

**FTAA – Free Trade Area of the Americas**

**Draft Agreement**

**Chapter on Investment**

• **CHAPTER ON INVESTMENT**

**Article 1 SCOPE**

[1. This Chapter applies to measures adopted or maintained by a Party relating to:<sup>1</sup>

- 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; and,
- c) all investments [of the investors of any Party] in the territory of the Party with regard to the article on Performance Requirements.]

[2. This Chapter shall apply to investments [admitted] [made], prior to or after the entry into force of the Agreement, by investors of a Party in the territory of another Party, in accordance with [the domestic legal framework] [the laws and regulations] of the host Party.]

[2. This Chapter applies to investments already existing prior to the entry into force of this Agreement, as well as to investments made or acquired subsequently.]

[2. This Agreement shall apply to investments admitted into the territory of a Party in accordance with national laws and regulations after the entry into force of this Agreement.]

[3. The provisions of this Chapter do not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this agreement.]

[3. This Chapter does not apply to:

- a) economic activities reserved by each Party, pursuant to its legislation in force on the date of the signing of this Agreement, pursuant to Annex XX;
- b) measures adopted or maintained by a Party [in relation to an investor of another Party, or the investments of such investors in financial institutions in the territory of the Party;] [in relation to financial services] [, pursuant to Chapter \_\_\_\_\_ (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; and
- d) disputes or claims arising [or resolved] before the entry into force of this Agreement or relating to facts that occurred before it entered into force, even if their effects persist thereafter.]

[3. Without prejudice to the foregoing, this Chapter shall not apply to disputes or disputes involving facts occurring prior to its entry into force, even though the effects of the dispute may last beyond its entry into force.

The reservations and exceptions of the Parties are set out in an Annex to this Chapter.

This Agreement shall not apply to investments made with capital or assets of illicit origin, nor shall it be construed as preventing Parties from adopting or maintaining measures aimed at preserving public order.]

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<sup>1</sup> [One delegation has omitted a provision on substantive scope. They believe that the substantive scope of the chapter is comprehensively addressed through the discipline and the definition of key terms in the chapter. They also believe that a substantive scope provision could lead to conflicting interpretations.]

[3. A Party may deny the benefits of this Chapter to an investor of another Party that is a company of such other Party and to investments of that investor if --

(a) investors of a non-Party own or control the company and the denying Party:

i. does not maintain diplomatic relations with the non-Party; or

ii. adopts or maintains measures with respect to the non-Party that prohibit transactions with the company or that would be violated or circumvented if the benefits of this Chapter were accorded to the company or to its investments; or

(b) the company 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 company.]

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

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

[5. 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].]

[6. Notwithstanding paragraph 5, 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.]

[7. 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.]

[8. 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 2        NATIONAL TREATMENT**

[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.]

[1. Each Contracting Party shall accord to the investments of the investors of other Contracting Parties made in its territory treatment no less favorable than that accorded to investments by its own investors.]

[1. Each Contracting Party shall grant treatment no less favorable than that it accords to the investments of its own national investors in the establishment, acquisition, expansion, management, conduct, operation, sale or other disposition of an investment. National treatment shall be granted in accordance with the laws of the host State.]

[2. The treatment accorded by a Party, under subparagraph 1 above, means, with respect to a State, treatment no less favorable than the most favorable treatment accorded by that State, in like circumstances, to the investors and investments of investors of the Party to which it belongs.]

[2. The treatment to be accorded by a state, territory, possession, or province under paragraph 1 is treatment no less favorable than the treatment that it accords, in like circumstances, to natural persons resident in and companies constituted under the laws of other states, territories, possessions, or provinces of the Party of which it forms a part, and to their respective investments.]

[3. While admitting the general applicability of the concept of national treatment with respect to the establishment, acquisition, expansion, management, conduct, operation, or sale of an investment, in certain special circumstances, e.g. the threat of economic instability stemming from vulnerability, prudential measures employed by a smaller economy may be allowed to fall less heavily on domestic companies than on foreign companies.]

### **Article 3 MOST-FAVORED-NATION TREATMENT**

[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 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.]

[1. Each Contracting Party shall accord to the investments of investors of the other Contracting Parties made in its territory treatment which is no less favorable than that accorded to investments by investors of third States.]

[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.]

### **Article 4 EXCEPTIONS TO NATIONAL TREATMENT AND MOST-FAVORED-NATION TREATMENT**

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

[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.”]]

[2. The provisions in the article on the most favored nation treatment shall not be extended to:

- a) the privileges, advantages or benefits that one Contracting Party concedes to the investors of another Contracting Party or third States 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 the present Agreement.]

[3. Parties will need to identify, where appropriate, specialized provisions for specific sectors and discuss how the Annexes containing exceptions to the obligations on national treatment and most-favored-nation treatment should be structured as well as the protection to be afforded to investments covered under such Annexes with respect to other obligations under the Investment Chapter.]

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

#### **Article 5            STANDARD OF TREATMENT**

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

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

#### **Article 6            FAIR AND EQUITABLE TREATMENT**

[1. [Each Party] [A Party] [Each Contracting Party] [shall accord] [shall at all times ensure] [to the investments of the investors of another Party] [to the investments of investors of the other Contracting Parties made in its territory] [to covered investments of investors of the other Parties] [to the investments of another Contracting Party] [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] [as well as juridical protection and security within its territory] [in accordance with the norms and principles of international law] [in accordance with principles of international law] [and shall not impair their management, maintenance, use, enjoyment or disposal through unjustified or discriminatory measures].]<sup>2</sup>

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

2. For greater certainty, the concepts of “fair and equitable treatment” and “full protection and security” mentioned in paragraph 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.

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

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<sup>2</sup> [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,” “full security,” and “juridical security.”]

[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 of this principle]

## **Article 7            PERFORMANCE REQUIREMENTS**

[1. [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, administration, management, conduct [or operation] [, operation, sale or other disposition] of an investment of an investor of a Party] [or of a non Party] [in connection with any investment of an investor of any Party] in its territory:] [1. None of the Contracting 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 [type,] 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] [or to purchase goods from persons] [or services from service providers] [in its territory]; [or,]]
- 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 [from such investments.] [associated with such investment;]]
- e) [to restrict sales of goods or services in its territory that such investment produces or provides 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, 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 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 to a specific regional [market] or [to the] world market.]

[This paragraph does not apply to any requirement other than those indicated herein.]

[1. No Party may unilaterally stipulate, as a condition for the establishment, expansion, or maintenance of investments, performance requirements which require or demand commitments to export goods, which specify that certain goods or services shall be acquired locally, or which impose any other similar requirement.]

[1. No Contracting 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.]

[1. The Parties may not impose any performance requirements incompatible with the disciplines of the Agreement on Trade-Related Investment Measures of the World Trade Organization, as a condition for establishing, expanding or maintaining investments.]

[2. A measure that requires an investment to use a technology to meet generally applicable health, [environmental or safety] [safety or environmental] requirements shall not be construed to be inconsistent with paragraph 1 (f). For greater certainty, [Articles \_\_\_ (National Treatment) and \_\_\_ (Most-Favored-Nation Treatment)] [the provisions on National Treatment and Most-Favored-Nation Treatment] shall apply to the measure.]

[3. [Performance Incentives:] No Party may condition the receipt or continued receipt of [an incentive or advantage] [an advantage] [a benefit], in connection with [the establishment, acquisition, expansion, management, conduct, 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 in its territory, or to purchase goods from [producers] [persons] in its territory;
- b) to achieve a given level or percentage of domestic content; [o,]
- 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 by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.]

[This paragraph does not apply to any other requirement other than those indicated herein.]

[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.]

[4. [Exceptions and Exclusions:]

[1. The provisions of:

- a) paragraphs (1)(a), (b) and (c), and paragraphs (3)(a) and (b) [of Article \_\_\_\_ (Performance Requirements)] do not apply to qualification requirements for goods [or services] [and services] with respect to export promotion and [domestic] [foreign] aid programs;
- b) paragraphs [(1)(b) and (c)] [(1)(b), (c), and (f)] [(1)(b), (c), (f), and (g)] and paragraphs (3)(a) and (b) [of Article \_\_\_\_ (Performance Requirements)] do not apply to procurement by a Party or a state enterprise; and
- c) paragraphs (3)(a) and (b) [of Article \_\_\_\_ (Performance Requirements)] do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.]

[2. The provisions of paragraph 1(f) do not apply:

- a) to measures relating to the transfer of intellectual property rights as set forth in and that are consistent with the provisions of Articles XXX (CITE TO SPECIFIC ARTICLES) of Chapter XX (Intellectual Property Rights) or
- b) when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws. This exception will be conformed to the language of the Intellectual Property Chapter.]

[3. [Nothing in paragraph 3] [The provisions of paragraph 3] [Nothing in this article] shall [not] be construed to prevent a Party [from imposing,] [in connection with an investment of an investor of a Party], [or of an investor of a non-Party] [in its territory] [requirements pertaining to the geographic location of production units, the employment or training of workers, or the carrying out of research and development activities.] [from conditioning the receipt or continued receipt of [an incentive or advantage] [an advantage] [a 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 [units], provide a service, train or employ workers, construct or expand [particular facilities] [certain installations] or carry out research and development activities[, in its territory].]]

[4. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in paragraphs 1(b) or (c) or 3(a) or (b)] [The provisions of paragraphs 1(b), 1(c), 1(f), 3(a), and 3(b)] shall [not] be construed to prevent any Party from adopting or maintaining measures [, including environmental measures, that are:] [necessary to:]

- 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) [related to] the conservation of living or non-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 trade or investment.]]<sup>3</sup>

[5. Notwithstanding the provisions hereinabove, the Contracting Parties may adopt or maintain the measures necessary to attain the following objectives, among others:

- a) the enforcement of laws and regulations that are not inconsistent with the provisions of this Agreement;
- b) the reduction of regional imbalances;
- c) the carrying out of activities related to research and development and the adoption of new technologies.]

[6. If, in the opinion of a Party, the imposition by another Party of any other requirement not established in paragraph 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.]

[7. This article does not preclude the application of any commitment, undertaking or requirement between private parties.]

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

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<sup>3</sup> [In the interest of greater clarity, several delegations wish to state that references to environment-related issues in this paragraph are made solely with respect to the article on Performance Requirements, without such references implying that there is a possibility of including discussion thereof as a new issue in the Chapter on Investment. ]

**Article 8            KEY PERSONNEL**

[[Senior Management] [and Boards of Directors] [and Directors]] [Administration, Entry of Personnel and Key Personnel] [Entry and Sojourn of Key Personnel]

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

[1. For the purposes of this Agreement, key personnel means foreign personnel performing executive, administrative, or management functions, or possessing specialized technical knowledge considered indispensable to guarantee the proper control, administration and operation of an investment. Key personnel authorized to work in an enterprise are subject to the provisions of the laws of each Contracting Party and shall not, in any way, hamper or prevent the exercise by an investor of control of his investment.]

[1. Investors may request Parties to admit to their territories, in accordance with national laws, regulations and procedures, top management personnel, persons possessing specialized technical knowledge, or other key personnel by mutual consent required to ensure the security, control or orderly administration of an investment. Such persons shall not practice a profession without meeting any and all national requirements.]

[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 States Parties shall not require investors of another State Party to appoint key personnel of a specific nationality. The State Party receiving the investment shall grant temporary entry permits to such key personnel 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 State Party receiving the investment.]

[2. Neither Party shall, in granting entry under paragraph 1, require a labor certification test or other procedures of similar effect, or apply any numerical restriction.]

[3. A Party may require that a majority of the board of directors of an enterprise of that Party, that is an investment of an investor of another Party, 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.]

[4. Subject to its laws relating to the entry and sojourn of aliens, each Party shall permit to enter and to remain in its territory nationals of another Party for the purpose of establishing, developing, administering or advising on the operation of an investment to which they, or a company of the other Party that employs them, have committed or are in the process of committing a substantial amount of capital or other resources.<sup>4</sup>]

[5. 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 knowhow and organizational technology.]

**Article 9            TRANSFERS<sup>5</sup>**

[1. Each Party shall permit all transfers relating to [an investment of an investor of] [another Party] [a covered investment] [in the territory of] [the Party] to be made freely and without delay [in its territory] [into and out of its territory]. Such transfers include:]

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<sup>4</sup> [Some delegations believe that this issue should be treated horizontally since it is related to other FTAA chapters, like, for example, the chapter on services.]

<sup>5</sup> [A delegation advises that a provision will be included to protect the faculty of central banks to restrict transfer rights.]

[1. Each Contracting Party shall permit investors of another Contracting Party the free transfer of investments and income [and in particular, although not exclusively:]]

[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) [contributions to capital;] [the capital and additional sums necessary for the maintenance and development of the investments;]

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;]

[the profits, earnings, income, interest, dividends and other current income;]

[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;] [the wages and salaries of the nationals of a Contracting Party that have obtained authorization to work in a position related to an investment.]

[proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;] [the proceeds from the total or partial sale, or liquidation of an investment;]

[profits, dividends, capital gains, and proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;]

[interest, royalty payments, management fees, and technical assistance and other fees;]

c) [payments made under a contract [entered into by the investor, or its investment,] including [payments made pursuant to] a loan agreement; [and]] [funds in repayments of loans related to an investment;] [funds for the reimbursement of loans directly linked to a specific investment;]

d) [payments [derived from compensation for expropriation] [made in accordance with the Article on Expropriation]; and payments arising out of the application of the provisions [of the dispute settlement mechanism] [relating to the Section on dispute settlement] [relating to the mechanism of dispute settlement between a Party and an investor of another Party] [of the dispute settlement mechanism set out in section B of this Chapter].]

[compensation [pursuant to] [owed to an investor by virtue of matters related to] (expropriation article) and (compensation for losses article) and payments arising out of an investment dispute.]

[the compensation and other payments made as a result of expropriations and compensations;]

e) [royalties, fees and any other payment related to intellectual property or intangible rights, including copyright and industrial property such as patents, industrial designs, marks, trade names, technical procedures, know-how and also royalties and fees deriving from licenses for prospecting, extracting and exploiting natural resources;]

[2. [With respect to spot transactions in the currency to be transferred,] Each Party shall permit transfers [relating to a covered investment] to be made in a [freely convertible currency] [freely usable currency] [on the international financial market] at the market rate of exchange prevailing on the date of transfer.]

[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 Contracting 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 regulations.]

[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 Contracting Party in whose territory the investment was made.]

[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.]

[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.]

[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.]

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

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

[6. 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;] [bankruptcy or insolvency]]
- 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; or ii) concerning reports or records of transfers; or]]
- c) [criminal or penal offenses [or administrative offenses] [or the rulings of administrative or legal proceedings;]]
- 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; or] [financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;]]
- e) [[ensuring the satisfaction of judgments] [or awards] [in adjudicatory proceedings] [or court orders]; [or,] [ensuring compliance with [orders or] judgments in judicial [or administrative] proceedings.] [guarantee of enforcement of warrants or judgments in judicial proceedings]]
- 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.] [Non-fulfillment of tax obligations]
- g) [non-fulfillment of labor obligations]
- h) [social security.]

[7. Paragraph 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 a) through e) of paragraph 6.]

[8. Notwithstanding the provisions of paragraph 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 6.]

[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.]

[9. The provisions of this Chapter shall not prevent Contracting Parties from enforcing [in exceptional cases or [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 [envisaged in International Agreements] [in a manner that is equitable, non- discriminatory and in good faith].]

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

[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.]

[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 the Section on Settlement of Disputes between a Party and an investor of another Party.

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.

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.

4. Notwithstanding the provisions of paragraphs 1 and 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

5. Paragraph 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 a) through e) of paragraph 4.

6. Notwithstanding the provisions of paragraph 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 4.]

[10. 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 10      EXPROPRIATION AND COMPENSATION**

[1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of the other Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (“expropriation”), except:

- (a) for a public purpose [or for reasons of public order [and] [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 due process of law [and Article] [on Fair and Equitable Treatment] [ \_\_ (Minimum Standard of Treatment)]; and
- (d) on payment of compensation in accordance with [paragraphs 2 through 4] [paragraphs 2, 3, 5 y 9].]

[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.]

[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.]

[1. No Party shall expropriate or nationalize the investments of investors of another Contracting 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 Contracting Parties in accordance with the Law, on a non-discriminatory basis and upon prompt, adequate and effective compensation.]

[2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before [any expropriation measure, adopted, or in the process of being adopted, is announced or published or made known publicly in any other way.] [the expropriation took place (date of expropriation), and shall 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.]

[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.]

[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 the article on Transfers in this Chapter.]

[3. a) Compensation shall be paid without delay and be fully realizable.]

[3. b) If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.]

[4. 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 usable currency in which the investment would have been made] [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 asset] [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.]

[5. Upon payment, compensation shall be freely transferable as provided in Article \_\_\_\_ (Transfers).]

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

[6. 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.]

[6. 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 Contracting Party that adopted it.]

[7. For purposes of this article and for greater certainty, a non-discriminatory measure of general application shall not be considered a measure tantamount to an expropriation of [a debt instrument] [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.]

[8. 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.]

[9. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the TRIPS Agreement.]

[10. 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.]

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

## **Article 11      COMPENSATION FOR LOSSES**

[1. Investors of a Party, whose investments in another Party have incurred losses owing to war or other armed conflict, national state of emergency, uprising, insurrection or riots in the territory of the other Party shall, as a

consequence thereof, receive treatment no less favorable than that accorded to their own investors or to the investors of other States as regards restitution, compensation or other form of indemnification.]

[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.]

[1. Where investors of one of the Contracting Parties incur losses because their investments have been adversely affected as a result of war, armed conflict, state of national emergency, civil strife or other similar events in the territory of the other Contracting Party, the latter shall accord those investors treatment no less favorable than that it accords its own investors and those of any other agreement, with regard to restitution, compensation or other settlement.]

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

[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.]

[1. An investor of a Party which has suffered losses relating to its investment in the territory of another Party due to war or other armed conflict, revolution, national emergency, insurrection, civil disturbance, or similar events shall be accorded by the latter Party, as regards restitution, indemnification, compensation or any other settlement, treatment no less favorable than that which it accords to its own investors or to investors of any third State, whichever is more favorable to the investor.]

[1. Without prejudice to the provisions of the fair and equitable treatment and to paragraph 6 (b) of the article on Reservations and Exceptions, each Party shall accord to the investors of another Party and to the investments of investors of another Party whose investments suffer losses in its territory as a result of armed conflicts or civil strife, non-discriminatory treatment in respect of any measures that it may or maintain in relation to such losses.]

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

(A) requisitioning of its 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,

shall be accorded by the latter Party restitution or compensation which in either case shall be prompt, adequate and effective and, with respect to compensation, shall be in accordance with Article X [expropriation].]

[2. The provisions of the previous paragraph does not apply to existing measures related to subsidies or donations that may be inconsistent with the provisions of the article on national treatment, except for what is provided for in paragraph 6(b) of the article on Reservations and Exceptions.]

[3. 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 12      GENERAL EXCEPTIONS AND RESERVATIONS**

[1. Any Party may present general exceptions, reservations and specific exceptions.]

*General Exceptions*

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

[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) Protect disadvantaged persons/minorities or regions;
- i) 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;
- j) Protect national treasures of artistic, historical, anthropological, paleantological and archaeological value;
- k) Give effect to international obligations including treaties on the avoidance of double taxation; and
- l) Give effect to benefits granted as a result of agreements establishing customs unions, common markets, economic or monetary unions, or similar arrangements.]

[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.]

*Reservations*

[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.]

[1. Articles\_\_\_\_(National Treatment), \_\_\_\_ (Most-Favored-Nation Treatment),\_\_\_\_ (Performance Requirements) [and\_\_\_\_(Senior Management and Boards of Directors)] [and \_\_\_\_ (Senior Management)] shall not apply to:

[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 the Annex on “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.]

[(a) any existing non-conforming measure that is maintained by:

(i) a Party at the national, or federal or state level, as set out in its schedule [in Annex I or III] [in the Annex on Existing Measures]; or

(ii) a local or municipal government.

b) the continuation or prompt renewal of any non-conforming measure referred to in sub-paragraph (a); or

(c) the modification of any non-conforming measure referred to in paragraph (a), to the extent that such modification does not decrease the conformity of the measure, as it existed immediately before the modification, with Articles\_\_\_\_ (National Treatment),\_\_\_\_ (Most-Favored-Nation Treatment),\_\_\_\_(Performance Requirements) [and \_\_\_\_ Senior Management] [and \_\_\_\_ (Senior Management and Boards of Directors)].]

[1. Parties to this Agreement 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.]

[2. Articles \_\_\_\_ (National Treatment), \_\_\_\_ (Most-Favored-Nation Treatment), \_\_\_\_ (Performance Requirements) [and \_\_\_\_ (Senior Management and Boards of Directors)] [and \_\_\_\_ Senior Management] shall not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors or activities, as set out [in section B “Future Measures” of the Annex on Non-Conforming and Future Measures,” which shall be listed at the time of the entry into force of this Agreement] [in its schedule in the Annex on Future Measures] [in Annex II].]

[3. Article\_\_\_\_(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 the Annex on most-favored-nation treatment] [in Annex IV].]

[4. Articles\_\_\_\_(National Treatment),\_\_\_\_(Most-Favored-Nation Treatment) [and \_\_\_\_ (Senior Management and Boards of Directors)] [and \_\_\_\_ Senior Management] do not apply to:

(a) procurements by a Party or a state enterprise; or

(b) subsidies, [or donations] [or grants], including government-supported loans, guarantees and insurance provided by a Party or a State enterprise[, except as provided in Article (Compensation for Losses)].]

[5. No Party shall, under to any measure adopted after the date of entry into force of this Agreement and covered by its schedule to [the Annex on Future Measures] [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.]

[6.The articles on National Treatment and Most-Favored-Nation Treatment do not apply to any measure that constitute exceptions or exemptions from the obligations of a Party under the Agreement on Trade-Related Aspects of Intellectual Property Rights which is part of the WTO Agreement, as specifically stipulated in that Agreement.]

[7. The provisions of:

(a) sub-paragraphs (1)(a), (b) and (c), and 3(a) and (b) of the Article on Performance Requirements shall not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs;

(b) sub-paragraphs (1)(b), (c), (f) and (g), and 3(a) and (b) of the Article on Performance Requirements shall not apply to procurement by a Party or a state enterprise; and

(c) sub-paragraphs 3 (a) and (b) of the Article on Performance Requirements shall not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.]

[8. The articles on National Treatment, Most-Favored-Nation Treatment, Performance Requirements and Senior Management do not apply to functions that are carried out in accordance with special or voluntary investment.<sup>6</sup>]

[9. 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.]

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<sup>6</sup> [One delegation reserves the right to present changes to this paragraph, in relation to special investment regimes.]

**Article 13        DISPUTE SETTLEMENT**

[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.]

[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 the articles of this Agreement regarding national treatment and most-favored-nation treatment.]

[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.]

**[Article 14        STATE-TO-STATE DISPUTES**

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.

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

[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.]]

**Article 15        INVESTOR-STATE DISPUTES**

[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.]

[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.]

**[2. Objective**

Without prejudice to the rights and obligations of the Parties [under the Chapter on Dispute Settlement] [under Chapter XX (Dispute Settlement Procedures)] [Without prejudice to the provisions of the Negotiating Group On 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].]

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

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 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.]

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.

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 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 "Submission of a claim to arbitration" ] the tribunal [established under article 15(14) on Consolidation] shall hear the claims together, unless the Tribunal finds that the legal interests of a disputing Party would be prejudiced.

4. An investment may not submit a claim to arbitration under this section].]

### **[3. Claim by an Investor of a Party on Its Own Behalf**

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.

2. An investor may not make a claim if more than 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.

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

1. 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.

2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three 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.

3. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article \_\_\_ (Claim by an Investor of a Party on Its Own Behalf) arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article \_\_\_ (Submission of a Claim to Arbitration), the claims should be heard together by a Tribunal established under Article \_\_\_ (Consolidation), unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.

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

### **[4. Settlement of a Claim through Consultation and Negotiation**

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

[4. Any dispute that arises between a Contracting Party and an investor of a Contracting 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.]

[4. Disputes arising under this Agreement between one of the Contracting Parties and an investor of the other Contracting Party that has invested in the territory of the former Contracting Party shall to the extent possible, be

settled through amicable consultations between the two parties in dispute. To this end, the investor will send a written communication to the other Party in dispute and they shall avail themselves of any mechanism to settle the dispute.]

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

[5. 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.]

[5. Where the dispute can not be resolved within a period of six 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 Contracting Party in whose territory the investment was made, or
- b) to the national arbitration of the Contracting Party in whose territory the investment was made, or
- c) to international arbitration.]

[5. If the parties do not reach a settlement within the six (6) months from the date of receipt of the communication referred to in the previous article, the dispute may be referred, at the choice of the investor, to any of the following settlement procedures, to which each Contracting Party gives its prior, irrevocable consent.

- a) the competent tribunal of the State in which the investment was made,
- b) international arbitration.

The choice of either of the procedures provided in subparagraphs a) or b) shall be final; therefore once the dispute has been referred to any of the said fora, there shall be no recourse to the other.]

#### **[6. Notice of Intent to Submit a Claim to Arbitration**

The disputing investor shall deliver to the disputing Party written notice of its intention to submit a claim to arbitration at least 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 \_\_\_\_ (Claim by an Investor of a Party 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.]

#### **[7. Submission of a Claim to Arbitration**

1. [Provided that 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 3,] [provided that 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].]

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

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

[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.]

[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.]

[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.]]

[7. 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 Contracting Parties have signed it and are members thereof.

c) Where one of the Contracting 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.

Once an investor has submitted the dispute to the competent court of the Contracting 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.]

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

1. 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.
2. Failing the above, the ICSID Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings.
3. 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).]

[7. 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.

Where an investor has submitted a dispute for settlement in accordance with sub-paragraph (a), (b) or (c) above, the choice shall be final.

Provided that the national or company concerned has not submitted the dispute for resolution under sub-paragraph (a) or (b), and that six 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:

- i) 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
- ii) An Arbitral Tribunal established in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or
- iii) If agreed by both parties to the dispute, to any other arbitration institution or in accordance with any other arbitration rules.

A national or company, notwithstanding that it may have submitted a dispute to binding arbitration under sub-paragraph (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.]

#### **[8. Conditions Precedent to Submission of a Claim to Arbitration**

1. A disputing investor may submit a claim [on its own behalf] to arbitration [under this section] [under Article \_\_\_\_ (Claim by an Investor of a Party on Its Own Behalf)] 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 15(3), 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 in the article "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 \_\_\_\_ (Claim by an Investor of a Party on Its Own Behalf), 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.]

2. A disputing investor may submit a claim [, on behalf of an enterprise] [under this section,] [under Article \_\_\_\_ (Claim by an Investor of a Party 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 15(3); 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 \_\_\_\_ (Claim by an Investor of a Party 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 "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.]

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.

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

(a) a waiver from the enterprise under paragraph 1(b) or 2(b) shall not be required; and

(b) [Article 15(7)(4)] [paragraph 15(7)(5) of the Article on Submission to a Claim to Arbitration] [Annex \_\_\_ ] shall not apply.]]

**[9. Consent to Arbitration**

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.]

2. The [consent given by paragraph 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.]

**[10. Number of Arbitrators and Method of Appointment**

[Except in respect of a Tribunal established [under Article 15(10)] [under Article \_\_\_ (Consolidation),] and unless the disputing parties otherwise agree,] [Except as provided for under the article “Consolidation,” and unless the disputing parties agree otherwise,] the Tribunal shall comprise three 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.]

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

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

1. The [ICSID] Secretary-General shall serve as appointing authority for an arbitration under this Section.

2. If a Tribunal, other than a Tribunal established [under Article 15(14) (Consolidation),] [under Article \_\_\_ (Consolidation),] has not been constituted within [ninety (90)] [90] days from the date that a claim is submitted to arbitration, the 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 paragraph 3. [In any event, the majority of the arbitrators may not be nationals of one of the disputing parties] [; or,]

3. The Secretary-General shall appoint the presiding arbitrator from the roster of presiding arbitrators referred to [in paragraph 4.] [under article 15(12) (Roster of Arbitrators)] [in the article “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.]]

**[12. Roster of Arbitrators]**

[4.] 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)] [of \_\_\_\_ ] [of 5] presiding arbitrators, [or from which to appoint the arbitrators to a Tribunal, pursuant to Article 15(14) (Consolidation), with experience in international law and investment-related matters and meeting the qualifications established in the Convention and Rules referred to in article 15(7).] [none of whom could be national of a Party, meeting the qualifications of the Convention and rules referred to in Article \_\_\_\_ (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 paragraph 5 of the article “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].]

**[13. Agreement to Appointment of Arbitrators in Case of ICSID Arbitration]**

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 15(11)(3)] [Article \_\_\_\_ (Constitution of a Tribunal When a Party Fails to Appoint an Arbitrator or the Disputing Parties Are Unable to Agree on a Presiding Arbitrator) (3)] 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 \_\_\_\_ (Claim by an Investor of a Party on Its Own Behalf)] 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 \_\_\_\_ (Claim by an Investor of a Party 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].]

**[14. Consolidation]**

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.

2. Where a Tribunal [established under this Article] is satisfied that claims have been submitted to arbitration [under Article 15(8) (Conditions Precedent to Submission of a Claim to Arbitration)] [under Article \_\_\_\_ (Notice of Intent to Submit a Claim to Arbitration)] [under the article “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.

3. A disputing party that seeks an order under paragraph 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.

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

5. Within [sixty (60)] [60] days of receipt of the request, the Secretary-General shall establish a Tribunal comprising [three (3)] [three] arbitrators. The Secretary-General shall appoint [the presiding arbitrator] from the roster referred to [in Article 15(12) (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 \_\_ (Constitution of a Tribunal When a Party Fails to Appoint an Arbitrator or the Disputing Parties Are Unable to Agree on a Presiding Arbitrator) (4).] [above 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 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 other members from the roster referred to [in Article 15(12) (Roster of Arbitrators)] [in Article (Constitution of a Tribunal When a Party Fails to Appoint an Arbitrator or the Disputing Parties Are Unable to Agree on a Presiding Arbitrator) (4),] [in the respective article] 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.

6. Where a Tribunal has been established [under this Article,] a disputing investor that has submitted a claim to arbitration [under Article 15(3)] [under Article \_\_ (Claim by an Investor of a Party on Its Own Behalf) or (Claim by an Investor of a Party on Behalf on an Enterprise)] [under the corresponding article] and that has not been named in a request made under paragraph 3 may make a written request to the Tribunal that it be included in an order made under paragraph 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.

[7. A disputing investor referred to in paragraph 6 shall deliver a copy of its request to the disputing parties named in a request made under paragraph 3.]

8. A Tribunal [established under Article 15(7) (Submission of a Claim to Arbitration)] [established under Article \_\_ (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.

9. On application of a disputing party, a Tribunal [established under this Article,] pending its decision under paragraph 2, may order that the proceedings of a Tribunal [established under Article 15(7)] [established under Article \_\_ (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.]

[10. A disputing Party shall deliver to the Secretariat, within 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.

11. A disputing Party shall deliver to the Secretariat a copy of a request made under paragraph 3:

(a) within 15 days of receipt of the request, in the case of a request made by a disputing investor;

(b) within 15 days of making the request, in the case of a request made by the disputing Party.

12. A disputing Party shall deliver to the Secretariat a copy of a request made under paragraph 6 within 15 days of receipt of the request.

13. The Secretariat shall maintain a public register of the documents referred to in paragraphs 10, 11 and 12.]

[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.]]

**[15. Notice**

1. A disputing Party shall deliver to the Secretariat, within [(fifteen) 15 days] [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.]

2. A disputing Party shall deliver to the Secretariat a copy of a request made under [Article 15(4) (3)] [paragraph 3 of the article "Consolidation"]:

(a) within [fifteen (15)] [15] days of receipt of the request, in the case of a request made by a disputing investor;

(b) within [fifteen (15)] [15] days of making the request, in the case of a request made by the disputing Party.

3. [A] [The] disputing Party shall deliver to the Secretariat a copy of a request made under paragraph 6 within [fifteen (15)] [15] days of receipt of the request.

4. The Secretariat shall maintain a public register of the documents referred to in paragraphs 1, 2, and 3.

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 30 days after the date that the claim is submitted; and

b) copies of all pleadings filed in the arbitration.]

**[15. Notice**

A disputing Party shall deliver to the other Parties:

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

**[16. Participation by a Party**

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.]

**[17. Documents**

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

- (a) the evidence that has been tendered to the Tribunal; and
- (b) the written argument of the disputing parties.

2. A Party receiving information pursuant to paragraph 1 shall treat the information as if it were a disputing Party.]

**[18. Place of Arbitration**

[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.]

[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.]]

[18. Any arbitration under sub-paragraph 4(a) (i), (ii), or (iii) 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.]

**[19. Governing Law**

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.

2. An interpretation by the Commission [in accordance with the article on the Administrative Commission of the Agreement] of a provision of [this Chapter] [this Agreement] shall be binding on a Tribunal established under this Section.]

[19. The arbitral tribunal shall decide the dispute according to the provisions of this Agreement, the law of the Contracting 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.]

[19. In the case of arbitration, the Arbitral Tribunal shall issue its award pursuant to the provisions of this Agreement, the legislation of the parties involved in the dispute, including rules on conflict of laws, and the accepted principles of International Law.

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

#### **[20. Interpretation of Annexes**

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 the article on the Administrative Commission of the Agreement]. The Commission, [in accordance with the article on the Administrative Commission of the Agreement,] within [sixty (60)] [60] days of delivery of the request, shall submit in writing its interpretation to the Tribunal.

2. [Further to Article \_\_\_ (Governing Law) (2),] The interpretation of the Commission submitted under paragraph 1 shall be binding on [any] [the] Tribunal [established under this section.]. If the Commission fails to submit an interpretation within [sixty (60)] [60] days, the Tribunal shall decide the issue.]

#### **[21. Expert Reports**

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.]

#### **[22. Interim or Precautionary Measures**

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 15(3)] [any compliance with or suspension of the measure alleged to be a breach of the provisions of the article “Claim by an investor of a Party on its own behalf or on behalf of an enterprise”].]

#### **[22. Interim Measures of Protection**

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 (Claim by an Investor of a Party on Its Own Behalf) or (Claim by an Investor of a Party on Behalf of an Enterprise). For purposes of this paragraph, an order includes a recommendation.]

**[23. Final Award**

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.]

[2. Subject to paragraph 1, where a claim is made under Article \_\_ (Claim by an Investor of a Party on Behalf of an Enterprise) (1):

(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.

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

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

3. Subject to paragraphs 1 and 2, where a claim is made under Article 15(3) 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.

4. For the purposes of paragraphs 1 and 2 the damages shall be determined in the currency in which the investment was made.

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.]

[2. Where a claim is made by an investor on behalf of an enterprise, on the basis of the article “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.

3. A Tribunal established under this section may not order a Party to pay punitive damages.

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.]]

**[24. Finality and Enforcement of the Award**

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.

2. Subject to paragraph 3 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.

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

(a) in the case of a final award [under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules:] [made under the ICSID Convention:]

(i) [ninety (90)] [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 days (120) days] [3 months] [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.]

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

5. If a disputing Party fails to abide by or comply with a final award, the Commission, [pursuant to the article on the 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, as provided for by the Negotiating Group on Dispute Settlement of this Agreement] [under the State-to-State Chapter on the Settlement of Disputes to the Agreement.] [under Article \_\_\_\_ (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.

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

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

[24. 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 Contracting Party in whose territory the investment was made.]

[24. 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.]

## **[25. General**

### *Time when a Claim is Submitted to Arbitration*

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.]

### *Service of Documents*

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 Annex \_\_\_\_.] [in the Annex provided for that purpose.]

### *Receipts under Insurance or Guarantee Contracts*

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.

### *Publication of an Award*

4. [Final awards shall not be published unless there is a written agreement between the Parties.] [Annex \_\_\_\_ 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.]]

[26. *Diplomatic Protection*

[5.] [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.]

[26. The Contracting 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.]

[26. If a Contracting Party, or a duly authorized public or private entity of that Contracting Party, compensates one of its own investors through insurance or other guarantee to cover non-commercial risks related to the investor's investment in the territory of the other Contracting Party, the latter Contracting Party shall recognize the subrogation of the former Contracting Party to the rights of the investor under this Agreement, without 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.

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

[27. 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.]

**[28. Exclusions**

An order by a Party that prohibits or restricts under the article on National Security in the Agreement 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 the Chapter on the Settlement of Disputes Among Parties to the Agreement.]

**Article 16      BASIC DEFINITIONS**

[1. For the purpose of this chapter, the following definitions shall apply:]

**2. 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;
- c) the 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 three 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 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:** 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]:

- shares and [any] other form of participation in the capital stock of firms constituted or organized pursuant to the legislation of another Party;
- 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);
- movable and immovable property and other property rights such as mortgages, lien, usufruct, and [similar rights];
- intellectual property rights; and,
- rights conferred by law or contract to carry out economic and commercial activities,

**[but does not include:**

- a payment obligation of the State or a State enterprise and the granting of such credit to the State or a State enterprise; nor
- claims to money derived exclusively from:
  - a) 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
  - b) the granting of credit in relation to a commercial transaction, whose period of maturity is less than three years, such as financing of trade]]<sup>7</sup>

**[Investment means:**

every asset owned or controlled, directly or indirectly, by an investor, that has the characteristics of an investment. Forms that an investment may take include, but are not limited to<sup>8</sup>:

- (a) a company;
- (b) shares, stock, and other forms of equity participation in a company;
- (c) bonds, debentures, other debt instruments, and loans<sup>9</sup>;
- (d) futures, options, and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- (f) money in bank and other similar accounts<sup>10</sup>;
- (g) intellectual property rights;
- (h) concessions, licenses, authorizations, permits, and similar rights conferred pursuant to applicable domestic law<sup>11 12</sup>;

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<sup>7</sup> [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. ]

<sup>8</sup>[Where an asset lacks the characteristics of an investment, that asset is not an investment regardless of the form it may take.]

<sup>9</sup>[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.]

<sup>10</sup> [Some bank accounts, such as those established and maintained in connection with the conduct of commercial activities, are more likely to have the characteristics of an investment, while other bank accounts, such as personal checking accounts, are less likely to have such characteristics. ]

<sup>11</sup>[Whether a particular type of permit, license, authorization, concession or similar instrument has the characteristics of an investment depends upon such factors as the nature and extent of the rights that the holder has under the

(i) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.]

**[“Investment”** shall be understood as meaning resources coming from abroad into the national territory of a Contracting Party, or resources reinvested in that territory, by an investor from another Contracting Party, including assets such as:

- a) Shares, or other type of participation in a company, and any other type of joint ventures, in accordance with domestic legislation;
- b) Movable and immovable property, property rights and other property rights such as leases, mortgages, liens and other privileges, acquired or used for the purpose of obtaining economic benefit, or for other business purposes;
- c) Supplementary contributions to the capital assigned to branches by the head office;
- 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;<sup>13</sup>
- 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 public 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.

**The present definition does not include:**

- a) Tangible or intangible property that is not directly linked to the production investment; 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 Contracting 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 Contracting Party in the territory of the other Contracting 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.

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domestic law of the Party. Among the permits, licenses, authorizations, concessions and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected by domestic law. ]

<sup>12</sup> [The term “investment” does not include an order entered in a judicial or administrative action.]

<sup>13</sup> [Subparagraph d) is without prejudice to the provisions of the chapter on Intellectual Property.]

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**” refers to every kind of asset or related rights, provided it has been made pursuant to all the laws and regulations of the Contracting 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 Contracting Party in whose territory the investment was made.

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

[The term “**investment**” shall refer to every kind of asset invested directly or indirectly by investors from one of the Contracting Parties in the territory of another Contracting Party, in accordance with the laws and regulations of the latter.<sup>14</sup> 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 the present Agreement.]

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

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<sup>14</sup> [One delegation does not recognize the phases preceding the effective realization of an investment as giving rise to rights and obligations in the terms of this Agreement.]

- 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 Contracting Party, for the purpose of establishing lasting economic relations, in the territory of another Contracting Party<sup>15</sup>, through:

- a) The creation or acquisition of the total ownership of an enterprise;
- 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 years,<sup>16</sup>

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

- d) A loan to an enterprise:
  - j) Where the enterprise is an affiliate of the investor, or
  - ii) Where the original maturity of the debt instrument is at least five years<sup>17</sup>,

But does not include a loan to a Contracting 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 Contracting 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.]

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<sup>15</sup> 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, 5<sup>th</sup> ed. OECD, Code of liberalization on Capital Movements and OECD, "Benchmark Definition of Foreign Direct Investment", Paris, 1996.

<sup>16</sup> Concept referred in the OECD Code of liberalization on Capital Movements.

<sup>17</sup> Term referred in the OECD Code of liberalization on Capital Movements.

### 3. 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** means:

- (a) a natural person who is a national of a Party in accordance with its applicable law; or
- (b) a company of a Party

that seeks to make, is making, or has made an investment.

A dual national shall be deemed to be exclusively a national of the State of his/her dominant and effective nationality.]

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

- a) The natural person who, in compliance with domestic legislation, is considered a citizen of a Contracting Party and has made investments in the territory of another Contracting 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 Contracting Party, which has made investments in the territory of another Contracting Party.

The present Agreement shall not apply to the investments made by natural persons who, simultaneously, have the nationality of the Contracting Party in which the investment is made and the nationality of the other Contracting 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 Contracting Party, pursuant to this Chapter:

- a) A natural person or individual who, under the legislation of the Contracting 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 Contracting Party, that has its seat, as well as effective economic activities, in the territory of said Contracting Party;
- c) The legal entities constituted under the legislation of any country, that are directly or indirectly controlled by nationals of a Contracting Party, in the territory of the Contracting Party where the legal entity conducts effective economic activities.]

[The term **“investor”** shall refer to:

- a) Any natural person who is a citizen of one of the Contracting 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 Contracting Parties in the territory of another Contracting Party, if said persons, at the time of the investment, are permanent

residents of or are domiciled in the latter Contracting 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 Contracting Party, and having its seat in the territory of said Contracting 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).]

#### 4. [Other Terms]

**[capital shares or debt instruments** include shares with or without voting rights, bonds or convertible debt instruments, stock options and warrants;]

**[Company** means:

an entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled. Forms that a company may take include a corporation, trust, partnership, sole proprietorship, branch, joint venture, association, or similar organization.]

**[A company or other legal entity is:**

- 1) substantially owned if more than 50 per cent of the equity interest therein is beneficially owned by nationals of a Party;
- 2) effectively controlled if nationals of a Party have the power to name a majority of its directors or otherwise legally to direct its actions.]

**[Company of a Party** means: a company organized or constituted under the laws of that Party.]

**[Covered investment** means:

an investment of an investor of a Party in the territory of another Party. Covered investments shall include those existing at the date of entry into force of this agreement as well as to those established or acquired thereafter.]

#### **[Dispute settlement-related terms]**

**[disputing investor:** an investor who makes a claim under [section C] [section XX (Dispute Settlement between a Party and an Investor of another Party) of this chapter];]

**[disputing Party:** a Party against which a claim is made under section [C] [XX (Dispute Settlement between a Party and an Investor of another Party) of this chapter];]

**[disputing party:** the disputing investor or the disputing Party;]

**[disputing parties:** the disputing investor and the disputing Party;]

**[ICSID:** International Centre for the Settlement of Investment Disputes;]

**[Secretary-General:** Secretary-General of ICSID;]

**[ICSID Convention:** Convention on the Settlement of Investment Disputes between States and Nationals of other States, done in Washington, D.C. on March 18, 1958;]

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

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

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

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

**[tribunal:** an arbitration tribunal established pursuant to Article [xx.xx] [... (Section on settlement of disputes between a Party and an investor of another Party); or an arbitration tribunal established pursuant to Article ... (Section on settlement of disputes between a Party and an investor of another Party)];]

**[consolidation tribunal:** an arbitration tribunal established pursuant to article x.xx.]

**[Earnings and related terms]**

**[Earnings** shall be understood to mean] [The term “**earnings**” refers to all] the sums [obtained from or] produced by an investment, such as profits, income, dividends, [interest,] royalties and [any other net income] [other current incomes].]

[“**Investment revenues**” refers to the returns produced by an investment or associated with it, and include profits, dividends and interest, appreciation, fees and in-kind income.]

**[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 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.]

**[financial institution:** any financial intermediary or other enterprise, duly authorized to do business, and regulated or supervised as a financial institution under the legislation of the Party in whose territory it is located;]

**[freely usable currency:** 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;]

**[government services or functions:** any service provided by a public institution, that is not provided under commercial conditions or in competition with one or more service providers;]

**[Investment Authorization**<sup>18</sup> means:  
an authorization granted by the foreign investment authority of a Party to a covered investment or an investor of another Party.]

**[investment of an investor of a Party:** 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]]

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<sup>18</sup> [This definition is needed to give content to investment dispute settlement provisions later in the chapter. Actions taken by an agency of a Party to enforce laws of general application such as competition law do not come within this definition.]

**[juridical person of a Party:** any legal entity duly constituted or organized in another manner pursuant to the applicable legislation of that Party, whether for profit or not for profit, and whether privately owned or publicly owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association]

**[juridical person owned or directly controlled by an investor:** If the investor has full ownership of more than fifty percent (50%) of its capital stock or has the power to appoint the majority of its directors or to legally direct, in some other manner, the operations thereof.]

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

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

**[natural person of a Party:** a natural person that is a national of that Party, pursuant to its legislation.]

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

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

**[person of a Party:** a national or an enterprise of a Party, not including a branch of an enterprise of a non-Party;]

**[State enterprise:** [an enterprise] [a company] owned or controlled through ownership interests by a Party;]

**[State enterprise:** a juridical person owned or directly controlled by a Party.]

**[Territory:** 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 Contracting 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**” shall refer to the national territory of each Contracting Party, including those maritime zones adjacent to the outer limit of its territorial waters over which the Contracting Party involved can, under international law, enforce sovereign rights and exercise jurisdiction.]

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

**[Others]**

**[goods:** the domestic products or merchandise, whether or not originating, as they are understood in the GATT 1994;]

**[Comission:** the commission established pursuant to article X.XX]

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

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

**[GATT 1994:** the 1994 General Agreement on Tariffs and Trade, which forms part of the Marrakesh Agreement by which the World Trade Organization was established;]

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

**[Article 17      TRANSPARENCY**

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.

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.

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.

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.]

**[Article 18      COMMITMENT NOT TO RELAX DOMESTIC LABOR LAWS TO ATTRACT INVESTMENT**

[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.]

[2. For smaller economies, a commitment not to relax domestic labour laws should be allied with compensating access to the Regional Integration Fund 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**

[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.]

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

**[Article 20      CHAPTER ON INVESTMENT AND ITS RELATIONSHIP WITH OTHER CHAPTERS**

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

**[Article 21      EXTRA-TERRITORIAL APPLICATION OF LAWS ON INVESTMENT-RELATED ISSUES**

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

- i) imposes or seeks to impose an obligation or responsibility on the investors of another Party or on its investments or,
- ii) 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 22      SPECIAL FORMALITIES AND INFORMATION REQUIREMENTS**

1. Nothing in Article (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.

2. Notwithstanding Articles (National Treatment) and (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.]