

PART FOUR: INVESTMENT, SERVICES AND RELATED MATTERS

CHAPTER 10: INVESTMENT

Section A Definitions

Article 10.01 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 C of this Chapter;

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

disputing parties: the disputing investor and the disputing Party;

disputing Party: a Party against which a claim is made under Section C 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;

ICC Arbitration Rules: the Rules of Arbitration of the International Chamber of Commerce that came into effect on January 1, 1998;

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 a branch of the investor; or
 - (ii) the date of maturity of the debt instrument or loan is at least three (3) years;
- (b) a share 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:

- (a) a payment obligation or a credit granted to the State or a state enterprise;
- (b) 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 date of maturity is less than three (3) years, such as trade financing, except a loan covered by the provisions of subparagraph (a); or

(c) any other monetary claim that does not refer to aspects set out in subparagraphs (a) through (d);

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

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; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality;

investment of an investor of a Party: the investment property or under direct or indirect control of an investor of this Party.

In the case of an enterprise, an investment is property of an investor of a Party if that investor has the property of more than fifty percent (50%) of the equity.

An investment is under the control of an investor of a Party if that investor has the power to:

(a) designate most of its directors; or

(b) direct otherwise its operations legally;

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

transfers: remittance and international payments;

Tribunal: an arbitration tribunal established under Article 10.22 and Article 10.28; 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.

Section B Investment

Article 10.02 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 the measures adopted or maintained by a Party related to:
 - (a) financial services;
 - (b) limiting the participation of an investment of investors of the other Party in its territory for reasons of public order or national security;
 - (c) government services or functions such as law enforcement, correctional services, income security or unemployment insurance, social security services, social welfare, water supply, public education, public training, health, and child care; and
 - (d) 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.

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 (c), 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, water supply, public education, public training, health, and child care, the investment of this investor shall be protected by the provisions of this Chapter.

5. Except for the provisions of Annex 10 D, 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 10.03 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 in its territory.

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 10.04 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 in its territory.

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.

3. For greater certainty, the treatment granted by this Article does not extend to the treatment accorded in other dispute settlement mechanisms, such as those provided for in Section C Settlement of Disputes Between a Party and an Investor of the Other Party of this Chapter, that are contained in international treaties or agreements.

Article 10.05 Fair and Equitable Treatment

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

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to the investors of the other Party and their investments. 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 that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

- (a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
- (b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.

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

Article 10.06 Compensation for Losses

Each Party shall accord to the investors of the other Party whose investments have been adversely affected in its territory due to armed conflict, war, revolution, 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, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any of the following requirements, or enforce any commitment or undertaking:

- (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;
- (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
- (e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
- (f) to transfer technology, production process, or other proprietary knowledge to a person in its territory, except when the requirement is imposed by a competent judicial court or administrative authority, to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement or when a Party authorizes use of an intellectual property right in accordance with Article 31 of the TRIPS, or to measures requiring the disclosure of proprietary information that falls within the scope of, and are consistent with Article 39 of the TRIPS¹; or

¹ For greater certainty, the references to "the TRIPS" in this paragraph include any waiver in force between the Parties of any provision of that Agreement granted by WTO Members in accordance with the WTO Agreement.

(g) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market.

All the provisions established in paragraph 1 do 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.

All the provisions established in paragraph 2 do 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), (c), (f), and (g) and paragraph 2 (a) and (b) do not apply to procurement by a Party or by a state enterprise; and

(c) paragraph 2 (a) and (b) does not apply to 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 such 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), (c), or (f) or paragraph 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. 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 1 (f). For greater certainty, Articles 10.03 and 10.04 apply to the measure.

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

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 or equivalent organs of administration, 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 Non-Conforming Measures

1. Articles 10.03, 10.04, 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
 - (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 10.03, 10.04, 10.07, and 10.08.

2. Articles 10.03, 10.04, 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 10.04 does not apply to treatment accorded by a Party in accordance with any International Treaty or Agreement, or with regards to the sectors, sub-sectors, and activities as set out in its Schedule to Annex III.

5. Articles 10.03, 10.04, 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. Provided they comply with the corresponding legislation, 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 dispute settlement mechanism under Section C 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 shall 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) administrative or judicial definitive resolutions or criminal offences;
- (c) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;
- (d) ensuring the satisfaction of judgments and arbitral awards in adjudicatory proceedings; or
- (e) issuing, trading, or dealing in securities, futures, options, or derivatives.

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 interest²;
- (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.

² For greater certainty, this term refers to a concept of customary international law.

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 the 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 10.03 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 10.03 and 10.04, 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 any confidential information 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 for providing a cross-border service into its territory does not of itself make this Chapter applicable to the rendering of that cross-border service. This Chapter applies to that Party's treatment of the posted bond or financial security.

Article 10.14 Denial of Benefits

Subject to previous notification and consultation done according to Articles 13.04 (Provision of Information) and 15.05 (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 the investors of a non-Party own or control, (directly or indirectly) the enterprise 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 Subrogation

1. When one Party, or any agency, institution, statutory body or corporation designated by it, has furnished an insurance contract or any other financial guarantee against non-commercial risks, relating to any investment of one of the investors of the other Party, the latter shall recognize the rights of the first Party to subrogate in the rights of the investor, whenever a payment has been made by virtue of such contract or guarantee.

2. When one Party, or any agency, institution, statutory body or corporation designated by it, has paid its investors and by that virtue has acquired his rights and benefits, such investors may not claim such rights and benefits to the other Party, except by express authorization of the first Party. For greater certainty, the same claim can only be submitted either by the investor or the Party.

Article 10.16 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 the investment activity in its territory is undertaken in compliance with its ecological or environmental laws and regulations.

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, within the Committee of Investment and Cross-border Trade in Services³.

Section C Settlement of Disputes between a Party and an Investor of the other Party

Article 10.17 Purpose

Notwithstanding the rights and obligations of the Parties under Chapter 15 (Dispute Settlement), this Section establishes a mechanism for the settlement of investment disputes arising from the violation of obligations established under Section B 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 10.18 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 three (3) years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has suffered losses or damages.

Article 10.19 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 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.

2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three (3) years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has 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 10.18 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 10.22, the claims should be

³ For greater certainty, no Party may have recourse to dispute settlement under this Agreement for any matter arising under this Article.

heard together by a Tribunal established under Article 10.28, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.

Article 10.20 Settlement of a Dispute through Consultation and Negotiation

The disputing Parties must first attempt to settle a dispute through consultation or negotiation. The period for consultation and negotiation cannot exceed one hundred and eighty (180) days from the date the disputing investor delivered written notice of its intention to initiate consultation and negotiation.

Article 10.21 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, said notice shall specify:

- (a) the name and address of the disputing investor and, where a claim is made under Article 10.19, the name, 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 10.22 Submission of a Claim to Arbitration

1. Provided that one hundred and eighty (180) days 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 Contracting 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 Contracting 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 10.23 Conditions Prior to the Submission of a Claim to Arbitration

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

2. The disputing investor shall exhaust its local administrative remedies as a condition for consenting to the arbitration under this Chapter. Nevertheless, if one hundred and eighty days (180) days 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. In order to submit to Arbitration under this Chapter a claim that is based on the fact that a Party has failed to comply with its obligation not to deny justice and therefore has not granted a “fair and equitable treatment” in accordance with customary international law, the disputing investor must previously exhaust all internal judicial remedies.

4. A disputing investor may submit a claim under Article 10.18 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 the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any competent judicial court or administrative authority, under the law of the Parties, 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 proceedings, not involving the payment of monetary damages, before a competent judicial court or administrative authority under the law of the disputing Party.

5. A disputing investor may present a claim to the arbitration procedure according to Article 10.19 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 competent judicial court or administrative authority under the law of the Parties, 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 10.19, except for proceedings, not involving the payment of monetary damages, before a competent judicial court or administrative authority under the law of the disputing Party.

6. 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.

7. The waiver by the enterprise, under paragraphs 4 (b) and 5 (b), shall not be required if, and only if, the disputing Party has deprived the disputing investor of the control of an enterprise.

Article 10.24 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 10.25 Number of Arbitrators and Method of Appointment

Except with regards to a Tribunal established under Article 10.28, and unless the disputing parties agree otherwise, the Tribunal shall be comprised of 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 10.26 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 with regards to 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. When a Tribunal, except with regards to a Tribunal established under Article 10.28, 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, or an appropriate official (hereinafter the Secretary-General) at an international organization agreed upon by the disputing parties with previous consultation of the same ones, shall appoint the pending 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 shall not be nationals of either 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 an available arbitrator cannot be found within the roster to head the Tribunal, the Secretary-General shall appoint the presiding arbitrators of the tribunal from the roster of arbitrators of the ICSID, 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 10.22 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 a substitute for the remaining period to which the former member was appointed.

Article 10.27 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 10.26 (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 10.18 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 10.19 (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 10.28 Consolidation

1. A Tribunal under this Article shall be established according to 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 determines that claims have been submitted to arbitration under Article 10.22 raise 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, order:

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

(b) to 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 10.26 (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 10.26 (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, under 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 10.18 or 10.19 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 10.22 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 10.22 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 fifteen (15) days of receipt by the disputing Party, a copy of:

(a) a request for arbitration made under paragraph (1) of Article 36 of the ICSID Convention;

(b) a notice of arbitration made under Article 2 of Schedule C of the ICSID Additional Facility Rules;

(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 of this Article.

Article 10.29 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 10.30 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 10.31 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 10.32 Venue of Arbitration

Unless the disputing parties agree otherwise, a Tribunal established under this Section shall hold an arbitration in the territory of a Contracting 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 10.33 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. When appropriate, the Tribunal may apply general principles of law, and the law of the disputing Party, including its rules on the conflict of laws.

3. A decision of the Commission declaring its interpretation of a provision of this Agreement shall be binding on a tribunal established under this Section, and any decision or award issued by the tribunal must be consistent with that decision.

Article 10.34 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 10.33 (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 10.35 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 issue concerning the controversy.

Article 10.36 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 established under this Section may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 10.18 or 10.19.

Article 10.37 Final Award

1. Where a Tribunal established under this Section makes a final award against a disputing 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 10.19 (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.

4. The tribunal is not authorized to award punitive damages.

Article 10.38 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) one hundred and twenty (120) days have elapsed from the date the award was rendered and no disputing party has requested explanation, 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, the UNCITRAL Arbitration Rules, or the ICC Arbitration Rules:

(i) ninety (90) days have elapsed from the date the award was rendered and no disputing party, has used pertinent legal remedies; or

(ii) a court has dismissed or allow the application of pertinent legal remedies against 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 15.07 (Establishment of 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 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 1 of the New York Convention.

Article 10.39 General Provisions

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 to a Party shall be made to the place named for that Party in Annex 10 C.

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.

ANNEX 10 A

Customary International Law

The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Articles 10.05 and 10.11 results from a general and consistent practice of States that they follow from a sense of legal obligation. The customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

ANNEX 10 B

Expropriation

The Parties confirm their shared understanding that:

1. Article 10.11 (1) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.

2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.

3. Article 10.11 (1) addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

4. The second situation addressed by Article 10.11 (1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

(iii) the character of the government action.

(b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

ANNEX 10 C

Delivery of Notifications and other Documents

1. For purposes of the Article 10.39 (2), the place for the delivery of notifications and other documents will be:

(a) in the case of the Republic of China (Taiwan): The Department of Investment Services, Ministry of Economic Affairs, 8F, No. 71, Guancian Road, Taipei 10047, Taiwan, R.O.C.;

(b) in the case of the Republic of El Salvador: Dirección de Administración de Tratados Comerciales, Ministerio de Economía, Alameda Juan Pablo II y Calle Guadalupe, Edificio C1-C2, Plan Maestro, Centro de Gobierno, San Salvador, El Salvador; and

(c) in the case of the Republic of Honduras: Dirección General de Integración Económica y Política Comercial, Secretaría de Estado en los Despachos de Industria y Comercio, Boulevard José Cecilio del Valle, Edificio San José, antiguo edificio de Fenaduanah, Tegucigalpa, Honduras.

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

ANNEX 10 D

The Parties agree that this Agreement substitutes the Agreement Between the Republic of China (Taiwan) and the Republic of El Salvador on the Reciprocal Promotion and Protection of Investments (herein Bilateral Investment Agreement), signed on August 30, 1996 and in force since February 25, 1997, as well as the Agreement Between the Republic of China (Taiwan) and the Republic of Honduras on the Treatment and Protection of Investments (herein Bilateral Investment Agreement), signed on February 26, 1996 and in force since October 26, 1998, and will therefore govern the relations between the Parties regarding the promotion and protection of investments.

Henceforth, all investments made after the entry into force of this Agreement by an investor of a Party in the territory of another Party, will be governed by the provisions contained in this Chapter.

Any covered investments existing prior to the entry into force of this Agreement will be governed at election of the investor by the corresponding Bilateral Investment Agreement or this Chapter for a term of ten (10) years after the entry into force of this Agreement. After the expiration of said term, those investments will be governed by the provisions contained in this Chapter.

Moreover, and only for the covered investments made prior to the entry into force of this Agreement, any dispute arising with regards to them will be governed, at the election of the investor, by the corresponding Bilateral Investment Agreement or this Chapter for a term of ten (10) years after the entry into force of this Agreement. After the expiration of said term, any dispute that arises and that is covered by the protections of this Agreement will be governed by the provisions contained in this Chapter.

For greater certainty, an investor, either on his behalf or on the behalf of an enterprise, cannot submit the same claim to both Investor-State Dispute Resolution Mechanisms. The election of one or the other mechanism will be definite and exclusive.

For purposes of this Agreement, the term "covered investment", means an investment that was made in accordance with the terms of the Bilateral Investment Agreements referred to above, and was therefore a protected investment under those Agreements.