordance with the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”)], 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 TRIPS Agreement] [Chapter XX (Intellectual Property Rights)].]

[13.1. No Party shall adopt measures to nationalize or expropriate, or any measure having the same effect, investments in its territory owned by investors from other Parties, unless such measures are adopted in the public or social interest, on a non-discriminatory basis and in accordance with due process of law. Such measures shall include provisions for the payment of a prompt, adequate and effective compensation.]

[13.1. Investments or returns of investors of a Party shall not be nationalized, expropriated or subjected to measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of another Party, except for a public purpose, under due process of law, in a non-discriminatory manner and against prompt, adequate and effective compensation. The extent of such compensation is to be determined through negotiation between the Party concerned and the affected investor and shall seek to provide fair recompense for the action taken.]

[13.1. No Party shall expropriate or nationalize the investments of investors of another Party that are established in its territory nor enforce measures with equivalent effects, unless such measures are adopted in the cases provided for in the Political Constitutions of the Parties in accordance with the Law, on a non-discriminatory basis and upon prompt, adequate and effective compensation.]

[13.2. The amount of such compensation shall be based on the market value of the expropriated investment immediately before the nationalization or expropriation was made public and shall include interest from the date of the expropriation until the date of payment.]

[13.2. The compensation referred to in the previous paragraph shall be equivalent to the fair price of the investment immediately before the measures were adopted or before the measures were made public, whichever is earlier, and shall include interest accrued between the date of expropriation and the date of payment. Such compensation shall be freely realizable in accordance with Article 12 (Transfers) in this Chapter.]

[13.3. Payments shall be freely transferable at the current exchange rate.]

[13.4. The investor affected shall have a right, under the law of the Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of its case and of the valuation of its investment or returns.]

[13.4. An investor whose investment was subject to the measures referred to in this Article shall be entitled to a review of his case and an assessment by the competent authorities of the Party that adopted it.]

[13.5. If one Party or one of its agencies makes a payment to an investor of a Party pursuant to an insurance against non-commercial risks to an investment of that investor, the Party in whose territory the investment was made shall recognize the subrogation of the Party, or of any of its agencies, having made such payment, to the rights or titles of the investor, for the purposes of obtaining the relevant compensation.]

[13.6. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights [in accordance with the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”)], 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 TRIPS Agreement] [Chapter XX (Intellectual Property Rights)].]

[13.7. Nothing in the provisions of this Agreement shall prevent, in accordance with the Law and to serve the public or social interest, the establishment of monopolies with the discretion to allocate revenue, subject to compensation of the investors that are deprived of their exercise of a licit economic activity. The provisions of this Article shall apply in such cases.]

[13.8. In the event of an expropriation occurring at a time of impending foreign exchange crisis, smaller economies may be granted flexibility with respect to prompt, adequate and effective compensation and therefore a longer time period for payment, with a waiver from payment of interest rates during the extension.]

Article 14. Compensation for Losses

[14.1. Investors of a Party which suffer losses in their investments in the territory of the other Party, as a consequence of war, armed conflict, revolution, state of [national] emergency, insurrection or civil disorder, or [other similar situations], shall receive from that Party [and in accordance with accepted principles of International Law], in respect of reparation, restitution, indemnification, compensation or other settlement or indemnification, treatment no less favorable than that accorded to its own investors or investors of a non-Party, [whichever is more favorable].]

[14.1. Each Party shall accord investors of another Party whose investments have been adversely affected in their territory as a result of armed conflicts or civil strife, [acts of God or *force majeure* (natural disasters),] non-discriminatory treatment with respect to [reparation, compensation or other settlement] [any measure adopted or maintained] in relation to [those] [such] losses.]

[14.1. Investors of a Party who suffer losses because their investments or returns on the territory of another Party are affected by an armed conflict, a national emergency or a natural disaster on that territory, shall be accorded by that Party, in respect of restitution, indemnification, compensation or other settlement, treatment no less favorable than that which it accords to investors of any other State. Such compensation as may be granted shall be reinvested in the host country. Smaller economies may delay payment of compensation for balance of payments reasons and may prioritize payments to meet national development objectives.]

[14.1. Notwithstanding Article 16.6.b) (Non-Conforming Measures, subsidies and grants), each Party shall accord to investors of another 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.]

[14.2. Notwithstanding the preceding paragraph, if an investor of a Party which, in the situations referred to in that paragraph, suffers a loss in the territory of another Party resulting from:

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

the latter Party shall provide the investor restitution or compensation which in either case shall be prompt, adequate and effective and, with respect to compensation, shall be in accordance with Article 13.2, 13.3, and 13.4 (Expropriation and Compensation).]

[14.3. Paragraph 14.1 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 4 (National Treatment) but for Article 16.6.b) (Non-Conforming Measures, subsidies and grants).]

[14.4. In the event of catastrophic loss, natural or man-made, smaller economies may not be obligated to compensate foreign investors to the same extent that they do domestic enterprises.]

Article 15. Exceptions to National Treatment and Most-Favored-Nation Treatment

[15.1. Exceptions to these principles may be notified.]

[15.2. [If a Party grants special treatment to the investor and the investment of an investor of a Party or non-Party under present or future participation in:

- a) agreements that establish provisions to avoid double taxation;
- b) international agreements relating totally or partially to tax matters;
- c) free-trade areas, customs unions, common market, economic or monetary unions and similar institutions;

Such Party shall not be obligated to extend this treatment to the other Parties of the Agreement that are not part of a), b), and c).]

[In applying the most-favored-nation principle, subparagraph f of the General Principles in Annex I of the San José Ministerial Declaration shall be taken into account: “The FTAA can co-exist with bilateral and sub-regional agreements, to the extent that the rights and obligations under these agreements are not covered by or go beyond the rights and obligations of the FTAA.”]]

[15.2. The provisions Article 5 (Most-Favored-Nation Treatment) shall not be extended to:

- a) the privileges, advantages or benefits that one Party concedes to the investors of another Party or a non-Party in virtue of economic integration agreements, including those involving a free trade area, customs union, common market or economic or monetary union;
- b) the privileges, advantages or benefits derived from agreements whose purpose is to facilitate border relations;
- c) the rights and obligations derived from agreements aimed at avoiding double taxation and, in general, any matter related to taxation.

The reservations to National Treatment and Most-Favored-Nation Treatment regarding specific matters or sectors shall be included in Annex 1 of this Agreement.]

[15.3. Special arrangements between smaller economies, who constitute a common market, shall not be obligated to be extended to Third Parties.]

Article 16. [Reservations] [Non-Conforming Measures]

[16.1. Articles 4 (National Treatment), 5 (Most-Favored-Nation Treatment), 10 (Performance Requirements), and 11 (Senior Management and Boards of Directors) do not apply to:

- a) any existing non-conforming measure that is maintained by a Party at:
 - i) the [central][national or federal] level of government, as set out by that Party in its Schedule to Annex I [or III],
 - ii) a [regional] [state or provincial] level of government, [as set out by that Party in its Schedule to Annex I], or
 - iii) a local level of government [as set out by that Party in its Schedule to Annex I];

- 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 4 (National Treatment), 5 (Most-Favored-Nation Treatment), 10 (Performance Requirements), and 11 (Senior Management and Boards of Directors).

[any non-conforming measure that is maintained or adopted by a Party, regardless of the level or type of government, in Section A (Non-Conforming Measures) of Annex XX (Non-Conforming and Future Measures), which shall be listed at the time of the entry into force of this Agreement. Measures adopted by a Party shall not be more restrictive than those existing at the time the measure is implemented.]

16.2. Articles 4 (National Treatment), 5 (Most-Favored-Nation Treatment), 10 (Performance Requirements), and 11 (Senior Management and Boards of Directors) 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] [Section B (Future Measures) of Annex XX (Non-Conforming and Future Measures), which shall be listed at the time of the entry into force of this Agreement].

16.3. No Party may, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to Annex II, require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

[16.4. Article 5 (Most-Favored-Nation Treatment) does not apply to treatment accorded by a Party pursuant to agreements or with respect to sectors, set out in its schedule [in Annex XX (Exceptions to Most-Favored-Nation Treatment)] [in Annex IV].]

16.5. Articles 4 (National Treatment) and 5 (Most-Favored-Nation Treatment) do not apply to any measure that is an exception to, or derogation from, the obligations under [the TRIPs Agreement] [Article XX (National Treatment) of Chapter XX (Intellectual Property Rights)] as specifically provided for in that [Agreement] [Article].

16.6. Articles 4 (National Treatment), 5 (Most-Favored-Nation Treatment), and 11 (Senior Management and Boards of Directors) do not apply to:

- a) [government procurement] [procurements 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 [, except as provided in Article 14 (Compensation for Losses).]

[16.7. Articles 4 (National Treatment), 5 (Most-Favored-Nation Treatment), 10 (Performance Requirements) and 11 (Senior Management and Boards of Directors) do not apply to functions that are carried out in accordance with special or voluntary investment.²⁰]

²⁰ [One delegation reserves the right to present changes to this paragraph, in relation to special investment regimes.]

[16.1. Parties may present reservations regarding specific provisions and definitions of this Agreement. Parties may also present specific exceptions, in a schedule attached to the Agreement, for the purpose of excluding measures and/or sectors of economic activity in the application of provisions of the Agreement. For the purpose of presenting the country schedules of exceptions, and in order to ensure the necessary transparency, the following criteria shall be applied:

- a) sector in which the exception is to be applied;
- b) sub-sector;
- c) specific obligations to be excepted;
- d) nature and specification of the measure (law, regulation, rule, ruling, or equivalent);
- e) concise description of the measure.]

[16.1. Parties may maintain measures which are inconsistent with general provisions of this Chapter or which provide for special treatment for particular sectors of their economy, including activities reserved for the State, in consideration of national developmental objectives. Such reservations shall be listed in an Annex to the Chapter in a manner to be agreed upon by the Parties. Parties shall commence negotiations to remove some or all of these reservations within three (3) years of the entry into force of the Agreement. Smaller economies shall be entitled to maintain such reservations as are necessary to achieve their national development objectives and will be able to remove reservations at a slower pace than other Parties.

16.2. Smaller economies shall be entitled to maintain reservations as are necessary to achieve their national development objectives, including those designed to protect small enterprises and sensitive industries, and will be allowed to remove such reservations at a slower pace than other Parties.]

Article 17. General Exceptions

[17.1. Any Party may present general exceptions.]

[17.1. Among general exceptions, all actions for the protection of international peace and security shall be permitted.]

[17.1. Nothing in this Agreement shall prevent a Party from adopting or enforcing measures it deems necessary to:

- a) protect public morality;
- b) prevent crime and maintain public order;
- c) protect or maintain its essential security interests;
- d) protect human, animal and plant life;
- e) protect the balance of payments and react to balance of payments difficulties;

- f) secure compliance with laws or regulations relating to the prevention of deceptive and fraudulent practices and the effects of a default on contracts;
- g) secure compliance with laws relating to taxation;
- h) [ensure or guarantee compliance with the penal, labor, tax, and administrative resolutions and judgments;]
- i) protect disadvantaged persons/minorities or regions and the interests of smaller economies and countries at a low level of development;
- j) secure compliance with laws or regulations relating to 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;
- k) protect national treasures of artistic, historical, anthropological, paleantological and archaeological value;
- l) give effect to international obligations including treaties on the avoidance of double taxation; and
- m) give effect to benefits granted as a result of agreements establishing customs unions, common markets, economic or monetary unions, or similar arrangements.]

[17.1. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or do not constitute a disguised restriction on international trade or investment, nothing in this Chapter shall be construed to prevent a Party from adopting or enforcing measures:

- a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;
- b) necessary to protect human, animal or plant life or health; or
- c) necessary for the conservation of living or non-living exhaustible natural resources.]

[17.2. Parties shall be permitted to adopt measures necessary for maintaining public order in cases where a genuine threat or act could affect a fundamental societal interest.]

[Article 18. Commitment Not To Relax Domestic Labor Laws To Attract Investment

[18.1. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic labor laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws as encouragement for the establishment, acquisition, expansion or retention of an investment of an investor in its territory.]

[18.2. For smaller economies, a commitment not to relax domestic labor laws should be allied with compensating access to the Hemispheric Cooperation Program for the training of workers to make them more productive and the associated enterprises more competitive.]]

[Article 19. Commitment Not To Relax Domestic Environmental Laws To Attract Investment

[19.1. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic environmental laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws as encouragement for the establishment, acquisition, expansion or retention of an investment of an investor in its territory.]

[19.2. For smaller economies, a commitment not to relax domestic environmental laws should be allied with compensating access to the Hemispheric Cooperation Program for the purpose of introducing more modern machinery and industrial practices that would better protect the environment.]]

[Article 20. Special Formalities and Information Requirements

20.1. Nothing in Article 4 (National Treatment) shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with the establishment of investments by investors of another Party, such as a requirement that investments be constituted pursuant to the legislation of the Party, provided that such formalities do not materially impair the protections afforded by a Party to investors of another Party and investments of investors of another Party pursuant to this Chapter.

20.2. Notwithstanding Articles 4 (National Treatment) and 5 (Most-Favored-Nation Treatment), a Party may require an investor of another Party, or its investment in its territory, to provide routine information concerning that investment solely for informational or statistical purposes. The Party shall protect such information that is confidential from any disclosure that could prejudice the competitive position of the investment or the investor. 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.]

Section C Procedures and Institutions

Subsection C.1. Transparency

[Article 21. Transparency

21.1. Each Party shall ensure that its laws, regulations, administrative practices and procedures of general application, and adjudicatory decisions, that affect or pertain to covered investments or investors are promptly published or otherwise made publicly available. Where a Party establishes policies that affect or pertain to covered investments or investors, which are not expressed in laws or regulations or by other means listed in this paragraph, that Party shall promptly publish them or otherwise make them publicly available.

21.2. To the extent practicable, each Party shall:

- a) publish in advance any laws, regulations, administrative practices and procedures of general application that it proposes to adopt; and
- b) provide interested persons and Parties a reasonable opportunity to comment on such proposed measures.

21.3. On the request of another Party, a Party shall promptly provide information and respond to questions pertaining to any actual or proposed laws, regulations, administrative practices and procedures of general application, or pertaining to any adjudicatory decision.

21.4. Nothing in this Article requires a Party to furnish or allow access to any confidential or proprietary information, including information concerning particular investors or investments, the disclosure of which would impede law enforcement, be contrary to its laws protecting confidentiality, or prejudice legitimate commercial interests of particular companies.]

Subsection C.2. Dispute Settlement

Article 22. Dispute Settlement

[22.1. The application of dispute settlement mechanisms shall be limited to acts or events that occurred or began after the entry into force of the Agreement.]

[22.2. Disputes that arise as a result of direct or indirect governmental administrative decisions of a regulatory or enforcement nature shall not be subject to the dispute settlement provisions of this Agreement, provided that such decisions are consistent with the legislation of the respective Party and with Articles 4 (National Treatment) and 5 (Most-Favored-Nation Treatment).]

[22.3. Smaller economies shall be allowed access to technical assistance and an extended time period, where necessary, for dealing with state-to-state and investor-state disputes.]

[Subsection C.2.a. State-to-State Disputes]

[Article 23. State-to-State Disputes²¹

[23.1. Disputes which may arise between Parties regarding the interpretation or application of the Agreement shall, to the extent possible, be settled by diplomatic channels.

23.2. If a dispute cannot be settled through diplomatic channels within a reasonable period of time, of no less than six (6) months, the matter shall be submitted to the general dispute settlement mechanism to be established in the framework of the FTAA.]

[23.2. Where a large or developed State submits a dispute to the general settlement mechanism, at least half of the legal costs incurred by the smaller economy State should be borne by a Regional Integration Fund or some other hemispheric technical assistance/cooperation scheme.]]

Subsection C.2.b. Dispute Settlement between a Party and an Investor of Another Party

[Article 24. Investor-State Disputes

[24.1. For purposes of this Agreement, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to investment agreement or alleged breach of any right conferred, created or recognized by this Treaty with respect to a covered investment.]

²¹ This issue was sent to the Negotiating Group on Dispute Settlement (NGDS) for its consideration.

[24.2. Where an investor of a large or developed economy is involved in a dispute with a smaller economy State and the matter is submitted to arbitration, at least half of the legal costs incurred by the State should be borne out of a Regional Integration Fund.]

[Article 25. Objective

25.1. [Without prejudice to the rights and obligations of the Parties under Chapter XX (Dispute Settlement)], this Section establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity [as well as due exercise of the right to a hearing and defense within the legal process before an arbitration tribunal.] [, and due process before an impartial tribunal].]

[Article 26. Claim* by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise]

[26.1. An investor of a Party may, on its own behalf or on behalf of an enterprise of another Party [that is a juridical person] owned or controlled directly or indirectly by the investor, submit to arbitration under this Section a claim* on the grounds that [a Party] [the other Party, or an enterprise controlled directly or indirectly by that Party,] has breached an obligation [under Section B (Substantive Obligations) of this Chapter] [under this Section], [provided the claim made by the investor of a Party on its own behalf or on behalf of an enterprise is for loss or damage incurred by reason of, or arising out of, that breach] [always provided the investor or its investment has suffered loss or damage incurred by reason, or as a consequence of that breach].

26.2. An investor may not make a claim* under this Section [on its own behalf or on behalf of an enterprise] if more than three (3) years have elapsed from the date on which the investor acquired, or should have acquired, knowledge of the alleged breach and the loss or damage incurred.

26.3. When an investor makes a claim* on behalf of an enterprise [that is a juridical person] that the investor owns or controls directly or indirectly and, concurrently, a non-controlling investor in the enterprise makes a claim on its own behalf arising out of the same events [that gave rise to the claim* being presented under this Article and], [or] two (2) or more claims* are submitted [to arbitration by virtue of the same measure adopted by a Party], [to arbitration under the terms of the Article 29 (Submission of a Claim to Arbitration)] the tribunal [established under Article 36 (Consolidation)] shall hear the claims* together, unless the Tribunal finds that the legal interests of a disputing Party would be prejudiced.

[26.4. An investment may not submit a claim to arbitration under this Section].]

[26.1. An investor of a Party may submit to arbitration under this Section a claim that another Party or an enterprise controlled directly or indirectly by this Party has breached an obligation under this Chapter, when the investor has incurred loss or damage by reason of, or arising out of, that breach.

26.2. An investor may not make a claim if more than three (3) years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

* Brackets in Spanish only; this symbol appears wherever multiple Spanish expressions are represented by a single expression in English.

26.3. An investor of a Party, on behalf of an enterprise of another 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 or an enterprise directly or indirectly controlled by this Party has breached an obligation under this Chapter when the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

26.4. An investor may not make a claim on behalf of an enterprise described in paragraph 26.3 if more than three (3) years 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.

26.5. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under paragraphs 26.1 and 26.2 arising out of the same events that gave rise to the claim under this Article, and two (2) or more of the claims are submitted to arbitration under Article 29 (Submission of a Claim to Arbitration), the claims should be heard together by a Tribunal established under Article 36 (Consolidation), unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.

26.6. An investment may not make a claim under this Section.]

[Article 27. [Settlement of a Claim through Consultation and Negotiation] [Settlement of a Claim through Consultation]

[27.1. The disputing parties should first attempt to settle a claim through consultation or negotiation.]

[27.1. Before a disputing investor may submit a claim to arbitration, the disputing parties shall first hold consultations in an attempt to settle a claim amicably. Consultations shall be held within thirty (30) days of the submission of the notice of intent to submit a claim to arbitration, unless the disputing parties otherwise agree. The place of consultation shall be the capital of the disputing Party, unless the disputing parties otherwise agree.]

[27.1. Any dispute that arises between a Party and an investor of a Party that has made investments in the territory of the former, with respect to the interpretation or application of this Agreement, shall be resolved, to the extent possible, through consultation, which shall be notified in writing, including detailed information on the disputed point(s). The disputing Parties shall seek to settle these disputes amicably.]

[27.1. Investment disputes should as far as possible be settled amicably, after consultation by the parties to the dispute.]

[27.2. If these consultations do not result in the resolution of the disputes, the parties shall seek to agree on an alternative mode of dispute settlement. In no agreement is reached, the provisions outlined below shall apply.]

[27.2. Where the dispute can not be resolved within a period of six (6) months from the date of the initiation of consultation and negotiation, it may be submitted, upon request by any of the disputing Parties:

- a) to the competent courts of the Party in whose territory the investment was made; or

- b) to the national arbitration of the Party in whose territory the investment was made; or
- c) to international arbitration.]]

[Article 28. Notice of Intent to Submit a Claim* to Arbitration

28.1. The disputing investor shall deliver to the disputing Party written notice of its intention to submit a claim* to arbitration at least ninety (90) days before the claim is submitted [, which] [. Such] notice shall specify:

- a) the name and address of the disputing investor [and, where a claim* is made on behalf of an enterprise, the name or corporate name and address of the enterprise;] [and, where a claim is made under Article 26.3, 26.4, 26.5 and 26.6 (Claim by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise), the name and address of the enterprise;]
- b) the provisions of [this Chapter] [this Agreement] alleged to have been breached and any other relevant provisions;
- c) [the issues and] the factual basis for the claim;* and
- d) the relief sought and the approximate amount of damages claimed.]

[Article 29. Submission of a Claim* to [[International] Arbitration] [Dispute Settlement Procedures]]

[29.1. [Provided that six (6) months have elapsed since the measures giving rise to the claim were adopted, and that it has not been possible to settle the dispute through amicable consultations and the use of corresponding administrative remedies,] [Except as provided for in paragraph 29.3,] [provided that six (6) months have elapsed since the events giving rise to a claim,*] a disputing investor may submit the claim* to arbitration [with the possibility to opt for:] [under:]

- [a) the UNCITRAL Arbitration Rules;
 - b) the ICSID Convention, if both the disputing Party and the Party of the investor are parties to the Convention; or
 - c) the Additional Facility Rules of ICSID, if either the disputing Party or the Party of the investor, but not both, is a Party to the ICSID Convention.]
-
- [a) [the Convention on the Settlement of Investment Disputes (ICSID Convention)] [the ICSID Convention], provided that both the disputing Party and the Party of the investor are Parties to the Convention;
 - b) the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a Party to the ICSID Convention; or
 - c) [the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)] [the UNCITRAL Arbitration Rules].]

[29.2. The rules chosen under an arbitration proceeding established in this Chapter, shall apply, except to the extent modified in this Section.]

[29.2. The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.]

[29.3. An investor of a Party may submit a claim under this Section on its own behalf provided that both the investor and the enterprise that is a juridical person owned or controlled directly or indirectly by the investor, have not made the same claim to a competent national court of the disputing party. Accordingly, once the investor or the enterprise has submitted the claim to the competent national court of the disputing Party, the choice of such procedure shall be final, precluding the possibility of submitting the claim to an arbitration procedure under this Section.]

[29.4. An investor of a Party may submit a claim under this Section on behalf of an enterprise, provided that both the investor and the enterprise that is a juridical person owned or controlled directly or indirectly by the investor, have not submitted the same claim to the national court of the disputing Party. Accordingly, once the investor or the enterprise has submitted the claim to the competent national court of the disputing Party, the choice of such procedure under this Section shall be final.]

[29.5. When an enterprise of a Party, owned by an investor of another Party or under its direct or indirect control, in proceedings before a competent judicial or administrative tribunal under the legislation of each Party, alleges that the first Party has breached an obligation of this Chapter relating to investment actions per se, the investor(s) may not allege the presumed breach in arbitration proceedings under this Section.]]

[29.1. In case of recourse to international arbitration, the dispute may be submitted:

- a) to an ad hoc arbitration tribunal which, unless the parties to the dispute agree otherwise, shall be established pursuant to the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules;
- b) to the International Centre for Settlement of Investment Disputes (ICSID), created through the Convention on the Settlement of Investment Disputes between States and Nationals of other States, signed in Washington on March 18, 1965, when the Parties have signed it and are members thereof;
- c) where one of the Parties has not signed and is not a member of the above Convention, the dispute may be submitted to the ICSID pursuant to the Additional Facility Rules.

29.2. Once an investor has submitted the dispute to the competent court of the Party in whose territory the investment was made or to any of the above indicated arbitral tribunals, the choice of one or the other procedure shall be final.]

[29.1. In the case of international arbitration, the dispute shall be referred to:

- a) the International Centre for Settlement of Investment Disputes (ICSID) created by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington on March 18, 1965, where applicable;

- b) failing the above, the ICSID Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings;
- c) alternatively, to an ad hoc Arbitral Tribunal which, unless the parties to the dispute agree otherwise, it shall be constituted in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).]

[29.1. A national or company that is a Party to an investment dispute may submit the dispute for resolution under one of the following alternatives:

- a) in accordance with any applicable and previously agreed dispute settlement procedures;
- b) to the courts or administrative tribunals of the Party that is a Party to the dispute; or
- c) in accordance with the terms of the paragraph below.

29.2. Where an investor has submitted a dispute for settlement in accordance with subparagraphs 29.1.a), 29.1.b) or 29.1.c) above, the choice shall be final.

29.3. Provided that the national or company concerned has not submitted the dispute for resolution under subparagraph 29.1.a) or 29.1.b), and that six (6) months have elapsed from the date on which the dispute arose, the national or company concerned may submit the dispute for settlement by binding arbitration:

- a) to the International Centre for the Settlement of Investment Disputes (herein after referred to as "the centre") having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States done at Washington on March 18, 1965; or
- b) an Arbitral Tribunal established in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or
- c) if agreed by both parties to the dispute, to any other arbitration institution or in accordance with any other arbitration rules.

29.4. A national or company, notwithstanding that it may have submitted a dispute to binding arbitration under subparagraph 29.3.a) may seek interim injunctive relief, not involving the payment of damages, before the judicial or administrative tribunals of the Party that is a Party to the dispute, prior to the institution of the arbitral proceeding or during the proceeding, for the preservation of its rights and interests.]

[Article 30. Conditions Precedent to Submission of a Claim* to Arbitration]

[30.1. A disputing investor may submit a claim [on its own behalf] to arbitration [under this Section] [under Article 26.1 and 26.2 (Claim by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise)] only if:

- a) the investor consents to arbitration in accordance with the procedures set out in [this Section] [this Agreement]; and

- b) the investor [and the enterprise] [and], where the claim is for loss or damage to an interest in an enterprise of another Party [that is a juridical person that the investor owns or controls directly or indirectly] [owned or controlled directly or indirectly by the investor], [the enterprise,] waive their right to initiate [or continue] any proceedings [before a competent national tribunal under the law of the disputing party, or other dispute settlement procedures with respect to the measure of the disputing Party that is alleged to be a breach of the provisions referred to in Article 26 (Claim by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise), unless it is a petition for injunctive, declaratory or extraordinary relief, not involving the payment of damages, before a competent administrative tribunal or court under the law of the disputing Party, or the use and exhaustion of administrative remedies before the same authorities executing the measure alleged to be a breach, provided under the law of the said Party. Accordingly, once the investor or the enterprise has submitted its claim to an arbitration procedure under this Section, the choice of such a procedure shall be final, precluding the possibility of submitting the claim to the competent national court of the disputing Party or to other dispute settlement procedures, without prejudice to the exceptions set out above with respect to preventive measures and administrative remedies.] [before a competent tribunal under the law of the disputing Party, or other dispute settlement procedures, with respect to the measure of the disputing Party that is alleged to be a breach of the provisions referred to Article 26 (Claim by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise), 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 the disputing Party, such as the exhaustion of administrative remedies before the same authorities executing the measure alleged to be a breach, as provided for under the law of the disputing Party.] [before any administrative tribunal or court under the law of any 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 26.1 and 26.2 (Claim by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise), 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 the disputing Party.]

30.2. A disputing investor may submit a claim [, on behalf of an enterprise] [under this Section,] [under Article 26.3, 26.4, 26.5 and 26.6 (Claim by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise)] to arbitration only if both the investor and the enterprise:

- a) consent to arbitration in accordance with the procedures set out [in this Section] [in this Agreement;] and
- b) waive their right to initiate[or continue] any proceedings [before a competent national court under the law of the disputing Party, or other dispute settlement procedures with respect to the measure of the disputing Party that is alleged to be a breach of the provisions of Article 26.1 and 26.2 (Claim by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise); unless it is a petition for injunctive, declaratory or extraordinary relief, not involving the payment of damages, before a competent administrative tribunal or court under the law of the disputing Party, or the use and exhaustion of administrative remedies before the same authorities executing the measure alleged to be a breach, provided under the law of the said Party. Accordingly, once the investor or the enterprise has submitted its claim to an arbitration procedure under this Section, the choice of such a procedure shall be final,

precluding the possibility of submitting the claim to the competent national court of the disputing Party or to other dispute settlement procedures, without prejudice to the exceptions set out above with respect to preventive measures and administrative remedies.] [before any administrative tribunal or court under the law of any 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 26.3, 26.4, 26.5 and 26.6 (Claim by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise), 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 the disputing Party.] [before a competent national tribunal under the law of the disputing Party, or other dispute settlement procedures, with respect to the measure of the disputing Party that is alleged to be a breach of the provisions referred to in the Article 26 (Claim by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise), except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before the competent national tribunal the law of the disputing Party, such as the exhaustion of administrative remedies before the same authorities executing the measure alleged to be a breach, as provided for under the law of the disputing Party.]

30.3. The consent and waiver required by this Article shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration.

30.4. Only where a disputing Party has deprived a disputing investor of control of an enterprise:

- a) a waiver from the enterprise under paragraph 30.1.b) or 30.2.b) shall not be required; and
- b) [Article 29.4 (Submission of a Claim to Arbitration)] [Article 29.5) (Submission of a Claim to Arbitration)] [Annex XX] shall not apply.]

[30.1. A disputing investor may submit a claim to arbitration under Article 26.1 and 26.2 (Claim by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise) only if:

- a) the investor consents to arbitration in accordance with the procedures set out in this Agreement;
- b) at least six (6) months have elapsed since the events giving rise to the claim;
- c) not more than three (3) years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage thereby;
- d) the investor has delivered the Notice of Intent required under Article 28 (Notice of Intent to Submit a Claim to Arbitration), in accordance with the requirements of that Article, at least ninety (90) days prior to submitting the claim; and
- e) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the 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 any 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 26.1 and 26.2 (Claim by an Investor of a Party on Its Own Behalf or an Behalf of an Enterprise), 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 the disputing Party.

30.2. A disputing investor may submit a claim to arbitration under Article 26.3, 26.4, 26.5 and 26.6 (Claim by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise) only if:

- a) both the investor and the enterprise consent to arbitration in accordance with the procedures set out in this Agreement;
- b) at least six (6) months have elapsed since the events giving rise to the claim;
- c) not more than three (3) years 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;
- d) the investor has delivered the Notice of Intent required under Article 28 (Notice of Intent to Submit a Claim to Arbitration), in accordance with the requirements of that Article, at least ninety (90) days prior to submitting the claim; and
- e) both the investor and the enterprise waive their right to initiate or continue before any administrative tribunal or court under the law of any 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 26.3, 26.4, 26.5 and 26.6 (Claim by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise), 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 the disputing Party.

30.3. A consent and waiver required by this Article shall be in the form provided for in Annex XX, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration.

30.4. A waiver from the enterprise under subparagraph 30.1.e) or 30.2.e) shall not be required only where a disputing Party has deprived a disputing investor of control of an enterprise.

30.5. Failure to meet any of the conditions precedent provided for in subparagraphs 30.1 through 30.3 nullifies the consent of the Parties given in Article 31 (Consent to Arbitration).]

[Article 31. Consent to Arbitration

31.1. Each Party consents to the submission of a claim* to arbitration in accordance with the procedures [and requirements] set out [in this Chapter.] [in this Agreement.] [in this Section.]

31.2. The [consent given by paragraph 31.1 and the] submission by a disputing investor of a claim* to arbitration 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;]

- 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 32. Number of Arbitrators and Method of Appointment

32.1. [Except in respect of a Tribunal established under Article 36 (Consolidation), and unless the disputing parties otherwise agree,] [Except as provided for under Article 36 (Consolidation), and unless the disputing parties agree otherwise,] the Tribunal shall comprise three (3) arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.]

[Article 32. Arbitrators

32.1. Except in respect of a Tribunal established under Article 36 (Consolidation), and unless the disputing parties agree otherwise, the Tribunal shall comprise three (3) arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.

32.2. Arbitrators shall:

- a) have expertise or experience in law, international trade, other matters covered by this Section, or the resolution of disputes arising under international trade agreements;
- b) be independent of, and not be affiliated with or take instructions from, any Party or disputing party; and
- c) comply with the Code of Conduct for Dispute Settlement procedures (Annex XX of Chapter XX (Dispute Settlement)).

32.3. The disputing parties should agree upon the arbitrators' remuneration. If the disputing parties do not agree on such remuneration before the constitution of the Tribunal, the prevailing ICSID rate for arbitrators shall apply.

32.4. The Joint Commission²² may establish rules relating to expenses incurred by the Tribunal.]

[Article 33. Constitution of a Tribunal When a Party Fails to Appoint an Arbitrator or the Disputing Parties Are Unable to Agree on a Presiding Arbitrator

33.1. [In the event that a disputing party fails to appoint an arbitrator or the disputing parties are unable to agree on a presiding arbitrator:]

- a) The [ICSID] Secretary-General shall serve as appointing authority for an arbitration under this Section;
- b) If a Tribunal, other than a Tribunal established under Article 36 (Consolidation), has not been constituted within ninety (90) days from the date that a claim* is submitted to arbitration, the

²² ["Joint Commission" or other Ministerial level body designated through these negotiations to oversee the operation of the Agreement.]

Secretary-General, on the request of either disputing party, shall appoint [, in his discretion,] the arbitrator or arbitrators not yet appointed, except that the presiding arbitrator shall be appointed in accordance with subparagraph 33.1.c). [In any event, the majority of the arbitrators may not be nationals of one of the disputing parties] [; or,]

- c) The Secretary-General shall appoint the presiding arbitrator from the roster of presiding arbitrators referred to under Article 34 (Roster of Arbitrators) [ensuring that the president of the Tribunal is not a national] [of any of the disputing parties.] [of the disputing Party or a national of the Party of the disputing investor.] In the event that no such presiding arbitrator is available to serve, the Secretary-General shall appoint, from the ICSID [Roster] [Panel of Arbitrators,] a presiding arbitrator who is not a national [of any of the disputing parties] [of any of the Parties.] [of the disputing Party or a national of the Party of the disputing investor.]]

[Article 34. Roster of Arbitrators

34.1. On the date of entry into force of this Agreement, [the Parties] [each Party] shall establish, and thereafter maintain, a roster of [up to fifteen (15)] [five (5)] [of ...] presiding arbitrators, [or from which to appoint the arbitrators to a Tribunal, pursuant to Article 36 (Consolidation), with experience in international law and investment-related matters and meeting the qualifications established in the Convention and Rules referred to in Article 29 (Submission of a Claim to Arbitration).] [none of whom could be national of a Party, meeting the qualifications of the Convention and rules referred to in Article 29 (Submission of a Claim to Arbitration) and experienced in international law and investment matters.] [or from which to appoint the arbitrators to a Tribunal, pursuant to Article 36.5 (Consolidation), who meet the qualifications established in the ICSID Convention and the ICSID Additional Facility Rules or the UNCITRAL arbitration rules, and have experience in international law and investment-related matters.] The roster members shall be appointed by consensus [, regardless of nationality].]

[Article 35. Agreement to Appointment of Arbitrators in Case of ICSID Arbitration

35.1. For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator based on [Article 33.1.c) (Constitution of a Tribunal When a Party Fails to Appoint an Arbitrator or the Disputing Parties Are Unable to Agree on a Presiding Arbitrator) or on a ground other than nationality:

- 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; [and]
- b) a disputing investor [, whether on its own behalf or on behalf of an enterprise,] [referred to in Article 26.1 and 26.2 (Claim by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise)] may submit a claim* to arbitration, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the disputing investor [and where appropriate, the enterprise it is representing] agrees in writing to the appointment of each individual member of the Tribunal [; and]
- [c) a disputing investor referred to in Article 26.3, 26.4, 26.5 and 26.6 (Claim by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise) may submit a claim to arbitration, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only

on condition that the disputing investor and the enterprise agree in writing to the appointment of each individual member of the Tribunal.]]

[Article 36. Consolidation

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

36.2. Where a Tribunal [established under this Article] is satisfied that claims* have been submitted to arbitration [under Article 30 (Conditions Precedent to Submission of a Claim to Arbitration)] [under Article 28 (Notice of Intent to Submit a Claim to Arbitration)] [under the Article 29 (Submission of a Claim to Arbitration)] [that raises question] [that have a question] of law or fact in common, the Tribunal may, [for the purposes of fair and efficient settlement of the claims] [in the interests of fair and efficient resolution of the claims,] and after hearing the disputing parties, [assume jurisdiction over, hear and settle together:] [by order:]

- a) [assume jurisdiction over, and hear and determine together,] all or part of the claims;* together, or
- 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.

36.3. A disputing party that seeks an order under paragraph 36.2 shall request the Secretary-General to establish a Tribunal and shall specify in the request:

- a) the name of the disputing Party or disputing investors against which the order is sought;
- b) the nature of the order sought; and
- c) the grounds on which the order is sought.

[36.4. The disputing party shall deliver to the disputing Party or disputing investors against which the order is sought a copy of the request.]

36.5. Within sixty (60) days of receipt of the request, the Secretary-General shall establish a Tribunal comprising three (3) arbitrators. The Secretary-General shall appoint [the presiding arbitrator] from the roster referred to [in Article 34 (Roster of Arbitrators) the presiding arbitrator of the Tribunal, who shall not be a national of the disputing Party or a national of the Party of the disputing investor.] [in Article 34 (Roster of Arbitrators).] In the event that no such presiding arbitrator is available to serve, the Secretary-General shall appoint, from the ICSID Panel of Arbitrators, a presiding arbitrator [who shall not be a national of the disputing Party or a national of the Party of the disputing investor.] [who is not a national of any of the Parties.] The Secretary-General shall appoint the two (2) other members from the roster referred to in Article 34 (Roster of Arbitrators) and to the extent not available from that roster, from the ICSID Panel of Arbitrators, and to the extent not available from that Panel, in the discretion of the Secretary-General. One member shall be a national of the disputing Party and one member shall be a national of a Party of the disputing investors.

36.6. Where a Tribunal has been established [under this Article,] a disputing investor that has submitted a claim* to arbitration [under Article 26 (Claim by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise)][under Article 26.1 and 26.2 (Claim by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise) or Article 26.3, 26.4, 26.5 and 26.6 (Claim by an Investor of a Party on Its Own Behalf or on Behalf on an Enterprise)] and that has not been named in a request made under paragraph 36.3 may make a written request to the Tribunal that it be included in an order made under paragraph 36.2, and shall specify in the request:

- a) the name and address of the disputing investor [and, where appropriate, the name or corporate name and address of the enterprise;]
- b) the nature of the order sought; and
- c) the grounds on which the order is sought.

[36.7. A disputing investor referred to in paragraph 36.6 shall deliver a copy of its request to the disputing parties named in a request made under paragraph 36.3.]

36.8. A Tribunal established under Article 29 (Submission of a Claim to Arbitration) shall not have jurisdiction to decide a claim, or a part of a claim,* over which a Tribunal [established under this Article] has assumed jurisdiction.

36.9. On application of a disputing party, a Tribunal [established under this Article,] pending its decision under paragraph 36.2, may order that the proceedings of a Tribunal [established under Article 29 (Submission of a Claim to Arbitration)] [be adjourned pending a decision on the legal basis for consolidation.] [be stayed, unless the latter Tribunal has already adjourned its proceedings]. [The latter Tribunal must abide by any such order.]

[36.10. A disputing Party shall deliver to the Secretariat, within fifteen (15) days of receipt by the disputing Party, a copy of:

- a) a request for arbitration made under paragraph 1 of Article 36 of the ICSID Convention;
- b) a notice of arbitration made under Article 2 of Schedule C of the ICSID Additional Facility Rules; or
- c) a notice of arbitration given under the UNCITRAL Arbitration Rules.

36.11. A disputing Party shall deliver to the Secretariat a copy of a request made under paragraph 36.3:

- a) within fifteen (15) days of receipt of the request, in the case of a request made by a disputing investor;
- b) within fifteen (15) days of making the request, in the case of a request made by the disputing Party.

36.12. A disputing Party shall deliver to the Secretariat a copy of a request made under paragraph 36.6 within fifteen (15) days of receipt of the request.

36.13. The Secretariat shall maintain a public register of the documents referred to in paragraphs 36.10, 36.11 and 36.12.]

[36.14. The Tribunal established under this Article, shall furnish a copy of the consolidation request to the disputing investors subject to any such consolidation order, at the cost of the interested investor.]]

[Article 37. Notice

37.1. A disputing Party shall deliver to the Secretariat, within fifteen (15) days of receipt by the disputing Party, a copy of:

- [a] a notice of arbitration given under the UNCITRAL Arbitration Rules; or
- b) a request for arbitration made under paragraph 1 of Article 36 of the ICSID Convention; or
- c) a notice of arbitration made under Article 2 of Schedule C of the ICSID Additional Facility Rules.]
- [a] a request for arbitration made under paragraph 1 of Article 36 of the ICSID Convention;
- b) a notice of arbitration made under Article 2 of Schedule C of the ICSID Additional Facility Rules; or
- c) a notice of arbitration given under the UNCITRAL Arbitration Rules.]

37.2. A disputing Party shall deliver to the Secretariat a copy of a request made under Article 36.3 (Consolidation):

- a) within fifteen (15) days of receipt of the request, in the case of a request made by a disputing investor;
- b) within fifteen (15) days of making the request, in the case of a request made by the disputing Party.

37.3. [A] [The] disputing Party shall deliver to the Secretariat a copy of a request made under Article 36.6 (Consolidation) within fifteen (15) days of receipt of the request.

37.4. The Secretariat shall maintain a public register of the documents referred to in paragraphs 37.1, 37.2, and 37.3.

37.5. The disputing Party shall deliver to the other [Party] [Parties]:

- a) written notice of a claim* that has been submitted to arbitration no later than [thirty (30)] [fifteen (15)] days after the date that the claim* is submitted; and
- b) copies of all pleadings filed in the arbitration.]

[Article 37. Notice

37.1. A disputing Party shall deliver to the other Parties:

- a) written notice of a claim that has been submitted to arbitration no later than thirty (30) days after the date that the claim is submitted; and
- b) copies of all pleadings filed in the arbitration.]

[Article 38. Participation by a Party

38.1. On written notice to the disputing parties, a Party may [make submissions to any Tribunal established under this Section on its interpretation [of the Chapter's provisions] [of the provisions of this Agreement] being discussed before the Tribunal] [make submissions to a Tribunal on a question of interpretation of this Agreement.]]

[Article 38. Participation by a Non-Disputing Party

38.1. On written notice to the disputing parties, a non-disputing Party may make submissions, oral or written, to a Tribunal on a question of interpretation of this Agreement.

38.2. Any non-disputing Party shall have the right to attend any hearings held under this Section, whether or not it makes submissions, oral or written, to the Tribunal.]

[Article 39. Documents

39.1. A Party shall be entitled to receive from the disputing Party, at the cost of the requesting Party a copy of:

- a) [the written communications of the disputing parties; and] [the evidence that has been tendered to the Tribunal; and]
- b) [the evidence that has been tendered to any Tribunal established under this Section.] [the written arguments of the disputing parties.]

39.2. A Party receiving information pursuant to paragraph 39.1 shall treat the information as if it were a disputing Party.]

[Article 40. Place of Arbitration

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

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

[40.2. Unless the disputing parties agree otherwise, a Tribunal [established under this Section] shall hold an arbitration in the territory of a Party 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.]]

[40.1. Any arbitration under Article 29.3.a), 29.3.b) or 29.3.c) (Submission of a Claim to Dispute Settlement Procedures) shall be held in a State Party to this Agreement that is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958.]

[Article 41. Governing Law

41.1. A Tribunal established under this Section shall decide the issues in dispute in accordance with [this Chapter] [this Agreement] and applicable rules of international law.

41.2. An interpretation by the Commission [in accordance with Article XX (Administrative Commission of the Agreement)] of a provision of [this Chapter] [this Agreement] shall be binding on a Tribunal established under this Section.]

[41.1. The arbitral tribunal shall decide the dispute according to the provisions of this Agreement, the law of the Party involved in the dispute, the terms of potential individual investment-related agreements, legal standards agreed by the Parties, as well as rules and principles of international law that may apply.]

[Article 42. Interpretation of Annexes

42.1. Where a disputing Party asserts as a defense that the measure alleged to be a breach is within the scope of a reservation or exception set out [in any of the Annexes,] [in Annex I, Annex II, Annex III or Annex IV,] on request of the disputing Party, [any] [the] [a] Tribunal [established under this Section] shall request the interpretation of the Commission on the issue, [in accordance with Article XX (Administrative Commission of the Agreement)]. The Commission, [in accordance with Article XX (Administrative Commission of the Agreement),] within sixty (60) days of delivery of the request, shall submit in writing its interpretation to the Tribunal.

42.2. [Further to Article 41.2 (Governing Law),] [T][t]he interpretation of the Commission submitted under paragraph 42.1 shall be binding on [any] [the] Tribunal [established under this Section.]. If the Commission fails to submit an interpretation within sixty (60) days, the Tribunal shall decide the issue.]

[Article 43. Expert Reports

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

[Article 44. Interim [or Precautionary] Measures [of Protection]]

[44.1. A Tribunal established under this Section may issue letters rogatory to national tribunals, or issue to the disputing Parties [an interim measure of protection] [interim or precautionary measures] to safeguard the rights of the disputing party or to ensure that the jurisdiction of the Tribunal produces its full effect [, including an order to safeguard the evidence in possession or control of a disputing party]. The tribunal may not order [any lifting or suspension of the enforcement of the measure alleged to be a breach of the provisions of Article 26 (Claim by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise)] [any compliance with or suspension of the measure alleged to be a breach of the provisions of Article 26 (Claim by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise)].]

[44.1. A Tribunal may recommend 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 recommend attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 26.1 and 26.2 (Claim by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise) or Article 26.3, 26.4, 26.5 and 26.6 (Claim by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise). For purposes of this paragraph, an order includes a recommendation.]

[Article 45. Final Award

45.1. Where a Tribunal [established under this Section] makes a final award against a Party, [this] [the] Tribunal may [award] [, separately or in combination,] [order] only:

- a) [payment of] monetary damages and any applicable interest; [or]
- 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.

[A tribunal [established under this Section] may also award costs in accordance with the applicable arbitration rules.]

[45.2. Subject to paragraph 45.1, where a claim is made under Article 26.3 (Claim by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise):

- a) an award of restitution of property shall provide that restitution be made to the enterprise;
- b) an award of monetary damages and any applicable interest shall provide that the sum be paid 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.

45.3. A Tribunal may not order a Party to pay punitive damages.]

[45.2. A tribunal may also order payment of costs in accordance with the applicable arbitration rules.]

45.3. Subject to paragraphs 45.1 and 45.2, where a claim is made under Article 26 (Claim by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise) by an investor on behalf of an enterprise:

- a) an award of restitution of property shall provide that restitution be made to the enterprise;
- b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise.

45.4. For the purposes of paragraphs 45.1 and 45.2 the damages shall be determined in the currency in which the investment was made.

45.5. The award shall be made without prejudice to the rights that a third party with legal interest may have in the relief for the damages incurred, under the applicable law.]

[45.2. Where a claim is made by an investor on behalf of an enterprise, on the basis of Article 26 (Claim by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise):

- a) an award of restitution of property shall provide that restitution be made to the enterprise; and
- b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise.

45.3. A Tribunal established under this Section may not order a Party to pay punitive damages.

45.4. The award shall be made without prejudice to the rights that any person with legal interest may have in the relief for the damages incurred, under the applicable law.]]

[Article 46. Finality and Enforcement of the Award

46.1. An award made by [any Tribunal established under this Section] [a Tribunal] [established under this Section] shall have no binding force except between the disputing parties and in respect of the particular case.

46.2. Subject to paragraph 46.3 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.

46.3. A disputing party may not seek enforcement of a final award until:

- a) in the case of a final award [under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules:] [made under the ICSID Convention:]
 - i) [ninety (90)] [one hundred and twenty (120)] days have elapsed from the date the award was rendered [and no disputing party has initiated proceedings for interpretation, rectification a further award or annulment; or] [and no disputing party has requested [clarification,] revision or annulment of the award; or
 - ii) [interpretation, rectification or additional award proceedings have been completed or an annulment request by the disputing Party has been resolved by a Tribunal and this resolution is not going to be challenged; and] [revision or annulment proceedings

have been completed; and] [clarification, revision or annulment proceedings have been completed; or]

- b) in the case of a final award [made under the ICSID Convention] [under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules]
 - i) [one hundred and twenty (120) days] [three (3) months] [ninety (90) days] have elapsed from the date the award was rendered [and no disputing party has requested clarification, revision or annulment.] [and no disputing party has commenced a proceeding to revise, set aside or annul the award, or] [and no disputing party has requested clarification, revision or annulment, or]
 - ii) [a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.] [revision or annulment proceedings have been completed.] [interpretation, rectification or additional award proceedings have been completed; or an annulment request has been resolved by a Tribunal of the disputing Party and this resolution is not open to challenge.]

46.4. Each Party shall provide for the enforcement of an award in its territory.

46.5. If a disputing Party fails to abide by or comply with a final award, the Commission, [pursuant to Article XX (Administrative Commission of the Agreement),] on [receipt] [delivery] of a request by a Party whose investor was a party to the arbitration, shall establish [a panel] [an arbitration panel] [under Chapter XX (Dispute Settlement).] [under Article XX (Request for an Arbitral 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 Party abide by or comply with the final award.

46.6. 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 46.5.

46.7. 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.]

[46.1. Arbitral awards shall be final and binding on the Parties to the dispute. Enforcement of the award shall be made pursuant to the domestic legislation of the Party in whose territory the investment was made.]

[46.1. Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party shall carry out without delay the provisions of any such award and provide in its territory for the enforcement of such award.]

[Article 47. General

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

- [a) the notice of arbitration given under the UNCITRAL Arbitration Rules is received by the disputing Party;
- b) the request for arbitration under paragraph 1 of Article 36 of the ICSID Convention has been received by the Secretary-General;
- c) the notice of arbitration under Article 2 of Schedule C) of the ICSID Additional Facility Rules has been received by the Secretary-General.]
- [a) the request for arbitration under paragraph 1 of Article 36 of the ICSID Convention has been received by the Secretary-General;
- b) the notice of arbitration under Article 2 of Schedule C of the ICSID Additional Facility Rules has been received by the Secretary-General; or
- c) the notice of arbitration given under the UNCITRAL Arbitration Rules is received by the disputing Party.]

47.2. Delivery of notice and other documents to a Party shall be made to the place named for that Party [in Appendix XXII (2).] [in the Annex provided for that purpose.] [in Annex XX.]

47.3. In an arbitration under this Section, a Party shall not assert, as a defense, counterclaim, right of setoff or otherwise, 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.

47.4. [Final awards shall not be published unless there is a written agreement between the Parties.] [Annex XX applies to the Parties specified in that Annex with respect to publication of an award.] [Awards shall be published in accordance with the procedural rules on this matter.]]

[Article 48. Diplomatic Protection

[48.1. The Parties shall refrain from addressing, through diplomatic channels, matters related to disputes submitted to judicial proceedings or arbitration under this Section, until such proceedings are completed.]

[48.1. The Parties shall refrain from treating, through diplomatic channels, matters related to disputes submitted to any of the dispute settlement procedures provided in this Chapter, unless one of the parties to the dispute has not complied with the judicial decision or the arbitral award, in the terms established in the respective decision or award.]

[48.2. In any proceeding involving an investment dispute arising from a nationalization, a Party shall not assert, as a defense, counterclaim, right of set-off or for any other reason, that indemnification or other compensation for all or part of the alleged damages has been received or will be received by a national or company of the other Party pursuant to an insurance or guarantee contract.]]

[Article 49. Exclusions

49.1. An order by a Party that prohibits or restricts under Article XX (National Security) the acquisition of an investment in its territory by an investor of another Party or that investor's investment, shall not be subject to the dispute settlement provisions of this Section or Chapter XX (Dispute Settlement).]

[Article 50. Public Access to Hearings and Documents

50.1. Hearings held under this Section shall be open to the public.

50.2. The Tribunal shall establish procedures for the protection of confidential information²³.

50.3. All documents submitted to, or issued by, the Tribunal shall be publicly available, subject to the redaction of confidential information. Notwithstanding the foregoing, written evidence submitted to the Tribunal need not be made publicly available.

50.4. 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.

50.5. The Parties may share with officials of their respective 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.

50.6. The Tribunal shall not require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting Cabinet confidences, personal privacy or the financial affairs and accounts of individual customers of financial institutions, or would be contrary to its essential security interests within the meaning of Article XX (Essential Security)²⁴.

50.7. To the extent of any inconsistency between a Tribunal's confidentiality order and a Party's law on access to information, the law of the Party shall prevail. Where possible, Parties should endeavour to protect the disputing investor's confidential information.]

[Article 51. Non-Party Participation

51.1. A Tribunal may grant leave to a non-Party petitioner to file a written submission. In making this decision, the Tribunal shall consider, *inter alia*, whether:

- a) there is a public interest in the arbitration;
- b) the petitioner has a substantial interest in the arbitration²⁵; and

²³ ["Confidential information" consists of confidential business information and information that is privileged or otherwise protected from disclosure.]

²⁴ [This is subject to the content of Chapter XX (General Exceptions), which could cover some of these matters.]

²⁵ [For greater clarity, an interest in the development of the "jurisprudence," in the interpretation of the agreement, or in the subject matter of the dispute alone does not suffice in establishing the presence of a substantial interest in the arbitration by a petitioner.]

- c) the non-Party's submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.

51.2. Where the Tribunal has granted such leave, it shall ensure that:

- a) the non-Party's submission does not introduce new issues to the litigation and is within the scope of the case as defined by the disputing parties;
- b) the petitioner follows any rules adopted by the Joint Commission for the filing of non-Party submissions;
- c) the non-Party's submission avoids disrupting the arbitration and preserves the equality of the parties; and
- d) the disputing parties have the opportunity to respond to the non-Party's submission.]]

[Article 24. Consultation and Negotiation

24.1. In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures.

Article 25. Submission of a Claim to Arbitration

25.1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

- a) the claimant, on its own behalf, may submit to arbitration under this Section a claim:
 - i) that the respondent has breached:
 - 1) an obligation under Section B (Substantive Obligations),
 - 2) an investment authorization, [or
 - 3) an investment agreement,] and
 - ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and
- b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim:
 - i) that the respondent has breached:
 - 1) an obligation under Section B (Substantive Obligations),
 - 2) an investment authorization, [or
 - 3) an investment agreement,] and
 - ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

25.2. For greater certainty, a claimant may submit to arbitration under this Section a claim that the respondent has breached an obligation under Section B (Substantive Obligations) through the actions of a designated monopoly or a state enterprise exercising delegated governmental authority as described in Article XX (Designated Monopolies) and Article XX (State Enterprises) of Chapter XX (Competition), respectively.

25.3. Without prejudice to Article XX (Scope and Coverage) of Chapter XX (Financial Services), no claim may be submitted under this Section that alleges a violation of any provision of this Agreement other than an obligation under Section B (Substantive Obligations).

25.4. At least ninety (90) days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration (“notice of intent”). The notice shall specify:

- a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;
- b) for each claim, the provision of this Agreement, investment authorization, [or investment agreement] alleged to have been breached and any other relevant provisions;
- c) the legal and factual basis for each claim; and
- d) the relief sought and the approximate amount of damages claimed.

25.5. Provided that six (6) months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 25.1:

- a) under the ICSID Convention and the ICSID Rules of Procedures for Arbitration Proceedings, provided that both the disputing Party and the Party of the claimant are parties to the ICSID Convention;
- b) under the ICSID Additional Facility Rules, provided that either the disputing Party or the Party of the claimant, but not both, is a party to the ICSID Convention;
- c) under the UNCITRAL Arbitration Rules; or
- d) if the claimant and the respondent agree, to any other arbitration institution or under any other arbitration rules.

25.6. A claim shall be deemed submitted to arbitration under this Section when the claimant’s notice of or request for arbitration (“notice of arbitration”):

- a) referred to in paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General;
- b) referred to in Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General;

- c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules, are received by the respondent; or
- d) referred to under any other arbitral institution or arbitral rules selected under subparagraph 25.5.d) is received by the respondent.

25.7. The arbitration rules applicable under paragraph 25.5, 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 Agreement.

25.8. The claimant shall provide with the notice of arbitration referred to in paragraph 25.6:

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

Article 26. Consent of Each Party to Arbitration

26.1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.

26.2. The consent under paragraph 26.1 and the submission of a claim to arbitration under this Section shall satisfy the requirements 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 27. Conditions and Limitations on Consent of Each Party

27.1. No claim may be submitted to arbitration under this Section if more than three (3) years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 25.1 (Submission of a Claim to Arbitration) and knowledge that the claimant (for claims brought under Article 25.1.a) (Submission of a Claim to Arbitration)) or the enterprise (for claims brought under Article 25.1.b) (Submission of a Claim to Arbitration)) has incurred loss or damage.

27.2. No claim may be submitted to arbitration under this Section unless:

- a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and
- b) the notice of arbitration referred to in Article 25.6 (Submission of a Claim to Arbitration) is accompanied:

- i) for claims submitted to arbitration under Article 25.1.a) (Submission of a Claim to Arbitration), by the claimant's written waiver, and
- ii) for claims submitted to arbitration under Article 25.1.b) (Submission of a Claim to Arbitration), by the claimant's and the enterprise's written waivers;

of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to [any measure] [the events] alleged to [constitute a breach referred to in Article 25 (Submission of a Claim to Arbitration)][give rise to the claimed breach].

27.3. Notwithstanding subparagraph 27.2.b), the claimant (for claims brought under Article 25.1.a) (Submission of a Claim to Arbitration)) and the claimant or the enterprise (for claims brought under Article 25.1.b) (Submission of a Claim to Arbitration)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.

Article 28. Selection of Arbitrators

28.1. Unless the disputing parties otherwise agree, the tribunal shall comprise three (3) arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.

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

28.3. If a tribunal has not been constituted within seventy-five (75) days from the date that a claim is submitted to arbitration under this Section, the Secretary-General, on the request of a disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.

28.4. 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 on a ground other than nationality:

- a) the respondent agrees to the appointment of each individual member of a tribunal established under the ICSID Convention or the ICSID Additional Facility Rules;
- b) a claimant referred to in Article 25.1.a) (Submission of a Claim to Arbitration) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant agrees in writing to the appointment of each individual member of the tribunal; and
- c) a claimant referred to in Article 25.1.b) (Submission of a Claim to Arbitration) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant and the enterprise agree in writing to the appointment of each individual member of the tribunal.

Article 29. Conduct of the Arbitration

29.1. The disputing parties may agree upon the legal place of any arbitration under the arbitral rules applicable under Article 25.5.b), 25.5.c), or 25.5.d) (Submission of a Claim to Arbitration). If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with the applicable arbitral rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.

29.2. A non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement.

29.3. The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party [("the submitter")]. [The submissions shall be provided in both Spanish and English, and shall identify the submitter and any Party, other government, person, or organization, other than the submitter, that has provided, or will provide, any financial or other assistance in preparing the submission.]

29.4. Without prejudice to a tribunal's authority to address other objections as a preliminary question, such as an objection that a dispute is not within a tribunal's competence, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 35 (Awards).

- a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration referred to in Article 25.6 (Submission of a Claim to Arbitration), the date the tribunal fixes for the respondent to submit its response to the amendment);
- b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, and establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefore;
- c) In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute;
- d) The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in the following paragraph.

29.5. In the event that the respondent so requests within forty-five (45) days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 29.4 or any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than one hundred and fifty (150) days after the date of the request. However, if a disputing party

requests a hearing, the tribunal may take an additional thirty (30) days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period of time, which may not exceed thirty (30) days.

29.6. When it decides a respondent's objection under paragraph 29.4 or 29.5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorneys' fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

29.7. A respondent may not assert, as a defense, counterclaim, right of setoff, or for any other reason that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract.

29.8. 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 a measure alleged to constitute a breach referred to in Article 25 (Submission of a Claim to Arbitration). For purposes of this paragraph, an order includes a recommendation.

29.9. [Placeholder for a mechanism to review awards under this Section.]

Article 30. Transparency of Arbitral Proceedings

30.1. Subject to paragraphs 30.2 and 30.4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Parties and make them available to the public:

- a) the notice of intent referred to in Article 25.4 (Submission of a Claim to Arbitration);
- b) the notice of arbitration referred to in Article 25.6 (Submission of a Claim to Arbitration);
- c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 29.2 and 29.3 (Conduct of the Arbitration) and Article 34 (Consolidation);
- d) minutes or transcripts of hearings of the tribunal, where available; and
- e) orders, awards, and decisions of the tribunal.

30.2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

30.3. Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article XX (Essential Security) or Article XX (Disclosure of Information) of Chapter XX (Exceptions).

30.4. Protected information shall, if such information is submitted to the tribunal, be protected from disclosure in accordance with the following procedures:

- a) Subject to subparagraph 30.4.d), neither the disputing parties nor the tribunal shall disclose to the non-disputing Parties or to the public any protected information where the disputing party that provided the information clearly designates it in accordance with subparagraph 30.4.b);
- b) Any disputing party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal;
- c) A disputing party shall, at the same time that it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the non-disputing Parties and made public in accordance with paragraph 30.1; and
- d) The tribunal shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may (i) withdraw all or part of its submission containing such information, or (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph 30.4.c). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under (i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under (ii) of the disputing party that first submitted the information.

30.5. Nothing in this Section authorizes a respondent to withhold from the public information required to be disclosed by its laws.

Article 31. Governing Law

31.1. Subject to paragraph 31.3, when a claim is submitted under Article 25.1.a)i)1) (Submission of a Claim to Arbitration) or Article 25.1.b)i)1) (Submission of a Claim to Arbitration), the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

31.2. Subject to paragraph 31.3 and the other terms of this Section, when a claim is submitted under Article 25.1.a)i)2) [or 25.1.a)i)3)] (Submission of a Claim to Arbitration), or Article 25.1.b)i)2) [or 25.1.b)i)3)] (Submission of a Claim to Arbitration), the tribunal shall apply:

- a) the rules of law specified in the pertinent [investment agreement or] investment authorization, or as the disputing parties may otherwise agree; or
- b) if the rules of law have not been specified or otherwise agreed:
 - i) the law of the respondent, including its rules on the conflict of laws;²⁶ and
 - ii) such rules of international law as may be applicable.

²⁶ [The "law of the respondent" means the law that a domestic court or tribunal of proper jurisdiction would apply in the same case.]

31.3. A decision of the (Joint Commission/Committee) declaring its interpretation of a provision of this Agreement under Article XX (Joint Commission/Committee) in Chapter XX (Administration and Dispute Settlement) shall be binding on a tribunal established under this Section, and any award must be consistent with that decision.

Article 32. Interpretation of Annexes

32.1. Where a respondent asserts as a defense that the measure alleged to be a breach is within the scope of a non-conforming measure set out in Annex I or Annex II, the tribunal shall, on request of the respondent, request the interpretation of the (Joint Commission/Committee) on the issue. The (Joint Commission/Committee) shall submit in writing any decision declaring its interpretation under Article XX (Joint Commission/Committee) of Chapter XX (Administration and Dispute Settlement) to the tribunal within sixty (60) days of delivery of the request.

32.2. A decision issued by the (Joint Commission/Committee) under paragraph 32.1 shall be binding on the tribunal, and any award must be consistent with that decision. If the (Joint Commission/Committee) fails to issue such a decision within sixty (60) days, the tribunal shall decide the issue.

Article 33. Expert Reports

33.1. 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, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety, or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

Article 34. Consolidation

34.1. Where two (2) or more claims have been submitted separately to arbitration under Article 25.1 (Submission of a Claim to Arbitration) 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 agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 34.2 through 34.10.

34.2. 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.

34.3. Unless the Secretary-General finds within thirty (30) days after receiving a request under paragraph 34.2 that the request is manifestly unfounded, a tribunal shall be established under this Article.

34.4. Unless all the disputing parties sought to be covered by the order agree otherwise, a tribunal established under this Article shall comprise three (3) arbitrators:

- a) one arbitrator appointed by agreement of the claimants;
- b) one arbitrator appointed by the respondent; and
- c) the presiding arbitrator appointed by the Secretary-General, provided, however, that the presiding arbitrator shall not be a national of any Party.

34.5. If, within sixty (60) days after the Secretary-General receives a request made under paragraph 34.2, the respondent fails or the claimants fail to appoint an arbitrator in accordance with paragraph 34.4, 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. In the event the respondent fails to appoint an arbitrator, the Secretary-General shall appoint a national of the disputing Party, and if the claimants fail to appoint an arbitrator, the Secretary-General shall appoint a national of a Party of the claimants.

34.6. Where a tribunal established under this Article is satisfied that two (2) or more claims that have been submitted to arbitration under Article 25.1 (Submission of a Claim to Arbitration), 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 Article 28 (Selection of Arbitrators) 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 claimant not previously a disputing party before that tribunal, shall be reconstituted with its original members, except that the arbitrator for the claimants shall be appointed pursuant to paragraphs 34.4.a) and 34.5, and
 - ii) that tribunal shall decide whether any prior hearing shall be repeated.

34.7. Where a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration under Article 25.1 (Submission of a Claim to Arbitration) and that has not been named in a request made under paragraph 34.2 may make a written request to the tribunal that it be included in any order made under paragraph 34.6, and shall specify in the request:

- a) the name and address of the claimant;
- b) the nature of the order sought; and
- c) the grounds on which the order is sought.

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

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

34.9. A tribunal established under Article 28 (Selection of Arbitrators) 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.

34.10. On application of a disputing party, a tribunal established under this Article, pending its decision under paragraph 34.6, may order that the proceedings of a tribunal established under Article 28 (Selection of Arbitrators) be stayed, unless the latter tribunal has already adjourned its proceedings.

Article 35. Awards

35.1. Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only:

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

A tribunal may also award costs and attorneys' fees in accordance with this Section and the applicable arbitration rules.

35.2. Subject to paragraph 35.1, where a claim is submitted to arbitration under Article 25.1.b) (Submission of a Claim to Arbitration):

- a) an award of restitution of property shall provide that restitution be made to the enterprise;
- b) an award of monetary damages and any applicable interest shall provide that the sum be paid 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.

35.3. A tribunal may not award punitive damages.

35.4. An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.

35.5. Subject to paragraph 35.6 below and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.

35.6. 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) one hundred and twenty (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, the UNCITRAL Arbitration Rules, or the rules selected pursuant to Article 25.5.d) (Submission of a Claim to Arbitration):
 - i) ninety (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.

35.7. Each Party shall provide for the enforcement of an award in its territory.

35.8. If the respondent fails to abide by or comply with a final award, on delivery of a request by a Party of the claimants, a panel shall be established under Article XX (Establishment of State-to-State Dispute Settlement Panels) in Chapter XX (Administration and Dispute Settlement). 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) If the Parties agree, a recommendation that the respondent abide by or comply with the final award.

35.9. A disputing party 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 35.8.

35.10. 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 36. Service of Documents

36.1. Delivery of notice and other documents on a Party shall be made to the place named for that Party in Annex XX-C.]

[Article 24 Dispute Settlement between a Party and an Investor of Another Party

24.1. Disputes arising under this Chapter between one of the Parties and an investor of the other Party that has invested in the territory of the former shall, to the extent possible, be settled through amicable consultations between the two parties to the dispute. To this end, the investor shall send a written communication to the other party to the dispute and may avail themselves of any non-arbitral or non-judicial mechanism to settle the dispute.

24.2. Should said consultations fail to produce a settlement within a period of six (6) months from the date of the request of settlement, the investor may submit the dispute:

- a) to the competent courts of the Party in whose territory the investment was made;

- b) to international arbitration at the International Centre for Settlement of Investment Disputes (ICSID), under the rules of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington on 18 March 1965;
- c) to the ICSID Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings, in case one of the Parties has not acceded to this convention; or
- d) to an ad hoc Arbitration Tribunal which, unless the parties to the dispute agree otherwise, shall be established pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law.

24.3. The concerned investor shall deliver to the party receiving the investment written notice of its intention to submit a claim to arbitration at least ninety (90) days before the claim is submitted. Said notification may only be submitted once the period of six (6) months referred to in the previous paragraph has elapsed, and must specify the name and address of the investor submitting the claim, the provisions of the Chapter that the disputing investor considers to have been breached, the facts, and the estimated value of the damages and compensations.

24.4. Each Party shall grant its prior and irrevocable consent so that all disputes of this nature may be submitted to any of the arbitration procedures indicated in subparagraphs 24.2.b), 24.2.c), and 24.2.d).

24.5. Once an investor has submitted the dispute to the competent court of the Party in whose territory the investment was made or to any of the arbitration tribunals indicated above, the choice of one procedure or another shall be final.

24.6. If a Party, or a duly authorized public or private entity of that Party, compensates one of its own investors by virtue of insurance or other guarantees to cover non-commercial risks related to the investor's investment in the territory of the other Party, the latter Party shall recognize the subrogation of the former Party to the rights of the investor under this Chapter, not being able to enter as an objection, at any stage of the dispute or the enforcement of the sentence or award, the fact that the payment has been made.

24.7. Where a Party or a public or private entity has paid its investor and therefore has assumed its rights and benefits, said investor may not claim such rights and benefits from the other Party, unless expressly authorized by the first Party.

24.8. The arbitration award shall be final and binding for the parties to the dispute and shall be enforced pursuant to the domestic legislation of the Party in whose territory the investment was made.

24.9. In the case of arbitration, the Arbitral Tribunal shall issue its award pursuant to the provisions of this Chapter, the legislation of the parties involved in the dispute, including rules on conflict of laws, and the accepted principles of international law.

24.10. In any case, the arbitral award shall be limited to determining whether there is non-compliance with a commitment under this Chapter and, in the case of damage or injury to the investor as a result of said non-compliance, it shall set the amount of the applicable compensation.

24.11. The Parties shall refrain from addressing, through diplomatic channels, matters related to disputes between a Party and an investor of another Party that have been submitted to judicial proceedings or to international arbitration pursuant to this Article, unless one of the Parties to the dispute has not complied with the judicial decision or the arbitral award, in the terms established in the respective decision or award.

24.12. An investor may not submit a claim if more than three (3) years have elapsed from the date on which knowledge was acquired, or should have been acquired, of the alleged breach to this Chapter, as well as of the loss or damage suffered.

24.13. An investor of a Party may submit to international arbitration a claim against the other Party on the grounds that: (a) the other Party has breached an obligation established in this Chapter; and (b) the investment has been subject to losses or damages by virtue of the breach or as a result thereof.

24.14. Only the investor of a Party may submit a dispute with the other Party to international arbitration.

24.15. All arbitral awards shall be made public.]

**[Annex XX
Customary International Law**

The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Articles 9 (Minimum Standard of Treatment) and 13 (Expropriation and Compensation) results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 9 (Minimum Standard of Treatment), the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.]

[Annex XX
Expropriation

The Parties confirm their shared understanding that:

1. Article 13.1 (Expropriation and Compensation) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.
2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.
3. Article 13.1 (Expropriation and Compensation) addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.
4. The second situation addressed by Article 13.1 (Expropriation and Compensation) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
 - a) The determination of whether an action or series of actions 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:
 - i) the economic impact of the government action, although the fact that an action or series of actions 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;
 - ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
 - iii) the character of the government action.
 - b) Except in rare circumstances, [such as when a measure is so severe in light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith,] nondiscriminatory [measures] [regulatory actions] by a Party that are designed and applied to protect legitimate public welfare objectives, such as [public] health, safety, and the environment, do not constitute indirect expropriations.]

[Annex XX
Standard Waiver

I, _____, waive my right to initiate or continue before any administrative tribunal or court under the law of any Party to the Free Trade Area of the Americas (“the Agreement”), or other dispute settlement procedures, any proceedings with respect to the measure of _____ that is alleged to be a breach of an obligation in Chapter XX of the Agreement, 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 _____.

(To be signed, dated and witnessed.)

I, _____, on behalf of _____, waive the enterprise’s right to initiate or continue before any administrative tribunal or court under the law of any Party to the Free Trade Area of the Americas (“the Agreement”), or other dispute settlement procedures, any proceedings with respect to the measure of _____ that is alleged to be a breach of an obligation in Chapter XX of the Agreement, 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 _____. I hereby solemnly declare that I have the power to bind the enterprise.

(To be signed, dated and witnessed.)]

[Annex XX-C
Service of Documents on a Party under Section C

(Investor State Dispute Settlement)

Chile

Notices and other documents in disputes under Section B shall be served on Chile by delivery to:

*Dirección de Asuntos Jurídicos del Ministerio de Relaciones
Exteriores de la República de Chile*
Morandé 441
Santiago, Chile

United States

Notices and other documents in disputes under Section C shall be served on the United States by delivery to:

Executive Director (L/EX)
Office of the Legal Adviser
Department of State
Washington, D.C. 20520
United States of America

Country X

Notices and other documents in disputes under Section C shall be served on Country X by delivery to:

(place of delivery of notice and other documents for Country X)
(There would be a list for all 34 countries)]

[Annex XX.2
Submission of a Claim to Arbitration

1. An investor of the FTAA member Party may not submit to arbitration under Section C (Procedures and Institutions), a claim that Chile has breached an obligation under Section B (Substantive Obligations):

- i) on its own behalf under Article 25.1.a) (Submission of a Claim to Arbitration), or
- ii) on behalf of an enterprise of Chile that is a juridical person that the investor owns or controls directly or indirectly under Article 25.1.b) (Submission of a Claim to Arbitration),

if the investor or the enterprise, respectively, has alleged that breach of an obligation under Section B (Substantive Obligations) in proceedings before a court or administrative tribunal of Chile; or

2. For greater certainty, if an investor of the FTAA member Party elects to submit a claim of the type described in this Annex to a court or administrative tribunal of Chile, that election shall be definitive and the investor may not thereafter submit the claim to arbitration under Section C (Procedures and Institutions).]