

PART FOUR

INVESTMENT, SERVICES AND RELATED MATTERS

**CHAPTER 10
INVESTMENT**

Section A - Investment

Article 10.01 Scope and Coverage

1. This Chapter applies to measures adopted or maintained by a Party relating to:
 - (a) investors of the other Party with respect to all aspects of its investments;
 - (b) investments of investors of the other Party in the territory of the Party; and
 - (c) all investments of the investors of a Party in the territory of the other Party with regard to Article 10.07.

2. This Chapter does not apply to:
 - (a) measures adopted or maintained by a Party in relation to financial services;
 - (b) measures adopted by a Party to limit the participation of investment of investors of the other Party in its territory for reasons of public order or national security;
 - (c) economic activities reserved by each Party pursuant to its law in force on the date of the signing of this Agreement, as listed in Annex III on economic activities reserved to each Party;
 - (d) government services or functions such as law enforcement, correctional services, income security or unemployment insurance, social security services, social welfare, public education, public training, health, and child care;
 - (e) disputes or claims arising 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; and

- (f) government procurement.

3. This Chapter applies to the entire territory of the Parties and to any level of government regardless of any inconsistent measures that may exist in the law of these government levels.

4. Notwithstanding the provisions of paragraph 2(d), if a duly authorized investor from a Party provides services or carries out functions such as correctional services, income security or unemployment insurance, social security services, social welfare, public education, public training, health, and child care, the investment of this investor shall be protected by the provisions of this Chapter.

5. This Chapter shall apply to both investments made prior to and after the entry into force of this Agreement, by investors of a Party in the territory of the other Party.

Article 10.02 National Treatment

1. Each Party shall accord to investors of the other 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.

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

Article 10.03 Most-Favored-Nation Treatment

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

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

Article 10.04 Fair and Equitable Treatment

Each Party shall accord to investors of the other Party and their investments treatment in accordance with international law, including fair and equitable treatment as well as full protection and security.

Article 10.05 Standard of Treatment

Each Party shall accord to investors of the other Party and to investments of investors of the other Party the better of the treatment required by Articles 10.02, 10.03 and 10.04.

Article 10.06 Compensation for Losses

Each Party shall accord the investors of the other Party whose investments have been adversely affected in its territory due to armed conflict, state of emergency, insurrection, or civil strife, non-discriminatory treatment on any measure adopted or maintained in relation to such losses.

Article 10.07 Performance Requirements

1. No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of the other Party in its territory:

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

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

2. No Party may condition the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of the other Party, on compliance with any of the following requirements:

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

- (c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment.

This paragraph does not apply to any requirements other than indicated herein.

3. The provisions included in:

- (a) paragraph 1(a), (b), and (c) and paragraph 2(a) and (b) do not apply to requirements relating to the qualification of goods and services for programs of export promotion and foreign aid programs;
- (b) paragraph 1(b) and (c) and paragraph 2(a) and (b) do not apply to the procurement by a Party or by a state enterprise; and
- (c) paragraph 2(a) and (b) does not apply to the requirements imposed by an importing Party related to the contents of a good necessary to qualify it for preferential tariffs or quotas.

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

5. Provided that these measures are not applied in an arbitrary or unjustified manner or do not constitute a disguised restriction to international trade or investment, nothing in paragraph 1(b) or (c) or 2(a) or (b) shall be construed to prevent a Party from adopting or maintaining measures, including environment measures, necessary to:

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

6. In the case where, in opinion of a Party, the imposition by the other Party of any of the following requirements shall adversely affect trade flows or constitutes a significant barrier to investment by an investor of a Party, the matter shall be considered by the Commission:

- (a) 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;
- (b) to transfer technology, production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or
- (c) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market.

7. A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent with paragraph 6(b). For greater certainty, Articles 10.02 and 10.03 apply to the measure.

8. If the Commission finds that the imposition of any of the above requirements adversely affects the trade flow, or represents a significant barrier to investment by an investor of the other Party, it shall recommend that the practice in question be suspended.

Article 10.08 Senior Management and Boards of Directors

1. No Party may require that an enterprise of that Party that is an investment of 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, of an enterprise of that Party that is an investment of an investor of the other 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.

Article 10.09 Reservations and Exceptions.

1. Articles 10.02, 10.03, 10.07 and 10.08 do not apply to:

- (a) any existing non-conforming measure that is maintained by:
 - (i) a Party at the national level, as set out in its Schedule to Annex I or III,
or

(ii) a local or municipal government;

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

(c) the amendment of any non-conforming measure referred to in subparagraph (a), provided that this amendment does not decrease the conformity of the measure as it existed before its amendment by Articles 10.02, 10.03, 10.07, and 10.08.

2. Articles 10.02, 10.03, 10.07 and 10.08 shall not apply to any measure adopted or maintained by a Party in relation to sectors, sub-sectors or activities, as are indicated in their Schedule to Annex II.

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

4. Article 10.03 does not apply to treatment accorded by a Party under agreements, or with respect to sectors included in its Schedule to Annex IV.

5. Articles 10.02, 10.03 and 10.08 do not apply to:

(a) procurement by a Party or a state enterprise; and

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

Article 10.10 Transfers

1. Each Party shall permit all transfers relating to an investment of an investor of the other 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 pursuant to Article 10.11; and
- (e) payments arising from the mechanism of dispute settlement under section B of this Chapter.

2. Each Party shall permit transfers to be made without delay in a freely convertible currency at the market rate of exchange prevailing on the date of transfer.

3. 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 the other Party.

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

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

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

Article 10.11 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 public order and social interest;

- (b) on a non-discriminatory basis;
- (c) in accordance with due process of law; and
- (d) on payment of compensation in accordance with this Article.

2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

3. Compensation shall be paid without delay and be fully realizable.

4. The amount paid as compensation shall be no less than the equivalent amount that would have been paid on that date to the expropriated investor in a currency of free convertibility in the international financial market according to the exchange rate in force on the date in which the fair market price was determined. The compensation shall include the payment of interests computed from the day of dispossession of the expropriated investment until the day of payment, and shall be computed on the basis of a commercially applicable rate for this currency set by the national bank system of the Party where the expropriation occurred.

5. Upon payment, the compensation shall be freely transferable according to Article 10.10.

6. 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 TRIPS.

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 security or loan covered by this Chapter solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.

Article 10.12 Special Formalities and Information Requirements

1. Nothing in Article 10.02 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 the other Party, such as a requirement that investors be residents of the Party or that investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not materially impair

the protections afforded by a Party to investors of the other Party and investments of investors of the other Party pursuant to this Chapter.

2. Notwithstanding Articles 10.02 and 10.03, a Party may require an investor of the other 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 would prejudice the competitive position of the investor or the investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.

Article 10.13 Relation to Other Chapters

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

2. A requirement by a Party that a service provider of the other Party post a bond or other form of financial security as a condition of providing a service into its territory does not of itself make this Chapter applicable to the provisions of that of cross border service. This Chapter applies to that Party's treatment of the posted bond or financial security.

Article 10.14 Denial of Benefits

Upon notification and consultation done according to Articles 17.04 (Provision of Information) and 19.06 (Consultations), a Party may deny the benefits under this Chapter to an investor of the other Party that is an enterprise of such other Party and to the investment of this investor, if investors of a non Party are owners of or control the enterprise under the terms set out in the definition "investment" of an investor of a Party according to Article 10.39 and the enterprise has no substantial business activities in the territory of the Party under whose law it is constituted or organized.

Article 10.15 Environmental Measures

1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken under its ecological or environmental laws.

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

**Section B-Settlement of Disputes between a Party
and an Investor of the other Party**

Article 10.16 Purpose

Without prejudice to the rights and obligations of the Parties under Chapter 19 (Dispute Settlement), this Section establishes a mechanism for the settlement of investment disputes arising from the violation of obligations established under Section A of this Chapter that assures both equal treatment among investors of the Parties in accordance with the principle of reciprocity and due process before an impartial tribunal.

Article 10.17 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 on the grounds that the other Party or an enterprise controlled directly or indirectly by the other Party, has breached an obligation under this Chapter if the investor has suffered losses or damages from the violation of this Chapter.

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 suffered losses or damages.

Article 10.18 Claim by an Investor of a Party on Behalf of an Enterprise

1. An investor of a Party, on behalf of an enterprise of the other Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party or an enterprise controlled directly or indirectly by that Party has breached an obligation under this Chapter, whenever the enterprise has suffered losses or damages due to that violation or arising therefrom.

2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than 3 years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has suffered losses or damages.

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 10.17 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 10.21, the claims should be heard together by a Tribunal established under Article 10.27, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.

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

Article 10.19 Settlement of a Claim through Consultation and Negotiation

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

Article 10.20 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 ninety (90) days before the claim is submitted, which notice shall specify:

- (a) the name and address of the disputing investor and, where a claim is made under Article 10.18, the name and address and the type of business of the enterprise;
- (b) the provisions of this Chapter alleged to have been breached and any other relevant provisions;
- (c) the issues and the factual basis for the claim; and
- (d) the relief sought and the approximate amount of damages claimed.

Article 10.21 Submission of a Claim to Arbitration

1. Provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under:

- (a) 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;
- (c) the UNCITRAL Arbitration Rules; or
- (d) the ICC Arbitration Rules.

2. The applicable arbitration rules shall govern the arbitration established in this Chapter except to the extent modified by this Section.

Article 10.22 Conditions Precedent to Submission of a Claim to Arbitration

1. Consent of the disputing parties in the arbitration procedure according to this Chapter shall be considered as a consent to this arbitration that excludes any other procedure.

2. Each Party may demand the exhaustion of its local administrative remedies as a condition for consenting to the arbitration under this Chapter. Nevertheless, if 6 months have elapsed from the date on which the administrative remedies were lodged and the administrative authorities have not issued a final resolution, the investor may directly appeal to arbitration, according to the provisions of this Section.

3. A disputing investor may submit a claim under Article 10.17 to arbitration only if:

(a) the investor consents to arbitration in accordance with the procedures set out in this Section; and

(b) the investor and, where the claim is for losses or damages to an interest in an enterprise of the other Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 10.17, 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.

4. A disputing investor may present a claim to the arbitration procedure according to Article 10.18 only if both investor and enterprise:

(a) consent to submit the claim to arbitration in accordance with the procedures set out in this Section; and

(b) waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 10.18, except for a proceeding 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.

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

6. The waiver by the enterprise, under paragraphs 3(b) and 4(b), shall not be required if, and only if, the disputing Party had deprived the disputing investor of the control of an enterprise.

Article 10.23 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 Section.

2. The consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration shall be deemed as having satisfied the requirement of:

(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties; and

(b) Article II of the New York Convention for an agreement in writing.

Article 10.24 Number of Arbitrators and Method of Appointment

Except in respect of a Tribunal established under Article 10.27, and unless the disputing parties otherwise agree, the Tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator of the Tribunal, appointed by agreement of the disputing parties.

Article 10.25 Constitution of a Tribunal When a Party Fails to Appoint an Arbitrator or the Disputing Parties Are Unable to Agree on a Presiding Arbitrator

1. In the event a disputing party does not appoint an arbitrator or an agreement is not reached about the appointment of the presiding arbitrator of the Tribunal, the arbitrator or the presiding arbitrator of the Tribunal in the arbitration proceeding shall be designated, according to this Section.

2. Where a Tribunal, not being the one created according to Article 10.27, is not constituted within a period of ninety (90) days from the date on which the claim is submitted to arbitration, the Secretary-General of the ICSID, the Secretary-General of the ICC or an appropriate official at an international organization agreed upon by the disputing parties (hereinafter the Secretary-General), shall appoint the not yet appointed arbitrator or arbitrators, except for the presiding arbitrator of the Tribunal who shall be

appointed according to paragraph 3. In any case, the majority of arbitrators may not be nationals of the disputing Party or the Party of the disputing investor.

3. The Secretary-General shall appoint the presiding arbitrator of the Tribunal from the roster of arbitrators referred to in paragraph 4, ensuring that the presiding arbitrator of the Tribunal is not a national of the disputing Party or a national of the Party of the disputing investor. In case of not finding in the roster an available arbitrator to head the Tribunal, the Secretary-General shall appoint from the roster of arbitrators of the ICSID the presiding arbitrator of the Tribunal, provided that he or she is of a nationality different from the disputing Party or from the Party of the disputing investor.

4. On the date of entry into force of this Agreement, the Parties shall establish and maintain a roster of six (6) arbitrators as possible presiding arbitrators of the Tribunal, none of which may be national of a Party, who comply with the rules contemplated in Article 10.21 and have experience in International Law and in investment matters. The members of the roster shall be appointed by mutual agreement, regardless of nationality, for a period of two (2) years that may be extended if the Parties so decide. In case of death or resignation of one member of the roster, the Parties shall appoint by mutual agreement the other person to substitute him or her in its functions for the remaining period to which the former person was appointed.

Article 10.26 Agreement to Appointment of Arbitrators

For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator based on Article 10.25(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;
- (b) a disputing investor referred to in Article 10.17 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 agrees in writing to the appointment of each individual member of the Tribunal; and
- (c) a disputing investor referred to in Article 10.18(1) may submit a claim to arbitration, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the disputing investor and the enterprise agree in writing to the appointment of each individual member of the Tribunal.

Article 10.27 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 10.21 that have a question of law or fact in common, the Tribunal may, in the interests 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.

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 a copy of the request to the disputing Party or disputing investors against which the order is sought.

5. Within sixty (60) days of receipt of the request, the Secretary-General shall establish a Tribunal comprising three arbitrators. The Secretary-General shall appoint the presiding arbitrator from the roster referred to in Article 10.25(4). 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 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 10.25(4), 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 the 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 10.17 or 10.18 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, address and the type of business of the enterprise of the disputing investor;
- (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 10.21 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 10.21 be stayed, unless the latter Tribunal has already adjourned its proceedings, until there is a decision about the propriety of consolidation.

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;
- (c) a notice of arbitration given under the UNCITRAL Arbitration Rules; or
- (d) a request for arbitration made under ICC Arbitration Rules.

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

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

Article 10.28 Notice

A disputing Party shall deliver to the other Party:

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

Article 10.29 Participation by a Party

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

Article 10.30 Documents

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

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

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

Article 10.31 Venue of Arbitration

Unless the disputing parties agree otherwise, a Tribunal established under this Section shall hold an arbitration in the territory of 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;
- (b) the UNCITRAL Arbitration Rules if the arbitration is under those Rules; or
- (c) the ICC Arbitration Rules if the arbitration is under those Rules.

Article 10.32 Governing Law

1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.
2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.

Article 10.33 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 those Annexes, on request of the disputing Party, the Tribunal shall request the interpretation of the Commission on the issue. The Commission, within sixty (60) days of delivery of the request, shall submit in writing its interpretation to the Tribunal.
2. Further to Article 10.32(2), a Commission interpretation submitted under paragraph 1 shall be binding on the Tribunal established under this Section. If the Commission fails to submit an interpretation within sixty (60) days, the Tribunal shall decide the issue.

Article 10.34 Expert Reports

Without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, a Tribunal, at the request of a disputing party or, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning the controversy.

Article 10.35 Interim Measures of Protection

A Tribunal established under this Section may request, or the disputing parties may petition to, in accordance with domestic legislation, national courts for imposing 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. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach

referred to in Article 10.17 or 10.18.

Article 10.36 Final Award

1. Where a Tribunal established under this Section makes a final award against a Party, the Tribunal may award, only:

- (a) 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 may also award costs in accordance with the applicable arbitration rules.

2. Subject to paragraph 1, where a claim is made under Article 10.18(1):

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

3. 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.

Article 10.37 Finality and Enforcement of an Award

1. An award made by 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 award, a disputing party shall abide by and comply with an award without delay.

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

- (a) in the case of a final award made under the ICSID Convention
 - (i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award, or

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

(b) in the case of a final award under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules

(i) ninety (90) days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award, or

(ii) a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.

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, on delivery of a request by a Party whose investor was a party to the arbitration, shall establish a panel under Article 19.09 (Request for an Arbitral Group). 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 New York Convention, or the ICSID 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.

Article 10.38 General Provision

Time when a Claim is Submitted to Arbitration

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

(a) the request for arbitration under paragraph (1) of Article 36 of the ICSID Convention 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;
- (c) the notice of arbitration given under the UNCITRAL Arbitration Rules is received by the disputing Party, or
- (d) the request for arbitration under Article 4 of the ICC Arbitration Rules has been received by the Secretariat.

Delivery of Notifications and Other Documents

2. Delivery of notifications and other documents on a Party shall be made to the place named for that Party in Annex 10.38(2).

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. The awards shall be published only if there is an agreement in writing by the disputing parties.

Section C - Definitions

Article 10.39 Definitions

For purposes of this Chapter, the following terms shall be understood as:

Additional Facility Rules of ICSID: Additional Facility Rules of ICSID established in 1978;

claim: the claim made by the disputing investor against a Party under Section B of this Chapter;

disputing investor: an investor that makes a claim under Section B of this Chapter;

disputing parties: the disputing investor and the disputing Party;

disputing Party: a Party against which a claim is made under Section B of this Chapter;

disputing party: the disputing investor or the disputing Party;

enterprise: an "enterprise" as defined in Chapter 2 (General Definitions), and a branch of an enterprise;

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

ICC: the International Chamber of Commerce;

ICSID: the International Centre for Settlement of Investment Disputes;

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

investment: any kind of goods or rights of any nature acquired or used with the purpose of obtaining an economic profit or other business objective, acquired with resources transferred or reinvested by an investor, and including:

- (a) an enterprise, shares in an enterprise, shares in the capital of an enterprise that allow the owner to participate in its income or profits. Debt instruments of an enterprise and loans to an enterprise where:
 - (i) the enterprise is an affiliate of the investor, or
 - (ii) the date of maturity of the debt instrument or loan is at least 3 years,
- (b) a stake in an enterprise that grants to the owner the right to participate in the assets of this enterprise in a liquidation, provided that they do not arise from a debt instrument or a loan excluded under subparagraph (a);
- (c) real estate or other properties, tangible or intangible, including rights in the intellectual property field, as well as any other proprietary right (such as mortgages, liens, usufruct and similar rights), acquired with the expectation of or used with the purpose of obtaining an economic benefit or other business objectives;

- (d) share or benefits arising from the allocation of capital or other resources to the developing of an economic activity in the territory of a Party according, *inter alia*; to:
 - (i) contracts that involve the presence of the property of an investor in the territory of a Party, including concessions and construction and turnkey contracts, or
 - (ii) contracts where remuneration substantially depends on the production, income or profits of an enterprise,

but investment does not include:

- (e) a payment obligation or a credit granted to the State or a state enterprise,
- (f) monetary claims exclusively derived from:
 - (i) commercial contracts for the sale of goods or services by a national or an enterprise in the territory of a Party to an enterprise in the territory of the other Party, or
 - (ii) a credit granted in relation to a commercial transaction, of which expiration date is less than 3 years, such as trade financing, except a loan covered by the provisions of subparagraph (a); or
- (g) any other monetary claim that does not involve the kinds of interests as set out in subparagraphs (a) through (d);

investor of a Party: a Party or a state enterprise of a Party or a national or an enterprise of a Party that makes or has made an investment in the territory of the other Party;

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

Secretary-General: the Secretary-General of the ICSID, or the ICC;

transfers: remittance and international payments;

Tribunal: an arbitration tribunal established under Article 10.21, and Article 10.27; and

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

ANNEX 10.38(2)

DELIVERY OF NOTIFICATIONS AND OTHER DOCUMENTS

1. For purposes of the Article 10.38(2), the place for the delivery of notifications and other documents will be:

(a) in the case of Panama:

Ministry of Trade and Industries

Vice-ministry of Foreign Trade

Vía Ricardo J. Alfaro, Plaza Edison, Piso #3

Panamá, República de Panamá

(b) in the case of the ROC:

Ministry of Economic Affairs

No.15 Fu-Chou Street, Taipei

Taiwan

The Republic of China

2. The Parties shall communicate any change of the designated place for the delivery of notifications and other documents.