

Chapter 8
Investment

Section 1
Investment

Article 72
Scope

1. This Chapter shall apply to measures adopted or maintained by a Party relating to:

(a) investors of the other Party;

(b) investments of investors of the other Party in the Area of the former Party; and

(c) with respect to Articles 77 and 87, all investments in the Area of the former Party.

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

3. This Chapter shall not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter 10.

4. This Chapter is subject to Annex 5.

Article 73
National Treatment

Each Party shall accord to investors of the other Party and to their investments made in the Area of the former Party, treatment no less favorable than that it accords, in like circumstances, to its own investors and to their investments with respect to investment activities in its Area.

Article 74
Most-Favored-Nation Treatment

Each Party shall accord to investors of the other Party and to their investments made in the Area of the former Party, treatment no less favorable than that it accords, in like circumstances, to investors of a non-Party and to their investments with respect to investment activities in its Area.

Article 75
General Treatment

Each Party shall accord to investments made in its Area by investors of the other Party, treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

Note 1: Article 75 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments made in the Area of a Party by investors of the other Party. The customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

Note 2: A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of Article 75.

Note 3: Each Party shall accord to investors of the other Party, non-discriminatory treatment with regard to access to the courts of justice and administrative tribunals and agencies of the former Party in pursuit and in defense of rights of such investors.

Article 76
Protection from Strife

1. Each Party shall accord to investors of the other Party that have suffered loss relating to their investments made in the Area of the former Party due to armed conflict, revolution, insurrection, civil disturbance or any other similar event, treatment, as regards restitution, indemnification, compensation or any other settlement, that is no less favorable than that it accords to its own investors or to investors of a non-Party.
2. Any payments as a means of settlement referred to in paragraph 1 shall be fully realizable, freely transferable and freely convertible at the market exchange rate into the currency of the Party of the investors concerned and freely usable currencies.
3. Paragraphs 1 and 2 shall not apply to any subsidies including grants, government supported loans, guarantees and insurance as provided for in subparagraph 5(b) of Article 79.

Article 77
Performance Requirements

1. Neither Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with investment activities of an investor of a Party or of a non-Party in its Area:

- (a) to export a given level or percentage of goods or services;
- (b) to achieve a given level or percentage of domestic content;
- (c) to purchase, use or accord a preference to goods produced or services supplied in its Area, or to purchase goods or services from persons in its Area;
- (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with investments of the investor;
- (e) to restrict sales of goods or services in its Area that investments of the investor produce or supply by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
- (f) to transfer technology, a production process or other proprietary knowledge to a person in its Area except when:
 - (i) the requirement is imposed or the commitment or undertaking is enforced by a court of justice, administrative tribunal or competition authority to remedy a practice determined after judicial or administrative process to be anti-competitive under its competition laws and regulations; or
 - (ii) the requirement concerns the transfer of intellectual property rights which is undertaken in a manner not inconsistent with the TRIPS Agreement; or
- (g) to supply to a specific region or the world market exclusively from its Area, the goods that the investor produces or the services that the investor supplies.

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

- (a) to achieve a given level or percentage of domestic content;
- (b) to purchase, use or accord a preference to goods produced in its Area, or to purchase goods from persons in its Area;
- (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 investments of the investor; or 47

(d) to restrict sales of goods or services in its Area that investments of the investor produce or supply by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

3.

(a) Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with investment activities of an investor of a Party or of a non-Party in its Area, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its Area.

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

(c) Subparagraphs 1(b), 1(c), 1(f), 1(g), 2(a) and 2(b) shall not apply to government procurement.

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

4. Paragraphs 1 and 2 shall not apply to any requirement other than the requirements set out in those paragraphs.

Article 78 Senior Management and Boards of Directors

1. Neither Party may require that an enterprise of that Party that is an investment made in its Area by an investor of the other Party appoint, to senior management positions, individuals of any particular nationality.

2. A Party may require that a majority of the board of directors, or any committee thereof, of an enterprise of that Party that is an investment made in its Area by an investor of the other Party, be of a particular nationality, or resident in the former Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

Article 79 Non-Conforming Measures

1. Articles 73, 74, 77 and 78 shall not apply to:

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

(i) with respect to Chile:

(A) the national government, as set out in its Schedule in Annex 6; or

(B) a local government; and Note: "The national government" includes regional governments.

(ii) with respect to Japan:

(A) the central government or a prefecture, as set out in its Schedule in Annex 6; or

(B) a local government other than prefectures;

(b) the continuation or prompt renewal of any nonconforming measure referred to in subparagraph (a); or

(c) an amendment or a modification to any nonconforming measure referred to in subparagraph (a), to the extent that the amendment or modification does not decrease the conformity of the measure, as it existed immediately before the amendment or modification, with Articles 73, 74, 77 and 78.

2. Articles 73, 74, 77 and 78 shall not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors or activities, as set out in its Schedule in Annex 7.

3. Neither Party may, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule in Annex 7, require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment that exists at the time the measure becomes effective.

4. Articles 73 and 74 shall not apply to any measure that is an exception to, or derogation from, the obligations under the TRIPS Agreement.

5. Articles 73, 74 and 78 shall not apply to:

(a) government procurement; or

(b) subsidies provided by a Party or a state enterprise, including grants, government-supported loans, guarantees and insurance.

Article 80 Notification

1. In the case where a Party makes an amendment or a modification to any existing non-conforming measure as set out in its Schedule in Annex 6, the Party shall notify the other Party, as soon as possible, of such amendment or modification.

2. In the case where a Party adopts any measure after the entry into force of this Agreement, with respect to sectors, sub-sectors or activities as set out in its Schedule in Annex 7, the Party shall, to the extent possible, notify the other Party of such measure.

Article 81 Transfers

1. Each Party shall allow all transfers relating to investments made in its Area by an investor of the other Party to be made freely and without delay into and out of its Area. Such transfers shall include:

(a) the initial capital and additional amounts to maintain or increase such investments;

(b) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance fees and other fees;

(c) proceeds from the sale or liquidation of all or any part of such investments;

(d) payments made under a contract, including payments made pursuant to a loan agreement;

(e) payments made pursuant to paragraphs 1 and 2 of Article 76 and Article 82; and

(f) payments arising under Section 2.

2. Each Party shall allow transfers referred to in paragraph 1 to be made in a freely usable currency at the market rate of exchange prevailing on the date of each transfer.

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

(a) bankruptcy, insolvency, or the protection of the rights of creditors;

(b) issuing, trading or dealing in securities or derivatives;

(c) criminal or penal offenses;

(d) reports or record keeping of transfers of currency or other monetary instruments; or

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

4. This Article is subject to Annex 8.

Article 82 Expropriation and Compensation

1. Neither Party may expropriate or nationalize investments made in its Area by investors of the other Party either directly or indirectly through measures equivalent to expropriation or nationalization (hereinafter referred to as "expropriation"), except:

(a) for a public purpose;

(b) on a non-discriminatory basis;

(c) on payment of prompt, adequate and effective compensation in accordance with paragraphs 2 through 4; and

(d) in accordance with due process of law and Article 75.

2. The compensation shall be equivalent to the fair market value of the expropriated investments at the time when the expropriation was officially announced or when the expropriation occurred, whichever is the earlier. The fair market value shall not reflect any change in market value occurring because the expropriation had become publicly known prior to such official announcement or occurrence of the expropriation. The compensation shall be paid without delay and be fully realizable and freely transferable.

3. If payment is made in a freely usable currency, the compensation paid shall include interest, at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

4. If a Party elects to pay in a currency other than a freely usable currency, the compensation paid, converted into the currency of payment at the market rate of exchange prevailing on the date of payment, shall be no less than the sum of the following:

(a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date; and

(b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

5. This Article shall not apply with respect to the grant of compulsory licenses concerning intellectual property rights in accordance with the TRIPS Agreement.

Note: For greater certainty, Article 82 shall be interpreted in accordance with Annex 9.

Article 83 Subrogation

1. If a Party or its designated agency makes a payment to any of its investors pursuant to an indemnity, guarantee or insurance contract, pertaining to an investment made by that investor within the Area of the other Party, the other Party shall:

(a) recognize the assignment, to the former Party or its designated agency, of any right of the investor that formed the basis of such payment; and

(b) recognize the right of the former Party or its designated agency to exercise by virtue of subrogation such right to the same extent as the original right of the investor.

2. For greater certainty, the investor shall continue to be entitled to exercise its rights that have not been subrogated pursuant to paragraph 1.

Article 84
Special Formalities and Information Requirements

1. Nothing in Article 73 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with investment activities of investors of the other Party and their investments made in the Area of the former Party, such as the compliance with registration requirements, or requirements that investors be residents of the Party or that investments be legally constituted under the laws and regulations of the Party, provided that such formalities do not materially impair the protections afforded by the Party to investors of the other Party and their investments pursuant to this Chapter.

2. Notwithstanding Articles 73 and 74, a Party may require investors of the other Party, or their investments made in its Area, to provide information concerning those investments solely for informational or statistical purposes. The Party shall protect such information that is confidential from any disclosure that would prejudice the competitive position of the investors or their investments. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good-faith application of its law.

Article 85
Temporary Safeguard Measures

1. A Party may adopt or maintain measures not conforming with its obligations under Articles 73 and 81, regarding payments and transfers related to an investment:

- (a) in the event of serious balance-of-payments and external financial difficulties or threat thereof; or
- (b) in cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies.

2. Measures referred to in paragraph 1:

- (a) shall be consistent with the Articles of Agreement of the International Monetary Fund;
- (b) shall not exceed those necessary to deal with the circumstances set out in paragraph 1;
- (c) shall be temporary and eliminated as soon as conditions permit;
- (d) shall be promptly notified to the other Party; and
- (e) shall avoid unnecessary damages to the commercial, economic and financial interests of the other Party.

3. Nothing in this Article shall be regarded as altering the rights enjoyed and obligations undertaken by a Party as a party to the Articles of Agreement of the International Monetary Fund.

Article 86
Denial of Benefits

1. A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of the other Party and to its investments if the enterprise is owned or controlled by an investor of a non-Party and the denying Party:

- (a) does not maintain diplomatic relations with the non-Party; or
- (b) adopts or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.

2. A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of the other Party and to its investments if the enterprise is owned or controlled by an investor of a non-Party or of the denying Party and the enterprise has no substantial business activities in the Area of the other Party, subject to prior notification to and consultation with the other Party.

Article 87
Environmental Measures

Each Party recognizes that it is inappropriate to encourage investments by investors of the other Party by relaxing its environmental measures. To this effect each Party should not waive or otherwise derogate from such environmental measures as an encouragement for establishment, acquisition or expansion of investments in its Area.

Section 2
Settlement of Investment Disputes between a Party and an Investor of the Other Party

Article 88
Consultation and Negotiation

In the event of an investment dispute between a Party and an investor of the other Party, they should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures.

Article 89
Submission of a Claim to Arbitration

1. In the event that an investment dispute cannot be settled by consultation and negotiation:

(a) the investor of a Party, on its own behalf, may submit to arbitration under this Section a claim:

(i) that the other Party has breached an obligation under Section 1; and

(ii) that the investor has incurred loss or damage by reason of, or arising out of, that breach; and

(b) the investor of a Party, on behalf of an enterprise of the other Party that is a juridical person that such investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim:

(i) that the other Party has breached an obligation under Section 1; and

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

2. An investment made by an investor of a Party may not submit a claim to arbitration under this Section.

3. For greater certainty:

(a) no claim may be submitted to arbitration under this Section that alleges a violation of any provision of this Agreement other than an obligation under Section 1; and

(b) an investor of a Party may not submit a claim to arbitration under this Section 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.

4. At least 90 days before submitting any claim to arbitration under this Section, an investor of a Party shall deliver to the other Party a written notice of its intention to submit the claim to arbitration (hereinafter referred to as "notice of intent"). The notice of intent shall specify:

(a) the name and address of the investor and, in the case of subparagraph 1 (b), the name, address, and place of incorporation of the enterprise;

(b) the provision of Section 1 alleged to have been breached;

(c) the legal and factual basis for that claim; and

(d) the relief sought and the approximate amount of damages claimed.

5. Provided that six months have elapsed since the events giving rise to the claim, an investor of a Party may submit a claim referred to in paragraph 1:

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

6. A claim shall be deemed submitted to arbitration under this Section when the claimant's notice of or request for arbitration (hereinafter referred to in this Section as "notice of arbitration"):

- (a) referred to in paragraph (1) of Article 36 of the ICSID Convention is received by the Secretary-General;
- (b) referred to in Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General;
- (c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules, is received by the respondent; or
- (d) under any other arbitration institution or arbitration rules selected under subparagraph 5(d) is received by the respondent, unless otherwise specified by such institution or in such rules.

7. The claimant shall provide with the notice of arbitration:

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

8. The arbitration rules applicable under paragraph 5, which are in effect on the date the claim is submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Section.

Article 90 Consent to Arbitration

1. Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Section.

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

- (a) Chapter II of the ICSID Convention and the ICSID Additional Facility Rules for written consent of the parties; and
- (b) Article II of the New York Convention for an agreement in writing.

Article 91 Conditions and Limitations on Consent

1. No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the investor in the case of subparagraph 1(a) of Article 89 or the enterprise in the case of subparagraph 1(b) of Article 89 first acquired, or should have first acquired, knowledge of the breach alleged under paragraph 1 of Article 89 and knowledge that such investor or enterprise had incurred loss or damage.

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

(a) in the case of subparagraph 1(a) of Article 89:

(i) the claimant consents in writing to arbitration in accordance with the procedures set out in this Section;

(ii) the claimant waives in writing any right to initiate before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceedings with respect to any measure alleged to constitute a breach referred to in paragraph 1 of Article 89; and

(iii) the claimant has not initiated any proceedings before any administrative tribunal or court referred to in subparagraph (ii). For greater certainty, if the investor elects to initiate such proceedings, that election shall be definitive and the investor may not thereafter submit the claim to arbitration under this Section; and

(b) in the case of subparagraph 1(b) of Article 89:

(i) both the claimant and the enterprise consent in writing to arbitration in accordance with the procedures set out in this Section;

(ii) both the claimant and the enterprise waive in writing any right to initiate before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceedings with respect to any measure alleged to constitute a breach referred to in paragraph 1 of Article 89; and

(iii) the claimant or the enterprise referred to in subparagraph (ii) has not initiated any proceedings before any administrative tribunal or court referred to in subparagraph (ii). For greater certainty, if the investor or the enterprise elects to initiate such proceedings, that election shall be definitive and neither the investor nor the enterprise may thereafter submit the claim to arbitration under this Section.

3. Notwithstanding subparagraphs 2(a)(ii), 2(a)(iii), 2(b)(ii) and 2(b)(iii), the claimant or the enterprise referred to in subparagraphs 2(b)(ii) and 2(b)(iii) may initiate or continue an action that seeks interim injunctive relief that does not involve the payment of monetary damages before an administrative tribunal or court under the law of the respondent.

Article 92 Establishment of a Tribunal

1. Unless the disputing parties otherwise agree, a 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.

2. If an arbitrator or arbitrators are not appointed pursuant to paragraph 1 within 75 days from the date on which the claim was submitted to arbitration, the Secretary-General may be requested by either disputing party to appoint the arbitrator or arbitrators not yet appointed from the ICSID Panel of Arbitrators subject to the requirements of paragraph 3.

3. Unless the disputing parties agree otherwise, the presiding arbitrator shall not be a national of either Party, nor have his or her usual place of residence in either Party, nor be employed by either disputing party, nor have dealt with the claim in any capacity.

4. The date of establishment of a Tribunal shall be the date on which all the arbitrators have been appointed and accepted such appointment.

Article 93 Governing Law

1. Subject to paragraph 2, when a claim is submitted to arbitration under this Section, a Tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

2. An interpretation of a provision of this Agreement adopted by the Commission shall be binding on a Tribunal, and any award must be consistent with that interpretation. Such interpretation shall be made publicly available through the means that each Party considers appropriate.

Article 94
Interpretation of Annexes

1. Where a respondent asserts as a defense that the measure alleged to be a breach is within the scope of a non-conforming measure set out in Annex 6 or 7, the Tribunal shall, on request of the respondent, request the Commission to adopt an interpretation on the issue. The Commission shall adopt and submit in writing its interpretation to the Tribunal within 60 days of delivery of the request.

2. The interpretation adopted and submitted by the Commission under paragraph 1 shall be binding on the Tribunal, and any award must be consistent with that interpretation. If the Commission fails to submit an interpretation within the aforementioned 60 days period, the Tribunal shall decide the issue.

Article 95
Participation in Arbitration

1. On written notice to the disputing parties, the Party other than the respondent may make submissions to the Tribunal on a question of interpretation of this Agreement.

2. The Party other than the respondent shall be entitled to receive from the respondent, a copy of:

(a) the evidence that has been tendered to the Tribunal; and

(b) the written argument of the disputing parties.

Article 96
Place of Arbitration

Unless the disputing parties agree otherwise, a Tribunal shall hold an arbitration in a country that is a party to the New York Convention.

Article 97
Preliminary Questions

1.

(a) A Tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, the Tribunal may not make an award against the respondent in accordance with Article 103, provided that the respondent so requests as soon as possible after the Tribunal is established, and in no event later than the date the Tribunal fixes for the respondent to submit its counter-memorial. In deciding such objection, the Tribunal shall assume to be true the factual allegations of the claimant in support of any claim in the notice of arbitration. The Tribunal may also consider any relevant facts not in dispute.

(b) Subparagraph (a) shall not prejudice the authority of the Tribunal to address as a preliminary question any objection other than the objection referred to in subparagraph (a), such as an objection that the dispute is not within the competence of the Tribunal.

(c) On receipt of the objection referred to in subparagraph (a), the Tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.

2. In the event that the respondent so requests within 45 days after the date of establishment of the Tribunal, the Tribunal shall address and decide on an expedited basis the objection referred to in subparagraph 1(a) or any objection that the dispute is not within the competence of the Tribunal. The Tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection, stating the grounds therefor, no later than 150 days, or 180 days if a hearing is held or under extraordinary circumstances, after the date of the request.

3. When it decides a respondent's objection pursuant to paragraph 1 or 2, the Tribunal may, if warranted, award to the prevailing disputing party reasonable costs including attorneys' fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the Tribunal shall consider whether

the claimant's claim was frivolous or whether the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

4. The respondent does not waive its right to make any objection or argument on the merits merely because the respondent did or did not make a request pursuant to paragraph 1 or 2.

Article 98 Insurance or Guarantee Contracts

In an arbitration under this Section, the respondent may not assert, as a defense, counterclaim, right of setoff or otherwise, that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract.

Article 99 Interim Measures of Protection

A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to facilitate the conduct of arbitral proceedings, including an order to preserve evidence in the possession or control of a disputing party. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in paragraph 1 of Article 89.

Article 100 Expert Report

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

Article 101 Consolidation of Multiple Claims

1. When a disputing party considers that two or more claims submitted to arbitration under paragraph 1 of Article 89 have a question of law or fact in common and arise out of the same events or circumstances, the disputing party may seek a consolidation order in accordance with the terms of paragraphs 2 through 10.

2. A disputing party that seeks a consolidation order under this Article shall deliver, in writing, a request to the Secretary-General to establish a Tribunal under this Article. The request shall specify:

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

3. Unless the Secretary-General finds within 60 days after receiving a request under paragraph 2 that the claims do not satisfy the requirements set out in paragraph 1, a Tribunal shall be established under this Article.

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

- (a) one arbitrator appointed by agreement of the claimants;
- (b) one arbitrator appointed by the respondent; and
- (c) the presiding arbitrator appointed by the Secretary-General, provided, however, that the presiding arbitrator shall not be a national of either Party, nor have his or her usual place of residence in either Party, nor be employed by any disputing party, nor have dealt with the claims in any capacity.

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

6. Where a claimant that has submitted a claim to arbitration under paragraph 1 of Article 89 considers that such a claim raises a question of law or fact in common to, and arises out of the same events or circumstances as, claims upon which the consolidation under paragraph 2 has been requested, but has not been named in such request, the claimant may make a written request to the Tribunal established under this Article that the claimant be covered by any order made under paragraph 7, and shall specify in the request:

(a) the name and address of the claimant;

(b) the nature of the order sought; and

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

7. Where a Tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration under paragraph 1 of Article 89 have a question of law or fact in common, and arise out of the same events or circumstances, the Tribunal may, in the interest of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

(a) assume jurisdiction over, and hear and determine together, all or part of the claims; 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.

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

9. A Tribunal established under Article 92 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.

10. On application of a disputing party, a Tribunal established under this Article, pending its decision as to whether to make an order under paragraph 7, may order the adjourning of the proceedings of a Tribunal established under Article 92.

11. For greater certainty, the provisions of this Section other than this Article shall apply with respect to a Tribunal established under this Article except to the extent modified by this Article.

Article 102 Proposed Award

A Tribunal shall, at the request of a disputing party, submit to the disputing parties a proposed award, before making an award, except an award issued pursuant to Article 97. The disputing parties may submit to the Tribunal written comments on the proposed award within 60 days after the date of submission of the proposed award. The Tribunal shall consider such comments and make an award within 105 days of the date of submission of the proposed award.

Article 103 Award

1. Where a Tribunal makes an award against the respondent, the Tribunal may award, separately or in combination, only:

(a) monetary damages and any applicable interest; and

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

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

2. Subject to paragraph 1, in the case of subparagraph 1(b) of Article 89:

(a) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and

(b) an award of restitution of property shall provide that restitution be made to the enterprise.

3. A Tribunal may not award punitive damages.

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

5. Subject to paragraph 7, a disputing party shall abide by and comply with an award without delay.

6. If the respondent fails to abide by or comply with an award, the Party other than the respondent may request the establishment of an arbitral tribunal pursuant to Article 178. The requesting Party may seek in such proceedings:

(a) a determination that the failure to abide by or comply with the award is inconsistent with the obligations of this Agreement; and

(b) a recommendation that the respondent abide by or comply with the award.

7. A disputing party may not seek enforcement of an award until such award becomes final. An award becomes final when:

(a) in the case of an award under the ICSID Convention:

(i) 120 days have elapsed from the date the award was made and no disputing party has requested revision or annulment of the award; or

(ii) revision or annulment proceedings have been completed; and

(b) in the case of an award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or the rules selected pursuant to subparagraph 5(d) of Article 89:

(i) 90 days have elapsed from the date the award was made and no disputing party has commenced a proceeding to revise or annul the award; or

(ii) an application to revise or annul the award has been dismissed or allowed and there is no further appeal.

8. Each Party shall provide for the enforcement of an award in its Area in accordance with its relevant laws and regulations.

Article 104 Service of Documents

1. Notices and other documents relating to arbitration under this Section shall be served on a Party by delivery to:

(a) with respect to Japan, the Ministry of Foreign Affairs; and

(b) with respect to Chile, the Ministry of Foreign Affairs, Legal Affairs Directorate (Dirección de Asuntos Jurídicos del Ministerio de Relaciones Exteriores de la República de Chile).

2. The Commission shall make publicly available the addresses of the authorities referred to in paragraph 1.

Section 3
Definitions

Article 105
Definitions

1. For the purposes of this Chapter:

- (a) the term “claimant” means an investor of a Party that submits a claim to arbitration under Section 2;
- (b) the term “disputing parties” means the claimant and the respondent;
- (c) the term “disputing party” means either the claimant or the respondent;
- (d) the term “freely usable currency” means freely usable currency as defined under the Articles of Agreement of the International Monetary Fund;
- (e) the term “ICSID” means the International Centre for Settlement of Investment Disputes;
- (f) the term “ICSID Additional Facility Rules” means the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes;
- (g) the term “ICSID Convention” means the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965;
- (h) the term “investment” means every kind of asset that an investor owns or controls, directly or indirectly, which has the characteristics of an investment. Forms that an investment may take include:

Note 1: The characteristics of an investment include the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.

Note 2: An investment does not include an order or judgment entered in a judicial or administrative action.

- (i) an enterprise and a branch of an enterprise;
- (ii) shares, stocks, and other forms of equity participation in an enterprise;
- (iii) bonds, debentures, loans and other debt instruments, but do not include a debt instrument of a Party or of a state enterprise;
- (iv) futures, options and other derivatives;
- (v) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;
- (vi) intellectual property rights;
- (vii) rights conferred pursuant to domestic law, such as concessions, licenses, authorizations and permits; and
- (viii) other tangible or intangible, movable or immovable property, and any related property rights, such as leases, mortgages, liens and pledges;
- (i) the term “investment activities” means establishment, acquisition, expansion, management, conduct, operation, maintenance, use, enjoyment and sale or other disposition of investments;
- (j) the term “investor of a Party” means a natural person or an enterprise of a Party, or the Party or state enterprise thereof, that attempts to make, is making, or has made investments in the Area of the other Party;

(k) the term “New York Convention” means the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958;

(l) the term “respondent” means a Party against which a claim is submitted to arbitration under Section 2;

(m) the term “Secretary-General” means the Secretary- General of ICSID;

(n) the term “Tribunal” means an arbitration tribunal established under Article 92 or 101; and

(o) the term “UNCITRAL Arbitration Rules” means the arbitration rules of the United Nations Commission on International Trade Law, approved by the United Nations General Assembly on December 15, 1976.

2. For the purposes of this Chapter, an enterprise is:

(a) “owned” by an investor if more than 50 percent of the equity interests in it is beneficially owned by the investor; and

(b) “controlled” by an investor if the investor has the power to name a majority of its directors or otherwise to legally direct its actions in accordance with the laws and regulations of a Party.