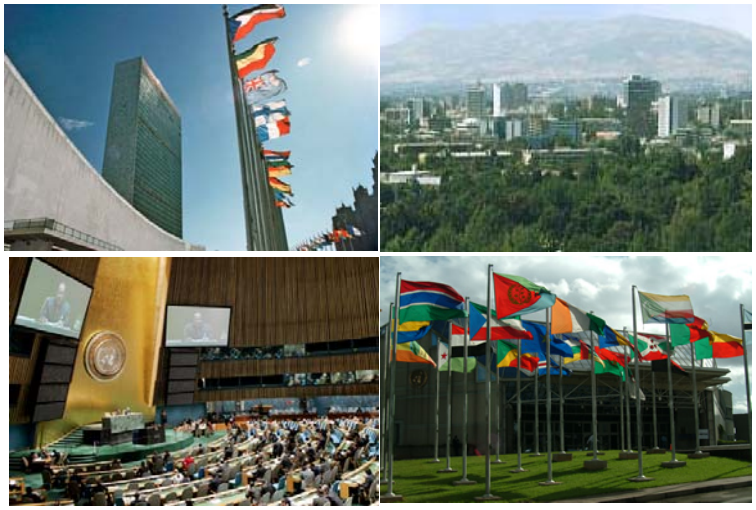
Addis Ababa, Ethiopia
7 April - 2 May 2014



Study Materials

International Investment Law

Codification Division of the United Nations Office of Legal Affairs

Addis Ababa, Ethiopia
7 April - 2 May 2014

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Codification Division of the United Nations Office of Legal Affairs

INTERNATIONAL INVESTMENT LAW
PROFESSOR MAKANE MOÏSE MBENGUE

Legal Instruments and Documents

Case Law

Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), Regulations and Rules, as amended in 2006

ICSID CONVENTION, REGULATIONS AND RULES

International Centre for
Settlement of Investment Disputes
1818 H Street, N.W.
Washington, D.C. 20433, U.S.A.

ICSID/15
April 2006

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Introduction

The International Centre for Settlement of Investment Disputes (ICSID or the Centre) is established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention or the Convention). The Convention was formulated by the Executive Directors of the International Bank for Reconstruction and Development (the World Bank). On March 18, 1965, the Executive Directors submitted the Convention, with an accompanying Report, to member governments of the World Bank for their consideration of the Convention with a view to its signature and ratification. The Convention entered into force on October 14, 1966, when it had been ratified by 20 countries. As at April 10, 2006, 143 countries have ratified the Convention to become Contracting States.

In accordance with the provisions of the Convention, ICSID provides facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States. The provisions of the ICSID Convention are complemented by Regulations and Rules adopted by the Administrative Council of the Centre pursuant to Article 6(1)(a)–(c) of the Convention (the ICSID Regulations and Rules).

The ICSID Regulations and Rules comprise Administrative and Financial Regulations; Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules); Rules of Procedure for Conciliation Proceedings (Conciliation Rules); and Rules of Procedure for Arbitration Proceedings (Arbitration Rules). The latest amendments of the ICSID Regulations and Rules adopted by the Administrative Council of the Centre came into effect on April 10, 2006.

Reprinted in this booklet are the ICSID Convention, the Report of the Executive Directors of the World Bank on the Convention, and the ICSID Regulations and Rules as amended effective April 10, 2006.

CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES

CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES

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CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES

Preamble

The Contracting States

Considering the need for international cooperation for economic development, and the role of private international investment therein;

Bearing in mind the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States;

Recognizing that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases;

Attaching particular importance to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire;

Desiring to establish such facilities under the auspices of the International Bank for Reconstruction and Development;

Recognizing that mutual consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators, and that any arbitral award be complied with; and

Declaring that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration,

Have agreed as follows:

Chapter I
International Centre for Settlement of Investment Disputes

Section 1
Establishment and Organization

Article 1

(1) There is hereby established the International Centre for Settlement of Investment Disputes (hereinafter called the Centre).

(2) The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.

Article 2

The seat of the Centre shall be at the principal office of the International Bank for Reconstruction and Development (hereinafter called the Bank). The seat may be moved to another place by decision of the Administrative Council adopted by a majority of two-thirds of its members.

Article 3

The Centre shall have an Administrative Council and a Secretariat and shall maintain a Panel of Conciliators and a Panel of Arbitrators.

Section 2
The Administrative Council

Article 4

(1) The Administrative Council shall be composed of one representative of each Contracting State. An alternate may act as representative in case of his principal's absence from a meeting or inability to act.

(2) In the absence of a contrary designation, each governor and alternate governor of the Bank appointed by a Contracting State shall be *ex officio* its representative and its alternate respectively.

Article 5

The President of the Bank shall be *ex officio* Chairman of the Administrative Council (hereinafter called the Chairman) but shall

have no vote. During his absence or inability to act and during any vacancy in the office of President of the Bank, the person for the time being acting as President shall act as Chairman of the Administrative Council.

Article 6

(1) Without prejudice to the powers and functions vested in it by other provisions of this Convention, the Administrative Council shall:

(a) adopt the administrative and financial regulations of the Centre;

(b) adopt the rules of procedure for the institution of conciliation and arbitration proceedings;

(c) adopt the rules of procedure for conciliation and arbitration proceedings (hereinafter called the Conciliation Rules and the Arbitration Rules);

(d) approve arrangements with the Bank for the use of the Bank's administrative facilities and services;

(e) determine the conditions of service of the Secretary-General and of any Deputy Secretary-General;

(f) adopt the annual budget of revenues and expenditures of the Centre;

(g) approve the annual report on the operation of the Centre.

The decisions referred to in sub-paragraphs (a), (b), (c) and (f) above shall be adopted by a majority of two-thirds of the members of the Administrative Council.

(2) The Administrative Council may appoint such committees as it considers necessary.

(3) The Administrative Council shall also exercise such other powers and perform such other functions as it shall determine to be necessary for the implementation of the provisions of this Convention.

Article 7

(1) The Administrative Council shall hold an annual meeting and such other meetings as may be determined by the Council, or convened by the Chairman, or convened by the Secretary-General at the request of not less than five members of the Council.

(2) Each member of the Administrative Council shall have one vote and, except as otherwise herein provided, all matters before the Council shall be decided by a majority of the votes cast.

(3) A quorum for any meeting of the Administrative Council shall be a majority of its members.

(4) The Administrative Council may establish, by a majority of two-thirds of its members, a procedure whereby the Chairman may seek a vote of the Council without convening a meeting of the Council. The vote shall be considered valid only if the majority of the members of the Council cast their votes within the time limit fixed by the said procedure.

Article 8

Members of the Administrative Council and the Chairman shall serve without remuneration from the Centre.

Section 3
The Secretariat

Article 9

The Secretariat shall consist of a Secretary-General, one or more Deputy Secretaries-General and staff.

Article 10

(1) The Secretary-General and any Deputy Secretary-General shall be elected by the Administrative Council by a majority of two-thirds of its members upon the nomination of the Chairman for a term of service not exceeding six years and shall be eligible for re-election. After consulting the members of the Administrative Council, the Chairman shall propose one or more candidates for each such office.

(2) The offices of Secretary-General and Deputy Secretary-General shall be incompatible with the exercise of any political function. Neither the Secretary-General nor any Deputy Secretary-General may hold any other employment or engage in any other occupation except with the approval of the Administrative Council.

(3) During the Secretary-General's absence or inability to act, and during any vacancy of the office of Secretary-General, the Deputy Secretary-General shall act as Secretary-General. If there shall be more than one Deputy Secretary-General, the Administrative Council shall determine in advance the order in which they shall act as Secretary-General.

Article 11

The Secretary-General shall be the legal representative and the principal officer of the Centre and shall be responsible for its administration, including the appointment of staff, in accordance with the provisions of this Convention and the rules adopted by the Administrative

Council. He shall perform the function of registrar and shall have the power to authenticate arbitral awards rendered pursuant to this Convention, and to certify copies thereof.

Section 4
The Panels

Article 12

The Panel of Conciliators and the Panel of Arbitrators shall each consist of qualified persons, designated as hereinafter provided, who are willing to serve thereon.

Article 13

(1) Each Contracting State may designate to each Panel four persons who may but need not be its nationals.

(2) The Chairman may designate ten persons to each Panel. The persons so designated to a Panel shall each have a different nationality.

Article 14

(1) Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

(2) The Chairman, in designating persons to serve on the Panels, shall in addition pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity.

Article 15

(1) Panel members shall serve for renewable periods of six years.

(2) In case of death or resignation of a member of a Panel, the authority which designated the member shall have the right to designate another person to serve for the remainder of that member's term.

(3) Panel members shall continue in office until their successors have been designated.

Article 16

(1) A person may serve on both Panels.

(2) If a person shall have been designated to serve on the same Panel by more than one Contracting State, or by one or more Contracting States and the Chairman, he shall be deemed to have been designated by the authority which first designated him or, if one such authority is the State of which he is a national, by that State.

(3) All designations shall be notified to the Secretary-General and shall take effect from the date on which the notification is received.

Section 5
Financing the Centre

Article 17

If the expenditure of the Centre cannot be met out of charges for the use of its facilities, or out of other receipts, the excess shall be borne by Contracting States which are members of the Bank in proportion to their respective subscriptions to the capital stock of the Bank, and by Contracting States which are not members of the Bank in accordance with rules adopted by the Administrative Council.

Section 6
Status, Immunities and Privileges

Article 18

The Centre shall have full international legal personality. The legal capacity of the Centre shall include the capacity:

(a) to contract;

(b) to acquire and dispose of movable and immovable property;

(c) to institute legal proceedings.

Article 19

To enable the Centre to fulfil its functions, it shall enjoy in the territories of each Contracting State the immunities and privileges set forth in this Section.

Article 20

The Centre, its property and assets shall enjoy immunity from all legal process, except when the Centre waives this immunity.

Article 21

The Chairman, the members of the Administrative Council, persons acting as conciliators or arbitrators or members of a Committee appointed pursuant to paragraph (3) of Article 52, and the officers and employees of the Secretariat

(a) shall enjoy immunity from legal process with respect to acts performed by them in the exercise of their functions, except when the Centre waives this immunity;

(b) not being local nationals, shall enjoy the same immunities from immigration restrictions, alien registration requirements and national service obligations, the same facilities as regards exchange restrictions and the same treatment in respect of travelling facilities as are accorded by Contracting States to the representatives, officials and employees of comparable rank of other Contracting States.

Article 22

The provisions of Article 21 shall apply to persons appearing in proceedings under this Convention as parties, agents, counsel, advocates, witnesses or experts; provided, however, that sub-paragraph (b) thereof shall apply only in connection with their travel to and from, and their stay at, the place where the proceedings are held.

Article 23

(1) The archives of the Centre shall be inviolable, wherever they may be.

(2) With regard to its official communications, the Centre shall be accorded by each Contracting State treatment not less favourable than that accorded to other international organizations.

Article 24

(1) The Centre, its assets, property and income, and its operations and transactions authorized by this Convention shall be exempt from all taxation and customs duties. The Centre shall also be exempt from liability for the collection or payment of any taxes or customs duties.

(2) Except in the case of local nationals, no tax shall be levied on or in respect of expense allowances paid by the Centre to the Chairman or members of the Administrative Council, or on or in respect of salaries, expense allowances or other emoluments paid by the Centre to officials or employees of the Secretariat.

(3) No tax shall be levied on or in respect of fees or expense allowances received by persons acting as conciliators, or arbitrators, or

members of a Committee appointed pursuant to paragraph (3) of Article 52, in proceedings under this Convention, if the sole jurisdictional basis for such tax is the location of the Centre or the place where such proceedings are conducted or the place where such fees or allowances are paid.

Chapter II
Jurisdiction of the Centre

Article 25

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) "National of another Contracting State" means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

(3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.

(4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting

States. Such notification shall not constitute the consent required by paragraph (1).

Article 26

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

Article 27

(1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

(2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

Chapter III
Conciliation

Section 1
Request for Conciliation

Article 28

(1) Any Contracting State or any national of a Contracting State wishing to institute conciliation proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.

(2) The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to conciliation in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.

(3) The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

Section 2
Constitution of the Conciliation Commission

Article 29

(1) The Conciliation Commission (hereinafter called the Commission) shall be constituted as soon as possible after registration of a request pursuant to Article 28.

(2) (a) The Commission shall consist of a sole conciliator or any uneven number of conciliators appointed as the parties shall agree.

(b) Where the parties do not agree upon the number of conciliators and the method of their appointment, the Commission shall consist of three conciliators, one conciliator appointed by each party and the third, who shall be the president of the Commission, appointed by agreement of the parties.

Article 30

If the Commission shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 28, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the conciliator or conciliators not yet appointed.

Article 31

(1) Conciliators may be appointed from outside the Panel of Conciliators, except in the case of appointments by the Chairman pursuant to Article 30.

(2) Conciliators appointed from outside the Panel of Conciliators shall possess the qualities stated in paragraph (1) of Article 14.

Section 3
Conciliation Proceedings

Article 32

(1) The Commission shall be the judge of its own competence.

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Commission, shall be considered by the Commission which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

Article 33

Any conciliation proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Conciliation Rules in effect on the date on which the parties consented to conciliation. If any question of procedure arises which is not covered by this Section or the Conciliation Rules or any rules agreed by the parties, the Commission shall decide the question.

Article 34

(1) It shall be the duty of the Commission to clarify the issues in dispute between the parties and to endeavour to bring about agreement between them upon mutually acceptable terms. To that end, the Commission may at any stage of the proceedings and from time to time recommend terms of settlement to the parties. The parties shall cooperate in good faith with the Commission in order to enable the Commission to carry out its functions, and shall give their most serious consideration to its recommendations.

(2) If the parties reach agreement, the Commission shall draw up a report noting the issues in dispute and recording that the parties have reached agreement. If, at any stage of the proceedings, it appears to the Commission that there is no likelihood of agreement between the parties, it shall close the proceedings and shall draw up a report noting the submission of the dispute and recording the failure of the parties to reach agreement. If one party fails to appear or participate in the proceedings, the Commission shall close the proceedings and shall draw up a report noting that party's failure to appear or participate.

Article 35

Except as the parties to the dispute shall otherwise agree, neither party to a conciliation proceeding shall be entitled in any other proceeding, whether before arbitrators or in a court of law or otherwise, to invoke or rely on any views expressed or statements or admissions or offers of settlement made by the other party in the conciliation proceedings, or the report or any recommendations made by the Commission.

Chapter IV
Arbitration

Section 1
Request for Arbitration

Article 36

(1) Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.

(2) The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.

(3) The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

Section 2
Constitution of the Tribunal

Article 37

(1) The Arbitral Tribunal (hereinafter called the Tribunal) shall be constituted as soon as possible after registration of a request pursuant to Article 36.

(2) (a) The Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree.

(b) Where the parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties.

Article 38

If the Tribunal shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 36, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible,

appoint the arbitrator or arbitrators not yet appointed. Arbitrators appointed by the Chairman pursuant to this Article shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute.

Article 39

The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties.

Article 40

(1) Arbitrators may be appointed from outside the Panel of Arbitrators, except in the case of appointments by the Chairman pursuant to Article 38.

(2) Arbitrators appointed from outside the Panel of Arbitrators shall possess the qualities stated in paragraph (1) of Article 14.

Section 3
Powers and Functions of the Tribunal

Article 41

(1) The Tribunal shall be the judge of its own competence.

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

Article 42

(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

(2) The Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law.

(3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree.

Article 43

Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings,

(a) call upon the parties to produce documents or other evidence, and

(b) visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate.

Article 44

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

Article 45

(1) Failure of a party to appear or to present his case shall not be deemed an admission of the other party's assertions.

(2) If a party fails to appear or to present his case at any stage of the proceedings the other party may request the Tribunal to deal with the questions submitted to it and to render an award. Before rendering an award, the Tribunal shall notify, and grant a period of grace to, the party failing to appear or to present its case, unless it is satisfied that that party does not intend to do so.

Article 46

Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

Article 47

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

Section 4
The Award

Article 48

(1) The Tribunal shall decide questions by a majority of the votes of all its members.

(2) The award of the Tribunal shall be in writing and shall be signed by the members of the Tribunal who voted for it.

(3) The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.

(4) Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.

(5) The Centre shall not publish the award without the consent of the parties.

Article 49

(1) The Secretary-General shall promptly dispatch certified copies of the award to the parties. The award shall be deemed to have been rendered on the date on which the certified copies were dispatched.

(2) The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award. The periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which the decision was rendered.

Section 5
Interpretation, Revision and Annulment of the Award

Article 50

(1) If any dispute shall arise between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in writing addressed to the Secretary-General.

(2) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter. The

Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

Article 51

(1) Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence.

(2) The application shall be made within 90 days after the discovery of such fact and in any event within three years after the date on which the award was rendered.

(3) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter.

(4) The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Tribunal rules on such request.

Article 52

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

(a) that the Tribunal was not properly constituted;

(b) that the Tribunal has manifestly exceeded its powers;

(c) that there was corruption on the part of a member of the Tribunal;

(d) that there has been a serious departure from a fundamental rule of procedure; or

(e) that the award has failed to state the reasons on which it is based.

(2) The application shall be made within 120 days after the date on which the award was rendered except that when annulment is requested on the ground of corruption such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered.

(3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons. None of the members of the Committee shall have been a member of

the Tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute. The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).

(4) The provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply *mutatis mutandis* to proceedings before the Committee.

(5) The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.

(6) If the award is annulled the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in accordance with Section 2 of this Chapter.

Section 6
Recognition and Enforcement of the Award

Article 53

(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

(2) For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.

Article 54

(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

Article 55

Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.

Chapter V
Replacement and Disqualification of Conciliators and Arbitrators

Article 56

(1) After a Commission or a Tribunal has been constituted and proceedings have begun, its composition shall remain unchanged; provided, however, that if a conciliator or an arbitrator should die, become incapacitated, or resign, the resulting vacancy shall be filled in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.

(2) A member of a Commission or Tribunal shall continue to serve in that capacity notwithstanding that he shall have ceased to be a member of the Panel.

(3) If a conciliator or arbitrator appointed by a party shall have resigned without the consent of the Commission or Tribunal of which he was a member, the Chairman shall appoint a person from the appropriate Panel to fill the resulting vacancy.

Article 57

A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification

of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.

Article 58

The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision. If it is decided that the proposal is well-founded the conciliator or arbitrator to whom the decision relates shall be replaced in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.

Chapter VI
Cost of Proceedings

Article 59

The charges payable by the parties for the use of the facilities of the Centre shall be determined by the Secretary-General in accordance with the regulations adopted by the Administrative Council.

Article 60

(1) Each Commission and each Tribunal shall determine the fees and expenses of its members within limits established from time to time by the Administrative Council and after consultation with the Secretary-General.

(2) Nothing in paragraph (1) of this Article shall preclude the parties from agreeing in advance with the Commission or Tribunal concerned upon the fees and expenses of its members.

Article 61

(1) In the case of conciliation proceedings the fees and expenses of members of the Commission as well as the charges for the use of the facilities of the Centre, shall be borne equally by the parties. Each party shall bear any other expenses it incurs in connection with the proceedings.

(2) In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tri-

bunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

Chapter VII
Place of Proceedings

Article 62

Conciliation and arbitration proceedings shall be held at the seat of the Centre except as hereinafter provided.

Article 63

Conciliation and arbitration proceedings may be held, if the parties so agree,

(a) at the seat of the Permanent Court of Arbitration or of any other appropriate institution, whether private or public, with which the Centre may make arrangements for that purpose; or

(b) at any other place approved by the Commission or Tribunal after consultation with the Secretary-General.

Chapter VIII
Disputes Between Contracting States

Article 64

Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement.

Chapter IX
Amendment

Article 65

Any Contracting State may propose amendment of this Convention. The text of a proposed amendment shall be communicated to the Secretary-General not less than 90 days prior to the meeting of the Administrative Council at which such amendment is to be considered

and shall forthwith be transmitted by him to all the members of the Administrative Council.

Article 66

(1) If the Administrative Council shall so decide by a majority of two-thirds of its members, the proposed amendment shall be circulated to all Contracting States for ratification, acceptance or approval. Each amendment shall enter into force 30 days after dispatch by the depositary of this Convention of a notification to Contracting States that all Contracting States have ratified, accepted or approved the amendment.

(2) No amendment shall affect the rights and obligations under this Convention of any Contracting State or of any of its constituent subdivisions or agencies, or of any national of such State arising out of consent to the jurisdiction of the Centre given before the date of entry into force of the amendment.

Chapter X
Final Provisions

Article 67

This Convention shall be open for signature on behalf of States members of the Bank. It shall also be open for signature on behalf of any other State which is a party to the Statute of the International Court of Justice and which the Administrative Council, by a vote of two-thirds of its members, shall have invited to sign the Convention.

Article 68

(1) This Convention shall be subject to ratification, acceptance or approval by the signatory States in accordance with their respective constitutional procedures.

(2) This Convention shall enter into force 30 days after the date of deposit of the twentieth instrument of ratification, acceptance or approval. It shall enter into force for each State which subsequently deposits its instrument of ratification, acceptance or approval 30 days after the date of such deposit.

Article 69

Each Contracting State shall take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories.

Article 70

This Convention shall apply to all territories for whose international relations a Contracting State is responsible, except those which are excluded by such State by written notice to the depositary of this Convention either at the time of ratification, acceptance or approval or subsequently.

Article 71

Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.

Article 72

Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.

Article 73

Instruments of ratification, acceptance or approval of this Convention and of amendments thereto shall be deposited with the Bank which shall act as the depositary of this Convention. The depositary shall transmit certified copies of this Convention to States members of the Bank and to any other State invited to sign the Convention.

Article 74

The depositary shall register this Convention with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations and the Regulations thereunder adopted by the General Assembly.

Article 75

The depositary shall notify all signatory States of the following:

(a) signatures in accordance with Article 67;

(b) deposits of instruments of ratification, acceptance and approval in accordance with Article 73;

(c) the date on which this Convention enters into force in accordance with Article 68;

(d) exclusions from territorial application pursuant to Article 70;

(e) the date on which any amendment of this Convention enters into force in accordance with Article 66; and

(f) denunciations in accordance with Article 71.

DONE at Washington, in the English, French and Spanish languages, all three texts being equally authentic, in a single copy which shall remain deposited in the archives of the International Bank for Reconstruction and Development, which has indicated by its signature below its agreement to fulfil the functions with which it is charged under this Convention.

REPORT OF THE EXECUTIVE DIRECTORS ON THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES

International Bank for Reconstruction and Development
March 18, 1965

REPORT OF THE EXECUTIVE DIRECTORS ON THE CONVENTION

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Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States

I

1. Resolution No. 214, adopted by the Board of Governors of the International Bank for Reconstruction and Development on September 10, 1964, provides as follows:

"RESOLVED:

(a) The report of the Executive Directors on "Settlement of Investment Disputes," dated August 6, 1964, is hereby approved.

(b) The Executive Directors are requested to formulate a convention establishing facilities and procedures which would be available on a voluntary basis for the settlement of investment disputes between contracting States and Nationals of other contracting States through conciliation and arbitration.

(c) In formulating such a convention, the Executive Directors shall take into account the views of member governments and shall keep in mind the desirability of arriving at a text which could be accepted by the largest possible number of governments.

(d) The Executive Directors shall submit the text of such a convention to member governments with such recommendations as they shall deem appropriate."

2. The Executive Directors of the Bank, acting pursuant to the foregoing Resolution, have formulated a Convention on the Settlement of Investment Disputes between States and Nationals of Other States and, on March 18, 1965, approved the submission of the text of the Convention, as attached hereto, to member governments of the Bank. This action by the Executive Directors does not, of course, imply that the governments represented by the individual Executive Directors are committed to take action on the Convention.

3. The action by the Executive Directors was preceded by extensive preparatory work, details of which are given in paragraphs 6-8 below. The Executive Directors are satisfied that the Convention in the form attached hereto represents a broad consensus of the views of those governments which accept the principle of establishing by inter-governmental agreement facilities and procedures for the settlement of investment disputes which States and foreign investors wish to submit to conciliation or arbitration. They are also satisfied that the Convention constitutes a suitable framework for such facilities and procedures. Accordingly, the text of the Convention is submitted to member governments for consideration with a view to signature and ratification, acceptance or approval.

4. The Executive Directors invite attention to the provision of Article 68(2) pursuant to which the Convention will enter into force as between the Contracting States 30 days after deposit with the Bank, the depositary of the Convention, of the twentieth instrument of ratification, acceptance or approval.

5. The attached text of the Convention in the English, French and Spanish languages has been deposited in the archives of the Bank, as depositary, and is open for signature.

II

6. The question of the desirability and practicability of establishing institutional facilities, sponsored by the Bank, for the settlement through conciliation and arbitration of investment disputes between States and foreign investors was first placed before the Board of Governors of the Bank at its Seventeenth Annual Meeting, held in Washington, D.C. in September 1962. At that Meeting the Board of Governors, by Resolution No. 174, adopted on September 18, 1962, requested the Executive Directors to study the question.

7. After a series of informal discussions on the basis of working papers prepared by the staff of the Bank, the Executive Directors decided that the Bank should convene consultative meetings of legal experts designated by member governments to consider the subject in greater detail. The consultative meetings were held on a regional basis in Addis Ababa (December 16-20, 1963), Santiago de Chile (February 3-7, 1964), Geneva (February 17-21, 1964) and Bangkok (April 27-May 1, 1964), with the administrative assistance of the United Nations Economic Commissions and the European Office of the United Nations, and took as the basis for discussion a Preliminary Draft of a Convention on Settlement of Investment Disputes between States and Nationals of Other States prepared by the staff of the Bank in the light of the discussions of the Executive Directors and the views of governments. The meetings were attended by legal experts from 86 countries.

8. In the light of the preparatory work and of the views expressed at the consultative meetings, the Executive Directors reported to the Board of Governors at its Nineteenth Annual Meeting in Tokyo, in September 1964, that it would be desirable to establish the institutional facilities envisaged, and to do so within the framework of an inter-gov-

ernmental agreement. The Board of Governors adopted the Resolution set forth in paragraph 1 of this Report, whereupon the Executive Directors undertook the formulation of the present Convention. With a view to arriving at a text which could be accepted by the largest possible number of governments, the Bank invited its members to designate representatives to a Legal Committee which would assist the Executive Directors in their task. This Committee met in Washington from November 23 through December 11, 1964, and the Executive Directors gratefully acknowledge the valuable advice they received from the representatives of the 61 member countries who served on the Committee.

III

9. In submitting the attached Convention to governments, the Executive Directors are prompted by the desire to strengthen the partnership between countries in the cause of economic development. The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.

10. The Executive Directors recognize that investment disputes are as a rule settled through administrative, judicial or arbitral procedures available under the laws of the country in which the investment concerned is made. However, experience shows that disputes may arise which the parties wish to settle by other methods; and investment agreements entered into in recent years show that both States and investors frequently consider that it is in their mutual interest to agree to resort to international methods of settlement.

11. The present Convention would offer international methods of settlement designed to take account of the special characteristics of the disputes covered, as well as of the parties to whom it would apply. It would provide facilities for conciliation and arbitration by specially qualified persons of independent judgment carried out according to rules known and accepted in advance by the parties concerned. In particular, it would ensure that once a government or investor had given consent to conciliation or arbitration under the auspices of the Centre, such consent could not be unilaterally withdrawn.

12. The Executive Directors believe that private capital will continue to flow to countries offering a favorable climate for attractive and sound investments, even if such countries did not become parties to the Convention or, having joined, did not make use of the facilities of the Centre. On the other hand, adherence to the Convention by a country would provide additional inducement and stimulate a larger flow of private international investment into its territories, which is the primary purpose of the Convention.

13. While the broad objective of the Convention is to encourage a larger flow of private international investment, the provisions of the Convention maintain a careful balance between the interests of investors and those of host States. Moreover, the Convention permits the institution of proceedings by host States as well as by investors and the Executive Directors have constantly had in mind that the provisions of the Convention should be equally adapted to the requirements of both cases.

14. The provisions of the attached Convention are for the most part self-explanatory. Brief comment on a few principal features may, however, be useful to member governments in their consideration of the Convention.

IV
The International Centre for Settlement of Investment Disputes

General

15. The Convention establishes the International Centre for Settlement of Investment Disputes as an autonomous international institution (Articles 18-24). The purpose of the Centre is "to provide facilities for conciliation and arbitration of investment disputes * * *" (Article 1(2)). The Centre will not itself engage in conciliation or arbitration activities. This will be the task of Conciliation Commissions and Arbitral Tribunals constituted in accordance with the provisions of the Convention.

16. As sponsor of the establishment of the institution the Bank will provide the Centre with premises for its seat (Article 2) and, pursuant to arrangements between the two institutions, with other administrative facilities and services (Article 6(d)).

17. With respect to the financing of the Centre (Article 17), the Executive Directors have decided that the Bank should be prepared to provide the Centre with office accommodation free of charge as long as the Centre has its seat at the Bank's headquarters and to underwrite, within reasonable limits, the basic overhead expenditure of the Centre for a period of years to be determined after the Centre is established.

18. Simplicity and economy consistent with the efficient discharge of the functions of the Centre characterize its structure. The organs of the Centre are the Administrative Council (Articles 4-8) and the Secretariat (Article 9-11). The Administrative Council will be composed of one representative of each Contracting State, serving without remuneration from the Centre. Each member of the Council casts one vote and matters before the Council are decided by a majority of the votes cast unless a different majority is required by the Convention. The President

of the Bank will serve *ex officio* as the Council's Chairman but will have no vote. The Secretariat will consist of a Secretary-General, one or more Deputy Secretaries-General and staff. In the interest of flexibility the Convention provides for the possibility of there being more than one Deputy Secretary-General, but the Executive Directors do not now foresee a need for more than one or two full time high officials of the Centre. Article 10, which requires that the Secretary-General and any Deputy Secretary-General be elected by the Administrative Council by a majority of two-thirds of its members, on the nomination of the Chairman, limits their terms of office to a period not exceeding six years and permits their re-election. The Executive Directors believe that the initial election, which will take place shortly after the Convention will have come into force, should be for a short term so as not to deprive the States which ratify the Convention after its entry into force of the possibility of participating in the selection of the high officials of the Centre. Article 10 also limits the extent to which these officials may engage in activities other than their official functions.

Functions of the Administrative Council

19. The principal functions of the Administrative Council are the election of the Secretary-General and any Deputy Secretary-General, the adoption of the budget of the Centre and the adoption of administrative and financial regulations, rules governing the institution of proceedings and rules of procedure for conciliation and arbitration proceedings. Action on all these matters requires a majority of two-thirds of the members of the Council.

Functions of the Secretary-General

20. The Convention requires the Secretary-General to perform a variety of administrative functions as legal representative, registrar and principal officer of the Centre (Articles 7(1), 11, 16(3), 25(4), 28, 36, 49(1), 50(1), 51(1), 52(1), 54(2), 59, 60(1), 63(b) and 65). In addition, the Secretary-General is given the power to refuse registration of a request for conciliation proceedings or arbitration proceedings, and thereby to prevent the institution of such proceedings, if on the basis of the information furnished by the applicant he finds that the dispute is *manifestly* outside the jurisdiction of the Centre (Article 28(3) and 36(3)). The Secretary-General is given this limited power to "screen" requests for conciliation or arbitration proceedings with a view to avoiding the embarrassment to a party (particularly a State) which might result from the institution of proceedings against it in a dispute which it had not consented to submit to the Centre, as well as the possibility that the machinery of the Centre would be set in motion in cases which for other reasons were obviously outside the jurisdiction of the

Centre e.g., because either the applicant or the other party was not eligible to be a party in proceedings under the Convention.

The Panels

21. Article 3 requires the Centre to maintain a Panel of Conciliators and a Panel of Arbitrators, while Articles 12-16 outline the manner and terms of designation of Panel members. In particular, Article 14(1) seeks to ensure that Panel members will possess a high degree of competence and be capable of exercising independent judgment. In keeping with the essentially flexible character of the proceedings, the Convention permits the parties to appoint conciliators and arbitrators from outside the Panels but requires (Articles 31(2) and 40(2)) that such appointees possess the qualities stated in Article 14(1). The Chairman, when called upon to appoint a conciliator or arbitrator pursuant to Article 30 or 38, is restricted in his choice to Panel members.

V
Jurisdiction of the Centre

22. The term "jurisdiction of the Centre" is used in the Convention as a convenient expression to mean the limits within which the provisions of the Convention will apply and the facilities of the Centre will be available for conciliation and arbitration proceedings. The jurisdiction of the Centre is dealt with in Chapter II of the Convention (Articles 25-27).

Consent

23. Consent of the parties is the cornerstone of the jurisdiction of the Centre. Consent to jurisdiction must be in writing and once given cannot be withdrawn unilaterally (Article 25(1)).

24. Consent of the parties must exist when the Centre is seized (Articles 28(3) and 36(3)) but the Convention does not otherwise specify the time at which consent should be given. Consent may be given, for example, in a clause included in an investment agreement, providing for the submission to the Centre of future disputes arising out of that agreement, or in a *compromis* regarding a dispute which has already arisen. Nor does the Convention require that the consent of both parties be expressed in a single instrument. Thus, a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing.

25. While consent of the parties is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring a dispute within its jurisdiction. In keeping with the purpose of the Con-

vention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto.

Nature of the Dispute

26. Article 25(1) requires that the dispute must be a "legal dispute arising directly out of an investment." The expression "legal dispute" has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.

27. No attempt was made to define the term "investment" given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).

Parties to the Dispute

28. For a dispute to be within the jurisdiction of the Centre one of the parties must be a Contracting State (or a constituent subdivision or agency of a Contracting State) and the other party must be a "national of another Contracting State." The latter term as defined in paragraph (2) of Article 25 covers both natural persons and juridical persons.

29. It should be noted that under clause (a) of Article 25(2) a natural person who was a national of the State party to the dispute would not be eligible to be a party in proceedings under the auspices of the Centre, even if at the same time he had the nationality of another State. This ineligibility is absolute and cannot be cured even if the State party to the dispute had given its consent.

30. Clause (b) of Article 25(2), which deals with juridical persons, is more flexible. A juridical person which had the nationality of the State party to the dispute would be eligible to be a party to proceedings under the auspices of the Centre if that State had agreed to treat it as a national of another Contracting State because of foreign control.

Notifications by Contracting States

31. While no conciliation or arbitration proceedings could be brought against a Contracting State without its consent and while no Contracting State is under any obligation to give its consent to such proceedings, it was nevertheless felt that adherence to the Convention might be interpreted as holding out an expectation that Contracting States would give favorable consideration to requests by investors for the submission of a dispute to the Centre. It was pointed out in that connection that there might be classes of investment disputes which

governments would consider unsuitable for submission to the Centre or which, under their own law, they were not permitted to submit to the Centre. In order to avoid any risk of misunderstanding on this score, Article 25(4) expressly permits Contracting States to make known to the Centre in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre. The provision makes clear that a statement by a Contracting State that it would consider submitting a certain class of dispute to the Centre would serve for purposes of information only and would not constitute the consent required to give the Centre jurisdiction. Of course, a statement excluding certain classes of disputes from consideration would not constitute a reservation to the Convention.

Arbitration as Exclusive Remedy

32. It may be presumed that when a State and an investor agree to have recourse to arbitration, and do not reserve the right to have recourse to other remedies or require the prior exhaustion of other remedies, the intention of the parties is to have recourse to arbitration to the exclusion of any other remedy. This rule of interpretation is embodied in the first sentence of Article 26. In order to make clear that it was not intended thereby to modify the rules of international law regarding the exhaustion of local remedies, the second sentence explicitly recognizes the right of a State to require the prior exhaustion of local remedies.

Claims by the Investor's State

33. When a host State consents to the submission of a dispute with an investor to the Centre, thereby giving the investor direct access to an international jurisdiction, the investor should not be in a position to ask his State to espouse his case and that State should not be permitted to do so. Accordingly, Article 27 expressly prohibits a Contracting State from giving diplomatic protection, or bringing an international claim, in respect of a dispute which one of its nationals and another Contracting State have consented to submit, or have submitted, to arbitration under the Convention, unless the State party to the dispute fails to honor the award rendered in that dispute.

VI
Proceedings under the Convention

Institution of Proceedings

34. Proceedings are instituted by means of a request addressed to the Secretary-General (Articles 28 and 36). After registration of the request the Conciliation Commission or Arbitral Tribunal, as the case

may be, will be constituted. Reference is made to paragraph 20 above on the power of the Secretary-General to refuse registration.

Constitution of Conciliation Commissions and Arbitral Tribunals

35. Although the Convention leaves the parties a large measure of freedom as regards the constitution of Commissions and Tribunals, it assures that a lack of agreement between the parties on these matters or the unwillingness of a party to cooperate will not frustrate proceedings (Articles 29-30 and 37-38, respectively).

36. Mention has already been made of the fact that the parties are free to appoint conciliators and arbitrators from outside the Panels (see paragraph 21 above). While the Convention does not restrict the appointment of conciliators with reference to nationality, Article 39 lays down the rule that the majority of the members of an Arbitral Tribunal should not be nationals of the State party to the dispute or of the State whose national is a party to the dispute. This rule is likely to have the effect of excluding persons having these nationalities from serving on a Tribunal composed of not more than three members. However, the rule will not apply where each and every arbitrator on the Tribunal has been appointed by agreement of the parties.

Conciliation Proceedings; Powers and Functions of Arbitral Tribunals

37. In general, the provisions of Articles 32-35 dealing with conciliation proceedings and of Articles 41-49, dealing with the powers and functions of Arbitral Tribunals and awards rendered by such Tribunals, are self-explanatory. The differences between the two sets of provisions reflect the basic distinction between the process of conciliation which seeks to bring the parties to agreement and that of arbitration which aims at a binding determination of the dispute by the Tribunal.

38. Article 41 reiterates the well-established principle that international tribunals are to be the judges of their own competence and Article 32 applies the same principle to Conciliation Commissions. It is to be noted in this connection that the power of the Secretary-General to refuse registration of a request for conciliation or arbitration (see paragraph 20 above) is so narrowly defined as not to encroach on the prerogative of Commissions and Tribunals to determine their own competence and, on the other hand, that registration of a request by the Secretary-General does not, of course, preclude a Commission or Tribunal from finding that the dispute is outside the jurisdiction of the Centre.

39. In keeping with the consensual character of proceedings under the Convention, the parties to conciliation or arbitration proceedings

may agree on the rules of procedure which will apply in those proceedings. However, if or to the extent that they have not so agreed the Conciliation Rules and Arbitration Rules adopted by the Administrative Council will apply (Articles 33 and 44).

40. Under the Convention an Arbitral Tribunal is required to apply the law agreed by the parties. Failing such agreement, the Tribunal must apply the law of the State party to the dispute (unless that law calls for the application of some other law), as well as such rules of international law as may be applicable. The term "international law" as used in this context should be understood in the sense given to it by Article 38(1) of the Statute of the International Court of Justice, allowance being made for the fact that Article 38 was designed to apply to inter-State disputes.[1]

Recognition and Enforcement of Arbitral Awards

41. Article 53 declares that the parties are bound by the award and that it shall not be subject to appeal or to any other remedy except those provided for in the Convention. The remedies provided for are revision (Article 51) and annulment (Article 52). In addition, a party may ask a Tribunal which omitted to decide any question submitted to it, to supplement its award (Article 49(2)) and may request interpretation of the award (Article 50).

42. Subject to any stay of enforcement in connection with any of the above proceedings in accordance with the provisions of the Convention, the parties are obliged to abide by and comply with the award and Article 54 requires every Contracting State to recognize the award as binding and to enforce the pecuniary obligations imposed by the award as if it were a final decision of a domestic court. Because of the different legal techniques followed in common law and civil law jurisdictions and the different judicial systems found in unitary and federal or other non-unitary States, Article 54 does not prescribe any particular method to be followed in its domestic implementation, but requires each Contracting State to meet the requirements of the Article in accordance with its own legal system.

43. The doctrine of sovereign immunity may prevent the forced execution in a State of judgments obtained against foreign States or

[1] Article 38(1) of the Statute of the International Court of Justice reads as follows:
"1. The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

against the State in which execution is sought. Article 54 requires Contracting States to equate an award rendered pursuant to the Convention with a final judgment of its own courts. It does not require them to go beyond that and to undertake forced execution of awards rendered pursuant to the Convention in cases in which final judgments could not be executed. In order to leave no doubt on this point Article 55 provides that nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.

VII
Place of Proceedings

44. In dealing with proceedings away from the Centre, Article 63 provides that proceedings may be held, if the parties so agree, at the seat of the Permanent Court of Arbitration or of any other appropriate institution with which the Centre may enter into arrangements for that purpose. These arrangements are likely to vary with the type of institution and to range from merely making premises available for the proceedings to the provision of complete secretariat services.

VIII
Disputes Between Contracting States

45. Article 64 confers on the International Court of Justice jurisdiction over disputes between Contracting States regarding the interpretation or application of the Convention which are not settled by negotiation and which the parties do not agree to settle by other methods. While the provision is couched in general terms, it must be read in the context of the Convention as a whole. Specifically, the provision does not confer jurisdiction on the Court to review the decision of a Conciliation Commission or Arbitral Tribunal as to its competence with respect to any dispute before it. Nor does it empower a State to institute proceedings before the Court in respect of a dispute which one of its nationals and another Contracting State have consented to submit or have submitted to arbitration, since such proceedings would contravene the provisions of Article 27, unless the other Contracting State had failed to abide by and comply with the award rendered in that dispute.

IX
Entry into Force

46. The Convention is open for signature on behalf of States members of the Bank. It will also be open for signature on behalf of any other State which is a party to the Statute of the International Court of Justice and which the Administrative Council, by a vote of two-thirds of its

members, shall have invited to sign. No time limit has been prescribed for signature. Signature is required both of States joining before the Convention enters into force and those joining thereafter (Article 67). The Convention is subject to ratification, acceptance or approval by the signatory States in accordance with their constitutional procedures (Article 68). As already stated, the Convention will enter into force upon the deposit of the twentieth instrument of ratification, acceptance or approval.

ADMINISTRATIVE AND FINANCIAL REGULATIONS

ADMINISTRATIVE AND FINANCIAL REGULATIONS

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The Administrative and Financial Regulations of ICSID were adopted by the Administrative Council of the Centre pursuant to Article 6(1)(a) of the ICSID Convention.

The Regulations of particular interest to parties to proceedings under the Convention are: 14-16, 22-31 and 34(1). They are intended to be complementary both to the Convention and to the Institution, Conciliation and Arbitration Rules adopted pursuant to Article 6(1)(b) and (c) of the Convention.

Administrative and Financial Regulations

Chapter I
Procedures of the Administrative Council

Regulation 1
Date and Place of the Annual Meeting

(1) The Annual Meeting of the Administrative Council shall take place in conjunction with the Annual Meeting of the Board of Governors of the International Bank for Reconstruction and Development (hereinafter referred to as the "Bank"), unless the Council specifies otherwise.

(2) The Secretary-General shall coordinate the arrangements for the Annual Meeting of the Administrative Council with the appropriate officers of the Bank.

Regulation 2
Notice of Meetings

(1) The Secretary-General shall, by any rapid means of communication, give each member notice of the time and place of each meeting of the Administrative Council, which notice shall be dispatched not less than 42 days prior to the date set for such meeting, except that in urgent cases such notice shall be sufficient if dispatched by telegram or cable not less than 10 days prior to the date set for such meeting.

(2) Any meeting of the Administrative Council at which no quorum is present may be adjourned from time to time by a majority of the members present and notice of the adjourned meeting need not be given.

Regulation 3
Agenda for Meetings

(1) Under the direction of the Chairman, the Secretary-General shall prepare a brief agenda for each meeting of the Administrative Council and shall transmit such agenda to each member with the notice of such meeting.

(2) Additional subjects may be placed on the agenda for any meeting of the Administrative Council by any member provided that he shall give notice thereof to the Secretary-General not less than seven days prior to the date set for such meeting. In special circumstances the Chairman, or the Secretary-General after consulting the Chairman, may at any time place additional subjects on the agenda for any meeting of the Council. The Secretary-General shall as promptly as possible give each member notice of the addition of any subject to the agenda for any meeting.

(3) The Administrative Council may at any time authorize any subject to be placed on the agenda for any meeting even though the notice required by this Regulation shall not have been given.

Regulation 4
Presiding Officer

(1) The Chairman shall be the Presiding Officer at meetings of the Administrative Council.

(2) If the Chairman is unable to preside over all or part of a meeting of the Council, one of the members of the Administrative Council shall act as temporary Presiding Officer. This member shall be the Representative, Alternate Representative or temporary Alternate Representative of that Contracting State represented at the meeting that stands highest on a list of Contracting States arranged chronologically according to the date of the deposit of instruments of ratification, acceptance or approval of the Convention, starting with the State following the one that had on the last previous occasion provided a temporary Presiding Officer. A temporary Presiding Officer may cast the vote of the State he represents, or he may assign another member of his delegation to do so.

Regulation 5
Secretary of the Council

(1) The Secretary-General shall serve as Secretary of the Administrative Council.

(2) Except as otherwise specifically directed by the Administrative Council, the Secretary-General, in consultation with the Chairman,

shall have charge of all arrangements for the holding of meetings of the Council.

(3) The Secretary-General shall keep a summary record of the proceedings of the Administrative Council, copies of which shall be provided to all members.

(4) The Secretary-General shall present to each Annual Meeting of the Administrative Council, for its approval pursuant to Article 6(1)(g) of the Convention, the annual report on the operation of the Centre.

Regulation 6
Attendance at Meetings

(1) The Secretary-General and the Deputy Secretaries-General may attend all meetings of the Administrative Council.

(2) The Secretary-General, in consultation with the Chairman, may invite observers to attend any meeting of the Administrative Council.

Regulation 7
Voting

(1) Except as otherwise specifically provided in the Convention, all decisions of the Administrative Council shall be taken by a majority of the votes cast. At any meeting the Presiding Officer may ascertain the sense of the meeting in lieu of a formal vote but he shall require a formal vote upon the request of any member. Whenever a formal vote is required the written text of the motion shall be distributed to the members.

(2) No member of the Administrative Council may vote by proxy or by any other method than in person, but the representative of a Contracting State may designate a temporary alternate to vote for him at any meeting at which the regular alternate is not present.

(3) Whenever, in the judgment of the Chairman, any action must be taken by the Administrative Council which should not be postponed until the next Annual Meeting of the Council and does not warrant the calling of a special meeting, the Secretary-General shall transmit to each member by any rapid means of communication a motion embodying the proposed action with a request for a vote by the members of the Council. Votes shall be cast during a period ending 21 days after such dispatch, unless a longer period is approved by the Chairman. At the expiration of the established period, the Secretary-General shall record the results and notify all members of the Council. If the replies received do not include those of a majority of the members, the motion shall be considered lost.

(4) Whenever at a meeting of the Administrative Council at which all Contracting States are not represented, the votes necessary to adopt a proposed decision by a majority of two-thirds of the members of the Council are not obtained, the Council with the concurrence of the Chairman may decide that the votes of those members of the Council represented at the meeting shall be registered and the votes of the absent members shall be solicited in accordance with paragraph (3) of this Regulation. Votes registered at the meeting may be changed by the member before the expiration of the voting period established pursuant to that paragraph.

Chapter II
The Secretariat

Regulation 8
Election of the Secretary-General and His Deputies

In proposing to the Administrative Council one or more candidates for the office of Secretary-General or any Deputy Secretary-General, the Chairman shall at the same time make proposals with respect to:

(a) the length of the term of service;

(b) approval for any of the candidates to hold, if elected, any other employment or to engage in any other occupation;

(c) the conditions of service, taking into account any proposals made pursuant to paragraph (b).

Regulation 9
Acting Secretary-General

(1) If, on the election of a Deputy Secretary-General, there should at any time be more than one Deputy Secretary-General, the Chairman shall immediately after such election propose to the Administrative Council the order in which these Deputies shall act as Secretary-General pursuant to Article 10(3) of the Convention. In the absence of such a decision the order shall be that of seniority in the post of Deputy.

(2) The Secretary-General shall designate the member of the staff of the Centre who shall act for him during his absence or inability to act, if all Deputy Secretaries-General should also be absent or unable to act or if the office of Deputy should be vacant. If there should be a simultaneous vacancy in the offices of Secretary-General and Deputy Secretary-General, the Chairman shall designate the member of the staff who shall act for the Secretary-General.

Regulation 10
Appointment of Staff Members

The Secretary-General shall appoint the members of the staff of the Centre. Appointments may be made directly or by secondment.

Regulation 11
Conditions of Employment

(1) The conditions of service of the members of the staff of the Centre shall be the same as those of the staff of the Bank.

(2) The Secretary-General shall make arrangements with the Bank, within the framework of the general administrative arrangements approved by the Administrative Council pursuant to Article 6(1)(d) of the Convention, for the participation of members of the Secretariat in the Staff Retirement Plan of the Bank as well as in other facilities and contractual arrangements established for the benefit of the staff of the Bank.

Regulation 12
Authority of the Secretary-General

(1) Deputy Secretaries-General and the members of the staff, whether on direct appointment or on secondment, shall act solely under the direction of the Secretary-General.

(2) The Secretary-General shall have authority to dismiss members of the Secretariat and to impose disciplinary measures. In the case of Deputy Secretaries-General dismissal may only be imposed with the concurrence of the Administrative Council.

Regulation 13
Incompatibility of Functions

The Secretary-General, the Deputy Secretaries-General and the members of the staff may not serve on the Panel of Conciliators or of Arbitrators, or as members of any Commission or Tribunal.

Chapter III
Financial Provisions

Regulation 14
Direct Costs of Individual Proceedings

(1) Unless otherwise agreed pursuant to Article 60(2) of the Convention, and in addition to receiving reimbursement for any direct expenses reasonably incurred, each member of a Commission, a Tribunal or an *ad hoc* Committee appointed from the Panel of Arbitrators pursuant to Article 52(3) of the Convention (hereinafter referred to as "Committee") shall receive:

(a) a fee for each day on which he participates in meetings of the body of which he is a member;

(b) a fee for the equivalent of each eight-hour day of other work performed in connection with the proceedings;

(c) in lieu of reimbursement of subsistence expenses when away from his normal place of residence, a *per diem* allowance based on the allowance established from time to time for the Executive Directors of the Bank;

(d) travel expenses in connection with meetings of the body of which he is a member based on the norms established from time to time for the Executive Directors of the Bank.

The amounts of the fees referred to in paragraphs (a) and (b) above shall be determined from time to time by the Secretary-General, with the approval of the Chairman. Any request for a higher amount shall be made through the Secretary-General.

(2) All payments, including reimbursement of expenses, to the following shall in all cases be made by the Centre and not by or through either party to the proceeding:

(a) members of Commissions, Tribunals and Committees;

(b) witnesses and experts summoned at the initiative of a Commission, Tribunal or Committee, and not of one of the parties;

(c) members of the Secretariat of the Centre, including persons (such as interpreters, translators, reporters or secretaries) especially engaged by the Centre for a particular proceeding;

(d) the host of any proceeding held away from the seat of the Centre pursuant to Article 63 of the Convention.

(3) In order to enable the Centre to make the payments provided for in paragraph (2), as well as to incur other direct expenses in connection with a proceeding (other than expenses covered by Regulation 15):

(a) the parties shall make advance payments to the Centre as follows:

(i) initially as soon as a Commission or Tribunal has been constituted, the Secretary-General shall, after consultation with the President of the body in question and, as far as possible, the parties, estimate the expenses that will be incurred by the Centre during the next three to six months and request the parties to make an advance payment of this amount;

(ii) if at any time the Secretary-General determines, after consultation with the President of the body in question and as far as possible the parties, that the advances made by the parties will not cover a revised estimate of expenses for the period or any subsequent period, he shall request the parties to make supplementary advance payments.

(b) the Centre shall not be required to provide any service in connection with a proceeding or to pay the fees, allowances or expenses of the members of any Commission, Tribunal or Committee, unless sufficient advance payments shall previously have been made;

(c) if the initial advance payments are insufficient to cover estimated future expenses, prior to requesting the parties to make additional advance payments, the Secretary-General shall ascertain the actual expenses incurred and commitments entered into by the Centre with regard to each proceeding and shall appropriately charge or credit the parties;

(d) in connection with every conciliation proceeding, and in connection with every arbitration proceeding unless a different division is provided for in the Arbitration Rules or is decided by the parties or the Tribunal, each party shall pay one half of each advance or supplemental charge, without prejudice to the final decision on the payment of the cost of an arbitration proceeding to be made by the Tribunal pursuant to Article 61(2) of the Convention. All advances and charges shall be payable, at the place and in the currencies specified by the Secretary-General, as soon as a request for payment is made by him. If the amounts requested are not paid in full within 30 days, then the Secretary-General shall inform both parties of the default and give an opportunity to either of them to make the required payment. At any time 15 days after such information is sent by the Secre-

tary-General, he may move that the Commission or Tribunal stay the proceeding, if by the date of such motion any part of the required payment is still outstanding. If any proceeding is stayed for non-payment for a consecutive period in excess of six months, the Secretary-General may, after notice to and as far as possible in consultation with the parties, move that the competent body discontinue the proceeding;

(e) in the event that an application for annulment of an award is registered, the above provisions of this Rule shall apply *mutatis mutandis,* except that the applicant shall be solely responsible for making the advance payments requested by the Secretary-General to cover expenses following the constitution of the Committee, and without prejudice to the right of the Committee in accordance with Article 52(4) of the Convention to decide how and by whom expenses incurred in connection with the annulment proceeding shall be paid.

Regulation 15
Special Services to Parties

(1) The Centre shall only perform any special service for a party in connection with a proceeding (for example, the provision of translations or copies) if the party shall in advance have deposited an amount sufficient to cover the charge for such service.

(2) Charges for special services shall normally be based on a schedule of fees to be promulgated from time to time by the Secretary-General and communicated by him to all Contracting States as well as to the parties to all pending proceedings.

Regulation 16
Fee for Lodging Requests

The party or parties (if a request is made jointly) wishing to institute a conciliation or arbitration proceeding, requesting a supplementary decision to, or the rectification, interpretation, revision or annulment of an arbitral award, or requesting resubmission of a dispute to a new Tribunal after the annulment of an arbitral award, shall pay to the Centre a non-refundable fee determined from time to time by the Secretary-General.

Regulation 17
The Budget

(1) The fiscal year of the Centre shall run from July 1 of each year to June 30 of the following year.

(2) Before the end of each fiscal year the Secretary-General shall prepare and submit, for adoption by the Administrative Council at its next Annual Meeting and in accordance with Article 6(1)(f) of the Convention, a budget for the following fiscal year. This budget is to indicate the expected expenditures of the Centre (excepting those to be incurred on a reimbursable basis) and the expected revenues (excepting reimbursements).

(3) If, during the course of a fiscal year, the Secretary-General determines that the expected expenditures will exceed those authorized in the budget, or if he should wish to incur expenditures not previously authorized, he shall, in consultation with the Chairman, prepare a supplementary budget, which he shall submit to the Administrative Council for adoption, either at the Annual Meeting or at any other meeting, or in accordance with Regulation 7(3).

(4) The adoption of a budget constitutes authority for the Secretary-General to make expenditures and incur obligations for the purposes and within the limits specified in the budget. Unless otherwise provided by the Administrative Council, the Secretary-General may exceed the amount specified for any given budget item, provided that the total amount of the budget is not exceeded.

(5) Pending the adoption of the budget by the Administrative Council, the Secretary-General may incur expenditures for the purposes and within the limits specified in the budget he submitted to the Council, up to one quarter of the amount authorized to be expended in the previous fiscal year but in no event exceeding the amount that the Bank has agreed to make available for the current fiscal year.

Regulation 18
Assessment of Contributions

(1) Any excess of expected expenditures over expected revenues shall be assessed on the Contracting States. Each State that is not a member of the Bank shall be assessed a fraction of the total assessment equal to the fraction of the budget of the International Court of Justice that it would have to bear if that budget were divided only among the Contracting States in proportion to the then current scale of contributions applicable to the budget of the Court; the balance of the total assessment shall be divided among the Contracting States that are members of the Bank in proportion to their respective subscription to the capital stock of the Bank. The assessments shall be calculated by the

Secretary-General immediately after the adoption of the annual budget, on the basis of the then current membership of the Centre, and shall be promptly communicated to all Contracting States. The assessments shall be payable as soon as they are thus communicated.

(2) On the adoption of a supplementary budget, the Secretary-General shall immediately calculate supplementary assessments, which shall be payable as soon as they are communicated to the Contracting States.

(3) A State which is party to the Convention during any part of a fiscal year shall be assessed for the entire fiscal year. If a State becomes a party to the Convention after the assessments for a given fiscal year have been calculated, its assessment shall be calculated by the application of the same appropriate factor as was applied in calculating the original assessments, and no recalculation of the assessments of the other Contracting States shall be made.

(4) If, after the close of a fiscal year, it is determined that there is a cash surplus, such surplus shall, unless the Administrative Council otherwise decides, be credited to the Contracting States in proportion to the assessed contributions they had paid for that fiscal year. These credits shall be made with respect to the assessments for the fiscal year commencing two years after the end of the fiscal year to which the surplus pertains.

Regulation 19
Audits

The Secretary-General shall have an audit of the accounts of the Centre made once each year and on the basis of this audit submit a financial statement to the Administrative Council for consideration at the Annual Meeting.

Chapter IV
General Functions of the Secretariat

Regulation 20
List of Contracting States

The Secretary-General shall maintain a list, which he shall transmit from time to time to all Contracting States and on request to any State or person, of the Contracting States (including former Contracting States, showing the date on which their notice of denunciation was received by the depositary), indicating for each:

(a) the date on which the Convention entered into force with respect to it;

(b) any territories excluded pursuant to Article 70 of the Convention and the dates on which the notice of exclusion and any modification of such notice were received by the depositary;

(c) any designation, pursuant to Article 25(1) of the Convention, of constituent subdivisions or agencies to whose investment disputes the jurisdiction of the Centre extends;

(d) any notification, pursuant to Article 25(3) of the Convention, that no approval by the State is required for the consent by a constituent subdivision or agency to the jurisdiction of the Centre;

(e) any notification, pursuant to Article 25(4) of the Convention, of the class or classes of disputes which the State would or would not consider submitting to the jurisdiction of the Centre;

(f) the competent court or other authority for the recognition and enforcement of arbitral awards, designated pursuant to Article 54(2) of the Convention;

(g) any legislative or other measures taken, pursuant to Article 69 of the Convention, for making its provisions effective in the territories of the State and communicated by the State to the Centre.

Regulation 21
Establishment of Panels

(1) Whenever a Contracting State has the right to make one or more designations to the Panel of Conciliators or of Arbitrators, the Secretary-General shall invite the State to make such designations.

(2) Each designation made by a Contracting State or by the Chairman shall indicate the name, address and nationality of the designee, and include a statement of his qualifications, with particular reference to his competence in the fields of law, commerce, industry and finance.

(3) As soon as the Secretary-General is notified of a designation, he shall inform the designee thereof, indicating to him the designating authority and the terminal date of the period of designation, and requesting confirmation that the designee is willing to serve.

(4) The Secretary-General shall maintain lists, which he shall transmit from time to time to all Contracting States and on request to any State or person, of the members of the Panels of Conciliators and of Arbitrators, indicating for each member:

(a) his address;

(b) his nationality;

(c) the terminal date of the current designation;

(d) the designating authority;

(e) his qualifications.

Regulation 22
Publication

(1) The Secretary-General shall appropriately publish information about the operation of the Centre, including the registration of all requests for conciliation or arbitration and in due course an indication of the date and method of the termination of each proceeding.

(2) If both parties to a proceeding consent to the publication of:

(a) reports of Conciliation Commissions;

(b) arbitral awards; or

(c) the minutes and other records of proceedings,

the Secretary-General shall arrange for the publication thereof, in an appropriate form with a view to furthering the development of international law in relation to investments.

Chapter V
Functions with Respect to Individual Proceedings

Regulation 23
The Registers

(1) The Secretary-General shall maintain, in accordance with rules to be promulgated by him, separate Registers for requests for conciliation and requests for arbitration. In these he shall enter all significant data concerning the institution, conduct and disposition of each proceeding, including in particular the method of constitution and the membership of each Commission, Tribunal and Committee. On the Arbitration Register he shall also enter, with respect to each award, all significant data concerning any request for the supplementation, rectification, interpretation, revision or annulment of the award, and any stay of enforcement.

(2) The Registers shall be open for inspection by any person. The Secretary-General shall promulgate rules concerning access to the Registers, and a schedule of charges for the provision of certified and uncertified extracts therefrom.

Regulation 24
Means of Communication

(1) During the pendency of any proceeding the Secretary-General shall be the official channel of written communications among the parties, the Commission, Tribunal or Committee, and the Chairman of the Administrative Council, except that:

(a) the parties may communicate directly with each other unless the communication is one required by the Convention or the Institution, Conciliation or Arbitration Rules (hereinafter referred to as the "Rules");

(b) the members of any Commission, Tribunal or Committee shall communicate directly with each other.

(2) Instruments and documents shall be introduced into the proceeding by transmitting them to the Secretary-General, who shall retain the original for the files of the Centre and arrange for appropriate distribution of copies. If the instrument or document does not meet the applicable requirements, the Secretary-General:

(a) shall inform the party submitting it of the deficiency, and of any consequent action the Secretary-General is taking;

(b) may, if the deficiency is merely a formal one, accept it subject to subsequent correction;

(c) may, if the deficiency consists merely of an insufficiency in the number of copies or the lack of required translations, provide the necessary copies or translations at the cost of the party concerned.

Regulation 25
Secretary

The Secretary-General shall appoint a Secretary for each Commission, Tribunal and Committee. The Secretary may be drawn from among the Secretariat of the Centre, and shall in any case, while serving in that capacity, be considered as a member of its staff. He shall:

(a) represent the Secretary-General and may perform all functions assigned to the latter by these Regulations or the Rules with regard to individual proceedings or assigned to the latter by the Convention, and delegated by him to the Secretary;

(b) be the channel through which the parties may request particular services from the Centre;

(c) keep summary minutes of hearings, unless the parties agree with the Commission, Tribunal or Committee on another manner of keeping the record of the hearings; and

(d) perform other functions with respect to the proceeding at the request of the President of the Commission, Tribunal or Committee, or at the direction of the Secretary-General.

Regulation 26
Place of Proceedings

(1) The Secretary-General shall make arrangements for the holding of conciliation and arbitration proceedings at the seat of the Centre or shall, at the request of the parties and as provided in Article 63 of the Convention, make or supervise arrangements if proceedings are held elsewhere.

(2) The Secretary-General shall assist a Commission or Tribunal, at its request, in visiting any place connected with a dispute or in conducting inquiries there.

Regulation 27
Other Assistance

(1) The Secretary-General shall provide such other assistance as may be required in connection with all meetings of Commissions, Tribunals and Committees, in particular in making translations and interpretations from one official language of the Centre into another.

(2) The Secretary-General may also provide, by use of the staff and equipment of the Centre or of persons employed and equipment acquired on a short-time basis, other services required for the conduct of proceedings, such as the duplication and translation of documents, or interpretations from and to a language other than an official language of the Centre.

Regulation 28
Depositary Functions

(1) The Secretary-General shall deposit in the archives of the Centre and shall make arrangements for the permanent retention of the original text:

(a) of the request and of all instruments and documents filed or prepared in connection with any proceeding, including the minutes of any hearing;

(b) of any report by a Commission or of any award or decision by a Tribunal or Committee.

(2) Subject to the Rules and to the agreement of the parties to particular proceedings, and upon payment of any charges in accordance with a schedule to be promulgated by the Secretary-General, he shall make available to the parties certified copies of reports and awards (reflecting thereon any supplementary decision, rectification, interpretation, revision or annulment duly made, and any stay of enforcement while it is in effect), as well as of other instruments, documents and minutes.

Chapter VI
Special Provisions Relating to Proceedings

Regulation 29
Time Limits

(1) All time limits, specified in the Convention or the Rules or fixed by a Commission, Tribunal, Committee or the Secretary-General, shall be computed from the date on which the limit is announced in the presence of the parties or their representatives or on which the Secretary-General dispatches the pertinent notification or instrument (which date shall be marked on it). The day of such announcement or dispatch shall be excluded from the calculation.

(2) A time limit shall be satisfied if a notification or instrument dispatched by a party is delivered at the seat of the Centre, or to the Secretary of the competent Commission, Tribunal or Committee that is meeting away from the seat of the Centre, before the close of business on the indicated date or, if that day is a Saturday, a Sunday, a public holiday observed at the place of delivery or a day on which for any reason regular mail delivery is restricted at the place of delivery, then before the close of business on the next subsequent day on which regular mail service is available.

Regulation 30
Supporting Documentation

(1) Documentation filed in support of any request, pleading, application, written observation or other instrument introduced into a proceeding shall consist of one original and of the number of additional copies specified in paragraph (2). The original shall, unless otherwise agreed by the parties or ordered by the competent Commission, Tribunal or Committee, consist of the complete document or of a duly certified copy or extract, except if the party is unable to obtain such document or certified copy or extract (in which case the reason for such inability must be stated).

(2) The number of additional copies of any document shall be equal to the number of additional copies required of the instrument to which the documentation relates, except that no such copies are required if the document has been published and is readily available. Each additional copy shall be certified by the party presenting it to be a true and complete copy of the original, except that if the document is lengthy and relevant only in part, it is sufficient if it is certified to be a true and complete extract of the relevant parts, which must be precisely specified.

(3) Each original and additional copy of a document which is not in a language approved for the proceeding in question, shall, unless otherwise ordered by the competent Commission, Tribunal or Committee, be accompanied by a certified translation into such a language. However, if the document is lengthy and relevant only in part, it is sufficient if only the relevant parts, which must be precisely specified, are translated, provided that the competent body may require a fuller or a complete translation.

(4) Whenever an extract of an original document is presented pursuant to paragraph (1) or a partial copy or translation pursuant to paragraph (2) or (3), each such extract, copy and translation shall be accompanied by a statement that the omission of the remainder of the text does not render the portion presented misleading.

Chapter VII
Immunities and Privileges

Regulation 31
Certificates of Official Travel

The Secretary-General may issue certificates to members of Commissions, Tribunals or Committees, to officers and employees of the Secretariat and to the parties, agents, counsel, advocates, witnesses and experts appearing in proceedings, indicating that they are traveling in connection with a proceeding under the Convention.

Regulation 32
Waiver of Immunities

(1) The Secretary-General may waive the immunity of:

(a) the Centre;

(b) members of the staff of the Centre.

(2) The Chairman of the Council may waive the immunity of:

(a) the Secretary-General or any Deputy Secretary-General;

(b) members of a Commission, Tribunal or Committee;

(c) the parties, agents, counsel, advocates, witnesses or experts appearing in a proceeding, if a recommendation for such waiver is made by the Commission, Tribunal or Committee concerned.

(3) The Administrative Council may waive the immunity of:

(a) the Chairman and members of the Council;

(b) the parties, agents, counsel, advocates, witnesses or experts appearing in a proceeding, even if no recommendation for such a waiver is made by the Commission, Tribunal or Committee concerned;

(c) the Centre or any person mentioned in paragraph (1) or (2).

Chapter VIII
Miscellaneous

Regulation 33
Communications with Contracting States

Unless another channel of communications is specified by the State concerned, all communications required by the Convention or these Regulations to be sent to Contracting States shall be addressed to the State's representative on the Administrative Council.

Regulation 34
Official Languages

(1) The official languages of the Centre shall be English, French and Spanish.

(2) The texts of these Regulations in each official language shall be equally authentic.

RULES OF PROCEDURE FOR THE INSTITUTION OF CONCILIATION AND ARBITRATION PROCEEDINGS (INSTITUTION RULES)

RULES OF PROCEDURE FOR THE INSTITUTION OF CONCILIATION AND ARBITRATION PROCEEDINGS (INSTITUTION RULES)

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The Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the Institution Rules) of ICSID were adopted by the Administrative Council of the Centre pursuant to Article 6(1)(b) of the ICSID Convention.

The Institution Rules are supplemented by the Administrative and Financial Regulations of the Centre, in particular by Regulations 16, 22(1), 23, 24, 30 and 34(1).

The Institution Rules are restricted in scope to the period of time from the filing of a request to the dispatch of the notice of registration. All transactions subsequent to that time are to be regulated in accordance with the Conciliation and the Arbitration Rules.

Institution Rules

Rule 1
The Request

(1) Any Contracting State or any national of a Contracting State wishing to institute conciliation or arbitration proceedings under the Convention shall address a request to that effect in writing to the Secretary-General at the seat of the Centre. The request shall indicate whether it relates to a conciliation or an arbitration proceeding. It shall be drawn up in an official language of the Centre, shall be dated, and shall be signed by the requesting party or its duly authorized representative.

(2) The request may be made jointly by the parties to the dispute.

Rule 2
Contents of the Request

(1) The request shall:

(a) designate precisely each party to the dispute and state the address of each;

(b) state, if one of the parties is a constituent subdivision or agency of a Contracting State, that it has been designated to the Centre by that State pursuant to Article 25(1) of the Convention;

(c) indicate the date of consent and the instruments in which it is recorded, including, if one party is a constituent subdivision or agency of a Contracting State, similar data on the approval of such consent by that State unless it had notified the Centre that no such approval is required;

(d) indicate with respect to the party that is a national of a Contracting State:

(i) its nationality on the date of consent; and

(ii) if the party is a natural person:

(A) his nationality on the date of the request; and

(B) that he did not have the nationality of the Contracting State party to the dispute either on the date of consent or on the date of the request; or

(iii) if the party is a juridical person which on the date of consent had the nationality of the Contracting State party to the dispute, the agreement of the parties that it should be treated as a national of another Contracting State for the purposes of the Convention;

(e) contain information concerning the issues in dispute indicating that there is, between the parties, a legal dispute arising directly out of an investment; and

(f) state, if the requesting party is a juridical person, that it has taken all necessary internal actions to authorize the request.

(2) The information required by subparagraphs (1)(c), (1)(d)(iii) and (1)(f) shall be supported by documentation.

(3) "Date of consent" means the date on which the parties to the dispute consented in writing to submit it to the Centre; if both parties did not act on the same day, it means the date on which the second party acted.

Rule 3
Optional Information in the Request

The request may in addition set forth any provisions agreed by the parties regarding the number of conciliators or arbitrators and the method of their appointment, as well as any other provisions agreed concerning the settlement of the dispute.

Rule 4
Copies of the Request

(1) The request shall be accompanied by five additional signed copies. The Secretary-General may require such further copies as he may deem necessary.

(2) Any documentation submitted with the request shall conform to the requirements of Administrative and Financial Regulation 30.

Rule 5
Acknowledgement of the Request

(1) On receiving a request the Secretary-General shall:

(a) send an acknowledgement to the requesting party;

(b) take no other action with respect to the request until he has received payment of the prescribed fee.

(2) As soon as he has received the fee for lodging the request, the Secretary-General shall transmit a copy of the request and of the accompanying documentation to the other party.

Rule 6
Registration of the Request

(1) The Secretary-General shall, subject to Rule 5(1)(b), as soon as possible, either:

(a) register the request in the Conciliation or the Arbitration Register and on the same day notify the parties of the registration; or

(b) if he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre, notify the parties of his refusal to register the request and of the reasons therefor.

(2) A proceeding under the Convention shall be deemed to have been instituted on the date of the registration of the request.

Rule 7
Notice of Registration

The notice of registration of a request shall:

(a) record that the request is registered and indicate the date of the registration and of the dispatch of that notice;

(b) notify each party that all communications and notices in connection with the proceeding will be sent to the address stated in the request, unless another address is indicated to the Centre;

(c) unless such information has already been provided, invite the parties to communicate to the Secretary-General any provisions agreed by them regarding the number and the method of appointment of the conciliators or arbitrators;

(d) invite the parties to proceed, as soon as possible, to constitute a Conciliation Commission in accordance with Articles 29 to 31 of the Convention, or an Arbitral Tribunal in accordance with Articles 37 to 40;

(e) remind the parties that the registration of the request is without prejudice to the powers and functions of the Conciliation Commission or Arbitral Tribunal in regard to jurisdiction, competence and the merits; and

(f) be accompanied by a list of the members of the Panel of Conciliators or of Arbitrators of the Centre.

Rule 8
Withdrawal of the Request

The requesting party may, by written notice to the Secretary-General, withdraw the request before it has been registered. The Secretary-General shall promptly notify the other party, unless, pursuant to Rule 5(1)(b), the request had not been transmitted to it.

Rule 9
Final Provisions

(1) The texts of these Rules in each official language of the Centre shall be equally authentic.

(2) These Rules may be cited as the "Institution Rules" of the Centre.

RULES OF PROCEDURE FOR CONCILIATION PROCEEDINGS (CONCILIATION RULES)

RULES OF PROCEDURE FOR CONCILIATION PROCEEDINGS (CONCILIATION RULES)

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The Rules of Procedure for Conciliation Proceedings (the Conciliation Rules) of ICSID were adopted by the Administrative Council of the Centre pursuant to Article 6(1)(c) of the ICSID Convention.

The Conciliation Rules are supplemented by the Administrative and Financial Regulations of the Centre, in particular by Regulations 14-16, 22-31 and 34(1).

The Conciliation Rules cover the period of time from the dispatch of the notice of registration of a request for conciliation until a report is drawn up. The transactions previous to that time are to be regulated in accordance with the Institution Rules.

Conciliation Rules

Chapter I
Establishment of the Commission

Rule 1
General Obligations

(1) Upon notification of the registration of the request for conciliation, the parties shall, with all possible dispatch, proceed to constitute a Commission, with due regard to Section 2 of Chapter III of the Convention.

(2) Unless such information is provided in the request, the parties shall communicate to the Secretary-General as soon as possible any provisions agreed by them regarding the number of conciliators and the method of their appointment.

Rule 2
Method of Constituting the Commission in the Absence of Previous Agreement

(1) If the parties, at the time of the registration of the request for conciliation, have not agreed upon the number of conciliators and the method of their appointment, they shall, unless they agree otherwise, follow the following procedure:

(a) the requesting party shall, within 10 days after the registration of the request, propose to the other party the appointment of a sole conciliator or of a specified uneven number of conciliators and specify the method proposed for their appointment;

(b) within 20 days after receipt of the proposals made by the requesting party, the other party shall:

(i) accept such proposals; or

(ii) make other proposals regarding the number of conciliators and the method of their appointment;

(c) within 20 days after receipt of the reply containing any such other proposals, the requesting party shall notify the other party whether it accepts or rejects such proposals.

(2) The communications provided for in paragraph (1) shall be made or promptly confirmed in writing and shall either be transmitted through the Secretary-General or directly between the parties with a copy to the Secretary-General. The parties shall promptly notify the Secretary-General of the contents of any agreement reached.

(3) At any time 60 days after the registration of the request, if no agreement on another procedure is reached, either party may inform the Secretary-General that it chooses the formula provided for in Article 29(2)(b) of the Convention. The Secretary-General shall thereupon promptly inform the other party that the Commission is to be constituted in accordance with that Article.

Rule 3
Appointment of Conciliators to a Commission Constituted in Accordance with Convention Article 29(2)(b)

(1) If the Commission is to be constituted in accordance with Article 29(2)(b) of the Convention:

(a) either party shall, in a communication to the other party:

(i) name two persons, identifying one of them as the conciliator appointed by it and the other as the conciliator proposed to be the President of the Commission; and

(ii) invite the other party to concur in the appointment of the conciliator proposed to be the President of the Commission and to appoint another conciliator;

(b) promptly upon receipt of this communication the other party shall, in its reply:

(i) name a person as the conciliator appointed by it; and

(ii) concur in the appointment of the conciliator proposed to be the President of the Commission or name another person as the conciliator proposed to be President;

(c) promptly upon receipt of the reply containing such a proposal, the initiating party shall notify the other party whether it concurs in the appointment of the conciliator proposed by that party to be the President of the Commission.

(2) The communications provided for in this Rule shall be made or promptly confirmed in writing and shall either be transmitted through the Secretary-General or directly between the parties with a copy to the Secretary-General.

Rule 4
Appointment of Conciliators by the Chairman of the Administrative Council

(1) If the Commission is not constituted within 90 days after the dispatch by the Secretary-General of the notice of registration, or such other period as the parties may agree, either party may, through the Secretary-General, address to the Chairman of the Administrative Council a request in writing to appoint the conciliator or conciliators not yet appointed and to designate a conciliator to be the President of the Commission.

(2) The provision of paragraph (1) shall apply *mutatis mutandis* in the event that the parties have agreed that the conciliators shall elect the President of the Commission and they fail to do so.

(3) The Secretary-General shall forthwith send a copy of the request to the other party.

(4) The Chairman shall use his best efforts to comply with that request within 30 days after its receipt. Before he proceeds to make an appointment or designation, with due regard to Article 31(1) of the Convention, he shall consult both parties as far as possible.

(5) The Secretary-General shall promptly notify the parties of any appointment or designation made by the Chairman.

Rule 5
Acceptance of Appointments

(1) The party or parties concerned shall notify the Secretary-General of the appointment of each conciliator and indicate the method of his appointment.

(2) As soon as the Secretary-General has been informed by a party or the Chairman of the Administrative Council of the appointment of a conciliator, he shall seek an acceptance from the appointee.

(3) If a conciliator fails to accept his appointment within 15 days, the Secretary-General shall promptly notify the parties, and if appropriate the Chairman, and invite them to proceed to the appointment of

another conciliator in accordance with the method followed for the previous appointment.

Rule 6
Constitution of the Commission

(1) The Commission shall be deemed to be constituted and the proceeding to have begun on the date the Secretary-General notifies the parties that all the conciliators have accepted their appointment.

(2) Before or at the first session of the Commission, each conciliator shall sign a declaration in the following form:

> "To the best of my knowledge there is no reason why I should not serve on the Conciliation Commission constituted by the International Centre for Settlement of Investment Disputes with respect to a dispute between _____and _____.
>
> "I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any report drawn up by the Commission.
>
> "I shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and in the Regulations and Rules made pursuant thereto.
>
> "A statement of my past and present professional, business and other relationships (if any) with the parties is attached hereto."

Any conciliator failing to sign such a declaration by the end of the first session of the Commission shall be deemed to have resigned.

Rule 7
Replacement of Conciliators

At any time before the Commission is constituted, each party may replace any conciliator appointed by it and the parties may by common consent agree to replace any conciliator. The procedure of such replacement shall be in accordance with Rules 1, 5 and 6.

Rule 8
Incapacity or Resignation of Conciliators

(1) If a conciliator becomes incapacitated or unable to perform the duties of his office, the procedure in respect of the disqualification of conciliators set forth in Rule 9 shall apply.

(2) A conciliator may resign by submitting his resignation to the other members of the Commission and the Secretary-General. If the

conciliator was appointed by one of the parties, the Commission shall promptly consider the reasons for his resignation and decide whether it consents thereto. The Commission shall promptly notify the Secretary-General of its decision.

Rule 9
Disqualification of Conciliators

(1) A party proposing the disqualification of a conciliator pursuant to Article 57 of the Convention shall promptly, and in any event before the Commission first recommends terms of settlement of the dispute to the parties or when the proceeding is closed (whichever occurs earlier), file its proposal with the Secretary-General, stating its reasons therefor.

(2) The Secretary-General shall forthwith:

(a) transmit the proposal to the members of the Commission and, if it relates to a sole conciliator or to a majority of the members of the Commission, to the Chairman of the Administrative Council; and

(b) notify the other party of the proposal.

(3) The conciliator to whom the proposal relates may, without delay, furnish explanations to the Commission or the Chairman, as the case may be.

(4) Unless the proposal relates to a majority of the members of the Commission, the other members shall promptly consider and vote on the proposal in the absence of the conciliator concerned. If those members are equally divided, they shall, through the Secretary-General, promptly notify the Chairman of the proposal, of any explanation furnished by the conciliator concerned and of their failure to reach a decision.

(5) Whenever the Chairman has to decide on a proposal to disqualify a conciliator, he shall use his best efforts to take that decision within 30 days after he has received the proposal.

(6) The proceeding shall be suspended until a decision has been taken on the proposal.

Rule 10
Procedure during a Vacancy on the Commission

(1) The Secretary-General shall forthwith notify the parties and, if necessary, the Chairman of the Administrative Council of the disqualification, death, incapacity or resignation of a conciliator and of the consent, if any, of the Commission to a resignation.

(2) Upon the notification by the Secretary-General of a vacancy on the Commission, the proceeding shall be or remain suspended until the vacancy has been filled.

Rule 11
Filling Vacancies on the Commission

(1) Except as provided in paragraph (2), a vacancy resulting from the disqualification, death, incapacity or resignation of a conciliator shall be promptly filled by the same method by which his appointment had been made.

(2) In addition to filling vacancies relating to conciliators appointed by him, the Chairman of the Administrative Council shall appoint a person from the Panel of Conciliators:

(a) to fill a vacancy caused by the resignation, without the consent of the Commission, of a conciliator appointed by a party; or

(b) at the request of either party, to fill any other vacancy, if no new appointment is made and accepted within 45 days of the notification of the vacancy by the Secretary-General.

(3) The procedure for filling a vacancy shall be in accordance with Rules 1, 4(4), 4(5), 5 and, *mutatis mutandis,* 6(2).

Rule 12
Resumption of Proceeding after Filling a Vacancy

As soon as a vacancy on the Commission has been filled, the proceeding shall continue from the point it had reached at the time the vacancy occurred. The newly appointed conciliator may, however, require that any hearings be repeated in whole or in part.

Chapter II
Working of the Commission

Rule 13
Sessions of the Commission

(1) The Commission shall hold its first session within 60 days after its constitution or such other period as the parties may agree. The dates of that session shall be fixed by the President of the Commission after consultation with its members and the Secretary-General. If upon its

constitution the Commission has no President because the parties have agreed that the President shall be elected by its members, the Secretary-General shall fix the dates of that session. In both cases, the parties shall be consulted as far as possible.

(2) The dates of subsequent sessions shall be determined by the Commission, after consultation with the Secretary-General and with the parties as far as possible.

(3) The Commission shall meet at the seat of the Centre or at such other place as may have been agreed by the parties in accordance with Article 63 of the Convention. If the parties agree that the proceeding shall be held at a place other than the Centre or an institution with which the Centre has made the necessary arrangements, they shall consult with the Secretary-General and request the approval of the Commission. Failing such approval, the Commission shall meet at the seat of the Centre.

(4) The Secretary-General shall notify the members of the Commission and the parties of the dates and place of the sessions of the Commission in good time.

Rule 14
Sittings of the Commission

(1) The President of the Commission shall conduct its hearings and preside at its deliberations.

(2) Except as the parties otherwise agree, the presence of a majority of the members of the Commission shall be required at its sittings.

(3) The President of the Commission shall fix the date and hour of its sittings.

Rule 15
Deliberations of the Commission

(1) The deliberations of the Commission shall take place in private and remain secret.

(2) Only members of the Commission shall take part in its deliberations. No other person shall be admitted unless the Commission decides otherwise.

Rule 16
Decisions of the Commission

(1) Decisions of the Commission shall be taken by a majority of the votes of all its members. Abstention shall count as a negative vote.

(2) Except as otherwise provided by these Rules or decided by the Commission, it may take any decision by correspondence among its members, provided that all of them are consulted. Decisions so taken shall be certified by the President of the Commission.

Rule 17
Incapacity of the President

If at any time the President of the Commission should be unable to act, his functions shall be performed by one of the other members of the Commission, acting in the order in which the Secretary-General had received the notice of their acceptance of their appointment to the Commission.

Rule 18
Representation of the Parties

(1) Each party may be represented or assisted by agents, counsel or advocates whose names and authority shall be notified by that party to the Secretary-General, who shall promptly inform the Commission and the other party.

(2) For the purposes of these Rules, the expression "party" includes, where the context so admits, an agent, counsel or advocate authorized to represent that party.

Chapter III
General Procedural Provisions

Rule 19
Procedural Orders

The Commission shall make the orders required for the conduct of the proceeding.

Rule 20
Preliminary Procedural Consultation

(1) As early as possible after the constitution of a Commission, its President shall endeavor to ascertain the views of the parties regarding questions of procedure. For this purpose he may request the parties to meet him. He shall, in particular, seek their views on the following matters:

(a) the number of members of the Commission required to constitute a quorum at its sittings;

(b) the language or languages to be used in the proceeding;

(c) the evidence, oral or written, which each party intends to produce or to request the Commission to call for, and the written statements which each party intends to file, as well as the time limits within which such evidence should be produced and such statements filed;

(d) the number of copies desired by each party of instruments filed by the other; and

(e) the manner in which the record of the hearings shall be kept.

(2) In the conduct of the proceeding the Commission shall apply any agreement between the parties on procedural matters, except as otherwise provided in the Convention or the Administrative and Financial Regulations.

Rule 21
Procedural Languages

(1) The parties may agree on the use of one or two languages to be used in the proceeding, provided that, if they agree on any language that is not an official language of the Centre, the Commission, after consultation with the Secretary-General, gives its approval. If the parties do not agree on any such procedural language, each of them may select one of the official languages (i.e., English, French and Spanish) for this purpose.

(2) If two procedural languages are selected by the parties, any instrument may be filed in either language. Either language may be used at the hearings, subject, if the Commission so requires, to translation and interpretation. The recommendations and the report of the Commission shall be rendered and the record kept in both procedural languages, both versions being equally authentic.

Chapter IV
Conciliation Procedures

Rule 22
Functions of the Commission

(1) In order to clarify the issues in dispute between the parties, the Commission shall hear the parties and shall endeavor to obtain any information that might serve this end. The parties shall be associated with its work as closely as possible.

(2) In order to bring about agreement between the parties, the Commission may, from time to time at any stage of the proceeding, make—orally or in writing—recommendations to the parties. It may recommend that the parties accept specific terms of settlement or that they refrain, while it seeks to bring about agreement between them, from specific acts that might aggravate the dispute; it shall point out to the parties the arguments in favor of its recommendations. It may fix time limits within which each party shall inform the Commission of its decision concerning the recommendations made.

(3) The Commission, in order to obtain information that might enable it to discharge its functions, may at any stage of the proceeding:

(a) request from either party oral explanations, documents and other information;

(b) request evidence from other persons; and

(c) with the consent of the party concerned, visit any place connected with the dispute or conduct inquiries there, provided that the parties may participate in any such visits and inquiries.

Rule 23
Cooperation of the Parties

(1) The parties shall cooperate in good faith with the Commission and, in particular, at its request furnish all relevant documents, information and explanations as well as use the means at their disposal to enable the Commission to hear witnesses and experts whom it desires to call. The parties shall also facilitate visits to and inquiries at any place connected with the dispute that the Commission desires to undertake.

(2) The parties shall comply with any time limits agreed with or fixed by the Commission.

Rule 24
Transmission of the Request

As soon as the Commission is constituted, the Secretary-General shall transmit to each member a copy of the request by which the proceeding was initiated, of the supporting documentation, of the notice of registration and of any communication received from either party in response thereto.

Rule 25
Written Statements

(1) Upon the constitution of the Commission, its President shall invite each party to file, within 30 days or such longer time limit as he may fix, a written statement of its position. If, upon its constitution, the Commission has no President, such invitation shall be issued and any such longer time limit shall be fixed by the Secretary-General. At any stage of the proceeding, within such time limits as the Commission shall fix, either party may file such other written statements as it deems useful and relevant.

(2) Except as otherwise provided by the Commission after consultation with the parties and the Secretary-General, every written statement or other instrument shall be filed in the form of a signed original accompanied by additional copies whose number shall be two more than the number of members of the Commission.

Rule 26
Supporting Documentation

(1) Every written statement or other instrument filed by a party may be accompanied by supporting documentation, in such form and number of copies as required by Administrative and Financial Regulation 30.

(2) Supporting documentation shall ordinarily be filed together with the instrument to which it relates, and in any case within the time limit fixed for the filing of such instrument.

Rule 27
Hearings

(1) The hearings of the Commission shall take place in private and, except as the parties otherwise agree, shall remain secret.

(2) The Commission shall decide, with the consent of the parties, which other persons besides the parties, their agents, counsel and advo-

cates, witnesses and experts during their testimony, and officers of the Commission may attend the hearings.

Rule 28
Witnesses and Experts

(1) Each party may, at any stage of the proceeding, request that the Commission hear the witnesses and experts whose evidence the party considers relevant. The Commission shall fix a time limit within which such hearing shall take place.

(2) Witnesses and experts shall, as a rule, be examined before the Commission by the parties under the control of its President. Questions may also be put to them by any member of the Commission.

(3) If a witness or expert is unable to appear before it, the Commission, in agreement with the parties, may make appropriate arrangements for the evidence to be given in a written deposition or to be taken by examination elsewhere. The parties may participate in any such examination.

Chapter V
Termination of the Proceeding

Rule 29
Objections to Jurisdiction

(1) Any objection that the dispute is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Commission shall be made as early as possible. A party shall file the objection with the Secretary-General no later than in its first written statement or at the first hearing if that occurs earlier, unless the facts on which the objection is based are unknown to the party at that time.

(2) The Commission may on its own initiative consider, at any stage of the proceeding, whether the dispute before it is within the jurisdiction of the Centre and within its own competence.

(3) Upon the formal raising of an objection, the proceeding on the merits shall be suspended. The Commission shall obtain the views of the parties on the objection.

(4) The Commission may deal with the objection as a preliminary question or join it to the merits of the dispute. If the Commission overrules the objection or joins it to the merits, it shall resume consideration of the latter without delay.

(5) If the Commission decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, it shall

close the proceeding and draw up a report to that effect, in which it shall state its reasons.

Rule 30
Closure of the Proceeding

(1) If the parties reach agreement on the issues in dispute, the Commission shall close the proceeding and draw up its report noting the issues in dispute and recording that the parties have reached agreement. At the request of the parties, the report shall record the detailed terms and conditions of their agreement.

(2) If at any stage of the proceeding it appears to the Commission that there is no likelihood of agreement between the parties, the Commission shall, after notice to the parties, close the proceeding and draw up its report noting the submission of the dispute to conciliation and recording the failure of the parties to reach agreement.

(3) If one party fails to appear or participate in the proceeding, the Commission shall, after notice to the parties, close the proceeding and draw up its report noting the submission of the dispute to conciliation and recording the failure of that party to appear or participate.

Rule 31
Preparation of the Report

The report of the Commission shall be drawn up and signed within 60 days after the closure of the proceeding.

Rule 32
The Report

(1) The report shall be in writing and shall contain, in addition to the material specified in paragraph (2) and in Rule 30:

(a) a precise designation of each party;

(b) a statement that the Commission was established under the Convention, and a description of the method of its constitution;

(c) the names of the members of the Commission, and an identification of the appointing authority of each;

(d) the names of the agents, counsel and advocates of the parties;

(e) the dates and place of the sittings of the Commission; and

(f) a summary of the proceeding.

(2) The report shall also record any agreement of the parties, pursuant to Article 35 of the Convention, concerning the use in other proceedings of the views expressed or statements or admissions or offers of settlement made in the proceeding before the Commission or of the report or any recommendation made by the Commission.

(3) The report shall be signed by the members of the Commission; the date of each signature shall be indicated. The fact that a member refuses to sign the report shall be recorded therein.

Rule 33
Communication of the Report

(1) Upon signature by the last conciliator to sign, the Secretary-General shall promptly:

(a) authenticate the original text of the report and deposit it in the archives of the Centre; and

(b) dispatch a certified copy to each party, indicating the date of dispatch on the original text and on all copies.

(2) The Secretary-General shall, upon request, make available to a party additional certified copies of the report.

(3) The Centre shall not publish the report without the consent of the parties.

Chapter VI
General Provisions

Rule 34
Final Provisions

(1) The texts of these Rules in each official language of the Centre shall be equally authentic.

(2) These Rules may be cited as the "Conciliation Rules" of the Centre.

RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS (ARBITRATION RULES)

RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS (ARBITRATION RULES)

Table of Contents

Arbitration Rules

The Rules of Procedure for Arbitration Proceedings (the Arbitration Rules) of ICSID were adopted by the Administrative Council of the Centre pursuant to Article 6(1)(c) of the ICSID Convention.

The Arbitration Rules are supplemented by the Administrative and Financial Regulations of the Centre, in particular by Regulations 14-16, 22-31 and 34(1).

The Arbitration Rules cover the period of time from the dispatch of the notice of registration of a request for arbitration until an award is rendered and all challenges possible to it under the Convention have been exhausted. The transactions previous to that time are to be regulated in accordance with the Institution Rules.

Arbitration Rules

Chapter I
Establishment of the Tribunal

Rule 1
General Obligations

(1) Upon notification of the registration of the request for arbitration, the parties shall, with all possible dispatch, proceed to constitute a Tribunal, with due regard to Section 2 of Chapter IV of the Convention.

(2) Unless such information is provided in the request, the parties shall communicate to the Secretary-General as soon as possible any provisions agreed by them regarding the number of arbitrators and the method of their appointment.

(3) The majority of the arbitrators shall be nationals of States other than the State party to the dispute and of the State whose national is a party to the dispute, unless the sole arbitrator or each individual member of the Tribunal is appointed by agreement of the parties. Where the Tribunal is to consist of three members, a national of either of these States may not be appointed as an arbitrator by a party without the agreement of the other party to the dispute. Where the Tribunal is to consist of five or more members, nationals of either of these States may not be appointed as arbitrators by a party if appointment by the other party of the same number of arbitrators of either of these nationalities would result in a majority of arbitrators of these nationalities.

(4) No person who had previously acted as a conciliator or arbitrator in any proceeding for the settlement of the dispute may be appointed as a member of the Tribunal.

Arbitration Rules

Rule 2
Method of Constituting the Tribunal in the Absence of Previous Agreement

(1) If the parties, at the time of the registration of the request for arbitration, have not agreed upon the number of arbitrators and the method of their appointment, they shall, unless they agree otherwise, follow the following procedure:

(a) the requesting party shall, within 10 days after the registration of the request, propose to the other party the appointment of a sole arbitrator or of a specified uneven number of arbitrators and specify the method proposed for their appointment;

(b) within 20 days after receipt of the proposals made by the requesting party, the other party shall:

(i) accept such proposals; or

(ii) make other proposals regarding the number of arbitrators and the method of their appointment;

(c) within 20 days after receipt of the reply containing any such other proposals, the requesting party shall notify the other party whether it accepts or rejects such proposals.

(2) The communications provided for in paragraph (1) shall be made or promptly confirmed in writing and shall either be transmitted through the Secretary-General or directly between the parties with a copy to the Secretary-General. The parties shall promptly notify the Secretary-General of the contents of any agreement reached.

(3) At any time 60 days after the registration of the request, if no agreement on another procedure is reached, either party may inform the Secretary-General that it chooses the formula provided for in Article 37(2)(b) of the Convention. The Secretary-General shall thereupon promptly inform the other party that the Tribunal is to be constituted in accordance with that Article.

Rule 3
Appointment of Arbitrators to a Tribunal Constituted in Accordance with Convention Article 37(2)(b)

(1) If the Tribunal is to be constituted in accordance with Article 37(2)(b) of the Convention:

(a) either party shall in a communication to the other party:

(i) name two persons, identifying one of them, who shall not have the same nationality as nor be a national of either party, as the arbitrator appointed by it, and the other as the arbitrator proposed to be the President of the Tribunal; and

(ii) invite the other party to concur in the appointment of the arbitrator proposed to be the President of the Tribunal and to appoint another arbitrator;

(b) promptly upon receipt of this communication the other party shall, in its reply:

(i) name a person as the arbitrator appointed by it, who shall not have the same nationality as nor be a national of either party; and

(ii) concur in the appointment of the arbitrator proposed to be the President of the Tribunal or name another person as the arbitrator proposed to be President;

(c) promptly upon receipt of the reply containing such a proposal, the initiating party shall notify the other party whether it concurs in the appointment of the arbitrator proposed by that party to be the President of the Tribunal.

(2) The communications provided for in this Rule shall be made or promptly confirmed in writing and shall either be transmitted through the Secretary-General or directly between the parties with a copy to the Secretary-General.

Rule 4
Appointment of Arbitrators by the Chairman of the Administrative Council

(1) If the Tribunal is not constituted within 90 days after the dispatch by the Secretary-General of the notice of registration, or such other period as the parties may agree, either party may, through the Secretary-General, address to the Chairman of the Administrative Council a request in writing to appoint the arbitrator or arbitrators not yet appointed and to designate an arbitrator to be the President of the Tribunal.

(2) The provision of paragraph (1) shall apply *mutatis mutandis* in the event that the parties have agreed that the arbitrators shall elect the President of the Tribunal and they fail to do so.

(3) The Secretary-General shall forthwith send a copy of the request to the other party.

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(4) The Chairman shall use his best efforts to comply with that request within 30 days after its receipt. Before he proceeds to make an appointment or designation, with due regard to Articles 38 and 40(1) of the Convention, he shall consult both parties as far as possible.

(5) The Secretary-General shall promptly notify the parties of any appointment or designation made by the Chairman.

Rule 5
Acceptance of Appointments

(1) The party or parties concerned shall notify the Secretary-General of the appointment of each arbitrator and indicate the method of his appointment.

(2) As soon as the Secretary-General has been informed by a party or the Chairman of the Administrative Council of the appointment of an arbitrator, he shall seek an acceptance from the appointee.

(3) If an arbitrator fails to accept his appointment within 15 days, the Secretary-General shall promptly notify the parties, and if appropriate the Chairman, and invite them to proceed to the appointment of another arbitrator in accordance with the method followed for the previous appointment.

Rule 6
Constitution of the Tribunal

(1) The Tribunal shall be deemed to be constituted and the proceeding to have begun on the date the Secretary-General notifies the parties that all the arbitrators have accepted their appointment.

(2) Before or at the first session of the Tribunal, each arbitrator shall sign a declaration in the following form:

"To the best of my knowledge there is no reason why I should not serve on the Arbitral Tribunal constituted by the International Centre for Settlement of Investment Disputes with respect to a dispute between _____and_____.

"I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by the Tribunal.

"I shall judge fairly as between the parties, according to the applicable law, and shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and in the Regulations and Rules made pursuant thereto.

"Attached is a statement of (a) my past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause my reliability for independent judgment to be questioned by a party. I acknowledge that by signing this declaration, I assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding."

Any arbitrator failing to sign a declaration by the end of the first session of the Tribunal shall be deemed to have resigned.

Rule 7
Replacement of Arbitrators

At any time before the Tribunal is constituted, each party may replace any arbitrator appointed by it and the parties may by common consent agree to replace any arbitrator. The procedure of such replacement shall be in accordance with Rules 1, 5 and 6.

Rule 8
Incapacity or Resignation of Arbitrators

(1) If an arbitrator becomes incapacitated or unable to perform the duties of his office, the procedure in respect of the disqualification of arbitrators set forth in Rule 9 shall apply.

(2) An arbitrator may resign by submitting his resignation to the other members of the Tribunal and the Secretary-General. If the arbitrator was appointed by one of the parties, the Tribunal shall promptly consider the reasons for his resignation and decide whether it consents thereto. The Tribunal shall promptly notify the Secretary-General of its decision.

Rule 9
Disqualification of Arbitrators

(1) A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor.

(2) The Secretary-General shall forthwith:

(a) transmit the proposal to the members of the Tribunal and, if it relates to a sole arbitrator or to a majority of the members of the Tribunal, to the Chairman of the Administrative Council; and

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(b) notify the other party of the proposal.

(3) The arbitrator to whom the proposal relates may, without delay, furnish explanations to the Tribunal or the Chairman, as the case may be.

(4) Unless the proposal relates to a majority of the members of the Tribunal, the other members shall promptly consider and vote on the proposal in the absence of the arbitrator concerned. If those members are equally divided, they shall, through the Secretary-General, promptly notify the Chairman of the proposal, of any explanation furnished by the arbitrator concerned and of their failure to reach a decision.

(5) Whenever the Chairman has to decide on a proposal to disqualify an arbitrator, he shall use his best efforts to take that decision within 30 days after he has received the proposal.

(6) The proceeding shall be suspended until a decision has been taken on the proposal.

Rule 10
Procedure during a Vacancy on the Tribunal

(1) The Secretary-General shall forthwith notify the parties and, if necessary, the Chairman of the Administrative Council of the disqualification, death, incapacity or resignation of an arbitrator and of the consent, if any, of the Tribunal to a resignation.

(2) Upon the notification by the Secretary-General of a vacancy on the Tribunal, the proceeding shall be or remain suspended until the vacancy has been filled.

Rule 11
Filling Vacancies on the Tribunal

(1) Except as provided in paragraph (2), a vacancy resulting from the disqualification, death, incapacity or resignation of an arbitrator shall be promptly filled by the same method by which his appointment had been made.

(2) In addition to filling vacancies relating to arbitrators appointed by him, the Chairman of the Administrative Council shall appoint a person from the Panel of Arbitrators:

(a) to fill a vacancy caused by the resignation, without the consent of the Tribunal, of an arbitrator appointed by a party; or

(b) at the request of either party, to fill any other vacancy, if no new appointment is made and accepted within 45 days of the notification of the vacancy by the Secretary-General.

(3) The procedure for filling a vacancy shall be in accordance with Rules 1, 4(4), 4(5), 5 and, *mutatis mutandis,* 6(2).

Rule 12
Resumption of Proceeding after Filling a Vacancy

As soon as a vacancy on the Tribunal has been filled, the proceeding shall continue from the point it had reached at the time the vacancy occurred. The newly appointed arbitrator may, however, require that the oral procedure be recommenced, if this had already been started.

Chapter II
Working of the Tribunal

Rule 13
Sessions of the Tribunal

(1) The Tribunal shall hold its first session within 60 days after its constitution or such other period as the parties may agree. The dates of that session shall be fixed by the President of the Tribunal after consultation with its members and the Secretary-General. If upon its constitution the Tribunal has no President because the parties have agreed that the President shall be elected by its members, the Secretary-General shall fix the dates of that session. In both cases, the parties shall be consulted as far as possible.

(2) The dates of subsequent sessions shall be determined by the Tribunal, after consultation with the Secretary-General and with the parties as far as possible.

(3) The Tribunal shall meet at the seat of the Centre or at such other place as may have been agreed by the parties in accordance with Article 63 of the Convention. If the parties agree that the proceeding shall be held at a place other than the Centre or an institution with which the Centre has made the necessary arrangements, they shall consult with the Secretary-General and request the approval of the Tribunal. Failing such approval, the Tribunal shall meet at the seat of the Centre.

(4) The Secretary-General shall notify the members of the Tribunal and the parties of the dates and place of the sessions of the Tribunal in good time.

Rule 14
Sittings of the Tribunal

(1) The President of the Tribunal shall conduct its hearings and preside at its deliberations.

(2) Except as the parties otherwise agree, the presence of a majority of the members of the Tribunal shall be required at its sittings.

(3) The President of the Tribunal shall fix the date and hour of its sittings.

Rule 15
Deliberations of the Tribunal

(1) The deliberations of the Tribunal shall take place in private and remain secret.

(2) Only members of the Tribunal shall take part in its deliberations. No other person shall be admitted unless the Tribunal decides otherwise.

Rule 16
Decisions of the Tribunal

(1) Decisions of the Tribunal shall be taken by a majority of the votes of all its members. Abstention shall count as a negative vote.

(2) Except as otherwise provided by these Rules or decided by the Tribunal, it may take any decision by correspondence among its members, provided that all of them are consulted. Decisions so taken shall be certified by the President of the Tribunal.

Rule 17
Incapacity of the President

If at any time the President of the Tribunal should be unable to act, his functions shall be performed by one of the other members of the Tribunal, acting in the order in which the Secretary-General had received the notice of their acceptance of their appointment to the Tribunal.

Rule 18
Representation of the Parties

(1) Each party may be represented or assisted by agents, counsel or advocates whose names and authority shall be notified by that party to the Secretary-General, who shall promptly inform the Tribunal and the other party.

(2) For the purposes of these Rules, the expression "party" includes, where the context so admits, an agent, counsel or advocate authorized to represent that party.

Chapter III
General Procedural Provisions

Rule 19
Procedural Orders

The Tribunal shall make the orders required for the conduct of the proceeding.

Rule 20
Preliminary Procedural Consultation

(1) As early as possible after the constitution of a Tribunal, its President shall endeavor to ascertain the views of the parties regarding questions of procedure. For this purpose he may request the parties to meet him. He shall, in particular, seek their views on the following matters:

(a) the number of members of the Tribunal required to constitute a quorum at its sittings;

(b) the language or languages to be used in the proceeding;

(c) the number and sequence of the pleadings and the time limits within which they are to be filed;

(d) the number of copies desired by each party of instruments filed by the other;

(e) dispensing with the written or the oral procedure;

(f) the manner in which the cost of the proceeding is to be apportioned; and

(g) the manner in which the record of the hearings shall be kept.

(2) In the conduct of the proceeding the Tribunal shall apply any agreement between the parties on procedural matters, except as otherwise provided in the Convention or the Administrative and Financial Regulations.

Rule 21
Pre-Hearing Conference

(1) At the request of the Secretary-General or at the discretion of the President of the Tribunal, a pre-hearing conference between the Tribunal and the parties may be held to arrange for an exchange of information and the stipulation of uncontested facts in order to expedite the proceeding.

(2) At the request of the parties, a pre-hearing conference between the Tribunal and the parties, duly represented by their authorized representatives, may be held to consider the issues in dispute with a view to reaching an amicable settlement.

Rule 22
Procedural Languages

(1) The parties may agree on the use of one or two languages to be used in the proceeding, provided, that, if they agree on any language that is not an official language of the Centre, the Tribunal, after consultation with the Secretary-General, gives its approval. If the parties do not agree on any such procedural language, each of them may select one of the official languages (i.e., English, French and Spanish) for this purpose.

(2) If two procedural languages are selected by the parties, any instrument may be filed in either language. Either language may be used at the hearings, subject, if the Tribunal so requires, to translation and interpretation. The orders and the award of the Tribunal shall be rendered and the record kept in both procedural languages, both versions being equally authentic.

Rule 23
Copies of Instruments

Except as otherwise provided by the Tribunal after consultation with the parties and the Secretary-General, every request, pleading, application, written observation, supporting documentation, if any, or other instrument shall be filed in the form of a signed original accompanied by the following number of additional copies:

(a) before the number of members of the Tribunal has been determined: five;

(b) after the number of members of the Tribunal has been determined: two more than the number of its members.

Rule 24
Supporting Documentation

Supporting documentation shall ordinarily be filed together with the instrument to which it relates, and in any case within the time limit fixed for the filing of such instrument.

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Rule 25
Correction of Errors

An accidental error in any instrument or supporting document may, with the consent of the other party or by leave of the Tribunal, be corrected at any time before the award is rendered.

Rule 26
Time Limits

(1) Where required, time limits shall be fixed by the Tribunal by assigning dates for the completion of the various steps in the proceeding. The Tribunal may delegate this power to its President.

(2) The Tribunal may extend any time limit that it has fixed. If the Tribunal is not in session, this power shall be exercised by its President.

(3) Any step taken after expiration of the applicable time limit shall be disregarded unless the Tribunal, in special circumstances and after giving the other party an opportunity of stating its views, decides otherwise.

Rule 27
Waiver

A party which knows or should have known that a provision of the Administrative and Financial Regulations, of these Rules, of any other rules or agreement applicable to the proceeding, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be deemed—subject to Article 45 of the Convention—to have waived its right to object.

Rule 28
Cost of Proceeding

(1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:

(a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;

(b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.

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(2) Promptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the Tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding. The Tribunal may, before the award has been rendered, request the parties and the Secretary-General to provide additional information concerning the cost of the proceeding.

Chapter IV
Written and Oral Procedures

Rule 29
Normal Procedures

Except if the parties otherwise agree, the proceeding shall comprise two distinct phases: a written procedure followed by an oral one.

Rule 30
Transmission of the Request

As soon as the Tribunal is constituted, the Secretary-General shall transmit to each member a copy of the request by which the proceeding was initiated, of the supporting documentation, of the notice of registration and of any communication received from either party in response thereto.

Rule 31
The Written Procedure

(1) In addition to the request for arbitration, the written procedure shall consist of the following pleadings, filed within time limits set by the Tribunal:

(a) a memorial by the requesting party;

(b) a counter-memorial by the other party;

and, if the parties so agree or the Tribunal deems it necessary:

(c) a reply by the requesting party; and

(d) a rejoinder by the other party.

(2) If the request was made jointly, each party shall, within the same time limit determined by the Tribunal, file its memorial and, if the parties so agree or the Tribunal deems it necessary, its reply; however,

the parties may instead agree that one of them shall, for the purposes of paragraph (1), be considered as the requesting party.

(3) A memorial shall contain: a statement of the relevant facts; a statement of law; and the submissions. A counter-memorial, reply or rejoinder shall contain an admission or denial of the facts stated in the last previous pleading; any additional facts, if necessary; observations concerning the statement of law in the last previous pleading; a statement of law in answer thereto; and the submissions.

Rule 32
The Oral Procedure

(1) The oral procedure shall consist of the hearing by the Tribunal of the parties, their agents, counsel and advocates, and of witnesses and experts.

(2) Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.

(3) The members of the Tribunal may, during the hearings, put questions to the parties, their agents, counsel and advocates, and ask them for explanations.

Rule 33
Marshalling of Evidence

Without prejudice to the rules concerning the production of documents, each party shall, within time limits fixed by the Tribunal, communicate to the Secretary-General, for transmission to the Tribunal and the other party, precise information regarding the evidence which it intends to produce and that which it intends to request the Tribunal to call for, together with an indication of the points to which such evidence will be directed.

Rule 34
Evidence: General Principles

(1) The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.

(2) The Tribunal may, if it deems it necessary at any stage of the proceeding:

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(a) call upon the parties to produce documents, witnesses and experts; and

(b) visit any place connected with the dispute or conduct inquiries there.

(3) The parties shall cooperate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2). The Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure.

(4) Expenses incurred in producing evidence and in taking other measures in accordance with paragraph (2) shall be deemed to constitute part of the expenses incurred by the parties within the meaning of Article 61(2) of the Convention.

Rule 35
Examination of Witnesses and Experts

(1) Witnesses and experts shall be examined before the Tribunal by the parties under the control of its President. Questions may also be put to them by any member of the Tribunal.

(2) Each witness shall make the following declaration before giving his evidence:

"I solemnly declare upon my honour and conscience that I shall speak the truth, the whole truth and nothing but the truth."

(3) Each expert shall make the following declaration before making his statement:

"I solemnly declare upon my honour and conscience that my statement will be in accordance with my sincere belief."

Rule 36
Witnesses and Experts: Special Rules

Notwithstanding Rule 35 the Tribunal may:

(a) admit evidence given by a witness or expert in a written deposition; and

(b) with the consent of both parties, arrange for the examination of a witness or expert otherwise than before the Tribunal itself. The Tribunal shall define the subject of the examination, the time limit, the procedure to be followed and other particulars. The parties may participate in the examination.

Rule 37
Visits and Inquiries; Submissions of Non-disputing Parties

(1) If the Tribunal considers it necessary to visit any place connected with the dispute or to conduct an inquiry there, it shall make an order to this effect. The order shall define the scope of the visit or the subject of the inquiry, the time limit, the procedure to be followed and other particulars. The parties may participate in any visit or inquiry.

(2) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;

(b) the non-disputing party submission would address a matter within the scope of the dispute;

(c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

Rule 38
Closure of the Proceeding

(1) When the presentation of the case by the parties is completed, the proceeding shall be declared closed.

(2) Exceptionally, the Tribunal may, before the award has been rendered, reopen the proceeding on the ground that new evidence is forthcoming of such a nature as to constitute a decisive factor, or that there is a vital need for clarification on certain specific points.

Chapter V
Particular Procedures

Rule 39
Provisional Measures

(1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.

(2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).

(3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.

(4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

(5) If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.

(6) Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests.

Rule 40
Ancillary Claims

(1) Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.

(2) An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the counter-memorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding.

(3) The Tribunal shall fix a time limit within which the party against which an ancillary claim is presented may file its observations thereon.

Rule 41
Preliminary Objections

(1) Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time.

(2) The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.

(3) Upon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceeding on the merits. The President of the Tribunal, after consultation with its other members, shall fix a time limit within which the parties may file observations on the objection.

(4) The Tribunal shall decide whether or not the further procedures relating to the objection made pursuant to paragraph (1) shall be oral. It may deal with the objection as a preliminary question or join it to the merits of the dispute. If the Tribunal overrules the objection or joins it to the merits, it shall once more fix time limits for the further procedures.

(5) Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.

(6) If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, or that all claims are manifestly without legal merit, it shall render an award to that effect.

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Rule 42
Default

(1) If a party (in this Rule called the "defaulting party") fails to appear or to present its case at any stage of the proceeding, the other party may, at any time prior to the discontinuance of the proceeding, request the Tribunal to deal with the questions submitted to it and to render an award.

(2) The Tribunal shall promptly notify the defaulting party of such a request. Unless it is satisfied that that party does not intend to appear or to present its case in the proceeding, it shall, at the same time, grant a period of grace and to this end:

(a) if that party had failed to file a pleading or any other instrument within the time limit fixed therefor, fix a new time limit for its filing; or

(b) if that party had failed to appear or present its case at a hearing, fix a new date for the hearing.

The period of grace shall not, without the consent of the other party, exceed 60 days.

(3) After the expiration of the period of grace or when, in accordance with paragraph (2), no such period is granted, the Tribunal shall resume the consideration of the dispute. Failure of the defaulting party to appear or to present its case shall not be deemed an admission of the assertions made by the other party.

(4) The Tribunal shall examine the jurisdiction of the Centre and its own competence in the dispute and, if it is satisfied, decide whether the submissions made are well-founded in fact and in law. To this end, it may, at any stage of the proceeding, call on the party appearing to file observations, produce evidence or submit oral explanations.

Rule 43
Settlement and Discontinuance

(1) If, before the award is rendered, the parties agree on a settlement of the dispute or otherwise to discontinue the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall, at their written request, in an order take note of the discontinuance of the proceeding.

(2) If the parties file with the Secretary-General the full and signed text of their settlement and in writing request the Tribunal to embody such settlement in an award, the Tribunal may record the settlement in the form of its award.

Rule 44
Discontinuance at Request of a Party

If a party requests the discontinuance of the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall in an order fix a time limit within which the other party may state whether it opposes the discontinuance. If no objection is made in writing within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Tribunal, or if appropriate the Secretary-General, shall in an order take note of the discontinuance of the proceeding. If objection is made, the proceeding shall continue.

Rule 45
Discontinuance for Failure of Parties to Act

If the parties fail to take any steps in the proceeding during six consecutive months or such period as they may agree with the approval of the Tribunal, or of the Secretary-General if the Tribunal has not yet been constituted, they shall be deemed to have discontinued the proceeding and the Tribunal, or if appropriate the Secretary-General, shall, after notice to the parties, in an order take note of the discontinuance.

Chapter VI
The Award

Rule 46
Preparation of the Award

The award (including any individual or dissenting opinion) shall be drawn up and signed within 120 days after closure of the proceeding. The Tribunal may, however, extend this period by a further 60 days if it would otherwise be unable to draw up the award.

Rule 47
The Award

(1) The award shall be in writing and shall contain:

(a) a precise designation of each party;

(b) a statement that the Tribunal was established under the Convention, and a description of the method of its constitution;

Arbitration Rules

(c) the name of each member of the Tribunal, and an identification of the appointing authority of each;

(d) the names of the agents, counsel and advocates of the parties;

(e) the dates and place of the sittings of the Tribunal;

(f) a summary of the proceeding;

(g) a statement of the facts as found by the Tribunal;

(h) the submissions of the parties;

(i) the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based; and

(j) any decision of the Tribunal regarding the cost of the proceeding.

(2) The award shall be signed by the members of the Tribunal who voted for it; the date of each signature shall be indicated.

(3) Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.

Rule 48
Rendering of the Award

(1) Upon signature by the last arbitrator to sign, the Secretary-General shall promptly:

(a) authenticate the original text of the award and deposit it in the archives of the Centre, together with any individual opinions and statements of dissent; and

(b) dispatch a certified copy of the award (including individual opinions and statements of dissent) to each party, indicating the date of dispatch on the original text and on all copies.

(2) The award shall be deemed to have been rendered on the date on which the certified copies were dispatched.

(3) The Secretary-General shall, upon request, make available to a party additional certified copies of the award.

(4) The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.

Rule 49
Supplementary Decisions and Rectification

(1) Within 45 days after the date on which the award was rendered, either party may request, pursuant to Article 49(2) of the Convention, a supplementary decision on, or the rectification of, the award. Such a request shall be addressed in writing to the Secretary-General. The request shall:

(a) identify the award to which it relates;

(b) indicate the date of the request;

(c) state in detail:

(i) any question which, in the opinion of the requesting party, the Tribunal omitted to decide in the award; and

(ii) any error in the award which the requesting party seeks to have rectified; and

(d) be accompanied by a fee for lodging the request.

(2) Upon receipt of the request and of the lodging fee, the Secretary-General shall forthwith:

(a) register the request;

(b) notify the parties of the registration;

(c) transmit to the other party a copy of the request and of any accompanying documentation; and

(d) transmit to each member of the Tribunal a copy of the notice of registration, together with a copy of the request and of any accompanying documentation.

(3) The President of the Tribunal shall consult the members on whether it is necessary for the Tribunal to meet in order to consider the request. The Tribunal shall fix a time limit for the parties to file their observations on the request and shall determine the procedure for its consideration.

(4) Rules 46-48 shall apply, *mutatis mutandis,* to any decision of the Tribunal pursuant to this Rule.

(5) If a request is received by the Secretary-General more than 45 days after the award was rendered, he shall refuse to register the request and so inform forthwith the requesting party.

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Chapter VII
Interpretation, Revision and Annulment of the Award

Rule 50
The Application

(1) An application for the interpretation, revision or annulment of an award shall be addressed in writing to the Secretary-General and shall:

(a) identify the award to which it relates;

(b) indicate the date of the application;

(c) state in detail:

(i) in an application for interpretation, the precise points in dispute;

(ii) in an application for revision, pursuant to Article 51(1) of the Convention, the change sought in the award, the discovery of some fact of such a nature as decisively to affect the award, and evidence that when the award was rendered that fact was unknown to the Tribunal and to the applicant, and that the applicant's ignorance of that fact was not due to negligence;

(iii) in an application for annulment, pursuant to Article 52(1) of the Convention, the grounds on which it is based. These grounds are limited to the following:

– that the Tribunal was not properly constituted;

– that the Tribunal has manifestly exceeded its powers;

– that there was corruption on the part of a member of the Tribunal;

– that there has been a serious departure from a fundamental rule of procedure;

– that the award has failed to state the reasons on which it is based;

(d) be accompanied by the payment of a fee for lodging the application.

(2) Without prejudice to the provisions of paragraph (3), upon receiving an application and the lodging fee, the Secretary-General shall forthwith:

(a) register the application;

(b) notify the parties of the registration; and

(c) transmit to the other party a copy of the application and of any accompanying documentation.

(3) The Secretary-General shall refuse to register an application for:

(a) revision, if, in accordance with Article 51(2) of the Convention, it is not made within 90 days after the discovery of the new fact and in any event within three years after the date on which the award was rendered (or any subsequent decision or correction);

(b) annulment, if, in accordance with Article 52(2) of the Convention, it is not made:

(i) within 120 days after the date on which the award was rendered (or any subsequent decision or correction) if the application is based on any of the following grounds:

– the Tribunal was not properly constituted;

– the Tribunal has manifestly exceeded its powers;

– there has been a serious departure from a fundamental rule of procedure;

– the award has failed to state the reasons on which it is based;

(ii) in the case of corruption on the part of a member of the Tribunal, within 120 days after discovery thereof, and in any event within three years after the date on which the award was rendered (or any subsequent decision or correction).

(4) If the Secretary-General refuses to register an application for revision, or annulment, he shall forthwith notify the requesting party of his refusal.

Rule 51
Interpretation or Revision: Further Procedures

(1) Upon registration of an application for the interpretation or revision of an award, the Secretary-General shall forthwith:

(a) transmit to each member of the original Tribunal a copy of the notice of registration, together with a copy of the application and of any accompanying documentation; and

(b) request each member of the Tribunal to inform him within a specified time limit whether that member is willing to take part in the consideration of the application.

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(2) If all members of the Tribunal express their willingness to take part in the consideration of the application, the Secretary-General shall so notify the members of the Tribunal and the parties. Upon dispatch of these notices the Tribunal shall be deemed to be reconstituted.

(3) If the Tribunal cannot be reconstituted in accordance with paragraph (2), the Secretary-General shall so notify the parties and invite them to proceed, as soon as possible, to constitute a new Tribunal, including the same number of arbitrators, and appointed by the same method, as the original one.

Rule 52
Annulment: Further Procedures

(1) Upon registration of an application for the annulment of an award, the Secretary-General shall forthwith request the Chairman of the Administrative Council to appoint an *ad hoc* Committee in accordance with Article 52(3) of the Convention.

(2) The Committee shall be deemed to be constituted on the date the Secretary-General notifies the parties that all members have accepted their appointment. Before or at the first session of the Committee, each member shall sign a declaration conforming to that set forth in Rule 6(2).

Rule 53
Rules of Procedure

The provisions of these Rules shall apply *mutatis mutandis* to any procedure relating to the interpretation, revision or annulment of an award and to the decision of the Tribunal or Committee.

Rule 54
Stay of Enforcement of the Award

(1) The party applying for the interpretation, revision or annulment of an award may in its application, and either party may at any time before the final disposition of the application, request a stay in the enforcement of part or all of the award to which the application relates. The Tribunal or Committee shall give priority to the consideration of such a request.

(2) If an application for the revision or annulment of an award contains a request for a stay of its enforcement, the Secretary-General shall, together with the notice of registration, inform both parties of the provisional stay of the award. As soon as the Tribunal or Committee is constituted it shall, if either party requests, rule within 30 days on

whether such stay should be continued; unless it decides to continue the stay, it shall automatically be terminated.

(3) If a stay of enforcement has been granted pursuant to paragraph (1) or continued pursuant to paragraph (2), the Tribunal or Committee may at any time modify or terminate the stay at the request of either party. All stays shall automatically terminate on the date on which a final decision is rendered on the application, except that a Committee granting the partial annulment of an award may order the temporary stay of enforcement of the unannulled portion in order to give either party an opportunity to request any new Tribunal constituted pursuant to Article 52(6) of the Convention to grant a stay pursuant to Rule 55(3).

(4) A request pursuant to paragraph (1), (2) (second sentence) or (3) shall specify the circumstances that require the stay or its modification or termination. A request shall only be granted after the Tribunal or Committee has given each party an opportunity of presenting its observations.

(5) The Secretary-General shall promptly notify both parties of the stay of enforcement of any award and of the modification or termination of such a stay, which shall become effective on the date on which he dispatches such notification.

Rule 55
Resubmission of Dispute after an Annulment

(1) If a Committee annuls part or all of an award, either party may request the resubmission of the dispute to a new Tribunal. Such a request shall be addressed in writing to the Secretary-General and shall:

(a) identify the award to which it relates;

(b) indicate the date of the request;

(c) explain in detail what aspect of the dispute is to be submitted to the Tribunal; and

(d) be accompanied by a fee for lodging the request.

(2) Upon receipt of the request and of the lodging fee, the Secretary-General shall forthwith:

(a) register it in the Arbitration Register;

(b) notify both parties of the registration;

(c) transmit to the other party a copy of the request and of any accompanying documentation; and

(d) invite the parties to proceed, as soon as possible, to constitute a new Tribunal, including the same number of arbitrators, and appointed by the same method, as the original one.

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(3) If the original award had only been annulled in part, the new Tribunal shall not reconsider any portion of the award not so annulled. It may, however, in accordance with the procedures set forth in Rule 54, stay or continue to stay the enforcement of the unannulled portion of the award until the date its own award is rendered.

(4) Except as otherwise provided in paragraphs (1)–(3), these Rules shall apply to a proceeding on a resubmitted dispute in the same manner as if such dispute had been submitted pursuant to the Institution Rules.

Chapter VIII
General Provisions

Rule 56
Final Provisions

(1) The texts of these Rules in each official language of the Centre shall be equally authentic.

(2) These Rules may be cited as the "Arbitration Rules" of the Centre.

North American Free Trade Agreement, 1994
(Chapter Eleven: Investment)

PART FIVE

INVESTMENT, SERVICES AND RELATED MATTERS

CHAPTER ELEVEN: INVESTMENT

Section A - Investment

Article 1101: Scope and Coverage

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

   (a) investors of another Party;

   (b) investments of investors of another Party in the territory of the Party; and

   (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.

2. A Party has the right to perform exclusively the economic activities set out in Annex III and to refuse to permit the establishment of investment in such activities.

3. This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Fourteen (Financial Services).

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

Article 1102: National Treatment

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

2. Each Party shall accord to investments of investors of another 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.

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

4. For greater certainty, no Party may:

   (a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or

   (b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.

Article 1103: Most-Favored-Nation Treatment

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

Article 1104: Standard of Treatment

Each Party shall accord to investors of another Party and to investments of investors of another Party the better of the treatment required by Articles 1102 and 1103.

Article 1105: Minimum Standard of Treatment

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

2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

3. Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b).

Article 1106: 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 a Party or of a non-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;

   (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, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or

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

2. 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 1102 and 1103 apply to the measure.

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

(a) to 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;

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

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

4. Nothing in paragraph 3 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 a Party or of a non-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. Paragraphs 1 and 3 do not apply to any requirement other than the requirements set out in those paragraphs.

6. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in paragraph 1(b) or (c) or 3(a) or (b) shall be construed to prevent any Party from adopting or maintaining measures, including environmental measures:

(a) necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;

(b) necessary to protect human, animal or plant life or health; or

(c) necessary for the conservation of living or non-living exhaustible natural resources.

Article 1107: 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 another Party appoint to senior management positions individuals of any particular nationality.

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

Article 1108: Reservations and Exceptions

1. Articles 1102, 1103, 1106 and 1107 do not apply to:

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

(i) a Party at the federal level, as set out in its Schedule to Annex I or III,

(ii) a state or province, for two years after the date of entry into force of this Agreement, and thereafter as set out by a Party in its Schedule to Annex I in accordance with paragraph 2, or

(iii) a local government;

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

(c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 1102, 1103, 1106 and 1107.

2. Each Party may set out in its Schedule to Annex I, within two years of the date of entry into force of this Agreement, any existing nonconforming measure maintained by a state or province, not including a local government.

3. Articles 1102, 1103, 1106 and 1107 do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors or activities, as set out in its Schedule to Annex II.

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

5. Articles 1102 and 1103 do not apply to any measure that is an exception to, or derogation from, the obligations under Article 1703 (Intellectual Property National Treatment) as specifically provided for in that Article.

6. Article 1103 does not apply to treatment accorded by a Party pursuant to agreements, or with respect to sectors, set out in its Schedule to Annex IV.

7. Articles 1102, 1103 and 1107 do not apply to:

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

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

8. The provisions of:

(a) Article 1106(1)(a), (b) and (c), and (3)(a) and (b) do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs;

(b) Article 1106(1)(b), (c), (f) and (g), and (3)(a) and (b) do not apply to procurement by a Party or a state enterprise; and

(c) Article 1106(3)(a) and (b) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

Article 1109: Transfers

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

(a) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance and other fees, returns in kind and other amounts derived from the investment;

(b) proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;

(c) payments made under a contract entered into by the investor, or its investment, including payments made pursuant to a loan agreement;

(d) payments made pursuant to Article 1110; and

(e) payments arising under Section B.

2. Each Party shall permit transfers to be made in a freely usable currency at the market rate of exchange prevailing on the date of transfer with respect to spot transactions in the currency to be transferred.

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 another 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) issuing, trading or dealing in securities;

(c) criminal or penal offenses;

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

(e) ensuring the satisfaction of judgments in adjudicatory proceedings.

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.

6. Notwithstanding paragraph 1, a Party may restrict transfers of returns in kind in circumstances where it could otherwise restrict such transfers under this Agreement, including as set out in paragraph 4.

Article 1110: Expropriation and Compensation

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

(a) for a public purpose;

(b) on a non-discriminatory basis;

(c) in accordance with due process of law and Article 1105(1); and

(d) on payment of compensation in accordance with paragraphs 2 through 6.

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

5. If a Party elects to pay in a currency other than a G7 currency, the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.

6. On payment, compensation shall be freely transferable as provided in Article 1109.

7. 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 Chapter Seventeen (Intellectual Property).

8. 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 1111: Special Formalities and Information Requirements

1. Nothing in Article 1102 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with the establishment of investments by investors of another Party, such as a requirement that 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 another Party and investments of investors of another Party pursuant to this Chapter.

2. Notwithstanding Articles 1102 or 1103, a Party may require an investor of another Party, or its investment in its territory, to provide routine information concerning that investment solely for informational or statistical purposes. The Party shall protect such business 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 1112: Relation to Other Chapters

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

2. A requirement by a Party that a service provider of another 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 provision of that crossborder service. This Chapter applies to that Party's treatment of the posted bond or financial security.

Article 1113: Denial of Benefits

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

(a) does not maintain diplomatic relations with the non-Party; or

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

2. Subject to prior notification and consultation in accordance with Articles 1803 (Notification and Provision of Information) and 2006 (Consultations), a Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such Party and to investments of such investors if investors of a non-Party own or control 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 1114: 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 in a manner sensitive to environmental concerns.

2. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should 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 another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

Section B Settlement of Disputes between a Party and an Investor of Another Party

Article 1115: Purpose

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

Article 1116: Claim by an Investor of a Party on Its Own Behalf

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,

and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

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

Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise

1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

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

3. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 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 1120, the claims should be heard together by a Tribunal established under Article 1126, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.

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

Article 1118: Settlement of a Claim through Consultation and Negotiation

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

Article 1119: Notice of Intent to Submit a Claim to Arbitration

The disputing investor shall deliver to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted, which notice shall specify:

(a) the name and address of the disputing investor and, where a claim is made under Article 1117, the name and address of the enterprise;

(b) the provisions of this Agreement alleged to have been breached and any other relevant provisions;

(c) the issues and the factual basis for the claim; and

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

Article 1120: Submission of a Claim to Arbitration

1. Except as provided in Annex 1120.1, and 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; or

(c) the UNCITRAL Arbitration Rules.

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

Article 1121: Conditions Precedent to Submission of a Claim to Arbitration

1. A disputing investor may submit a claim under Article 1116 to arbitration only if:

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

(b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

2. A disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise:

(a) consent to arbitration in accordance with the procedures set out in this Agreement; 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 1117, 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.

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

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

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

(b) Annex 1120.1(b) shall not apply.

Article 1122: Consent to Arbitration

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

2. The consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of:

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

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

(c) Article I of the InterAmerican Convention for an agreement.

Article 1123: Number of Arbitrators and Method of Appointment

Except in respect of a Tribunal established under Article 1126, 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, appointed by agreement of the disputing parties.

Article 1124: 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. The Secretary-General shall serve as appointing authority for an arbitration under this Section.

2. If a Tribunal, other than a Tribunal established under Article 1126, has not been constituted within 90 days from the date that a claim is submitted to arbitration, the Secretary-General, on the request of either disputing party, shall appoint, in his discretion, the arbitrator or arbitrators not yet appointed, except that the presiding arbitrator shall be appointed in accordance with paragraph 3.

3. The Secretary-General shall appoint the presiding arbitrator from the roster of presiding arbitrators referred to in paragraph 4, provided that the presiding arbitrator shall not be a national of the disputing Party or a national of the Party of the disputing investor. In the event that no such presiding arbitrator is available to serve, the Secretary-General shall appoint, from the ICSID Panel of Arbitrators, a presiding arbitrator who is not a national of any of the Parties.

4. On the date of entry into force of this Agreement, the Parties shall establish, and thereafter maintain, a roster of 45 presiding arbitrators meeting the qualifications of the Convention and rules referred to in Article 1120 and experienced in international law and

investment matters. The roster members shall be appointed by consensus and without regard to nationality.

Article 1125: 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 1124(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 1116 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 1117(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 1126: 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 1120 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 to the disputing Party or disputing investors against which the order is sought a copy of the request.

5. Within 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 1124(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 1124(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 a Party of the disputing investors.

6. Where a Tribunal has been established under this Article, a disputing investor that has submitted a claim to arbitration under Article 1116 or 1117 and that has not been named in a request made under paragraph 3 may make a written request to the Tribunal that it be included in an order made under paragraph 2, and shall specify in the request:

(a) the name and address of the disputing investor;

(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 1120 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 1120 be stayed, unless the latter Tribunal has already adjourned its proceedings.

10. A disputing Party shall deliver to the Secretariat, within 15 days of receipt by the disputing Party, a copy of:

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

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

(c) a notice of arbitration given under the UNCITRAL Arbitration Rules.

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

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

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

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

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

Article 1127: Notice

A disputing Party shall deliver to the other Parties:

(a) written notice of a claim that has been submitted to arbitration no later than 30 days after the date that the claim is submitted; and

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

Article 1128: 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 1129: Documents

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

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

(b) the written argument of the disputing parties.

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

Article 1130: Place of Arbitration

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

(a) the ICSID Additional Facility Rules if the arbitration is under those Rules or the ICSID Convention; or

(b) the UNCITRAL Arbitration Rules if the arbitration is under those Rules.

Article 1131: 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 1132: 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 Annex I, Annex II, Annex III or Annex IV, on request of the disputing Party, the Tribunal shall request the interpretation of the Commission on the issue. The Commission, within 60 days of delivery of the request, shall submit in writing its interpretation to the Tribunal.

2. Further to Article 1131(2), a Commission interpretation submitted under paragraph 1 shall be binding on the Tribunal. If the Commission fails to submit an interpretation within 60 days, the Tribunal shall decide the issue.

Article 1133: 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, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

Article 1134: Interim Measures of Protection

A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117. For purposes of this paragraph, an order includes a recommendation.

Article 1135: Final Award

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

(a) monetary damages and any applicable interest;

(b) restitution of property, in which case the award shall provide that the 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 1117(1):

(a) an award of restitution of property shall provide that restitution be made to the enterprise;

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

(c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.

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

Article 1136: Finality and Enforcement of an Award

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

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

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

(a) in the case of a final award 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) 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) three months 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 2008 (Request for an Arbitral Panel). The requesting Party may seek in such proceedings:

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

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

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

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

Article 1137: General

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; or

(c) the notice of arbitration given under the UNCITRAL Arbitration Rules is received by the disputing Party.

Service of Documents

2. Delivery of notice and other documents on a Party shall be made to the place named for that Party in Annex 1137.2.

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. Annex 1137.4 applies to the Parties specified in that Annex with respect to publication of an award.

Article 1138: Exclusions

1. Without prejudice to the applicability or non-applicability of the dispute settlement provisions of this Section or of Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures) to other actions taken by a Party pursuant to Article 2102 (National Security), a decision by a Party to prohibit or restrict the acquisition of an investment in its territory by an investor of another Party, or its investment, pursuant to that Article shall not be subject to such provisions.

2. The dispute settlement provisions of this Section and of Chapter Twenty shall not apply to the matters referred to in Annex 1138.2.

Section C – Definitions

Article 1139: Definitions

For purposes of this Chapter:

disputing investor means an investor that makes a claim under Section B;

disputing parties means the disputing investor and the disputing Party;

disputing party means the disputing investor or the disputing Party;

disputing Party means a Party against which a claim is made under Section B;

enterprise means an "enterprise" as defined in Article 201 (Definitions of General Application), and a branch of an enterprise;

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

equity or debt securities includes voting and non-voting shares, bonds, convertible debentures, stock options and warrants;

G7 Currency means the currency of Canada, France, Germany, Italy, Japan, the United Kingdom of Great Britain and Northern Ireland or the United States;

ICSID means the International Centre for Settlement of Investment Disputes;

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

InterAmerican Convention means the *InterAmerican Convention on International Commercial Arbitration*, done at Panama, January 30, 1975;

investment means:

(a) an enterprise;

(b) an equity security of an enterprise;

(c) a debt security of an enterprise

(i) where the enterprise is an affiliate of the investor, or

(ii) where the original maturity of the debt security is at least three years,

but does not include a debt security, regardless of original maturity, of a state enterprise;

(d) a loan to an enterprise

(i) where the enterprise is an affiliate of the investor, or

(ii) where the original maturity of the loan is at least three years,

but does not include a loan, regardless of original maturity, to a state enterprise;

(e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;

(f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);

(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and

(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under

(i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or

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

but investment does not mean,

(i) claims to money that arise solely from

(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or

(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or

(j) any other claims to money,

that do not involve the kinds of interests set out in subparagraphs (a) through (h);

investment of an investor of a Party means an investment owned or controlled directly or indirectly by an investor of such Party;

investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment;

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

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

Secretary-General means the Secretary-General of ICSID;

transfers means transfers and international payments;

Tribunal means an arbitration tribunal established under Article 1120 or 1126; and

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

Annex 1120.1: Submission of a Claim to Arbitration

Mexico

With respect to the submission of a claim to arbitration:

(a) an investor of another Party may not allege that Mexico has breached an obligation under:

(i) Section A or Article 1503(2) (State Enterprises), or

(ii) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, both in an arbitration under this Section and in proceedings before a Mexican court or administrative tribunal; and

(b) where an enterprise of Mexico that is a juridical person that an investor of another Party owns or controls directly or indirectly alleges in proceedings before a Mexican court or administrative tribunal that Mexico has breached an obligation under:

(i) Section A or Article 1503(2) (State Enterprises), or

(ii) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,

the investor may not allege the breach in an arbitration under this Section.

Annex 1137.2: Service of Documents on a Party Under Section B

Each Party shall set out in this Annex and publish in its official journal by January 1, 1994, the place for delivery of notice and other documents under this Section.

Annex 1137.4: Publication of an Award

Canada

Where Canada is the disputing Party, either Canada or a disputing investor that is a party to the arbitration may make an award public.

Mexico

Where Mexico is the disputing Party, the applicable arbitration rules apply to the publication of an award.

United States

Where the United States is the disputing Party, either the United States or a disputing investor that is a party to the arbitration may make an award public.

Annex 1138.2: Exclusions from Dispute Settlement

Canada

A decision by Canada following a review under the *Investment Canada Act*, with respect to whether or not to permit an acquisition that is subject to review, shall not be subject to the dispute settlement provisions of Section B or of Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures).

Mexico

A decision by the National Commission on Foreign Investment ("Comisión Nacional de Inversiones Extranjeras") following a review pursuant to Annex I, page IM4, with respect to whether or not to permit an acquisition that is subject to review, shall not be subject to the dispute settlement provisions of Section B or of Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures).

CHAPTER TWELVE: CROSS-BORDER TRADE IN SERVICES

Article 1201: Scope and Coverage

1. This Chapter applies to measures adopted or maintained by a Party relating to cross-border trade in services by service providers of another Party, including measures respecting:

(a) the production, distribution, marketing, sale and delivery of a service;

(b) the purchase or use of, or payment for, a service;

(c) the access to and use of distribution and transportation systems in connection with the provision of a service;

(d) the presence in its territory of a service provider of another Party; and

(e) the provision of a bond or other form of financial security as a condition for t he provision of a service.

2. This Chapter does not apply to:

(a) financial services, as defined in Chapter Fourteen (Financial Services);

(b) air services, including domestic and international air transportation services, whether scheduled or non-scheduled, and related services in support of air services, other than

(i) aircraft repair and maintenance services during which an aircraft is withdrawn from service, and

(ii) specialty air services;

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

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

The Dominican Republic – Central America – United States Free Trade Agreement (CAFTA-DR), 2004 (Chapter Ten: Investment)

Chapter Ten

Investment

Section A: Investment

Article 10.1: Scope and Coverage

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

   (a) investors of another Party;

   (b) covered investments; and

   (c) with respect to Articles 10.9 and 10.11, all investments in the territory of the Party.

2. A Party's obligations under this Section shall apply to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party.

3. For greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.

Article 10.2: Relation to Other Chapters

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

2. A requirement by a Party that a service supplier of another Party post a bond or other form of financial security as a condition of the cross-border supply of a service does not of itself make this Chapter applicable to measures adopted or maintained by the Party relating to such cross-border supply of the service. This Chapter applies to measures adopted or maintained by the Party relating to the posted bond or financial security, to the extent that such bond or financial security is a covered investment.

3. This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Twelve (Financial Services).

Article 10.3: National Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment,

acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

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

3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that regional level of government to investors, and to investments of investors, of the Party of which it forms a part.

Article 10.4: Most-Favored-Nation Treatment

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

Article 10.5: Minimum Standard of Treatment[1]

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and 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 covered 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.

[1] Article 10.5 shall be interpreted in accordance with Annex 10-B.

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

Article 10.6: Treatment in Case of Strife

1. Notwithstanding Article 10.13.5(b), each Party shall accord to investors of another Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

2. Notwithstanding paragraph 1, if an investor of a Party, in the situations referred to in paragraph 1, suffers a loss in the territory of another Party resulting from:

(a) requisitioning of its covered investment or part thereof by the latter's forces or authorities; or

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

the latter Party shall provide the investor restitution or compensation, which in either case shall be in accordance with customary international law and, with respect to compensation, shall be in accordance with Article 10.7.2 through 10.7.4.[2]

3. Paragraph 1 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 10.3 but for Article 10.13.5(b).

Article 10.7: Expropriation and Compensation[3]

1. No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:

(a) for a public purpose;

(b) in a non-discriminatory manner;

[2] The limitations set out in Annex 10-D apply to the submission to arbitration under Section B of a claim alleging a breach of this paragraph.

[3] Article 10.7 shall be interpreted in accordance with Annexes 10-B and 10-C.

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

(d) in accordance with due process of law and Article 10.5.

2. Compensation shall:

(a) be paid without delay;

(b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation");

(c) not reflect any change in value occurring because the intended expropriation had become known earlier; and

(d) be fully realizable and freely transferable.

3. If the fair market value is denominated in a freely usable currency, the compensation paid shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

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

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

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

5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with Chapter Fifteen (Intellectual Property Rights).[4]

Article 10.8: Transfers

1. Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include:

[4] For greater certainty, the reference to "the TRIPS Agreement" in paragraph 5 includes any waiver in force between the Parties of any provision of that Agreement granted by WTO Members in accordance with the WTO Agreement.

(a) contributions to capital;

(b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;

(c) interest, royalty payments, management fees, and technical assistance and other fees;

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

(e) payments made pursuant to Article 10.6.1 and 10.6.2 and Article 10.7; and

(f) payments arising out of a dispute.

2. Each Party shall permit transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer.

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

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

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

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

(c) criminal or penal offenses;

(d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or

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

Article 10.9: 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 in its territory, or to purchase goods 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 supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;

(f) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory; or

(g) to supply exclusively from the territory of the Party the goods that such investment produces or the services that it supplies to a specific regional market or to the world market.

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

(a) to 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 persons in its territory;

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

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

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

(b) Paragraph 1(f) does not apply:

(i) when a Party authorizes use of an intellectual property right in accordance with Article 31 of the TRIPS Agreement, or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement;[5] or

(ii) when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under the Party's competition laws.[6]

(c) Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), (c), and (f), and 2(a) and (b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:

(i) necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement;

(ii) necessary to protect human, animal, or plant life or health; or

(iii) related to the conservation of living or non-living exhaustible natural resources.

[5] For greater certainty, the references to "the TRIPS Agreement" in paragraph 3(b)(i) include any waiver in force between the Parties of any provision of that Agreement granted by WTO Members in accordance with the WTO Agreement.

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

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

(e) Paragraphs 1(b), (c), (f), and (g), and 2(a) and (b), do not apply to procurement.

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

4. For greater certainty, paragraphs 1 and 2 do not apply to any requirement other than the requirements set out in those paragraphs.

5. 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 10.10: Senior Management and Boards of Directors

1. No Party may require that an enterprise of that Party that is a covered investment appoint to senior management positions natural persons of any particular nationality.

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

Article 10.11: Investment and Environment

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 in a manner sensitive to environmental concerns.

Article 10.12: Denial of Benefits

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

(a) does not maintain diplomatic relations with the non-Party; or

(b) adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or

circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.

2. Subject to Articles 18.3 (Notification and Provision of Information) and 20.4 (Consultations), a Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of any Party, other than the denying Party, and persons of a non-Party, or of the denying Party, own or control the enterprise.

Article 10.13: Non-Conforming Measures

1. Articles 10.3, 10.4, 10.9, and 10.10 do not apply to:

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

(i) the central level of government, as set out by that Party in its Schedule to Annex I,

(ii) a regional level of government, as set out by that Party in its Schedule to Annex I, or

(iii) a local level of government;

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

(c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Article 10.3, 10.4, 10.9, or 10.10.

2. Articles 10.3, 10.4, 10.9, and 10.10 do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II.

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

4. Articles 10.3 and 10.4 do not apply to any measure that is an exception to, or derogation from, the obligations under Article 15.1.8 (General Provisions) as specifically provided in that Article.

5. Articles 10.3, 10.4, and 10.10 do not apply to:

(a) procurement; or

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

Article 10.14: Special Formalities and Information Requirements

1. Nothing in Article 10.3 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as a requirement that investors be residents of the Party or that covered 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 another Party and covered investments pursuant to this Chapter.

2. Notwithstanding Articles 10.3 and 10.4, a Party may require an investor of another Party, or a covered investment, to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect any confidential business information from any disclosure that would prejudice the competitive position of the investor or the covered 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.

Section B: Investor-State Dispute Settlement

Article 10.15: Consultation and Negotiation

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

Article 10.16: Submission of a Claim to Arbitration

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

(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim

(i) that the respondent has breached

(A) an obligation under Section A,

(B) an investment authorization, or

(C) an investment agreement;

and

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

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

(i) that the respondent has breached

(A) an obligation under Section A,

(B) an investment authorization, or

(C) an investment agreement;

and

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

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

(a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;

(b) for each claim, the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;

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

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

3. Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:

(a) under the ICSID Convention and the ICSID Rules of Procedures for Arbitration Proceedings, provided that both the respondent and the Party of the claimant are parties to the ICSID Convention;

(b) under the ICSID Additional Facility Rules, provided that either the respondent or the Party of the claimant is a party to the ICSID Convention; or

(c) under the UNCITRAL Arbitration Rules.

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

(a) referred to in paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General;

(b) referred to in Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General; or

(c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules, are received by the respondent.

A claim asserted for the first time after such notice of arbitration is submitted shall be deemed submitted to arbitration under this Section on the date of its receipt under the applicable arbitral rules.

5. The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Agreement.

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

(a) the name of the arbitrator that the claimant appoints; or

(b) the claimant's written consent for the Secretary-General to appoint such arbitrator.

Article 10.17: Consent of Each Party to Arbitration

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

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

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

(b) Article II of the New York Convention for an "agreement in writing;" and

(c) Article I of the Inter-American Convention for an "agreement."

Article 10.18: Conditions and Limitations on Consent of Each Party

1. No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.

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

(a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and

(b) the notice of arbitration is accompanied,

(i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, and

(ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers

of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.

3. Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 10.16.1(a)) and the claimant or the enterprise (for claims brought under Article 10.16.1(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.

4. No claim may be submitted to arbitration:

(a) for breach of an investment authorization under Article 10.16.1(a)(i)(B) or Article 10.16.1(b)(i)(B), or

(b) for breach of an investment agreement under Article 10.16.1(a)(i)(C) or Article 10.16.1(b)(i)(C),

if the claimant (for claims brought under Article 10.16.1(a)) or the claimant or the enterprise (for claims brought under Article 10.16.1(b)) has previously submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure, for adjudication or resolution.

Article 10.19: Selection of Arbitrators

1. 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, appointed by agreement of the disputing parties.

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

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

4. For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator on a ground other than nationality:

(a) the respondent agrees to the appointment of each individual member of a tribunal established under the ICSID Convention or the ICSID Additional Facility Rules;

(b) a claimant referred to in Article 10.16.1(a) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant agrees in writing to the appointment of each individual member of the tribunal; and

(c) a claimant referred to in Article 10.16.1(b) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant and the enterprise agree in writing to the appointment of each individual member of the tribunal.

Article 10.20: Conduct of the Arbitration

1. The disputing parties may agree on the legal place of any arbitration under the arbitral rules applicable under Article 10.16.3. If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with the applicable arbitral rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.

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

3. The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party.

4. Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.

(a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment).

(b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.

(c) In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.

(d) The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.

5. In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of

extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

6. When it decides a respondent's objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

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

8. A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 10.16. For purposes of this paragraph, an order includes a recommendation.

9. (a) In any arbitration conducted under this Section, at the request of a disputing party, a tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or award to the disputing parties and to the non-disputing Parties. Within 60 days after the tribunal transmits its proposed decision or award, the disputing parties may submit written comments to the tribunal concerning any aspect of its proposed decision or award. The tribunal shall consider any such comments and issue its decision or award not later than 45 days after the expiration of the 60-day comment period.

(b) Subparagraph (a) shall not apply in any arbitration conducted pursuant to this Section for which an appeal has been made available pursuant to paragraph 10 or Annex 10-F.

10. If a separate multilateral agreement enters into force as between the Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment arrangements to hear investment disputes, the Parties shall strive to reach an agreement that would have such appellate body review awards rendered under Article 10.26 in arbitrations commenced after the multilateral agreement enters into force as between the Parties.

Article 10.21: Transparency of Arbitral Proceedings

1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Parties and make them available to the public:

(a) the notice of intent;

(b) the notice of arbitration;

(c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 10.20.2 and 10.20.3 and Article 10.25;

(d) minutes or transcripts of hearings of the tribunal, where available; and

(e) orders, awards, and decisions of the tribunal.

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

3. Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 21.2 (Essential Security) or Article 21.5 (Disclosure of Information).

4. Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:

(a) Subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to any non-disputing Party or to the public any protected information where the disputing party that provided the information clearly designates it in accordance with subparagraph (b);

(b) Any disputing party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal;

(c) A disputing party shall, at the same time that it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the non-disputing Parties and made public in accordance with paragraph 1; and

(d) The tribunal shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the

information may (i) withdraw all or part of its submission containing such information, or (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (c). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under (i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under (ii) of the disputing party that first submitted the information.

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

Article 10.22: Governing Law

1. Subject to paragraph 3, when a claim is submitted under Article 10.16.1(a)(i)(A) or Article 10.16.1(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

2. Subject to paragraph 3 and the other terms of this Section, when a claim is submitted under Article 10.16.1(a)(i)(B) or (C), or Article 10.16.1(b)(i)(B) or (C), the tribunal shall apply:

(a) the rules of law specified in the pertinent investment agreement or investment authorization, or as the disputing parties may otherwise agree; or

(b) if the rules of law have not been specified or otherwise agreed:

(i) the law of the respondent, including its rules on the conflict of laws;[7] and

(ii) such rules of international law as may be applicable.

3. A decision of the Commission declaring its interpretation of a provision of this Agreement under Article 19.1.3(c) (The Free Trade Commission) 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 10.23: Interpretation of Annexes

1. Where a respondent asserts as a defense that the measure alleged to be a breach is within the scope of Annex I or Annex II, the tribunal shall, on request of the respondent, request the interpretation of the Commission on the issue. The Commission shall submit in writing any

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

decision declaring its interpretation under Article 19.1.3(c) (The Free Trade Commission) to the tribunal within 60 days of delivery of the request.

2. A decision issued by the Commission under paragraph 1 shall be binding on the tribunal, and any decision or award issued by the tribunal must be consistent with that decision. If the Commission fails to issue such a decision within 60 days, the tribunal shall decide the issue.

Article 10.24: 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, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety, or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

Article 10.25: Consolidation

1. Where two or more claims have been submitted separately to arbitration under Article 10.16.1 and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 2 through 10.

2. A disputing party that seeks a consolidation order under this Article shall deliver, in writing, a request to the Secretary-General and to all the disputing parties sought to be covered by the order and shall specify in the request:

(a) the names and addresses of all the disputing parties sought to be covered by the order;

(b) the nature of the order sought; and

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

3. Unless the Secretary-General finds within 30 days after receiving a request under paragraph 2 that the request is manifestly unfounded, a tribunal shall be established under this Article.

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

(a) one arbitrator appointed by agreement of the claimants;

(b) one arbitrator appointed by the respondent; and

(c) the presiding arbitrator appointed by the Secretary-General, provided, however, that the presiding arbitrator shall not be a national of any Party.

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

6. Where a tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration under Article 10.16.1 have a question of law or fact in common, and arise out of the same events or circumstances, the tribunal may, in the interest of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

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

(b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others; or

(c) instruct a tribunal previously established under Article 10.19 to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that

(i) that tribunal, at the request of any claimant not previously a disputing party before that tribunal, shall be reconstituted with its original members, except that the arbitrator for the claimants shall be appointed pursuant to paragraphs 4(a) and 5; and

(ii) that tribunal shall decide whether any prior hearing shall be repeated.

7. Where a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration under Article 10.16.1 and that has not been named in a request made under paragraph 2 may make a written request to the tribunal that it be included in any order made under paragraph 6, and shall specify in the request:

(a) the name and address of the claimant;

(b) the nature of the order sought; and

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

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

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

9. A tribunal established under Article 10.19 shall not have jurisdiction to decide a claim, or a part of a claim, over which a tribunal established or instructed under this Article has assumed jurisdiction.

10. On application of a disputing party, a tribunal established under this Article, pending its decision under paragraph 6, may order that the proceedings of a tribunal established under Article 10.19 be stayed, unless the latter tribunal has already adjourned its proceedings.

Article 10.26: Awards

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

(a) monetary damages and any applicable interest;

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

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

2. Subject to paragraph 1, where a claim is submitted to arbitration under Article 10.16.1(b):

(a) an award of restitution of property shall provide that restitution be made to the enterprise;

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

(c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.

3. A tribunal is not authorized to award punitive damages.

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

5. Subject to paragraph 6 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.

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

(a) in the case of a final award made under the ICSID Convention

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

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

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

(i) 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.

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

8. If the respondent fails to abide by or comply with a final award, on delivery of a request by the Party of the claimant, a panel shall be established under Article 20.6 (Request for an Arbitral Panel). The requesting Party may seek in such proceedings:

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

(b) in accordance with Article 20.13 (Initial Report), a recommendation that the respondent abide by or comply with the final award.

9. A disputing party may seek enforcement of an arbitration award under the ICSID Convention, the New York Convention, or the Inter-American Convention regardless of whether proceedings have been taken under paragraph 8.

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

Article 10.27: Service of Documents

Delivery of notice and other documents on a Party shall be made to the place named for that Party in Annex 10-G.

Section C: Definitions

Article 10.28: Definitions

For purposes of this Chapter:

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

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

disputing parties means the claimant and the respondent;

disputing party means either the claimant or the respondent;

enterprise means an enterprise as defined in Article 2.1 (Definitions of General Application), and a branch of an enterprise;

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

freely usable currency means "freely usable currency" as determined by the International Monetary Fund under its *Articles of Agreement*;

ICSID Additional Facility Rules means the *Rules Governing the Additional Facility for the Administration of Proceeding by the Secretariat of the International Centre for Settlement of Investment Disputes*;

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

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

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

(a) an enterprise;

(b) shares, stock, and other forms of equity participation in an enterprise;

(c) bonds, debentures, other debt instruments, and loans;[8] [9]

(d) futures, options, and other derivatives;

(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;

(f) intellectual property rights;

(g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law;[10] [11] and

(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges;

investment agreement means a written agreement[12] that takes effect on or after the date of entry into force of this Agreement between a national authority[13] of a Party and a covered investment or an investor of another Party that grants the covered investment or investor rights:

(a) with respect to natural resources or other assets that a national authority controls; and

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[8] Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt are less likely to have such characteristics.

[9] For purposes of this Agreement, claims to payment that are immediately due and result from the sale of goods or services are not investments.

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

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

[12] "Written agreement" refers to an agreement in writing, executed by both parties, that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 10.22.2. For greater certainty, (a) a unilateral act of an administrative or judicial authority, such as a permit, license, or authorization issued by a Party solely in its regulatory capacity or a decree, order, or judgment; and (b) an administrative or judicial consent decree or order, shall not be considered a written agreement.

[13] For purposes of this definition, "national authority" means an authority at the central level of government.

(b) upon which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself;

investment authorization[14] means an authorization that the foreign investment authority of a Party grants to a covered investment or an investor of another Party;

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

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

national means a natural person who has the nationality of a Party according to Annex 2.1 (Country-Specific Definitions);

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

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

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

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

Secretary-General means the Secretary-General of ICSID;

tribunal means an arbitration tribunal established under Article 10.19 or 10.25; and

UNCITRAL Arbitration Rules means the arbitration rules of the United Nations Commission on International Trade Law.

[14] For greater certainty, actions taken by a Party to enforce laws of general application, such as competition laws, are not encompassed within this definition.

Annex 10-A

Public Debt

The rescheduling of the debts of a Central American Party or the Dominican Republic, or of such Party's institutions owned or controlled through ownership interests by such Party, owed to the United States and the rescheduling of any of such Party's debts owed to creditors in general are not subject to any provision of Section A other than Articles 10.3 and 10.4.

Annex 10-B

Customary International Law

The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Articles 10.5, 10.6, and Annex 10-C results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, 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-C

Expropriation

The Parties confirm their shared understanding that:

1. Article 10.7.1 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 10.7.1 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 10.7.1 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, nondiscriminatory 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-D

Treatment in Case of Strife

1. No investor may submit to arbitration under Section B a claim alleging that Guatemala has breached Article 10.6.2 as a result of an armed movement or civil disturbance and that the investor or the investor's enterprise has incurred loss or damage by reason of or arising out of such movement or disturbance.

2. No investor of Guatemala may submit to arbitration under Section B a claim alleging that any other Party has breached Article 10.6.2(b).

3. The limitation set out in paragraph 1 is without prejudice to other limitations existing in Guatemala's law with respect to an investor's claim that Guatemala has breached Article 10.6.2.

Annex 10-E

Submission of a Claim to Arbitration

1. An investor of the United States may not submit to arbitration under Section B a claim that a Central American Party or the Dominican Republic has breached an obligation under Section A either:

(a) on its own behalf under Article 10.16.1(a), or

(b) on behalf of an enterprise of a Central American Party or the Dominican Republic that is a juridical person that the investor owns or controls directly or indirectly under Article 10.16.1(b),

if the investor or the enterprise, respectively, has alleged that breach of an obligation under Section A in proceedings before a court or administrative tribunal of a Central American Party or the Dominican Republic.

2. For greater certainty, if an investor of the United States elects to submit a claim of the type described in paragraph 1 to a court or administrative tribunal of a Central American Party or the Dominican Republic, that election shall be definitive, and the investor may not thereafter submit the claim to arbitration under Section B.

3. Notwithstanding Article 10.18, an investor of the United States may not submit to arbitration under Section B a claim relating to an investment in sovereign debt instruments with a maturity of less than one year unless one year has elapsed from the date of the events giving rise to the claim.

Annex 10-F

Appellate Body or Similar Mechanism

1. Within three months of the date of entry into force of this Agreement, the Commission shall establish a Negotiating Group to develop an appellate body or similar mechanism to review awards rendered by tribunals under this Chapter. Such appellate body or similar mechanism shall be designed to provide coherence to the interpretation of investment provisions in the Agreement. The Commission shall direct the Negotiating Group to take into account the following issues, among others:

(a) the nature and composition of an appellate body or similar mechanism;

(b) the applicable scope and standard of review;

(c) transparency of proceedings of an appellate body or similar mechanism;

(d) the effect of decisions by an appellate body or similar mechanism;

(e) the relationship of review by an appellate body or similar mechanism to the arbitral rules that may be selected under Articles 10.16 and 10.25; and

(f) the relationship of review by an appellate body or similar mechanism to existing domestic laws and international law on the enforcement of arbitral awards.

2. The Commission shall direct the Negotiating Group to provide to the Commission, within one year of establishment of the Negotiating Group, a draft amendment to the Agreement that establishes an appellate body or similar mechanism. On approval of the draft amendment by the Parties, in accordance with Article 22.2 (Amendments), the Agreement shall be so amended.

Annex 10-G

Service of Documents on a Party Under Section B

Costa Rica

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

Dirección de Aplicación de Acuerdos
Comerciales Internacionales
Ministerio de Comercio Exterior
San José, Costa Rica

The Dominican Republic

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

Dirección de Comercio Exterior y Administración de Tratados Comerciales Internacionales
Secretaría de Estado de Industria y Comercio
Santo Domingo, República Dominicana

El Salvador

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

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

Guatemala

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

Ministerio de Economía
Ciudad de Guatemala, Guatemala

Honduras

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

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

Nicaragua

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

Dirección de Integración y Administración de Tratados, or its successor
Ministerio de Fomento, Industria y Comercio
Managua, Nicaragua

United States

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

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

ASEAN Comprehensive Investment Agreement, 2009

2009 ASEAN COMPREHENSIVE INVESTMENT AGREEMENT

Signed by the Economic Ministers at the 14th ASEAN Summit in Cha-am, Thailand on 26 February 2009
[http://www.aseansec.org/22244.htm]

The Governments of Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam, Member States of the Association of Southeast Asian Nations ("ASEAN"), hereinafter collectively referred to as "Member States" or singularly as "Member State";

RECALLING the decisions of the 39th ASEAN Economic Ministers ("AEM") Meeting held in Makati City, Philippines on 23 August 2007 to revise the Framework Agreement on the ASEAN Investment Area signed in Makati City, Philippines on 7 October 1998 ("AIA Agreement"), as amended, into a comprehensive investment agreement which is forward-looking, with improved features and provisions, comparable to international best practices in order to increase intra-ASEAN investments and to enhance ASEAN's competitiveness in attracting inward investments into ASEAN;

RECOGNISING the different levels of development within ASEAN especially the least developed Member States which require some flexibility including special and differential treatment as ASEAN moves towards a more integrated and interdependent future;

REAFFIRMING the need to move forward from the AIA Agreement and the ASEAN Agreement for the Promotion and Protection of Investments signed in Manila, Philippines on 15 December 1987 ("ASEAN IGA"), as amended, in order to further enhance regional integration to realise the vision of the ASEAN Economic Community ("AEC");

CONVINCED that sustained inflows of new investments and reinvestments will promote and ensure dynamic development of ASEAN economies;

RECOGNISING that a conducive investment environment will enhance freer flow of capital, goods and services, technology and human resource and overall economic and social development in ASEAN; and

DETERMINED to further intensify economic cooperation between and among Member States,

HAVE AGREED as follows:

SECTION A

ARTICLE 1
OBJECTIVE

The objective of this Agreement is to create a free and open investment regime in ASEAN in order to achieve the end goal of economic integration under the AEC in accordance with the AEC Blueprint, through the following:

(a) progressive liberalisation of the investment regimes of Member States;

(b) provision of enhanced protection to investors of all Member States and their investments;

(c) improvement of transparency and predictability of investment rules, regulations and procedures conducive to increased investment among Member States;

(d) joint promotion of the region as an integrated investment area; and

(e) cooperation to create favourable conditions for investment by investors of a Member State in the territory of the other Member States.

ARTICLE 2
GUIDING PRINCIPLES

This Agreement shall create a liberal, facilitative, transparent and competitive investment environment in ASEAN by adhering to the following principles:

(a) provide for investment liberalisation, protection, investment promotion and facilitation;

(b) progressive liberalisation of investment with a view towards achieving a free and open investment environment in the region;

(c) benefit investors and their investments based in ASEAN;

(d) maintain and accord preferential treatment among Member States;

(e) no back-tracking of commitments made under the AIA Agreement and the ASEAN IGA;

(f) grant special and differential treatment and other flexibilities to Member States depending on their level of development and sectoral sensitivities;

(g) reciprocal treatment in the enjoyment of concessions among Member States, where appropriate; and

(h) accommodate expansion of scope of this Agreement to cover other sectors in the future.

ARTICLE 3
SCOPE OF APPLICATION

1. This Agreement shall apply to measures adopted or maintained by a Member State relating to:

   (a) investors of any other Member State; and

   (b) investments, in its territory, of investors of any other Member State.

2. This Agreement shall apply to existing investments as at the date of entry into force of this Agreement as well as to investments made after the entry into force of this Agreement.

3. For the purpose of liberalisation and subject to Article 9 (Reservations), this Agreement shall apply to the following sectors:

   (a) manufacturing;

   (b) agriculture;

   (c) fishery;

(d) forestry;

(e) mining and quarrying;

(f) services incidental to manufacturing, agriculture, fishery, forestry, mining and quarrying; and

(g) any other sectors, as may be agreed upon by all Member States.

4. This Agreement shall not apply to:

(a) any taxation measures, except for Articles 13 (Transfers) and 14 (Expropriation and Compensation);

(b) subsidies or grants provided by a Member State;

(c) government procurement;

(d) services supplied in the exercise of governmental authority by the relevant body or authority of a Member State. For the purposes of this Agreement, a service supplied in the exercise of governmental authority means any service, which is supplied neither on a commercial basis nor in competition with one or more service suppliers; and

(e) measures adopted or maintained by a Member State affecting trade in services under the ASEAN Framework Agreement on Services signed in Bangkok, Thailand on 15 December 1995 ("AFAS").

5. Notwithstanding sub-paragraph 4 (e), for the purpose of protection of investment with respect to the commercial presence mode of service supply, Articles 11 (Treatment of Investment), 12 (Compensation in Cases of Strife), 13 (Transfers), 14 (Expropriation and Compensation) and 15 (Subrogation) and Section B (Investment Disputes Between an Investor and a Member State), shall apply, mutatis mutandis, to any measure affecting the supply of a service by a service supplier of a Member State through commercial presence in the territory of any other Member State but only to the extent that they relate to an investment and obligation under this Agreement regardless of whether or not such service sector is scheduled in the Member States' schedule of commitments made under AFAS.

6. Nothing in this Agreement shall affect the rights and obligations of any Member State under any tax convention. In the event of any inconsistency between this Agreement and any such convention, that convention shall prevail to the extent of the inconsistency.

ARTICLE 4
DEFINITIONS

For the purpose of this Agreement:

(a) "**covered investment**" means, with respect to a Member State, an investment in its territory of an investor of any other Member State in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter, and has been

admitted according to its laws, regulations, and national policies, and where applicable, specifically approved in writing[1] by the competent authority of a Member State;

(b) "**freely usable currency**" means a freely usable currency as determined by the International Monetary Fund ("IMF") under its Articles of Agreement and any amendments thereto;

(c) "**investment**"[2] means every kind of asset, owned or controlled, by an investor, including but not limited to the following:

i) movable and immovable property and other property rights such as mortgages, liens or pledges;

ii) shares, stocks, bonds and debentures and any other forms of participation in a juridical person and rights or interest derived therefrom;

iii) intellectual property rights which are conferred pursuant to the laws and regulations of each Member State;

iv) claims to money or to any contractual performance related to a business and having financial value[3];

v) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts; and

vi) business concessions required to conduct economic activities and having financial value conferred by law or under a contract, including any concessions to search, cultivate, extract or exploit natural resources.

The term "investment" also includes amounts yielded by investments, in particular, profits, interest, capital gains, dividend, royalties and fees. Any alteration of the form in which assets are invested or reinvested shall not affect their classification as investment;

(d) "**investor**" means a natural person of a Member State or a juridical person of a Member State that is making, or has made an investment in the territory of any other Member State;

(e) "**juridical person**" means any legal entity duly constituted or otherwise organised under the applicable law of a Member State, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any enterprise, corporation, trust, partnership, joint venture, sole proprietorship, association, or organisation;

[1] For the purpose of protection, the procedures relating to specific approval in writing shall be as specified in Annex 1 (Approval in Writing).

[2] Where an asset lacks the characteristics of an investment, that asset is not an investment regardless of the form it may take. The characteristics of an investment include the commitment of capital, the expectation of gain or profit, or the assumption of risk.

[3] For greater certainty, investment does not mean claims to money that arise solely from:
(a) commercial contracts for sale of goods or services; or
(b) the extension of credit in connection with such commercial contracts.

(f) "**measures**" means any measure of a Member State, whether in the form of laws, regulations, rules, procedures, decisions, and administrative actions or practice, adopted or maintained by:

i) central, regional or local government or authorities; or

ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;

(g) "**natural person**" means any natural person possessing the nationality or citizenship of, or right of permanent residence in the Member State in accordance with its laws, regulations and national policies;

(h) "**newer ASEAN Member States**" means the Kingdom of Cambodia, the Lao People's Democratic Republic, the Union of Myanmar and the Socialist Republic of Viet Nam;

(i) "**WTO**" means the World Trade Organization; and

(j) "**WTO Agreement**" means the Marrakesh Agreement Establishing the World Trade Organization, done at Marrakesh, Morocco on 15 April 1994, as may be amended.

ARTICLE 5
NATIONAL TREATMENT

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

ARTICLE 6
MOST-FAVOURED-NATION TREATMENT[4]

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

[4] For greater certainty:
(a) this Article shall not apply to investor-State dispute settlement procedures that are available in other agreements to which Member States are party; and
(b) in relation to investments falling within the scope of this Agreement, any preferential treatment granted by a Member State to investors of any other Member State or a non-Member State and to their investments, under any existing or future agreements or arrangements to which a Member State is a party shall be extended on a most-favoured-nation basis to all Member States.

2. Each Member State shall accord to investments of investors of another Member State treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any other Member State or a non-Member State with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.
3. Paragraphs 1 and 2 shall not be construed so as to oblige a Member State to extend to investors or investments of other Member States the benefit of any treatment, preference or privilege resulting from:

   (a) any sub-regional arrangements between and among Member States[5]; or

   (b) any existing agreement notified by Member States to the AIA Council pursuant to Article 8(3) of the AIA Agreement.[6]

ARTICLE 7
PROHIBITION OF PERFORMANCE REQUIREMENTS

1. The provisions of the Agreement on Trade-Related Investment Measures in Annex 1A to the WTO Agreement (TRIMs), which are not specifically mentioned in or modified by this Agreement, shall apply, mutatis mutandis, to this Agreement.
2. Member States shall undertake joint assessment on performance requirements no later than 2 years from the date of entry into force of this Agreement. The aim of such assessment shall include reviewing existing performance requirements and considering the need for additional commitments under this Article.
3. Non-WTO Members of ASEAN shall abide by the WTO provisions in accordance with their accession commitments to the WTO.

ARTICLE 8
SENIOR MANAGEMENT AND BOARD OF DIRECTORS

1. A Member State shall not require that a juridical person of that Member State appoint to senior management positions, natural persons of any particular nationality.
2. A Member State may require that a majority of the board of directors of a juridical person of that Member State, be of a particular nationality, or resident in the territory of the Member State, provided that this requirement does not materially impair the ability of the investor to exercise control over its investment.

[5] For greater certainty, sub-regional arrangements between and among Member States shall include but not be limited to Greater Mekong Sub-region ("GMS"), ASEAN Mekong Basin Development Cooperation ("AMBDC"), Indonesia-Malaysia-Thailand Growth Triangle ("IMT-GT"), Indonesia-Malaysia-Singapore Growth Triangle ("IMS-GT"), Brunei-Indonesia-Malaysia-Philippines East ASEAN Growth Area ("BIMP-EAGA").

[6] This sub-paragraph refers to the Treaty of Amity and Economic Relations between the Kingdom of Thailand and the United States of America signed in Bangkok, Thailand on 29 May 1966.

ARTICLE 9
RESERVATIONS

1. Articles 5 (National Treatment) and 8 (Senior Management and Board of Directors) shall not apply to:
   (a) any existing measure that is maintained by a Member State at:
      i) the central level of government, as set out by that Member State in its reservation list in the Schedule referred to in paragraph 2;
      ii) the regional level of government, as set out by that Member State in its reservation list in the Schedule referred to in paragraph 2; and
      iii) a local level of government;
   (b) the continuation or prompt renewal of any reservations referred to sub-paragraph (a).
2. Each Member State shall submit its reservation list to the ASEAN Secretariat for the endorsement of the AIA Council within 6 months after the date of signing of this Agreement. This list shall form a Schedule to this Agreement.
3. Any amendment or modification to any reservations contained in the Schedule referred to in paragraph 2 shall be in accordance with Article 10 (Modification of Commitments).
4. Each Member State shall reduce or eliminate the reservations specified in the Schedule in accordance with the three phases of the Strategic Schedule of the AEC Blueprint and Article 46 (Amendments).
5. Articles 5 (National Treatment) and 6 (Most-Favoured-Nation Treatment) shall not apply to any measure covered by an exception to, or derogation from, the obligations under Articles 3 and 4 of the Agreement on Trade-Related Aspects of Intellectual Property Rights in Annex 1C to the WTO Agreement, as may be amended ("TRIPS Agreement"), as specifically provided in those Articles and in Article 5 of the TRIPS Agreement.

ARTICLE 10
MODIFICATION OF COMMITMENTS

1. For a period of 12 months after the date of submission of each Member State's reservation list, a Member State may adopt any measures or modify any of its reservations made in the Schedule under Article 9 (Reservations) for prospective applications to investors of any other Member States and their investments, provided that such measures or modification shall not adversely affect any existing investors and investments.
2. After the expiration of the period referred to in paragraph 1, a Member State may, by negotiation and agreement with any other Member States to which it made commitments under this Agreement, adopt any measure, or modify or withdraw such commitments and

reservations, provided that such measure, modification or withdrawal shall not adversely affect any existing investors or investments.[7]

3. In any such negotiations and agreement referred to in paragraph 2, which may include provisions for compensatory adjustments with respect to other sectors, the Member States concerned shall maintain a general level of reciprocal and mutually advantageous commitments and reservations that is not less favourable to investors and investments than that provided for in this Agreement prior to such negotiations and agreements.
4. Notwithstanding paragraphs 1 and 2, a Member State shall not, under any measure adopted pursuant to this Article after the entry into force of this Agreement, require an investor of any other Member State, by reason of that investor's nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective, unless otherwise specified in the initial approval by the relevant authorities.

ARTICLE 11
TREATMENT OF INVESTMENT

1. Each Member State shall accord to covered investments of investors of any other Member State, fair and equitable treatment and full protection and security.
2. For greater certainty:
   (a) fair and equitable treatment requires each Member State not to deny justice in any legal or administrative proceedings in accordance with the principle of due process; and
   (b) full protection and security requires each Member State to take such measures as may be reasonably necessary to ensure the protection and security of the covered investments.
3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

ARTICLE 12
COMPENSATION IN CASES OF STRIFE

Each Member State shall accord to investors of any other Member State, in relation to their covered investments which suffered losses in its territory due to armed conflict or civil strife or state of emergency, non-discriminatory treatment with respect to restitution, compensation or other valuable consideration.

[7] For the avoidance of doubt, Member States shall not adopt any measures or modify any of its reservation under the Schedule for a period of 6 months after the expiration of the period specified in paragraph 1.

ARTICLE 13
TRANSFERS

1. Each Member State shall allow all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include:
   (a) contributions to capital, including the initial contribution;
   (b) profits, capital gains, dividends, royalties, license fees, technical assistance and technical and management fees, interest and other current income accruing from any covered investment;
   (c) proceeds from the total or partial sale or liquidation of any covered investment;
   (d) payments made under a contract, including a loan agreement;
   (e) payments made pursuant to Articles 12 (Compensation in Cases of Strife) and 14 (Expropriation and Compensation);
   (f) payments arising out of the settlement of a dispute by any means including adjudication, arbitration or the agreement of the Member States to the dispute; and
   (g) earnings and other remuneration of personnel employed and allowed to work in connection with that covered investment in its territory.
2. Each Member State shall allow transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer.
3. Notwithstanding paragraphs 1 and 2, a Member State may prevent or delay a transfer through the equitable, non-discriminatory, and good faith application of its laws and regulations relating to:
   (a) bankruptcy, insolvency, or the protection of the rights of creditors;
   (b) issuing, trading, or dealing in securities, futures, options, or derivatives;
   (c) criminal or penal offences and the recovery of the proceeds of crime;
   (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;
   (e) ensuring compliance with orders or judgments in judicial or administrative proceedings;
   (f) taxation;
   (g) social security, public retirement, or compulsory savings schemes;
   (h) severance entitlements of employees; and
   (i) the requirement to register and satisfy other formalities imposed by the Central Bank and other relevant authorities of a Member State.
4. Nothing in this Agreement shall affect the rights and obligations of the Member States as members of the IMF, under the Articles of Agreement of the IMF, including the use of exchange actions which are in conformity with the Articles of Agreement of the IMF, provided that a Member State shall not impose restrictions on any capital transactions

inconsistently with its specific commitments under this Agreement regarding such transactions, except:
   (a) at the request of the IMF;
   (b) under Article 16 (Measures to Safeguard the Balance-of-Payments); or
   (c) where, in exceptional circumstances, movements of capital cause, or threaten to cause, serious economic or financial disturbance in the Member State concerned.
5. The measures taken in accordance with sub-paragraph 4(c):[8]
   (a) shall be consistent with the Articles of Agreement of the IMF;
   (b) shall not exceed those necessary to deal with the circumstances described in sub-paragraph 4(c);
   (c) shall be temporary and shall be eliminated as soon as conditions no longer justify their institution or maintenance;
   (d) shall promptly be notified to the other Member States;
   (e) shall be applied such that any one of the other Member States is treated no less favourably than any other Member State or non-Member State;
   (f) shall be applied on a national treatment basis; and
   (g) shall avoid unnecessary damage to investors and covered investments, and the commercial, economic and financial interests of the other Member State(s).

ARTICLE 14
EXPROPRIATION AND COMPENSATION[9]

1. A Member State shall not expropriate or nationalise a covered investment either directly or through measures equivalent to expropriation or nationalisation ("expropriation"), except:[10]
   (a) for a public purpose
   (b) in a non-discriminatory manner;
   (c) on payment of prompt, adequate, and effective compensation; and
   (d) in accordance with due process of law.
2. The compensation referred to in sub-paragraph 1(c) shall:

[8] For greater certainty, any measures taken to ensure the stability of the exchange rate including to prevent speculative capital flows shall not be adopted or maintained for the purpose of protecting a particular sector.

[9] This Article shall be read with Annex 2 (Expropriation and Compensation).

[10] For the avoidance of doubt, any measure of expropriation relating to land shall be as defined in the Member States' respective existing domestic laws and regulations and any amendments thereto, and shall be for the purposes of and upon payment of compensation in accordance with the aforesaid laws and regulations.

(a) be paid without delay;[11]

(b) be equivalent to the fair market value of the expropriated investment immediately before or at the time when the expropriation was publicly announced, or when the expropriation occurred, whichever is applicable;

(c) not reflect any change in value because the intended expropriation had become known earlier; and

(d) be fully realisable and freely transferable in accordance with Article 13 (Transfers) between the territories of the Member States.

3. In the event of delay, the compensation shall include an appropriate interest in accordance with the laws and regulations of the Member State making the expropriation. The compensation, including any accrued interest, shall be payable either in the currency in which the investment was originally made or, if requested by the investor, in a freely usable currency.

4. If an investor requests payment in a freely useable currency, the compensation referred to in sub-paragraph 1(c), including any accrued interest, shall be converted into the currency of payment at the market rate of exchange prevailing on the date of payment.

5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement.

ARTICLE 15
SUBROGATION

1. If a Member State or an agency of a Member State makes a payment to an investor of that Member State under a guarantee, a contract of insurance or other form of indemnity it has granted on non-commercial risk in respect of an investment, the other Member State shall recognise the subrogation or transfer of any right or title in respect of such investment. The subrogated or transferred right or claim shall not be greater than the original right or claim of the investor. This, however, does not necessarily imply recognition of the latter Member State of the merits of any case or the amount of any claims arising therefrom.

2. Where a Member State or an agency of a Member State has made a payment to an investor of that Member State and has taken over rights and claims of the investor, that investor shall not, unless authorised to act on behalf of the Member State or the agency of the Member State making the payment, pursue those rights and claims against the other Member State.

3. In the exercise of subrogated rights or claims, a Member State or the agency of the Member State exercising such rights or claims shall disclose the coverage of the claims arrangement with its investors to the relevant Member State.

[11] Member States understand that there may be legal and administrative processes that need to be observed before payment can be made

ARTICLE 16
MEASURES TO SAFEGUARD THE BALANCE-OF-PAYMENTS

1. In the event of serious balance-of-payments and external financial difficulties or threat thereof, a Member State may adopt or maintain restrictions on payments or transfers related to investments. It is recognised that particular pressures on the balance-of-payments of a Member State in the process of economic development may necessitate the use of restrictions to ensure, inter alia, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development.

2. The restrictions referred to in paragraph 1 shall:

(a) be consistent with the Articles of Agreement of the IMF;

(b) avoid unnecessary damage to the commercial, economic and financial interests of another Member State;

(c) not exceed those necessary to deal with the circumstances described in paragraph 1;

(d) be temporary and be phased out progressively as the situation specified in paragraph 1 improves;

(e) be applied such that any one of the other Member States is treated no less favourably than any other Member State or non-Member State.

3. Any restrictions adopted or maintained under paragraph 1, or any changes therein, shall be promptly notified to the other Member States.

4. To the extent that it does not duplicate the process under WTO, IMF, or any other similar processes, the Member State adopting any restrictions under paragraph 1 shall commence consultations with any other Member State that requests such consultations in order to review the restrictions adopted by it.

ARTICLE 17
GENERAL EXCEPTIONS

1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Member States or their investors where like conditions prevail, or a disguised restriction on investors of any other Member State and their investments, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member State of measures:

(a) necessary to protect public morals or to maintain public order;[12]

(b) necessary to protect human, animal or plant life or health;

[12] The public order exception may be invoked by a Member State only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

(c) necessary to secure compliance with laws or regulations which are not inconsistent with this Agreement, including those relating to:

i) the prevention of deceptive and fraudulent practices to deal with the effects of a default on a contract;

ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;

iii) safety;

(d) aimed at ensuring the equitable or effective[13] imposition or collection of direct taxes in respect of investments or investors of any Member State;

(e) imposed for the protection of national treasures of artistic, historic or archaeological value;

(f) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

2. Insofar as measures affecting the supply of financial services are concerned, paragraph 2 (Domestic Regulation) of the Annex on Financial Services of the General Agreement on Trade in Services in Annex 1B to the WTO Agreement ("GATS") shall be incorporated into and form an integral part of this Agreement, mutatis mutandis.

ARTICLE 18
SECURITY EXCEPTIONS

Nothing in this Agreement shall be construed:

(a) to require any Member State to furnish any information, the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any Member State from taking any action which it considers necessary for the protection of its essential security interests, including but not limited to:

i) action relating to fissionable and fusionable materials or the materials from which they derived;

ii) action relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

iii) action taken in time of war or other emergency in domestic or international relations;

[13] For the purpose of this sub-paragraph, footnote 6 of Article XIV of the General Agreement on Trade in Services in Annex 1B to the WTO Agreement (GATS) is incorporated into and forms an integral part of this Agreement, mutatis mutandis.

iv) action taken so as to protect critical public infrastructure, including communication, power and water infrastructures, from deliberate attempts intended to disable or degrade such infrastructure; or

(c) to prevent any Member State from taking any action pursuant to its obligations under the United Nations Charter for the maintenance of international peace and security.

ARTICLE 19
DENIAL OF BENEFITS

1. A Member State may deny the benefits of this Agreement to:

(a) an investor of another Member State that is a juridical person of such other Member State and to investments of such investor if an investor of a non-Member State owns or controls the juridical person and the juridical person has no substantive business operations in the territory of such other Member State;

(b) an investor of another Member State that is a juridical person of such other Member State and to investments of such investor if an investor of the denying Member State owns or controls the juridical person and the juridical person has no substantive business operations in the territory of such other Member State; and

(c) an investor of another Member State that is a juridical person of such other Member State and to an investment of such investor if investors of a non-Member State own or control the juridical person, and the denying Member State does not maintain diplomatic relations with the non-Member State.

2. Following notification to the Member State of the investor, and without prejudice to paragraph 1, a Member State may deny the benefits of this Agreement to investors of another Member State and to investments of that investor, where it establishes that such investor has made an investment in breach of the domestic laws of the denying Member State by misrepresenting its ownership in those areas of investment which are reserved for natural or juridical persons of the denying Member State.

3. A juridical person is:

(a) "owned" by an investor in accordance with the laws, regulations and national policies of each Member States;

(b) "controlled" by an investor if the investor has the power to name a majority of its directors or otherwise to legally direct its actions.

ARTICLE 20
SPECIAL FORMALITIES AND DISCLOSURE OF INFORMATION

1. Nothing in Articles 5 (National Treatment) or 6 (Most-Favoured-Nation Treatment) shall be construed to prevent a Member State from adopting or maintaining a measure that prescribes special formalities in connection with investments, including a requirement that investments be legally constituted or assume a certain legal form under the laws or

regulations of the Member State and compliance with registration requirements, provided that such formalities do not materially impair the rights afforded by a Member State to investors of another Member State and investments pursuant to this Agreement.

2. Notwithstanding Articles 5 (National Treatment) or 6 (Most-Favoured-Nation Treatment), a Member State may require an investor of another Member State, or a covered investment, to provide information concerning that investment solely for informational or statistical purposes. The Member State shall protect any confidential information from any disclosure that would prejudice legitimate commercial interests or particular juridical persons, public or private or the competitive position of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Member State from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.

ARTICLE 21
TRANSPARENCY

1. In order to achieve the objectives of this Agreement, each Member State shall:
   (a) promptly and at least annually inform the AIA Council of any investment-related agreements or arrangements which it has entered into and where preferential treatment was granted;
   (b) promptly and at least annually inform the AIA Council of the introduction of any new law or of any changes to existing laws, regulations or administrative guidelines, which significantly affect investments or commitments of a Member State under this Agreement;
   (c) make publicly available, all relevant laws, regulations and administrative guidelines of general application that pertain to, or affect investments in the territory of the Member State; and
   (d) establish or designate an enquiry point where, upon request of any natural person, juridical person or any other Member State, all information relating to the measures required to be published or made available under sub-paragraphs (b) and (c) may be promptly obtained.
2. Nothing in this Agreement shall require a Member State to furnish or allow access to any confidential information, including information concerning particular investors or investments, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular juridical persons, public or private.

ARTICLE 22
ENTRY, TEMPORARY STAY AND WORK OF INVESTORS AND KEY PERSONNEL

Subject to its immigration and labour laws, regulations and national policies relating to the entry, temporary stay and authorisation to work, and consistent with its commitments under AFAS,

each Member State shall grant entry, temporary stay and authorisation to work to investors, executives, managers and members of the board of directors of a juridical person of any other Member State, for the purpose of establishing, developing, administering or advising on the operation in the territory of the former Member State of an investment to which they, or a juridical person of the other Member States that employs such executives, managers and members of the board of directors, have committed or are in the process of committing a substantial amount of capital or other resources.

ARTICLE 23
SPECIAL AND DIFFERENTIAL TREATMENT FOR THE NEWER ASEAN MEMBER STATES

In order to increase the benefits of this Agreement for the newer ASEAN Member States, and in accordance with the objectives and principles set out in the Preamble and Articles 1 (Objective) and 2 (Guiding Principles), Member States recognise the importance of according special and differential treatment to the newer ASEAN Member States, through:

(a) technical assistance to strengthen their capacity in relation to investment policies and promotion, including in areas such as human resource development;

(b) commitments in areas of interest to the newer ASEAN Member States; and

(c) recognising that commitments by each newer ASEAN Member State may be made in accordance with its individual stage of development.

ARTICLE 24
PROMOTION OF INVESTMENT

Member States shall cooperate in increasing awareness of ASEAN as an integrated investment area in order to increase foreign investment into ASEAN and intra-ASEAN investments through, among others:

(a) encouraging the growth and development of ASEAN small and medium enterprises and multi-national enterprises;

(b) enhancing industrial complementation and production networks among multi-national enterprises in ASEAN;

(c) organising investment missions that focus on developing regional clusters and production networks;

(d) organising and supporting the organisation of various briefings and seminars on investment opportunities and on investment laws, regulations and policies; and

(e) conducting exchanges on other issues of mutual concern relating to investment promotion.

ARTICLE 25
FACILITATION OF INVESTMENT

Member States shall endeavour to cooperate in the facilitation of investments into and within ASEAN through, among others:

(a) creating the necessary environment for all forms of investments;

(b) streamlining and simplifying procedures for investment applications and approvals;

(c) promoting dissemination of investment information, including investment rules, regulations, policies and procedures;

(d) establishing one-stop investment centres;

(e) strengthening databases on all forms of investments for policy formulation to improve ASEAN's investment environment;

(f) undertaking consultation with the business community on investment matters; and

(g) providing advisory services to the business community of the other Member States.

ARTICLE 26
ENHANCING ASEAN INTEGRATION

Member States recognise the importance of fostering ASEAN economic integration through various initiatives, including the Initiative for ASEAN Integration, Priority Integration Sectors, and AEC, all of which include cooperation on investment. In order to enhance ASEAN economic integration, Member States shall endeavour to, among others:

(a) harmonise, where possible, investment policies and measures to achieve industrial complementation;

(b) build and strengthen capacity of Member States, including human resource development, in the formulation and improvement of investment policies to attract investment;

(c) share information on investment policies and best practices, including promoted activities and industries; and

(d) support investment promotion efforts amongst Member States for mutual benefits.

ARTICLE 27
DISPUTES BETWEEN OR AMONG MEMBER STATES

The ASEAN Protocol on Enhanced Dispute Settlement Mechanism signed in Vientiane, Lao PDR on 29 November 2004, as amended, shall apply to the settlement of disputes concerning the interpretation or application of this Agreement.

SECTION B
INVESTMENT DISPUTE BETWEEN AN INVESTOR AND A MEMBER STATE

ARTICLE 28
DEFINITIONS

For the purpose of this Section:

(a) "**Appointing Authority**" means:

i) in the case of arbitration under Article 33(1)(b) or (c), the Secretary-General of ICSID;

ii) in the case of arbitration under Article 33(1)(d), the Secretary-General of the Permanent Court of Arbitration; or

iii) in the case of arbitration under Article 33(1)(e) and (f), the Secretary-General, or a person holding equivalent position, of that arbitration centre or institution;

(b) "**disputing investor**" means an investor of a Member State that makes a claim on its own behalf under this Section, and where relevant, includes an investor of a Member State that makes a claim on behalf of a juridical person of the other Member State that the investor owns or controls;

(c) "**disputing Member State**" means a Member State against which a claim is made under this Section;

(d) "**disputing parties**" means a disputing investor and a disputing Member State;

(e) "**ICSID**" means the International Centre for Settlement of Investment Disputes;

(f) "**ICSID Additional Facility Rules**" means the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes;

(g) "**ICSID Convention**" means the Convention on the Settlement of Investment Disputes between States and National of other States, done at Washington, D.C., United States of America on 18 March 1965;

(h) "**New York Convention**" means the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, United States of America on 10 June 1958;

(i) "**non-disputing Member State**" means the Member State of the disputing investor; and

(j) "**UNCITRAL Arbitration Rules**" means the arbitration rules of the United Nations Commission on International Trade Law, approved by the United Nations General Assembly on 15 December 1976.

ARTICLE 29
SCOPE OF COVERAGE

1. This Section shall apply to an investment dispute between a Member State and an investor of another Member State that has incurred loss or damage by reason of an alleged breach of any rights conferred by this Agreement with respect to the investment of that investor.
2. A natural person possessing the nationality or citizenship of a Member State shall not pursue a claim against that Member State under this Section.
3. This Section shall not apply to claims arising out of events which occurred, or claims which have been raised prior to the entry into force of this Agreement.
4. Nothing in this Section shall be construed so as to prevent a disputing investor from seeking administrative or judicial settlement available within the country of a disputing Member State.

ARTICLE 30
CONCILIATION

1. The disputing parties may at any time agree to conciliation, which may begin at any time and be terminated at the request of the disputing investor at any time.
2. If the disputing parties agree, procedures for conciliation may continue while procedures provided for in Article 33 (Submission of a Claim) are in progress.
3. Proceedings involving conciliation and positions taken by the disputing parties during these proceedings shall be without prejudice to the rights of either disputing parties in any further proceedings under this Section.

ARTICLE 31
CONSULTATIONS

1. In the event of an investment dispute, the disputing parties shall initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third party procedures. Such consultations shall be initiated by a written request for consultations delivered by the disputing investor to the disputing Member State.
2. Consultations shall commence within 30 days of receipt by the disputing Member State of the request for consultations, unless the disputing parties otherwise agree.
3. With the objective of resolving an investment dispute through consultations, a disputing investor shall make all reasonable efforts to provide the disputing Member State, prior to the commencement of consultations, with information regarding the legal and factual basis for the investment dispute.

ARTICLE 32
CLAIM BY AN INVESTOR OF A MEMBER STATE

If an investment dispute has not been resolved within 180 days of the receipt by a disputing Member State of a request for consultations, the disputing investor may, subject to this Section, submit to arbitration a claim:

(a) that the disputing Member State has breached an obligation arising under Articles 5 (National Treatment), 6 (Most-Favoured-Nation Treatment), 8 (Senior Management and Board of Directors), 11 (Treatment of Investment), 12 (Compensation in Cases of Strife), 13 (Transfers) and 14 (Expropriation and Compensation) relating to the management, conduct, operation or sale or other disposition of a covered investment; and

(b) that the disputing investor in relation to its covered investment has incurred loss or damage by reason of or arising out of that breach.

ARTICLE 33
SUBMISSION OF A CLAIM

1. A disputing investor may submit a claim referred to in Article 32 (Claim by an Investor of a Member State) at the choice of the disputing investor:

   (a) to the courts or administrative tribunals of the disputing Member State, provided that such courts or tribunals have jurisdiction over such claims; or

   (b) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings,[14] provided that both the disputing Member State and the non-disputing Member State are parties to the ICSID Convention; or

   (c) under the ICSID Additional Facility Rules, provided that either of the disputing Member State or the non-disputing Member State is a party to the ICSID Convention; or

   (d) under the UNCITRAL Arbitration Rules; or

   (e) to the Regional Centre for Arbitration at Kuala Lumpur or any other regional centre for arbitration in ASEAN; or

   (f) if the disputing parties agree, to any other arbitration institution,

   provided that resort to any arbitration rules or fora under sub-paragraphs (a) to (f) shall exclude resort to the other.

2. A claim shall be deemed submitted to arbitration under this Section when the disputing investor's notice of or request for arbitration ("notice of arbitration") is received under the applicable arbitration rules.

[14] In the case of the Philippines, submission of a claim to ICSID and the ICSID Rules of Procedure for Arbitration Proceedings shall be subject to a written agreement between the disputing parties in the event that an investment dispute arises.

3. The arbitration rules applicable under paragraph 1, as in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Agreement.
4. In relation to a specific investment dispute or class of disputes, the applicable arbitration rules may be waived, varied or modified by written agreement between the disputing parties. Such rules shall be binding on the relevant tribunal or tribunals established under this Section, and on individual arbitrators serving on such tribunals.
5. The disputing investor shall provide with the notice of arbitration:
   (a) the name of the arbitrator that the disputing investor appoints; or
   (b) the disputing investor's written consent for the Appointing Authority to appoint that arbitrator.

ARTICLE 34
CONDITIONS AND LIMITATIONS ON SUBMISSION OF A CLAIM

1. The dispute shall be submitted to arbitration under Article 33(1)(b) to (f) in accordance with this Section, and shall be conditional upon:
   (a) the submission of the investment dispute to such arbitration taking place within 3 years of the time at which the disputing investor became aware, or should reasonably have become aware, of a breach of an obligation under this Agreement causing loss or damage to the disputing investor or a covered investment; and
   (b) the disputing investor providing written notice, which shall be submitted at least 90 days before the claim is submitted, to the disputing Member State of its intent to submit the investment dispute to such arbitration and which briefly summarises the alleged breach of the disputing Member State under this Agreement (including the provisions alleged to have been breached) and the loss or damage allegedly caused to the disputing investor or a covered investment; and
   (c) the notice of arbitration under Article 33(2) being accompanied by the disputing investor's written waiver of the disputing investor's right to initiate or continue any proceedings before the courts or administrative tribunals of the disputing Member State, or other dispute settlement procedures, of any proceeding with respect to any measure alleged to constitute a breach referred to in Article 32 (Claim by an Investor of a Member State).
2. Notwithstanding sub-paragraph 1(c), the disputing investor shall not be prevented from initiating or continuing an action that seeks interim measures of protection for the sole purpose of preserving the disputing investor's rights and interests and does not involve the payment of damages or resolution of the substance of the matter in dispute, before the courts or administrative tribunals of the disputing Member State.
3. A Member State shall not give diplomatic protection, or bring an international claim, in respect of a dispute which one of its investors and the other Member State have consented to submit or have submitted to arbitration under this Section, unless such other Member

State has failed to abide by and comply with the award rendered in such dispute. Diplomatic protection, for the purposes of this paragraph, shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

4. A disputing Member State shall not assert, as a defence, counter-claim, right of set off or otherwise, that the disputing investor in relation to the covered investment has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of any alleged loss.

ARTICLE 35
SELECTION OF ARBITRATORS

1. Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators:
   (a) one arbitrator appointed by each of the disputing parties; and
   (b) the third arbitrator, who shall be the presiding arbitrator, appointed by agreement of the disputing parties. The third arbitrator shall be a national of a non-Member State which has diplomatic relations with the disputing Member State and non-disputing Member State, and shall not have permanent residence in either the disputing Member State or non-disputing Member State.
2. Any person appointed as an arbitrator shall have expertise or experience in public international law, international trade or international investment rules. An arbitrator shall be chosen strictly on the basis of objectivity, reliability, sound judgment and independence and shall conduct himself or herself on the same basis throughout the course of the arbitral proceedings.
3. Subject to Article 36 (Conduct of the Arbitration), if a tribunal has not been constituted within 75 days from the date that a claim is submitted to arbitration under this Section, the Appointing Authority, on the request of a disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators who have not been appointed.
4. The tribunal shall reach its decisions by a majority of votes and its decisions shall be binding.
5. The parties to the dispute shall bear the cost of their respective arbitrators to the tribunal and share equally the cost of the presiding arbitrator and other relevant costs. In all other respects, the tribunal shall determine its own procedures.
6. The disputing parties may establish rules relating to expenses incurred by the tribunal, including remuneration of the arbitrators.
7. Where any arbitrator appointed as provided for in this Article resigns or becomes unable to act, a successor shall be appointed in the same manner as prescribed for the appointment of the original arbitrator and the successor shall have all the powers and duties of the original arbitrator.

ARTICLE 36
CONDUCT OF THE ARBITRATION

1. Where issues relating to jurisdiction or admissibility are raised as preliminary objections, the tribunal shall decide the matter before proceeding to the merits.
2. A disputing Member State may, no later than 30 days after the constitution of the tribunal, file an objection that a claim is manifestly without merit. A disputing Member State may also file an objection that a claim is otherwise outside the jurisdiction or competence of the tribunal. The disputing Member State shall specify as precisely as possible the basis for the objection.
3. The tribunal shall address any such objection as a preliminary question apart from the merits of the claim. The disputing parties shall be given a reasonable opportunity to present their views and observations to the tribunal. If the tribunal decides that the claim is manifestly without merit, or is otherwise not within the jurisdiction or competence of the tribunal, it shall render an award to that effect.
4. The tribunal may, if warranted, award the prevailing party reasonable costs and fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claim or the objection was frivolous or manifestly without merit, and shall provide the disputing parties a reasonable opportunity to comment.
5. Unless the disputing parties otherwise agree, the tribunal shall determine the place of arbitration in accordance with the applicable arbitration rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.
6. Where an investment dispute relate to a measure which may be a taxation measure, the disputing Member State and the non-disputing Member State, including representatives of their tax administrations, shall hold consultations to determine whether the measure in question is a taxation measure.
7. Where a disputing investor claims that the disputing Member State has breached Article 14 (Expropriation and Compensation) by the adoption or enforcement of a taxation measure, the disputing Member State and the non-disputing Member State shall, upon request from the disputing Member State, hold consultations with a view to determining whether the taxation measure in question has an effect equivalent to expropriation or nationalisation.
8. Any tribunal that may be established under this Section shall accord serious consideration to the decision of both Member States under paragraphs 6 and 7.
9. If both Member States fail either to initiate such consultations referred to paragraphs 6 and 7, or to make such joint decisions, within the period of 180 days from the date of the receipt of request for consultation referred to in Article 31 (Consultations), the disputing investor shall not be prevented from submitting its claim to arbitration in accordance with this Section.

ARTICLE 37
CONSOLIDATION

Where two or more claims have been submitted separately to arbitration under Article 32 (Claim by an Investor of a Member State) and the claims have a question of law or fact in common and arise out of the same or similar events or circumstances, all concerned disputing parties may agree to consolidate those claims in any manner they deem appropriate.

ARTICLE 38
EXPERT REPORTS

Without prejudice to the appointment of other kinds of experts where authorised by the applicable arbitration rules, the tribunal, at the request of the disputing parties, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, public health, safety or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

ARTICLE 39
TRANSPARENCY OF ARBITRAL PROCEEDINGS

1. Subject to paragraphs 2 and 3, the disputing Member State may make publicly available all awards, and decisions produced by the tribunal.
2. Any of the disputing parties that intend to use information designated as confidential information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.
3. Any information specifically designated as confidential that is submitted to the tribunal or the disputing parties shall be protected from disclosure to the public.
4. A disputing party may disclose to persons directly connected with the arbitral proceedings such confidential information as it considers necessary for the preparation of its case, but it shall require that such confidential information is protected.
5. The tribunal shall not require a Member State to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Member State's law protecting Cabinet confidences, personal privacy or the financial affairs and accounts of individual customers of financial institutions, or which it determines to be contrary to its essential security.
6. The non-disputing Member State shall be entitled, at its cost, to receive from the disputing Member State a copy of the notice of arbitration, no later than 30 days after the date that such document has been delivered to the disputing Member State. The disputing Member State shall notify all other Member States of the receipt of the notice of arbitration within 30 days thereof.

ARTICLE 40
GOVERNING LAW

1. Subject to paragraphs 2 and 3, when a claim is submitted under Article 33 (Submission of a Claim), the tribunal shall decide the issues in dispute in accordance with this Agreement, any other applicable agreements between the Member States, and the applicable rules of international law and where applicable, any relevant domestic law of the disputing Member State.
2. The tribunal shall, on its own account or at the request of a disputing party, request a joint interpretation of any provision of this Agreement that is in issue in a dispute. The Member States shall submit in writing any joint decision declaring their interpretation to the tribunal within 60 days of the delivery of the request. Without prejudice to paragraph 3, if the Member States fail to issue such a decision within 60 days, any interpretation submitted by a Member State shall be forwarded to the disputing parties and the tribunal, which shall decide the issue on its own account.
3. A joint decision of the Member States, declaring their interpretation of a provision of this Agreement shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.

ARTICLE 41
AWARDS

1. The disputing parties may agree on a resolution of the dispute at any time before the tribunal issues its final award.
2. Where a tribunal makes a final award against either of the disputing parties, the tribunal may award, separately or in combination, only:
   (a) monetary damages and any applicable interest; and
   (b) restitution of property, in which case the award shall provide that the disputing Member State may pay monetary damages and any applicable interest in lieu of restitution.
3. A tribunal may also award costs and attorney's fees in accordance with this Agreement and the applicable arbitration rules.
4. A tribunal may not award punitive damages.
5. An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.
6. Subject to paragraph 7 and the applicable review procedure for an interim award, the disputing party shall abide by and comply with an award without delay.[15]
7. The disputing party may not seek enforcement of a final award until:

[15] The Parties understand that there may be domestic legal and administrative processes that need to be observed before an award can be complied with.

   (a) in the case of a final award under the ICSID Convention:
      i) 120 days has elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award; or
      ii) revision or annulment proceedings have been completed;
   (b) in the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or the rules selected pursuant to Article 33(1)(e):
      i) 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.
8. A claim that is submitted for 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.
9. Each Member State shall provide for the enforcement of an award in its territory.

SECTION C

ARTICLE 42
INSTITUTIONAL ARRANGEMENTS

1. The AIA Council, as established by the AEM under the AIA Agreement, shall be responsible for the implementation of this Agreement.
2. The ASEAN Coordinating Committee on Investment ("CCI") as established by the AIA Council and comprising senior officials responsible for investment and other senior officials from relevant government agencies, shall assist the AIA Council in the performance of its functions. The CCI shall report to the AIA Council through the Senior Economic Officials Meeting ("SEOM"). The ASEAN Secretariat shall be the secretariat for the AIA Council and the CCI.
3. The functions of the AIA Council shall be to:
   (a) provide policy guidance on global and regional investment matters concerning promotion, facilitation, protection, and liberalisation;
   (b) oversee, coordinate and review the implementation of this Agreement;
   (c) update the AEM on the implementation and operation of this Agreement;
   (d) consider and recommend to the AEM any amendments to this Agreement;
   (e) facilitate the avoidance and settlement of disputes arising from this Agreement;
   (f) supervise and coordinate the work of the CCI;

(g) adopt any necessary decisions; and

(h) carry out any other functions as the AEM may agree.

ARTICLE 43
CONSULTATIONS BY MEMBER STATES

The Member States agree to consult each other at the request of any Member State on any matter relating to investments covered by this Agreement, or otherwise affecting the implementation of this Agreement.

ARTICLE 44
RELATION TO OTHER AGREEMENTS

Nothing in this Agreement shall derogate from the existing rights and obligations of a Member State under any other international agreements to which it is a party.

ARTICLE 45
ANNEXES, SCHEDULE AND FUTURE INSTRUMENTS

This Agreement shall include the Annexes, the Schedule and the contents therein, which shall form an integral part of this Agreement, and all future legal instruments agreed pursuant to this Agreement.

ARTICLE 46
AMENDMENTS

The provisions of this Agreement may be modified through amendments mutually agreed upon in writing by the Member States.

ARTICLE 47
TRANSITIONAL ARRANGEMENTS RELATING TO THE ASEAN IGA AND THE AIA AGREEMENT

1. Upon the entry into force of this Agreement, the ASEAN IGA and the AIA Agreement shall be terminated.
2. Notwithstanding the termination of the AIA Agreement, the Temporary Exclusion List and the Sensitive List to the AIA Agreement shall apply to the liberalisation provisions of the ACIA, mutatis mutandis, until such time that the Reservation List of ACIA comes into force.
3. With respect to investments falling within the ambit of this Agreement as well as under the ASEAN IGA, or within the ambit of this Agreement and the AIA Agreement, investors of these investments may choose to apply the provisions, but only in its entirety, of either this

Agreement or the ASEAN IGA or the AIA Agreement, as the case may be, for a period of 3 years after the date of termination of the ASEAN IGA and the AIA Agreement.

ARTICLE 48
ENTRY INTO FORCE

1. This Agreement shall enter into force after all Member States have notified or, where necessary, deposited instruments of ratification with the Secretary-General of ASEAN, which shall not take more than 180 days after the signing of this Agreement.
2. The Secretary-General of ASEAN shall promptly notify all Member States of the notifications or deposit of each instrument of ratification referred to in paragraph 1.

ARTICLE 49
DEPOSITARY

This Agreement shall be deposited with the Secretary-General of ASEAN, who shall promptly furnish a certified copy thereof to each Member State.

IN WITNESS WHEREOF, the undersigned, being duly authorised by their respective Governments, have signed this ASEAN Comprehensive Investment Agreement.

DONE at Cha-am, Thailand, this Twenty Sixth Day of February in the Year Two Thousand and Nine, in a single original copy in the English language

For Brunei Darussalam: **LIM JOCK SENG**, Second Minister of Foreign Affairs and Trade

For the Kingdom of Cambodia: **CHAM PRASIDH**, Second Minister and Minister of Commerce

For the Republic of Indonesia: **MARI ELKA PANGESTU**, Minister of Trade

For the Lao People's Democratic Republic: **NAM VIYAKETH**, Minister of Industry and Commerce

For Malaysia: **TAN SRI MUHYIDDIN YASSIN**, Minister of International Trade and Industry

For the Union of Myanmar: **U SOE THA**, Minister for National Planning and Economic Development

For the Republic of the Philippines: **PETER B. FAVILA**, Secretary of Trade and Industry

For the Republic of Singapore: **LIM HNG KIANG**, Minister for Trade and Industry

For the Kingdom of Thailand: **PORNTIVA NAKASAI**, Minister of Commerce

For the Socialist Republic of Viet Nam: **VU HUY HOANG**, Minister of Industry and Trade

ANNEX 1
APPROVAL IN WRITING

Where specific approval in writing is required for covered investments by a Member State's domestic laws, regulations and national policies, that Member State shall:

(a) inform all the other Member States through the ASEAN Secretariat of the contact details of its competent authority responsible for granting such approval;

(b) in the case of an incomplete application, identify and notify the applicant in writing within 1 month from the date of receipt of such application of all the additional information that is required;

(c) inform the applicant in writing that the investment has been specifically approved or denied within 4 months from the date of receipt of complete application by the competent authority; and

(d) in the case an application is denied, inform the applicant in writing of the reasons for such denial. The applicant shall have the opportunity of submitting, at that applicant's discretion, a new application.

ANNEX 2
EXPROPRIATION AND COMPENSATION

1. An action or a series of related actions by a Member State cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in a covered investment.

2. Article 14(1) addresses two situations:

   (a) the first situation is where an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and

   (b) the second situation is where an action or series of related actions by a Member State has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

3. The determination of whether an action or series of actions by a Member State, in a specific fact situation, constitutes an expropriation of the type referred to in sub-paragraph 2(b), requires a case-by-case, fact-based inquiry that considers, among other factors:

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

   (b) whether the government action breaches the government's prior binding written commitment to the investor whether by contract, licence or other legal document; and

   (c) the character of the government action, including, its objective and whether the action is disproportionate to the public purpose referred to in Article 14(1).

4. Non-discriminatory measures of a Member State that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an expropriation of the type referred to in sub-paragraph 2(b).

Investment Agreement for the COMESA Common Investment Area, 2007

COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA

MARCHE COMMUN **MERCADO COMUM**

INVESTMENT AGREEMENT FOR THE COMESA COMMON INVESTMENT AREA

Rmm/(07)

INVESTMENT AGREEMENT FOR THE COMESA COMMON INVESTMENT AREA

PREAMBLE

The Governments of Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe, Member States of the Common Market for Eastern and Southern Africa (COMESA);

REAFFIRMING the importance of having sustainable economic growth and development in all Member States and the region through joint efforts in liberalising and promoting intra-COMESA trade and investment flows;

RECALLING the decision of the Third COMESA Summit of the Authority held on 29 June 1998 in Kinshasa, Democratic Republic of Congo, to establish the COMESA Common Investment Area (hereinafter referred to as "CCIA"), in order to enhance COMESA's attractiveness and competitiveness for promoting foreign direct and cross border investments;

RECALLING the establishment of the COMESA Free Trade Area (FTA) on 31st October 2000 and recognising that direct investment is an important source of finance for sustaining the pace of economic, industrial, infrastructure and technology development; hence, the need to attract higher and sustainable level of direct investment flows in COMESA;

RECALLING that the Member States have agreed under paragraph 1 of Article 159 of the Treaty Establishing COMESA to encourage and facilitate private investment flows into COMESA;

RECOGNISING that particular pressures on the balance of payments of a Member State in the process of economic development or economic transition may necessitate the use of restrictions to ensure, *inter alia*, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition;

DETERMINED to realise the vision of COMESA to establish a competitive COMESA Common Investment Area through a more liberal and transparent investment environment by 1st January 2010; and

BEARING IN MIND that the measures agreed upon shall contribute towards the realisation of the Common Market and the achievement of sustainable development in the region.

HAVE AGREED AS FOLLOWS:

ARTICLE 1

Definitions

For the purposes of this Agreement:

1. "CCIA" means the area that covers the whole of the territories of Member States of COMESA as defined by their respective legislation.

2. "CCIA Committee" means the Committee referred to under Article 7 of this Agreement.

3. "COMESA" means the Common Market for Eastern and Southern Africa established under Article 1 of the COMESA Treaty.

4. "COMESA investor" means:

(i) a natural person of a Member State; or

(ii) a juridical person of a Member State,

making an investment in another Member State, in accordance with the laws and regulations of the Member State in which the investment is made. For the purposes of this definition:

For purposes of the definition of COMESA investor:

(i) "Natural person" means a person having citizenship of a Member State in accordance with its applicable laws and regulations; and

(ii) "Juridical person" means any legal entity duly constituted or otherwise organised under the applicable laws and regulations of a Member State provided that a juridical person owned or controlled by foreign nationals shall not qualify as a COMESA investor unless it maintains substantial business activity in the Member State in which it is duly constituted or organised.

The concept of 'substantial business activity' requires an overall examination, on a case-by-case basis, of all the circumstances, including, *inter alia*:

(a) the amount of investment brought into the country;
(b) the number of jobs created;
(c) its effect on the local community; and
(d) the length of time the business has been in operation.

5. "COMESA Treaty" means the Treaty establishing the Common Market for Eastern and Southern Africa.

6. "Council" means the Council of Ministers of COMESA as established under Article 7 of the COMESA Treaty.

7. "economic activities" means all economic activities of the economy, including services, where investment, as defined in this Article, is taking place.

8. "freely convertible currency" means a convertible currency as classified by the International Monetary Fund or any currency that is widely traded in international foreign exchange market.

9. "investment" means assets admitted or admissible in accordance with the relevant laws and regulations of the COMESA Member State in whose territory the investment is made, and includes:

(a) moveable and immovable property and other related property rights such as mortgages, liens and pledges;

(b) claims to money, goods, services or other performance having economic value;

(c) stocks, shares and debentures of companies and interest in the property of such companies;

(d) intellectual property rights, technical processes, know-how, goodwill and other benefits or advantages associated with a business operating in the territory of the COMESA Member States in which the investment is made;

(e) business concessions conferred by law or under contract, including:

(i) build, operate, own/transfer, rehabilitate, expand, restructure and/or improve infrastructure;

(ii) concessions to search for, cultivate, extract or exploit natural resources; and

(f) such other activities that may be declared by the Council as investments;

but excludes : goodwill market share, whether or not it is based on foreign-origin trade, or rights to trade; claims to money deriving solely from commercial contracts for the sale of goods and services to or from the territory of a Member State to the territory of another Member State, or a loan to a Member State or to a Member State enterprise; a bank letter of credit; or the extension of credit in connection with a commercial transaction, such as trade financing.

10. "measures" means any legal, administrative, judicial or policy decision that is taken by a Member State, directly relating to and affecting an investment in its territory, after this Agreement has come into effect.

11. “Member State” means a Member State of COMESA that has ratified or acceded to this Agreement.

12. ‘returns’ mean the amount yielded by an investment and in particular, though not exclusively, includes dividends, profit, interest, capital gains or other equivalent charges, royalties and other payments deriving from licenses, franchises, concessions and other similar rights.

13. “Sensitive List” set out in Annex C of this Agreement means those:

(a) economic activities listed by a Member State that are partially or wholly excluded from foreign investment pursuant to Article 18 of this Agreement; or

(b) measures affecting investment listed by Member States pursuant to Article 18 of this Agreement; or

(c) a list of the forms of investment that a Member State may wish to exclude from the definition of investment under Article 1 of this Agreement.

14. “Temporary Exclusion List” set out in Annex D means those:

(a) economic activities listed by a Member State where foreign investment is temporarily excluded for a given period of time pursuant to Article 18 of this Agreement; or

(b) measures affecting investment listed by Member States that are temporarily excluded from the scope of all or part of this Agreement for a given period of time pursuant to Article 18 of this Agreement; or

(c) a list of the forms of investment that a Member State may wish to exclude temporarily for a given period of time from the definition of investment under Article 1 of this Agreement.

PART ONE

COMESA COMMON INVESTMENT AREA

ARTICLE 2
Objectives of Part One

The objective of Part One of this Agreement is to establish a competitive COMESA Common Investment Area with a more liberal and transparent investment environment among Member States in order to:

(a) substantially increase the free flow of investments into COMESA from both COMESA and non-COMESA sources;

(b) jointly promote COMESA as an attractive investment area;

(c) strengthen and increase the competitiveness of COMESA's economic activities;

(d) gradually eliminate investment restrictions and conditions which may impede investment flows and the operation of investment projects in COMESA.

ARTICLE 3
Features

The CCIA shall be an area where:

(a) there is a coordinated COMESA investment co-operation programme that will generate increased investments from COMESA and non-COMESA sources;

(b) there is freer flow of capital, skilled labour and professionals, and technology amongst Member States. Towards this end, Member States shall make every effort to:

(i) extend national treatment to COMESA investors by 2010;

(ii) ensure all economic activities are opened for investment to COMESA investors by 2010; and

(c) the private sector is a partner and fully participates in investment and related activities of the Common Market as provided for under Article 151 of the COMESA Treaty.

ARTICLE 4
Transparency

1. Each Member State shall make available to the CCIA Committee before the Agreement comes into effect all relevant measures, which pertain to, or affect, the operation of this Agreement. This shall also apply to international agreements pertaining to or affecting investment to which a Member State is also a signatory.

2. Each Member State shall publish all relevant measures which pertain to, or affect, the operation of this Agreement.

3. Each Member State shall, within 30 days of the enactment or the introduction of any new measure or any changes in existing measures which affect investments or its commitments under this Agreement inform the CCIA Committee and the general public.

4. Nothing in this Agreement shall require any Member State to provide confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private.

ARTICLE 5
General Obligations

To realise the objectives referred to in Article 2, the Member States shall:

(a) undertake appropriate actions to promote transparency and consistency in the application and interpretation of their investment laws, regulations and administrative procedures;

(b) strengthen the process of facilitation, promotion and liberalisation which would contribute continuously and significantly to achieving the objective of a more liberal and transparent investment environment;

(c) take appropriate actions to enhance the attractiveness of their investment environment for direct investment flows;

(d) take such reasonable actions as may be available to them to ensure observance of the provisions of this Agreement by the regional and local government authorities within their territories.

(e) not waive or otherwise derogate from or offer to waive or otherwise derogate from measures concerning labour, public health, safety or the environment as an encouragement for the establishment, expansion or retension of investments.

ARTICLE 6
International Multilateral Agreements

Member States shall, where they have not done so, endeavour to accede to:

(a) the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards;

(b) the International Convention on Settlement of Investment Disputes between States and Nationals of Other States;

(c) the Convention Establishing the Multilateral Investment Guarantee Agency;

(d) the Agreement Establishing the African Trade Insurance Agency; and

(e) any other multilateral agreement designed to promote or protect investment.

ARTICLE 7
Institutional Arrangements

1. The following COMESA organs shall be responsible for administering this Agreement:

   (a) The Meeting of Ministers responsible for investment of each Member State, which for the purposes of this Agreement, shall be known as the COMESA Common Investment Area Committee (“CCIA Committtee”) ; and

   (b) The Co-ordinating Committee on Investment composed of senior officials from Ministeries responsible for investment and Chief Executives of Investment Promotion Agencies as may be designated by each Member State, which for the purposes of this Agreement, shall be known as the Co-ordinating Committee on Investment (CCI)

2. The CCIA Committee shall be responsible for:

   (a) overall supervision of the implementation of this Agreement;

   (b) making decisions or issuing directions that may require to be made under Articles 18(3), 18(4), 24(3) and 25(5) of this Agreement;

(c) recommending to the Council any review of this Agreement when necessary;

(d) making recommendations to the Council on any policy issues that need to be made to enhance the objectives of this Agreement. For example the development of common minimum standards relating to investment in areas such as:

(i) environmental impact and social impact assessments
(ii) labour standards
(iii) respect for human rights
(iv) conduct in conflict zones
(v) corruption
(vi) subsidies; and

(e) conducting a review of the effectiveness of this Agreement and its implementation in the light of its objectives four years after its entry into force and every four years thereafter.

3. The CCI shall be responsible for:

(a) monitoring and keeping under constant review the implementation of this Agreement;

(b) co-ordinating the implementation of this Agreement;

(c) submiting its reports and recommendations to the CCIA Committee, either on its own initiative or upon the request of the CCIA Committee, concerning the implementation of the provisions of this Agreement;

(d) preparation and development of action plans for the implementation of this Agreement; and

(e) carrying out such other functions as are assigned to it by or under this Agreement.

4. The COMESA Secretariat shall provide secretarial services to the institutions described in paragraph 1 of this Article.

5. The Manager of the COMESA Regional Investment Agency or their representative shall participate in all the meetings of the organs described under paragraph 1 as an ex-officio member

6. Subject to this Agreement and any directions given by Council, the CCIA Committee and the CCI shall meet as often as necessary for the proper discharge of their functions and shall determine their own Rules of Procedure.

7. Subject to the Rules of Procedure agreed pursuant to paragraph 6 of this Article, the key representatives of the private sector and other

stakeholders as may be determined by each Member State, shall participate in the meetings of the institutions described under paragraph 1 of this Article as ex-officio members.

ARTICLE 8
Implementing Programmes and Action Plans

1. Member States shall, for the implementation of the obligations under this Agreement, undertake the joint development and implementation of the following programmes:

(a) co-operation and facilitation programme as specified in Schedule I annexed hereto;

(b) promotion and awareness programme as specified in Schedule II annexed hereto; and

(c) liberalisation programme as specified in Schedule III annexed hereto.

2. Member States shall submit action plans for the implementation of programmes mentioned in paragraph 1 to the CCIA Committee within a year of ratifying or acceding to this Agreement.

3. The Action Plans shall be reviewed by the CCIA Committee every two years to ensure that the objectives of this Agreement are achieved.

ARTICLE 9
Modification of Schedules, Annexes and Action Plans

1. Any modification to or withdrawal of any commitments by Member States in Schedules I, II and III and Action Plans thereof shall be subject to the consideration of the CCIA Committee.

2. Member States may amend the lists in Annexes B, C and D at their discretion subject to the preservation of rights for a COMESA investor who has commenced the process of establishing an investment or who has established an investment pursuant to this Agreement. Member States shall inform the CCIA Committee of any amendments made to Annexes B, C and D.

3. Any modification to Schedules I, II, III and Action Plans thereof, and the Annexes to this Agreement shall be included in any revised Schedules, Action Plans or Annexes published later than such modification. The COMESA Secretariat shall notify the Member States of such modification within one month.

ARTICLE 10

Relation to Dispute Settlement

No investor shall have recourse to dispute settlement for any matter relating to Part One of this Agreement.

PART TWO

RIGHTS AND OBLIGATIONS

ARTICLE 11

Objectives of Part Two

The objectives of Part Two of this Agreement are to provide COMESA investors with certain rights in the conduct of their business within an overall balance of rights and obligations between investors and Member States.

ARTICLE 12
Coverage

1. This Agreement shall only apply to investments of COMESA investors that have been specifically registered pursuant to this Agreement with the relevant authority of the Member State in which the investment is made as set out in Annex B .

2. Subject to paragraph 1 of this Article, this Agreement shall cover investments of COMESA investors made in the territory of Member States in accordance with their laws and regulations prior to or after entry into force of this Agreement.

3. Subject to paragraph 1 of this Article, this Agreement shall not be applicable to claims arising out of disputes which occurred prior to entry into force of the Agreement.

ARTICLE 13
Investor Obligation

COMESA investors and their investments shall comply with all applicable domestic measures of the Member State in which their investment is made.

ARTICLE 14
Fair and Equitable Treatment

1. Member States shall accord fair and equitable treatment to COMESA investors and their investments, in accordance with customary international law. 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.

2. Paragraph 1 of this Article prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments and does not require treatment in addition to or beyond what is required by that standard.

3. For greater certainty, Member States understand that different Member States have different forms of administrative, legislative and judicial systems and that Member States at different levels of development may not achieve the same standards at the same time. Paragraphs 1 and 2 of this Article do not establish a single international standard in this context.

ARTICLE 15

Transfer of Assets

Taking account of the need to facilitate, promote and enhance the movement of capital in the CCIA, and according to their laws and regulations, Member States shall accord to COMESA investors the right to:

(a) repatriate investment returns;

(b) repatriate funds for repayment of loans;

(c) repatriate proceeds from compensation upon expropriation, the liquidation or sale of the whole or part of the investment including an appreciation or increase of the value of the investment capital;

(d) transfer payments for maintaining or developing the investment project, such as funds for acquiring raw or auxillary materials, semi-finished products as well as replacing capital assets; and

(e) remit the unspent earnings of expatriate staff of the investment project.

ARTICLE 16

Movement of Labour

Taking account of the need to facilitate the movement of labour resources in the CCIA, Member States shall accord to investors the right to hire technically qualified persons from any country. Such persons shall have full rights to enter and receive the necessary authorisations to reside in the Member State subject to the laws in force in that Member State promptly and without burdensome requirements. However, COMESA investors shall accord a priority to workers who possess the same qualifications and are available in the Member State or any other Member State.

ARTICLE 17

National Treatment

1. Subject to Article 18, each Member State shall accord to COMESA investors and their investments treatment no less favourable than the treatment it accords, in like circumstance, to its own investors and to their investments with respect to the establishment, acquisition, expansion, management, operation and disposition of investments in its territory.

2. For greater certainty, references to 'like circumstances' in paragraph 1 of this Article requires an overall examination on a case by case basis of all the circumstances of an investment including, inter alia:

(a) its effects on third persons and the local community;

(b) its effects on the local, regional or national environment, including the cumulative effects of all investments within a jurisdiction on the environment;

(c) the sector the investor is in;

(d) the aim of the measure concerned;

(e) the regulatory process generally applied in relation to the measure concerned; and

(f) other factors directly relating to the investment or investor in relation to the measure concerned;

and the examination shall not be limited to or be biased towards any one factor.

ARTICLE 18

Exceptions to National Treatment and Other Obligations

1. This Agreement shall not apply to the Temporary Exclusion List and/or Sensitive List which a Member State may submit provided the Temporary Exclusion List and/or Sensitive List is submitted to the CCIA Committee within six months after the date of ratification and accession to this Agreement.

2. Any Temporary Exclusion List and/or Sensitive List submitted by a Member State shall be included in Annexes C and D to this Agreement.

3. In the event that a Member State, for justifiable reasons, is unable to provide any list within the stipulated period, it may seek an extension from the CCIA Committee. The CCIA Committee shall determine the length of the extension which shall not be longer than one year.

4. The Sensitive and Temporary Exclusion Lists shall be reviewed every two years and at such subsequent periodic intervals as may be decided by the CCIA Committee.

ARTICLE 19
Most Favoured Nation Treatment

1. Subject to the exceptions provided for under paragraph 3 of this Article, each Member State shall accord to COMESA investors and their investments treatment no less favorable than that it accords, in like circumstances, to investors and their investments from any third country with respect to the establishment, acquisition, expansion, management, operation and disposition of investments in its territory. This paragraph shall not apply to investment agreements entered into by Member States with non-Member States prior to the entry into force of this Agreement.

2. The provisions of Article 17(3) shall apply with the necessary modification to this Article.

3. Nothing in paragraph 1 of this Article shall oblige a Member State to extend to COMESA investors the benefits of any treatment, preference or privilege resulting from:

(a) any customs union, free trade area, common market or monetary union, or any similar international convention or other forms of regional preferential arrangements, present or future, of which any of the Member States is or may become a party; or

(b) any matter, including international agreements, pertaining wholly or mainly to taxation.

ARTICLE 20
Expropriation

1. Member States shall not nationalize or expropriate investments in their territory or adopt any other measures tantamount to expropriation of investments except:

(a) in the public interest;
(a) on a non-discriminatory basis;
(b) in accordance with due process of law; and
(c) on payment of prompt adequate compensation.

2. Appropriate compensation shall normally 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. Compensation may be adjusted to reflect the aggravating conduct by a COMESA investor or such conduct that does not seek to mitigate damages.

3. If payment is made in a currency of the host or home state, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.

4. If a Member State elects to pay in a currency other than a host or home state currency, the amount paid on the date of payment, if converted into a host or home state currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that host or home state currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that host or home state currency from the date of expropriation until the date of payment.

5. On payment, compensation shall be freely transferable. Awards that are significantly burdensome on a host state may be paid yearly over a period agreed by the Parties, subject to interest at the rate established by agreement of the disputants or by a tribunal.

6 This Article shall not apply to the issuance of compulsory licences 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 applicable international agreements on intellectual property.

7. A measure of general application shall not be considered an expropriation of a debt security or loan covered by this Agreement solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.

8. Consistent with the right of states to regulate and the customary international law principles on police powers, bona fide regulatory measures taken by a Member State that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, shall not constitute an indirect expropriation under this Article.

9. The investor affected by the expropriation shall have a right under the law of the Member State making the expropriation, to a review by a juridical or other independent authority of that Member State, of his/its case and the valuation of his/its investment in accordance with the principles set out in paragraphs (1) to (8) of this Article. The Member State making the expropriation shall ensure that such a review is carried out promptly.

ARTICLE 21

Compensation for Losses

1 COMESA investors whose investments in the territory of the Member States suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot shall be accorded treatment, as regards restitution, indemnification, compensation or other settlement, not less favourable than that which Member States accord to their own investors or to investors of any third State. Resulting payments shall be freely transferable at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force.

2. Without derogating from the provisions of paragraph (1) of this Article, any investor who, in any of the situations referred to in that paragraph, suffers losses in a Member State resulting from:

(a) requisitioning of their property by the forces or authorities of the Member States, acting under and within the scope of the legal provisions relating to their competences, duties and command structures; or

(b) destruction of their property by the forces or authorities of the Member States, which was not caused in combat action or was not required by the necessity of the situation or observance of any legal requirement;

shall be accorded restitution, or adequate compensation not less favourable than that which the Member States accord to their own investors or to investors of any third State.

3. For the purposes of this Article, state of emergency excludes natural disaster.

ARTICLE 22

General Exceptions

1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between investor**s** where like conditions prevail, or a disguised restriction on investment flows, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member State of measures:

(a) designed and applied to protect national security and public morals;

(b) designed and applied to protect human, animal or plant life or health;

(c) designed and applied to protect the environment; or

(d) any other measures as may from time to time be determined by a Member State, subject to approval by the CCIA Committee.

2. Nothing in this Agreement shall be construed to prevent a Member State from adopting, maintaining or enforcing any measure that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to the principles outlined in sub-paragraphs 1(a) to (c) above.

3. Nothing in this Agreement shall be construed to:

(a) preclude a Member State from applying measures that it considers necessary for the fulfillment of its obligations under the United Nations Charter with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests; or

(b) require a Member State to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests.

ARTICLE 23

Non-Application to Taxation Measures

1. This Agreement shall not apply to taxation measures except as provided for in paragraph 2 of this Article.

2. Article 20 shall apply to a taxation measure alleged to be an expropriation. However, no investor may invoke Article 20 as the basis of a claim where it has been determined pursuant to this Paragraph that the measure is not an expropriation.

3. An investor that seeks to invoke Article 20 with respect to a taxation measure must refer to the Secretary General of the COMESA at the time that it gives its notice of intention to arbitrate under Article 28 the issue of whether that taxation measure involves an expropriation. The Secretary General shall ask the competent authorities of the host state and home state whether they do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation within a period of six months of such referral, in which case the investor may submit its claim to arbitration, if the other conditions of Article 28 have been fulfilled as well.

ARTICLE 24

Emergency Safeguard Measures

1. If, as a result of opening up of economic activities in accordance with this Agreement, a Member State suffers or is threatened with any serious injury, the Member State may take emergency safeguard measures to the extent and for such period as may be necessary to prevent or to remedy such injury. The measures taken shall be provisional and without discrimination.

2. Where emergency safeguard measures are taken pursuant to this Article, notice of such measures shall be given to the CCIA Committee within 14 days from the date they are taken. The notice shall include justification of such action supported by evidence gathered from an investigation.

3. The CCIA Committee shall determine what constitutes serious injury and threat of serious injury and the procedures of instituting emergency safeguard measures pursuant to this Article.

ARTICLE 25

Measures to Safeguard Balance of Payments

1. In the event of serious balance of payment and external financial difficulties or threat thereof, a Member State may adopt or maintain restrictions on investments on which it has undertaken commitments provided for in Articles 15, 17, 19 and 20, including on payments or transfers for transactions related to such commitments.

2. Where measures to safeguard balance of payments are taken pursuant to this Article, notice of such measures shall be given to the CCIA Committee within 14 days from the date such measures are taken.

3. The measures referred to in paragraph 1:

(a) shall not discriminate among Member States;

(b) shall be consistent with Article VIII of the Agreement of the International Monetary Fund;

(c) shall avoid unnecessary damage to the commercial, economic and financial interests of any other Member State;

(d) shall not exceed those necessary to deal with the circumstances described in paragraph 1; and

(e) shall be temporary and be phased out progressively as the situation specified in paragraph 1 improves.

4. A Member State adopting the balance of payment measures shall commence consultations with Member States through the CCIA Committee within 90 days from the date of notification in order to review the balance of payment measures adopted by it.

5. The CCIA Committee shall determine the rules applicable to the procedures under this Article.

PART THREE

DISPUTE SETTLEMENT

ARTICLE 26
Negotiation and Mediation

1. In the event that a dispute arises from the interpretation and application of this Agreement between Member States, or between a Member State and a COMESA investor, the party wishing to raise the dispute shall issue a notice of intention to initiate a claim under the dispute resolution process provided for under Articles 27 or 28 under this Agreement to the other potential disputing party ("notice of intention").

2. For the purposes of this Agreement, there shall be the minimum of a six-month cooling-off period between the date of a notice of intention under this Agreement ("the cooling off period"), and the date a party may formally initiate a dispute under Articles 27 or 28.

3. The parties shall seek to resolve potential disputes through amicable means, both prior to and during the cooling-off period.

4. Where no alternative means of dispute settlement are agreed upon, a party shall seek the assistance of a mediator to resolve disputes during the cooling-off period required under this Agreement between the notice of intention and the initiation of dispute settlement proceedings under Articles 27 or 28. The potential disputants shall use a mediator from the list established by the COMESA Secretariat for this purpose, or another one of their joint choosing. Recourse to mediation does not alter the minimum cooling-off period.

5. If no mediator is chosen by the disputing parties prior to three months before the expiration of the cooling-off period, the President of the COMESA Court of Justice or his designate shall appoint a mediator from the COMESA Secretariat's list who is not a national of the Member State of the COMESA investor or the Member State(s) party to the dispute. The appointment shall be binding on the disputing parties.

6. If the parties accept a mediation ruling, the ruling shall immediately be implemented thereafter.

ARTICLE 27
Settlement of Disputes between Member States

1. Any dispute between Member States as to the interpretation or application of this Agreement not satisfactorily settled through negotiation within 6 months, may be referred for decision to either**:**

(i) an arbitral tribunal constituted under the COMESA Court of Justice in accordance with Article 28(b) of the COMESA Treaty; or

(ii) an independent arbitral tribunal; or

(iii) the COMESA Court of Justice sitting as a court;

2. The arbitral tribunal shall be formed in accordance with the provisions on arbitration set out in Annex A.

3. All documents relating to a notice of intention to arbitrate, the settlement of any dispute pursuant to Article 27, the initiation of a panel , or the pleadings, evidence and decisions in them, shall be available to the public.

4. Procedural and substantive oral hearings shall be open to the public.

5. An arbitral tribunal may take such steps as are necessary, by exception, to protect confidential business information in written form or at oral hearings.

6. An arbitral tribunal shall be open to the receipt of amicus curiae submissions in accordance with the process set out in Annex A.

7. The forum that a Member State first uses to bring its claim under this Article shall be determinative and it shall not subsequently have the right to bring a claim before any other fora.

8. The decision of the COMESA Court of Justice sitting as a tribunal or the independent arbitral tribunal shall be final and binding subject to the right of appeal as set out in Annex A.

ARTICLE 28
Investor-State Disputes

1. In the event that a dispute between a COMESA investor and a Member State has not been resolved pursuant to good faith efforts in accordance with Article 26, a COMESA investor may submit to arbitration under this Agreement a claim that the Member State in whose territory it has made an investment has breached an obligation under Part Two of this Agreement and that the investment has incurred loss or damage by reason of, or arising out of that breach by submitting that claim to any one of the following fora at a time:

(a) to the competent court of the Member State in whose territory the investment has been made;

(b) to the COMESA Court of Justice in accordance with Article 28(b) of the COMESA Treaty; or

(c) to international arbitration:

(i) under the International Centre for the Settlement of Investment Disputes (ICSID) Convention, provided that both the home state of an investor and Member State in whose territory the investment has been made are parties to the ICSID Convention;

(ii) under the ICSID Additional Facility Rules, provided that either the non-disputing Party or the respondent is a party to the ICSID Convention;

(ii) under the UNCITRAL Arbitration Rules; or

(iv) under any other arbitration institution or under any other arbitration rules, if the both parties to the dispute agree.

2. No claim shall be submitted to arbitration if more than three (3) years have elapsed from the date on which the COMESA investor first acquired, or

should have first acquired, knowledge of the breach and knowledge that the COMESA investor has incurred loss or damage.

3. If the COMESA investor elects to submit a claim at one of the fora set out in paragraph 1 of this Article, that election shall be definitive and the investor may not thereafter submit a claim relating to the same subject matter or underlying measure to other fora.

4. Each Member State consents to the submission of a claim to arbitration under this Agreement in accordance with its provisions. Each investor, by virtue of establishing or continuing to operate or own an investment subject to this Agreement, consents to the terms of the submission of a claim to dispute resolution under this Agreement if he exercises the right to bring a claim against a Member State under this Agreement.

5. All documents relating to a notice of intention to arbitrate, the settlement of any dispute pursuant to Article 28, the initiation of an arbitral tribunal , or the pleadings, evidence and decisions in them, shall be available to the public.

6. Procedural and substantive oral hearings shall be open to the public.

7. An arbitral tribunal may take such steps as are necessary, by exception, to protect confidential business information in written form or at oral hearings.

8. An arbitral tribunal shall be open to the receipt of amicus curiae submissions in accordance with the process set out in Annex A with necessary adaption for application to investor-state disputes under this Article.

9. A Member State against whom a claim is brought by a COMESA investor under this Article may assert as a defence, counterclaim, right of set off or other similar claim, that the COMESA investor bringing the claim has not fulfilled its obligations under this Agreement, including the obligations to comply with all applicable domestic measures or that it has not taken all reasonable steps to mitigate possible damages.

ARTICLE 29
Enforceability of Final Awards

Member States shall adopt such domestic rules as are required to make final awards enforceable in domestic legal proceedings in their states.

ARTICLE 30
Roster of Arbitrators

The COMESA Secretariat shall maintain a roster of qualified arbitrators from which parties to an arbitration under this Agreement may select arbitrators.

ARTICLE 31

Governing Law in Disputes

When a claim is submitted to an arbitral tribunal, it shall be decided in accordance with this Agreement, the COMESA Treaty, national law of the host state, and the general principles of international law.

PART FOUR

FINAL PROVISIONS

ARTICLE 32

Other Agreements

1. This Agreement or any action taken under it shall not affect the rights and obligations of the Member States under existing agreements to which they are parties.

2. Nothing in this Agreement shall affect the rights of the Member States to enter into other agreements not contrary to the principles, objectives and terms of this Agreement.

3. In the event of inconsistency between this Agreement and such other agreements between Member States mentioned in paragraph 2 of this Article, this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement.

4. This Agreement shall not cover matters relating to investments covered by non-COMESA Agreements.

5. Where Member States have an international investment agreement with a third party, they shall strive to renegotiate that agreement to make it consistent with the present Agreement.

ARTICLE 33

Amendments

Any amendments to this Agreement shall be adopted by the Council and shall enter into force when ratified by fifty per cent of the Member States that have ratified or acceded to the Agreement.

ARTICLE 34

Supplementary Agreements or Arrangements

The Schedules, Action Plans, Annexes, and any other arrangements or agreements arising under this Agreement shall form an integral part of this Agreement.

ARTICLE 35

Adoption of Protocols

The Council may on the recommendation of the CCIA Committee adopt additional protocols to this Agreement which shall come into force in accordance with the provisions of Article 37of this Agreement.

ARTICLE 36

Accession of New Members

New members of COMESA shall accede to this Agreement on terms and conditions agreed between them and signatories to this Agreement.

ARTICLE 37

Entry into Force

1. This Agreement shall enter into force when signed and ratified by at least six Member States.

2. Any Member State that has not ratified the agreement on the date of its entry into force may accede to this Agreement.

3. This Agreement shall enter into force in relation to an acceding Member State on the date its instrument of accession shall be deposited.

ARTICLE 38

Depository

This Agreement and all Instruments of Ratification or Accession shall be deposited with the Secretary General who shall transmit certified true copies of this Agreement to all the Member States.

ARTICLE 39

Withdrawal and Renewal

1. This Agreement shall remain in force for a period of ten years and shall continue in force for the same period unless terminated by consensus of Member States.

2. Notwithstanding Article 39, for ten years from the date of termination, the Agreement shall continue to apply to investments of COMESA investors established and acquired prior to the date of termination.

3. A Member State may withdraw from this Agreement by written notification to the Secretary General who shall immediately inform all the Member States. The Agreement shall expire for that Member State one year after the date of such notification, provided that the rights of COMESA investors where an investment is substantially in the process of being established or has been established shall survive for a period of five years from such withdrawal.

IN WITNESS WHEREOF, the undersigned being duly authorised by their respective Governments, have signed this Investment Agreement for the COMESA Common Investment Area.

DONE at …….. this …… day of ……. **2007**, in the English and French languages both texts being authentic.

SCHEDULE I

CO-OPERATION AND FACILITATION PROGRAMME

In respect of the Co-operation Facilitation Programme, Member States shall take:

(a) Individual initiative to:

(i) Increase transparency of Member State's investment rules, regulations, policies and procedures through the publication of Such information on a regular basis and making such information widely available;

(ii) Simplify and expedite procedures for applications and approvals of investment projects at all levels; and

(iii) Expand the number of bilateral Double Taxation Avoidance Agreements among COMESA member States.

(b) Collective initiative to:

(i) Establish a Database for COMESA Supporting Industries and COMESA Technology Suppliers;

(ii) Establish a COMESA database to enhance the flow of COMESA investment data and information on investment opportunities in COMESA:

(iii) Promote public-private sector linkages through regular dialogues with the COMESA business community and other international organizations to identify investment impediments within and outside COMESA and propose ways to improve the COMESA investment environment;

(iv) Identify target areas for technical co-operation, e.g. development of human resources, infrastructure, supporting industries, small and medium-sized enterprises, information technology, industrial technology, R & D and co-ordinate efforts within COMESA and other international organizations involved in technical co-operation;

(v) Review and where possible improve the Investment Agreement for the COMESA Common Investment Area; and

(vi) Examine the possibility of a COMESA Double Taxation Agreement.

SCHEDULE II

PROMOTION AND AWARENESS PROGRAMME

In respect of the Promotion and Awareness programme, Member States shall;

1. Organise joint investment promotion activities e.g. seminars, workshops, inbound familiarization tours for investors from capital exporting countries, joint promotion of specific projects with active business sector participation.

2. Conduct regular consultation among investment agencies of COMESA on investment promotion matters;

3. Organize investment-related training programmes for officials of investment agencies of COMESA;

4. Exchange lists of promoted sectors/industries where member States could encourage investments from other member States and initiate promotional activities; and

5. examine possible ways by which the investment agencies of Member States can support the promotion efforts of other member States.

SCHEDULE III

LIBERALISATION PROGRAMME

In respect of the Liberalization Programme, Member States shall:

1. Unilaterally reduce and eliminate restrictive investment measures and review their investment regimes regularly towards further liberalization. In this context, Member States may undertake actions to liberalise, among others:

   (i) rules, regulations and policies relating to investment;
   (ii) rules on licensing conditions;
   (iii) rules relating to access to domestic finance; and
   (iv) rules to facilitate payment, receipts and repatriation of profits by investors.

2. Undertake individual action plans to:

   (i) open up all industries for investment to COMESA investors by 2010 in accordance with the provisions of this Agreement; and

   (ii) extend national treatment to all COMESA investors by 2010 in accordance with the provisions of this Agreement; and

3. Promote freer flow of capital, skilled labour, professionals and technology among COMESA member States.

ANNEX A

STATE-STATE ARBITRATION

Article 1: Consultation and Negotiation

In the event of a dispute under this Agreement, the claimant and the respondent shall seek to resolve the dispute in accordance with Article 28. The claimant and respondent constitute the disputing parties.

Article 2: Submission of a Claim to Arbitration

(1) In the event that a disputing party considers that a dispute cannot be settled by alternative means, and all other pre-conditions for such a dispute as required by the Agreement have been fulfilled: a Member State may submit to arbitration under this Agreement a claim that the respondent has breached an obligation under this Agreement, and that the claimant or its investor has incurred loss or damage by reason of, or arising out of, that breach;

(2) For greater certainty, a claimant may submit to arbitration a claim referred to in Paragraph (1) that the respondent has breached an obligation through the actions of a designated government monopoly, local or state government or a state enterprise exercising delegated government authority.

(3) At least 180 days before submitting any claim to arbitration, a potential claimant shall deliver to the potential respondent a written notice of its intention to submit the claim to arbitration (“notice of intention”). The notice shall specify:

(a) the name and address of the claimant and its legal representative;

(b) for each claim, the provision(s) of this Agreement alleged to have been breached and any other relevant provisions;

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

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

The CCIA Committee may establish a specific form for this purpose and make it available through the Internet and other means.

(4) Provided that at least six months have elapsed since the events giving rise to the claim, and all other pre-conditions for such a dispute as required by the Agreement have been fulfilled, a claimant may formally submit a Notice of Arbitration to the respondent Stateand to the COMESA Secretariat.

(5) A claim shall be deemed submitted to arbitration when the claimant's Notice of Arbitration is submitted to the respondents and to the COMESA Secretariat. The CCIA Committee may establish a specific form for this purpose and make it available through the internet and other means. The Notice of Arbitration shall include, at a minimum, the information required in Paragraph (3).

Article 3: Rules of Arbitration

The CCIA Committee shall establish Rules of Arbitration consistent with the provisions of this Agreement. Until the adoption of such Rules, the Rules of Arbitration of the International Centre for Settlement of Investment Disputes in effect on the date the claim or claims were submitted to arbitration under this Agreement, shall govern the arbitration except to the extent modified by this Agreement, irrespective of whether the host and home states are parties to the ICSID Convention.

Article 4: Consent of Each Party to Arbitration

Each Member State consents to the submission of a claim to arbitration under this Agreement in accordance with its provisions.

Article 5: Conditions and Limitations on Consent of Each Party

No claim may be submitted to arbitration if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged in the Notice of Arbitration.

Article 6: Selection of Arbitrators

(1) The Secretary General of the COMESA Secretariat shall, within 30 days of the filing of a notice of arbitration, appoint the panel members from the

standing roster of panelists. No panel member shall be from the host or home state.

(2) A panel shall be composed of three members, with one designated as President of the panel.

(3) A disputing party may contest the nomination of an arbitrator for good cause, including real or apparent conflict of interest. Any challenges shall be decided by the remaining two designated arbitrators. Such a challenge must be brought as soon as practicable after information leading to the challenge is made known to the challenging party.

Article 7: Conduct of the Arbitration

(1) Unless otherwise agreed by the disputing parties, the place of arbitration shall be at the COMESA Secretariat.

(2) Any non-disputing Member State may make oral and written submissions to the tribunal regarding the interpretation of this Agreement.

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

(a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its first written argument.

(b) On receipt of an objection under this Paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds thereof.

(c) In deciding an objection under this Paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration. The tribunal may also consider any relevant facts not in dispute.

(d) The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this Paragraph or make use of the expedited procedure set out in the following Paragraph.

(4) In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under Paragraph (3) or any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds thereof, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period of time, which may not exceed 30 days.

(5) When it decides a respondent's objection under Paragraph (3), the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorneys' fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider inter alia whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

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

(7) A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach of the relevant parts of this Agreement. The protection of the public welfare and public interests shall be considered when any interim measures are requested.

Article 8: Amicus Curiae

(1) The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party (the "submitter").

(2) The submissions shall be provided in English, French or Potugesesor in the principal language of the host state, and shall identify the submitter and any Party, other government, person, or organization, other than the submitter, that has provided, or will provide, any financial or other assistance in preparing the submission.

(3) The CCIA Committee may establish and make available to the public a standard form for applying for sta/tus as amicus curiae. This may include specific criteria which will help guide a tribunal in determining whether to accept a submission in any given instance.

(4) *Amicus curiae* submissions may relate to any matter covered by this Agreement that is relevant to the claim before the tribunal.

Article 9: Transparency of Arbitral Proceedings

(1) Subject to Paragraphs (2) and (4), the claimant and respondent shall, after sending the following documents to the other disputing party, promptly transmit them to the Secretariat which shall make them available to the public including by Internet:

(a) the notice of intention;

(b) any settlement agreement resulting from alternative dispute resolution processes;

(c) the notice of arbitration;

(d) pleadings, memorials and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to this Annex or the Rules of Arbitration;

(e) minutes or transcripts of hearings of the tribunal, where available; and

(f) all orders, awards, and decisions of the tribunal.

(2) The tribunal shall conduct all hearings open to the public and shall determine, in consultation with the disputing parties and the Secretariat the appropriate logistical arrangements. However, any disputing party that intends to use information designated as confidential business information or information that is privileged or otherwise protected from disclosure under a party's law in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

(3) Nothing in this section requires a respondent to disclose confidential business information or information that is privileged or otherwise protected from disclosure under a Member State's law or to furnish or allow access to information that it may withhold in accordance with this Agreement.

(4) Confidential business information or information that is privileged or otherwise protected from disclosure under a Member State's law shall, if such information is submitted to the tribunal, be protected from disclosure in accordance with the following procedures:

(a) subject to Sub-paragraph (d), neither the disputing parties nor the tribunal shall disclose to the non-disputing party or to the public any confidential business information or information that is privileged or otherwise protected from disclosure under a Member State's law where the disputing party that provided the information clearly designates it in accordance with Sub-paragraph (b);

(b) any disputing party claiming that certain information constitutes confidential business information or information that is privileged or otherwise protected from disclosure under a Member State's law shall clearly designate the information at the time it is submitted to the tribunal;

(c) a disputing party shall, at the same time that it submits a document containing information claimed to be confidential business information or information that is privileged or otherwise protected from disclosure under a Member State's law, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the non-disputing party and made public in accordance with Paragraph (1); and

(d) the tribunal shall decide any objection regarding the designation of information claimed to be confidential business information or information that is privileged or otherwise protected from disclosure under a Member State's law. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may:

i) withdraw all or part of its submission containing such information; or

ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and Sub-paragraph (c). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under Sub-paragraph (d)(i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under Sub-paragraph (d)(ii) of the disputing party that first submitted the information.

(5) Nothing in this Agreement authorizes a respondent to withhold from the public information required to be disclosed by its laws.

Article 10: Expert Reports

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 environmental, health, safety or other matters raised in a

proceeding. The tribunal shall consider any terms or conditions relating to such appointments that the disputing parties may suggest.

Article 11: Consolidation

(1) Where two or more claims have been submitted separately to arbitration under this Agreement and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order.

(2) A disputing party that seeks a consolidation order under this Article shall deliver, in writing, a request to the Secretary General of the COMESA Secretariat and to all the disputing parties sought to be covered by the order and shall specify in the request:

a) the names and addresses of all the disputing parties sought to be covered by the order;

b) the nature of the order sought; and

c) the grounds on which the order is sought.

(3) Unless the Secretary General of the COMESA Secretariat finds within 30 days after receiving a request under Paragraph (2) that the request is manifestly unfounded, a separate tribunal shall be established under this Article by the Secretary General solely to consider the issue of consolidation.

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

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

b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others; or

c) instruct a tribunal previously established to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that that tribunal shall decide whether any prior hearing shall be repeated.

(5) Where a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration and that has not been named in a request made under Paragraph (2) may make a written request to the tribunal that it be included in any order made under Paragraph (4), and shall specify in the request:

a) the name and address of the claimant;

b) the nature of the order sought; and

c) the grounds on which the order is sought.

(6) On application of a disputing party, a tribunal established under this Article, pending its decision under Paragraph (4), may order that the proceedings of another tribunal be stayed, unless the latter tribunal has already adjourned its proceedings.

Article 12: Awards

(1) Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only:

a) monetary damages and any applicable interest against a Member State; and

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

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

(2) Subject to Paragraph (1), where a claim is submitted to arbitration on behalf of an investment:

a) an award of restitution of property shall provide that restitution be made to the investment; and

b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the investment.

(3) A tribunal may not award punitive damages.

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

(5) Subject to Paragraph (6), a disputing party shall comply with an award without delay.

(6) A disputing party may not seek enforcement of a final award until:

a) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to appeal the award; or

b) the COMESA Court of Justice has rejected an appeal.

(7) Each Party shall provide for the enforcement of an award in its territory and make the appropriate legal proceedings available for this purpose.

Article 13: Appellate process

(1) A Member State may appeal to the COMESA Court of Justice, within 60 days, a panel decision on the basis of procedural irregularity, an error of law or a material and manifest error of fact. Such appeals shall proceed in accordance with Annex A. No other appeal or arbitration review process shall be applicable to arbitrations under this Agreement.

(2) The appellate process shall apply, mutatis mutandis, the rules of procedure for the arbitration tribunals, subject to such moficiations as required by this Agreement.

(3) The appeal must be filed within 60 days of the decision being appealed.

(4) The CCIA Committee shall establish, at it first meeting, the timelines for the appellate process.

(5) The decision on appeal shall be final and binding and not subject to further appeal or judicial review.

(6) A tribunal decision not taken to appeal shall have the same final and binding status.

ANNEX B

List of national authority contact points for Member States for the purposes of registering an investment under Article 12

ANNEX C

Sensitive List for Member States pursuant to Articles 1(13) and 18 of the Agreement

ANNEX D

Temporary Exclusion List for Member States pursuant to Articles 1(14) and 18 of the Agreement

South African Development Community (SADC) Model Bilateral Investment Treaty Template, with Commentary, 2012

SADC Model Bilateral Investment Treaty Template
with Commentary

SOUTHERN AFRICAN DEVELOPMENT COMMUNITY •• JULY 2012

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with Commentary

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SADC Model Bilateral Investment Treaty Template with Commentary
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Introduction

The development of the SADC Model Bilateral Investment Treaty Template has taken place under the overall goal of the SADC Protocol on Finance and Investment to promote harmonization of the Member States' investment policies and laws. For the purposes of this project, the specific goal was to develop a comprehensive approach from which Member States can choose to use all or some of the model provisions as a basis for developing their own specific Model Investment Treaty or as a guide through any given investment treaty negotiation. Inclusion of any given provision in this document does not mean every individual State has endorsed it. Each Member State will ultimately be responsible for its choice of clauses and the final result of any particular BIT negotiation.

Given the above, the SADC Model BIT is not intended to be and is not a legally binding document. Rather, it provides advice to governments that they may consider in any future negotiations they enter into relating to an investment treaty. It also provides an educational tool for officials, and may serve as the basis of training sessions for SADC government officials.

To support these roles, each article is accompanied by a commentary after the proposed text. The commentary forms an integral part of the final product.

The preparation of the SADC Model BIT Template has been undertaken in an interactive process by a drafting committee consisting of representatives form Malawi, Mauritius, Namibia, South-Africa and Zimbabwe, with technical support provided by Mr Howard Mann, Senior International Law Advisor, International Institute for Sustainable Development (IISD). Representatives from Angola, Botswana, Mozambique and the Seychelles also participated in the final drafting committee meeting of May 2012. The SADC Secretariat facilitated the process. The SADC Model BIT Template was supported by the EU funded FIP Project and the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH on behalf of the German Government.

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Preamble

The Government of _____ and the Government of _____ ,

Desiring to strengthen the bonds of friendship and cooperation between the State Parties;

Recognizing the important contribution investment can make to the sustainable development of the State Parties, including the reduction of poverty, increase of productive capacity, economic growth, the transfer of technology, and the furtherance of human rights and human development;

Seeking to promote, encourage and increase investment opportunities that enhance sustainable development within the territories of the State Parties;

Understanding that sustainable development requires the fulfilment of the economic, social and environmental pillars that are embedded within the concept;

Reaffirming the right of the State Parties to regulate and to introduce new measures relating to investments in their territories in order to meet national policy objectives, and—taking into account any asymmetries with respect to the measures in place—the particular need of developing countries to exercise this right;

Seeking an overall balance of the rights and obligations among the State Parties, the investors, and the investments under this Agreement;

Have agreed as follows:

••

Commentary

The preamble of an international agreement of any type provides an introduction to the goals and thinking of the drafters of the agreement. It also provides an introduction for those who may interpret and apply the treaty at a later date. Of primary significance from this perspective is the role arbitrators may look to a preamble to play as they interpret and apply the treaty in an arbitration context between an investor and a State.

In these circumstances, there have been several instances where arbitral tribunals have examined the preamble of a given treaty and found only references to the promotion of investment and the provision of investor rights under the treaty. As a result, the preamble has been held to establish a presumption that the sole purpose of the treaty is the protection of the investor in order, presumably, to attract higher levels of investment. This has led to several instances where arbitrators have specifically held that this creates a presumption in favour of broader over narrower rights for the investor, fewer and more limited rights for government regulatory activity in relation to an investment, and an overall presumption of investor-friendly interpretations.

Although there are several arbitrations that have rejected this approach and it has been the subject of much academic and other professional criticism, it continues to be used in some instances. This includes in decisions made as recently as in 2010 and 2011. As a result, the preamble set out above is crafted to:

- Reflect development goals of the SADC Member States, both in general terms and specifically in relation to FDI.

- Be balanced, as between development objectives and investor interests, so as to preclude unintended expansive interpretation of substantive provisions in favour of investors on the basis of the intent to protect investors expressed in the preamble, as seen in several arbitrations.
- Be focused on key issues and not become a listing of all of the issues reflected in the final text.

The paragraph on the right to regulate and the recognition of asymmetry issues, with modification for the broader subject matter here, is drawn from the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS), which of course has all developed countries as State Parties. This should enhance its acceptability in a north–south negotiating context. At least in some measure, asymmetry is part of the policy mix for developing States' development policy building. This preamble recognizes such asymmetries as part of this mix for international investment law purposes, which overlaps with Mode 3 of the GATS. Hence there is a strong correlation between the two, and the proposed text can be seen as derived from the already agreed upon GATS.

••

Part 1: Common Provisions

Part 1: Common Provisions

ARTICLE 1 •• Objective

The main objective of this Agreement is to encourage and increase investments [between investors of one State Party into the territory of the other State Party] that support the sustainable development of each Party, and in particular the Host State where an investment is to be located.

••

Commentary

Many treaties include an objective article to highlight, in a succinct manner within the substantive text, the treaty's main goal. This gives added weight to the objective as an interpretational guide, beyond that which is normally attributed to the preamble. The link between foreign direct investment (FDI) and the promotion of sustainable development is recognized in the Finance and Investment Protocol (FIP) and other SADC instruments. It is used here to support the key objective of the SADC Member States: for FDI to contribute to the development objectives of each State and the region as a whole, rather than simply being an end in itself.

The bracketed text reflects simply a stylistic choice: its inclusion is technically correct and appropriate, but the text reads more directly and succinctly without the bracketed language.

••

ARTICLE 2 •• Definitions

For the purposes of this Agreement:

Home State means, in relation to

1. a natural person, the State Party of nationality or predominant residence of the investor in accordance with the laws of that State Party
2. a legal or juridical person, the State Party of incorporation or registration of the investor in accordance with the laws of that State Party

[and declared as the Home State at the time of registration where required under the law of the Host State].

Host State means the State Party where the investment is located.

ICSID means the International Centre for Settlement of Investment Disputes, established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

Investment

SPECIAL NOTE: The definition of investment is very critical and still very controversial. Three options are included here in full: an enterprise-based definition, a closed-list asset-based approach, and an open-list asset-based approach. These are presented in order from the least to the most expansive in terms of what they cover. The pros and cons of each will be fully explained in the final commentary of Article 2.

I. ENTERPRISE-BASED DEFINITION

Investment means an enterprise within the territory of one State Party established, acquired or expanded by an investor of the other State Party, including through the constitution, maintenance or acquisition of a juridical person or the acquisition of shares, debentures or other ownership instruments of such an enterprise, provided that the enterprise is established or acquired in accordance with the laws of the Host State[; and [registered][approved][recognized] in accordance with the legal requirements of the Host State]. An enterprise may possess assets such as:

1. Shares, stocks, debentures and other equity instruments of the enterprise or another enterprise
2. A debt security of another enterprise
3. Loans to an enterprise
4. Movable or immovable property and other property rights such as mortgages, liens or pledges
5. Claims to money or to any performance under contract having a financial value
6. Copyrights, know-how, goodwill and industrial property rights such as patents, trademarks, industrial designs and trade names, to the extent they are recognized under the law of the Host State
7. Rights conferred by law or under contract, including licences to cultivate, extract or exploit natural resources

For greater certainty, Investment does not include:

1. Debt securities issued by a government or loans to a government
2. Portfolio investments
3. Claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or the extension of credit in connection with a commercial transaction, or any other claims to money that do not involve the kind of interests set out in subparagraphs (a) through (g) above.

II. ASSET-BASED OPTION 1: CLOSED-LIST, EXHAUSTIVE TEST (BASED ON CANADIAN MODEL BIT)

Investment means the following assets admitted or established in accordance with the laws and regulations of the Party in whose territory the investment is made:

1. An enterprise
2. An equity security of an enterprise
3. A debt security of an enterprise
   (a) where the enterprise is an affiliate of the investor, or
   (b) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a State or State enterprise

4. A loan to an enterprise
   (a) where the enterprise is an affiliate of the investor, or
   (b) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a State enterprise
5. An interest in an enterprise that entitles the owner to share in income or profits of the enterprise
6. An interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraphs (3) or (4) of this Article
7. Real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes
8. Interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
   (a) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or
   (b) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise
9. For greater certainty, an investment for the purposes of this Agreement does not include assets that are solely in the nature of portfolio investments; goodwill; market share, whether or not it is based on foreign origin trade, or rights to trade; claims to money deriving solely from commercial contracts for the sale of goods or services to or from the territory of a Party to the territory of the other Party, or a loan to a Party or to a State enterprise; a bank letter of credit; the extension of credit in connection with a commercial transaction, such as trade financing; or a loan to, or debt security issued by a State Party or a State enterprise thereof.
10. In order to qualify as an investment under this Agreement, an asset must have the characteristics of an investment, such as the [substantial] commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, and significance for the Host State's development.

OR

III. ASSET-BASED OPTION 2: NON-EXHAUSTIVE ASSET-BASED TEST (BASED ON U.S. MODEL TEXT)

Investment means assets admitted or established in accordance with the laws and regulations of the Party in whose territory the investment is made, and includes:

1. Movable and immovable property and other related property rights such as mortgages, liens and pledges
2. Claims to money, goods, services or other performance having economic value
3. Stocks, shares and debentures of enterprises and interest in the property of such enterprises
4. Intellectual property rights, technical processes, know-how, goodwill and other benefits or advantages associated with a business operating in the territory of the Party in which the investment is made

5. Business concessions conferred by law or under contract, including
   (a) contracts to build, operate, own/transfer, rehabilitate, expand, restructure and/or improve infrastructure, and
   (b) concessions to search for, cultivate, extract or exploit natural resources
6. For greater certainty, an investment for the purposes of this Agreement does not include assets that are solely in the nature of portfolio investment; goodwill; market share, whether or not it is based on foreign origin trade, or rights to trade; claims to money deriving solely from commercial contracts for the sale of goods or services to or from the territory of a Party to the territory of the other Party, or a loan to a Party or to a State enterprise; a bank letter of credit; or the extension of credit in connection with a commercial transaction, such as trade financing.
7. In order to qualify as an investment under this Agreement, an asset must have the characteristics of an investment, such as the [substantial] commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, and significance for the Host State's development.

Investment authorization means any government permit, authorization, licence, registration certificate or similar legal instrument that entitles an investor to establish, expand, acquire, own or operate an investment.

Investor means a natural person or a juridical person of the Home State Party making an investment into the territory of the Host State Party, provided that:

1. the natural person, if a dual citizen, is predominantly a resident of the Home State[, and in any event is not a national of the Host State Party as well]
2. for a juridical person, [it is a legally incorporated enterprise under the laws of the Home State.] [it is a legally incorporated enterprise under the laws of the Home State and is effectively owned or controlled by a natural or juridical person of the Home State Party.][it is a legally incorporated enterprise under the laws of the Home State, and conducts [substantial] [substantive] business activity in the Home State Party.] [it is a legally incorporated enterprise under the laws of the Home State, is effectively owned or controlled by a natural or juridical person of the Home State Party and conducts [substantial][substantive] business activity in the Home State Party.]

[**Optional addition**: The provisions of this Agreement shall not apply to investments owned or controlled by State-owned enterprises or sovereign wealth funds.]

Measure means any form of legally binding governmental act directly affecting an investor or its investment, and includes any law, regulation, procedure, requirement, final judicial decision, or binding executive decision [subject to the exclusion of measures of a [state][provincial] [municipal] level government].

Portfolio investment means investment that constitutes less than 10 per cent of the shares of the company or otherwise does not give the portfolio investor the possibility to exercise effective management or influence on the management of the investment.

State Party or Party means a State that is party to this Agreement.

Territory in relation to a State means the total land area of that State Party and, in relation to [a coastal State] _____, includes, in addition, the territorial sea and any maritime area situated beyond the territorial sea that has been designated, or that may in future be designated, under the law of _____ and in accordance with international law, as an area over which _____ may exercise rights with regard to the sea bed, subsoil or natural resources.

Transfers means international payments and transactions in cash or electronic form.

UNCITRAL Arbitration Rules means the arbitration rules of the United Nations Commission on International Trade Law as approved at the time an arbitration is commenced pursuant to the submission of a notice of arbitration under such Rules, including any rules or annexes specific to investor-State arbitration processes.

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Commentary

For many definitions, such as "investor" and "investment," perfect solutions are illusive. One should focus, therefore, on drafting good definitions that are clear and consistent, rather than seeking perfect definitions that will fit every possible "what if" question.

Additional definitions will be added at the completion of drafting when it is determined that they are needed. Below are some commentaries on the key issues raised in the draft definitions above.

Investment is perhaps the most controversial and critical issue to define. The definition will determine which foreign capital flows will be covered by the Agreement.

- Three options are presented here, in order from the most specific and narrowly drafted to the most open-ended and broadly drafted. Option 1 adopts an enterprise-based approach. It requires the establishment or acquisition of an enterprise, as one classically associates with FDI. The assets of the enterprise are then included among the covered assets of the investor. The language used is taken in significant part from the GATS definition of commercial presence, which requires the establishment of an operating enterprise in the Host State. The illustrative list of assets that follows the opening paragraph in Option 1 is not the test of an investment, but illustrates the types of assets an investment covered under the treaty may own or possess.
- Option 2 is a closed-list, asset-based definition, drawing on the Canadian Model BIT of 2004 and subsequent treaties entered into by Canada. The list starts from an enterprise approach, but expands this to include such assets as intellectual property rights, whether or not they are associated with an existing enterprise in the Host State. This mixed approach is broader than an enterprise-based approach, but has the virtue of setting out a defined and limited list. Thus it is a middle ground between Options 1 and 3 in terms of scope of coverage, but should not be seen as an "easy" compromise text as it goes outside the enterprise-based approach. Many of the listed items can be interpreted in a very expansive manner by tribunals.
- Option 3 is the most expansive approach, an open-ended asset-based test that allows most assets to be claimed as covered investments. This is the most favourable to investors, and least predictable for Host States. Many of the texts that adopt this approach use language such as "every asset," allowing tribunals to read it just in that way, with no limitations. This is the approach in most existing SADC BITs and it is recommended that this be rejected for all future treaties in favour of Option 1 in particular.
- The choice of options should, we believe, also be considered in light of the overall objective, which is being formulated here from a developing country perspective, to promote investment that is supportive of sustainable development, which development policy suggests means business that brings constructive economic and social benefits.
- It should be noted that a failure to include a broader definition does not mean other assets cannot be owned by foreign investors or foreign citizens. That question then becomes a matter for each State to determine. Rather, it simply means they will be protected through domestic law processes and not through international treaties.
- The so-called ***Salini* test**: If Option 2 or Option 3 is used, it is strongly recommended that the test of the relationship of the investment to the Host economy be added. This test arises from arbitrations that have looked at what qualifies as an investment under the ICSID Convention, concluding that, as seen in the *Salini* arbitration award, "In order to qualify as an investment under this Agreement, an asset must have the characteristics of an investment, such as the [substantial] commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, and a significance for the Host State's development." This text appears above as paragraph 10 in the second option above, and as paragraph 7 in the final option. It is not likely it is needed in the first option because it starts from the enterprise-based approach, but could be included for greater certainty.

Investment authorization is included here due to a reference to this term in the dispute settlement section. It relates to the scope of dispute settlement under the treaty, in particular if an investor-State system is included. It may be noted that in the U.S. Model BIT, this term is used to expand the scope of investor-State arbitration under a treaty by including any dispute related to an investment authorization within the scope of the treaty. Thus a dispute over a regulatory interpretation in an environmental assessment could be covered. However, the United States usually excludes all state-level authorizations from this, which covers almost all of the U.S. authorizations. In the present approach, the term is included to narrow the scope of investor-State disputes by ensuring that if any investment law, regulation, permit or contract includes a dispute resolution clause, it must be respected and utilized before any investor-State process can be initiated.

Investor addresses the critical issues to prevent dual nationals from using the treaty to invest back into his or her Home State, and to preclude "treaty shopping." This occurs when investors adopt locational choices as their Home State, where no substantive business is actually done, for the sole purpose of taking advantage of investment and/or taxation treaties. The provisions of the text seek to forestall this practice.

- The proposed text suggests options to preclude this, including possible requirements that the investment be legally owned or controlled by a person or business from the Home State and/or conduct substantive business in the Home State in order to qualify as an investor under the treaty.
- Not all governments may wish to foreclose all flexibility for foreign investments. Under the Common Market for Eastern and Southern Africa (COMESA) agreement, for instance, the substantial business test is adopted, but not the requirement for effective ownership and control.

- The terms [substantial][substantive] are both used in the text in this regard. Substantial has become the more common term in investment treaties, including in the FIP. Substantive is used in the SADC Services protocol and the GATS. There is not likely to be a significant difference in how these two terms are interpreted in this context, and both will be seen in context relative to the nature of the enterprise at issue. Both would ensure that, for example, simply being incorporated in a State with no actual business activity would not suffice to meet the test of being an investor for treaty protection purposes.
- A final issue is reflected in the "optional" paragraph in the proposed definition of investor, relating to an exclusion of State-owned enterprises. This is a highly debated issue. One can treat them the same as a private investor, which will be done by saying nothing specific in the text, removing them from coverage with a text such as that set out above. An additional option, so far untested, is to include a reference to the Santiago Principles on the operation of sovereign wealth funds and State-owned enterprises to establish a minimum expected standard of conduct and transparency of such enterprises, and penalizing a failure to meet these standards with a withdrawal of coverage under the treaty. As this is a new area of debate, the reference here can be seen as a placeholder to allow for debate on this issue between the negotiating parties.

Measure is set up to accommodate different forms of government. Governments should choose what levels of government should be covered. Note also that a judicial decision would be included in the list proposed. This is commonly understood to be within the scope of investment treaties to avoid a potential major loophole.

- "**directly affecting**" as used in the definition means the measure must have a direct impact on or relation to the investment, not simply lead to some tangential or indirect impact upon it. This is seen in several arbitrations.

UNCITRAL rules definition adjusts for the pending negotiation on specific rules for investor-State arbitration now underway at UNCITRAL and would automatically include any resulting updated versions.

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ARTICLE 3 •• Admission of Investments of Investors of the Other Party

SPECIAL NOTE: This article replaces any other possible article on Investment Liberalization.

The State Parties shall promote and admit Investments in accordance with their applicable law, and shall apply such laws in good faith.

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Commentary

The treatment of investment liberalization provisions in an investment treaty is a highly controversial issue. In the context of investment treaties, liberalization provisions almost always come in the form of allowing foreign investors to receive national treatment, or the same treatment as domestic investors, in making an investment. The commitment is often then tailored to exclude or include certain sectors for which the commitment will apply. This is described in more detail below. This type of provision does not mean that a foreign investor is not subject to regulation, but rather that the regulation cannot be any less favourable than that applied to a domestic investor.

It is also important to note at the outset of this discussion that investment liberalization decisions take place through a State's domestic law and policy, and not, as is often suggested, in a treaty. ***Thus, not including a binding provision in a treaty does not in any way prevent a State from taking any and all measures to fully or partially open its investment markets, as it so wishes.*** However, including such provisions in a treaty can legally preclude a State from later altering its domestic law as circumstances may warrant, most notably closing a sector that is listed as open in the treaty if domestic economic needs should so require. This can entail a significant loss of domestic control over one's economy, and it is for this reason that the recommendation is not to include such a binding provision in a treaty.

While there is growing pressure to include investment liberalization guarantees into such treaties, the primary recommendation here, as noted, is not to do so. The SADC FIP does not do so, and the vast majority of existing BITS with a SADC Member State do not do so. The Drafting Committee proposal is to avoid including binding investment liberalization commitments. The present text, however, does include specific notes to assist those governments that do choose to include such a commitment. Some States are facing very heavy pressure under the EPA negotiations, for example, to include investment liberalization provisions.

The short draft provision suggested above does not entail any international law commitments on investment liberalization. However, it does entail a commitment to apply the domestic law relating to admissions of investments in good faith. This, unless excluded from dispute settlement, would create legal obligations under the treaty for how the government treats a potential investor.

For example, if two investors are competing for a mining licence and one achieves the licence by corruption, the other would have a possible claim under this provision for not acting in good faith. Damages would potentially include all the costs of seeking the investment, including possible several millions for assessments, environmental reviews,

negotiating with local communities, etc., and possibly some level of lost profits. Therefore, the above draft provision does have a legal impact, though not one of mandatory investment liberalization.

The phrase "in accordance with their applicable law" in the text is understood here to include in accordance with treaty obligations that are in force for the State.

Some treaty texts include what are referred to as standstill or "no-backsliding" clauses on investment liberalization. Such a clause would require a State to not close or restrict entry into a sector once it has been opened to foreign investors of the other State. It is highly recommended that such a provision, if proposed in a negotiation, not be adopted, as it produces the same loss of future policy space as a direct liberalization commitment.

In support of the above approach, the Drafting Committee also noted that there are significant capacity constraints on developing countries to prepare and negotiate the schedules that are needed for a proper liberalization provision, thus producing significant risks of inadvertent error.

If a State does choose to adopt legally binding investment liberalization commitments, ***the Drafting Committee strongly recommended that it should follow the GATS "list-in" model.*** Thus, a schedule of liberalization commitments would be required for each party to the agreement. This stands in contrast to the North American Free Trade Agreement (NAFTA) model, which includes an open-ended provision for liberalization, subject to a schedule that excludes certain sectors or subsectors.

Establishing an investment liberalization commitment (or "pre-establishment right") does not require much drafting. Indeed, in most cases, it is simply added into the type of post-establishment national treatment provision seen in draft Article 4, below. This is done simply by including the additional words "establishment, acquisition, expansion." Thus, it is critical to watch out for the inclusion of these words in any draft text presented as part of a negotiation.

Even with a list-in approach, however, provisions for exclusion lists for certain subsectors and for inconsistent measures would need to be included. Thus, a properly constructed provision for investment liberalization would include three related elements:

- A list of sectors included for the liberalization commitment
- A list of subsectors that are excluded from the commitment
- A list of existing or future potential measures that are excluded from the scope of the treaty, at the national level, plus a clear statement on how any existing non-conforming measures at subnational levels are to be treated. This exclusion list should also note that any amendments to these measures would remain excluded as long as they are not more inconsistent than allowed by the original exclusion.

A failure to include all of these three elements places the Host State at significant risk of an improper commitment that can seriously constrain future government measures. In this regard, it may be noted that this is reflective of good practice: The NAFTA, for example, includes over 100 pages of such exclusions from coverage under its investment rules. ***It is normal and prudent practice for States to clearly address these issues in a treaty text.*** It is also not contrary to other international law to do so.

Two additional alternatives relating to investment liberalization may be noted:

It is possible to include an investment liberalization component, but exclude it from any formal dispute settlement system. This reduces the risk of potential arbitration by would-be investors.

Liberalization commitments can be included, but subject to the right of each State Party to alter the commitments unilaterally over time, without any form of penalty. While any existing investor would remain fully protected, this would allow the termination of future rights to make an investment in any specified sector.

Additionally, there are related issues related to ensuring that no prohibitions on performance requirements are included in the text, whether or not investment liberalization is articulated in the text. This is specifically covered by an exception later on for measures to promote development.

Finally, the Drafting Committee noted that there are significant capacity constraints on managing and regulating investments when flows in new sectors begin. Thus, it is recommended that any acceptance of a liberalization provision should be tied to ensuring the capacity to adequately regulate is present prior to the commitment becoming legally binding. This could be part of a development package in relation to such a provision and should help secure development benefits for the Host State.

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NOTES ••

Part 2: Investor Rights Post-Establishment

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ARTICLE 4 •• Non-Discrimination

4.1. Subject to paragraphs 4.3-4.5, each State Party shall accord to Investors and their Investments treatment no less favourable than the treatment it accords, in like circumstances, to its own investors and their investments with respect to the management, operation and disposition of Investments in its territory.

4.2. For greater certainty, references to "like circumstances" in paragraph 4.1 requires an overall examination on a case-by-case basis of all the circumstances of an Investment including, inter alia:

(a) its effects on third persons and the local community;

(b) its effects on the local, regional or national environment, including the cumulative effects of all investments within a jurisdiction on the environment;

(c) the sector the Investor is in;

(d) the aim of the measure concerned;

(e) the regulatory process generally applied in relation to the measure concerned; and

(f) other factors directly relating to the Investment or Investor in relation to the measure concerned.

The examination referred to in this paragraph shall not be limited to or be biased toward any one factor.

4.3. Non-conforming measures and excluded sectors:

(a) This Article shall not apply to the measures, present or future, or sectors and activities set out in the Schedules to this Agreement.

[*NOTE: The Schedules will include, to be listed on a State-by-State basis:*

- *Measures, including all existing non-conforming government measures, future amendments to same, and other possible areas, including performance requirements.*
- *Sectors or subsectors to be excluded from post-establishment national treatment obligations.]*

(b) Unless otherwise set out in the Schedules, Paragraph 4.1 shall not apply to non-conforming measures, if any, existing at the date of entry into force of this Agreement maintained by each State Party under its laws and regulations or any amendment or modification to such measures, provided that the amendment or modification does not decrease the conformity of the measure as it existed immediately before the amendment or modification. Subject to paragraph 4.3(a), treatment granted to investment once admitted shall in no case be less favourable than that granted at the time when the original investment was made.

4.4. Notwithstanding any other provision of this Agreement, the provisions of this Article shall not apply to concessions, advantages, exemptions or other measures that may result from:

(a) a bilateral investment treaty or free trade agreement [that entered into force prior to this agreement]; or

(b) any multilateral or regional agreement relating to investment or economic integration in which a State Party is participating or may participate.

4.5. Exception for formalities

Nothing in this Article shall be construed to prevent a State Party from adopting or maintaining a measure that prescribes special formalities in connection with the Investments of Investors, such as a requirement that their Investments be legally constituted under the laws or regulations of the State Party, provided that such formalities do not materially impair the protections afforded by a State Party to Investors of the other State Party and their Investments pursuant to this Agreement.

4.6. Application to Agreement

This Article shall constitute the definition and scope of all references to non-discrimination or national treatment [or Most Favoured Nation treatment] for all purposes under this Agreement. Any reference to any such term elsewhere in this Agreement shall be applied and interpreted in accordance with this Article.

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Commentary

The text above is on non-discrimination. Many treaties include two elements: national treatment that requires non-discrimination as between domestic and foreign investors; and Most Favoured Nation treatment (MFN) that requires non-discrimination between different foreign investors. The Drafting Committee, as explained more below, has recommended against including an MFN provision here.

It is critical to note that the scope of coverage for post-establishment non-discrimination is just as important to set out as the scope of any pre-establishment rights in a treaty. Indeed, the most advanced agreements include many exceptions to national treatment or MFN coverage post-establishment. Such inclusions and exclusions can relate to sectors or subsectors and to existing or new measures that may be inconsistent with the non-discrimination obligations. This is similar to what is described in the commentary to Article 3 in relation to the inclusion of pre-establishment rights. The same types of exclusion lists should be created in every treaty for post-establishment rights as well. This is what is set out in paragraph 4.3, which refers to separate Schedules.

In addition to the exclusions and limits that would be included in a schedule, there are several exclusions from national treatment set out directly in the text of the article, most notably the exclusion of any advantages given to an investor due to other international agreements relating to investment. A broad approach to doing this is set out above in paragraph 4.5. (In practice, this may be more important for an MFN than a national treatment provision, but it is included here for extra certainty.)

The text above also sets out a proper basis for comparison of investors "in like circumstances." This is to ensure that a broad view is taken, rather than simply a narrow question of whether the investors are in the same or a related or competitive sector, an approach seen in a number of earlier arbitrations. This additional text, also seen in the COMESA Investment Agreement (CCIA), ensures the reasons for any measures can be fully considered, and not just their financial impacts.

The exceptions for non-conforming measures and the excluded sectors have two elements. The first is the capacity to exclude existing and future measures from coverage, as well as specified activities or sectors. Items included in the Schedules constitute a permanent exception from the non-discrimination obligation. The second element is a grandfathering clause that reduces the need for States to list all existing non-conforming measures of the central and other levels of government. This sets out an exemption for all existing non-

conforming measures, including future amendments as long as the amendments are not more discriminatory in nature. This automatic exemption can then be supplemented for future measures or specific economic matters by using the Schedules option set out in the previous paragraph. This approach is drawn from the recently concluded Japan–Korea–China Investment Treaty.

The inclusion of paragraph 4.6 ensures that further references to non-discrimination in the text do not create additional or alternative, freestanding, legal obligations relating to non-discrimination. This ensures consistency and should prevent unanticipated consequences.

The language in the article is limited to the **management, operation and disposition** of investments. These are key terms of art relating to post-establishment phases. What is excluded are the terms referring to pre-establishment rights noted above: **establishment, acquisition and expansion**. The inclusion of these words would extend the article to pre-establishment rights of national treatment for investors. That said, there is some debate as to whether "expansion" of an existing business should be considered an establishment process, in particular when it is the actual expansion of productive capacity as opposed to expansion via a merger or acquisition. This may be one issue where some flexibility may be warranted, when it can be so limited, and subject to any other laws such as those relating to competition practices and consumer protection.

As noted, MFN treatment is excluded above. ***The Drafting Committee noted that these should be bilateral treaties and that, as such, they should not establish unintended multilateralization through the MFN provision.*** This is even more important should a treaty include a pre-establishment right for foreign investors. The Committee also noted that the MFN provision has been very broadly, and on several occasions unexpectedly, interpreted in arbitrations, making it very unpredictable in practice. This poses unnecessary risks for States, especially developing countries.

Nevertheless, should a Member State choose to include an MFN provision, the Drafting Committee recommended that the Member State should insert the following paragraph into the above text as paragraph 4.2, with appropriate changes in subsequent paragraph numbering and cross references to the remaining paragraphs:

- **4.2. Most Favoured Nation Treatment:** Subject to paragraphs 4.4-4.6, each State Party shall accord to Investors and their Investments treatment no less favourable than the treatment it accords, in like circumstances, to investors of any other State and their investments with respect to the management, operation and disposition of Investments in its territory.

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ARTICLE 5 •• Fair and Equitable Treatment

SPECIAL NOTE: The fair and equitable treatment provision is, again, a highly controversial provision. The Drafting Committee recommended against its inclusion in a treaty due to very broad interpretations in a number of arbitral decisions. It requested the inclusion of an alternative formulation of a provision on "Fair Administrative Treatment." Both options are now set out below.

Article 5: Option 1: Fair and Equitable Treatment

5.1. Each State Party shall accord to Investments or Investors of the other State Party fair and equitable treatment in accordance with customary international law on the treatment of aliens.

5.2. For greater certainty, paragraph 5.1 requires the demonstration of an act or actions by the government that are an outrage, in bad faith, a wilful neglect of duty or an insufficiency so far short of international standards that every reasonable and impartial person would readily recognize its insufficiency.

Article 5: Option 2: Fair Administrative Treatment

5.1. The State Parties shall ensure that their administrative, legislative, and judicial processes do not operate in a manner that is arbitrary or that denies administrative and procedural [justice][due process] to investors of the other State Party or their investments [taking into consideration the level of development of the State Party].

5.2. Investors or their Investments, as required by the circumstances, shall be notified in a timely manner of administrative or judicial proceedings directly affecting the Investment(s), unless, due to exceptional circumstances, such notice is contrary to domestic law.

5.3. Administrative decision-making processes shall include the right of [administrative review] [appeal] of decisions, commensurate with the level of development and available resources at the disposal of State Parties.

5.4. The Investor or Investment shall have access to government-held information in a timely fashion and in accordance with domestic law, and subject to the limitations on access to information under the applicable domestic law.

5.5. State Parties will progressively strive to improve the transparency, efficiency, independence and accountability of their legislative, regulatory, administrative and judicial processes in accordance with their respective domestic laws and regulations.

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Commentary

Two alternatives are suggested in this text. One is based on the traditional fair and equitable treatment (FET) provision common to many BITs. The second is an alternative formulation that would be a new approach to addressing key issues in a more restricted and careful manner than the FET text.

The FET provisions in other treaties have become very broadly interpreted, leaving more recent treaties to provide interpretational guidance in the event of future disputes. The language on FET presented here is the least likely to lead to mischief through expansive interpretations by arbitrators.

The language in the first paragraph 5.2 is derived from the well-known *Neer* case,[1] but uses the language specifically as opposed to other more simple references to the case or to customary international law. This is to be more specific and precise in the standard to be applied. A reference to customary international law, or even the customary international law on the treatment of aliens, does not appear, as a result of some arbitral decisions and academic writings, to suffice to restrain arbitrator creativity in this regard.

[1] Neer v Mexico, Opinion, 15 October 1926, 4 RIIA (1926) 60

Some States may find this too high a standard to be meaningful to investors today. However, it is clear that this was the intended standard when the original treaties were drafted and that the expansive interpretations since provided by some tribunals had not been anticipated.

It is because of the large degree of unpredictability of the FET standard that the Government of South Africa has developed and proposed the formulation of a different standard on fair administrative treatment. This alternative approach seeks to avoid the most controversial elements of FET, while still addressing levels and types of actions by States toward an investor that should create a liability. The Drafting Committee was unanimous in believing this could be a constructive alternative approach.

Some key elements in the approach include changing the focus of the language from investor rights to a focus on governance standards. This should help alter the interpretational approach in the event of an arbitration. Second, the text refers to just one part of what other texts refer to as being included in the FET concept. Thus it is expressly narrower in scope and coverage. Third, the language sets a fairly high standard of "arbitrary" conduct by a government agency, or conduct that amounts to "a denial" of procedural justice or due process. These are significant thresholds to be met, in keeping with concepts of a breach of natural justice.

Given the above, the Drafting Committee was impressed with the potential viability of Option 2 as a replacement for the FET standard. It was believed that this would still provide useful protection for investors, while limiting the risks of the expansive rulings associated with the FET standard in a number of arbitral awards.

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ARTICLE 6 •• Expropriation

6.1. A State Party shall not directly or indirectly nationalize or expropriate investments in its territory except:

(a) in the public interest;

(b) in accordance with due process of law; and

(c) on payment of fair and adequate compensation within a reasonable period of time.

6.2. **Option 1:** The assessment of fair and adequate compensation shall be based on an equitable balance between the public interest and interest of those affected, having regard for all relevant circumstances and taking into account the current and past use of the property, the history of its acquisition, the fair market value of the property, the purpose of the expropriation, the extent of previous profit made by the foreign investor through the investment, and the duration of the investment.

6.2. **Option 2:** Fair and adequate compensation shall normally be assessed in relation 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. However, where appropriate, the assessment of fair and adequate compensation shall be based on an equitable balance between the public interest and interest of those affected, having regard for all relevant circumstances and taking account of: the current and past use of the property, the history of its acquisition, the fair market value of the investment, the purpose of the expropriation, the extent of previous profit made by the foreign investor through the investment, and the duration of the investment.

6.2. **Option 3:** Fair and adequate compensation shall be assessed in relation to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation") and not reflect any change in value occurring because the intended expropriation had become known earlier.

6.3. Any payment shall be made in a freely convertible currency. Payment shall include simple interest at the [LIBOR rate][current commercial rate of the Host State] from the date of expropriation until the date of actual payment. On payment, compensation shall be freely transferable.

6.4. Awards that are significantly burdensome on a Host State may be paid yearly over a three-year period or such other period as agreed by the parties to the arbitration, subject to interest at the rate established by agreement of the parties to the arbitration or by a tribunal failing such agreement.

6.5. This Article shall not apply to the issuance of compulsory licences 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 applicable international agreements on intellectual property.

6.6. A [non-discriminatory] measure of general application shall not be considered an expropriation of a debt security or loan covered by this Agreement solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.

6.7. A [non-discriminatory] measure of a State Party that is designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, does not constitute an indirect expropriation under this Agreement.

6.8. The Investor affected by the expropriation shall have a right under the law of the State Party making the expropriation to a review by a judicial or other independent authority of that State Party of his/its case and the valuation of his/its investment in accordance with the principles set out in this Article.

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Commentary

Paragraph 6.1 follows most existing models in relation to expropriation, with the exception that the often-seen condition that an expropriation must be non-discriminatory has been removed. This is because, in many instances, expropriations are specific and targeted, and thus in a strict legal sense could be defined as being discriminatory by their very nature. If parties to a negotiation were to wish to reinsert this condition, it is strongly recommended that it be tied to the obligation of non-discrimination set out in the actual treaty text, as opposed to creating an additional stand-alone obligation just for the expropriation tests. This is already built in with the inclusion of paragraph 4.6 in the Article on non-discrimination.

The structure set out above follows most recent models, including the COMESA CCIA and SADC approaches, as well as the Canadian and U.S. Model BITs. Variations relating to the valuation of an expropriation have been added here.

The above text also uses the fair and adequate payment standard, and requires compensation to be paid in a reasonably timely manner. This text leaves open the possibility that compensation may not always be fair market value (FMV), depending on the option chosen for paragraph 6.2. In essence, Member States can determine if fair and adequate must always and only equal FMV, or if and when other factors may be considered. Under Option 3 on valuation of damages, FMV is the basis to use for valuation, and it is therefore the most favourable toward the investor. Under Option 2, there is a presumption FMV will

be used, but the State can rebut the presumption on the basis of the equitable criteria set out in the option. The State bears the burden of doing so. This provides a more balanced approach. Under Option 1, there is no presumption but FMV would remain one of several factors to consider on an equal basis.

The language on a reasonable time period is meant to leave some flexibility but also respond to realities on the ground, that determining compensation may take some time, including for a negotiated agreement.

The calculation of interest can be a difficult issue. Two alternatives are presented. One is the Host State commercial interest rate. The second is a neutral alternative using the London inter-bank rate known as LIBOR. This reduces the potential volatility factor as well for interest rates in some States.

The exclusion of compulsory licensing measures by a State, or other removals of intellectual property rights (IPRs) that are consistent with international agreements on the subject is consistent with many, many treaties. This is especially important for medicines that developing States fought hard to secure IPR limitations for. The text here is reflected in NAFTA, COMESA and many other agreements.

The exclusion for regulatory measures in paragraph 6.7 is specific and clear, rather than leaving open possibilities for investors to argue otherwise. This is the traditional customary international law approach, drawn from the notion that "police powers" measures are not, by definition, acts of expropriation. The text is inspired by the COMESA CCIA and ASEAN texts. The 1990s and early 2000s' texts did not include such provisions, but these types of clauses are becoming increasingly common and should be made clear and apparent in the treaty text. Indeed, it is likely that a failure to include such a provision now would lead to the assumption that such a clear exclusion was not meant to be included and create the risk that a tribunal will hold that by not excluding regulatory measures the parties meant to include them within the scope of the expropriation article.

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ARTICLE 7 •• Senior Management and Employees

7.1. A State Party shall not require an Investor to appoint, to senior management positions for its Investment, individuals of any particular nationality.

7.2. A State Party may require that a majority of the board of directors, or any committee thereof, of an Investment be of a particular nationality, or resident in the territory of the State Party, provided that the requirement does not materially impair the ability of the Investor to exercise control over its Investment.

7.3. Subject to its laws, regulations and policies relating to the entry of aliens and engagement of non-national labour or management, each State Party shall grant temporary entry to nationals of the other State Party, employed by an Investor of the other State Party, for the purpose of rendering services to an Investment of that Investor in the territory of the Host State Party, in a capacity that is senior managerial or executive or requires specialized knowledge.

7.4. Notwithstanding any provisions of this Agreement, a State Party may require an Investor of the other Party or its Investment, in keeping with its size and nature, to have progressive increases in the number of senior management, executive or specialized knowledge positions that nationals of the Host State occupy; institute training programs for the purposes of achieving the increases

set out in the preceding paragraph and to Board of Director positions; and to establish mentoring programs for this purpose.

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Commentary

This is an article that most investors want to see, yet that must be balanced with the underlying premise that FDI should lead to skills transfers and upgrade and higher value added positions for nationals of the Host State.

The paragraphs each address specific segments of senior management and personnel positions, with specifically nuanced obligations. These include senior management, those employees with special knowledge or skills, and the Board of Directors.

Only these levels of employees are covered. But this may raise some issues where highly technical but not senior management positions are at issue. This is particularly so when labour, health and safety, and environmental risks are at issue. Allusion to this is seen in paragraph 7.3, on admission of foreign personnel, as regards persons with specialized knowledge.

Paragraph 7.4 is an addition to the traditional form of this type of article and reflects the additional balance for improving opportunities for nationals of the Host State. It is not mandatory on any given investor or State Party, but ensures such requirements can be imposed in a transparent and legal manner.

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ARTICLE 8 •• Repatriation of Assets

8.1. A State Party shall accord to Investors the right to:

(a) repatriate the capital invested and the Investment returns;

(b) repatriate funds for repayment of loans;

(c) repatriate proceeds from compensation upon expropriation, the liquidation or sale of the whole or part of the Investment including an appreciation or increase of the value of the Investment capital;

(d) transfer payments for maintaining or developing the Investment project, such as funds for acquiring raw or auxiliary materials, semi-finished products as well as replacing capital assets;

(e) remit the unspent earnings of expatriate staff of the Investment project;

(f) any compensation to the investor paid pursuant to this Agreement; and

(g) make payments arising out of the settlement of a dispute by any means including adjudication, arbitration or the agreement of the State Party to the dispute.

8.2. Each State Party shall allow transfers in paragraph 8.1 to be made in a freely convertible currency at the market rate of exchange prevailing at the time of transfer.

8.3. Notwithstanding paragraphs 8.1 and 8.2, a State Party may prevent or delay a transfer through the non-discriminatory application of its law and regulations relating to:

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

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

(c) criminal or penal offences and the recovery of the proceeds of crime;

(d) financial reporting or record keeping of transactions when necessary to assist law enforcement or financial regulatory authorities;

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

(f) taxation;

(g) social security, public retirement or compulsory savings schemes;

(h) severance entitlements of employees; and

(i) the formalities required to register and satisfy the Central Bank and other relevant authorities of a State Party.

8.4. Safeguard provision:

(a) Where, in the opinion of a State Party, payments and capital movements under this Agreement cause or threaten to cause serious

(i) difficulties for balance of payment purposes,

(ii) external financial difficulties, or

(iii) difficulties for macroeconomic management including monetary policy or exchange rate policy,

the State Party concerned may take safeguard measures with regard to capital movements on a temporary basis so as to be eliminated as soon as conditions permit, and in any event as it relates to measures taken under paragraphs (ii)-(iii), for a period of not longer than 12 months if it considers such measures to be necessary.

(b) Where such measures are taken under 4.1(a)(ii) or (iii), a State Party shall enter into consultations with the other State Party at its request, with a view to review such measures and seek the minimum impact of such measures on an investor.

(c) Where, in the opinion of a State Party that has taken such measures, it is necessary to extend them for a further period due to the extended period of conditions described in paragraph 4.1(a), the State Party shall offer to enter into consultations with the other State Party with a view to seeking the minimum impact of such measures on an investor. Such measures shall again be taken on a temporary basis so as to be eliminated as soon as conditions permit, and in any event for a period of no longer than 12 months from their renewal.

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Commentary

This article provides for the inclusion of the general right of an investor to repatriate its assets, subject to prudential measures, law enforcement, tax obligations, and a general emergency balance of payments situation. It is consistent with Canada and U.S. Model BITs, several regional examples, and the COMESA CCIA text, though with a clearer and stronger safeguards provision to ensure the ability of States to reply to emergency situations.

The language in the safeguards section, paragraph 8.4 of the Article, is broader than just balance of payments concerns, but is limited time-wise to the conditions identified in the grounds for the exception, either by reference to the conditions still being in existence or a 12-month period. The language is drawn in significant part from the Japan–Korea BIT. Examples of the circumstances in which such measures might be taken include national balance of payments crises, financial system crashes such as Argentina experienced, regional economic crises such as experienced in Asia, or responding to particular impacts of a global financial crisis.

Importantly, the safeguards provision is also self-executing. In other words, once the State taking the safeguard measure declares it to be necessary, that is the end of the matter: subject to patent abuse, the decision cannot be challenged under the arbitration process. However, in order to ensure a certain level of discipline, the State Party taking such measures is compelled to consult with the other State Party after taking such measures, or prior to their renewal if needed. This does not give a right of veto to the other State Party, but does impose a measure of accountability in the process.

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ARTICLE 9 •• Protection and Security

9.1. A State Party shall accord Investments of Investors of the other State Party protection and security no less favourable than that which it accords to investments of its own investors or to investments of investors of any third State.

9.2. Investors of one State Party whose Investments in the territory of the other State Party suffer losses as a result of a breach of paragraph 9.1, in particular owing to war or other armed conflict, revolution, revolt, insurrection or riot in the territory of the Host State shall be accorded by the Host State treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the Host State accords to investors of any third State.

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Commentary

Many agreements include the issue of full protection and security in the general minimum standards of treatment or FET provisions. We believe it is best, if included, as a stand-alone provision, with the compensation for breach of the standard clearly set out in the same article. This better identifies its scope and limits the potential for huge damage awards. The standard set out here is essentially that of an MFN standard: all foreign investors must receive the same level of compensation in the event of a breach of the obligation, on a pro-rata basis for the level of loss (e.g., 10 per cent or 30 per cent or whatever the level may be).

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Part 3: Rights and Obligations of Investors and State Parties

Part 3: Rights and Obligations of Investors and State

ARTICLE 10 •• Common Obligation against Corruption

10.1. Investors and their Investments shall not, prior to the establishment of an Investment or afterwards, offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a public official of the Host State, or a member of an official's family or business associate or other person in close proximity to an official, for that official or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties, in order to achieve any favour in relation to a proposed investment or any licences, permits, contracts or other rights in relation to an Investment.

10.2. Investors and their Investments shall not be complicit in any act described in Paragraph 10.1, including incitement, aiding and abetting, and conspiracy to commit or authorization of such acts.

10.3. A breach of this article by an Investor or an Investment is deemed to constitute a breach of the domestic law of the Host State Party concerning the establishment and operation of an investment.

10.4. The State Parties to this Agreement, consistent with their applicable law, shall prosecute and where convicted penalize persons that have breached the applicable law implementing this obligation.

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Commentary

This article would create one common obligation on corruption for investors, Host States and Home States, instead of separate articles for each such actor. The main obligation against corruption is derived from the UN and OECD conventions on bribery, but closes a loophole that allows payments to be made to a family member or business associate instead of directly to a politician or senior official.

Implementation of the article from most enforcement and penal perspectives is through domestic law. However, and this is very important, paragraph 10.3 makes it clear that an investment achieved by corruption in breach of this article or of applicable domestic law is a breach of the treaty and domestic law related to the establishment and operation of the investment, and therefore, by virtue of the definition of an investment that requires it to be made in accordance with domestic law, it is no longer a covered investment and no longer has dispute settlement rights. This is consistent with recent arbitral decisions relating to corruption in the making of an investment that have negated investment arbitration rights as a result of a finding of corruption.

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ARTICLE 11 •• Compliance with Domestic Law

Investors and Investments shall comply with all laws, regulations, administrative guidelines and policies of the Host State concerning the establishment, acquisition, management, operation and disposition of investments.

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Commentary

This article is drawn from the SADC FIP as well as several other investment treaties. This seeks only to establish an obvious legal obligation and does not go beyond what would be in the domestic law of the Host State. This is, or should be, a basic expectation of all parties. It also means that an investor cannot plead a provision of this agreement as a legal excuse for not complying with the domestic law, though it may seek damages afterwards if the law is inconsistent with a protection in this agreement.

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ARTICLE 12 •• Provision of Information

12.1. An Investor shall provide such information to an actual or potential Host State as that State Party may require concerning the Investment in question and the corporate history and practices of the Investor, for purposes of decision making in relation to that Investment or solely for statistical purposes.

12.2. The actual or potential Host State shall have the right to timely and accurate information in this regard. An Investor shall not commit fraud or provide false or misleading information provided in accordance with this Article.

12.3. A material breach of paragraph 12.2 by an Investor or an Investment is deemed to constitute a breach of the domestic law of the Host State concerning the establishment, acquisition, management, operation and disposition of Investments.

12.4. The actual or potential Host State Party may make such information available to the public in the location where the Investment is to be located, subject to other applicable law and the redaction of confidential business information. The State Party shall protect any confidential business information from any disclosure that would prejudice the competitive position of the Investor or the Investment.

12.5. Nothing in this Article shall be construed to prevent a State Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its domestic law or in connection with disputes between the Investor and the State regarding the Investment.

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Commentary

This article carries forward the anti-corruption idea to issues of fraud and misrepresentation in the making of an investment. It is consistent with recent arbitral decisions that have found material fraud and misrepresentation by investors in the information provided to a State in the making of an investment. In essence, it sets out clearly an obligation for honesty and plain dealing in making investments.

Paragraph 12.3 establishes the same penalty for fraud and misrepresentation as for corruption, but sets a standard of "material" to avoid severe penalties for *de minimus* errors or inconsequential misrepresentations in the course of "selling" the investment to the government. Material is a legal standard that requires a finding that the information was relied on as part of, but not solely, in the making of relevant decisions by the government.

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ARTICLE 13 •• Environmental and Social Impact Assessment

13.1. Investors or their Investments shall comply with environmental and social assessment screening criteria and assessment processes applicable to their proposed investments prior to their establishment, as required by the laws of the Host State for such an investment [[or the laws of the Home State for such an investment][or the International Finance Corporation's performance standards on Environmental and Social Impact Assessment], whichever is more rigorous in relation to the Investment in question.]

13.2. The impact assessments required under paragraph 13.1 shall include assessments of the impacts on the human rights of the persons in the areas potentially impacted by the investment, including the progressive realization of human rights in those areas.

13.3. Investors or their Investments shall make the environmental and social impact assessments:

(a) public [including via the Internet] and

(b) accessible to the local communities, or other areas with potentially affected interests, in an effective and sufficiently timely manner so as to allow comments to be made to the Investor, Investment and/or government prior to the completion of the Host State processes for establishing an Investment.

13.4. Investors, their Investments and the Host State authorities shall apply the precautionary principle[2] to their environmental impact assessment and to decisions taken in relation to a proposed investment, including any necessary mitigating or alternative approaches to the Investment, or precluding the Investment if necessary. The application of the precautionary principle by Investors and Investments shall be described in the environmental impact assessment.

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Commentary

This obligation is consistent with domestic law in virtually every State today. It reiterates the need for compliance by investors, and supplements the domestic law of the Host State where this may be necessary.

Where the domestic law is sufficiently developed, such supplementing will not be needed. However, where the domestic law may for some reason be insufficient, due to the nature or size of the project being new for example, gaps can be made up by reference to the

[2] The precautionary principle is defined in Article 15 of the Rio Declaration on Environment and Development as follows: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as reason for postponing cost-effective measures to prevent environmental degradation."

International Finance Corporation's standards or the law applicable to the proposed investment were it to be located in the Home State. This is an effort to create a floor standard in the event of gaps in the domestic law in relation to a given project, in particular larger projects that may be more extensive in terms of potential impacts than previously seen in a developing country Party. It does not, however, set any restrictions on the applicable domestic law, which remains the law of first recourse.

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ARTICLE 14 •• Environmental Management and Improvement

14.1. Investments shall, in keeping with good practice requirements relating to the size and nature of the Investment, maintain an environmental management system consistent with recognized international environmental management standards and good business practice standards.

14.2. Emergency response and decommissioning plans shall be included, and regularly reviewed and updated in the environmental management system process, and made accessible to the Host State and the public.

14.3. A closure fund to ensure that resources are available to implement the decommissioning plan shall be established and maintained by the Investor or its Investment in accordance with good industry practice for such funds.

14.4. Environmental management plans shall include provision for the continued improvement of environmental management technologies and practices over the life of the Investment. Such improvements shall be consistent with applicable laws, but shall strive to exceed legally applicable standards and always maintain high levels of environmental performance consistent with best industry practice.

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Commentary

This article reflects good industry practice in environmental management and planning. It does not create a one-size-fits-all obligation, but rather an obligation that is scaled to the nature and size of the investment, in accordance with international standards (such as ISO 14000) and good business practice. Thus, the obligation here is flexible, and practicable.

Environmental management systems can assist in ensuring that domestic environmental laws are in fact complied with. But they go beyond this to require ongoing environmental diligence and improvement. This basic component of all environmental management standards is important in many respects, including as an answer to potential investors that may seek environmental law stabilization clauses, which are increasingly understood as inappropriate despite ongoing requests by some investors.

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ARTICLE 15 •• Minimum Standards for Human Rights, Environment and Labour

15.1. Investors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located. Investors and their investments shall not undertake or cause to be undertaken acts that breach such human rights. Investors and their investments shall not assist in, or be complicit in, the violation of the human rights by others in the Host State, including by public authorities or during civil strife.

15.2. Investors and their investments shall act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998.[3]

15.3. Investors and their investments shall not [establish,] manage or operate Investments in a manner inconsistent with international environmental, labour, and human rights obligations binding on the Host State or the Home State, whichever obligations are higher.

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Commentary

Paragraph 15.1 begins with the concept of Prof. John Ruggie as UN Secretary-General Special Representative on Business and Human Rights on the corporate duty to respect human rights. The second sentence then makes this an obligation on the investors.

Sentence 3 of paragraph 15.1 then comes back to the Ruggie concept that investors also should not be complicit in breaches of human rights by others. Complicity is a legal standard that requires some form of direct affiliation or deliberate failure to act in the face of human rights abuses. Complicity does not generally include simply paying taxes or other compliance with law, absent specific factors that might inform the investor or investment of human rights abuses related to such acts.

For labour standards, the ILO Declaration sets out what are considered as the minimum global standards, or core labour standards. Almost all States have subscribed to these minimum standards. There is no evident rationale for any investor to operate in a manner than denies these standards, given the tripartite nature of the process by which ILO standards are adopted, as between government, industry and labour.

Paragraph 15.3 broadens paragraph 15.2 by imposing a duty on investors and investments to respect the international human rights, environmental and labour standards adopted by the Host State though participation in international agreements. These are easily identifiable. It sets such international agreements as a floor for their conduct, even if not fully incorporated into domestic law. These are not open-ended obligations, but derive expressly from the act or ratification of an agreement by the Host State, or Home State in certain circumstances

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[3] These core labour standards are further elaborated, in accordance with the Declaration, in ILO Conventions concerning freedom of association, the elimination of forced labour, the abolition of child labour and the elimination of discrimination in the work place.
Several international environmental agreements have differentiated obligations. Circumvention of an agreement does not occur when the differentiated obligations of the Host State under an agreement are not breached.

ARTICLE 16 •• Corporate Governance Standards

16.1. Investments shall meet or exceed national and internationally accepted standards of corporate governance for the sector involved, in particular for transparency and in the application of internationally accepted accounting standards.

16.2. Investors and their investments shall ensure that all transactions with related or affiliated companies shall be arms length transactions at fair market price. Investors and their investments shall not undertake any transfer pricing practices between themselves or any other related or affiliated companies.

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Commentary

This article should not be required, but sadly the practices of many multinational companies still make it necessary. The article would set a basic level of expectation of corporate conduct and governance.

The transfer pricing issue in paragraph 16.2 is a major factor in protecting government revenues from improper internal corporate practices that reallocate costs and expenses to reduce or avoid taxes in the Host State. For developing countries, with less capacity to monitor such practices, transfer pricing can have a significant impact on tax revenues. Clarity here can establish clear expectations as well as the possibility of claims against the company when other domestic laws may not be sufficiently clear.

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ARTICLE 17 •• Investor Liability

17.1. Investors and Investments shall be subject to civil actions for liability in the judicial process of their Home State for the acts, decisions or omissions made in the Home State in relation to the Investment where such acts, decisions or omissions lead to significant damage, personal injuries or loss of life in the Host State.

17.2. Home States shall ensure that their legal systems and rules allow for, or do not prevent or unduly restrict, the bringing of court actions on their merits before domestic courts relating to the civil liability of Investors and Investments for damages resulting from alleged acts, decisions or omissions made by Investors in relation to their Investments in the territory of the Host State.

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Commentary

This article requires Home States to restrict the use of such procedural or jurisdictional constraints as seen in the *forum non conveniens* rule, or similar rules, that impede hearings on the merits of cases relating to investor acts or decisions. Such measures by the Home State will in turn allow persons in the Host State to sue in the Home State for the impacts of decisions made by the investor.

Alternatively, the provision could be phrased as a requirement for an investment to waive any right to claim *forum non conveniens* or a similar jurisdictional bar, but this may be more difficult to apply in practice than a governmental measure that prevents the use of the doctrine in the circumstances envisioned here.

The above does not in any way create a determination of any liability of the investor. It simply terminates a jurisdictional barrier invented in a different era by courts operating under very different circumstances. This would ensure that an investor can be held liable for the impacts in foreign countries of its decisions in the Home State. The legal process of the Home State, together with the standard and burden of proof, etc., would continue to apply to the proceedings. This is the same approach as is currently applied, for example, in the European Union.

The Drafting Committee recognized the need for careful attention to be paid to the national implementation of this obligation, should it be adopted. New legislation or regulation concerning access to domestic courts and/or the jurisdiction of domestic courts may be needed by Member States, depending on current jurisdictional rules in each state. Specific training for this purpose may be needed for governments in the region.

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ARTICLE 18 •• Transparency of Contracts and Payments

18.1. Investors or their investments shall make public in a timely manner all contracts related to the establishment or right to operate an Investment made by the Investor or the Investment with a government in the Host State.

18.2. Investors or their investments shall make public in a timely manner all payments made to a government related to the establishment or right to operate of an Investment, including all taxes, royalties and similar payments.

18.3. Where feasible, such contracts and payments shall be made available on an Internet website freely accessible by the public.

18.4. The State Party that is the recipient of payments or party to an investment-related contract shall [have the right to] make the payments and contracts available to the public, including through an Internet site freely accessible to the public.

18.5. Confidential business information shall be redacted from contracts made public in accordance with this Article.

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Commentary

There is a growing concern for transparency in contract negotiation that many developing countries and international organizations are now responding to. Indeed, many now see this as one of the most important ingredients in the fight against corruption. This article sets out the principle of transparency and an expectation that both investors and governments will act on this expectation.

Payments by investors to the government, which may be in the form of taxes, rents, royalties, etc., are similarly subject to increased demands for transparency. The Extractive Industry Transparency Initiative is one application of this principle. This article again adopts a pro-transparency position in this regard.

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ARTICLE 19 •• Relation to Dispute Settlement

19.1. Subject to any other specific directions under this Agreement as to the consequences of a breach of an obligation, where an Investor or its Investment is alleged by a State Party in a dispute settlement proceeding under this Agreement to have failed to comply with its obligations under this Agreement, the tribunal hearing such a dispute shall consider whether this breach, if proven, is materially relevant to the issues before it, and if so, what mitigating or off-setting effects this may have on the merits of a claim or on any damages awarded in the event of such award.

19.2. A Host State may initiate a counterclaim against the Investor before any tribunal established pursuant to this Agreement for damages or other relief resulting from an alleged breach of the Agreement.

19.3. In accordance with its applicable domestic law, the Host State, including political subdivisions and officials thereof, private persons, or private organizations, may initiate a civil action in domestic courts against the Investor or Investment for damages arising from an alleged breach of the obligations set out in this Agreement.

19.4. In accordance with the domestic law of the Home State, the Host State, including political subdivisions and officials thereof, private persons, or private organizations, may initiate a civil action in domestic courts of the Home State against the Investor, where such an action relates to the specific conduct of the Investor, and claims damages arising from an alleged breach of the obligations set out in this Agreement.

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Commentary

One issue that frequently arises in relation to including obligations on investors in BITs is their enforcement. Here, the issue is addressed in two ways. The first is making it clear that such breaches can and should be taken into account in any dispute settlement proceedings initiated under the agreement. This includes a specific provision allowing counterclaims by States, the subject of inconclusive discussions under other treaties.

The second method of enforcement is by creating a monetary liability in domestic courts of the Host State for a breach of the treaty obligations by an investor. This is, arguably, the most effective method of all, as it does not rely on government officials or capacity. The initiation of a complaint against an investor does not, of course, presume its guilt, simply that the matter can be tried and damages assessed if the breach is proven.

The opening words of paragraph 19.1 ensure that consequences related to corruption and fraud remain under the direction of those specific articles.

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ARTICLE 20 •• Right of States to Regulate

20.1. In accordance with customary international law and other general principles of international law, the Host State has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives.

20.2. Except where the rights of a Host State are expressly stated as an exception to the obligations of this Agreement, a Host State's pursuit of its rights to regulate shall be understood as embodied within a balance of the rights and obligations of Investors and Investments and Host States, as set out in this Agreement

20.3. For greater certainty, non-discriminatory measures taken by a State Party to comply with its international obligations under other treaties shall not constitute a breach of this Agreement.

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Commentary

This article confirms that the treaty does not alter the Host State's basic right to regulate, but without eliminating all the effects of the investor protections. It should be read with more specific articles that enable performance requirements to be imposed, and carefully define the non-discrimination and expropriation rules, for example. All of these provisions are intended to work together.

The broader goal is restated in paragraph 20.2, again ensuring that some of the predilections of arbitrators to view investment treaties purely as investor rights would be untenable under the present approach. In view of the broad obligations in BITs, it is useful to reaffirm the Host State's right to regulate investments in the public interest.

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ARTICLE 21 •• Right to Pursue Development Goals

21.1. Notwithstanding any other provision of this Agreement, a State Party may grant preferential treatment in accordance with their domestic legislation to any enterprise so qualifying under the domestic law in order to achieve national or sub-national regional development goals.

21.2. Notwithstanding any other provision of this Agreement, a State Party may

(a) support the development of local entrepreneurs, and

(b) seek to enhance productive capacity, increase employment, increase human resource capacity and training, research and development including of new technologies, technology transfer and other benefits of investment through the use of specified requirements on investors made at the time of the establishment or acquisition of the investment and applied during its operation.

21.3. Notwithstanding any other provision of this Agreement, a State Party may take measures necessary to address historically based economic disparities suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures against such groups prior to the signing of this Agreement.

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Commentary

These provisions are developed in part from the existing SADC FIP and in part from other regionally based agreements. Collectively they provide a significant exclusion from the disciplines of the Agreement for measures specifically taken to promote development within the Host State's economy.

Paragraph 21.1 is derived from the FIP.

Paragraph 21.2 is partly from the FIP but has been expanded to ensure that performance requirements may be imposed on foreign investors in order to promote the social and economic benefits that are often ascribed to FDI. This provision does not impose any performance requirements, but does enable a government to require them without fear of potential claims that they are in breach of the agreement, in particular the non-discrimination provision. Combined, these articles will help reinforce the right of States to utilize performance requirement obligations when imposed at the outset of an investment.

Paragraph 3 captures the Black Economic Empowerment type of measures that are seen in many southern African States. It is derived from South African investment treaty language.

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ARTICLE 22 •• Obligations of States on Environment and Labour Standards

22.1. Each State Party has the right to establish its own levels of domestic environmental protection and development policies and priorities, and labour laws and standards, and to adopt or modify such laws, standards and policies. In the exercise of this right, each State Party shall strive to ensure that it provides for high levels of environmental and labour protection, taking into account internationally accepted standards, and shall strive to continue to improve their standards.

22.2. The State Parties recognize that it is inappropriate to encourage investment by relaxing domestic environmental and labour legislation. Accordingly, the State Parties shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such legislation as an encouragement for the establishment, maintenance or expansion in its territory of an Investment. If a State Party considers that the other State Party has offered such an encouragement, it may request consultations with the other State Party.

[**22.3.** This Article is not subject to the dispute settlement process set out in the investor-State dispute settlement process of this Agreement.]

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Commentary

A provision to preclude the lowering of environmental and related standards, labour standards, and human rights standards, in order to attract or maintain investments, was first included in NAFTA's Chapter 11 in 1992. However, it was done in a non-legally binding manner. The text above sets out a mandatory obligation not to lower such standards in order to attract or maintain investment. The SADC FIP includes a similar provision in mandatory language as well; hence this approach has already been adopted region-wide.

Of note, the above text includes a note suggesting the removal of this provision from the purview of an investor-State arbitration process if one is adopted. The Drafting Committee has not recommended the inclusion of an investor-State arbitration process, but recognizes that States may choose in some circumstances to do so; hence this is included to ensure attention is drawn to this question, in the event a State does choose this direction.

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Part 4: General Provisions

Part 4: General Provisions

ARTICLE 23 •• Cooperation in Promotion of Investment

23.1. The State Parties shall cooperate in the promotion of investment by their Investors into the territory of the other Party. Such cooperation may include joint investment promotion events, tours with industrial leaders and investors, technology promotion, and other measures designed to promote investment.

23.2. The State Parties shall exchange information with respect to the investment opportunities, laws and regulations for foreign investors in their territories.

23.3. The State Parties may provide Investment financing and Investment guarantee facilities for Investors from their State into the territory of the other State Party. Such facilities shall, if used, promote compliance with the obligations of Investors set forth in this Agreement.

23.4. [State Party X shall provide technical assistance to State Party B in the implementation of this Article.]

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Commentary

Investment treaties are often styled as investment promotion and protection treaties. But they contain few if any provisions relating to the promotion of investment or to reviewing the effectiveness of the treaty in doing so.

This article sets out the obligation to promote investment, and proposes some specific tools that may, with the agreement of the parties, be used to do so. It is a minimal first step in this direction.

In addition, the article allows Home States to require that its investors who seek to make an investment under the treaty comply with the obligations contained herein as a condition of State financing or insuring of the investment. This gives some specific responsibility to the Home State for the conduct of its investors where governmental facilities are being used to support the investor. The concluding paragraph on assistance is intended to apply in a developed/developing State context. For a south-south context, one might consider including a sentence on the exchange of best practices in the implementation of this article instead.

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ARTICLE 24 •• Transparency of Investment Information

24.1. Each State Party shall promptly publish, or otherwise make publicly available, its laws and regulations of general application as well as international agreements that may affect the Investments of Investors of the other State Party.

24.2. Each State Party shall endeavour to promptly publish, or otherwise make publicly available, its policies and administrative guidelines or procedures that may affect investment under this Agreement.

24.3. Nothing in this Agreement shall require a State Party to furnish or allow access to any confidential or proprietary information, including information concerning particular Investors or Investments, the disclosure of which would impede law enforcement or be contrary to its domestic laws protecting confidentiality.

24.4. [This Article shall not be subject to the investor-State dispute settlement process.]

24.5. [State Party X shall provide technical assistance to State Party B in the implementation of this Article.]

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Commentary

This article aims to promote transparency for the information that should be available to investors about the investment making process. It sets out a binding obligation in relation to laws and regulations and a best efforts obligation in relation to policies and other administrative measures. This division recognizes that some forms of information may be more accessible than others on a short-term basis for implementation, while seeking to ensure that higher levels of transparency are brought into place as capacity is available.

At the same time, the obligation is removed from the investor-State dispute settlement process, if such a process is included in the treaty. If there is no investor-State provision then this paragraph can be removed.

The additional language on technical assistance recognizes that one of the State Parties may lack the technical capacity or resources to ensure this goal is achieved. When this is the case and support from the other treaty partner may be available, the text encourages this to be considered. As seen previously, the provision on assistance is intended to apply in a developed/developing State context. For a south-south context, one might consider including a sentence on the exchange of best practices in the implementation of this article instead.

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ARTICLE 25 •• Exceptions

25.1. [Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination pursuant to Article [4]] Nothing in this Agreement shall be construed to oblige a State Party to pay compensation for adopting or enforcing measures taken in good faith and designed and applied:

(a) to protect public morals and safety;

(b) to protect human, animal or plant life or health;

(c) for the conservation of living or non-living exhaustible natural resources; and

(d) to protect the environment.

25.2. For greater certainty, nothing in this Agreement shall be construed to oblige a State Party to pay compensation if it adopts or maintains reasonable measures for prudential reasons, such as:

(a) the protection of investors, depositors, financial market participants, policy-holders, policy-claimants, or persons to whom a fiduciary duty is owed by a financial institution;

(b) the maintenance of the safety, soundness, integrity or financial responsibility of financial institutions; and

(c) ensuring the integrity and stability of a State Party's financial system.

25.3. Nothing in this Agreement shall apply to taxation measures, subject to the continued application of Article 6 [Expropriation].

25.4. Nothing in this Agreement shall apply to non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies. This paragraph shall not affect a State Party's obligations under Article 8 [Repatriation of Assets].

25.5. Nothing in this Agreement shall apply to a State Party's measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its national security interests.

25.6. Nothing in this Agreement requires a State Party to furnish or allow access to any information, the disclosure of which it determines to be contrary to its national security interests.

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Commentary

This article combines a number of exceptions issues seen in various regional and bilateral agreements. Each is considered in order.

Paragraph 25.1 is drawn from Article XX of the GATT, and is also reflected in the COMESA CCIA and other bilateral agreements. However, it is more specifically drafted to make clear that no compensation is required to be paid to an investor for the types of measures set out therein as long as they are taken in good faith. This avoids a situation, for example, where a measure is "made legal" by virtue of paying compensation. Hence the test is not one of being a breach of the treaty or not, but a more refined and specific statement that the covered measures simply do not require compensation when taken in a *bona fide* manner. The addition of the last subparagraph is to ensure that the environment is clearly included, as opposed to simply implied by virtue of the other terms or by reference to WTO dispute settlement decisions. This makes the provision complete and express, rather than implied.

The role of a non-discrimination proviso (in square brackets at the beginning of the text) here is unclear, though it is always included in such formulations derived from the GATT. Yet this would negate any application of a general exception such as this to the national treatment or MFN provisions. Moreover, many measures may legitimately differentiate between investors in a region or in similar sectors. Hence, it is considered vital that if such introductory language is included, it should be made clear, again, that this is to be understood as per the article on non-discrimination and not as creating a new or different standard for non-discrimination. This, as noted previously, is done through the use of paragraph 4.6 in the text above.

We are not aware of such a general provision being used to date in an investment arbitration, and there remains some doubt as to its efficacy. Nonetheless, many agreements now contain this or similar text.

Paragraph 25.2 relates to measures to ensure the stability and integrity of the financial system. The notion of prudential measures in this text is intended to relate to the technical use of that term in relation to the financial sector only. It may be seen as complementary to the provision on safeguards measures enabling certain limitations on the export of assets by an investor.

Paragraph 25.3 concerns a broad exclusion for taxation measures. This is one approach seen in investment treaties, and is very clearly stated. Another approach is to make this subject to review by the Parties themselves in the event of an arbitration. This is used in the U.S. treaties now. It allows the Parties to the treaty to determine if a measure is a valid tax measure or not, a determination which, if agreed upon, becomes determinative. If the two State Parties do not agree, however, the issue falls back to the arbitration tribunal to determine.

Paragraph 25.4 relates to a general exception for financial and exchange rate policies, again as a complement to the safeguards provision relating to the repatriation of assets.

The exclusions relating to national security are inspired by the U.S. Model BIT and subsequent U.S. treaties. They are self-executing here, meaning that as soon as a State declares this exception, it is binding and not subject to arbitral review. This removes the review of this issue from any dispute settlement process. This self-executing approach is seen in the U.S. treaties.

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ARTICLE 26 •• Denial of Benefits

26.1. A Party may at any time deny the benefits of this Agreement to an investor of another Party that is an enterprise of such Party and to investments of such investor if investors of a non-Party own or control the enterprise and the denying Party:

(a) does not maintain diplomatic relations with the non-Party, or

(b) adopts or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Agreement were accorded to the enterprise or to its investments.

26.2. Subject to prior notification and consultation with the other State Party, a State Party may at any time deny the benefits of this Agreement to an investor of another Party that is an enterprise of such Party and to investments of such investors if investors of a non-Party own or control the enterprise and the enterprise has no substantial business activities in the territory of the Party under whose law it is constituted or organized.

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Commentary

This article has become a common feature of investment treaties. As set out here, it provides for two types of situations where a State Party may exercise its right to deny an investor the benefits of the treaty, including access to any dispute settlement benefits. The first is where a State Party does not have diplomatic relations with the Home State of the actual beneficial owner of the investor making the putative investment, or the actual beneficial owner is from a State subject to economic sanctions by the Host State Party.

The second situation is where the actual beneficial owner of the investor is from a third State not a party to the treaty and the investor does not actually carry on substantial business activity in the putative Home State. This is included here out of a sense of caution due to the multiple options set out for defining an investor under the treaty. If a substantial (or substantive) business test is adopted there, paragraph 2 above will not likely be needed. The paragraph is designed to act as a barrier to formal incorporation being the sole test of whether an investor is properly to be covered by the treaty benefits, and thus to prevent simply forum shopping to achieve the benefits of the treaty.

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ARTICLE 27 •• Periodic Review of this Agreement

27.1. The State Parties shall meet every five years after the entry into force of this Agreement to review its operation and effectiveness, including the levels of investment between the Parties.

27.2. The State Parties may adopt joint measures in order to improve the effectiveness of this Agreement.

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Commentary

This article seeks to give an ongoing, active life to the Agreement beyond the risk of arbitrations for alleged breaches of the treaty being commenced. It requires the State Parties to consider value and effectiveness of the agreement every five years, and enables the adoption of adjustments if needed. This has been found in a number of Canadian investment treaties, and is also included in the review mechanisms in broader economic cooperation or trade agreements with investment chapters.

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NOTES ••

Part 5: Dispute Settlement

Part 5: Dispute Settlement

ARTICLE 28 •• State-State Dispute Settlement

28.1. Disputes between the State Parties concerning the interpretation or application of this Agreement should, as far as possible, be settled through the amicable means. The treaty review mechanism in Article 26 shall be used to raise such issues in a regular meeting or through a special ad hoc meeting convened by either State Party for this purpose.

28.2. If a dispute between the State Parties cannot thus be settled within six months of the initiation of consultations to resolve the dispute, either State Party may request mediation of the dispute, including through recognized institutions or the use of good offices for such purposes. Both State Parties shall cooperate in good faith when one State Party has made such a request.

28.3. Subject to the provisions of paragraph 28.4, a State Party may submit a claim to arbitration

(a) seeking damages for an alleged breach of this Agreement on behalf of an Investor or Investment, or

(b) for a matter concerning the interpretation or application of a provision of this Agreement in which it is in dispute with the other State Party.

28.4. A State Party may not submit a claim to arbitration seeking damages for an alleged breach of this Agreement on behalf of an Investor or Investment

(a) unless the Investor or Investment, as appropriate, has first submitted a claim before the domestic courts of the Host State for the purpose of pursuing local remedies, after the exhaustion of any administrative remedies, relating to the measure underlying the claim under this Agreement, and a resolution has not been reached within a reasonable period of time from its submission to a local court of the Host State, or

(b) unless the claimant State Party demonstrates to the tribunal established under this Article that there are no reasonably available domestic legal remedies capable of providing effective relief for the dispute concerning the underlying measure, or that the legal remedies provide no reasonable possibility of such relief in a reasonable period of time.

28.5. Subject to paragraphs 28.3 and 28.4, a State Party may request an arbitration [at a designated regional arbitration center in accordance with its Rules or] under an ad hoc process in accordance with the following rules. Within two months of the receipt of the request for arbitration, each State Party shall appoint one member of the tribunal. Those two members shall then select a national of a third State who, on approval by the two State Parties, shall be appointed Chairperson of the tribunal. The Chairperson shall be appointed within two months from the date of appointment of the other two members.

28.6. If within the periods specified in paragraph 28.5 the necessary appointments have not been made, either State Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointments. If the President is a national of either State Party or if he or she is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either State Party or if he or she, too, is prevented from discharging the said function, the Member of the International Court of Justice next in seniority who is not a national of either State Party shall be invited to make the necessary appointments.

28.7. The arbitral tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both State Parties.

28.8. Each State Party shall share equally the costs and expenses of the tribunal unless the tribunal shall decide otherwise.

28.9. [The tribunal shall determine its own procedure.][The tribunal shall apply the [UNCITRAL] [ICSID] Arbitration Rules in force at the time of the submission of the dispute to arbitration, in accordance with paragraph 28.5.]

28.10. All documents relating to a notice of arbitration, the settlement or resolution of any dispute pursuant to this Article, and the pleadings, evidence and decisions in them, shall be available to the public, subject to the redaction of confidential information.

28.11. *Amicus Curiae* submissions: The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a governmental entity of either State Party. The procedures in Schedule 4 shall apply for this purpose.

28.12. Procedural and substantive oral hearings shall be open to the public. This may be achieved though live broadcasting of the hearings by Internet broadcast.

28.13. An arbitral tribunal may take such steps as are necessary, by exception, to protect confidential business information in written form or at oral hearings.

28.14. No claims under this provision may be commenced if more than three years have elapsed from the date on which the Investor first acquired, or should have first acquired, knowledge of the breach alleged in the arbitration claim and knowledge that the Investor has incurred loss or damage; or one year from the conclusion of the request for local remedies initiated in the domestic courts.

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Commentary

Most investment treaties include a State-State dispute settlement provision. The text above divides out the two possible roles of a State-State dispute settlement system: a State claiming damages on behalf of an investor for an alleged breach of the treaty; and a "pure" dispute between the State Parties themselves over the interpretation or application of the treaty. Importantly, the former is made subject to the same exhaustion of local remedies requirements as the text below on investor-State, should governments choose to include investor-State arbitration.

Paragraphs 28.1 and 28.2 set out a requirement to seek to resolve disputes by amicable means prior to resorting to a formal and binding dispute settlement process. This is very common. Paragraph 28.2 seeks to encourage a formal mediation process and makes it mandatory for both parties to enter into such a process if one party formally states it desires to do so. Mediation is a non-binding process; hence a solution to the potential dispute cannot be imposed during mediation without the consent of both State Parties.

Paragraph 28.3 sets out the two options for State-State dispute settlement noted above: a State acting on behalf of an investor and a State initiating the process in order to resolve a dispute directly between itself and the other State Party. States have, under customary international law, a right to make claims for damages suffered by their citizens or businesses due to breaches of international law by a State. The provisions allowing for a State Party to make a claim on behalf of an investor here reflects a concrete application of this customary law right.

Paragraph 28.4 requires the exhaustion of local remedies by an investor or investment before a State may initiate a claim on behalf of an investor. The exhaustion of local remedies clause means that before any claim can be taken under the dispute settlement process set out in the treaty, the investor or investment must have sought to resolve the dispute in the local courts or other dispute settlement processes available in the Host State. It is important to note here that the language for such a clause must be set out as domestic proceedings relating to the measures underlying the claim under this Agreement. Some treaties have phrased the condition as requiring a claim concerning the breach of the treaty to be taken in the domestic courts, if it can be so taken. However, most States do not allow claims for a breach of the treaty per se to be taken, but rather a claim that the measure taken by the government is otherwise in breach of the domestic law or constitution. This difference is important.

In addition, the exhaustion of local remedies clause allows a State seeking to take a claim on behalf of an investor or investment to argue that no local remedies are available under which to challenge the underlying measure. A State making such a claim must show evidence of this in order to be entitled to go directly to the international process.

Paragraphs 28.5–28.8 are fairly standard paragraphs relating to the appointment and operation of a tribunal at the international level. They ensure that the tribunal can be appointed and become functional even if one State is recalcitrant and uncooperative.

Paragraph 28.9 sets out options that States may consider for identifying the arbitration rules that will be applied by the tribunal to the dispute. This can be made specific, or left general. It should be noted that a tribunal can utilize the ICSID arbitration rules, which are fully accessible at any time to the public, without having to utilize the ICSID process if it does not wish to. Similarly, the UNCITRAL arbitration rules can be adopted, or any other rules, without any other impacts on the organization of the arbitration.

Paragraphs 28.10–28.13 are drawn from the COMESA approach and more recent approaches to investor-State arbitration in the U.S. and Canadian treaties, as well as others. Paragraph 28.10 requires that all the key arbitral documents be made public. Posting them on a website is the easiest way to do this.

Paragraph 28.11 allows for the participation of amicus curiae, either organizations or individuals, with an interest in the case. This is now common in investor-State arbitration and is carried over into the State-State process here as well.

Paragraph 28.12 requires the tribunal hearings to be open to the public. Paragraph 28.13 sets out the exception to the previous few paragraphs, that the tribunal can take such steps as may be needed to protect confidential business information from being put into the public domain. For documents this can be done by redacting any such information from the public versions. For oral hearings it may mean holding portions of a session in camera.

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ARTICLE 29 •• Investor-State Dispute Settlement

SPECIAL NOTE: The Drafting Committee was of the view that the preferred option is not to include investor-State dispute settlement. Several States are opting out or looking at opting out of investor-State mechanisms, including Australia, South Africa and others. However, if a State does decide to negotiate and include this, the text below provides comprehensive guidance for this purpose. This text is drawn primarily from the U.S. and Canadian Model BITs, other recent treaties, and existing arbitration rules. Due to the length of the text, commentary follows each paragraph.

29.1. Amicable Settlement of Disputes

In the event of an investment dispute between an Investor or its Investment (referred to as an "Investor" for the purposes of the Investor-State dispute settlement provisions) and a Host State pursuant to this Agreement, the Investor and the Host State should initially seek to resolve the dispute through consultation and negotiation, which may include the use of nonbinding, third-party mediation or other mechanisms.

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Commentary

It is widely accepted that prior to initiating any arbitration process, investors and/or their investments should have a general obligation to resolve the dispute amicably. This paragraph sets out such a requirement.

It may be noted here that the right to initiate an arbitration, if it is given, could be exercised by the investor or the investment, which are usually two distinct legal entities. This is quite common.

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29.2. Notice of Intent to Arbitrate

At least six months before submitting any claim to arbitration under this Part, an Investor shall deliver to the Host State a written notice of its intention to submit the claim to arbitration ("Notice of Intent"). The notice shall specify:

(a) the name and address of the Investor;

(b) for each claim, the provision of this Agreement alleged to have been breached and any other relevant provisions;

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

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

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Commentary

This paragraph begins the arbitration process with a preliminary step known as a Notice of Intent to arbitrate. The Notice of Intent is the formal signal of the investor's intent to initiate the process if it is not otherwise resolved in an amicable fashion. The notice period in practice today ranges from 3 to 12 months. The Drafting Committee has suggested 6 months here.

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29.3. Mediation

After submission of the Notice of Intent, the Investor or the Host State may request mediation of the dispute, in which case the other disputing party may agree to such mediation. The costs of the mediation shall be shared equally [unless the mediator decides otherwise for good cause. The mediator shall provide written reasons for such a decision].

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Commentary

This article provides for a mediation option where both parties to the potential arbitration agree. The United Nations Conference on Trade and Development (UNCTAD) and some academics are promoting such an option. In some instances, however, States are simply not able to mediate, for example when a claim contends that a new public safety regulation to reduce smoking is an expropriation of a company's intellectual property rights. Such a claim has recently been made against both Uruguay and Australia. A State simply cannot accept such a position and mediation that requires it to alter its public health measure. Where mediation is used, it does not require that a settlement be reached. So there is no obligation to successfully conclude a mediation process.

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29.4. Conditions for Submission of a Claim to Arbitration

An Investor may submit a claim to arbitration pursuant to this Agreement, provided that:

(a) six months have elapsed since the Notice of Intent was filed with the State Party and no solution has been reached;

(b) the Investor or Investment, as appropriate,

(i) has first submitted a claim before the domestic courts of the Host State for the purpose of pursuing local remedies, after the exhaustion of any administrative remedies, relating to the measure underlying the claim under this Agreement, and a resolution has not been reached within a reasonable period of time from its submission to a local court of the Host State; or

(ii) the Investor demonstrates to a tribunal established under this Agreement that there are no reasonably available legal remedies capable of providing effective remedies of the dispute concerning the underlying measure, or the legal remedies provide no reasonable possibility of such remedies in a reasonable period of time.

(c) The Investor has provided a clear and unequivocal waiver of any right to pursue and/or to continue any claim relating to the measures underlying the claim made pursuant to this Agreement, on behalf of both the Investor and the Investment, before local courts in the Host State or in any other dispute settlement forum.

(d) No more than three years have elapsed from the date on which the Investor first acquired, or should have first acquired, knowledge of the breach alleged in the Notice of Arbitration and knowledge that the Investor has incurred loss or damage, or one year from the conclusion of the request for local remedies initiated in the domestic courts.

(e) The Investor consents in writing to arbitration in accordance with the procedures set out in this Agreement.

(f) For the avoidance of doubt, the provisions in this Agreement relating to arbitration procedures shall prevail over those in the arbitration rules selected to govern the arbitration in the event of any inconsistency.

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Commentary

This article sets out the full range of conditions that MUST be fulfilled prior to an investor initiating an arbitration. These include, in order from above:

- A six-month waiting period is becoming increasingly standard after the Notice of Intent.
- The investor has exhausted local remedies, as described above, or no such remedies are available and this can be demonstrated to a tribunal. The SADC FIP has such an exhaustion of local remedies provision.
- Paragraph (c) is what is known as a fork-in-the-road provision: an investor can choose arbitration under this Agreement or another form of dispute settlement, but not both. For example, if an investor has a separate investment contract with an arbitration provision, it might seek to use that provision. The paragraph would make this impossible by making a waiver of any other dispute settlement rights a requirement. This estops ("estoppel") an investor from utilizing other remedies in most legal systems.
- As in the exhaustion of local remedies provisions, the fork-in-the-road provision must be carefully drafted to address not "treaty" claims per se, but any claims relating to the underlying measures to the treaty claim that may be subject to domestic or other proceedings.
- The three-year period in (d) is a "statute of limitations" period. Three years is emerging as a common period. This period is defined by when the investor knew, or ought to have known if it had been acting reasonably, of the taking of the underlying measure.
- The consent in writing to arbitration is a basic requirement. This is set out clearly here.
- The final paragraph is an interpretive provision that ensures the treaty will prevail over any arbitration rules that may be used and might be either inconsistent with, or not as complete as, the present text. This ensures the will of the parties is maintained.

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29.5. Exception for Interim Relief

Notwithstanding paragraph 29.4(c), the Investor may initiate or continue an action that seeks interim relief before a judicial or administrative tribunal of the State Party, for the sole purpose of preserving the Investor's rights and interests during the pendency of the arbitration, and that does not involve the payment of monetary damages.

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Commentary

This allows an investor to use the courts of the Host State to seek to an injunction against further government measures, or the implementation of the challenged measure, if the investor believes it will cause the situation to deteriorate more. No damages are claimable under such a measure. The intent here is merely to preserve the status quo from getting worse. Whether such an injunction may be granted is then a matter for the domestic courts to decide.

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29.6. Applicable Arbitration Rules

Subject to Article 29.3, an Investor may submit an arbitration claim:

(a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the Host State and the other State Party are parties to the ICSID Convention;

(b) under the ICSID Additional Facility Rules, provided that either the Host State or the other State Party is a party to the ICSID Convention;

(c) under the UNCITRAL Arbitration Rules;

[(d) to XX regional arbitration forum in a region of one or both State Parties,] or

(d/e) if the Investor and the Host State agree, to any other arbitration institution or under any other arbitration rules.

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Commentary

It is very common for an investment treaty to indicate which arbitration rules the investor may draw from when initiating an arbitration. The list of options above is now fairly standard, though some States have stopped including the ICSID option. The list can be adjusted by the States negotiating to include other rules or fora such as those under the International Chamber of Commerce and the Stockholm Chamber of Commerce.

The list above also assumes that no regional forum for arbitration exists that may be able to provide the appropriate rules and, in some cases, facilities. Where such a forum exists, the Drafting Committee was of the view that it should be carefully considered for inclusion or as an exclusive option to be used.

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29.7. Date of Submission of Claim

A claim shall be deemed submitted to arbitration under this Part when the Investor's notice of arbitration or request for arbitration ("Notice of Arbitration"):

(a) referred to in paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General;

(b) referred to in Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General;

(c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules, are received by the respondent; or

(d) referred to under any arbitral institution or arbitral rules selected under paragraph 29.6 is received by the Host State.

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Commentary

The formal date of submission is determined by the acts needed to be taken under the rules of arbitration chosen for the proceedings when the investor submits its claim to arbitration under that set of rules. It may at some time need to be established with certainty, for example if it is argued that the three-year period for initiating an arbitration has lapsed.

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29.8. Place of Arbitration

The place of arbitration and legal situs of the arbitration shall be [in the capital city of the Host State] [in XXX (to be an agreed neutral venue)][in a place determined by agreement of the parties to the arbitration or determined by the tribunal in the absence of such agreement].

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Commentary

The choice of location of the arbitration has both legal and political contexts. The legal issues include the process and standards for review of an arbitral decision by the supervising courts. In addition, some States now have legislation requiring all investment related arbitration to be within the territory of the (Host) State. The text provides three options that allow for the negotiators to raise and address these issues and reach specific decisions on how to address them.

29.9. Scope of Arbitration

(a) An arbitration under this Article shall relate to an allegation of a breach of one or more rights or obligations under this Agreement that is subject to arbitration.

(b) Where an investment authorization or a contract includes a choice of forum clause for the resolution of disputes pertaining to that investment or the authorization or contract, no arbitration under this Agreement may be initiated by the Investor when the underlying measure in the arbitration would be covered by such a choice of forum clause.

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Commentary

This paragraph addresses the very critical issue of what types of claims can be made in the arbitration process. This is in fact a very controversial issue, and the drafting of this provision should be undertaken with great care, as much can be at stake.

The above text is specific to claims based on an alleged breach of one or more of the obligations under the treaty that are subject to arbitration. It does not, for example, say simply an alleged breach of this treaty, which may be read to override another provision that excludes an obligation from the scope of dispute settlement. This drafting avoids any such risk.

This is the narrowest possible approach and it is strongly recommended.

In paragraph 29.9(b), it is supported by a clear statement directing the tribunal to recognize and enforce any other choice of forum clause applicable between the State and the investor/investment related to the underlying measure being complained of. In particular, paragraph 29.9(b) requires the tribunal to give full priority to any choice of forum clauses specifically agreed or accepted by the investor in a contract or investment authorization. (Investment authorization is a defined term and includes, essentially, any form of permit, authorization, licence, etc.)

This has been a very controversial issue in investment arbitration and subject to different and opposite results in various arbitrations. The drafting above resolves the issue clearly and in favour of the choice of forum clause adopted by the investor and State directly. It is important, again, that the provision relates to the underlying measure, rather than the dispute under the Agreement, for the reasons explained previously.

This paragraph also goes a long way to address a problem where multiple dispute settlement fora have been authorized by a tribunal under a treaty, under a contract, and at the same time under a judicial process. In many cases, a breach of contract claim has, for example, simply been restated as a breach of treaty claim, a simple linguistic exercise for a junior lawyer to complete. The above text helps address all of these issues that have arisen in practice.

Other agreements have also included additional claims that could be included in arbitration under the treaty. These are noted here, with a strong recommendation that they not be included in the text:

- Several treaties allow any obligations undertaken by a State toward an investor in whatever legal form, a so-called umbrella clause, to be taken to arbitration by including respect for such obligations as substantive treaty provisions. This is not included in the obligations set out above.
- It is important, then, that this not be accomplished indirectly through language in the dispute settlement provisions that authorize a broad scope. Language such as "any dispute relating to an investment" or "any matter relating to an investment" have been seen and should be avoided.
- Some treaties' dispute settlement provisions have included disputes relating to any investment agreement or contract, or investment authorization, including some recent U.S. treaties. Again, this is in our view too broad and inappropriately risks replacing the choice of forum clause in such agreements or contracts instead of respecting them, as paragraph 29.9(b) would require.
- Some treaties have allowed an alleged breach of any legal provision in the Host State's domestic law that provides guarantees to an investor to be litigated in the arbitration instead of in the domestic court, where domestic law should be litigated.

Getting these provisions right is very important as it determines the scope of the arbitration and whether the arbitration process will override any other process selected directly by the State and investor.

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29.10. Selection of Investor Arbitrator

The claimant shall provide with the Notice of Arbitration:

(a) the name of the arbitrator that the claimant appoints, or

(b) the claimant's written consent for the Secretary-General to appoint that arbitrator.

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Commentary

This is a simple procedural requirement.

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29.11. Consent to Arbitration

(a) Each Party consents to the submission of a claim to arbitration under this Section in accordance with this treaty.

(b) The consent under paragraph 29.11(a) and the submission of a claim to arbitration under this Section shall satisfy the requirements of:

(i) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute; [and]

(ii) Article II of the New York Convention for an "agreement in writing"; [and]

(iii) [Name any other body used and reference rule on submission of an arbitration]

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Commentary

This is also a common procedural article and confirms the consent by each State Party to the arbitration is valid for the primary arbitration rules that are listed above as available for use under the process.

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29.12. Establishment of Tribunal

(a) 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, appointed by agreement of the disputing parties.

(b) [All arbitrators shall be drawn from a roster of eligible arbitrators established by the State Parties within 12 months of the entry into force of this Agreement and maintained up to date by the State Parties. Said roster shall be composed of persons of good standing, independence and with experience in international law, international investment, and/or dispute settlement under international law.]

(c) If a tribunal has not been constituted within 75 days from the date that a claim is submitted to arbitration under this Article, the Secretary-General, on the request of a

disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.

(d) For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator on a ground other than nationality,

(i) the State Party hereby agrees to the appointment of each individual member of a tribunal established under the ICSID Convention or the ICSID Additional Facility Rules; and

(ii) an Investor may submit a claim to arbitration under this Article, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the Investor agrees in writing to the appointment of each individual member of the tribunal.

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Commentary

The establishment of a tribunal has traditionally been done through the appointment, by each side, of its own selection and the appointment of a president of the tribunal by either the agreement of the other appointed arbitrators, the arbitrating parties, or through the intervention of the appointing authority under the selected rules of arbitration of the treaty in question. This is the approach generally described here.

However, an alternative approach has also been included here for further consideration. This is the selection by the parties to the treaty of a roster of potential arbitrators under the treaty, from which the three arbitrators must be chosen. This allows for greater certainty of the necessary qualities of an arbitrator in the selection process and less opportunity for parties to manipulate the process with arbitrators known to represent investors or States in the process. This alternative approach is gaining currency today.

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29.13. Avoidance of Conflict of Interest of Arbitrators

The arbitrators appointed to resolve disputes under this Agreement must, at all times during the arbitration:

(a) be impartial, free of actual conflicts of interest and an appearance of conflict of interest, and independent of the disputing parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding until the final award has been rendered or the proceeding has otherwise finally terminated; and

(b) disclose to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and to the co-arbitrators, any items that may, in the eyes of a reasonable third person , give rise to doubts as to the arbitrator's impartiality, freedom from conflicts of interest, or independence.

For greater certainty, the above requirements include the requirement not to act concurrently as counsel in another actual or potential treaty-based arbitration involving a foreign investor and a State.

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Commentary

Conflicts of interest are a growing concern in investment arbitration, and have led to a range of very controversial decisions as regard what constitutes conflict of interest for arbitrators. This provision addresses the concerns by providing clear and unequivocal language requiring arbitrators to be impartial, independent and free of any conflict of interest for the entire period of the arbitration. The language suggested extends and tightens the rules to avoid conflicts of interest by arbitrators in the UNCITRAL and ICSID processes, primarily by eliminating the "manifest" requirement in ICSID. It also clearly sets out the common standard of an "appearance of conflict of interest", incorporated into the International Bar Association's Guidelines on Conflicts of Interests in International Arbitration.

In addition, the final paragraph raises an issue of some debate, whether arbitrators should serve as counsel in other arbitrations at the same time. A growing number of arbitrators have said they will no longer do so due to the conflicts of interest it creates. Others have refused to recognize this as a problem. The text suggested resolves this issue in favour of ensuring no conflict can arise in this regard by disallowing arbitrators from concurrently acting as counsel in other treaty based investment arbitrations.

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29.14. Submissions by Non-Disputing State Party

The non-disputing State Party to this Agreement may make oral and written submissions to the tribunal regarding the interpretation of this treaty and be present at the oral arguments.

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Commentary

This provision addresses the State Party to the treaty that is not party to the arbitration. It was first seen in the NAFTA investor-State provisions and has been adopted on a number of occasions since then. It is a useful position for the States to have such a right under the treaty and can help avoid significant unexpected interpretations by tribunals when the considered views of both State Parties are before them in any given instance.

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29.15. *Amicus Curiae* Submissions

The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party. The procedures in Schedule 4 shall apply for this purpose.

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Commentary

The acceptance of *amicus curiae* submissions in investment arbitration began in 2000 and is now understood to be common practice. It is certainly not controversial. It is usually done now through an application to the tribunal by the person or organization that intends to make the submission. ICSID now has specific but not very detailed rules for this and UNCITRAL is in the process of negotiating such rules at this time. The suggested Schedule 4 would set out a clear set of rules in the treaty for the State Parties, any investor, the tribunal and the would-be *amicus* petitioners to follow in a clear and consistent manner.

••

29.16. 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 subject to the consent of the disputing parties, which consent shall not be unreasonably withheld, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

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Commentary

This is an increasingly common provision in investment arbitration processes and is also similar to one found in the WTO dispute settlement process. It ensures the tribunal can engage its own technical experts on any given matter and not have to rely only upon evidence of the disputing parties.

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29.17. Transparency of Proceedings

(a) Subject to paragraphs 29.17(c) and (d), the State Party that is party to the arbitration shall, after receiving the following documents, promptly make them available to the public and the non-disputing State Party:

(i) the Notice of Intent;

(ii) the Notice of Arbitration;

(iii) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted in the form of *amicus* submissions;

(iv) minutes or transcripts of hearings of the tribunal, where available; and

(v) orders, awards, and decisions of the tribunal.

(b) The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements.

(c) Any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

(d) Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:

(i) Subject to subparagraph (iv), neither the disputing parties nor the tribunal shall disclose to the non-disputing State Party or to the public any protected information where the disputing State Party that provided the information clearly designates it in accordance with subparagraph (ii).

(ii) Any disputing State Party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal.

(iii) A disputing State Party shall, at the time it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the public in accordance with paragraph 29.17(a).

(iv) The tribunal shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may withdraw all or part of its submission containing such information, or agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (iii). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents that either remove the information withdrawn by the disputing party that first submitted the information or re-designate the information, consistent with the designation of the disputing party that first submitted the information.

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Commentary

This article is within the emerging international standards on transparency for investor-State arbitration. It is seen in the COMESA CCIA and in many other treaties. ICSID enables many such steps to be taken, and UNCITRAL is in the process of revising the rules for investor-State arbitration toward this same end.

The transparency principle is set out clearly, subject to an ability of the parties and the tribunal to ensure that legitimate confidential business information is protected. The process for doing so is set out in detail above, drawn from the most advanced texts for this purpose.

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29.18. Consolidation of Arbitrations

(a) Where two or more claims have been submitted separately to arbitration under this Article and the claims have a question of law or fact in common and arise out of the same underlying measure or measures or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 29.2 – 29.10.

(b) A disputing party that seeks a consolidation order under this Article shall deliver, in writing, a request to the [President of the International Court of Justice] and to all the disputing parties sought to be covered by the order and shall specify in the request:

(i) the names and addresses of all the disputing parties sought to be covered by the order;

(ii) the nature of the order sought

(iii) the grounds on which the order is sought

(c) Unless the [President of the International Court of Justice] finds within 30 days after receiving a request under paragraph 29.18(b) that the request is manifestly unfounded, a tribunal shall be established under this Article.

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

(i) one arbitrator appointed by agreement of the claimants;

(ii) one arbitrator appointed by the respondent; and

(iii) the presiding arbitrator appointed by the [President of the International Court of Justice], provided, however, that the presiding arbitrator shall not be a national of either Party.

(e) If, within 60 days after the [President of the International Court of Justice] receives a request made under paragraph 29.18(b), the respondent fails or the claimants fail to appoint an arbitrator in accordance with paragraph 29.18(d), the [President of the International Court of Justice], on the request of any disputing Party sought to be covered by the order, shall appoint the arbitrator or arbitrators not yet appointed. If the respondent fails to appoint an arbitrator, the [President] shall appoint a national of the disputing Party, and if the claimants fail to appoint an arbitrator, the [President] shall appoint a national of the non-disputing Party.

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

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

(ii) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others, or

(iii) instruct a tribunal previously established under Article 29 to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that

(a) that tribunal, at the request of any Investor not previously a disputing party before that tribunal, shall be reconstituted with its original members, except that the arbitrator for the claimants shall be appointed pursuant to paragraphs 29.18(d)(i) and (e),, and

(b) that tribunal shall decide whether any prior hearing shall be repeated.

(g) Where a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration under this Agreement and that has not been named in a request made under paragraph 29.18(b) may make a written request to the tribunal that it be included in any order made under paragraph 29.18(f), and shall specify in the request:

(i) The name and address of the claimant;

(ii) The nature of the order sought; and

(iii) The grounds on which the order is sought

The Investor shall deliver a copy of its request to the [President].

(h) A tribunal established under this Article shall conduct its proceedings in accordance with the UNCITRAL Arbitration Rules in force at the time the proceedings are initiated, except as modified by this Agreement.

(I) A tribunal established under this Article shall not have jurisdiction to decide a claim, or a part of a claim, over which a tribunal established or instructed under this paragraph has assumed jurisdiction.

(J) On application of a disputing party, a tribunal established under this paragraph, pending its decision under subparagraph (f), may order that the proceedings of a tribunal established under this Article be stayed, unless the latter tribunal has already adjourned its proceedings.

••

Commentary

The initiation of a number of arbitrations against a State all arising from the same measure and similar investment treaties is a growing phenomenon. The article above is derived from revised U.S. texts and is comprehensive on how to address the possible consolidation of such multiple claims into one process.

••

29.19. Awards

(a) Where a tribunal makes a final award against a Host State or against an Investor in the light of a counterclaim by a State authorized under this agreement, the tribunal may award, separately or in combination, only:

(i) monetary damages and any applicable interest;

(ii) restitution of property, in which case the award shall provide that the Host State or Investor, as the case may be, may pay monetary damages and any applicable interest in lieu of restitution.

(b) A tribunal established under this Agreement [shall issue an award for costs and legal representation fees for any arbitration where the jurisdiction of the tribunal is denied to the Investor, and][may][shall][shall, unless by special exception there is good reason not to do so] issue an award for costs and legal representation to the disputing party that prevails in the final award.

(c) A tribunal may not award punitive damages.

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

(e) Subject to paragraph 29.19(f) and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.

(f) A disputing party may not seek enforcement of a final award until:

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

(ii) in the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or any other rules selected pursuant to this Article, 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 a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.

(g) Each Party shall provide for the enforcement of an award in its territory.

(h) A disputing party may seek enforcement of an arbitration award [under the ICSID Convention when it is in force for both Parties] or the New York Convention.

(i) A claim that is submitted to arbitration under this Section shall be presumed to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention, unless the State Party has proven that the claim has related to a sovereign matter.

••

Commentary

This provision addresses a number of issues relating to a final decision against a State or an investor if a counterclaim has also been initiated.

First, it ensures that only monetary damages can be awarded in most cases, as opposed, for example, to ordering a State to withdraw a measure to protect the environment that it has enacted. The restitution of property may be a possible award as well, but the losing party in such a case may elect to pay monetary damages instead.

Second, the text precludes any punitive damages being awarded (known as exemplary damages in some jurisdictions). Thus, an award can only be for the value of proven economic damages resulting from the breach of the Agreement.

Third, the text addresses the issue of costs clearly. Today, the practice is more often to not award any costs of the proceedings or legal representation to the winning party. This practice is reversed in the text, subject to some discretion for the tribunal depending on the final formulation chosen. However, where a tribunal finds it has no jurisdiction to hear a claim brought by an investor, it must, under the text, award costs in favour of the Host State.

The remaining paragraphs deal with issues of enforcement of the award and are fairly typical provisions ensuring enforceability under the New York Convention. Paragraph (i) refers to Article 1 of the New York Convention, which establishes the scope of the Convention for enforcement related matters. It requires arbitral decisions to be commercial arbitration in order for the Convention regime to apply. Paragraph (i) establishes a rebuttable presumption that arbitrations under the Agreement meet this test of being commercial arbitrations.

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29.20. Appeal Mechanism

If a separate, multilateral or bilateral agreement enters into force between the State Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment arrangements to hear investment disputes, the State Parties shall strive to reach an agreement that would have such appellate body review awards rendered under this Agreement in arbitrations commenced after the multilateral agreement enters into force between the State Parties.

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Commentary

This is a "precautionary" provision dealing with an appeal mechanism. Several States and organizations are considering how such a mechanism might be developed in an efficient and economical manner. This text simply notes this situation as a future possibility, but does not automatically adopt any such mechanism that may be developed in the future.

••

A joint decision of the State Parties, each acting through its representative designated for purposes of this Article, declaring their joint interpretation of a provision of this Agreement, shall be binding on any tribunal, and any decision or award issued by a tribunal must apply and be consistent with that joint decision.

••

Commentary

This provision was also used first in the NAFTA agreement and is present in the U.S. and Canadian Model BITs and treaties derived from them. A very recent UNCTAD report recommends the inclusion of such provisions today. The parties to NAFTA have in fact issued such an interpretative statement to restrict the broad interpretation of FET by arbitration tribunals ruling under that treaty.

This is a highly recommended provision as it is the only effective safety valve to preclude unintended interpretations being binding on the parties over the longer term. Implementing this provision is a much simpler and more direct process than amending the treaty, making it a very functional process.

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ARTICLE 31 •• Governing Law in Dispute Settlement

31.1. When a claim is submitted to a tribunal under this Agreement, it shall be decided in accordance with this Agreement. The governing law for the interpretation of this Agreement shall be this Agreement and the general principles of international law relating to the interpretation of treaties, including the presumption of consistency between international treaties to which the State Parties are party. For matters related to domestic law, the national law of the Host State shall be resorted to as the governing law.

31.2. For greater certainty, paragraph 31.1 does not expand or alter the scope of obligations contained in this Agreement or incorporate other standards except where specifically expressed herein.

••

Commentary

The identification of the governing law in an agreement is increasingly important. The above provision ensures a broad purposive approach to the interpretation and application of the Agreement and again mitigates against the ability of a tribunal to focus only on the investor protection provisions as the basis of an interpretative exercise.

The text also limits the role of the governing law clause to the interpretation of the treaty and precludes the addition of new obligations from other parts of international law.

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ARTICLE 32 •• Service of Documents

Delivery of notices and other documents on a State Party shall be made to the place named for that State Party in Schedule C.

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Commentary

This is a simple technical provision that clearly identifies the appropriate contact points in the event of a dispute under this Agreement.

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NOTES ••

Part 6: Final Provisions

Part 6: Final Provisions

ARTICLE 33 •• Entry into Force

This Agreement shall be subject to ratification by the State Parties in accordance with their constitutional procedures. It shall enter into force 60 days after the deposit by the last State Party of its instrument of ratification with the other Party.

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Commentary

This is a simple clause on entry into force. This is a key technical legal provision required to ensure clarity on when the obligations on the parties become legally binding.

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ARTICLE 34 •• Period in Force and Termination

34.1. The Agreement shall remain in force for ten years following its entry into force.

34.2. Option 1 This Agreement shall be renewed for further periods of ten years following the exchange of official instruments between each State Party confirming the renewal of the Agreement. The notices of renewal shall be exchanged prior to the expiration of the Agreement. This Agreement shall expire where no such exchange of instruments is completed prior to the expiration of each ten-year period.

34.2. Option 2: This Agreement shall automatically be renewed for an additional period of ten years, unless either State Party has submitted a Notice of Intent to terminate the Agreement at the expiration of the current ten-year period at least six months prior to the renewal date.

34.3. Either State Party may terminate this Agreement by giving an official notice to the other Party twelve months prior to its intended termination date, notwithstanding any prior renewal of this Agreement.

34.4. The rights of Investors and the State Parties shall continue in force for [five][ten] years following the expiration of the period in force for investments made during the period the Agreement was in force.

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Commentary

Many existing investment treaties have minimal provisions on the minimum period for which the treaty will be in force and provisions for its renewal or for the withdrawal of a Party. This leaves the Parties free to rely upon rules from outside the treaty, in particular the Vienna Convention on the Law of Treaties, to determine these issues. The view of the Drafting Committee was that the Model Agreement should contain the needed rules on this issue.

The initial period for which the treaty would be in force is ten years. Afterwards, two options are set out. One is a requirement for the Parties to exchange letters of intent to renew the treaty. A failure of either Party to do so means the treaty would then lapse. The second option is the opposite: the treaty renews automatically at the end of ten years for a further ten years, indefinitely, unless either Party notifies the other of its wish to not have the treaty renew itself. There is no legal difference in the end result, but Option 1 requires the positive acts of renewal, while Option 2 requires steps to avoid the automatic renewal. The Drafting Committee felt it was prudent to include both of the options.

In addition, the text provides a mechanism for either Party to terminate the treaty upon 12 months notice to the other Party. This provides an additional safety valve for the Parties in the event of significant difficulties being experienced, significant differences in interpretation or application of the treaty, or other policy reasons a State may have to terminate the treaty. This specific rule would replace general rules under the Vienna Convention.

Finally, it is common for investment treaties to provide for a period of continued application of the treaty in favour of investors of the other State Party made prior to the termination of the treaty. In some instances, treaties have extended this period to between 20 and 30 years. In other instances, the period has been 10 years. The shorter period is adopted here, with an additional option to adopt only a 5-year time period. The Drafting Committee was unanimously of the view that the time period should be kept at the shorter end.

••

ARTICLE 35 •• Amendment

This Agreement may be amended by the mutual consent of the State Parties through an exchange of notes or signing of an amendment agreement. An amendment shall enter into force 60 days following the deposit by the last State Party of its instrument of ratification of the amendment with the other Party.

••

Commentary

Again, many investment treaties do not include provisions on amendment of the treaty. This is virtually unique to investment treaties, given that almost all other types of treaties do include such provisions. The language above allows easy adaptation to the form of treaty making and amendment that is used in different States. If this provision is not included, the amendment process would be defined by the Vienna Convention instead.

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ARTICLE 36 •• Schedules and Notes Part of Treaty

The Schedules and notes to this Agreement form an integral part of this Agreement.

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Commentary

This is a common article. It simply ensures that all of the elements of the negotiated text are considered in the event of any dispute. It is common for important elements to be included in schedules or agreed notes of the negotiating parties.

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ARTICLE 37 •• Authentic Text

The authentic text of this Agreement shall be in [English][and French][and Portuguese].

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Commentary

This is again a common technical element, essential to ensure which languages are the critical texts in the event of a dispute.

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SPECIAL NOTE: The following are the suggested schedules, based on the text set out above. The content of each would then be proposed by each negotiating party for itself, and adopted as part of the text by agreement. It is possible that a State may object to some of the proposed inclusions, and this could be subject to negotiation. In practice, many developed States do seek to minimize any such schedules proposed by their developing country negotiating partners, while maximizing the use of them themselves. It is important for negotiators to focus on these details, and for early preparation of these schedules by SADC Member States, in order to achieve a balanced result in the negotiations.

SCHEDULE 1 •• Excluded/Included Sectors for Investment Liberalization, If Applicable

- List of included or excluded sectors, depending on model chosen; and excluded subsectors
- List of excluded non-conforming measures

SCHEDULE 2 •• Excluded/Included Sectors for Post-Establishment Investor Protections, If Applicable

- List of excluded sectors (if top-down drafting), or subsectors
- List of excluded non-conforming measures

SCHEDULE 3 •• List on National Authorities and Contact Points

The Official Contact Point for the purposes of this Agreement shall be:

State Party A:

State Party B:

The contact points shall be responsible for the exchange of information required under this Agreement.

SCHEDULE 4 •• Procedure for *Amicus Curiae* Submissions

1. The person or organization seeking *amicus curiae* status shall serve the tribunal and all disputing parties with a Petition for leave to file an *amicus curiae* submission and the planned submission.

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Commentary

The full text of this schedule is sequential, setting out the process as it should move forward. This ensures transparency and efficiency in the *amicus* process. The first step is the petition for amicus status by the interested person or group, along with the submission they intend to submit.

••

2. The Petition for leave to file an *amicus curiae* submission shall:

   (a) be made in writing, dated and signed by the person or organization filing the application, and include the address and other contact details of the Petitioner. Counsel may file and represent the person or organization for this purpose;

   (b) be no longer than ten typed pages;

   (c) describe the Petitioner, including, where relevant, its membership and legal status (e.g., company, trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the applicant);

   (d) disclose whether or not the Petitioner has any affiliation, direct or indirect, with any disputing party;

   (e) identify any government, person or organization that has provided any financial or other assistance in preparing the submission;

   (f) specify the nature of the interest that the Petitioner has in the arbitration;

   (g) identify the specific issues of fact or law in the arbitration that the Petitioner has addressed in its written submission;

   (h) explain, by reference to the factors specified in paragraph 4 below, why the tribunal should accept the submission; and

   (i) be made in a language of the arbitration or the primary language of the disputing State Party.

••

Commentary

This provision ensures transparency by the potential amicus on who is making the Petition and why. Any relationships to either of the litigation parties must be made clear, including organizational or financial. The Petitioner must also indicate the reasons it is making the submission and what its broader interest in the outcome of the arbitration may be. This could be more local in nature, such as specific environmental impacts, or more broadly developed, such as the proper approach to interpreting the treaty due to the impact the approaches may have on other related situations the amicus is concerned with.

••

3. The submission filed by an *amicus curiae* shall:

   (a) be dated and signed by the person filing the submission;

   (b) be concise, and in no case longer than [50][40] typed pages, including any appendices;

   (c) set out a precise statement supporting the *amicus curiae's* position on the issues; and

   (d) only address matters within the scope of the dispute.

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Commentary

This text gives specific direction to the amicus Petitioner on the form, scope and length for the submission itself. The most critical element is that the submission should be legal and not political in nature. This is an important discipline for the Petitioners.

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4. The tribunal shall set an appropriate date for the disputing parties to comment on the Petition for leave to file an *amicus curiae* submission.

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Commentary

This is an important element of ensuring that the arbitrating parties each have ample and fair opportunity to comment on the amicus submissions, ensuring neither side is unequally affected.

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5. In determining whether to grant leave to file an *amicus curiae* submission, the tribunal shall consider, *inter alia*, the extent to which:

   (a) the *amicus curiae* submission would assist the tribunal in the determination of a factual or legal issue related to the dispute;

   (b) the *amicus curiae* submission would address a matter within the scope of the dispute;

   (c) the *amicus curiae* has a significant interest in the arbitration; and

   (d) there is a public interest in the subject-matter of the arbitration.

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Commentary

This is critical guidance that ensures the Petitioner and the tribunal and the arbitrating parties all understand the criteria upon which a decision to admit (or not admit) an amicus submission is to be made.

••

6. The tribunal shall ensure that:

   (a) any *amicus curiae* submission does not disrupt the proceedings; and

   (b) neither disputing party is unduly burdened or unfairly prejudiced by such submissions.

••

Commentary

This places the burden on the tribunal to manage its procedure in such a way as to be transparent and equal and fair in its treatment of the arbitrating parties in light of their interests as the primary litigants.

••

7. The tribunal shall decide whether to grant leave to file an *amicus curiae* submission. If leave to file is granted, the tribunal shall set an appropriate date for the disputing parties and the non-disputing State Party to respond in writing to the *amicus curiae* submission.

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Commentary

This is a procedural provision to ensure proper scheduling of the timetable for all parties.

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8. A tribunal that grants leave to file an *amicus curiae* submission is not required to address the submission at any point in the arbitration. The tribunal may request any person or organization making a submission to appear before the tribunal to reply to specific issues or questions concerning the submission.

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Commentary

Again, this is primarily addressed to ensure that the tribunal can efficiently manage its operations.

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9. Access to hearings and documents by persons or organizations that file petitions under these procedures shall be governed by the provisions pertaining to public access to hearings and documents under this Agreement[, unless otherwise determined by the tribunal after consultations with the disputing parties].

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Commentary

As public access to arbitrations under the agreement is already permitted, this is a safety provision allowing the tribunal to make adjustments to those rules if that may be useful to manage the procedure properly.

••

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Canadian Model Bilateral Agreement for the Promotion and Protection of Investments, 2004

AGREEMENT BETWEEN CANADA AND ----------
FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

Canada and ----------, hereinafter referred to as the "Parties",

Recognizing that the promotion and the protection of investments of investors of one Party in the territory of the other Party will be conducive to the stimulation of mutually beneficial business activity, to the development of economic cooperation between them and to the promotion of sustainable development,

Have agreed as follows:

Section A - Definitions

Article 1
Definitions

For the purpose of this Agreement:

administrative ruling of general application means an administrative ruling or interpretation that applies to all persons and fact situations that fall generally within its ambit and that establishes a norm of conduct, but does not include;

(a) a determination or ruling made in an administrative or quasi-judicial proceeding that applies to a particular person, good or service of the other Party in a specific case; or

(b) a ruling that adjudicates with respect to a particular act or practice.

Commission means the body established by the Parties under Article 51;

confidential information means confidential business information and information that is privileged or otherwise protected from disclosure;

covered investment means, with respect to a Party, an investment in its territory of an investor of the other Party existing on the date of entry into force of this Agreement, as well as investments made or acquired thereafter;

cultural industries means persons engaged in any of the following activities:

(i) the publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing;

(ii) the production, distribution, sale or exhibition of film or video recordings;

(iii) the production, distribution, sale or exhibition of audio or video music recordings;

(iv) the publication, distribution, sale or exhibition of music in print or machine readable form; or

(v) radio communications in which the transmissions are intended for direct reception by the general public, and all radio, television or cable broadcasting undertakings and all satellite programming and broadcast network services.

days means calendar days, including weekends and holidays;

designate means to establish, designate or authorize, or to expand the scope of a monopoly to cover an additional good or service after the date of entry into force of the Agreement;

disputing investor means an investor that makes a claim under Section C;

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

disputing party means the disputing investor or the disputing Party;

enterprise means:

(i) any entity constituted or organized under applicable law, whether or not for profit, whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association; and

(ii) a branch of any such entity;

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

equity or debt securities includes voting and non-voting shares, bonds, convertible debentures, stock options and warrants;

existing means in effect on the date of entry into force of this Agreement;

financial institution means any financial intermediary or other enterprise that is authorized to do business and regulated or supervised as a financial institution under the law of the Party in whose territory it is located;

financial service means a service of a financial nature, including insurance, and a service incidental or auxiliary to a service of a financial nature;

government monopoly means a monopoly that is owned, or controlled through ownership interests, by the federal government of a Party or by another such monopoly;

ICSID means the International Centre for Settlement of Investment Disputes;

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

intellectual property rights means copyright and related rights, trademark rights, rights in geographical indications, rights in industrial designs, patent rights, rights in layout

designs of integrated circuits, rights in relation to protection of undisclosed information, and plant breeders' rights.

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

investment means:

(I) an enterprise;

(II) an equity security of an enterprise;

(III) a debt security of an enterprise

(i) where the enterprise is an affiliate of the investor, or

(ii) where the original maturity of the debt security is at least three years,

but does not include a debt security, regardless of original maturity, of a state enterprise;

(IV) a loan to an enterprise

(i) where the enterprise is an affiliate of the investor, or

(ii) where the original maturity of the loan is at least three years,

but does not include a loan, regardless of original maturity, to a state enterprise;

(V) (i) notwithstanding subparagraph (III) and (IV) above, a loan to or debt security issued by a financial institution is an investment only where the loan or debt security is treated as regulatory capital by the Party in whose territory the financial institution is located, and

(ii) a loan granted by or debt security owned by a financial institution, other than a loan to or debt security of a financial institution referred to in (i), is not an investment;

for greater certainty:

(iii) a loan to, or debt security issued by, a Party or a state enterprise thereof is not an investment; and

(iv) a loan granted by or debt security owned by a cross-border financial service provider, other than a loan to or debt security

issued by a financial institution, is an investment if such loan or debt security meets the criteria for investments set out elsewhere in this Article;

(VI) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;

(VII) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraphs (III) (IV) or (V);

(VIII) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and

(IX) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under

(i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or

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

but investment does not mean,

(X) claims to money that arise solely from

(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of the other Party, or

(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraphs (IV) or (V); and

(XI) any other claims to money,

that do not involve the kinds of interests set out in subparagraphs (I) through (IX);

investment of an investor of a Party means an investment owned or controlled directly or indirectly by an investor of such Party;

investor of a Party means

in the case of Canada:

(i) Canada or a state enterprise of Canada, or
(ii) a national or an enterprise of Canada,

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

in the case of _____:

_____;

that seeks to make, is making or has made an investment and that does not possess the citizenship of Canada.

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

measure includes any law, regulation, procedure, requirement, or practice;

monopoly means an entity, including a consortium or government agency, that in any relevant market in the territory of a Party is designated as the sole provider or purchaser of a good or service, but does not include an entity that has been granted an exclusive intellectual property right solely by reason of such grant;

national means a natural person who is a citizen or permanent resident of a Party;

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

person means a natural person or an enterprise;

person of a Party means a national, or an enterprise of a Party;

public entity means a central bank or monetary authority of a Party, or any financial institution owned or controlled by a Party;

Secretary-General means the Secretary-General of ICSID;

state enterprise means an enterprise that is owned or controlled through ownership interests by a Party;

sub-national government means:

in respect of Canada, provincial or local governments; and

in respect of……

tax convention means a convention for the avoidance of double taxation or other international taxation agreement or arrangement;

territory means

(i) in respect of Canada:

(a) the land territory of Canada, air space and internal waters of Canada;
(b) those maritime areas, including the territorial sea, exclusive economic zone, and the seabed and subsoil to the outer limit of the territorial sea, over which Canada has sovereignty or over which Canada exercises, in accordance with international law, sovereign rights for the purpose of exploration and exploitation of the natural resources; and
(c) artificial islands, installations and structures on the continental shelf over which Canada has jurisdiction as a coastal state.

(ii) in respect of .

transfers include international payments;

Tribunal means an arbitration tribunal established under Article 27 (Submission of a Claim to Arbitration) or Article 32 (Consolidation);

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

WTO Agreement means the Agreement Establishing the World Trade Organization done at Marrakesh on April 15, 1994.

Section B – Substantive Obligations

Article 2
Scope

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

(a) investors of the other Party; and

(b) covered investments.

Article 3
National Treatment

1. Each Party shall accord to investors of the other Party treatment no less favourable 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 covered investments treatment no less favourable 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 in its territory.

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a sub-national government, treatment no less favourable than the treatment accorded, in like circumstances, by that sub-national government to investors, and to investments of investors, of the Party of which it forms a part.

Article 4[1]
Most-Favoured-Nation Treatment

1. Each Party shall accord to investors of the other Party treatment no less favourable 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 covered investments treatment no less favourable 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 in its territory.

[1] For greater certainty, the treatment accorded by a Party under this Article means, with respect to a sub-national government, treatment accorded, in like circumstances, by that sub-national government to investors, and to investments of investors, of a non-Party.

Article 5
Minimum Standard of Treatment

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

2. The concepts of "fair and equitable treatment" and "full protection and security" in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

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

Article 6
Senior Management, Boards of Directors and Entry of Personnel

1. A Party may not require that an enterprise of that Party, that is a covered investment, appoint to senior management positions individuals of any particular nationality.

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

3. Subject to its laws, regulations and policies relating to the entry of aliens, each Party shall grant temporary entry to nationals of the other Party, employed by an investor of the other Party, who seeks to render services to an investment of that investor in the territory of the Party, in a capacity that is managerial or executive or requires specialized knowledge.[2]

Article 7
Performance Requirements

1. Neither 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 a Party or a non-Party in its territory:

[2] No investor may have recourse to dispute settlement under Section C for any matter arising under this paragraph.

(a) to export a given level or percentage of goods;

(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, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority, to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or

(g) to supply exclusively from the territory of the Party the goods it produces or the services it provides to a specific regional market or to the world market.

2. 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 3 and 4 apply to the measure.

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

(a) to 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;

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

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

4. Nothing in paragraph 3 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 a 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. Paragraphs 1 and 3 shall not apply to any requirement other than the requirements set out in those paragraphs.

6. The provisions of:

(a) Paragraphs (1) (a), (b) and (c), and (3) (a) and (b) shall not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs;

(b) Paragraphs (1) (b), (c), (f) and (g), and (3) (a) and (b) shall not apply to procurement by a Party or a state enterprise; and

(c) Paragraphs (3) (a) and (b) shall not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

Article 8
Monopolies and State Enterprises[3]

1. Nothing in this Agreement shall be construed to prevent a Party from designating a monopoly, or from maintaining or establishing a state enterprise.

2. Where a Party intends to designate a monopoly[4] and the designation may affect the interests of persons of the other Party, the Party shall, wherever possible, provide prior written notification to the other Party of the designation.

[3] No investor may have recourse to dispute settlement under Section C for any matter arising under paragraphs 1 and 2 of this Article.

[4] Nothing in this Article shall be construed to prevent a monopoly from charging different prices in different geographic markets, where such differences are based on normal commercial considerations, such as taking account of supply and demand conditions in those markets.

3. Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any privately-owned monopoly that it designates and any government monopoly that it maintains or designates acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative or other governmental authority that the Party has delegated to it in connection with the monopoly good or service, such as the power to grant import or export licenses, approve commercial transactions or impose quotas, fees or other charges[5];

4. Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges.

Article 9
Reservations and Exceptions

1. Articles 3, 4, 6 and 7 shall 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 sub-national government;

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

(c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 3, 4, 6 and 7.

2. Articles 3, 4, 6 and 7 shall not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors or activities, as set out in its schedule to Annex II.

3. Article 4 shall not apply to treatment accorded by a Party pursuant to agreements, or with respect to sectors, set out in its schedule to Annex III.

[5] A "delegation" includes a legislative grant, and a government order, directive or other act transferring to the monopoly, or authorizing the exercise by the monopoly of, governmental authority.

4. In respect of intellectual property rights, a Party may derogate from Articles 3 and 4 in a manner that is consistent with the WTO Agreement.

5. The provisions of Articles 3, 4 and 6 of this Agreement shall not apply to:

(a) procurement by a Party or state enterprise;

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

6. For greater certainty, Article 3 of this Agreement shall not apply to the granting by a Party to a financial institution of an exclusive right to provide activities or services forming part of a public retirement plan or statutory system of social security.

7. The provisions of Article 4 of this Agreement shall not apply to financial services.

Article 10
General Exceptions

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

(a) to protect human, animal or plant life or health;

(b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or

(c) for the conservation of living or non-living exhaustible natural resources.

2. Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining reasonable measures for prudential reasons, such as:

(a) the protection of investors, depositors, financial market participants, policy-holders, policy-claimants, or persons to whom a fiduciary duty is owed by a financial institution;

(b) the maintenance of the safety, soundness, integrity or financial responsibility of financial institutions; and

(c) ensuring the integrity and stability of a Party's financial system.

3. Nothing in this Agreement shall apply to non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies. This paragraph shall not affect a Party's obligations under Article 7 (Performance Requirements) or Article 14 (Transfer of Funds);

4. Nothing in this Agreement shall be construed:

(a) to require any Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests;

(b) to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests

(i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment,

(ii) taken in time of war or other emergency in international relations, or

(iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices; or

(c) to prevent any Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

5. Nothing in this Agreement shall be construed to require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting Cabinet confidences, personal privacy or the confidentiality of the financial affairs and accounts of individual customers of financial institutions.

6. The provisions of this Agreement shall not apply to investments in cultural industries.

7. Any measure adopted by a Party in conformity with a decision adopted by the World Trade Organization pursuant to Article IX:3 of the WTO Agreement shall be deemed to be also in conformity with this Agreement. An investor purporting to act pursuant to Section C of this Agreement may not claim that such a conforming measure is in breach of this Agreement.

Article 11
Health, Safety and Environmental Measures

The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should 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 and the two Parties shall consult with a view to avoiding any such encouragement.

Article 12
Compensation for Losses

1. Each Party shall accord to investors of another Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict, civil strife or a natural disaster.

2. Paragraph (1) shall not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 3 but for Article 9(5)(b).

Article 13[6]
Expropriation

1. Neither Party shall nationalize or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation"), except for a public purpose, in accordance with due process of law, in a non-discriminatory manner and on prompt, adequate and effective compensation.

2. Such 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 shall be fully realizable and freely transferable. Compensation shall be payable in a freely convertible currency and shall include interest at a commercially reasonable rate for that currency from the date of expropriation until date of payment.

[6] For greater certainty, Article 13(1) shall be interpreted in accordance with Annex B.13(1) on the clarification of indirect expropriation.

4. The investor affected shall have a right, under the law of the Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of its case and of the valuation of its investment in accordance with the principles set out in this Article.

5. The provisions of this Article shall 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 WTO Agreement.

Article 14
Transfer of Funds

1. Each Party shall permit all transfers relating to a covered investment to be made freely, and without delay, into and out of its territory. Such transfers include:

(a) contributions to capital;

(b) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance and other fees, returns in kind and other amounts derived from the investment;

(c) proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;

(d) payments made under a contract entered into by the investor, or the covered investment, including payments made pursuant to a loan agreement;

(e) payments made pursuant to Articles 12 and 13; and

(f) payments arising under Section C.

2. Each Party shall permit transfers relating to a covered investment to be made in the convertible currency in which the capital was originally invested, or in any other convertible currency agreed by the investor and the Party concerned. Unless otherwise agreed by the investor, transfers shall be made at the rate of exchange applicable on the date of transfer.

3. 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) issuing, trading or dealing in securities;

(c) criminal or penal offences;

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

(e) ensuring the satisfaction of judgments in adjudicatory proceedings.

4. Neither 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.

5. Paragraph 4 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 3.

6. Notwithstanding the provisions of paragraphs 1, 2 and 4, and without limiting the applicability of paragraph 5, a Party may prevent or limit transfers by a financial institution to, or for the benefit of, an affiliate of or person related to such institution, through the equitable, non-discriminatory and good faith application of measures relating to maintenance of the safety, soundness, integrity or financial responsibility of financial institutions.

7. Notwithstanding paragraph 1, a Party may restrict transfers in kind in circumstances where it could otherwise restrict transfers under the WTO Agreement and as set out in paragraph 3.

Article 15
Subrogation

1. If a Party or any agency thereof makes a payment to any of its investors under a guarantee or a contract of insurance it has entered into in respect of an investment, the other Party shall recognize the validity of the subrogation in favour of such Party or agency thereof to any right or title held by the investor.

2. A Party or any agency thereof which is subrogated to the rights of an investor in accordance with paragraph 1 of this Article, shall be entitled in all circumstances to the same rights as those of the investor in respect of the investment. Such rights may be exercised by the Party or any agency thereof, or by the investor if the Party or any agency thereof so authorizes.

Article 16
Taxation Measures

1. Except as set out in this Article, nothing in this Agreement shall apply to taxation measures. For further certainty, nothing in this Agreement shall affect the rights and obligations of the Parties under any tax convention. In the event of any inconsistency between the provisions of this Agreement and any such convention, the provisions of that convention shall apply to the extent of the inconsistency.

2. Nothing in this Agreement shall be construed to require a Party to furnish or allow access to information the disclosure of which would be contrary to the Party's law protecting information concerning the taxation affairs of a taxpayer.

3. A claim by an investor that a tax measure of a Party is in breach of an agreement between a Party and the investor concerning an investment shall be considered a claim for breach of this Agreement unless the taxation authorities of the Parties, no later than six months after being notified by the investor of its intention to submit the claim to arbitration, jointly determine that the measure does not contravene such agreement. The investor shall refer the issue of whether a taxation measure does not contravene an agreement for a determination to the taxation authorities of the Parties at the same time that it gives notice under Article 24 (Notice of Intent to Submit a Claim to Arbitration).

4. The provisions of Article 13 shall apply to taxation measures unless the taxation authorities of the Parties, no later than six months after being notified by an investor that the investor disputes a taxation measure, jointly determine that the measure in question is not an expropriation. The investor shall refer the issue of whether a taxation measure is an expropriation for a determination to the taxation authorities of the Parties at the same time that it gives notice under Article 24 (Notice of Intent to Submit a Claim to Arbitration).

5. An investor may submit a claim relating to taxation measures covered by this Agreement to arbitration under Section C only if the taxation authorities of the Parties fail to reach the joint determinations specified in paragraph 3 and paragraph 4 of this Article within six months of being notified in accordance with the provisions of this Article.

6. If, in connection with a claim by an investor of a Party or a dispute between the Parties, an issue arises as to whether a measure of a Party is a taxation measure, a Party may refer the issue to the taxation authorities of the Parties. The taxation authorities shall decide the issue, and their decision shall bind any Tribunal formed pursuant to Section C or arbitral panel formed pursuant to Section D, as the case may be, with jurisdiction over the claim or the dispute. A Tribunal or arbitral panel seized of a claim or a dispute in which the issue arises may not proceed pending receipt of the decision of the taxation authorities. If the taxation authorities have not decided the issue within six months of the referral, the Tribunal or arbitral panel shall decide the issue in place of the taxation authorities.

7. The taxation authorities referred to in this Article shall be the following until notice in writing to the contrary is provided to the other Party:

(a) for Canada: the Assistant Deputy Minister, Tax Policy, of the Department of Finance Canada;

(b) for _____:

Article 17
Prudential Measures

1. Where an investor submits a claim to arbitration under Section C, and the disputing Party invokes Articles Article 10(2) or 14(6), the Tribunal established pursuant to Article 22 (Claim by an Investor of a Party on its Own Behalf) or 23 (Claim by an Investor of a Party on Behalf of and Enterprise) shall, at the request of that Party, seek a report in writing from the Parties on the issue of whether and to what extent the said paragraphs are a valid defence to the claim of the investor. The Tribunal may not proceed pending receipt of a report under this Article.

2. Pursuant to a request received in accordance with paragraph (1), the Parties shall proceed in accordance with Section D to prepare a written report, either on the basis of agreement following consultations, or by means of an arbitral panel. The consultations shall be between the financial services authorities of the Parties. The report shall be transmitted to the Tribunal, and shall be binding on the Tribunal.

3. Where, within 70 days of the referral by the Tribunal, no request for the establishment of a panel pursuant to paragraph (2) has been made, and no report has been received by the Tribunal, the Tribunal may proceed to decide the matter.

Article 18
Denial of Benefits

1. A Party may deny the benefits of this Agreement to an investor of the other Party that is an enterprise of such Party and to investments of such investor if investors of a non-Party own or control the enterprise and the denying Party adopts or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Agreement were accorded to the enterprises or to its investments.

2. Subject to prior notification and consultation in accordance with Article 19, a Party may deny the benefits of this Agreement to an investor of the other Party that is an enterprise of such Party and to investments of such investors if investors of a non-Party own or control 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 19[7]
Transparency

1. Each Party shall, to the extent possible, ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and the other Party to become acquainted with them.

2. To the extent possible, each Party shall:

(a) publish in advance any such measure that it proposes to adopt; and

(b) provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures.

3. Upon request by a Party, information shall be exchanged on the measures of the other Party that may have an impact on covered investments.

[7] No investor may have recourse to dispute settlement under Section C for any matter arising under this Article.

Annex B.13(1)

Expropriation

The Parties confirm their shared understanding that:

a) Indirect expropriation results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure;

b) The determination of whether a measure or series of measures of a Party constitute an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:

i) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;

ii) the extent to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations; and

iii) the character of the measure or series of measures;

c) Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.

Section C - Settlement of Disputes between an Investor and the Host Party

Article 20
Purpose

Without prejudice to the rights and obligations of the Parties under Section D (State to State Dispute Settlement Procedures), this Section establishes a mechanism for the settlement of investment disputes.

Article 21
Limitation of Claims with respect to financial institutions

With respect to:

(a) financial institutions of a Party; and

(b) investors of a Party, and investments of such investors, in financial institutions in the other Party's territory,

this Section applies only in respect of claims that the other Party has breached an obligation under Articles 11, 13, 14, or 18.

Article 22
Claim by an Investor of a Party on Its Own Behalf

1. An investor of a Party may submit to arbitration under this Section a claim that the other Party has breached an obligation under Section B, and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

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

Article 23
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 has breached an obligation under Section B, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

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

3. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 22 (Claim by an Investor of a Party on Its Own Behalf) arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 27 (Submission of a Claim to Arbitration), the claims should be heard together by a Tribunal established under Article 32 (Consolidation), unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.

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

Article 24
Notice of Intent to Submit a Claim to Arbitration

1. The disputing investor shall deliver to the disputing Party written notice of its intent to submit a claim to arbitration at least 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 23 (Claim by an Investor of a Party on Behalf of an Enterprise), the name and address of the enterprise;

(b) the provisions of this Agreement alleged to have been breached and any other relevant provisions;

(c) the issues and the factual basis for the claim, including the measures at issue; and

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

2. The disputing investor shall also deliver, with its Notice of Intent to Submit a Claim to Arbitration, evidence establishing that it is an investor of the other Party.

Article 25
Settlement of a Claim through Consultation

1. Before a disputing investor may submit a claim to arbitration, the disputing parties shall first hold consultations in an attempt to settle a claim amicably.

2. Consultations shall be held within 30 days of the submission of the notice of intent to submit a claim to arbitration, unless the disputing parties otherwise agree.

3. The place of consultation shall be the capital of the disputing Party, unless the disputing parties otherwise agree.

Article 26
Conditions Precedent to Submission of a Claim to Arbitration

1. A disputing investor may submit a claim to arbitration under Article 22 (Claim by an Investor of a Party on Its Own Behalf) only if:

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

(b) at least six months have elapsed since the events giving rise to the claim;

(c) not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage thereby;

(d) the investor has delivered the Notice of Intent required under Article 24 (Notice of Intent to Submit a Claim to Arbitration), in accordance with the requirements of that Article, at least 90 days prior to submitting the claim; and

(e) the investor and, where the claim is for loss or damage to an interest in an enterprise of 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 22 (Claim by an Investor of a Party on Its Own Behalf), except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

2. A disputing investor may submit a claim to arbitration under Article 23 (Claim by an Investor of a Party on Behalf of an Enterprise) only if:

(a) both the investor and the enterprise consent to arbitration in accordance with the procedures set out in this Agreement;

(b) at least six months have elapsed since the events giving rise to the claim;

(c) not more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage thereby;

(d) the investor has delivered the Notice of Intent required under Article 24 (Notice of Intent to Submit a Claim to Arbitration), in accordance with the requirements of that Article, at least 90 days prior to submitting the claim; and

(e) both the investor and the enterprise waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 23 (Claim by an Investor of a Party on Behalf of an Enterprise, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

3. A consent and waiver required by this Article shall be in the form provided for in Annex C.26, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration.

4. A waiver from the enterprise under paragraph 1(e) or 2(e) shall not be required only where a disputing Party has deprived a disputing investor of control of an enterprise.

5. Failure to meet any of the conditions precedent provided for in paragraphs 1 through 3 shall nullify the consent of the Parties given in Article 28 (Consent to Arbitration).

Article 27
Submission of a Claim to Arbitration

1. A disputing investor who meets the conditions precedent provided for in Article 26 (Conditions Precedent to Submission of a Claim to Arbitration) may submit the claim to arbitration under:

(a) the ICSID Convention, provided that both the disputing Party and the Party of the disputing investor are parties to the Convention;

(b) the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the disputing investor, but not both, is a party to the ICSID Convention;

(c) the UNCITRAL Arbitration Rules; or

(d) any other body of rules approved by the Commission as available for arbitrations under this Section.

2. The Commission shall have the power to make rules supplementing the applicable arbitral rules and may amend any rules of its own making. Such rules shall be binding on a Tribunal established under this Section, and on individual arbitrators serving on such Tribunals.

3. The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section, and supplemented by any rules adopted by the Commission under this Section.

Article 28
Consent to Arbitration

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

2. The consent given in paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of:

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

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

[(c) Article I of the Inter-American Convention for an agreement.]

Article 29
Arbitrators

1. Except in respect of a Tribunal established under Article 32 (Consolidation), and unless the disputing parties agree otherwise, the Tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.

2. Arbitrators shall:

(a) have expertise or experience in public international law, international trade or international investment rules, or the resolution of disputes arising under international trade or international investment agreements;

(b) be independent of, and not be affiliated with or take instructions from, either Party or disputing party; and

(c) comply with any Code of Conduct for Dispute Settlement as agreed by the Commission.

3. Where a disputing investor claims that a dispute involves measures adopted or maintained by a Party relating to financial institutions of the other Party, or investors of the other Party and investments of such investors, in financial institutions in a Party's territory, then

(a) where the disputing parties are in agreement, the arbitrators shall, in addition to the criteria set out in paragraph 2, have expertise or experience in financial services law or practice, which may include the regulation of financial institutions; or

(b) where the disputing parties are not in agreement,

(i) each disputing party may select arbitrators who meet the qualifications set out in subparagraph (a), and

(ii) if the Party complained against invokes Articles 14(6) or 17, the chair of the panel shall meet the qualifications set out in subparagraph (a).

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

5. The Commission may establish rules relating to expenses incurred by the Tribunal.

Article 30
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. The Secretary-General shall serve as appointing authority for an arbitration under this Section.

2. If a Tribunal, other than a Tribunal established under Article 32 (Consolidation), has not been constituted within 90 days from the date that a claim is submitted to arbitration, the Secretary-General, on the request of either disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed, except that the presiding arbitrator shall not be a national of either Party.

Article 31
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 a ground other than citizenship or permanent residence:

(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 22 (Claim by an Investor of a Party on Its Own Behalf) may submit a claim to arbitration, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the disputing investor agrees in writing to the appointment of each individual member of the Tribunal; and

(c) a disputing investor referred to in Article 23(1) (Claim by an Investor of a Party on Behalf of an Enterprise) may submit a claim to arbitration, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the disputing investor and the enterprise agree in writing to the appointment of each individual member of the Tribunal.

Article 32
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 submitted to arbitration under Article 27 (Submission of a Claim to Arbitration) 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 to the disputing Party or disputing investors against which the order is sought a copy of the request.

5. Within 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 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 ICSID Panel of Arbitrators. To the extent arbitrators are not available from that Panel, appointments shall be at 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 27 (Submission of a Claim to Arbitration) and that has not been named in a request made under paragraph 3 may make a written request to the Tribunal that it be included in an order made under paragraph 2, and shall specify in the request:

(a) the name and address of the disputing investor;

(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 27 (Submission of a Claim to Arbitration) shall not have jurisdiction to decide a claim, or a part of a claim, over which a Tribunal established under this Article has assumed jurisdiction.

9. On application of a disputing party, a Tribunal established under this Article, pending its decision under paragraph 2, may order that the proceedings of a Tribunal established under Article 27 (Submission of a Claim to Arbitration) be stayed, unless the latter Tribunal has already adjourned its proceedings.

Article 33
Notice to the Non-Disputing Party

A disputing Party shall deliver to the other Party a copy of the Notice of Intent to Submit a Claim to Arbitration and other documents, such as a Notice of Arbitration and Statement of Claim, no later than 30 days after the date that such documents have been delivered to the disputing Party.

Article 34
Documents

1. The non-disputing Party shall be entitled, at its cost, to receive from the disputing Party a copy of:

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

(b) copies of all pleadings filed in the arbitration; and

(c) the written argument of the disputing parties.

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

Article 35
Participation by the Non-Disputing Party

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

2. The non-disputing Party shall have the right to attend any hearings held under this Section, whether or not it makes submissions to the Tribunal.

Article 36
Place of Arbitration

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

(a) the ICSID Additional Facility Rules, if the arbitration is under those Rules or the ICSID Convention; or

(b) the UNCITRAL Arbitration Rules, if the arbitration is under those Rules.

Article 37
Preliminary Objections to Jurisdiction or Admissibility

Where issues relating to jurisdiction or admissibility are raised as preliminary objections, a Tribunal shall, wherever possible, decide the matter before proceeding to the merits.

Article 38
Public Access to Hearings and Documents

1. Hearings held under this Section shall be open to the public. To the extent necessary to ensure the protection of confidential information, including business confidential information, the Tribunal may hold portions of hearings *in camera*.

2. The Tribunal shall establish procedures for the protection of confidential information and appropriate logistical arrangements for open hearings, in consultation with the disputing parties.

3. All documents submitted to, or issued by, the Tribunal shall be publicly available, unless the disputing parties otherwise agree, subject to the deletion of confidential information.

4. Notwithstanding paragraph 3, any Tribunal award under this Section shall be publicly available, subject to the deletion of confidential information.

5. A disputing party may disclose to other persons in connection with the arbitral proceedings such unredacted documents as it considers necessary for the preparation of its case, but it shall ensure that those persons protect the confidential information in such documents.

6. The Parties may share with officials of their respective federal and sub-national governments all relevant unredacted documents in the course of dispute settlement under this Agreement, but they shall ensure that those persons protect any confidential information in such documents.

7. As provided under Article 10(4) and (5), the Tribunal shall not require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting Cabinet confidences, personal privacy or the financial affairs and accounts of individual customers of financial institutions, or which it determines to be contrary to its essential security.

8. To the extent that a Tribunal's confidentiality order designates information as confidential and a Party's law on access to information requires public access to that information, the Party's law on access to information shall prevail. However, a Party

should endeavour to apply its law on access to information so as to protect information designated confidential by the Tribunal.

Article 39
Submissions by a Non-Disputing Party

1. Any non-disputing party that is a person of a Party, or has a significant presence in the territory of a Party, that wishes to file a written submission with a Tribunal (the "applicant") shall apply for leave from the Tribunal to file such a submission, in accordance with Annex C.39. The applicant shall attach the submission to the application.

2. The applicant shall serve the application for leave to file a non-disputing party submission and the submission on all disputing parties and the Tribunal.

3. The Tribunal shall set an appropriate date for the disputing parties to comment on the application for leave to file a non-disputing party submission.

4. In determining whether to grant leave to file a non-disputing party submission, the Tribunal shall consider, among other things, the extent to which:

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

(b) the non-disputing party submission would address a matter within the scope of the dispute;

(c) the non-disputing party has a significant interest in the arbitration; and

(d) there is a public interest in the subject-matter of the arbitration.

5. The Tribunal shall ensure that:

(a) any non-disputing party submission does not disrupt the proceedings; and

(b) neither disputing party is unduly burdened or unfairly prejudiced by such submissions.

6. The Tribunal shall decide whether to grant leave to file a non-disputing party submission. If leave to file a non-disputing party submission is granted, the Tribunal shall set an appropriate date for the disputing parties to respond in writing to the non-disputing party submission. By that date, the non-disputing Party may, pursuant to Article

34 (Participation by the Non-Disputing Party), address any issues of interpretation of this Agreement presented in the non-disputing party submission.

7. The Tribunal that grants leave to file a non-disputing party submission is not required to address the submission at any point in the arbitration, nor is the non-disputing party that files the submission entitled to make further submissions in the arbitration.

8. Access to hearings and documents by non-disputing parties that file applications under these procedures shall be governed by the provisions pertaining to public access to hearings and documents under Article 38 (Public Access to Hearings and Documents).

Article 40
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, and any award under this Section shall be consistent with such interpretation.

Article 41
Interpretation of Annexes

1. Where a disputing Party asserts as a defence that the measure alleged to be a breach is within the scope of a reservation or exception set out in Annex I, Annex II or Annex III, on request of the disputing Party, the Tribunal shall request the interpretation of the Commission on the issue. The Commission, within 60 days of delivery of the request, shall submit in writing its interpretation to the Tribunal.

2. Further to Article 40(2) (Governing Law), a Commission interpretation submitted under paragraph 1 shall be binding on the Tribunal. If the Commission fails to submit an interpretation within 60 days, the Tribunal shall decide the issue.

Article 42
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, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

Article 43
Interim Measures of Protection

A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 22 (Claim by an Investor of a Party on Its Own Behalf) or 23 (Claim by an Investor of a Party on Behalf of an Enterprise). For purposes of this paragraph, an order includes a recommendation.

Article 44
Final Award

1. Where a Tribunal makes a final award against the disputing Party, the Tribunal may award, separately or in combination, only:

(a) monetary damages and any applicable interest;

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

The tribunal may also award costs in accordance with the applicable arbitration rules.

2. Subject to paragraph 1, where a claim is made under Article 23(1) (Claim by an Investor of a Party on Behalf of an Enterprise):

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

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

(c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.

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

Article 45
Finality and Enforcement of an Award

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

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

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

(a) in the case of a final award 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) 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) 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 the disputing Party fails to abide by or comply with a final award, the Commission, on delivery of a request by the Party of the disputing investor, shall establish an arbitral panel under Section D (State-to-State Dispute Settlement Procedures). 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 disputing Party abide by or comply with the final award.

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

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

Article 46
General

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 is received by the Secretary-General;

(b) the notice of arbitration under Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General; or

(c) the notice of arbitration given under the UNCITRAL Arbitration Rules is received by the disputing Party.

Service of Documents

2. Delivery of notice and other documents on a Party shall be made to the place named for that Party below.

For Canada……

For _____ …….

Receipts under Insurance or Guarantee Contracts

3. In an arbitration under this Section, a disputing Party shall not assert, as a defence, countercla im, 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.

Article 47
Exclusions

The dispute settlement provisions of this Section and of Section D (State-to-State Dispute Settlement Procedures) shall not apply to the matters referred to in Annex IV (Exclusions from Dispute Settlement).

Annex C.26

Standard Waiver and Consent in Accordance with Article 26 of this Agreement

In the interest of facilitating the filing of waivers as required by Article 26 of this Agreement, and to facilitate the orderly conduct of the dispute resolution procedures set out in Section C, the following standard waiver forms shall be used, depending on the type of claim.

Claims filed under Article 22 (Claim by an investor of a Party on Its Own Behalf) must be accompanied by either Form 1, where the investor is a national of a Party, or Form 2, where the investor is a Party, a state enterprise thereof, or an enterprise of such Party.

Where the claim is based on loss or damage to an interest in an enterprise of the other Party that is a juridical person that the investor owns or controls directly or indirectly, either Form 1 or 2 must be accompanied by Form 3.

Claims made under Article 23 (Claim by an Investor of a Party on Behalf of an Enterprise) must be accompanied by either Form 1, where the investor is a national of a Party, or Form 2, where the investor is a Party, a state enterprise thereof, or an enterprise of such Party, and Form 4.

Form 1

Consent and waiver for an investor of a Party bringing a claim under Article 22 or Article 23 (where the investor is a national of a Party) of the Agreement between Canada and ---------- for the Promotion and Protection of Investments of (date of entry-into-force)**:**

I, (Name of investor), consent to arbitration in accordance with the procedures set out in this Agreement, and waive my right to initiate or continue before any administrative tribunal or court under the law of any Party to the Agreement, or other dispute settlement procedures, any proceedings with respect to the measure of (Name of disputing Party) that is alleged to be a breach referred to in Article 22 or Article 23, 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 (Name of disputing Party).
(To be signed and dated)

Form 2

Consent and waiver for an investor of a Party bringing a claim under Article 22 or Article 23 (where the investor is a Party, a state enterprise thereof, or an enterprise of such Party) of the Agreement between Canada and ---------- for the Promotion and Protection of Investments of (date of entry-into-force)**:**

I, (Name of declarant), on behalf of (Name of investor), consent to arbitration in accordance with the procedures set out in this Agreement, and waive the right of (Name of investor) to initiate or continue before any administrative tribunal or court under the law of any Party to the Agreement, or other dispute settlement procedures, any proceedings with respect to the measure of (Name of disputing Party) that is alleged to be a breach referred to in Article 22 or Article 23, 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 (Name of disputing Party). I hereby solemnly declare that I am duly authorised to execute this consent and waiver on behalf of (Name of investor).
(To be signed and dated)

Form 3

Waiverof an enterprise that is the subject of a claim by an investor of a Party under Article 22 of the Agreement between Canada and ---------- for the Promotion and Protection of Investments of (date of entry-into-force)**:**

I, (Name of declarant), waive the right of (Name of the enterprise) to initiate or continue before any administrative tribunal or court under the law of any Party to this Agreement, or other dispute settlement procedures, any proceedings with respect to the measure of (Name of disputing Party) that is alleged by (Name of investor) to be a breach referred to in Article 22, 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 (Name of disputing Party). I hereby solemnly declare that I am duly authorised to execute this waiver on behalf of (Name of the enterprise).
(To be signed and dated)

Form 4

Consent and waiver of an enterprise that is the subject of a claim by an investor of a Party under Article 23 of the Agreement between Canada and --------- for the Promotion and Protection of Investments of (date of entry-into-force)**:**

I, (Name of declarant), on behalf of (Name of enterprise), consent to arbitration in accordance with the procedures set out in this Agreement, and waive the right of (Name of enterprise) to initiate or continue before any administrative tribunal or court under the law of any Party to the Agreement, or other dispute settlement procedures, any proceedings with respect to the measure of (Name of disputing Party) that is alleged by (Name of investor) to be a breach referred to in Article 23, 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 (Name of disputing Party). I hereby solemnly declare that I am duly authorised to execute this consent and waiver on behalf of (Name of the enterprise).
(To be signed and dated)

Annex C.39

Submissions by Non-Disputing Parties

1. The application for leave to file a non-disputing party submission shall:

   (a) be made in writing, dated and signed by the person filing the application, and include the address and other contact details of the applicant;

   (b) be no longer than 5 typed pages;

   (c) describe the applicant, including, where relevant, its membership and legal status (*e.g.*, company, trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the applicant);

   (d) disclose whether the applicant has any affiliation, direct or indirect, with any disputing party;

   (e) identify any government, person or organization that has provided any financial or other assistance in preparing the submission;

   (f) specify the nature of the interest that the applicant has in the arbitration;

   (g) identify the specific issues of fact or law in the arbitration that the applicant has addressed in its written submission;

   (h) explain, by reference to the factors specified in Article 39(4), why the Tribunal should accept the submission; and

   (i) be made in a language of the arbitration.

2. The submission filed by a non-disputing party shall:

   (a) be dated and signed by the person filing the submission;

   (b) be concise, and in no case longer than 20 typed pages, including any appendices;

   (c) set out a precise statement supporting the applicant's position on the issues; and

   (d) only address matters within the scope of the dispute.

Section D – State-to-State Dispute Settlement Procedures

Article 48
Disputes between the Parties

1. Either Party may request consultations on the interpretation or application of this Agreement. The other Party shall give sympathetic consideration to the request. Any dispute between the Parties concerning the interpretation or application of this Agreement shall, whenever possible, be settled amicably through consultations.

2. If a dispute cannot be settled through consultations, it shall, at the request of either Party, be submitted to an arbitral panel for decision.

3. An arbitral panel shall be constituted for each dispute. Within two months after receipt through diplomatic channels of the request for arbitration, each Party shall appoint one member to the arbitral panel. The two members shall then select a national of a third State who, upon approval by the two Parties, shall be appointed Chairman of the arbitral panel. The Chairman shall be appointed within two months from the date of appointment of the other two members of the arbitral panel.

4. If within the periods specified in paragraph (3) of this Article the necessary appointments have not been made, either Party may invite the President of the International Court of Justice to make the necessary appointments. If the President is a national of either Party or is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Party or is prevented from discharging the said function, the Member of the International Court of Justice next in seniority, who is not a national of either Party, shall be invited to make the necessary appointments.

5. Arbitrators shall:

   (a) have expertise or experience in public international law, international trade or international investment rules, or the resolution of disputes arising under international trade or international investment agreements;

   (b) be independent of, and not be affiliated with or take instructions from, either Party; and

   (c) comply with any Code of Conduct for Dispute Settlement as agreed by the Commission.

6. Where a Party claims that a dispute involves measures relating to financial institutions, or to investors or investments of such investors in financial institutions, then

   (a) where the disputing Parties are in agreement, the arbitrators shall, in addition to the criteria set out in paragraph 5, have expertise or experience

in financial services law or practice, which may include the regulation of financial institutions; or

(b) where the disputing Parties are not in agreement,

(i) each disputing Party may select arbitrators who meet the qualifications set out in subparagraph (a), and

(ii) if the Party complained against invokes Articles 14(6) or 17, the chair of the panel shall meet the qualifications set out in subparagraph (a).

7. The arbitral panel shall determine its own procedure. The arbitral panel shall reach its decision by a majority of votes. Such decision shall be binding on both Parties. Unless otherwise agreed, the decision of the arbitral panel shall be rendered within six months of the appointment of the Chairman in accordance with paragraphs (3) or (4) of this Article.

8. Each Party shall bear the costs of its own member of the panel and of its representation in the arbitral proceedings; the costs related to the Chairman and any remaining costs shall be borne equally by the Parties. The arbitral panel may, however, in its decision direct that a higher proportion of costs be borne by one of the two Parties, and this award shall be binding on both Parties.

9. The Parties shall, within 60 days of the decision of a panel, reach agreement on the manner in which to resolve their dispute. Such agreement shall normally implement the decision of the panel. If the Parties fail to reach agreement, the Party bringing the dispute shall be entitled to compensation or to suspend benefits of equivalent value to those awarded by the panel.

Section E – Final Provisions

Article 49
Consultations

A Party may request in writing consultation with the other Party regarding any actual or proposed measure or any other matter that it considers might affect the operation of this Agreement.

Article 50
Extent of Obligations

The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by sub-national governments.

Article 51
Commission

1. The Parties hereby agree to establish a Commission, comprising cabinet-level representatives of the Parties or their designees.

2. The Commission shall:

(a) supervise the implementation of this Agreement;

(b) resolve disputes that may arise regarding its interpretation or application;

(c) consider any other matter that may affect the operation of this Agreement;

(d) adopt a Code of Conduct for Arbitrators.

3. The Commission may take such other action in the exercise of its functions as the Parties may agree, including amendment of the Code of Conduct for Arbitrators.

4. The Commission shall establish its rules and procedures.

Article 52
Application and Entry into Force

1. The Annexes hereto shall form integral parts hereof.

2. Each Party shall notify the other in writing of the completion of the procedures required in its territory for the entry into force of this Agreement. This Agreement shall enter into force on the date of the latter of the two notifications.

3. This Agreement shall remain in force unless either Party notifies the other Party in writing of its intention to terminate it. The termination of this Agreement shall become effective one year after notice of termination has been received by the other Party. In respect of investments or commitments to invest made prior to the date when the termination of this Agreement becomes effective, the provisions of Articles 1 to 51 inclusive, as well as paragraphs (1) and (2) of this Article, shall remain in force for a period of fifteen years.

ANNEX I

Reservations for Existing Measures and Liberalization Commitments

Schedule of Canada……
Schedule of the other Party……

ANNEX II

Reservations for Future Measures

Schedule of Canada……
Schedule of the other Party……

ANNEX III

Exceptions from Most-Favoured-Nation Treatment

1. Article 4 shall not apply to treatment accorded under all bilateral or multilateral international agreements in force or signed prior to the date of entry into of this Agreement.

2. Article 4 shall not apply to treatment by a Party pursuant to any existing or future bilateral or multilateral agreement:

(a) establishing, strengthening or expanding a free trade area or customs union;

(b) relating to:

(i) aviation;

(ii) fisheries;

(iii) maritime matters, including salvage.

3. For greater certainty, Article 4 shall not apply to any current or future foreign aid programme to promote economic development, whether under a bilateral agreement, or pursuant to a multilateral arrangement or agreement, such as the OECD Agreement on Export Credits.

Annex IV

Exclusions from Dispute Settlement

1. A decision by Canada following a review under the *Investment Canada Act*, with respect to whether or not to permit an acquisition that is subject to review, shall not be subject to the dispute settlement provisions under Sections C or D of this Agreement

2. Issues relating to the administration or enforcement of Canada's Competition Act, its regulations, policies and practices, or any successor legislation, policies and practices and any decision pursuant to the Competition Act made in any cases or patterns of cases by the Commissioner of Competition, Attorney General of Canada, the Competition Tribunal, the responsible Minister or the courts, shall not be subject to the dispute settlement provisions under Sections C or D of this Agreement.

Side letter

Code of Conduct (as agreed by the Commission)

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Section A - Definitions

Section B – Substantive Obligations

Section C - Settlement of Disputes between an Investor and the Host Party

Section D – State-to-State Dispute Settlement Procedures

Section E – Final Provisions

ANNEXES

SIDE LETTER

Colombian Model Bilateral Agreement for the Promotion and Protection of Investments, 2007

BILATERAL AGREEMENT FOR THE PROMOTION AND PROTECTION OF INVESTMENTS BETWEEN THE REPUBLIC OF COLOMBIA AND _____
COLOMBIAN MODEL AUGUST 2007

PREAMBLE

The Government of the Republic of Colombia and the Government of _____ hereinafter referred to as the "Contracting Parties";

Desiring to intensify the economic cooperation to the mutual benefit of both Contracting Parties,

Intending to create and maintain favourable conditions for the investments of investors of one Contracting Party in the territory of the other Contracting Party;

Recognizing the need to promote and protect foreign investments with the aim to foster the economic prosperity of both Contracting Parties;

Have agreed as follows:

ARTICLE I
DEFINITIONS

For the purposes of this Agreement:

1. Investor

1.1. The term "Investor" means for each of the Contracting Parties:

a. Natural persons of a Contracting Party who, according to the law of that Contracting Party, are considered to be its nationals;

b. Legal entities including companies, corporations, commercial associations and other organizations, constituted or otherwise organized according to the law of the Contracting Party and have their seat, as well as substantial business activities in the territory of the same Contracting Party;

c. Legal entities not established under the law of that Party but effectively controlled, in accordance with the law of the Party where the investment is made, by natural persons, as defined in paragraph 1.1.a or by legal entities as defined in paragraph 1.1.b.

1.2. This Agreement shall not apply to investments made by natural persons who are nationals of both Contracting Parties.

2. Investment

2.1. **Investment** means every kind of economic assets that have been invested by investors of a Contracting Party in the territory of the other Contracting Party in accordance with the law of the latter including in particular, but not exclusively, the following:

a. Movable and immovable property, as well as any other rights *in rem*, including property rights;

b. Shares, parts and any other kind of economic participation in corporations;

c. Claims to money or to any performance having an economic value;

d. Intellectual property rights, including, among others, copyrights and related rights, and industrial property rights such as patents, technical processes, manufacturers' brands and trademarks, trade names, industrial designs, know-how and goodwill;

e. Concessions granted by law, administrative act or contract, including concessions to explore, grow, extract or exploit natural resources;

f. All operations of foreign loan, as established by the law of each Contracting Party, related to an investment.

Investment does not include:

i. public debt operations;

ii. claims to money arising solely from:

a. Commercial contracts for the sale of goods and services by a national or legal entity in the territory of a Contracting Party to a national or a legal entity in the territory of the other Contracting Party; or

b. Credits granted in relation with a commercial transaction;

2.2. A change in the manner in which assets have been invested or re-invested does not affect their status as investment under this Agreement, provided that such modification is comprised within the definitions of this article and is made according to the law of the Contracting Party in whose territory the investment has been admitted.

2.3. In accordance with paragraph 1 of this Article, the minimum characteristics of an investment shall be:

a. The commitment of capital or other resources;
b. The expectation of gain or profit;
c. The assumption of risk for the investor.

3. Returns

The term "returns" means the amounts yielded by an investment during a specific period of time, in particular, but not exclusively, profits, dividends and interests.

4. Territory

The term "Territory" comprises, in addition to the land territory, the maritime space and the airspace under the sovereignty of each Contracting Party, the maritime and sub-maritime areas over which they exercise sovereign rights and jurisdiction, in accordance with respective laws and international law.

ARTICLE II
SCOPE OF APPLICATION

1. This Agreement is applicable to existing investments at the time of its entry into force, as well as to investments made thereafter in the territory of a Contracting Party in accordance with the law of the latter by investors of the other Contracting Party. For greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.

2. In case of foreign loans, this Agreement shall apply exclusively to loans contracted after this Agreement enters into force.

3. Nothing contained in this Agreement shall bind either Contracting Party to protect investments made with capital or assets derived from illegal activities, and it shall not be construed so as to prevent a Party from adopting or maintaining measures intended to preserve public order, the fulfilment of its duties for the keeping or restoration of international peace and security; or the protection of its own essential security interests.

4. The provisions of this Agreement shall not apply to tax matters.

5. Nothing contained in this Agreement shall apply to measures adopted by any Contracting Party, in accordance with its law, with respect to the financial sector for prudential reasons, including those measures aimed at protecting investors, depositors, insurance takers or trustees, or to safeguard the integrity and stability of the financial system.

ARTICLE III
PROMOTION, ADMISSION AND PROTECTION OF INVESTMENTS

1. Each Contracting Party, subject to its general policy on foreign investments, shall promote in its territory investments of investors of the other Contracting Party and shall admit them in accordance with its law.

2. Each Contracting Party shall protect within its territory investments made in accordance with its law by investors of the other Contracting Party and shall not impair with discriminatory measures the management, maintenance, use, enjoyment, extension, sale and liquidation of said investments.

3. Each Party shall accord fair and equitable treatment in accordance with customary international law, and full protection and security in its territory to investments of investors of the other Contracting Party.

4. For greater certainty,

    a. The concepts of "fair and equitable treatment" and "full protection and security" do not require additional treatment to that required under the minimum standard of treatment of aliens in accordance with the standard of customary international law.

    b. A determination that there has been a breach of another provision of this Agreement or another international agreement does not imply that the minimum standard of treatment of aliens has been breached.

    c. "Fair and equitable treatment" includes the prohibition against denial of justice in criminal, civil, or administrative proceedings in accordance with the principle of due process embodied in the main legal systems of the world.

    d. The "Full protection and security" standard does not imply, in any case, a better treatment to that accorded to nationals of the Contracting Party where the investment has been made.

ARTICLE IV

TREATMENT OF INVESTMENTS

1. Each Contracting Party shall grant to the investments of investors of the other Contracting Party made in its territory, a not less favourable treatment than that accorded, in like circumstances, to investments of its own investors or to investors of any other third State, whichever is more favourable to the investor.

2. The most favourable treatment to be granted in like circumstances referred to in this Agreement does not encompass mechanisms for the settlement of investment disputes, such as those contained in Articles IX and X of this Agreement, which are provided for in treaties or international investment agreements.

3. The provisions of this Agreement concerning the granting of a no less favourable treatment than that accorded to investments of investors of any of the Contracting Parties or of any third state shall not be construed so as to bind a Contracting Party to extend to investments of investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from: Any existing or future free trade area, customs union, common market, economic union or any other kind of economic or regional organization or any international agreement intended at facilitating border trade, which a Contracting Party is or becomes a Party to.

ARTICLE V FREE TRANSFERS

1. Each Contracting Party, prior fulfilment of the requirements under its law and without unjustified delay, shall allow investors of the other Contracting Party to effect, in a freely convertible currency, transfers of:

    a. The principal amount and additional sums necessary for maintaining, increasing and developing the investment;

    b. Returns as defined in Article 1;

    c. Payments pursuant to foreign loans;

    d. Funds yielded from settlement of disputes and compensations, as provided for in Articles VI and VII;

    e. Proceeds from the sale of all or any part of the investment, or from the partial or complete liquidation of the investment;

f. Salaries and remunerations received by the employees hired overseas in connection with an investment.

2. Transfers shall be made in conformity with the current market exchange rate on the day of the transfer, in accordance with the law of the Contracting Party in whose territory the investment has been made.

3. Notwithstanding the provisions of this Article, a Contracting Party may condition or prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:

   a. Bankruptcy proceedings, company restructuring or insolvency;
   b. Compliance with judicial, arbitral or confirmed administrative verdicts and awards;
   c. Compliance with labour or tax obligations;

4. With respect to the obligations under this Article, Colombia maintains its central bank and governmental powers and attributions to adopt measures in conformity with applicable law, including Law 9 of 1991 and Law 31 of 1992, or other regulations, in order to ensure currency stability and normality in internal and external payments, granting for these purposes powers to regulate the amount of credit and money supply, execution credit operations and foreign exchange, as well as to issuing regulations on monetary, credit, financial and foreign exchange.

   These measures include, among others, the establishment of requirements restricting or limiting payments and transfers (capital movement) to or from each Party, as well as operations related thereto, such as, establishing that deposits, investments or credits for or from the foreign market be bound to maintaining mandatory reserves or deposits. In applying such measures in accordance with the present article, Colombia shall not discriminate between the other Party and a non-Party with respect to operations of the same kind.

5. Notwithstanding the provisions of this Article, each Party, in circumstances of serious difficulties in its balance of payments, or threats thereof, may exercise equitably, on a non-discriminatory manner and in good faith, powers granted under its law to restrict or delay transfers.

ARTICLE VI EXPROPRIATION AND COMPENSATION

1. Investments of investors of a Contracting Party in the territory of the other Contracting Party will not be subject of nationalization, direct or indirect expropriation, or any measures having similar effects (hereinafter "expropriation") except for reasons of public purpose or social interest, in accordance with due process of law, in a non-discriminatory manner, in good faith and accompanied by a prompt, adequate and effective compensation

2. It is understood that:

   a. Indirect expropriation results from a measure or series of measures of a Contracting Party having an equivalent effect to direct expropriation without formal transfer of title or outright seizure;

   b. The determination of whether a measure or series of measures of a Contracting Party constitute indirect expropriation requires a case-by-case, fact-based inquiry considering:

      i) The economic impact of the measure or series of measures; however, the sole fact of a measure or series of measures having adverse effects on the economic value of an investment does not imply that an indirect expropriation has occurred;

      ii) The scope of the measure or series of measures and their interference on the reasonable and distinguishable expectations concerning the investment;

   c. Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied

for public purposes or social interest or with objectives such as public health, safety and environment protection, do not constitute indirect expropriation.

3. The compensation shall amount to the market value of the investment immediately before the expropriatory measures were adopted or immediately before the imminent measures were of public knowledge, whichever is earlier, (hereinafter the "date of value").

4. The fair market value will be calculated in a freely convertible currency, per the exchange rate on the date of the value. The compensation shall include interests at a commercially rate fixed in accordance with the market criteria for that currency, accrued from the date of expropriation until the date of payment. The compensation shall be paid without unjustified delay, be fully realizable and freely transferable.

5. The legality of the measure and the amount of the compensation may be challenged before the judicial authorities of the Contracting Party adopting it.

6. The Contracting Parties may establish monopolies and reserve strategic activities depriving investors from developing certain economic activities, provided that it is for public purposes or social interest. The investor shall receive a prompt, adequate and effective compensation, considering the conditions prescribed in the present article.

7. The Contracting Parties confirm that issuance of compulsory licenses granted in accordance with the TRIPS Agreement of the WTO, may not be challenged under the provisions set out in this Article.

ARTICLE VII COMPENSATION FOR DAMAGES OR LOSSES

Investors of a Contracting Party whose investments in the territory of the other Contracting Party suffer losses due to war, armed conflict, revolution, state of national emergency; insurrection, civil disturbances or other similar events, shall enjoy regarding restitution, indemnification, compensation or other settlement, the same or equivalent treatment as that accorded by the Contracting Party in whose territory the investment is made, to its own investors.

ARTICLE VIII.

INVESTMENT AND ENVIRONMENT

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure that it considers appropriate to ensure that an investment activity in its territory is undertaken in accordance with the environmental law of the Party, provided that such measures are proportional to the objectives sought.

ARTICLE IX

SETTLEMENT OF DISPUTES BETWEEN ONE CONTRACTING PARTY AND AN INVESTOR OF THE OTHER CONTRACTING PARTY

1. With regard to acts of a governmental authority, in order to submit a claim to arbitration under this article or to a local court or administrative tribunal, local administrative remedies shall be exhausted, should it be required by the law of the Contracting Party. Such procedure shall in no case exceed six months from the date of its initiation by the investor and shall not prevent the investor from requesting consultations as referred to in paragraph 3 of the present Article.

2. Any disputes arising between an investor of a Contracting Party and the other Contracting Party in connection to the interpretation or application of this Agreement, including a claim that the other Contracting Party has breached an obligation of this Agreement and therefore has generated damages to the investor, shall be settled, as far as possible, amicably. Any dispute shall be notified by submitting a notice of the dispute in writing, including detailed information of the facts and legal basis, by the investor to the Contracting Party receiving the investment.

3. Nothing in this Article shall be construed as to prevent the parties of a dispute from referring their dispute, by mutual agreement, to *ad hoc* or institutional mediation or conciliation before or during the arbitral proceeding.

4. If the dispute has not been settled within twelve (12) months from the date of the written notification mentioned in paragraph 2 of this Article, a notice of request for

arbitration ("request for arbitration") may be submitted, at the discretion of the investor to:

a. Competent tribunals of the Contracting Party in whose territory the investment was made; or

b. An *ad hoc* arbitral tribunal that, unless otherwise agreed by the parties, shall be established in accordance with the UNCITRAL Arbitration Rules; or

c. The International Centre for Settlement of Investment Disputes (ICSID), under the rules of the Convention on Settlement of Disputes between States and Nationals of other States, open for signature in Washington on March 18, 1965, when each of the Contracting parties has adhered to it. In the event that one of the Contracting Parties has not adhered to the mentioned Convention, the dispute may be resolved in accordance with the ICSID Rules Governing the Additional Facility for the Administration of Procedures for Conciliation, Arbitration and Fact-Finding; or

d. An arbitral tribunal under any other arbitration institution or any other arbitration rules, agreed by the Contracting Parties.

5. The disputing investor may only submit a request for arbitration if the term established in paragraph 4 of the present Article has elapsed, and the disputing investor has notified, in writing a hundred and eighty (180) days in advance, the Contracting Party of his intention to submit a request for arbitration ("notice of intent"). Such a notice shall indicate the name and address of the disputing investor, the provisions of the Agreement which he deems to be breached, the facts which the dispute is based on, the estimated value of the damages and the compensation sought.

6. Each Contracting Party hereby gives in advance its irrevocable consent to the submission of a dispute of this nature to any of the arbitral proceedings established in paragraph 4.b. and c. of this Article.

7. Once the investor has submitted the dispute to either a competent tribunal of the Contracting Party in whose territory the investment has been admitted or any of the arbitration mechanisms stated above, the choice of the procedure shall be final.

8. Arbitration awards shall be final and binding for the disputing parties and shall be enforced, when required, in accordance with the law of the Contracting Party in whose territory the investment was made.

9. The Contracting Parties shall refrain from pursuing through diplomatic channels matters related to disputes between a Contracting Party and an investor of the other Contracting Party submitted to court proceedings or international arbitration, in accordance with the provisions of this article, unless one of the parties to the dispute has failed to comply with the court decision or arbitral award, under the terms established in the respective decision or arbitral award.

10. An investor may not file a complaint if more than three years have elapsed since the date the investor had knowledge or should have had knowledge of the alleged violation to this Agreement, as well as of the alleged losses and damages.

11. An investor of one of the Contracting Parties may submit a complaint to arbitration on the basis of: a) a breach by the other Party of a provision established in this Agreement, and b) losses or damages to the investment as a result of the abovementioned breach.

12. The dispute settlement mechanisms provided in this Agreement will be based on the provisions of the present Agreement, the national law of the Contracting Party in whose territory the investment has been made, including the rules related to conflict of laws, on the general principles of law and international customary law.

13. Before ruling on the merits, the tribunal shall rule on the preliminary questions of competence and admissibility.
When deciding about the objection of the respondent, the tribunal shall rule on the costs and fees of attorneys incurred during the proceedings, considering whether or not the objection prevailed.
The tribunal shall consider whether either the claim of the claimant or the objection of the respondent is frivolous, and shall provide the disputing parties a reasonable

opportunity for comments. In the event of a frivolous claim the tribunal shall award costs against the claimant.

14. A tribunal ruling a final award against a respondent may only award monetary damages and any applicable interests; and may award costs and fees of attorneys in accordance with this Article and applicable arbitration rules. The tribunal shall not be competent to rule on the legality of the measure as a matter of domestic law.

15. The presentation of the notice of intent and other documents to a Party will be done in the place designated by that Party en the Annex I. (Presentation of Documents Regarding Article IX)

ARTICLE X

SETTLEMENT OF DISPUTES BETWEEN THE CONTRACTING PARTIES

1. Disputes arising between the Contracting Parties regarding the interpretation and application of this Agreement, including a claim alleging that the other Contracting Party has breached an obligation of the present Agreement and has consequently generated damages to an investor, shall be settled, as far as possible, through direct negotiations.

2. If an agreement is not reached within six (6) months from the date on which the dispute was notified, any of the Contracting Parties may submit the dispute to an *ad-hoc* Arbitration Tribunal, in accordance with the provisions of this Article.

3. The Arbitration Tribunal shall be comprised of three members and, unless otherwise agreed between the Parties, shall be established as follows: within two (2) months from the date of notification of the arbitration request, each Contracting Party shall appoint an arbitrator. Those two arbitrators shall then, within three (3) months from the date of the last appointment, agree upon a third member who shall be a national of a third State with which both Contracting Parties maintain diplomatic relations, and who shall be preside over the tribunal. The appointment of the President shall be approved by the Contracting Parties within thirty (30) days from the date of his nomination.

4. If, the necessary appointments are not made within the deadline provided for in paragraph (3) of this Article, either Contracting Party, unless otherwise agreed, may request the President of the International Court of Justice to make the necessary appointments. If the President of the International Court of Justice is prevented, for any reason, from performing the abovementioned duty or if that person is a national of either Contracting Party, the appointments shall be made by the Vice-president of the International Court of Justice, and if the latter is prevented or if that person is a national of either Contracting Party, the appointments shall be made by the most senior Judge of the Court of Justice who is not a national of either of the Contracting Parties.

5. The Arbitration tribunal shall rule based on the provisions of this Agreement and principles of International Law applicable to the subject matter. The Tribunal shall reach its decisions by a majority of votes and shall determine its own procedural rules.

6. Each of the Contracting Parties shall equally bear the costs of the arbitrators and the arbitral proceeding, unless otherwise established. The decisions of the tribunal shall be final and binding for the Contracting Parties.

ARTICLE XI OTHER PROVISIONS

If, from legal provisions of a Contracting Party or from current or future obligations derived from international law different from those contained in this Agreement, a general or particular regulation results between the Contracting Parties thereby providing a more favourable treatment to the investment of investors than that foreseen in the present Agreement, the aforementioned regulation shall prevail over this Agreement, to the extent that it is more favourable.

ARTICLE XII CONSULTATIONS

The Contracting Parties shall consult with each other concerning any matter related to the application or interpretation of this Agreement.

ARTICLE XIII FINAL PROVISIONS

1. The Contracting Parties shall notify each other of the compliance of the internal requirements of each of the Contracting Parties in connection to the entry into force of this Agreement. This Agreement shall enter into force sixty (60) days after the date of receipt of the latter notification.

2. This Agreement shall remain in force for a ten (10) year period and shall be extended indefinitely thereafter. After ten years, this Agreement may be denounced at any time by any of the Contracting Parties, by serving a twelve-month prior notice, sent through diplomatic channels.

3. With respect to investments admitted before the date on which the notice of termination of this Agreement becomes effective, the provisions of this Agreement shall remain in force for an additional term of ten (10) years from such a date.

EXPLANATION OF SOME ISSUES OF THE BIT MODEL

ARTICLE II
SCOPE OF APPLICATION

Paragraph

3. Nothing contained in this Agreement shall bind either Contracting Party to protect investments made with capital or assets derived from illegal activities, and it shall not be construed so as to prevent a Party from adopting or maintaining measures intended to preserve public order, the fulfilment of its duties for the keeping or restoration of international peace and security; or the protection of its own essential security interests.

Explanation

According to the Colombian Constitution the State shall have the possibility of guarantying public order, as set out in article 100 which reads as follows:

> *"Aliens in Colombia will enjoy the same civil rights as Colombian citizens. Notwithstanding, for reasons of public order, the law may impose special conditions on or nullify the exercise of specific civil rights by aliens.*
>
> *Similarly, aliens will enjoy, in the territory of the Republic, guarantees granted to citizens, except for the limitations established by the Constitution or the law".*

This concept has been developed by the Constitutional Court in its jurisprudence.

Paragraph

4. The provisions of this Agreement shall not apply to tax matters.

Explanation

It is policy of Colombia to treat tax matters in double taxation treaties.

ARTICLE V FREE TRANSFERS

Paragraph

2. Notwithstanding the aforesaid, due to reasons affecting the macroeconomic balance, the Contracting Parties may establish measures related to capital inflows of foreign loans and/or involving an extra-charge to payments in advance of such loans,

ANNEX I

Presentation of Documents to a Party Regarding Article VIII

Name of the Country

The place of presentation of the notice of intent and other documents concerning settlement of disputes regarding article VIII, in (Name of the Country) is:

Public entity designated
Address
City, Country

Colombia

The place of presentation of the notice of intent and other documents concerning settlement of disputes regarding article VIII, in Colombia is:

Dirección de Inversión Extranjera y Servicios
Ministerio de Comercio, Industria y Turismo
Calle 28 # 13 A – 15
Bogotá D.C. – Colombia

provided that the application of such measures is equitable, non discriminatory and in good faith.

5. Notwithstanding the provisions of this Article, each Contracting Party, in serious difficulties in its balance of payments, or threats thereof, may exercise equitably, on a non-discriminatory basis and in good faith, powers conferred under its law to restrict or delay transfers.

Explanation

The Central Bank has constitutional powers, set out, among others, in articles 371 and 372 of the Colombian Constitution. These powers are prescribed and safeguarded by these clauses which have been fully recognized by the Constitutional Court.

ARTICLE VI EXPROPIATION AND COMPENSATION

Paragraph

1. Investments of investors of a Contracting Party in the territory of the other Contracting Party will not be subject of nationalization, direct or indirect expropriation, or any measures having similar effects (hereinafter "expropriation") except for reasons of public purpose or social interest, in accordance with due process of law, in a non-discriminatory manner, in good faith and accompanied by a prompt, adequate and effective compensation.

Explanation

Article 58 of the Colombian Constitution protects private property. However, it recognizes the right of expropriating for public purposes or social interest as defined by the legislator. This position has been confirmed by the Constitutional Court in its jurisprudence.

Paragraph

6. The Contracting Parties may establish monopolies and reserve strategic activities depriving investors from developing certain economic activities, provided that it is for public purposes or social interest. The investor shall receive a prompt, adequate and effective compensation, considering the conditions prescribed in the present article.

Explanation

In accordance with articles 336 and 365 of the Colombian Constitution the State may establish monopolies to obtain proceeds for public or social interest, or to reserve itself certain strategic activities or public services due to reasons of sovereignty or social interest. In any of such cases, authorization from Congress through the passing of a law and previous compensation, to those whom under such a law are deprived of exercising a lawful activity, are required.

ARTICLE VIII SETTLEMENT OF DISPUTES BETWEEN ONE CONTRACTING PARTY AND AN INVESTOR OF THE OTHER CONTRACTING PARTY

Paragraph

1. With regard to acts of a governmental authority, in order to submit a claim to arbitration under this article or to a local court or administrative tribunal, local administrative remedies shall be exhausted, should it be required by the law of the Contracting Party. Such procedure shall in no case exceed six months from the date of its initiation by the investor and shall not prevent the investor from requesting consultations as referred to in paragraph 3 of the present Article.

Explanation

The exhaustion of non-judicial administrative local remedies does not imply the exhaustion of judicial local remedies.

The objective of this provision is providing transparency to the procedure that the investor is required to exhaust in accordance with domestic law, which is equally applied to nationals and aliens, prior to the submission of the dispute to international arbitration.

The basis of this provision consists of:

a. Internal legal order:

In accordance with the Colombian legal order (Art. 35 CCA) the exhaustion of non-judicial administrative local remedies is compulsory before referring a dispute to local courts. As established in the jurisprudence, this procedure should be understood as a chance granted to governmental authorities of reviewing its own measures "so as to enable governmental authorities to review, modify, clarify and even revoke the initial measures, thereby permitting amending its mistakes and reinstating those rights of the party affected."

b. Benefits for investors:

The exhaustion of local administrative remedies does not create any damage, unlike the perception that may exist with regard to exhausting judicial local remedies because:

a. Economy: For the investor the exhaustion of local administrative remedies constitutes an chance that its requests be considered without the major costs that may be generated by a court or arbitral tribunal.

b. Celerity: This procedure is done in less than five months.

c. Due process of law: The decisions resulting from the exhaustion of administrative local remedies are not *res judicata*, and therefore the investor may, once the administrative local remedies are exhausted, submit the dispute to any local courts or arbitration as provided in this Agreement.

German Model Treaty concerning the Encouragement and Reciprocal Protection of Investment, 2008

Treaty

between

the Federal Republic of Germany

and

.....

concerning

the Encouragement and Reciprocal Protection of Investments

Federal Ministry for Economics and Technology

The Federal Republic of Germany

and

..... –

desiring to intensify economic co-operation between the two States,

intending to create favourable conditions for investments by investors of either State in the territory of the other State,

recognizing that the encouragement and contractual protection of such investments are apt to stimulate private business initiative and to increase the prosperity of both nations –

have agreed as follows:

Article 1
Definitions

Within the meaning of this Treaty,

1. the term "investments" comprises every kind of asset which is directly or indirectly invested by investors of one Contracting State in the territory of the other Contracting State. The investments include in particular:

   (a) movable and immovable property as well as any other rights in rem, such as mortgages, liens and pledges;

   (b) shares of companies and other kinds of interest in companies;

(c) claims to money which has been used to create an economic value or claims to any performance having an economic value;

(d) intellectual property rights, in particular copyrights and related rights, patents, utility-model patents, industrial designs, trademarks, plant variety rights;

(e) trade-names, trade and business secrets, technical processes, know-how, and good-will;

(f) business concessions under public law, including concessions to search for, extract or exploit natural resources;

any alteration of the form in which assets are invested shall not affect their classification as investment. In the case of indirect investments, in principle only those indirect investments shall be covered which the investor realizes via a company situated in the other Contracting State;

2. the term "returns" means the amounts yielded by an investment for a definite period, such as profit, dividends, interest, royalties or fees;

3. the term "investor" means

(a) in respect of the Federal Republic of Germany:

– any natural person who is a German within the meaning of the Basic Law of the Federal Republic of Germany or a national of a Member State of the European Union or of the European Economic Area who, within the context of freedom of establishment pursuant to Article 43 of the EC Treaty, is established in the Federal Republic of Germany;

– any juridical person and any commercial or other company or association with or without legal personality which is founded pursuant to the law of the Federal Republic of Germany or the law of a Member State of the European Union or the European Economic Area and is organized pursuant to the law of the Federal Republic of Germany, registered in a public register in the Federal Republic of Germany or enjoys freedom of establishment as an agency or permanent establishment in Germany pursuant to Articles 43 and 48 of the EC Treaty;

which in the context of entrepreneurial activity is the owner, possessor or shareholder of an investment in the territory of the other Contracting State, irrespective of whether or not the activity is directed at profit;

(b) in respect of .....:

– ……

– ……

4. the term "territory" refers to the area of each Contracting State including the exclusive economic zone and the continental shelf insofar as international law allows the Contracting State concerned to exercise sovereign rights or jurisdiction in these areas.

Article 2

Admission and protection of investments

(1) Each Contracting State shall in its territory promote as far as possible investments by investors of the other Contracting State and admit such investments in accordance with its legislation.

(2) Each Contracting State shall in its territory in every case accord investments by investors of the other Contracting State fair and equitable treatment as well as full protection under this Treaty.

(3) Neither Contracting State shall in its territory impair by arbitrary or discriminatory measures the activity of investors of the other Contracting State with regard to investments, such as in particular the management, maintenance, use, enjoyment or disposal of such investments. This provision shall be without prejudice to Article 7 (3).

(4) Returns from an investment, as well as returns from reinvested returns, shall enjoy the same protection as the original investment.

Article 3

National and most-favoured-nation treatment

(1) Neither Contracting State shall in its territory subject investments owned or controlled by investors of the other Contracting State to treatment less favourable than it accords to investments of its own investors or to investments of investors of any third State.

(2) Neither Contracting State shall in its territory subject investors of the other Contracting State, as regards their activity in connection with investments, to treatment less favourable than it accords to its own investors or to investors of any third State. The following shall, in particular, be deemed treatment less favourable within the meaning of this Article:

1. different treatment in the event of restrictions on the procurement of raw or auxiliary materials, of energy and fuels, and of all types of means of production and operation;

2. different treatment in the event of impediments to the sale of products at home and abroad; and

3. other measures of similar effect.

Measures that have to be taken for reasons of public security and order shall not be deemed treatment less favourable within the meaning of this Article.

(3) Such treatment shall not relate to privileges which either Contracting State accords to investors of third States on account of its membership of, or association with, a customs or economic union, a common market or a free trade area.

(4) The treatment granted under this Article shall not relate to advantages which either Contracting State accords to investors of third States by virtue of an agreement for the avoidance of double taxation in the field of taxes on income and assets or other agreements regarding matters of taxation.

(5) This Article shall not oblige a Contracting State to extend to investors resident in the territory of the other Contracting State tax privileges, tax exemptions and tax reductions which according to its tax laws are granted only to investors resident in its territory.

(6) The Contracting States shall within the framework of their national legislation give sympathetic consideration to applications for the entry and sojourn of persons of either Contracting State who wish to enter the territory of the other Contracting State in connection with an investment; the same shall apply to employed persons of either Contracting State who in connection with an investment wish to enter the territory of the other Contracting State and sojourn there to take up employment. Where necessary, applications for work permits shall also be given sympathetic consideration.

(7) Notwithstanding any bilateral or multilateral agreements which are binding on both Contracting States, the investors of the Contracting States are free to select the means of transport for the international transportation of persons and of capital goods directly related to an investment within the meaning of this Treaty. Transport companies of the Contracting States shall not be discriminated against thereby.

Article 4

Compensation in case of expropriation

(1) Investments by investors of either Contracting State shall enjoy full protection and security in the territory of the other Contracting State.

(2) Investments by investors of either Contracting State may not directly or indirectly be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting State except for the public benefit and against compensation. Such compensation must be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation, nationalization or other measure became publicly known. The compensation must be paid without delay and shall carry the usual bank interest until the time of payment; it must be effectively realizable and freely transferable. Provision must have been made in an appropriate manner at or prior to the time of expropriation, nationalization or other measure for the determination and payment of such compensation. The legality of any such expropriation, nationalization or other measure and the amount of compensation must be subject to review by due process of law.

(3) Investors of either Contracting State whose investments suffer losses in the territory of the other Contracting State owing to war or other armed conflict, revolution, a state of national emergency, or revolt, shall be accorded treatment no less favourable by such other Contracting State than that State accords to its own investors as regards restitution, indemnification, compensation or other valuable consideration. Such payments must be freely transferable.

(4) Investors of either Contracting State shall enjoy most-favoured-nation treatment in the territory of the other Contracting State in respect of the matters provided for in the present Article.

Article 5

Free transfer

(1) Each Contracting State shall guarantee to investors of the other Contracting State the free transfer of payments in connection with an investment, in particular

1. the principal and additional amounts to maintain or increase the investment;
2. the returns;
3. the repayment of loans;
4. the proceeds from the liquidation or the sale of the whole or any part of the investment;
5. the compensation provided for in Article 4.

(2) Transfers under Article 4 (2) or (3), under the present Article or Article 6, shall be made without delay at the market rate of exchange applicable on the day of the transfer. A transfer shall be deemed to have been made without delay if made within such period as is normally required for the completion of transfer formalities. The period shall commence with the submission of the corresponding application, where such an application is necessary, or the notification of the intended transfer, and must in no circumstances exceed two months.

(3) Should it not be possible to ascertain a market rate pursuant to paragraph (2), the cross rate obtained from those rates which would be applied by the International Monetary Fund on the

date of payment for conversions of the currencies concerned into Special Drawing Rights shall apply.

Article 6
Subrogation

If either Contracting State makes payment to any of its investors under a guarantee it has assumed in respect of an investment in the territory of the other Contracting State, the latter Contracting State shall, without prejudice to the rights of the former Contracting State under Article 9, recognize the assignment, whether under a law or pursuant to a legal transaction, of any right or claim from such investors to the former Contracting State. Furthermore, the latter Contracting State shall recognize the subrogation of that Contracting State to any such right or claim (assigned claim), which that Contracting State shall be entitled to assert to the same extent as its predecessor in title. As regards the transfer of payments on the basis of such assignment, Article 4 (1) and (2) and Article 5 shall apply mutatis mutandis.

Article 7
Other provisions

(1) If the legislation of either Contracting State or international obligations existing at present or established hereafter between the Contracting States in addition to this Treaty contain any provisions, whether general or specific, entitling investments by investors of the other Contracting State to a treatment more favourable than is provided for by this Treaty, such provisions shall prevail over this Treaty to the extent that they are more favourable.

(2) Each Contracting State shall fulfil any other obligations it may have entered into with regard to investments in its territory by investors of the other Contracting State.

(3) With regard to the treatment of income and assets for the purpose of taxation, precedence shall be given to the application of the agreements in force at the time between the Federal Republic of Germany and … for the avoidance of double taxation in the field of taxes on income and assets.

Article 8
Scope of application

This Treaty shall also apply to investments made prior to its entry into force by investors of either Contracting State in the territory of the other Contracting State consistent with the latter's legislation.

Article 9
Settlement of disputes between the Contracting States

(1) Disputes between the Contracting States concerning the interpretation or application of this Treaty should as far as possible be settled by the Governments of the two Contracting States.

(2) If a dispute cannot thus be settled, it shall upon the request of either Contracting State be submitted to an arbitral tribunal.

(3) The arbitral tribunal shall be constituted for each case as follows: each Contracting State shall appoint one member, and these two members shall agree upon a national of a third State as their chairman to be appointed by the Governments of the two Contracting States. The members shall be appointed within two months, and the chairman within three months, from the date on which either Contracting State has informed the other Contracting State that it wants to submit the dispute to an arbitral tribunal.

(4) If the periods specified in paragraph (3) have not been observed, either Contracting State may, in the absence of any other relevant agreement, invite the President of the International Court of Justice to make the necessary appointments. If the President is a national of either Contracting State or if he is otherwise prevented from discharging the said function, the Vice-President should make the necessary appointments. If the Vice-President is a national of either Contracting State or if he, too, is prevented from discharging the said function, the Member of the Court next in seniority who is not a national of either Contracting State should make the necessary appointments.

(5) The arbitral tribunal shall reach its decisions by a majority of votes. Its decisions shall be binding. Each Contracting State shall bear the cost of its own member and of its representatives in the arbitration proceedings; the cost of the chairman and the remaining costs shall be borne in equal parts by the Contracting States. The arbitral tribunal may make a different regulation concerning costs. In all other respects, the arbitral tribunal shall determine its own procedure.

Article 10

Settlement of disputes between a Contracting State
and an investor of the other Contracting State

(1) Disputes concerning investments between a Contracting State and an investor of the other Contracting State should as far as possible be settled amicably between the parties to the dispute. To help them reach an amicable settlement, the parties to the dispute also have the option of agreeing to institute conciliation proceedings under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID).

(2) If the dispute cannot be settled within six months of the date on which it was raised by one of the parties to the dispute, it shall, at the request of the investor of the other Contracting State, be submitted to arbitration. The two Contracting States hereby declare that they unreservedly and bindingly consent to the dispute being submitted to one of the following dispute settlement

mechanisms of the investor's choosing:

1. arbitration under the auspices of the International Centre for Settlement of Investment Disputes pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID), provided both Contracting States are members of this Convention, or

2. arbitration under the auspices of the International Centre for Settlement of Investment Disputes pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID) in accordance with the Rules on the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre, where the personal or factual preconditions for proceedings pursuant to figure 1 do not apply, but at least one Contracting State is a member of the Convention referred to therein, or

3. an individual arbitrator or an ad-hoc arbitral tribunal which is established in accordance with the rules of the United Nations Commission on International Trade Law (UNCITRAL) as in force at the commencement of the proceedings, or

4. an arbitral tribunal which is established pursuant to the Dispute Resolution Rules of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) or the Arbitration Institute of the Stockholm Chamber of Commerce, or

5. any other form of dispute settlement agreed by the parties to the dispute.

(3) The award shall be binding and shall not be subject to any appeal or remedy other than those provided for in the Convention or arbitral rules on which the arbitral proceedings chosen by the investor are based. The award shall be enforced by the Contracting States as a final and absolute ruling under domestic law.

(4) Arbitration proceedings pursuant to this Article shall take place at the request of one of the parties to the dispute in a State which is a Contracting Party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958.

(5) During arbitration proceedings or the enforcement of an award, the Contracting State involved in the dispute shall not raise the objection that the investor of the other Contracting State has received compensation under an insurance contract in respect of all or part of the damage.

Article 11

Relations between the Contracting States

This Treaty shall be in force irrespective of whether or not diplomatic or consular relations exist between the Contracting States.

Article 12

Registration clause

Registration of this Treaty with the Secretariat of the United Nations, in accordance with Article 102 of the United Nations Charter, shall be initiated immediately following its entry into force by the Contracting State in which the signing took place. The other Contracting State shall be informed of registration, and of the UN registration number, as soon as this has been confirmed by the Secretariat of the United Nations.

Article 13

Entry into force, duration and notice of termination

(1) This Treaty shall be subject to ratification; the instruments of ratification shall be exchanged as soon as possible.

(2) This Treaty shall enter into force on the first day of the second month following the exchange of the instruments of ratification. It shall remain in force for a period of ten years and shall continue in force thereafter for an unlimited period unless denounced in writing through diplomatic channels by either Contracting State twelve months before its expiration. After the expiry of the period of ten years this Treaty may be denounced at any time by either Contracting State giving twelve months' notice.

(3) In respect of investments made prior to the date of termination of this Treaty, the provisions of the above Articles shall continue to be effective for a further period of twenty years from the date of termination of this Treaty.

Done in on in duplicate in the German and ..... languages, both texts being equally authentic.

For the Federal Republic of Germany	For .....

Indian Model Agreement for the Promotion and Protection of Investments, 2003

Indian Model Text of BIPA

AGREEMENT

BETWEEN

THE GOVERNMENT OF THE REPUBLIC OF

INDIA

AND

THE GOVERNMENT OF THE REPUBLIC OF

FOR

THE PROMOTION AND PROTECTION

OF INVESTMENTS

The Government of the Republic of India and the Government of the Republic of (hereinafter referred to as the "Contracting Parties");

Desiring to create conditions favourable for fostering greater investment by investors of one State in the territory of the other State;

Recognising that the encouragement and reciprocal protection under International agreement of such investment will be conducive to the stimulation of individual business initiative and will increase prosperity in both States;

Have agreed as follows:

ARTICLE 1

Definitions

For the purposes of this Agreement:

(a) "Companies" means:

(i) in respect of India : corporations, firms and associations incorporated or constituted or established under the law in force in any part of India;

(ii) in respect of

(b) "investment" means every kind of asset established or acquired including changes in the form of such investment, in accordance with the national laws of the Contracting Party in whose territory the investment is made and in particular, though not exclusively, includes:

(i) movable and immovable property as well as other rights such as mortgages, liens or pledges;

(ii) shares in and stock and debentures of a company and any other similar forms of participation in a company;

(iii) rights to money or to any performance under contract having a financial value;

(iv) intellectual property rights, in accordance with the relevant laws of the respective Contracting Party;

(v) business concessions conferred by law or under contract, including concessions to search for and extract oil and other minerals;

(c) "investors" means any national or company of a Contracting Party;

(d) " nationals" means:

(i) In respect of India : persons deriving their status as Indian nationals from the law in force in India;

(ii) In respect of

(e) "returns" means the monetary amounts yielded by an investment such as profit, interest, capital gains, dividends, royalties and fees;

(f) "territory" means:

(a) in respect of India : the territory of the Republic of India including its territorial waters and the airspace above it and other maritime zones including the Exclusive Economic Zone and continental shelf over which the Republic of India has sovereignty, sovereign rights or exclusive jurisdiction in accordance with its laws in force, the l982 United Nations Convention on the Law of the Sea and International Law.

(b) in respect of

ARTICLE 2

Scope of the Agreement

This Agreement shall apply to all investments made by investors of either Contracting Party in the territory of the other Contracting Party, accepted as such in accordance with its laws and regulations, whether made before or after the coming into force of this Agreement.

ARTICLE 3

Promotion and Protection of Investment

(1) Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its territory, and admit such investments in accordance with its laws and policy.

(2) Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party.

ARTICLE 4

National Treatment and Most-Favoured-Nation Treatment

(l) Each Contracting Party shall accord to investments of investors of the other Contracting Party, treatment which shall not be less favourable than that

accorded either to investments of its own or investments of investors of any third State.

(2) In addition, each Contracting Party shall accord to investors of the other Contracting Party, including in respect of returns on their investments, treatment which shall not be less favourable than that accorded to investors of any third State.

(3) The provisions of paragraphs (l) and (2) above shall not be construed so as to oblige one Contracting Party to extend to the investors of the other the benefit of any treatment, preference or privilege resulting from:

(a) any existing or future customs unions or similar international agreement to which it is or may become a party, or

(b) any matter pertaining wholly or mainly to taxation.

ARTICLE 5

Expropriation

(1) Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as " expropriation") in the territory of the other Contracting Party except for a public purpose in accordance with law on a non-discriminatory basis and against fair and equitable compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a fair and equitable rate until the date of payment, shall be made without unreasonable delay, be effectively realizable and be freely transferable.

(2) The investor affected shall have right, under the law of the Contracting Party making the expropriation, to review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph. The Contracting Party making the expropriation shall make every endeavour to ensure that such review is carried out promptly.

(3) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which investors of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to ensure fair and equitable compensation in respect of their investment to such investors of the other Contracting Party who are owners of those shares.

ARTICLE 6

Compensation for Losses

Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, a state of national emergency or civil disturbances in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State. Resulting payments shall be freely transferable.

ARTICLE 7

Repatriation of Investment and Returns

(l) Each Contracting Party shall permit all funds of an investor of the other Contracting Party related to an investment in its territory to be freely transferred, without unreasonable delay and on a non-discriminatory basis. Such funds may include:

(a) Capital and additional capital amounts used to maintain and increase investments;

(b) Net operating profits including dividends and interest in proportion to their share-holdings;

(c) Repayments of any loan including interest thereon, relating to the investment;

(d) Payment of royalties and services fees relating to the investment;

(e) Proceeds from sales of their shares;

(f) Proceeds received by investors in case of sale or partial sale or liquidation;

(g) The earnings of citizens/nationals of one Contracting Party who work in connection with investment in the territory of the other Contracting Party.

(2) Nothing in paragraph (l) of this Article shall affect the transfer of any compensation under Article 6 of this Agreement.

(3) Unless otherwise agreed to between the parties, currency transfer under paragraph (1) of this Article shall be permitted in the currency of the original Investment or any other convertible currency. Such transfer shall be made at the prevailing market rate of exchange on the date of transfer.

ARTICLE 8

Subrogation

Where one Contracting Party or its designated agency has guaranteed any indemnity against non-commercial risks in respect of an investment by any of its investors in the territory of the other Contracting Party and has made payment to such investors in respect of their claims under this Agreement, the other Contracting Party agrees that the first Contracting Party or its designated agency is entitled by virtue of subrogation to exercise the rights and assert the claims of those investors. The subrogated rights or claims shall not exceed the original rights or claim of such investors.

ARTICLE 9

Settlement of Disputes Between an Investor and a Contracting Party

(1) Any dispute between an investor of one Contracting Party and the

other Contracting Party in relation to an investment of the former under this Agreement shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.

(2) Any such dispute which has not been amicably settled within a period of six months may, if both Parties agree, be submitted:

(a) for resolution, in accordance with the law of the Contracting Party which has admitted the investment to that Contracting Party's competent judicial, arbitral or administrative bodies; or

(b) to International conciliation under the Conciliation Rules of the United Nations Commission on International Trade Law.

(3) Should the Parties fail to agree on a dispute settlement procedure provided under paragraph (2) of this Article or where a dispute is referred to conciliation but conciliation proceedings are terminated other than by signing of a settlement agreement, the dispute may be referred to Arbitration. The Arbitration procedure shall be as follows:

(a) If the Contracting Party of the Investor and the other Contracting Party are both parties to the convention on the Settlement of Investment Disputes between States and nationals of other States, 1965 and the investor consents in writing to submit the dispute to the International Centre for the Settlement of Investment Disputes such a dispute shall be referred to the Centre; or

(b) If both parties to the dispute so agree, under the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding proceedings; or

(c) to an ad hoc arbitral tribunal by either party to the dispute in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, 1976, subject to the following modifications:

(i) The appointing authority under Article 7 of the Rules shall be the President, the Vice-President or the next senior Judge of the International Court of Justice, who is not a national of either Contracting Party. The third arbitrator shall not be a national of either Contracting party.

(ii) The parties shall appoint their respective arbitrators within two months.

(iii) The arbitral award shall be made in accordance with the provisions of this Agreement and shall be binding for the parties in dispute.

(iv) The arbitral tribunal shall state the basis of its decision and give reasons upon the request of either party.

ARTICLE 10

Disputes Between the Contracting Parties

(1) Disputes between the Contracting Parties concerning the interpretation or application of this Agreement should, as far as possible, be settled through negotiation.

(2) If a dispute between the Contracting Parties cannot thus be settled within six months from the time the dispute arose, it shall upon the request of either Contracting Party be submitted to an arbitral tribunal.

(3) Such an arbitral tribunal shall be constituted for each individual case in the following way. Within two months of the receipt of the request for arbitration, each Contracting Party shall appoint one member of the tribunal. Those two members shall then select a national of a third State who on approval by the two Contracting Parties shall be appointed Chairman of the tribunal. The Chairman shall be appointed within two months from the date of appointment of the other two members.

(4) If within the periods specified in paragraph (3) of this Article the necessary appointments have not been made, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointments. If the President is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice President shall be invited to make the necessary appointments. If the Vice President is a national of either Contracting Party or if he too is prevented from discharging the said function, the Member of the International Court of Justice next in seniority who is not a national of either Contracting Party shall be invited to make the necessary appointments.

(5) The arbitral tribunal shall reach its decision by a majority of votes. Such decisions shall be binding on both Contracting Parties. Each Contracting Party shall bear the cost of its own member of the tribunal and of its representation in the arbitral proceedings; the cost of the Chairman and the remaining costs shall be borne in equal parts by the Contracting Parties. The tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the two Contracting Parties, and this award shall be binding on both Contracting Parties. The tribunal shall determine its own procedures.

ARTICLE 11

Entry and Sojourn of Personnel

A Contracting Party shall, subject to its laws applicable from time to time relating to the entry and sojourn of non-citizens, permit natural persons of the other Contracting Party and personnel employed by companies of the other Contracting Party to enter and remain in its territory for the purpose of engaging in activities connected with investments.

ARTICLE 12

Applicable Laws

(1) Except as otherwise provided in this Agreement, all investment shall be governed by the laws in force in the territory of the Contracting Party in which such investments are made.

(2) Notwithstanding paragraph (1) of this Article nothing in this Agreement precludes the host Contracting Party from taking action for the protection of its essential security interests or in circumstances of extreme emergency in accordance with its laws normally and reasonably applied on a non discriminatory basis.

ARTICLE l3

Application of other Rules

If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment

more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement.

ARTICLE l4

Entry into Force

This Agreement shall be subject to ratification and shall enter into force on the date of exchange of Instruments of Ratification.

ARTICLE l5

Duration and Termination

(1) This agreement shall remain in force for a period of ten years and thereafter it shall be deemed to have been automatically extended unless either Contracting Party gives to the other Contracting Party a written notice of its intention to terminate the Agreement. The Agreement shall stand terminated one year from the date on receipt of such written notice.

(2) Notwithstanding termination of this Agreement pursuant to paragraph (1) of this Article, the Agreement shall continue to be effective for a further period of fifteen years from the date of its termination in respect of investments made or acquired before the date of termination of this Agreement.

In witness whereof the undersigned, duly authorised thereto by their respective Governments, have signed this Agreement.

Done at on this 2003 in two originals each in the Hindi and English languages, both the texts being equally authoritative.

In case of any divergence, the English text shall prevail.

For the Government of the Republic of India	For the Government of the Republic of

United Kingdom Model Bilateral Investment Treaty, 2005
(with 2006 amendments)

Appendix 10

United Kingdom Model BIT (2005, with 2006 amendments)

Draft Agreement Between The Government of The United Kingdom of Great Britain and Northern Ireland and The Government of [Country] for The Promotion and Protection of Investments

The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of [country];

Desiring to create favourable conditions for greater investment by nationals and companies of one State in the territory of the other State;

Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both States;

Have agreed as follows:

Article 1 Definitions

For the purposes of this Agreement:

(a) "investment" means every kind of asset, owned or controlled directly or indirectly, and in particular, though not exclusively, includes:
  (i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
  (ii) shares in and stock and debentures of a company and any other form of participation in a company;
  (iii) claims to money or to any performance under contract having a financial value;
  (iv) intellectual property rights, goodwill, technical processes and know-how;
  (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

  A change in the form in which assets are invested does not affect their character as investments and the term "investment" includes all investments, whether made before or after the date of entry into force of this Agreement;

(b) "returns" means the amounts yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties and fees;

(c) "nationals" means:
  (i) in respect of the United Kingdom: physical persons deriving their status as United Kingdom nationals from the law in force in the United Kingdom;
  (ii) in respect of [country];

(d) "companies" means:
  (i) in respect of the United Kingdom: corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 12;
  (ii) in respect of [country];

(e) "territory" means:
  (i) in respect of the United Kingdom: Great Britain and Northern Ireland, including the territorial sea and maritime area situated beyond the territorial sea of the United Kingdom which has been or might in the future be designated under the national law of the United Kingdom in accordance with international law as an area within which the United Kingdom may exercise rights with regard to the sea-bed and subsoil and the natural resources and any territory to which this Agreement is extended in accordance with the provisions of Article 12;
  (ii) in respect of [country].

Article 2 Promotion and Protection of Investment

(1) Each Contracting Party shall encourage and create favourable conditions for nationals or companies of the other Contracting Party to invest capital in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such capital.

(2) Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.

Article 3 National Treatment and Most-favoured-nation Provisions

(1) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own

nationals or companies or to investments or returns of nationals or companies of any third State.

(2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.

(3) For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 12 of this Agreement.

Article 4 Compensation for Losses

(1) Nationals or companies of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable that that which the latter Contracting Party accords to its own nationals or companies or to nationals or companies of any third State. Resulting payments shall be freely transferable.

(2) Without prejudice to paragraph (1) of this Article, nationals or companies of one Contracting Party who in any of the situations referred to in that paragraph suffer losses in the territory of the other Contracting Party resulting from:
   (a) requisitioning of their property by its forces or authorities, or
   (b) destruction of their property by its forces or authorities, which was not caused in combat action or was not required by the necessity of the situation,

   shall be accorded restitution or adequate compensation. Resulting payments shall be freely transferable.

Article 5 Expropriation

(1) Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without

delay, be effectively realizable and be freely transferable. The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.

(2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which nationals or companies of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of their investment to such nationals or companies of the other Contracting Party who are owners of those shares.

Article 6 Repatriation of Investment and Returns

Each Contracting Party shall in respect of investments guarantee to nationals or companies of the other Contracting Party the unrestricted transfer of their investments and returns. Transfers shall be effected without delay in the convertible currency in which the capital was originally invested or in any other convertible currency agreed by the investor and the Contracting Party concerned. Unless otherwise agreed by the investor transfers shall be made at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force.

Article 7 Exceptions

(1) The provisions of this Agreement relative to the grant of treatment not less favourable than that accorded to the nationals or companies of either Contracting Party or of any third State shall not be construed so as to preclude the adoption or enforcement by a Contracting Party of measures which are necessary to protect national security, public security or public order, nor shall these provisions be construed to oblige one Contracting Party to extend to the nationals or companies of the other the benefit of any treatment, preference or privilege resulting from:
   (a) any existing or future customs, economic or monetary union, a common market or a free trade area or similar international agreement to which either of the Contracting Parties is or may become a party, and includes the benefit of any treatment, preference or privilege resulting from obligations arising out of an international agreement or reciprocity arrangement of that customs, economic or monetary union, common market or free trade area; or
   (b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation;

(c) any requirements resulting from the United Kingdom's membership of the European Union including measures prohibiting, restricting or limiting the movement of capital to or from any third country.

(2) Where, in exceptional circumstances, payments and capital movements between the Contracting Parties cause or threaten to cause serious difficulties for the operation of monetary policy or exchange rate policy in either Contracting Party, the Contracting Party concerned may take safeguard measures with regard to capital movements between the Contracting Parties for a period not exceeding six months if such measures are strictly necessary. The Contracting Party adopting the safeguard measures shall inform the other Contracting Party forthwith and present, as soon as possible, a time schedule for their removal.

Article 8 Reference to International Centre for Settlement of Investment Disputes

(1) Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (hereinafter referred to as "the Centre") for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington DC on 18 March 1965 any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.

(2) A company which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which before such a dispute arises the majority of shares are owned by nationals or companies of the other Contracting Party shall in accordance with Article 25 (2) (b) of the Convention be treated for the purposes of the Convention as a company of the other Contracting Party.

(3) If any such dispute should arise and agreement cannot be reached within three months between the parties to this dispute through pursuit of local remedies or otherwise, then, if the national or company affected also consents in writing to submit the dispute to the Centre for settlement by conciliation or arbitration under the Convention, either party may institute proceedings by addressing a request to that effect to the Secretary-General of the Centre as provided in Articles 28 and 36 of the Convention. In the event of disagreement as to whether conciliation or arbitration is the more appropriate procedure the national or company affected shall have the right to choose. The Contracting Party which is a party to the dispute shall not raise as an objection at any stage of the proceedings or enforcement of an award the fact that the national or company which is the other party to the dispute has received in pursuance of an insurance contract an indemnity in respect of some or all of his or its losses.

(4) Neither Contracting Party shall pursue through the diplomatic channel any dispute referred to the Centre unless:
   (a) the Secretary-General of the Centre, or a conciliation commission or an arbitral tribunal constituted by it, decides that the dispute is not within the jurisdiction of the Centre; or
   (b) the other Contracting Party shall fail to abide by or to comply with any award rendered by an arbitral tribunal.

[Alternative]

Article 8 Settlement of Disputes between an Investor and a Host State

(1) Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of three months from written notification of a claim, be submitted to international arbitration if the national or company concerned so wishes.

(2) Where the dispute is referred to international arbitration, the national or company and the Contracting Party concerned in the dispute may agree to refer the dispute either to:
   (a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington DC on 18 March 1965 and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or
   (b) the Court of Arbitration of the International Chamber of Commerce; or
   (c) an international arbitrator or ad hoc arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.

   If after a period of three months from written notification of the claim there is no agreement to one of the above alternative procedures, the dispute shall at the request in writing of the national or company concerned be submitted to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The parties to the dispute may agree in writing to modify these Rules.

Article 9 Disputes between the Contracting Parties

(1) Disputes between the Contracting Parties concerning the interpretation or application of this Agreement should, if possible, be settled through the diplomatic channel.

(2) If a dispute between the Contracting Parties cannot thus be settled, it shall upon the request of either Contracting Party be submitted to an arbitral tribunal.
(3) Such an arbitral tribunal shall be constituted for each individual case in the following way. Within two months of the receipt of the request for arbitration, each Contracting Party shall appoint one member of the tribunal. Those two members shall then select a national of a third State who on approval by the two Contracting Parties shall be appointed Chairman of the tribunal. The Chairman shall be appointed within two months from the date of appointment of the other two members.
(4) If within the periods specified in paragraph (3) of this Article the necessary appointments have not been made, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointments. If the President is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting Party or if he too is prevented from discharging the said function, the Member of the International Court of Justice next in seniority who is not a national of either Contracting Party shall be invited to make the necessary appointments.
(5) The arbitral tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both Contracting Parties. Each Contracting Party shall bear the cost of its own member of the tribunal and of its representation in the arbitral proceedings; the cost of the Chairman and the remaining costs shall be borne in equal parts by the Contracting Parties. The tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the two Contracting Parties, and this award shall be binding on both Contracting Parties. The tribunal shall determine its own procedure.

Article 10 Subrogation

(1) If one Contracting Party or its designated Agency ("the first Contracting Party") makes a payment under an indemnity given in respect of an investment in the territory of the other Contracting Party ("the second Contracting Party"), the second Contracting Party shall recognise:
   (a) the assignment to the first Contracting Party by law or by legal transaction of all the rights and claims of the party indemnified; and
   (b) that the first Contracting Party is entitled to exercise such rights and enforce such claims by virtue of subrogation, to the same extent as the party indemnified.
(2) The first Contracting Party shall be entitled in all circumstances to the same treatment in respect of:

   (a) the rights and claims acquired by it by virtue of the assignment, and
   (b) any payments received in pursuance of those rights and claims,
   as the party indemnified was entitled to receive by virtue of this Agreement in respect of the investment concerned and its related returns.
(3) Any payments received in non-convertible currency by the first Contracting Party in pursuance of the rights and claims acquired shall be freely available to the first Contracting Party for the purpose of meeting any expenditure incurred in the territory of the second Contracting Party.

Article 11 Application of other Rules

If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain rules, whether general or specific, entitling investments by nationals or companies of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement.

Article 12 Scope of Application

This Agreement shall apply to all investments, whether made before or after its entry into force, but shall not apply to any dispute concerning an investment which arose, or any claim concerning an investment which was settled, before its entry into force.

Article 12 Territorial Extension

At the time of [signature] [entry into force] [ratification] of this Agreement, or at any time thereafter, the provisions of this Agreement may be extended to such territories for whose international relations the Government of the United Kingdom are responsible as may be agreed between the Contracting Parties in an Exchange of Notes.

Article 13 Entry into Force

[This Agreement shall enter into force on the day of signature.]

or

[Each Contracting Party shall notify the other in writing of the completion of the constitutional formalities required in its territory for the entry into force of this Agreement. This Agreement shall enter into force on the date of the latter of the two notifications.]

or

[The Agreement shall be ratified and shall enter into force on the exchange of Instruments of Ratification.]

Article 14 Duration and Termination

This Agreement shall remain in force for a period of ten years. Thereafter it shall continue in force until the expiration of twelve months from the date on which either Contracting Party shall have given written notice of termination to the other. Provided that in respect of investments made whilst the Agreement is in force, its provisions shall continue in effect with respect to such investments for a period of twenty years after the date of termination and without prejudice to the application thereafter of the rules of general international law.

In witness whereof the undersigned, duly authorised thereto by their respective Governments, have signed this Agreement.

Done in duplicate at …… this …… day of ……. 200_ [in the English and ……..…. languages, both texts being equally authoritative].

For the Government of [country]:

For the Government of the United Kingdom of Great Britain and Northern Ireland:

United States Model Bilateral Investment Treaty, 2012

2012 U.S. Model Bilateral Investment Treaty

TREATY BETWEEN
THE GOVERNMENT OF THE UNITED STATES OF AMERICA
AND THE GOVERNMENT OF [Country]
CONCERNING THE ENCOURAGEMENT
AND RECIPROCAL PROTECTION OF INVESTMENT

The Government of the United States of America and the Government of [Country] (hereinafter the "Parties");

Desiring to promote greater economic cooperation between them with respect to investment by nationals and enterprises of one Party in the territory of the other Party;

Recognizing that agreement on the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;

Agreeing that a stable framework for investment will maximize effective utilization of economic resources and improve living standards;

Recognizing the importance of providing effective means of asserting claims and enforcing rights with respect to investment under national law as well as through international arbitration;

Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights;

Having resolved to conclude a Treaty concerning the encouragement and reciprocal protection of investment;

Have agreed as follows:

SECTION A

Article 1: Definitions

For purposes of this Treaty:

"central level of government" means:

(a) for the United States, the federal level of government; and

(b) for [Country], [___].

"Centre" means the International Centre for Settlement of Investment Disputes ("ICSID") established by the ICSID Convention.

"claimant" means an investor of a Party that is a party to an investment dispute with the other Party.

"covered investment" means, with respect to a Party, an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Treaty or established, acquired, or expanded thereafter.

"disputing parties" means the claimant and the respondent.

"disputing party" means either the claimant or the respondent.

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

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

"existing" means in effect on the date of entry into force of this Treaty.

"freely usable currency" means "freely usable currency" as determined by the International Monetary Fund under its *Articles of Agreement*.

"GATS" means the *General Agreement on Trade in Services*, contained in Annex 1B to the WTO Agreement.

"government procurement" means the process by which a government obtains the use of or acquires goods or services, or any combination thereof, for governmental purposes and not with a view to commercial sale or resale, or use in the production or supply of goods or services for commercial sale or resale.

"ICSID Additional Facility Rules" means the *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes*.

"ICSID Convention" means the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, done at Washington, March 18, 1965.

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

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

(a) an enterprise;

(b) shares, stock, and other forms of equity participation in an enterprise;

(c) bonds, debentures, other debt instruments, and loans;[1]

(d) futures, options, and other derivatives;

(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;

(f) intellectual property rights;

(g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law;[2, 3] and

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

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

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

"investment agreement" means a written agreement[4] between a national authority[5] of a Party and a covered investment or an investor of the other Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor:

(a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale;

(b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications; or

(c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government.

"investment authorization"[6] means an authorization that the foreign investment authority of a Party grants to a covered investment or an investor of the other Party.

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

"investor of a Party" means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of 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.

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

[4] "Written agreement" refers to an agreement in writing, executed by both parties, whether in a single instrument or in multiple instruments, that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 30[Governing Law](2). For greater certainty, (a) a unilateral act of an administrative or judicial authority, such as a permit, license, or authorization issued by a Party solely in its regulatory capacity, or a decree, order, or judgment, standing alone; and (b) an administrative or judicial consent decree or order, shall not be considered a written agreement.

[5] For purposes of this definition, "national authority" means (a) for the United States, an authority at the central level of government; and (b) for [Country], [ ].

[6] For greater certainty, actions taken by a Party to enforce laws of general application, such as competition laws, are not encompassed within this definition.

"measure" includes any law, regulation, procedure, requirement, or practice.

"national" means:

(a) for the United States, a natural person who is a national of the United States as defined in Title III of the Immigration and Nationality Act; and

(b) for [Country], [___].

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

"non-disputing Party" means the Party that is not a party to an investment dispute.

"person" means a natural person or an enterprise.

"person of a Party" means a national or an enterprise of a Party.

"protected information" means confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law.

"regional level of government" means:

(a) for the United States, a state of the United States, the District of Columbia, or Puerto Rico; and

(b) for [Country], [___].

"respondent" means the Party that is a party to an investment dispute.

"Secretary-General" means the Secretary-General of ICSID.

"state enterprise" means an enterprise owned, or controlled through ownership interests, by a Party.

"territory" means:

(a) with respect to the United States,

(i) the customs territory of the United States, which includes the 50 states, the District of Columbia, and Puerto Rico;

(ii) the foreign trade zones located in the United States and Puerto Rico.

(b) with respect to [Country,] [___].

(c) with respect to each Party, the territorial sea and any area beyond the territorial sea of the Party within which, in accordance with customary international law as reflected in the United Nations Convention on the Law of the Sea, the Party may exercise sovereign rights or jurisdiction.

"TRIPS Agreement" means the *Agreement on Trade-Related Aspects of Intellectual Property Rights*, contained in Annex 1C to the WTO Agreement.[7]

"UNCITRAL Arbitration Rules" means the arbitration rules of the United Nations Commission on International Trade Law.

"WTO Agreement" means the *Marrakesh Agreement Establishing the World Trade Organization*, done on April 15, 1994.

Article 2: Scope and Coverage

1. This Treaty applies to measures adopted or maintained by a Party relating to:

(a) investors of the other Party;

(b) covered investments; and

(c) with respect to Articles 8 [Performance Requirements], 12 [Investment and Environment], and 13 [Investment and Labor], all investments in the territory of the Party.

2. A Party's obligations under Section A shall apply:

(a) to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party;[8] and

(b) to the political subdivisions of that Party.

3. For greater certainty, this Treaty does not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Treaty.

[7] For greater certainty, "TRIPS Agreement" includes any waiver in force between the Parties of any provision of the TRIPS Agreement granted by WTO Members in accordance with the WTO Agreement.

[8] For greater certainty, government authority that has been delegated includes a legislative grant, and a government order, directive or other action transferring to the state enterprise or other person, or authorizing the exercise by the state enterprise or other person of, governmental authority.

Article 3: 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 covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the treatment accorded, in like circumstances, by that regional level of government to natural persons resident in and enterprises constituted under the laws of other regional levels of government of the Party of which it forms a part, and to their respective investments.

Article 4: 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 any 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 covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Article 5: Minimum Standard of Treatment[9]

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and 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 covered 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:

[9] Article 5 [Minimum Standard of Treatment] shall be interpreted in accordance with Annex A.

(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 Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article.

4. Notwithstanding Article 14 [Non-Conforming Measures](5)(b) [subsidies and grants], each Party shall accord to investors of the other Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

5. Notwithstanding paragraph 4, if an investor of a Party, in the situations referred to in paragraph 4, suffers a loss in the territory of the other Party resulting from:

(a) requisitioning of its covered investment or part thereof by the latter's forces or authorities; or

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

the latter Party shall provide the investor restitution, compensation, or both, as appropriate, for such loss. Any compensation shall be prompt, adequate, and effective in accordance with Article 6 [Expropriation and Compensation](2) through (4), *mutatis mutandis*.

6. Paragraph 4 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 3 [National Treatment] but for Article 14 [Non-Conforming Measures](5)(b) [subsidies and grants].

Article 6: Expropriation and Compensation[10]

1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:

(a) for a public purpose;

(b) in a non-discriminatory manner;

(c) on payment of prompt, adequate, and effective compensation; and

[10] Article 6 [Expropriation] shall be interpreted in accordance with Annexes A and B.

(d) in accordance with due process of law and Article 5 [Minimum Standard of Treatment](1) through (3).

2. The compensation referred to in paragraph 1(c) shall:

(a) be paid without delay;

(b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation");

(c) not reflect any change in value occurring because the intended expropriation had become known earlier; and

(d) be fully realizable and freely transferable.

3. If the fair market value is denominated in a freely usable currency, the compensation referred to in paragraph 1(c) shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

4. If the fair market value is denominated in a currency that is not freely usable, the compensation referred to in paragraph 1(c) – converted into the currency of payment at the market rate of exchange prevailing on the date of payment – shall be no less than:

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

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

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

Article 7: Transfers

1. Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include:

(a) contributions to capital;

(b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;

(c) interest, royalty payments, management fees, and technical assistance and other fees;

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

(e) payments made pursuant to Article 5 [Minimum Standard of Treatment](4) and (5) and Article 6 [Expropriation and Compensation]; and

(f) payments arising out of a dispute.

2. Each Party shall permit transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer.

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

4. Notwithstanding paragraphs 1 through 3, 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) issuing, trading, or dealing in securities, futures, options, or derivatives;

(c) criminal or penal offenses;

(d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or

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

Article 8: Performance Requirements

1. Neither 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 requirement or enforce any commitment or undertaking:[11]

(a) to export a given level or percentage of goods or services;

[11] For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 2 does not constitute a "commitment or undertaking" for the purposes of paragraph 1.

(b) to achieve a given level or percentage of domestic content;

(c) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods 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 supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;

(f) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory;

(g) to supply exclusively from the territory of the Party the goods that such investment produces or the services that it supplies to a specific regional market or to the world market; or

(h) (i) to purchase, use, or accord a preference to, in its territory, technology of the Party or of persons of the Party[12]; or

(ii) that prevents the purchase or use of, or the according of a preference to, in its territory, particular technology,

so as to afford protection on the basis of nationality to its own investors or investments or to technology of the Party or of persons of the Party.

2. Neither Party may condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of a Party or of a non-Party, on compliance with any requirement:

(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 persons in its territory;

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

[12] For purposes of this Article, the term "technology of the Party or of persons of the Party" includes technology that is owned by the Party or persons of the Party, and technology for which the Party holds, or persons of the Party hold, an exclusive license.

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

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

(b) Paragraphs 1(f) and (h) do not apply:

(i) when a Party authorizes use of an intellectual property right in accordance with Article 31 of the TRIPS Agreement, or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or

(ii) when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under the Party's competition laws.[13]

(c) Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), (c), (f), and (h), and 2(a) and (b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:

(i) necessary to secure compliance with laws and regulations that are not inconsistent with this Treaty;

(ii) necessary to protect human, animal, or plant life or health; or

(iii) related to the conservation of living or non-living exhaustible natural resources.

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

(e) Paragraphs 1(b), (c), (f), (g), and (h), and 2(a) and (b), do not apply to government procurement.

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

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

4. For greater certainty, paragraphs 1 and 2 do not apply to any commitment, undertaking, or requirement other than those set out in those paragraphs.

5. 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 9: Senior Management and Boards of Directors

1. Neither Party may require that an enterprise of that Party that is a covered investment appoint to senior management positions natural persons of any particular nationality.

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

Article 10: Publication of Laws and Decisions Respecting Investment

1. Each Party shall ensure that its:

(a) laws, regulations, procedures, and administrative rulings of general application; and

(b) adjudicatory decisions

respecting any matter covered by this Treaty are promptly published or otherwise made publicly available.

2. For purposes of this Article, "administrative ruling of general application" means an administrative ruling or interpretation that applies to all persons and fact situations that fall generally within its ambit and that establishes a norm of conduct but does not include:

(a) a determination or ruling made in an administrative or quasi-judicial proceeding that applies to a particular covered investment or investor of the other Party in a specific case; or

(b) a ruling that adjudicates with respect to a particular act or practice.

Article 11: Transparency

1. The Parties agree to consult periodically on ways to improve the transparency practices set out in this Article, Article 10 and Article 29.

2. Publication

To the extent possible, each Party shall:

(a) publish in advance any measure referred to in Article 10(1)(a) that it proposes to adopt; and

(b) provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures.

3. With respect to proposed regulations of general application of its central level of government respecting any matter covered by this Treaty that are published in accordance with paragraph 2(a), each Party:

(a) shall publish the proposed regulations in a single official journal of national circulation and shall encourage their distribution through additional outlets;

(b) should in most cases publish the proposed regulations not less than 60 days before the date public comments are due;

(c) shall include in the publication an explanation of the purpose of and rationale for the proposed regulations; and

(d) shall, at the time it adopts final regulations, address significant, substantive comments received during the comment period and explain substantive revisions that it made to the proposed regulations in its official journal or in a prominent location on a government Internet site.

4. With respect to regulations of general application that are adopted by its central level of government respecting any matter covered by this Treaty, each Party:

(a) shall publish the regulations in a single official journal of national circulation and shall encourage their distribution through additional outlets; and

(b) shall include in the publication an explanation of the purpose of and rationale for the regulations.

5. Provision of Information

(a) On request of the other Party, a Party shall promptly provide information and respond to questions pertaining to any actual or proposed measure that the requesting Party considers might materially affect the operation of this Treaty or otherwise substantially affect its interests under this Treaty.

(b) Any request or information under this paragraph shall be provided to the other Party through the relevant contact points.

(c) Any information provided under this paragraph shall be without prejudice as to whether the measure is consistent with this Treaty.

6. Administrative Proceedings

With a view to administering in a consistent, impartial, and reasonable manner all measures referred to in Article 10(1)(a), each Party shall ensure that in its administrative proceedings applying such measures to particular covered investments or investors of the other Party in specific cases:

(a) wherever possible, covered investments or investors of the other Party that are directly affected by a proceeding are provided reasonable notice, in accordance with domestic procedures, when a proceeding is initiated, including a description of the nature of the proceeding, a statement of the legal authority under which the proceeding is initiated, and a general description of any issues in controversy;

(b) such persons are afforded a reasonable opportunity to present facts and arguments in support of their positions prior to any final administrative action, when time, the nature of the proceeding, and the public interest permit; and

(c) its procedures are in accordance with domestic law.

7. Review and Appeal

(a) Each Party shall establish or maintain judicial, quasi-judicial, or administrative tribunals or procedures for the purpose of the prompt review and, where warranted, correction of final administrative actions regarding matters covered by this Treaty. Such tribunals shall be impartial and independent of the office or authority entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter.

(b) Each Party shall ensure that, in any such tribunals or procedures, the parties to the proceeding are provided with the right to:

(i) a reasonable opportunity to support or defend their respective positions; and

(ii) a decision based on the evidence and submissions of record or, where required by domestic law, the record compiled by the administrative authority.

(c) Each Party shall ensure, subject to appeal or further review as provided in its domestic law, that such decisions shall be implemented by, and shall govern the practice of, the offices or authorities with respect to the administrative action at issue.

8. Standards-Setting

(a) Each Party shall allow persons of the other Party to participate in the development of standards and technical regulations by its central government bodies.[14] Each Party shall allow persons of the other Party to participate in the development of these measures, and the development of conformity assessment procedures by its central government bodies, on terms no less favorable than those it accords to its own persons.

(b) Each Party shall recommend that non-governmental standardizing bodies in its territory allow persons of the other Party to participate in the development of standards by those bodies. Each Party shall recommend that non-governmental standardizing bodies in its territory allow persons of the other Party to participate in the development of these standards, and the development of conformity assessment procedures by those bodies, on terms no less favorable than those they accord to persons of the Party.

(c) Subparagraphs 8(a) and 8(b) do not apply to:

(i) sanitary and phytosanitary measures as defined in Annex A of the World Trade Organization (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures; or

(ii) purchasing specifications prepared by a governmental body for its production or consumption requirements.

(d) For purposes of subparagraphs 8(a) and 8(b), “central government body”, “standards”, “technical regulations” and “conformity assessment procedures” have the meanings assigned to those terms in Annex 1 of the WTO Agreement on Technical Barriers to Trade. Consistent with Annex 1, the three latter terms do not include standards, technical regulations or conformity assessment procedures `for the supply of a service.

[14] A Party may satisfy this obligation by, for example, providing interested persons a reasonable opportunity to provide comments on the measure it proposes to develop and taking those comments into account in the development of the measure.

Article 12: Investment and Environment

1. The Parties recognize that their respective environmental laws and policies, and multilateral environmental agreements to which they are both party, play an important role in protecting the environment.

2. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, each Party shall ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its environmental laws[15] in a manner that weakens or reduces the protections afforded in those laws, or fail to effectively enforce those laws through a sustained or recurring course of action or inaction, as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.

3. The Parties recognize that each Party retains the right to exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters, and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with paragraph 2 where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a *bona fide* decision regarding the allocation of resources.

4. For purposes of this Article, "environmental law" means each Party's statutes or regulations,[16] or provisions thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health, through the:

(a) prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants;

(b) control of environmentally hazardous or toxic chemicals, substances, materials, and wastes, and the dissemination of information related thereto; or

(c) protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas,

in the Party's territory, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.

5. Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to

[15] Paragraph 2 shall not apply where a Party waives or derogates from an environmental law pursuant to a provision in law providing for waivers or derogations.

[16] For the United States, "statutes or regulations" for the purposes of this Article means an act of the United States Congress or regulations promulgated pursuant to an act of the United States Congress that is enforceable by action of the central level of government.

ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

6. A Party may make a written request for consultations with the other Party regarding any matter arising under this Article. The other Party shall respond to a request for consultations within thirty days of receipt of such request. Thereafter, the Parties shall consult and endeavor to reach a mutually satisfactory resolution.

7. The Parties confirm that each Party may, as appropriate, provide opportunities for public participation regarding any matter arising under this Article.

Article 13: Investment and Labor

1. The Parties reaffirm their respective obligations as members of the International Labor Organization ("ILO") and their commitments under the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up*.

2. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each Party shall ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its labor laws where the waiver or derogation would be inconsistent with the labor rights referred to in subparagraphs (a) through (e) of paragraph 3, or fail to effectively enforce its labor laws through a sustained or recurring course of action or inaction, as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.

3. For purposes of this Article, "labor laws" means each Party's statutes or regulations,[17] or provisions thereof, that are directly related to the following:

(a) freedom of association;

(b) the effective recognition of the right to collective bargaining;

(c) the elimination of all forms of forced or compulsory labor;

(d) the effective abolition of child labor and a prohibition on the worst forms of child labor;

(e) the elimination of discrimination in respect of employment and occupation; and

(f) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

[17] For the United States, "statutes or regulations" for purposes of this Article means an act of the United States Congress or regulations promulgated pursuant to an act of the United States Congress that is enforceable by action of the central level of government.

4. A Party may make a written request for consultations with the other Party regarding any matter arising under this Article. The other Party shall respond to a request for consultations within thirty days of receipt of such request. Thereafter, the Parties shall consult and endeavor to reach a mutually satisfactory resolution.

5. The Parties confirm that each Party may, as appropriate, provide opportunities for public participation regarding any matter arising under this Article.

Article 14: Non-Conforming Measures

1. Articles 3 [National Treatment], 4 [Most-Favored-Nation Treatment], 8 [Performance Requirements], and 9 [Senior Management and Boards of Directors] do not apply to:

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

(i) the central level of government, as set out by that Party in its Schedule to Annex I or Annex III,

(ii) a regional level of government, as set out by that Party in its Schedule to Annex I or Annex III, or

(iii) a local level of government;

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

(c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Article 3 [National Treatment], 4 [Most-Favored-Nation Treatment], 8 [Performance Requirements], or 9 [Senior Management and Boards of Directors].

2. Articles 3 [National Treatment], 4 [Most-Favored-Nation Treatment], 8 [Performance Requirements], and 9 [Senior Management and Boards of Directors] do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II.

3. Neither Party may, under any measure adopted after the date of entry into force of this Treaty 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. Articles 3 [National Treatment] and 4 [Most-Favored-Nation Treatment] do not apply to any measure covered by an exception to, or derogation from, the obligations under Article 3 or 4 of

the TRIPS Agreement, as specifically provided in those Articles and in Article 5 of the TRIPS Agreement.

5. Articles 3 [National Treatment], 4 [Most-Favored-Nation Treatment], and 9 [Senior Management and Boards of Directors] do not apply to:

(a) government procurement; or

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

Article 15: Special Formalities and Information Requirements

1. Nothing in Article 3 [National Treatment] shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as a requirement that investors be residents of the Party or that covered 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 covered investments pursuant to this Treaty.

2. Notwithstanding Articles 3 [National Treatment] and 4 [Most-Favored-Nation Treatment], a Party may require an investor of the other Party or its covered investment to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect any confidential business information from any disclosure that would prejudice the competitive position of the investor or the covered 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 16: Non-Derogation

This Treaty shall not derogate from any of the following that entitle an investor of a Party or a covered investment to treatment more favorable than that accorded by this Treaty:

1. laws or regulations, administrative practices or procedures, or administrative or adjudicatory decisions of a Party;

2. international legal obligations of a Party; or

3. obligations assumed by a Party, including those contained in an investment authorization or an investment agreement.

Article 17: Denial of Benefits

1. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party:

(a) does not maintain diplomatic relations with the non-Party; or

(b) adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Treaty were accorded to the enterprise or to its investments.

2. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise.

Article 18: Essential Security

Nothing in this Treaty shall be construed:

1. to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or

2. to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

Article 19: Disclosure of Information

Nothing in this Treaty shall be construed to require a Party to furnish or allow access to confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest, or which would prejudice the legitimate commercial interests of particular enterprises, public or private.

Article 20: Financial Services

1. Notwithstanding any other provision of this Treaty, a Party shall not be prevented from adopting or maintaining measures relating to financial services for prudential reasons, including for the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial services supplier, or to ensure the integrity and stability of the financial

system.[18] Where such measures do not conform with the provisions of this Treaty, they shall not be used as a means of avoiding the Party's commitments or obligations under this Treaty.

2. (a) Nothing in this Treaty applies to non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies. This paragraph shall not affect a Party's obligations under Article 7 [Transfers] or Article 8 [Performance Requirements].[19]

(b) For purposes of this paragraph, "public entity" means a central bank or monetary authority of a Party.

3. Where a claimant submits a claim to arbitration under Section B [Investor-State Dispute Settlement], and the respondent invokes paragraph 1 or 2 as a defense, the following provisions shall apply:

(a) The respondent shall, within 120 days of the date the claim is submitted to arbitration under Section B, submit in writing to the competent financial authorities[20] of both Parties a request for a joint determination on the issue of whether and to what extent paragraph 1 or 2 is a valid defense to the claim. The respondent shall promptly provide the tribunal, if constituted, a copy of such request. The arbitration may proceed with respect to the claim only as provided in subparagraph (d).

(b) The competent financial authorities of both Parties shall make themselves available for consultations with each other and shall attempt in good faith to make a determination as described in subparagraph (a). Any such determination shall be transmitted promptly to the disputing parties and, if constituted, to the tribunal. The determination shall be binding on the tribunal.

(c) If the competent financial authorities of both Parties, within 120 days of the date by which they have both received the respondent's written request for a joint determination under subparagraph (a), have not made a determination as described in that subparagraph, the tribunal shall decide the issue or issues left

[18] It is understood that the term "prudential reasons" includes the maintenance of the safety, soundness, integrity, or financial responsibility of individual financial institutions, as well as the maintenance of the safety and financial and operational integrity of payment and clearing systems.

[19] For greater certainty, measures of general application taken in pursuit of monetary and related credit policies or exchange rate policies do not include measures that expressly nullify or amend contractual provisions that specify the currency of denomination or the rate of exchange of currencies.

[20] For purposes of this Article, "competent financial authorities" means, for the United States, the Department of the Treasury for banking and other financial services, and the Office of the United States Trade Representative, in coordination with the Department of Commerce and other agencies, for insurance; and for [Country], [___].

unresolved by the competent financial authorities. The provisions of Section B shall apply, except as modified by this subparagraph.

(i) In the appointment of all arbitrators not yet appointed to the tribunal, each disputing party shall take appropriate steps to ensure that the tribunal has expertise or experience in financial services law or practice. The expertise of particular candidates with respect to the particular sector of financial services in which the dispute arises shall be taken into account in the appointment of the presiding arbitrator.

(ii) If, before the respondent submits the request for a joint determination in conformance with subparagraph (a), the presiding arbitrator has been appointed pursuant to Article 27(3), such arbitrator shall be replaced on the request of either disputing party and the tribunal shall be reconstituted consistent with subparagraph (c)(i). If, within 30 days of the date the arbitration proceedings are resumed under subparagraph (d), the disputing parties have not agreed on the appointment of a new presiding arbitrator, the Secretary-General, on the request of a disputing party, shall appoint the presiding arbitrator consistent with subparagraph (c)(i).

(iii) The tribunal shall draw no inference regarding the application of paragraph 1 or 2 from the fact that the competent financial authorities have not made a determination as described in subparagraph (a).

(iv) The non-disputing Party may make oral and written submissions to the tribunal regarding the issue of whether and to what extent paragraph 1 or 2 is a valid defense to the claim. Unless it makes such a submission, the non-disputing Party shall be presumed, for purposes of the arbitration, to take a position on paragraph 1 or 2 not inconsistent with that of the respondent.

(d) The arbitration referred to in subparagraph (a) may proceed with respect to the claim:

(i) 10 days after the date the competent financial authorities' joint determination has been received by both the disputing parties and, if constituted, the tribunal; or

(ii) 10 days after the expiration of the 120-day period provided to the competent financial authorities in subparagraph (c).

(e) On the request of the respondent made within 30 days after the expiration of the 120-day period for a joint determination referred to in subparagraph (c), or, if the tribunal has not been constituted as of the expiration of the 120-day period, within 30 days after the tribunal is constituted, the tribunal shall address and decide the issue or issues left unresolved by the competent financial authorities as referred to

in subparagraph (c) prior to deciding the merits of the claim for which paragraph 1 or 2 has been invoked by the respondent as a defense. Failure of the respondent to make such a request is without prejudice to the right of the respondent to invoke paragraph 1 or 2 as a defense at any appropriate phase of the arbitration.

4. Where a dispute arises under Section C and the competent financial authorities of one Party provide written notice to the competent financial authorities of the other Party that the dispute involves financial services, Section C shall apply except as modified by this paragraph and paragraph 5.

(a) The competent financial authorities of both Parties shall make themselves available for consultations with each other regarding the dispute, and shall have 180 days from the date such notice is received to transmit a report on their consultations to the Parties. A Party may submit the dispute to arbitration under Section C only after the expiration of that 180-day period.

(b) Either Party may make any such report available to a tribunal constituted under Section C to decide the dispute referred to in this paragraph or a similar dispute, or to a tribunal constituted under Section B to decide a claim arising out of the same events or circumstances that gave rise to the dispute under Section C.

5. Where a Party submits a dispute involving financial services to arbitration under Section C in conformance with paragraph 4, and on the request of either Party within 30 days of the date the dispute is submitted to arbitration, each Party shall, in the appointment of all arbitrators not yet appointed, take appropriate steps to ensure that the tribunal has expertise or experience in financial services law or practice. The expertise of particular candidates with respect to financial services shall be taken into account in the appointment of the presiding arbitrator.

6. Notwithstanding Article 11(2)-(4) [Transparency – Publication], each Party, to the extent practicable,

(a) shall publish in advance any regulations of general application relating to financial services that it proposes to adopt and the purpose of the regulation;

(b) shall provide interested persons and the other Party a reasonable opportunity to comment on such proposed regulations; and

(c) should at the time it adopts final regulations, address in writing significant substantive comments received from interested persons with respect to the proposed regulations.

7. The terms "financial service" or "financial services" shall have the same meaning as in subparagraph 5(a) of the Annex on Financial Services of the GATS.

8. For greater certainty, nothing in this Treaty shall be construed to prevent the adoption or enforcement by a party of measures relating to investors of the other Party, or covered

investments, in financial institutions that are necessary to secure compliance with laws or regulations that are not inconsistent with this Treaty, including those related to the prevention of deceptive and fraudulent practices or that deal with the effects of a default on financial services contracts, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on investment in financial institutions.

Article 21: Taxation

1. Except as provided in this Article, nothing in Section A shall impose obligations with respect to taxation measures.

2. Article 6 [Expropriation] shall apply to all taxation measures, except that a claimant that asserts that a taxation measure involves an expropriation may submit a claim to arbitration under Section B only if:

(a) the claimant has first referred to the competent tax authorities[21] of both Parties in writing the issue of whether that taxation measure involves an expropriation; and

(b) within 180 days after the date of such referral, the competent tax authorities of both Parties fail to agree that the taxation measure is not an expropriation.

3. Subject to paragraph 4, Article 8 [Performance Requirements] (2) through (4) shall apply to all taxation measures.

4. Nothing in this Treaty shall affect the rights and obligations of either Party under any tax convention. In the event of any inconsistency between this Treaty and any such convention, that convention shall prevail to the extent of the inconsistency. In the case of a tax convention between the Parties, the competent authorities under that convention shall have sole responsibility for determining whether any inconsistency exists between this Treaty and that convention.

Article 22: Entry into Force, Duration, and Termination

1. This Treaty shall enter into force thirty days after the date the Parties exchange instruments of ratification. It shall remain in force for a period of ten years and shall continue in force thereafter unless terminated in accordance with paragraph 2.

[21] For the purposes of this Article, the "competent tax authorities" means:

(a) for the United States, the Assistant Secretary of the Treasury (Tax Policy), Department of the Treasury; and

(b) for [Country], [___].

2. A Party may terminate this Treaty at the end of the initial ten-year period or at any time thereafter by giving one year's written notice to the other Party.

3. For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered investments.

SECTION B

Article 23: Consultation and Negotiation

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

Article 24: Submission of a Claim to Arbitration

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

(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim

(i) that the respondent has breached

(A) an obligation under Articles 3 through 10,

(B) an investment authorization, or

(C) an investment agreement;

and

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

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

(i) that the respondent has breached

(A) an obligation under Articles 3 through 10,

(B) an investment authorization, or

(C) an investment agreement;

and

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

provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(i)(C) a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.

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

(a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;

(b) for each claim, the provision of this Treaty, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;

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

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

3. Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:

(a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention;

(b) under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention;

(c) under the UNCITRAL Arbitration Rules; or

(d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules.

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

(a) referred to in paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General;

(b) referred to in Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General;

(c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 20 of the UNCITRAL Arbitration Rules, are received by the respondent; or

(d) referred to under any arbitral institution or arbitral rules selected under paragraph 3(d) is received by the respondent.

A claim asserted by the claimant for the first time after such notice of arbitration is submitted shall be deemed submitted to arbitration under this Section on the date of its receipt under the applicable arbitral rules.

5. The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Treaty.

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

(a) the name of the arbitrator that the claimant appoints; or

(b) the claimant's written consent for the Secretary-General to appoint that arbitrator.

Article 25: Consent of Each Party to Arbitration

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

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

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

(b) Article II of the New York Convention for an "agreement in writing[."] [;" and

(c) Article I of the Inter-American Convention for an "agreement."]

Article 26: Conditions and Limitations on Consent of Each Party

1. No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 24(1) and knowledge that the claimant (for claims brought under Article 24(1)(a)) or the enterprise (for claims brought under Article 24(1)(b)) has incurred loss or damage.

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

(a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Treaty; and

(b) the notice of arbitration is accompanied,

(i) for claims submitted to arbitration under Article 24(1)(a), by the claimant's written waiver, and

(ii) for claims submitted to arbitration under Article 24(1)(b), by the claimant's and the enterprise's written waivers

of any right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 24.

3. Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 24(1)(a)) and the claimant or the enterprise (for claims brought under Article 24(1)(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.

Article 27: Selection of Arbitrators

1. 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, appointed by agreement of the disputing parties.

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

3. Subject to Article 20(3), if a tribunal has not been constituted within 75 days from the date that a claim is submitted to arbitration under this Section, the Secretary-General, on the request of a disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.

4. For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator on a ground other than nationality:

(a) the respondent agrees to the appointment of each individual member of a tribunal established under the ICSID Convention or the ICSID Additional Facility Rules;

(b) a claimant referred to in Article 24(1)(a) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant agrees in writing to the appointment of each individual member of the tribunal; and

(c) a claimant referred to in Article 24(1)(b) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant and the enterprise agree in writing to the appointment of each individual member of the tribunal.

Article 28: Conduct of the Arbitration

1. The disputing parties may agree on the legal place of any arbitration under the arbitral rules applicable under Article 24(3). If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with the applicable arbitral rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.

2. The non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Treaty.

3. The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party.

4. Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 34.

(a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment).

(b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.

(c) In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 20 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.

(d) The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.

5. In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

6. When it decides a respondent's objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

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

8. A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 24. For purposes of this paragraph, an order includes a recommendation.

9. (a) In any arbitration conducted under this Section, at the request of a disputing party, a tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or award to the disputing parties and to the non-disputing Party. Within 60 days after the tribunal transmits its proposed decision or award, the disputing parties may submit written comments to the tribunal concerning any aspect of its proposed decision or award. The tribunal shall consider any such comments and issue its decision or award not later than 45 days after the expiration of the 60-day comment period.

(b) Subparagraph (a) shall not apply in any arbitration conducted pursuant to this Section for which an appeal has been made available pursuant to paragraph 10.

10. In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article 34 should be subject to that appellate mechanism. The Parties shall strive to ensure that any such appellate mechanism they consider adopting provides for transparency of proceedings similar to the transparency provisions established in Article 29.

Article 29: Transparency of Arbitral Proceedings

1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Party and make them available to the public:

(a) the notice of intent;

(b) the notice of arbitration;

(c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 28(2) [Non-Disputing Party submissions] and (3) [*Amicus* Submissions] and Article 33 [Consolidation];

(d) minutes or transcripts of hearings of the tribunal, where available; and

(e) orders, awards, and decisions of the tribunal.

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

3. Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 18 [Essential Security Article] or Article 19 [Disclosure of Information Article].

4. Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:

(a) Subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to the non-disputing Party or to the public any protected information where the disputing party that provided the information clearly designates it in accordance with subparagraph (b);

(b) Any disputing party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal;

(c) A disputing party shall, at the time it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the non-disputing Party and made public in accordance with paragraph 1; and

(d) The tribunal shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may (i) withdraw all or part of its submission containing such information, or (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (c). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under (i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under (ii) of the disputing party that first submitted the information.

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

Article 30: Governing Law

1. Subject to paragraph 3, when a claim is submitted under Article 24(1)(a)(i)(A) or Article 24(1)(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Treaty and applicable rules of international law.

2. Subject to paragraph 3 and the other terms of this Section, when a claim is submitted under Article 24(1)(a)(i)(B) or (C), or Article 24(1)(b)(i)(B) or (C), the tribunal shall apply:

(a) the rules of law specified in the pertinent investment authorization or investment agreement, or as the disputing parties may otherwise agree; or

(b) if the rules of law have not been specified or otherwise agreed:

(i) the law of the respondent, including its rules on the conflict of laws;[22] and

(ii) such rules of international law as may be applicable.

3. A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.

Article 31: Interpretation of Annexes

1. Where a respondent asserts as a defense that the measure alleged to be a breach is within the scope of an entry set out in Annex I, II, or III, the tribunal shall, on request of the respondent, request the interpretation of the Parties on the issue. The Parties shall submit in writing any joint decision declaring their interpretation to the tribunal within 90 days of delivery of the request.

2. A joint decision issued under paragraph 1 by the Parties, each acting through its representative designated for purposes of this Article, shall be binding on the tribunal, and any decision or award issued by the tribunal must be consistent with that joint decision. If the Parties fail to issue such a decision within 90 days, the tribunal shall decide the issue.

Article 32: 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, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety, or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

Article 33: Consolidation

1. Where two or more claims have been submitted separately to arbitration under Article 24(1) and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 2 through 10.

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

2. A disputing party that seeks a consolidation order under this Article shall deliver, in writing, a request to the Secretary-General and to all the disputing parties sought to be covered by the order and shall specify in the request:

(a) the names and addresses of all the disputing parties sought to be covered by the order;

(b) the nature of the order sought; and

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

3. Unless the Secretary-General finds within 30 days after receiving a request under paragraph 2 that the request is manifestly unfounded, a tribunal shall be established under this Article.

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

(a) one arbitrator appointed by agreement of the claimants;

(b) one arbitrator appointed by the respondent; and

(c) the presiding arbitrator appointed by the Secretary-General, provided, however, that the presiding arbitrator shall not be a national of either Party.

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

6. Where a tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration under Article 24(1) have a question of law or fact in common, and arise out of the same events or circumstances, the tribunal may, in the interest of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

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

(b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others; or

(c) instruct a tribunal previously established under Article 27 [Selection of Arbitrators] to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that

(i) that tribunal, at the request of any claimant not previously a disputing party before that tribunal, shall be reconstituted with its original members, except that the arbitrator for the claimants shall be appointed pursuant to paragraphs 4(a) and 5; and

(ii) that tribunal shall decide whether any prior hearing shall be repeated.

7. Where a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration under Article 24(1) and that has not been named in a request made under paragraph 2 may make a written request to the tribunal that it be included in any order made under paragraph 6, and shall specify in the request:

(a) the name and address of the claimant;

(b) the nature of the order sought; and

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

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

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

9. A tribunal established under Article 27 [Selection of Arbitrators] shall not have jurisdiction to decide a claim, or a part of a claim, over which a tribunal established or instructed under this Article has assumed jurisdiction.

10. On application of a disputing party, a tribunal established under this Article, pending its decision under paragraph 6, may order that the proceedings of a tribunal established under Article 27 [Selection of Arbitrators] be stayed, unless the latter tribunal has already adjourned its proceedings.

Article 34: Awards

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

(a) monetary damages and any applicable interest; and

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

A tribunal may also award costs and attorney's fees in accordance with this Treaty and the applicable arbitration rules.

2. Subject to paragraph 1, where a claim is submitted to arbitration under Article 24(1)(b):

(a) an award of restitution of property shall provide that restitution be made to the enterprise;

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

(c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.

3. A tribunal may not award punitive damages.

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

5. Subject to paragraph 6 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.

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

(a) in the case of a final award made under the ICSID Convention,

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

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

(b) in the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or the rules selected pursuant to Article 24(3)(d),

(i) 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.

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

8. If the respondent fails to abide by or comply with a final award, on delivery of a request by the non-disputing Party, a tribunal shall be established under Article 37 [State-State Dispute Settlement]. Without prejudice to other remedies available under applicable rules of international law, 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 Treaty; and

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

9. A disputing party may seek enforcement of an arbitration award under the ICSID Convention or the New York Convention [or the Inter-American Convention] regardless of whether proceedings have been taken under paragraph 8.

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

Article 35: Annexes and Footnotes

The Annexes and footnotes shall form an integral part of this Treaty.

Article 36: Service of Documents

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

SECTION C

Article 37: State-State Dispute Settlement

1. Subject to paragraph 5, any dispute between the Parties concerning the interpretation or application of this Treaty, that is not resolved through consultations or other diplomatic channels, shall be submitted on the request of either Party to arbitration for a binding decision or award by a tribunal in accordance with applicable rules of international law. In the absence of an agreement by the Parties to the contrary, the UNCITRAL Arbitration Rules shall govern, except as modified by the Parties or this Treaty.

2. Unless the Parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each Party and the third, who shall be the presiding arbitrator, appointed by agreement of the Parties. If a tribunal has not been constituted within 75 days from the date that a claim is submitted to arbitration under this Section, the Secretary-General, on the request of either Party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.

3. Expenses incurred by the arbitrators, and other costs of the proceedings, shall be paid for equally by the Parties. However, the tribunal may, in its discretion, direct that a higher proportion of the costs be paid by one of the Parties.

4. Articles 28(3) [*Amicus Curiae* Submissions], 29 [Investor-State Transparency], 30(1) and (3) [Governing Law], and 31 [Interpretation of Annexes] shall apply *mutatis mutandis* to arbitrations under this Article.

5. Paragraphs 1 through 4 shall not apply to a matter arising under Article 12 or Article 13.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this Treaty.

DONE in duplicate at [city] this [number] day of [month, year], in the English and [foreign] languages, each text being equally authentic.

FOR THE GOVERNMENT OF
THE UNITED STATES OF AMERICA:

FOR THE GOVERNMENT OF
[Country]:

Annex A

Customary International Law

The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 5 [Minimum Standard of Treatment] and Annex B [Expropriation] results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 5 [Minimum Standard of Treatment], the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

Annex B

Expropriation

The Parties confirm their shared understanding that:

1. Article 6 [Expropriation and Compensation](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 6 [Expropriation and Compensation](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 6 [Expropriation and Compensation](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 C

Service of Documents on a Party

United States

Notices and other documents shall be served on the United States by delivery to:

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

[Country]

Notices and other documents shall be served on [Country] by delivery to:

[insert place of delivery of notices and other documents for [Country]]

International Institute for Sustainable Development (IISD) Model International Agreement on Investment for Sustainable Development, 2005

iisd International Institute for Sustainable Development / Institut international du développement durable

http://www.iisd.org

IISD Model International Agreement on Investment for Sustainable Development

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The International Institute for Sustainable Development contributes to sustainable development by advancing policy recommendations on international trade and investment, economic policy, climate change, measurement and assessment, and natural resources management. Through the Internet, we report on international negotiations and share knowledge gained through collaborative projects with global partners, resulting in more rigorous research, capacity building in developing countries and better dialogue between North and South.

IISD's vision is better living for all—sustainably; its mission is to champion innovation, enabling societies to live sustainably. IISD is registered as a charitable organization in Canada and has 501(c)(3) status in the United States. IISD receives core operating support from the Government of Canada, provided through the Canadian International Development Agency (CIDA), the International Development Research Centre (IDRC) and Environment Canada; and from the Province of Manitoba. The institute receives project funding from numerous governments inside and outside Canada, United Nations agencies, foundations and the private sector.

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The development of the International Institute for Sustainable Development's (IISD) Model International Agreement on Investment for Sustainable Development began with our initial work on the legal and policy dimensions of international investment and sustainable development in 1997 and 1998. By 2002, it became apparent that the direction of international investment negotiations, and the arbitrations that their outcomes produced, were wholly disconnected from any of the global development and sustainable development objectives that are said to underpin international economic negotiations.

In 2003, IISD launched the two intertwined projects that have led to this publication. One was the Southern Agenda on Investment (SAI), whose policy-based results form a major input into this text. The second was the model agreement initiative designed to take the debate on policy and translate it into the legal form of a model international agreement.

This effort could not have been undertaken without the initial support for IISD's investment work from the Ford Foundation and Mott Foundation, the latter of which has given us annual support. Specific funding for the Model Agreement project has come from several donors whose support we gratefully acknowledge:

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- the Swiss Agency for Development and Cooperation (SDC); and
- the Danish International Development Agency (DANIDA).

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In January 2005, IISD sponsored a workshop in The Hague attended by over 30 people from around the world, and representing all points of the political and legal spectrum. The participants spent three days discussing, in fine detail, a preliminary discussion draft of the Model Agreement. The fact that we can't name them all here does not diminish our gratitude to them for the effort they made in coming to The Hague and engaging in a fascinating discussion from which we have benefitted significantly. We are sincerely grateful. We are also grateful for the numerous comments on the discussion draft we received by e-mail. All have been carefully reviewed and considered. We look forward to continuing our dialogue in this way, as well as through the dissemination efforts planned for the next year.

Finally, the authors would like to thank those within the IISD family whose support has been unwavering, and contributions immense. Mark Halle is IISD's European Representative and Director of the institute's Trade and Investment Program. The two projects were developed under his guidance, and with his magical fundraising skills to see them through. Pernille Fenger has been project manager for both projects, responsible for the innumerable details needed for four international meetings; arrangements with all of the funders and regional partners; and the continued meddling of the authors in all of it. These projects would not have come to fruition without their enormous contributions.

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Stu Slayen has worked his own brand of magic in editing and polishing our words over the years, and turning them into publications that are readable by others. He has been supported throughout by Dennis Cunningham and Don Berg, our designer. To this extraordinary team, we extend our sincere thanks.

Finally, we must absolve all those who have contributed to this product of any responsibility for its failings. We are most grateful for their efforts, but we alone are responsible for its final content and the flaws or errors it may contain.

Howard Mann
Konrad von Moltke
Luke Peterson
Aaron Cosbey

April 2005

Introduction

International investment plays an increasingly important role in many economies. Perhaps more critically, it is an essential component of a sound global strategy for sustainable development. The International Institute for Sustainable Development (IISD) recognizes the close linkages between investment flows and sustainable development. The move from unsustainable practices in agriculture, energy, water use, resource harvesting, industry and other sectors towards more sustainable practices requires investment at national and international levels.

Because of the importance of foreign investment for sustainable development, IISD has for more than eight years been studying the nature and evolution of international investment agreements (IIAs). During that time, we have seen IIAs evolve to take on an expanded role and new meaning in international economic law, as well as in the practice of states, investors and international institutions. Indeed, the experience over the past several years has shown that IIAs are now an important part of the legal and policy mechanisms that underpin the economic processes of globalization today. Simply stated, IIAs are about governance for globalization.

Since their beginning in 1959, these agreements have provided significant rights for investors. IISD has, however, become increasingly skeptical of their broader impacts. The current model for investment agreements was developed in the political context of the 1950s and 1960s—a period characterized by fear of the spread of communism and concern for the impacts of decolonization on business interests in newly independent developing countries. Given this origin, the initial agreements were singularly focussed on just one aspect of the investment process: the protection of foreign capital and investments.

In addition, because the agreements grew on a bilateral basis between home and host states, no institutional home ever emerged, and no process for analyzing the success or failures of the agreements was developed. Assumptions that the signing of investment agreements would in itself be an act that attracted investment (a common refrain through the 1990s) have proven to be unfounded. Moreover, the arbitration process developed to address disputes under the agreements—with the primary focus on investor-state arbitrations—turned out in recent years to be rife with conflicts of interest, and has failed to meet the same basic criteria of legitimacy, transparency and accountability applied to the national dispute settlement processes it now routinely displaces.

Whatever its merits at the time, the model for IIAs developed 50 years ago no longer meets the needs of the global economy in the 21st century. Many observers, especially from civil society groups around the world, believe that the current international investment regime is so inherently flawed as to be beyond repair or reform. They argue for the complete dissolution of the regime, and for the construction of an alternative regime specifically focussed on the obligations of transnational actors. While IISD shares many of the concerns, we have taken a different tack in response to them. We believe the time is ripe to propose a new model for IIAs, a new direction that is consistent with the goals and requirements of sustainable development and the global economy of the 21st century.

Over the past 20 years, three attempts to negotiate binding multilateral rules for investment have failed—in the United Nations, in the Organisation for Economic Co-operation and Development (OECD) and, most recently, in the World Trade Organization (WTO).

IISD believes that these failures are not cause to abandon the search for multilateral rules. Rather, it is an indication of their importance and of the fact that governments have not yet identified an appropriate negotiating agenda. IISD believes it is, therefore, time for a new approach that responds to rapid globalization and to the need to promote sustainable development.

Towards this end, IISD has undertaken several projects to analyze the basis for such a new approach to international investment negotiations. We have worked on our own and with partners to identify the shortcomings of existing agreements and to explore the interests of developing countries in these negotiations. Above all, we have begun the process of developing a positive negotiating agenda that:

- recognizes that an investment agreement is fundamentally about good governance, and applies a standard of good governance to the agreement itself;
- ensures that investor rights and public goods are protected in a manner that is legitimate, transparent and accountable;
- establishes the aspirations of developing countries and the promotion of global sustainable development as a clear purpose for the international agreement;
- contains provisions that balance investor rights with a novel mix of voluntary and binding investor responsibilities, and with both host and home state rights and obligations;
- sets out specific proposals to establish a dispute settlement process that fixes what is currently a broken investor-state arbitration process;
- develops an understanding of the need for appropriate funding; and
- sets out an institutional framework that allows the regime to evolve based on its successes and failures.

Investment, both domestic and international in varying mixes for different states, is central to any attempt to promote sustainable development, but the current models are divorced from this reality and do little to promote such investments. We believe that the new approach we are proposing will set an agenda to improve the international investment climate, to place development at the heart of the process and to advance sustainable development.

Development of the Text: Past, Present and Future

The analytical work that underpins this project is found at www.iisd.org/investment. The full process for this specific project is also described there. In brief, this project evolved with a sister project to understand a Southern Agenda on Investment. We sought to understand what issues are currently on the agenda of developing countries—or should be, in their view—and what lessons can be learned from the recent explosion in the use and interpretation of existing bilateral and regional investment agreements. This brought us into contact with many researchers, analysts and civil society, business and government representatives, and has fueled much of what is found in this document. In addition, our own analysis has suggested the need for new directions to be established, that are expressly supportive of the role investment must play in a sustainable development context. In the absence of any models that could support what we viewed as essential, we undertook the preparation of a first consultation draft of this text. That document was the basis of intensive and detailed discussion at a workshop in The Hague in January 2005. Participants included experts in international law from several different perspectives, members of the international arbitration bar, arbitrators, economists, development experts and others. We also received important feedback on the consultation draft once it was made available for comment on the Internet.

The discussions at The Hague meeting and the comments received from others have been reviewed, leading to the revised text now being published. IISD is grateful to all those who took the time to participate, who expressed their views, concerns and criticisms.

The Model Agreement set out below should be seen as a living text. It provides an agenda for future negotiations, and a comprehensive, consistent view of the linkages between investment and sustainable development. The text is intended to be adaptable to bilateral, regional and multilateral negotiations, though differences will occur between each, and between different negotiating partners.

Viewed as a multilateral approach, the Model Agreement also provides a single window approach to addressing the defects in the now over 2,000 bilateral and regional agreements, all of which more or less share the same type of model. Thus, IISD believes that a multilateral approach offers significant advantages over further proliferation of bilateral agreements and regional agreements. IISD also believes that the opportunities for a coherent developing country approach to negotiating investment agreements will generate additional significant benefits for the development of a new model IIA.

Negotiators' Version Also Available

We have also published the IISD Model International Agreement on Investment for Sustainable Development: Negotiators' Handbook, an enhanced product designed for international investment negotiators.

The negotiators' version provides both the text of the model agreement that you see here as well as a commentary on each article. The goals of the commentary are:

- to elucidate key elements of the text from a policy or legal perspective; and
- to provide a sense of the options or alternative approaches to issues raised by the text. The commentary also seeks to explain why we chose the article as presented.

It is hoped that this will be a useful tool for negotiators, especially from developing countries. But it is also intended for academic use; for non-expert observers in civil society and in elected offices or parliaments at all levels of government; those who are experts and seeking a different level of analysis and those who are otherwise involved in the debate on the future of international investment agreements.

The objective has been to make this a user-friendly publication, with space for the reader's own notes. It can be a tool in preparing for negotiations and an aid in participating in them. The negotiators' version is available for free download at http://www.iisd.org/investment/model_agreement.asp.

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The electronic version of this document can be found at http://www.iisd.org/investment/model_agreement.asp. IISD welcomes your comments on this Model Agreement. Please send them to modelagreement@iisd.ca

PREAMBLE

The Parties,

Seeking to promote sustainable development at the national, regional and global levels;

Understanding sustainable development as being development that meets the needs of the present without compromising the ability of future generations to meet their own needs, and recognizing the contribution of the 1992 Rio Declaration on Environment and Development, the 2002 World Summit on Sustainable Development and the Millennium Development Goals to our understanding of sustainable development;

Recognizing that the promotion of sustainable investments is critical for the further development of national and global economies, as well as for the pursuit of national and global objectives for sustainable development;

Understanding further that the promotion of such investments requires cooperative efforts of investors, host governments and home governments;

Recognizing the development of protections for foreign investors in international law to date;

Affirming the progressive development of international law and policy on the relationships between multinational enterprises and host governments as seen in such international instruments as the ILO Tripartite Declaration on Multinational Enterprises and Social Policy; the OECD Guidelines for Multinational Enterprises; and the United Nations' *Norms and Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*;

Seeking an overall balance of rights and obligations in international investment between investors, host countries and home countries; and

Recognizing that an international investment agreement should reflect the basic principles of transparency, accountability and legitimacy for all participants in foreign investment processes,

Have agreed as follows:

PART 1: GENERAL PROVISIONS

Article 1: Objective

The objective of this Agreement is to promote foreign investment that supports sustainable development, in particular in developing and least-developed countries.

Article 2: Definitions

(A) "company" means any entity constituted or organized under the applicable law of the home or host state, whether or not for profit, and whether privately or governmentally owned or controlled;

(B) "national" of a Party means a natural person who is a national of that Party under its applicable law;

(C) "investment" means:

i) a company;

ii) shares, stock and other forms of equity participation in a company, and bonds, debentures and other forms of debt interests in a company;

iii) contractual rights, such as under turnkey, construction or management contracts, production or revenue-sharing contracts, concessions or other similar contracts;

iv) tangible property, including real property; and intangible property, including rights, such as leases, mortgages, hypothecs, liens and pledges on real property;

v) rights conferred pursuant to law, such as licences and permits

provided that

a) such investments are not in the nature of portfolio investments which shall not be covered by this Agreement;

b) that there is a significant[1] physical presence of the investment in the host state;

c) that the investment in the host state is made in accordance with the laws of that host state;

d) the investment is part or all of a business or commercial operation;[2] and

e) the investment is made by an investor as defined herein.

For greater certainty, an investment does not include: market share, whether or not it is based on foreign-origin trade; claims to money deriving solely from commercial contracts for the sale of goods and services to or from the territory of a Party to the territory of another country, or a loan to a Party or to a State enterprise; a bank letter of credit; or the extension of credit in connection with a commercial transaction, such as trade financing.

(D) "investor" is a national or company of a home State Party that makes, or is making, an investment into the territory of another Party;

(E) "international investment agreements" means any bilateral or regional Agreement in force that contains provisions for the protection of foreign investment or provisions that also set out rights and responsibilities of foreign investors, host states and/or home states relating to foreign investment; and includes parts, chapters or sections of integrated trade and investment agreements;

(F) "ICSID Convention" means the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington, March 18, 1965;

1 A significant physical presence would not include, for example, sales offices without other operational facilities, post office box-based businesses, Internet-based business or other types of business with very limited physical presence in the host state. As an example of a contrasting situation, a turnkey operation would normally involve significant capital investment, construction equipment, real property interests and other physical presences.

2 The Parties understand that not-for-profit operations, for example research institutes and non-governmental organizations, may fall within this Paragraph.

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

(H) "measures" includes any legal, administrative, legislative, judicial or policy decision that is taken by the host state, directly relating to and affecting an investment in the territory of the host state, but does not include measures in draft form;

(I) "home state" means the state declared by the investor and accepted by the host state as such in accordance with the following rules:

i) A foreign investor shall promptly choose its home state based on its principal place of business or a major centre of effective and sustained links with the home state economy and from where effective control over the investment is exercised,[3] and shall notify the host state of its home state.

ii) Where an investor changes in relation to an investment, it shall so notify the host state and identify the home state of the new investor, based on its principal place of business or a major centre of actual operations closely related to the investment.

iii) Subject to prior notification and consultation with the investor at the time notice is received, a Party may, within 90 days of such notice, deny the benefits of this Agreement to an investor of another Party that does not meet the requirements of Paragraphs A or B, or if investors of a non-Party own or control the enterprise and has no substantial business activities in the territory of the Party under whose law it is constituted or organized.

iv. For greater certainty, an investor may not declare its home state to be a Party where it is an enterprise of such Party but where it has no substantial business activities in the territory of that Party and persons of a non-Party, or of the putative host state own or control the enterprise.

v. Where an investor has its corporate headquarters or its principal place of business in a State Party to this Agreement, that state shall be deemed to be the home state for purposes of this Agreement where the preceding paragraphs have not led to another accepted choice.[4]

The selection of home state is for the purposes of this Agreement only.

(I) "host state" is the state where the investment is located.

3 Shell corporations, off-shore tax haven registrations and incorporations, and other forms of incorporation or location shall not be determinative of the formal place of location of home state. Effective control of the investment is the central issue here, commensurate with the capacity of home state liability to be effectively pursued if appropriate, in accordance with Article 17.

4 Footnote 3 applies here, *mutatis, mutandis*.

Article 3: Scope of coverage

(A) Subject to Paragraphs (D)–(F), this Agreement applies to all investments by an investor, whether the investment is made before or after the entry into force of this Agreement.

(B) Subject to Paragraphs (D)–(F), this Agreement applies to any measure adopted or maintained by a Party after the entry into force of this Agreement by a governmental authority of the host state.

(C) Subject to Paragraphs (D)–(F), this Agreement applies to measures taken by government authorities at the national, state, provincial or municipal level of government of a Party.

(D) This Agreement does not create retroactive obligations or responsibilities for investors. Investors who are not in compliance with ongoing obligations and responsibilities shall seek to enter into compliance as soon as possible, and within 12 months of the entry into force of this Agreement.

(E) Pre-establishment rights

i) Notwithstanding any other provision, nothing in this Agreement should be interpreted so as to create a right of establishment for potential investors in a potential home state.

ii) Parties wishing to list sectors in which they have, under their domestic law, removed barriers to foreign investors, including in services sectors, may list these in Annex E to this Agreement. Any conditions or limitations on the right to establishment of foreign investors in the listed sectors shall be listed at the same time.[5]

iii) Investors in sectors listed in Annex E, or otherwise seeking to make an investment they have a legal right to make, shall, subject to the limitations or conditions also set out in Annex E or in domestic law, then be covered by the provisions of this Agreement for acts related to the establishment or acquisition of an investment.

iv) States may amend their lists in Annex E, including any conditions, at their discretion, subject to the preservation of rights for an investor pursuant to this Agreement who has commenced the process of establishing an investment or who has established an investment.

(F) Notwithstanding any other provision of this Agreement, this Agreement does not apply to any investments that are made before or after the entry into force of this Agreement, or to measures adopted or maintained by a Party, as follows:

i) Sectors: For investments in any economic sectors in a host state listed in Annex C, including service sectors, and the Articles listed in Annex C with that list.

ii) Non-conforming measures: The application of any measures, or specific provisions of measures, including at a non-national level, not conforming to this Agreement that are listed in Annex D. All municipal measures in effect at the entry into force of this Agreement shall be deemed to be included in Annex D by reference to this Paragraph.

iii) Non-conforming measures amendments: The continuation of, or any amendments or other alterations to, measures or specific provisions of measures listed in Annex D, providing that such continuation, amendment or alteration shall not create any greater degree of non-conformity than the measure presently exhibits.

except that the vested rights of pre-existing investors and their investments pursuant to prior international investment agreements, and arising in any sector or in relation to any measure falling within this Paragraph, shall continue to apply for the duration of the extinguishment period in such agreements,[6] and providing that Article 8 of this Agreement shall apply to all investments.

5 The Parties understand that such limitations or conditions can include quantitative restrictions on overall investment, for example in the natural resources harvesting sectors or in relation to setting of ambient or specific pollution loads. They may also include limitations on the application of specific articles of this Agreement.

6 International investment agreements may include a provision that extends the rights of protection of an investor for a specific period of time after the agreement is terminated. This is the "extinguishment" period referred to in this Paragraph.

Article 4: Denial of benefits

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

   A) does not maintain diplomatic relations with the non-Party; or

   B) adopts or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Agreement were accorded to the enterprise or to its investments.

2. A Party may deny the benefits of this Agreement to an investor of another Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise.

PART 2: STANDARDS OF TREATMENT OF FOREIGN INVESTORS

Part 2 begins the articulation of the six categories of rights and obligations set out in this text: investor rights and obligations; host state rights and obligations; and home state rights and obligations. The investor rights are a refinement of the ongoing development of international law in this field. Host state obligations are, similarly, a refinement of ongoing developments. Host state rights, investor obligations, and home state rights and obligations have rarely seen any articulation in existing investment agreements, but some precedent is drawn on from broader economic cooperation agreements. Part 2 addresses investor rights, Parts 3–6 cover the remaining sets of complementary rights and obligations. They are NOT hierarchical in nature, however, all Parts having to be read in a manner that creates consistency among them as opposed to a hierarchy.

It can be argued that an actual treaty might not be drafted in such a structured format, which does necessitate some duplication. However, IISD believes it is better left this way for present purposes so that the issues and approaches can be fully understood.

Article 5: National treatment

(A) Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the management, conduct, operation, expansion and sale or other disposition of investments. Where a foreign investor may, under domestic law, establish an investment, this Article shall apply to the extent it is not inconsistent with such domestic law relating to the establishment or acquisition of investments.

(B) Each Party shall accord to investments of investors of another Party treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the, management, conduct, operation, expansion and sale or other disposition of investments.

(C) Measures taken in accordance with government procurement policies specifically for the purchase of goods or services by any level of government shall not be considered a breach of this Article.

(D) The treatment accorded by a Party under Paragraphs (A) and (B) means, with respect to a non-national level of government, treatment no less favourable than that government accords, in like circumstances, to investors and to investments within the jurisdiction of the government in question.

(E) For greater certainty, the concept of "in like circumstances" requires an overall examination, on a case-by-case basis, of all the circumstances of an investment, including, *inter alia*:

a) its effects on third persons and the local community;

b) its effects upon the local, regional or national environment, or the global commons;[7]

c) the sector the investor is in;

d) the aim of a measure of concern;

e) the regulatory process generally applied in relation to a measure of concern; and

f) other factors directly relating to the investment or investor in relation to the measure of concern.

The examination shall not be limited to or biased toward any one factor.

7 The Parties understand that such considerations can include the cumulative impacts of all investments within a jurisdiction, for example in the natural resources harvesting sectors or in relation to setting of ambient or specific pollution loads. Many jurisdictions do not allow new investments that will cause applicable environmental or human health tolerances to be exceeded.

Article 6: Most-favoured-nation treatment

(A) This Article applies to:

a) all measures of a Party covered by the Agreement, and

a) to the substantive provisions[8] of other international agreements relating to investment that enter into force after this Agreement has entered into force.

(B) Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the management, conduct, operation, expansion, sale or other disposition of investments. Where a foreign investor of a Party or non-Party may, under domestic law, establish an investment, this provision shall apply to the extent it is not inconsistent with such domestic law relating to the establishment or acquisition of investments.

(C) Each Party shall accord to investments of investors of another Party treatment no less favourable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the management, conduct, operation, expansion, sale or other disposition of investments.

(D) Each Party shall accord to investors of another Party, and to investments of investors of another Party, the better of the treatment required by this Article and the national treatment obligation.

(E) Paragraphs (B)–(D) do not oblige one Party to extend to the investors of another Party the benefit of any treatment, preference or privilege contained in

i) any existing or future customs union, free trade area, common market, any international environmental agreement to which the investor's home state is not a Party, or

ii) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.

(F) Paragraphs (C)–(E) of Article 5 apply, *mutatis mutandis*, to the present Article.

8 This Article does not apply to procedural, institutional or dispute settlement provisions of other international agreements relating to investment that enter into force after this Agreement.

Article 7: Minimum international standards

(A) Each Party shall accord to investors or their investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. This obligation shall be understood to be consistent with the obligation of host states, in particular under Article 19 of this Agreement.

(B) Paragraph (A) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments. The concepts of "fair and equitable treatment" and "full protection and security" are included within this standard, and do not create additional substantive rights.

(C) Each Party shall accord to investors and investments non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

(D) Notwithstanding Paragraph (C), if an investor of a Party, in the situations referred to in that Paragraph, suffers a loss in the territory of the other Party resulting from:

i) requisitioning of its investment or part thereof by the latter's forces or authorities; or

ii) destruction of its investment or part thereof by the latter's forces or authorities,

which was not required by the necessity of the situation, the latter Party shall provide the investor restitution or compensation, which in either case shall be prompt, adequate and effective, and, with respect to compensation, shall be in readily convertible form.

Article 8: Expropriation

(A) No Party may directly or indirectly nationalize or expropriate an investment in its territory ("expropriation"), except:

i) for a public purpose;

ii) on a nondiscriminatory basis;

iii) in accordance with due process of law; and

iv) on payment of compensation in accordance with Paragraphs (B)–(F).

(B) Appropriate compensation shall normally 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. Compensation may be adjusted to reflect aggravating conduct by an investor or conduct that does not seek to mitigate damages.

(C) Compensation shall be paid without delay and be fully realizable.

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

(E) If a Party elects to pay in a currency other than a G7 currency, the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.

(F) On payment, compensation shall be freely transferable. Awards that are significantly burdensome on a host state may be paid yearly over a period of three years or such other period as agreed by the Parties, subject to interest at the rate established by agreement of the disputants or by a tribunal.

(G) This Article does not apply to the issuance of compulsory licences 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 applicable international agreements on intellectual property.

(H) A non-discriminatory measure of general application shall not be considered an expropriation of a debt security or loan covered by this Agreement solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.

(I) Consistent with the right of states to regulate and the customary international law principles on police powers, *bona fide*, non-discriminatory regulatory measures taken by a Party that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an indirect expropriation under this Article.[9]

9 By contrast, a measure in the form of legislation or a regulation that takes title to property would not fall under the indirect expropriation formulation.

Article 9: Senior management and boards of directors

(A) No Party may require that an investment appoint to senior management positions individuals of any particular nationality.

(B) A Party may require that a majority of the board of directors, or any committee thereof, of an investment, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

C) Subject to generally applicable rules of entry, no Party may unduly restrict or prevent the cross-border movement of senior management and members of the boards of directors of an investment.

Article 10: Transfers of assets

(A) Each Party shall permit all transfers relating to an investment to be made freely and without delay. Such transfers include:

i) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance and other fees, returns in kind, physical assets and other amounts derived from the investment;

ii) proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;

iii) payments made under a contract entered into by the investor, or its investment, including payments made pursuant to a loan agreement;

iv) payments made pursuant to Article 8; and

v) payments arising under any dispute settlement process.

(B) Each Party shall permit transfers to be made in a freely usable currency at the market rate of exchange prevailing on the date of transfer with respect to spot transactions in the currency to be transferred.

(C) Notwithstanding Paragraphs (A) and (B), a Party may prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:

i) bankruptcy, insolvency or the protection of the rights of creditors;

ii) issuing, trading or dealing in securities;

iii) criminal or penal offenses;

iv) reports of transfers of currency or other monetary instruments; or

v) ensuring the satisfaction of judgments in adjudicatory proceedings.

(D) Notwithstanding Paragraph (B), a Party may restrict transfers or returns in kind in circumstances where it could otherwise restrict such transfers under this Agreement.

PART 3: OBLIGATIONS AND DUTIES OF INVESTORS AND INVESTMENTS

Article 11: General obligations

(A) Investments are subject to the laws and regulations of the host state.

(B) Investors and investments must comply with the host state measures prescribing the formalities of establishing an investment, and accept host state jurisdiction with respect to the investment.

(C) Investors and investments shall strive, through their management policies and practices, to contribute to the development objectives of the host states and the local levels of government where the investment is located.

(D) An investor shall provide such information to a potential host State Party as that Party may require concerning the investment in question for purposes of decision-making in relation to that investment or solely for statistical purposes. The Party shall protect any confidential business 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 domestic law.

Article 12: Pre-establishment impact assessment

A) Investors or the investment shall comply with environmental assessment screening criteria[10] and assessment processes applicable to their proposed investments prior to their establishment, as required by the laws of the host state for such an investment or the laws of the home state for such an investment, whichever is more rigorous in relation to the investment in question. On all occasions, the investor or investment shall comply with the minimum standards on environmental impact assessment and screening that the Parties shall adopt at the first meeting of the Parties, to the extent these are applicable to the investment in question.

(B) Investors or the investment shall conduct a social impact assessment of the potential investment. The Parties shall adopt standards for this purpose at the first meeting of the Conference of the Parties.

(C) Investors or the investment shall make the environmental and social impact assessments public and accessible in the local community and to affected interests in the host state where the investment is intended to be made prior to the completion of the host state measures prescribing the formalities for establishing an investment.

(D) Investors, their investment and host state authorities shall apply the precautionary principle to their environmental impact assessment and to decisions taken in relation to a proposed investment, including any necessary mitigating or alternative approaches to the investment, or precluding the investment if necessary.[11] The application of the precautionary principle by investors and investments shall be described in the environmental impact assessment they undertake.

10 Screening criteria include issues related to the size of an enterprise, its inputs and its outputs, each of which impact the scope of an assessment that may be required. These will normally exempt small enterprises and many service-related enterprises from the application of any assessment process. By contrast, resource-related projects will rarely be exempted.

11 The precautionary principle is defined in Article 15 of the Rio Declaration on Environment and Development as follows: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

Article 13: Anti-corruption

(A) Investors and their investments shall not, prior to the establishment of an investment or afterwards, offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a public official of the host state, for that official or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties, in order to achieve any favour in relation to a proposed investment or any licences, permits, contracts or other rights in relation to an investment.

(B) Investors and their investments shall not be complicit in any act described in Paragraph (A), including incitement, aiding and abetting, and conspiracy to commit or authorization of such acts.

Article 14: Post-establishment obligations

(A) Investments shall, in keeping with good practice requirements relating to the size and nature of the investment, maintain an environmental management system. Companies with over [250][500] employees, or in areas of resource exploitation or high-risk industrial enterprises shall maintain a current certification to ISO 14001 or an equivalent environmental management standard. Emergency response and decommissioning plans shall be included in the environmental management system process.[12]

(B) Investors and investments should uphold human rights in the workplace and in the state and community in which they are located. Investors shall not undertake or cause to be undertaken, acts that breach such human rights. Investors and investments shall not by complicit with, or assist in, the violation of the human rights by others in the host state, including public authorities or during civil strife. The Parties shall, at their first meeting, adopt a list of international human rights and human rights instruments to assist investors in complying with this Provision.

(C) Investors and investments shall act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998.[13]

(D) Investors and investments shall not manage or operate the investments in a manner that circumvents international environmental,[14] labour and human rights obligations to which the host state and/or home state are Parties.

12 The ability to maintain a current certification may be hampered by lack of qualified certification bodies in some regions. This may be seen as a temporary problem when alternatives are being pursued in good faith by an investment.

13 These core labour standards are further elaborated, in accordance with the Declaration, in ILO Conventions concerning freedom of association, the elimination of forced labour, the abolition of child labour and the elimination of discrimination in the work place.

14 Several international environmental agreements have differentiated obligations. Circumvention of an agreement does not occur when the differentiated obligations of the host state under an agreement are not breached.

Article 15: Corporate governance and practices

In accordance with the size and nature of an investment,

(A) Investments shall meet or exceed national and internationally accepted standards of corporate governance for the sector involved, in particular for transparency and accounting practices.

(B) Investors and investments shall make available to the public any investment contract or agreement with the host state government(s) involved in the investment authorization process, subject to the redaction of confidential business information. Investors or investments shall publish all information relating to payments made to host state public authorities, including taxes, royalties, surcharges, fees and all other payments.

(C) Investments shall establish and maintain, where appropriate, local community liaison processes, in accordance with internationally accepted standards when available.

(D) Where relevant internationally accepted standards of the type described in this Article are not available or have been developed without the participation of developing countries, the Conference of the Parties may establish such standards.

Article 16: Corporate social responsibility

(A) In addition to the obligation to comply with all applicable laws and regulations of the host state and the obligations in this Agreement, and in accordance with the size, capacities and nature of an investment, and taking into account the development plans and priorities of the host state, the Millennium Development Goals and the indicative list of key responsibilities provided in Annex F, investors and their investments should strive to make the maximum feasible contributions to the sustainable development of the host state and local community through high levels of socially responsible practices.

(B) Investors should apply the ILO Tripartite Declaration on Multinational Enterprises and Social Policy and the OECD Guidelines for Multinational Enterprises, as well as specific or sectoral standards of responsible practice where these exist.

(C) Where standards of corporate social responsibility increase, investors should strive to apply and achieve the higher level standards.

Article 17: Investor liability

Investors shall be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state.

Article 18: Relation of this Part to dispute settlement

(A) Where an investor or its investment has breached Article 13 of this Agreement, neither the investor not investment shall be entitled to initiate any dispute settlement process established under this Agreement. A host or home state may raise this as an objection to jurisdiction in any dispute under this Agreement, or in the procedure set out in Part 9 of this Agreement.

(B) Where an investor or its investment is alleged by a host state or an intervener in a dispute settlement proceeding under this Agreement to have failed to comply with its obligation relating to pre-establishment impact assessment, the tribunal hearing such a dispute shall consider whether this breach, if proven, is materially relevant to the issues before it, and if so, what mitigating or off-setting effects this may have on the merits of a claim or on any damages awarded in the event of such award.

(C) Where a host state or home state believes that an investor or its investment has breached Article 13 or has persistently failed to comply with its obligations under Articles 14 or 15, and such investor or investment has been notified by the host state or home state, as appropriate, either the host state or the home state may initiate proceedings before a tribunal under Part 9 of this Agreement to have the rights of the investor or investment, as the case may be, abrogated.

(D) Where a persistent failure to comply with Articles 14 or 15 is raised by a host state defendant or an intervener in a dispute settlement proceeding under this Agreement, the tribunal hearing such a dispute shall consider whether this breach, if proven, is materially relevant to the issues before it, and if so, what mitigating or off-setting effects this may have on the merits of a claim or on any damages award in the event of such award.

(E) A host state may initiate a counterclaim before any tribunal established pursuant to this Agreement for damages resulting from an alleged breach of the Agreement.

(F) In accordance with the applicable domestic law, a host state or private person or organization, may initiate actions for damages under the domestic law of the host state, or the domestic law of the home state where such an action relates to the specific conduct of the investor, for damages arising from an alleged breach of the obligations set out in this Part.

PART 4: HOST STATE OBLIGATIONS

Article 19: Procedural fairness

In accordance with the requirements of Article 7:

(A) Host states shall ensure that their administrative, legislative and judicial processes do not operate in a manner that is arbitrary or that denies administrative and procedural fairness to investors and investments. Investors or investments shall be notified in a timely fashion of administrative or judicial proceedings directly relating to them, unless such notice is contrary to domestic law on an exceptional basis.[14]

(B) Hosts states shall act in a manner that does not create a denial of justice in judicial and administrative proceedings.[15]

(C) Administrative decision-making processes shall include the right of administrative appeal of decisions, commensurate with the level of development of the host state. Judicial review of administrative decisions should also be available through domestic judicial review processes.

(D) For greater certainty, the Parties understand that different Parties have different forms of administrative, legislative and judicial systems, and that states at different levels of development may not achieve the same standards or qualities for their administrative and judicial processes. Paragraphs (A)–(C) of this Article do not establish a single international standard in this context.

(E) Host states should strive to improve the transparency, efficiency, independence and accountability of their legislative, regulatory, administrative and judicial processes, and shall provide review or appeal procedures to ensure that they operate in accordance with applicable domestic laws and regulations.

(F) Judicial and administrative review processes shall be open to the public and documents shall be accessible by the public unless prohibited in accordance with domestic law. Decisions of such bodies shall be made available to the public.

14 For example, criminal investigations may require that no notice be given to anyone.

15 The fact that an investor or investment does not achieve a desired result does not constitute a denial of justice.

Article 20: Maintenance of environmental and other standards

The Parties recognize that it is inappropriate to encourage investment by relaxing domestic labour, public health, safety or environmental measures and thus 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 their territories, of an investment.

Article 21: Minimum standards for environmental, labour and human rights protection

(A) Recognizing the right of each Party to establish its own level of domestic environmental protection and its own sustainable development policies and priorities, and to adopt or modify its environmental laws and regulations, each Party shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations.

(B) Each Party shall ensure that its laws and regulations provide for high levels of labour and human rights protection appropriate to its economic and social situation, and shall strive to continue to improve these laws and regulations.

(C) All Parties shall have, as a soon as practicable, a domestic environmental impact assessment law and social impact assessment law that meets the minimum standards adopted by the Conference of the Parties on these matters.

(D) All Parties shall ensure that their domestic law and policies are consistent with the core labor requirements of the ILO Declaration on Fundamental Principles and Rights of Work, 1998.

(E) All parties shall ensure that their laws, policies and actions are consistent with the international human rights agreements to which they are a Party and, at a minimum, as soon as practicable with the list of human rights obligations and agreements to be adopted by the first meeting of the Parties.

Article 22: Anti-corruption

All host states shall ensure that

(A) the offering, solicitation or acceptance of an offer, promise or gift of any pecuniary or other nature, whether directly or through intermediaries, to any public official of the host state, for that official or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties to achieve any favour in relation to a proposed investment or any licences, permits, contracts or other rights in relation to an investment; and

(B) any acts complicit in any act described in Paragraph (A), including incitement, aiding and abetting, conspiracy to commit or authorization of such acts;

shall be made criminal offences in the host state and subject to appropriate criminal enforcement and sanctions. Host states shall make every effort to prosecute such activities in accordance with domestic law.

Article 23: Publication of information

Host states shall make available to the public any investment contracts or agreements with an investor or investment involved in the investment authorization process, subject to the redaction of confidential business information. Host states shall make available to the public all information relating to payments made to host state public authorities, including taxes, royalties, surcharges, fees and all other payments by investments.

Article 24: Subsidies

Potential host states should not compete for the achievement of foreign investment or investments through subsidies or other means, including tax relief, that distort international competition for investments. The Parties shall initiate negotiations on a Protocol to establish legally binding obligations in this issue, having due regard for the need for special and differential treatment of developing countries, particularly least-developed countries, in such obligations.

PART 5: HOST STATE RIGHTS

Article 25: Inherent rights of states

(A) Host states have, in accordance with the general principles of international law, the right to pursue their own development objectives and priorities.

(B) In accordance with customary international law and other general principles of international law, host states have the right to take regulatory or other measures to ensure that development in their territory is consistent with the goals and principles of sustainable development, and with other social and economic policy objectives.

(C) Except where the rights of a host state are expressly stated as an exception to the obligations of this Agreement, the pursuit of these rights shall be understood as embodied within a balance of the rights and obligations of investors and investments and host states, as set out in this agreement, and consistent with other norms of customary international law.

(D) *Bona fide*, non-discriminatory, measures taken by a Party to comply with its international obligations under other treaties shall not constitute a breach of this Agreement.

(E) Host states may, through their applicable constitutional processes, fully incorporate this Agreement into their own domestic law so as to make the provisions herein enforceable before domestic courts or other appropriate processes.

Article 26: Performance requirements

(A) The Parties recognize their obligations regarding trade-related investment measures established in other international agreements to which they are a Party.

(B) Subject to Paragraph (A), host states may impose performance requirements to promote domestic development benefits from investments. Measures adopted prior to the completion of the host state measures prescribing the formalities for establishing an investment shall be deemed to be in compliance with this Agreement. If such measures are taken after the completion of the host state measures prescribing the formalities for establishing an investment, they shall be subject to the provisions of this Agreement.

(C) Measures covered by this Article include requirements:

i) to export a given level or percentage of goods or services;

ii) to achieve a given level or percentage of domestic content;

iii) to purchase, use or accord a preference to goods produced or services provided in its territory;

iv) to purchase goods or services from persons in its territory;

v) to relate the volume or value of imports to the volume or value of exports or to the amount of foreign exchange flows associated with such investment;

vi) to restrict sales of goods or services in its territory that such investment produces by relating such sales to the volume or value of its exports or foreign exchange earnings; and

vii) similar measures intended to promote domestic development.

Article 27: Investment promotion and facilitation

Host states may maintain and develop investment promotion and facilitation agencies and services.

Article 28: Access to investor information

(A) Host states have the right to seek information from a potential investor or its home state about its corporate governance history and its practices as an investor, including in its home state.

(B) Host states shall protect confidential business information they receive in this regard.

(C) Host states may make the information provided available to the public in the community where the investment may be located, subject to the protection of confidential business information and to other applicable domestic laws.

PART 6: HOME STATE RIGHTS AND OBLIGATIONS

Article 29: Assistance and facilitation for foreign investment

(A) Home states with the capacity to do so should assist developing and least-developed states in the promotion and facilitation of foreign investment into such states, in particular by their own investors. Such assistance shall be consistent with the development goals and priorities of the countries in question. Such assistance may include, *inter alia*:

i) capacity building with respect to host state agencies and programs on investment promotion and facilitation;

ii) insurance programs based on commercial principles;

iii) direct financial assistance in support of the investment or of feasibility studies prior to the investment being established;

iv) technical or financial support for environmental and social impact assessments of a potential investment;

v) technology transfer; and

vi) periodic trade missions, support for joint business councils and other cooperative efforts to promote sustainable investments.

(B) Home states shall inform host states of the form and extent of available assistance as appropriate for the type and size of different investments.

Article 30: Information

(A) Home states shall, on request, and in a timely manner, provide to a potential host state such information as is requested and available for the purposes of the host state to meet its obligations and perform its duties in relation to an investor or investment under this Agreement and the host state's domestic law. Home states shall protect confidential business information in this regard.

(B) Home states shall, on request, and in a timely manner, provide information relevant to the home state standards that might apply under like circumstances to the investment proposed by its investor, including but not limited to the home state environmental impact assessment process.

Article 31: Investor liability in home state

Home states shall ensure that their legal systems and rules allow for, or do not prevent or unduly restrict, the bringing of court actions on their merits before domestic courts relating to the civil liability of investors for damages resulting from alleged acts or decisions made by investors in relation to their investments in the territory of other Parties.[16] The host state laws on liability shall apply to such proceedings.

16 This Article requires home states to end such procedural or jurisdictional constraints as seen in the *forum non conveniens* rule, or similar rules, that impede hearings on the merits of cases relating to investor acts or decisions.

Article 32: Anti-corruption

(A) All home states shall ensure that:

i) the offer, promise or giving of any money or gift of any other nature, whether directly or through intermediaries, to any public official of the host state, for that official or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties to achieve any favour in relation to a proposed investment or any licences, permits, contracts or other rights in relation to an investment; and

ii) any acts complicit in any act described in Paragraph (i), including incitement, aiding and abetting, conspiracy to commit or authorization of such acts;

shall be made criminal offences in the home state and subject to appropriate criminal enforcement and sanctions. Home states shall make every effort to prosecute such activities in accordance with domestic law.

(B) All home states shall ensure that any money or other forms of benefits encompassed in Paragraph (A) shall not be recoverable or deductible in any fiscal or tax laws or policies.

(C) Home states shall, when possible, provide all available information that might assist a dispute settlement tribunal under this Agreement in determining whether a breach off an anti-corruption obligation has occurred.

PART 7: RELATION TO OTHER AGREEMENTS

Article 33: Relation to other investment agreements and obligations

(A) Upon the home and host states becoming Parties to this Agreement, all pre-existing international investment agreements to which they are a Party shall, as between such states, be deemed to be terminated by mutual consent and all the rights and obligations due shall be pursuant to this Agreement. Except as specified in Article 3(F), such termination shall be immediate notwithstanding any expiration period for the rights of investors or investments under such pre-existing agreements.

(B) Where states Party to this agreement have an international investment agreement with a non-Party, they shall strive to renegotiate those agreements to make them consistent with the present Agreement or to ensure that all Parties to the other Agreement become a Party to this Agreement.

(C) States Party to this agreement shall ensure that all future investment agreements to which they may become Party are fully consistent with the present Agreement, particularly with the balance of rights and obligations it establishes, and the principal features of the dispute settlement system. The Conference of the Parties may be called upon to assess compliance with this obligation on the request of a Party.

(D) Notwithstanding any of the above, any disputes that have been formally initiated under prior international investment agreements shall be decided in accordance with the rights and obligations of that agreement.

Article 34: Relation to other international agreements

(A) The Parties agree that the provisions of other international trade agreements to which they are a Party are consistent with the provisions of this Agreement. The Parties shall seek to interpret such agreements in a mutually supportive manner.

(B) In the event of any dispute arising on this issue, the Parties shall seek to resolve such dispute within the mechanisms of this agreement as a first step.

(C) The Parties hereby re-affirm their obligations under international environmental and human rights agreements to which they are a Party.

PART 8: INSTITUTIONS

Article 35: National Authority

(A) Each Party shall establish a National Authority as a contact point for purposes related to the Agreement. The functions of the National Authority shall include:

i) requesting or transmitting information from or to another Party;

ii) providing a contact for assistance in investment promotion and facilitation;

iii) maintaining statistics about inward and outward investment of the Party;

iv) handling enquiries in relation to the conduct of investments or investors of the Party;

v) investigating and seeking to resolve concerns or conflicts raised by individuals or civil society groups in relation to the conduct of investors or investments concerning their obligations under this Agreement or the additional responsibilities set out in the Agreement;

vi) reporting on any matters dealt with under Paragraph v; and

vii) any other functions the Party incorporates into its work.

(B) The National Authority shall operate in a visible, accessible, transparent and accountable manner. It shall receive and consider information, statements of concern or other information from government officials, non-governmental groups or individuals from the State Party in which it is established, or from the host state of an investor for which it is the home state.

Article 36: Conference of the Parties

(A) The Conference of the Parties will be the governing body of the Agreement. It shall meet within one year of the Agreement coming into force, and once every year after that.

(B) The Conference of the Parties shall adopt at its first meeting rules of procedure and financial rules for itself and any subsidiary bodies, as well as financial provisions governing the functioning of the Conference of the Parties and the Secretariat.

(C) All Parties shall have an equal voice on the Conference of the Parties. Decisions shall be taken by consensus. Where, after all efforts are exhausted, no consensus is deemed possible by the chair of a meeting, a decision may be taken by three-quarters of the Parties present and voting.

(D) The Conference of the Parties shall perform the tasks assigned by the Agreement and such additional tasks as it deems appropriate for the fulfillment of the purposes of the Agreement. These tasks shall include, *inter alia*:

i) appoint the Executive Director of the Secretariat, and instruct the Secretariat on its functions;

ii) adopt Protocols and Annexes to this Agreement;

iii) adopt the instruments or lists required of it in other Articles of this Agreement;

iv) promote the development of qualitative standards for sustainable investments;

v) establish qualitative criteria for measuring the effective contribution of investments to host state development;

vi) monitor the effectiveness of this Agreement, including undertaking of a three-year review of the operation and effectiveness of this Agreement and subsequent reviews every three years;

vii) establish a procedure for Parties to report on the implementation and effectiveness of the Agreement at the state level;

viii) appoint such sub-organs or committees as it determines necessary for the proper functioning of this Agreement, including an Executive Committee of regionally balanced representation to oversee the management and operation of this Agreement between meetings of the Conference of the Parties, and a review and monitoring body to assist in the monitoring of this Agreement; and

ix) adopt interpretative statements concerning the interpretation of this Agreement.

(E) The United Nations and its specialized agencies, the World Trade Organization, the World Bank and its component agencies, any other inter-governmental organization whose work is impacted by this Agreement, as well as any state not Party to this Convention, may be represented at meetings of the Conference of the Parties as observers. Any body or agency, whether national or international, governmental or non-governmental, qualified in matters covered by the Convention, and which has informed the Secretariat of its wish to be represented at a meeting of the Conference of the Parties as an observer, may be admitted unless at least two-thirds of the Parties present object. The admission and participation of observers shall be subject to the rules of procedure adopted by the Conference of the Parties.

Article 37: Technical Assistance Committee

A Technical Assistance Committee of the Conference of the Parties is hereby established as a Committee of the whole. This Committee shall:

i) have special expertise in the promotion of development and sustainable investments;

ii) organize the provision of technical assistance to the Parties relating to the implementation of this Agreement, upon their request, including in the area of development planning and investment linkages;

iii) establish and manage a special fund for the provisions of technical assistance;

iv) promote the transfer of technology through appropriate investments; and

v) such other matters as the members of the Committee or the Conference of the Parties may determine.

The rules of procedure and participation applicable to the Conference of the Parties shall apply, *mutatis mutandis*, to this Committee.

Article 38: Financial mechanism

The Parties shall establish a financial mechanism with the objective of supporting institutional development and capacity building in host state developing countries and, in particular, least-developed countries. Support from this mechanism may be directed at support for the Technical Assistance Committee, investment promotion and facilitation projects, at the monitoring of the effectiveness of this agreement, and for the establishment and operation of the Legal Assistance Centre.

Article 39: Secretariat

(A) A Secretariat to the Agreement is hereby established. The Secretariat shall be headed by an Executive Director appointed by the Conference of the Parties.

(B) The Executive Director shall be responsible for appointing and managing an international staff capable of providing the necessary range of support for the Conference of the Parties and to meet its responsibilities.

(C) The Secretariat shall be an independent body and undertake such tasks as may be directed by the Conference of the Parties. Such tasks may include:

i) making arrangements for meetings of the Conference of the Parties and its subsidiary bodies and to provide them with services as required;

ii) facilitating assistance to the Parties, particularly developing Parties and Parties with economies in transition, on request, in the implementation of this Agreement;

iii) ensuring the necessary coordination with the Secretariats of other relevant international bodies;

iv) entering, under the overall guidance of the Conference of the Parties, into such administrative and contractual arrangements as may be required for the effective discharge of its functions;

v) collecting and disseminating information on the functioning of this Agreement, including the implementation of its provisions and the rates of foreign direct investment under the Agreement;

vi) establishing a list of qualified mediators to assist Parties, investors and investments in resolving potential disputes;

vii) performing the other Secretariat functions specified in this Convention and such other functions as may be determined by the Conference of the Parties; and

viii) performing the tasks necessary to assist in preparing for the first meeting of the Conference of the Parties.

Article 40: Dispute Settlement Body

(A) A Dispute Settlement Body (DSB) is hereby established to manage the dispute settlement processes under this Agreement.

(B) The Dispute Settlement Body shall be composed of a Council of the Parties open to all Parties, a panel division and an appellate division.

(C) The Council of the Parties shall establish a Secretariat to assist the Dispute Settlement Body in its operation and the panel and appellate divisions in the management of their cases. The Secretariat shall be headed by a Director.[17] This dispute settlement Secretariat shall be independent of any other body established by this Agreement.

(D) The Council shall oversee the operation of the Dispute Settlement Body. It shall be responsible for ensuring the smooth operation of the dispute settlement processes as a whole. The Council may not interfere in any individual disputes between Parties or between an investor or investment and a Party.

(E) There shall be a standing body of 35 panelists from which all panel members shall be drawn. The Director of the Council shall appoint all panelists on disputes on a lottery basis, and subject to:

i) no panelist being called to serve more than twice before all other panelists have served at least once; and

ii) no panelist being from a state of a disputing Party.

(F) The panelists shall be chosen by the Council at its first meeting, with one-third then chosen at each subsequent meeting. No panelist can serve more than three terms, subject to completing any ongoing dispute settlement processes in which the panelist is engaged.

(G) Any panelist in a position of real or apparent conflict of interest shall recuse himself or herself from the panel in question.

(H) The appellate division shall be composed of nine individuals with recognized expertise in the matters covered by this Agreement. Appellate body members shall be appointed on a full-time basis and be free of any real or apparent conflict of interest in any case on which they sit.

(I) Appellate division members shall be chosen by the Council for a term of seven years. The Council shall choose a replacement for any member who is incapable of continuing to fulfill their duties for the remainder of their term. Members may be re-elected one time. For the first period, the Council shall select new members or re-select existing members, after four years.

(J) Members of the panel and appellate divisions shall be individuals of high repute with expertise in the matters covered by this Agreement. Each shall comply with a Code of Ethics that will establish the highest standards of conduct and ensure the absence of a real or apparent conflict of interest in all cases.[18] No panel or appellate body member may be an advocate in any arbitration cases at the same time as being a member of either division, or affiliated with other advocates in a similar situation.

17 The Council of the Parties may designate, subject to appropriate arrangements being agreed, the Centre to act as the Secretariat for the Dispute Settlement Body if it becomes an independent body responsible only to the Council of the Parties.

18 A minimum standard to be included in the Code of Ethics shall require that no panel division member may be an advocate in any investment arbitration cases at the same time as being a member of either division, or directly affiliated with other advocates in a similar situation. (Appellate division appointments are full time and in a personal capacity, and hence encompass this rule by definition.)

Article 41: Legal Assistance Centre

(A) A Legal Assistance Centre to assist developing country Parties, and especially least-developed states, in responding to claims by an investor or in initiating procedures permitted under this Agreement against investors, shall be established.

(B) This Centre shall be independent of the Secretariat and function as a self-directed body. Its legal advice shall be confidential and subject to the same standards of lawyer-client protection and service as a private law firm.

(C) The Centre may also assist in capacity building on legal issues raised in this Agreement in developing countries, or for the implementation of the Agreement under domestic law and policy.

(D) The Legal Assistance Centre shall report to the Conference of the Parties on a yearly basis concerning its financing and a summary of its activities.

(E) The Legal Assistance Centre shall disclose all sources of funds. It may receive funds from states Party, other States, international organizations and non-governmental organizations as long as the receipt of such funds is public and does not compromise the integrity of the Centre.

PART 9: DISPUTE PREVENTION AND SETTLEMENT

Article 42: Prevention of disputes and mediation

(A) In the event a dispute arises between the Parties, between a State Party and an investment or investor, or between an investment or investor and a host state, the Party wishing to raise the dispute shall issue a notice of intention to initiate an arbitration under this Agreement to the other potential disputing Party or Parties.

(B) For the purposes of this Agreement, there shall be a minimum six-month cooling-off period between the date of a notice of intention to initiate a dispute settlement process under this Agreement, and the date a Party, investment or investor, as the case may be, may formally initiate a dispute.

(C) The Parties shall seek to resolve potential disputes through amicable means, both prior to and during the cooling-off period. Investors and investments shall similarly seek to resolve potential disputes with host states, and host states with their investors and investments, in an amicable manner, prior to and during the cooling-off period. The use of good offices, conciliation, mediation or any other agreed dispute resolution process may be applied.

(D) Where no alternative means of dispute settlement are agreed upon, Parties, investors or investments, as the case requires, shall seek the assistance of a mediator to resolve disputes during the cooling-off period required under this Agreement between notification of a potential dispute and the initiation of dispute settlement proceedings. The potential disputants shall use a mediator from the list established by the Secretariat for this purpose, or another one of their joint choosing. Recourse to mediation does alter the minimum cooling-off period.

(E) If no mediator is chosen by the disputing parties prior to three months before the expiration of the cooling-off period, the Director of the Council shall appoint a mediator from the Secretariat list who is not a national of a State Party or the investor. The appointment shall be binding on the disputing parties.

(F) The Parties may also establish regionally-based mediation centres to facilitate the resolution of disputes between Parties and investors or investments, taking into account regional customs and traditions. Mediators officially appointed to such centres shall be incorporated into the Secretariat list.

Article 43: State-state disputes

(A) In the event of a dispute between two or more Parties as to the application or interpretation of this Agreement, and such dispute has not been resolved pursuant to good faith efforts in accordance with Article 42, a Party may initiate an arbitration in accordance with the rules in this Agreement, including Annex A of this Agreement, applying them *mutatis mutandis* to the context of a state-state dispute.

(B) Such a dispute shall, unless otherwise resolved, proceed to a panel, and may, at the discretion of a disputing Party, subsequently be taken to the appellate division.

Article 44: Procedure for abrogation of investor/investment rights

(A) In the event of a dispute between a Party and an investor or investment relating to the abrogation of said investor's or investment's rights under Article 18 of this Agreement, and such dispute has not been resolved pursuant to good faith efforts in accordance with Article 42, a Party may initiate an arbitration in accordance with the rules in this Agreement, including Annex A of this Agreement, applying them *mutatis mutandis* to the context of a state-investor/investment dispute.

(B) A special expedited process shall be established by the Council to ensure that a panel decision shall be rendered within six months of an arbitration being initiated. The appellate division shall decide any appeal on this issue within 90 days of its submission to them.[19]

19 Panels and the appellate division shall establish their own *ad hoc* procedure, in keeping with good international practice, in the event of an action under this Article prior to the Council adopting a procedure.

(C) The panel or appellate division may, if requested, issue an interim order suspending the rights of the investor(s) or investment for the duration of the process, so long as any period of limitations that may impact the ability of the investor or investment to initiate a dispute is subsequently extended by the length of any such suspension if necessary.

(D) A dispute under this Article may, at the discretion of a disputing party, be appealed to the appellate division.

(E) The decision of the panel or appellate division on the abrogation of rights may be permanent or for any period over a minimum of three years it determines is appropriate, or may provide a minimum period after which the investment or investor(s) may apply for reinstatement of its rights.

Article 45: Investor/investment-state disputes

(A) In the event of a dispute between an investor or investment and a host State Party as to the application or interpretation of this Agreement, and such dispute has not been resolved pursuant to good faith efforts in accordance with Article 42, the investment or investor may initiate an arbitration in accordance with the rules in this Agreement, including in Annex A, applying them *mutatis mutandis* to the context of an investor/investment-state dispute.

(B) A dispute between an investor or investment and a host state may not be commenced until domestic remedies are exhausted in relation to the underlying issues pleaded in relation to a breach of the Agreement.

(C) Where such remedies are unavailable due to the subject of the dispute or a demonstrable lack of independence or timeliness of the judicial or administrative processes[20] implicated in the matter in the host state, an investor may plead this in an application before a panel as a preliminary matter. The decision of a panel on this issue shall be final. This panel shall be chosen in accordance with Article 40. The Council shall establish procedures for such a pleading at its first meeting.[21]

(D) Where a dispute under this Article proceeds to a panel, the decision may, at the discretion of a disputing Party, subsequently be taken to the appellate division.

(E) Use of the investor-state process by an investor is subject to Article 18.

20 The Parties recognize that different processes do take different amounts of time. Thus, the key determinant should be that the procedures are moving forward in a time that is consistent with good practice and the normally anticipated timeframe for that type of procedure in the host state, and that no undue burdens or impediments are being placed on the proceedings.

21 Panels shall establish their own *ad hoc* procedure, in keeping with good international practice, in the event of an action under this Paragraph prior to the Council adopting a procedure.

Article 46: Transparency of proceedings

(A) All documents relating to a notice of intention to arbitrate, the settlement of any dispute pursuant to Article 42, the initiation of a panel or appeal, or the pleadings, evidence and decisions in them, shall be available to the public through an Internet site.

(B) Procedural and substantive oral hearings shall be open to the public.

(C) A panel or appellate tribunal may take such steps as are necessary, by exception, to protect confidential business information in written form or at oral hearings.

(D) A panel or appellate tribunal shall be open to the receipt of *amicus curiae* submissions in accordance with the process set out in Annex A.

Article 47: Enforceability of final awards

Parties shall adopt such domestic rules as are required to make final awards enforceable in domestic legal proceedings in their states.

Article 48: Governing law in disputes

(A) When a claim is submitted to a panel or an appeal tribunal, it shall be decided in accordance with this Agreement, national law of the host state, and the general principles of international law.

(B) The Interpretive Notes of the Parties attached to this Agreement shall be binding upon any tribunal established under this Agreement, and any award must be consistent with such Notes.

(C) An Interpretive Statement adopted by the Conference of the Parties declaring its interpretation of a provision of this Agreement shall be binding upon any tribunal established under this Agreement, and any award must be consistent with such a Statement.

(D) A decision by the appellate division on an interpretation of this Agreement shall be binding on subsequent panels and appellate tribunals, unless it is made inapplicable by virtue of an Interpretive Statement relating to the Agreement adopted by the Conference of the Parties, or an amendment to the Agreement.

PART 10: GENERAL EXCEPTIONS

Article 49: National security

Nothing in this Agreement shall be construed:

i) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or

ii) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations under the United Nations Charter with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

Article 50: Rules for taxation measures

(A) Except as set out in this Article, nothing in this Agreement shall apply to taxation measures.

(B) Nothing in this Agreement shall affect the rights and obligations of either Party under any tax convention. In the event of any inconsistency between this Agreement and any such convention, that convention shall prevail to the extent of the inconsistency. In the case of a tax convention between the Parties, the competent authorities under that convention shall have sole responsibility for determining whether any inconsistency exists between this Agreement and that convention.

(C) National treatment and most-favoured-nation treatment shall apply to all taxation measures, other than those on income, capital gains or on the taxable capital of corporations, taxes on estates, inheritances, gifts, and generation-skipping transfers, except that nothing in those Articles shall apply:

i) in the case of a most-favoured-nation obligation, with respect to an advantage accorded by a Party pursuant to a tax convention;

ii) to a non-conforming provision of any existing taxation measure;

iii) to the continuation or prompt renewal of a non-conforming provision of any existing taxation measure;

iv) to an amendment to a non-conforming provision of any existing taxation measure to the extent that the amendment does not decrease its conformity, at the time of the amendment, with any of those Articles;

v) to the adoption or enforcement of any taxation measure aimed at ensuring the equitable or effective imposition or collection of taxes (as permitted by Article XIV(d) of GATS); or

vi) to a provision that conditions the receipt, or continued receipt, of an advantage relating to the contributions to, or income of, pension trusts or pension plans on a requirement that the Party maintain continuous jurisdiction over the pension trust or pension plan.

(D) Article 8 shall apply to a taxation measure alleged to be an expropriation. However, no investor may invoke Article 8 as the basis of a claim where it has been determined pursuant to this Paragraph that the measure is not an expropriation. An investor that seeks to invoke Article 8 with respect to a taxation measure must refer to the Executive Director of the Secretariat at the time that it gives its notice of intention to arbitrate under Article 42 the issue of whether that taxation measure involves an expropriation. The Executive Director shall ask the competent authorities of the host state and home state whether they do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation within a period of six months of such referral, in which case the investor may submit its claim to arbitration, if the other conditions of Article 45 have been fulfilled as well.

Article 51: General reservations and exceptions

(A) The provisions of this Agreement, except Article 8, do not apply to any law or other measure of a host state the purpose of which is to promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, disadvantaged by long-term historic discrimination in its territory, provided that such law or other measure is compatible with the requirements of Article 19.

(B) State Parties may take such measures as are necessary to avoid or abate a balance of payments emergency. Such measures shall be kept in force for as short as possible to address the emergency situation. Such measures shall not be subject to this Agreement.

PART 11: FINAL PROVISIONS

Article 52: Regional cooperation

Where appropriate, the Parties shall cooperate in the negotiation of regional cooperation agreements on matters covered by this agreement, and the development of regional capacity in this field.

Article 53: Amendment

(A) The Parties may agree on any modification of, or addition to, this Agreement, through the Conference of the Parties.

(B) When so agreed, and approved in accordance with the applicable legal procedures of each Party, and the provisions on entry into force with the amendment, a modification or addition shall constitute an integral part of this Agreement for those Parties that become Party to the amendment.

Article 54: Annexes, Appendices and Notes

(A) The Annexes and footnotes to this Agreement constitute an integral part of this Agreement.

(B) The national lists in Annex E may be amended by each Party at their discretion.

Article 55: Protocols

The Parties may, at a Conference of the Parties, adopt a Protocol to this Agreement.

Article 56: Entry into force

This Agreement shall enter into force 90 days after the receipt by the depository of the 40th instrument of ratification or accession to this Agreement.

Article 57: Withdrawal

(A) Any Party may withdraw from this Agreement by written notification to the other Parties. This Agreement shall expire for that Party 180 days after the date of such notification.

(B) Notwithstanding Paragraph (A), the rights and obligations of investors and investments and host and home states in relation to that investment or investor, where an investment is substantially in progress of being established or has been established shall survive for a period of five years from such a withdrawal. The five-year period shall be extended to the full period of any investment contract, agreement or authorization if one is in existence at the time of the withdrawal.

Article 58: Authentic texts

The English language text of this Agreement shall be its authentic language.

Article 59: Depositary

The Depositary of this Agreement shall be the Secretary-General of the United Nations.

ANNEX A: INVESTOR-STATE DISPUTE SETTLEMENT

Article 1: Consultation and negotiation

In the event of a dispute under this Agreement, the claimant (investor/investment/State Party) and the respondent (investor/investment/State Party) shall seek to resolve the dispute in accordance with Article 42. The claimant and respondent constitute the disputing parties.

Article 2: Submission of a claim to arbitration

(1) In the event that a disputing party considers that a dispute cannot be settled by alternative means, and all other pre-conditions for such a dispute as required by the Agreement have been fulfilled:

a) the investment, on its own behalf, may submit to arbitration under this Agreement a claim that the respondent host State has breached an obligation under this Agreement and that the investment has incurred loss or damage by reason of, or arising out of, that breach;

b) the investor, on its own or on behalf of the investment if it is the controlling investor, may submit to arbitration under this Agreement a claim that the respondent has breached an obligation under this Agreement, and that the claimant has incurred loss or damage by reason of, or arising out of, that breach;

c) a State Party may submit a claim to arbitration under this Agreement as claimant against another State party; and

d) a State Party may submit a claim to arbitration as claimant against an investor or investment.

(2) For greater certainty, an investor or investment claimant may submit to arbitration a claim referred to in Paragraph (1) that the respondent has breached an obligation through the actions of a designated monopoly or a state enterprise exercising delegated government authority.

(3) At least 180 days before submitting any claim to arbitration, a potential claimant shall deliver to the potential respondent a written notice of its intention to submit the claim to arbitration ("notice of intention"). The notice shall specify:

a) the name and address of the claimant and its legal representative and, where a claim is submitted on behalf of an investment, the name, address and place of incorporation of the investment;

b) for each claim, the provision(s) of this Agreement alleged to have been breached and any other relevant provisions;

c) the legal and factual basis for each claim; and

d) the relief sought and, where appropriate, the approximate amount of damages claimed.

The Council may establish a specific form for this purpose and make it available through the Internet and other means, and through the National Authorities.

(4) Provided that at least six months have elapsed since the events giving rise to the claim, and all other pre-conditions for such a dispute as required by the Agreement have been fulfilled, a claimant may formally submit a Notice of Arbitration to the Dispute Settlement Body, panel division, established by this Agreement.

(5) A claim shall be deemed submitted to arbitration when the claimant's Notice of Arbitration is submitted to the Secretariat of the Dispute Settlement Body and to the respondent at its designated place of business or to its National Authority. The Council may establish a specific form for this purpose and make it available through the internet and other means, and through the National Authorities. The Notice of Arbitration shall include, at a minimum, the information required in Paragraph (3).

Article 3: Rules of Arbitration

The Council of the Dispute Settlement Body shall establish Rules of Arbitration consistent with the provisions of this Agreement. Until the adoption of such Rules, the Rules of Arbitration of the Centre in effect on the date the claim or claims were submitted to arbitration under this Agreement, shall govern the arbitration except to the extent modified by this Agreement, irrespective of whether the host and home states are parties to the ICSID Convention.

Article 4: Consent of each Party to arbitration

Each State Party consents to the submission of a claim to arbitration under this Agreement in accordance with its provisions. Each investor and investment, by virtue of establishing or continuing to operate or own an investment subject to this Agreement, consents to the submission of a claim to arbitration under this Agreement.

Article 5: Conditions and limitations on consent of each Party

(1) No claim may be submitted to arbitration if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged in the Notice of Arbitration. This Article does not apply in the case of Article 13 of this Agreement.

(2) No claim may be submitted to arbitration by an investor or investment unless the claimant has demonstrated that the requirement for the exhaustion of local remedies has been complied with or the claimant has been granted a request to a panel for a finding that it is not in a viable position to exhaust local remedies. In the event of the latter case, the Notice of Arbitration shall be accompanied by an express written waiver of any such rights conditional on the initiation of an arbitration.

Article 6: Selection of arbitrators

(1) The Director shall, within 30 days of the filing of a notice of arbitration, appoint the panel members from the standing roster of panelists. No panel member shall be from the host or home state.

(2) A panel shall be composed of three members, with one designated as President of the panel.

(3) A disputing party may contest the nomination of an arbitrator for good cause, including real or apparent conflict of interest. Any challenges shall be decided by the remaining two designated arbitrators. Such a challenge must be brought as soon as practicable after information leading to the challenge is made known to the challenging party.

Article 7: Conduct of the arbitration

(1) Unless otherwise agreed, the place of arbitration shall be at the Secretariat to the Dispute Settlement Body or a regional affiliate in the region of the disputing party. The disputing parties may agree on another place of arbitration within 30 days of the notice of arbitration being filed.

(2) Any non-disputing party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement.

(3) Without prejudice to a tribunal's authority to address other objections as a preliminary question, such as an objection that a dispute is not within a tribunal's competence, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made. This includes an objection pursuant to Article 18(1) of the Agreement.

a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its first counter-memorial.

b) On receipt of an objection under this Paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has estab-

lished for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefore.

c) In deciding an objection under this Paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration, except in so far as it may relate to a breach of Article 13 issue. The tribunal may also consider any relevant facts not in dispute.

d) The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this Paragraph or make use of the expedited procedure set out in the following Paragraph.

(4) In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under Paragraph (3) or any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefore, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period of time, which may not exceed 30 days.

(5) A claim to loss of jurisdiction due to a breach of Article 13 shall be decided by the tribunal on the basis of a balance of probabilities on the facts adduced in evidence before it. A tribunal does not have to wait for a determination by a domestic court in the host or home state.

(6) When it decides a respondent's objection under Paragraph (3) or (4), the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorneys' fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider inter alia whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

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

(8) A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach of the relevant parts of this Agreement. The protection of the public welfare and public interests shall be considered when any interim measures are requested.

Article 8: *Amicus curiae*

(1) The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party (the "submitter").

(2) The submissions shall be provided in English or in the principal language of the host state, and shall identify the submitter and any Party, other government, person, or organization, other than the submitter, that has provided, or will provide, any financial or other assistance in preparing the submission.

(3) The Council may establish and make available to the public a standard form for applying for status as *amicus curiae*. This may include specific criteria which will help guide a tribunal in determining whether to accept a submission in any given instance.

(4) *Amicus curiae* submissions may relate to any matter covered by this Agreement.

Article 9: Transparency of arbitral proceedings

(1) Subject to Paragraphs (2) and (4), the claimant and respondent shall, after sending the following documents to the other disputing party, promptly transmit them to the Secretariat of the Dispute Settlement Body which shall make them available to the public, including by Internet:

a) the notice of intention;

b) any settlement agreement resulting from alternative dispute resolution processes;

c) the notice of arbitration;

d) pleadings, memorials and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to this Annex or the Rules of Arbitration;

e) minutes or transcripts of hearings of the tribunal, where available; and

f) all orders, awards, and decisions of the tribunal.

(2) The tribunal shall conduct all hearings open to the public and shall determine, in consultation with the disputing parties and the dispute settlement Secretariat the appropriate logistical arrangements. However, any disputing party that intends to use information designated as confidential business information or information that is privileged or otherwise protected from disclosure under a party's law in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

(3) Nothing in this section requires a respondent to disclose confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law or to furnish or allow access to information that it may withhold in accordance with this Agreement.

(4) Confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law shall, if such information is submitted to the tribunal, be protected from disclosure in accordance with the following procedures:

a) subject to Sub-paragraph (d), neither the disputing parties nor the tribunal shall disclose to the non-disputing party or to the public any confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law where the disputing party that provided the information clearly designates it in accordance with Sub-paragraph (b);

b) any disputing party claiming that certain information constitutes confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law shall clearly designate the information at the time it is submitted to the tribunal;

c) a disputing party shall, at the same time that it submits a document containing information claimed to be confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the non-disputing party and made public in accordance with Paragraph (1); and

d) the tribunal shall decide any objection regarding the designation of information claimed to be confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may:

i) withdraw all or part of its submission containing such information; or

ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and Sub-paragraph (c).

In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under Sub-paragraph (d)(i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under Sub-paragraph (d)(ii) of the disputing party that first submitted the information.

(5) Nothing in this Agreement authorizes a respondent to withhold from the public information required to be disclosed by its laws.

Article 10: Interpretation of Annexes

(1) Where a respondent asserts as a defense that the measure alleged to be a breach is within the scope of an excluded sector in Annex C or is a non-conforming measure set out in Annex D, the tribunal shall, on request of a State Party that is a disputing party request the interpretation of the home and host

state on the issue. The home and host state shall submit in writing any decision declaring its interpretation under this Article the tribunal within 60 days of delivery of the request.

(2) A decision issued under Paragraph (A) shall be binding on the tribunal, and any award must be consistent with that decision. If the home and host state fails to issue such a decision within 60 days, the tribunal shall decide the issue.

Article 11: Expert reports

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 environmental, health, safety or other matters raised in a proceeding. The tribunal shall consider any terms or conditions relating to such appointments that the disputing parties may suggest.

Article 12: Consolidation

(1) Where two or more claims have been submitted separately to arbitration under this Agreement and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order.

(2) A disputing party that seeks a consolidation order under this Article shall deliver, in writing, a request to the Director and to all the disputing parties sought to be covered by the order and shall specify in the request:

a) the names and addresses of all the disputing parties sought to be covered by the order;

b) the nature of the order sought; and

c) the grounds on which the order is sought.

(3) Unless the Director finds within 30 days after receiving a request under Paragraph (2) that the request is manifestly unfounded, a separate tribunal shall be established under this Article by the Director solely to consider the issue of consolidation.

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

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

b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others; or

c) instruct a tribunal previously established to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that that tribunal shall decide whether any prior hearing shall be repeated.

(5) Where a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration and that has not been named in a request made under Paragraph (2) may make a written request to the tribunal that it be included in any order made under Paragraph (4), and shall specify in the request:

a) the name and address of the claimant;

b) the nature of the order sought; and

c) the grounds on which the order is sought.

(6) On application of a disputing party, a tribunal established under this Article, pending its decision under Paragraph (4), may order that the proceedings of another tribunal be stayed, unless the latter tribunal has already adjourned its proceedings.

Article 13: Awards

(1) Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only:

a) the specific remedies allowed for in Articles 18 and 44 of this Agreement in relation to an investor or investment;

b) monetary damages and any applicable interest against a State Party; and

c) restitution of property from a State Party, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.

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

(2) Subject to Paragraph (1), where a claim is submitted to arbitration on behalf of an investment:

a) an award of restitution of property shall provide that restitution be made to the investment; and

b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the investment.

(3) A tribunal may not award punitive damages.

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

(5) Subject to Paragraph (6) and the applicable appeal procedure, a disputing party shall abide by and comply with an award without delay.

(6) A disputing party may not seek enforcement of a final award until:

a) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to appeal the award; or

b) the appellate division has rejected an appeal.

(7) Each Party shall provide for the enforcement of an award in its territory and make the appropriate legal proceedings available for this purpose.

Article 14: Appellate process

(1) A disputing investor/investment or party may appeal, within 60 days, a panel decision on the basis of an error of law or a material and manifest error of fact. Such appeals shall proceed in accordance with Annex A. No other appeal or arbitration review process shall be applicable to arbitrations under this Agreement.

(2) The appellate process shall apply, *mutatis mutandis*, the rules of procedure for the panel division, subject to such mediations as required by this Agreement.

(3) The appeal must be filed within 60 days of the decision being appealed.

(4) The Council of the Dispute Settlement Body shall establish, at it first meeting, the timelines for the appellate process.

(5) The decision on appeal shall be final and binding and not subject to further appeal or judicial review. A panel decision not taken to appeal shall have the same final and binding status.

ANNEX B: List of National Authority contact points for all State Parties

This list of National Authority contact points for all State Parties would be relevant for dispute settlement purposes, exchange of information and all other matters necessary for the operation of the Agreement.

The list is to be developed by submission from each Party, to the Secretariat.

ANNEX C: National lists of excluded sectors from coverage of all or part of the Agreement

This list would be part of the end result of a negotiation.

ANNEX D: National list of grandfathered non-complying measures, from all or part of the Agreement

This list would be part of the end result of a negotiation.

ANNEX E: National list of sectors subject to establishment rights of foreign investors under domestic law

This list would initially be developed during the negotiations, but is subject to unilateral changes by each State Party.

ANNEX F: Indicative list of corporate social responsibility issues

This indicative list of issues of concern should be understood, for present purposes, as a very preliminary list for further development.

Trade Practices:

- Fair trading practices
- Ethical advertising
- Avoidance of abuse of market dominant positions and use of anti-competitive practices
- Other?

Corporate Governance:

- Regulatory compliance systems
- Board of directors integrity and independence
- Transparent reporting and accounting
- Risk management strategies
- Protection and respect of intellectual property
- Protection of whistle-blowers
- Other?

Employment and Industrial Relations:

- Equal opportunity
- Fair wages and conditions
- Reasonable disciplinary practices
- Reasonable working hours and conditions
- Protection of individual privacy
- Fair, non-discriminatory dispute and issue resolution mechanisms
- Other?

Production and Product-related Issues:

- Product stewardship
- Design for recycling/re-use
- Energy efficiency
- Non-hazardous materials and manufacturing processes
- Minimization of environmental impacts
- Product recycling
- Product disposal/waste management
- Safe working practices
- Safe working environment
- Occupational hygiene
- Control of hazardous substances and dangerous goods

- Emergency preparedness
- Fair workers' compensation, rehabilitation and return-to-work programs
- Other?

Business Relationships:

- Ethical purchasing
- Non-collusive tendering
- Avoidance of price fixing
- Other?

Environment Protection/Sustainability:

- Sustainable production
- Energy reduction
- Waste and discharge management
- Protection of flora, fauna and cultural heritage
- Protection of traditional knowledge
- Stakeholder consultation/communication
- Other?

Good Corporate Citizenship:

- Philanthropy
- Organizational accountability
- SR reporting
- Other?

International Centre for Settlement of Investment Disputes

Brandes Investment Partners, LP *v.* the Bolivarian Republic of Venezuela
Award

ICSID Case No. ARB/08/3, 2 August 2011

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON, D.C.

BRANDES INVESTMENT PARTNERS, LP
(CLAIMANT)

v.

THE BOLIVARIAN REPUBLIC OF VENEZUELA
(RESPONDENT)

(ICSID CASE NO. ARB/08/3)

AWARD

Members of the Tribunal
Mr. Rodrigo Oreamuno, *President*
Prof. Dr. Karl-Heinz, Böckstiegel, *Arbitrator*
Prof. Brigitte Stern, *Arbitrator*

Secretary of the Tribunal
Ms. Janet M. Whittaker

Representing the Claimant

Mr. Michael D. Nolan
Mr. Edward G. Baldwin
Ms. Elitza Popova-Talty
Mr. Frédéric G. Sourgens
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United States of America

Representing the Respondent

Mr. George Kahale, III
Mr. Mark H. O'Donoghue
Ms. Miriam K. Harwood
Mr. Hermann Ferré
Ms. Claudia Frutos-Peterson
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11580 México, D.F., México

Date of Dispatch: 2 August, 2011

TABLE OF CONTENTS

I. GLOSSARY

(a) Brandes: Brandes Investment Partners, LP or the Claimant.

(b) ICSID Convention: Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

(c) LPPI: Decree No. 356 with rank and force of Law on the Promotion and Protection of Investments, published on 22 October, 1999 in the Official Gazette of the Bolivarian Republic of Venezuela, No. 5,390.

(d) Memorial on Objections: Memorial of the Bolivarian Republic of Venezuela on Objections to Jurisdiction dated 15 April, 2009.

(e) Counter-Memorial: Counter-Memorial of Brandes Relating to Respondent's Jurisdictional Objection dated 30 June, 2009.

(f) Rejoinder: Rejoinder of Brandes Relating to Respondent's Jurisdictional Objections dated 15 October, 2009.

(g) Reply: Reply Memorial of the Bolivarian Republic of Venezuela on Objections to Jurisdiction dated 1 September, 2009.

(h) Claimant's Post-Hearing Memorial: Claimant's Post-Hearing Brief Regarding Respondent's Jurisdictional Objections dated 15 December, 2010.

(i) Respondent's Post-Hearing Memorial: Post-Hearing Brief on Objections to Jurisdiction of the Bolivarian Republic of Venezuela dated 15 December, 2010.

(j) Venezuela: The Bolivarian Republic of Venezuela or the Respondent.

II. PROCEDURAL HISTORY

1. On 14 February, 2008, Brandes Investment Partners, LP, a United States registered investment adviser, filed with the International Centre for Settlement of Investment Disputes ("ICSID" or "the Centre") a Request for Arbitration (the "Request") against the Bolivarian Republic of Venezuela. On 24 March, 2008, the Centre registered the Request.

2. The Claimant is represented in this proceeding by the law firm of Milbank, Tweed, Hadley & McCloy LLP in Washington, DC. Since 22 February, 2008, the Respondent has been represented in this proceeding by the law firm of Curtis, Mallet-Prevost, Colt & Mosle LLP in New York and SC in Mexico City.

3. By letter of 28 March, 2008, the Claimant appointed Professor Dr. Karl-Heinz Böckstiegel, a German national, as arbitrator.

4. By letter of 14 May, 2008, the Respondent appointed Professor Brigitte Stern, a French national, as arbitrator.

5. As the Tribunal was not constituted within 90 days of registration of the Request, by letter of 12 September, 2008, the Claimant requested the appointment of the third presiding arbitrator by the Chairman of the ICSID Administrative Council, as provided for under Article 38 of the ICSID Convention and Rule 4 of the Rules of Procedure for Arbitration Proceedings ("ICSID Arbitration Rules"). On 5 December, 2008, the Chairman of the ICSID Administrative Council appointed Dr. Robert Briner, a national of Switzerland, as President of the Tribunal.

6. All of the arbitrators having accepted their appointments, the Tribunal was constituted on 8 December, 2008. Ms. Katia Yannaca-Small, Senior Counsel at ICSID, was appointed as Secretary of the Tribunal.

7. On 15 December, 2008, having consulted with the Parties and the Centre, the Tribunal scheduled the first session of the Tribunal to take place on 29 January, 2009, at the World Bank's Paris Conference Center. On the same date, the Secretary of the Tribunal circulated a provisional agenda to the Parties, who were invited to confer and to advise the Tribunal, by no later than 16 January, 2009, of any points on the provisional agenda about which they were able

to reach agreement. The Parties were also invited to notify the Tribunal of any other items that they wished to see included in the agenda. By joint submission of 16 January, 2009b the Parties communicated to the Tribunal their positions and views on the items of the provisional agenda.

8. On 19 December, 2008, the Respondent filed its Objections Pursuant to Rule 41(5) of the ICSID Arbitration Rules.

9. On 12 January, 2009, the Claimant submitted its Response to Respondent's Preliminary Objections of 19 December, 2008.

10. The first session of the Tribunal and the hearing on the Respondent's Preliminary Objections were held on 29 January, 2009, at the World Bank's Paris Conference Center. Present at the session were:

Members of the Tribunal

Dr. Robert Briner, *President*

Prof. Dr. Karl-Heinz Böckstiegel, *Arbitrator*

Prof. Brigitte Stern, *Arbitrator*

ICSID Secretariat

Mrs. Katia Yannaca-Small, *Secretary of the Tribunal*

Representing the Claimant

Mr. Michael D. Nolan, *Milbank, Tweed, Hadley, & McCloy LLP*

Mr. Frédéric Sourgens, *Milbank, Tweed, Hadley, & McCloy LLP*

Representing the Respondent

Mr. George Kahale, III, *Curtis Mallet-Prevost, Colt & Mosle LLP*

Mr. Mark H. O'Donoghue, *Curtis Mallet-Prevost, Colt & Mosle LLP*

Ms. Gabriela Álvarez Ávila, *Curtis Mallet-Prevost, Colt & Mosle SC*

Mr. Carlos Arvelaiz, General Counsel of the Ministry of Telecommunications and Information Technology, *Bolivarian Republic of Venezuela*

Ms. Alejandra Hidalgo, Ministry of Telecommunications and Information Technology, *Bolivarian Republic of Venezuela*

11. Paragraph 14 of the Minutes of the First Session reads as follows:

"**Number and Sequence of Pleadings, Time Limits, Supporting Documentation (Arbitration Rules 20 (1) (c) and 31)**

Respondent objects to the Tribunal´s jurisdiction. Claimant submits that the Tribunal has jurisdiction to address the merits of this proceeding. In accordance with Arbitration Rule 41, and as agreed during the session, Respondent´s jurisdictional objection, limited to the interpretation of Article 22 of the Venezuelan Foreign Investment Law as a basis for jurisdiction in this case, shall be addressed by the Tribunal prior to consideration of the merits of the claim asserted in the Request for Arbitration.

At the session, the Parties have agreed to and the Tribunal confirmed the following schedule for briefing on Respondent´s jurisdictional objections …"

12. At the first session of the Tribunal, counsel for both Parties orally presented their positions regarding the Respondent's preliminary objections under Rule 41(5) and answered questions posed by the Members of the Tribunal.

13. The Tribunal's Decision on the Respondent's Objections under Rule 41(5) of the ICSID Arbitration Rules dated 2 February, 2009 was notified to the Parties on 4 February, 2009. A reasoned decision was provided to the Parties on 3 April, 2009.

14. The Respondent filed its Memorial on Objections to Jurisdiction on 15 April, 2009. On 30 June, 2009, the Claimant filed its Counter-Memorial on Jurisdiction. The Respondent filed its Reply on Jurisdiction on 1 September, 2009, and the Claimant filed its Rejoinder on Jurisdiction on 15 October, 2009.

15. By letter of 28 July, 2009, Dr. Briner submitted his resignation to his co-arbitrators and the Secretary General of ICSID due to ill health. In accordance with ICSID Arbitration Rule 10(2), the proceeding was suspended until the vacancy created by Dr. Briner's resignation could be filled.

16. The Parties were unable to agree on a candidate for president of the Tribunal to replace Dr. Briner. Accordingly, by letter of 20 November, 2009, the Claimant requested that ICSID proceed with the appointment of the new President pursuant to ICSID Arbitration Rule 11 (1). After due consultation with the Parties, on 22 December, 2009, the Chairman of the ICSID Administrative Council appointed Mr. Rodrigo Oreamuno, a national of Costa Rica, as the third and presiding arbitrator in this case. On 23 December, 2009, upon Mr. Oreamuno's acceptance of his appointment, the ICSID Secretary-General confirmed that the proceeding had resumed.

17. On 9 September, 2010, Ms. Janet Whittaker was appointed as Secretary of the Tribunal, following the conclusion of Ms. Katia Yannaca-Small's secondment to ICSID from the Organisation for Economic Co-Operation and Development.

18. An oral hearing on jurisdiction was held at the offices of the World Bank in Washington, DC on 15 and 16 November, 2010. Present at the hearing were:

Members of the Tribunal

Mr. Rodrigo Oreamuno, *President*

Prof. Dr. Karl-Heinz Böckstiegel, *Arbitrator*

Prof. Brigitte Stern, *Arbitrator*

ICSID Secretariat

Ms. Janet M. Whittaker, *Secretary of the Tribunal*

Representing the Claimant

Mr. Michael D. Nolan, *Milbank, Tweed, Hadley, & McCloy LLP*

Mr. Edward G. Baldwin, *Milbank, Tweed, Hadley, & McCloy LLP*

Mr. Frédéric Sourgens, *Milbank, Tweed, Hadley, & McCloy LLP*

Mr. Andrés Mezgravis, *Mezgravis y Asociados*

Mr. Ian Rose, *Brandes Investment Partners, LP*

Ms. Roberta Loubier, *Brandes Investment Partners LP*

Representing the Respondent

Ms. Miriam K. Harwood, *Curtis Mallet-Prevost, Colt & Mosle LLP*

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Ms. Katiria Calderón, *Curtis Mallet-Prevost, Colt & Mosle LLP*

Ms. Elisa Botero, *Curtis Mallet-Prevost, Colt & Mosle LLP*

Dr. Jesús Centeno, *Bolivarian Republic of Venezuela*

19. Following the hearing, the Parties submitted Post-Hearing Memorials on 15 December, 2010.

20. The Tribunal deliberated in New York City on 14 January, 2011.

21. The Tribunal has taken into account all of the pleadings, documents and testimony submitted in this case.

22. The issuance of this Award constitutes the closure of this proceeding.

III. BACKGROUND

23. On 2 February, 1999, Mr. Hugo Chávez Frías took office as the President of the "Republic of Venezuela", as it was then named. Soon after he took office, a Constituent Assembly was appointed to draft a new Political Constitution to replace the 1961 Constitution. The new Constitution was adopted on 20 December, 1999.

24. As a result of a sharp decline in the price of oil during 1998, when President Chávez took office in February, 1999, the economy of his country was in a difficult situation. However, by the end of 1998, oil prices had started to increase and, by the end of 1999, oil prices were almost treble those in 1998.[1]

25. As part of its efforts to reactivate the economy, the Government of Venezuela promulgated the Law on the Promotion and Protection of Investments (LPPI). It was enacted as an "executive decree with the rank and force of Law" by President Chávez, exercising the powers vested in him by the new Political Constitution, on 3 October, 1999, and published in the Official Gazette on 22 October, 1999.

26. As indicated in paragraphs 11 and 14 of the Award, the Respondent objected to the jurisdiction of ICSID over, and the competence of the Tribunal to resolve, the dispute between the Parties; the Claimant opposed Venezuela's objections and asserted that this Tribunal does have competence to resolve the existing dispute between the Parties.

27. The Request for Arbitration filed by Brandes is essentially based on the contention that Article 22 of the LPPI contains the consent of the Bolivarian Republic of Venezuela to ICSID jurisdiction. The Respondent asserts that this statement is not correct. In essence, this is the only issue that is before the Tribunal at this stage of the proceeding.

[1] Reply, ¶ 13.

28. The Tribunal has considered carefully the extensive arguments on factual and legal issues presented by the Parties in their written and oral presentations, as well as the experts' opinions and other documentation provided for the record. All of these documents have been extremely useful to the Tribunal. In this Award, the Tribunal analyzes the Parties' arguments that it considers to be most relevant to its decision about the Respondent's jurisdictional objection referenced at paragraph 27 above. The reasoning of the Tribunal, even when it does not refer expressly to all of the arguments made by the Parties, is based on all of their arguments with respect to the factors considered by the Tribunal to be determinative in deciding this question.

29. The Parties based the arguments contained in their written and oral presentations on numerous decisions of other arbitral tribunals and courts. For this reason, the Tribunal considers it to be convenient to set forth some preliminary observations of a general nature on this subject.

30. First, the Tribunal considers it to be useful to establish from the outset that it considers that its task at this stage of this proceeding is, specifically, to analyze the scope of Article 22 of the LPPI and other provisions of Venezuelan law, in order to resolve the dispute that has arisen between the Parties about this issue. For this purpose, it shall consider the relationship between Article 22 and other relevant legal norms of the Bolivarian Republic of Venezuela, and Article 25 of the ICSID Convention. When interpreting the latter text, the Tribunal shall take into account the provisions of Article 31 of the Vienna Convention on the Law of Treaties, which provides in particular that a treaty shall be interpreted in good faith, in accordance with the ordinary meaning given to the terms of the treaty, in their context and in light of its object and purpose.

31. The Tribunal does not consider that the decisions of other arbitral tribunals are decisive in resolving this matter. Furthermore, it is evident that those decisions are not binding on this Tribunal. However, this does not preclude this Tribunal from considering the substance of decisions rendered by other arbitral tribunals, and the arguments of the Parties based on those decisions, to the extent that those decisions may shed light on the issue to be decided at this stage of the proceeding.

IV. THE PARTIES' SUBMISSIONS ON THE INTERPRETATION OF ARTICLE 22 OF THE LPPI

32. The Tribunal analyzes below the methodologies proposed by each of the Parties for interpreting Article 22 of the LPPI correctly. The article provides as follows:

> "Disputes arising between an international investor, whose country of origin has in effect with Venezuela a treaty or agreement for the promotion and protection of investments, or disputes to which are applicable the provisions of the Multilateral Investment Guarantee Agency (MIGA), or the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID), shall be submitted to international arbitration, according to the terms of the respective treaty or agreement, if it so provides, without prejudice to the possibility of using, if appropriate, the dispute resolution means provided for under the Venezuelan legislation in effect, when applicable."[2]

33. Opinions have been expressed by the Parties during this proceeding to the effect that the content of Article 22 of the LPPI is clear. The Bolivarian Republic of Venezuela considers this to be the case, stating that this article does not provide the consent of that State to ICSID jurisdiction. The Claimant maintains that there is no doubt that the article does provide such consent.

34. Doctrine and jurisprudence addressing the issue of the consent to arbitration have noted that such consent may be given by different means, and have recognized the possibility that it may be expressed not only through national legislation, but also through treaties on the protection of investments:

> "Another technique to give consent to ICSID dispute settlement is a provision in the national legislation of the host State, most often its investment code. Such a provision offers ICSID dispute settlement to foreign investors in general terms. Many capital importing countries have adopted such provisions. Since consent to jurisdiction is always based on an agreement between the parties, the mere existence of such a provision in national legislation will not suffice. The investor may accept the offer in writing at any time while the legislation is in effect. In fact, the acceptance may be made simply by instituting proceedings."[3]

[2] *See* Ex. R-15.

[3] *See* Ex. Pellet-18, Christoph Schreuer, *International Centre for Settlement of Investment Disputes, Dispute Settlement, 2.3. Consent to Arbitration*. United Nations Conference on Trade and Development (2003) at p. 6.

> "As indicated by the Report of the Executive Directors … the drafters of the Convention, which entered into force eight years prior to the enactment of Article 8, anticipated that a State might unilaterally give advance "consent in writing" to the Centre's jurisdiction through investment legislation."[4]

35. As the Parties to this proceeding have agreed,[5] the interpretation of a legal provision and, specifically, in this case, Article 22 of the LPPI, should begin with a **purely grammatical analysis**; if this initial analysis fails to define clearly the meaning of the provision, it then becomes necessary to examine the **context** in which it was enacted, including a review of other provisions of Venezuelan law relating to the same subject and, in particular, having regard to the hierarchy of norms of the Venezuelan legal system as set forth in the Political Constitution of that State. Other elements that must be used to interpret with clarity the content of Article 22 are the **circumstances** in which it was enacted and the **goals** that it was intended to achieve. The Tribunal shall follow those guidelines in the following analysis.

36. Given that Article 22, insofar as it is relevant to this arbitration, is a unilateral declaration by Venezuela, it is obvious that the initial process of interpretation should be conducted according to the parameters set by the Republic's legal system, starting with the Political Constitution, which is the supreme norm of the State. However, because in the context of this proceeding the outcome of that interpretation has direct effects on the operation of Article 25 of the ICSID Convention, the conclusions resulting from that initial analysis must be read in accordance with the principles of international law[6].

37. Article 22 refers to the following disputes:

a. Those arising between an international investor, whose country of origin has in effect with Venezuela a treaty or agreement on the promotion and protection of investments;

[4] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case ARB/84/3), Decision on Preliminary Objections on Jurisdiction dated 14 April, 1988 ("*SPP*"), ¶ 98.

[5] Counter-Memorial, ¶ 42; Reply, ¶ 42.

[6] *See also Cemex Caracas Investment B.V., Cemex Caracas II Investment B.V. v. Bolivarian Republic of Venezuela* (ICSID Case ARB/08/15), Decision on Jurisdiction dated 30 December, 2010, ¶ 79 ("*Cemex*") ("Unilateral acts by which a State consents to ICSID jurisdiction are standing offers made by a sovereign State to foreign investors under the ICSID Convention. Such offers could be incorporated into domestic legislation or not. But, whatever may be their form, they must be interpreted according to the ICSID Convention and to the principles of international law governing unilateral declarations of States".).

b. Those to which the provisions of the Convention Establishing the Multilateral Investment Guarantee Agency (OMGI-MIGA) apply;

c. The disputes to which the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) apply.

The article provides that such disputes "… shall be submitted to international arbitration according to the terms of the respective treaty or agreement, if it so provides … ."

38. As concerns the first two types of disputes, the Parties agree on the interpretation of the article. They do not agree with respect to the last type. This difference in interpretation is the basis for the dispute being resolved in the Award.

39. The Parties performed their own **grammatical analysis** of Article 22 which led them to opposite conclusions.

40. The Respondent concludes that:

> "As explained in more detail below, Article 22 of the Investment Law does not constitute consent by the Republic to arbitrate the investment dispute alleged by Claimant …
>
> By its terms, Article 22 only provides for submission to arbitration 'according to the terms of the respective treaty or agreement, if it so provides'. It does not itself constitute a standing, general consent to ICSID jurisdiction of any investment dispute with an investor from a country that is a signatory to the ICSID Convention ... ."[7]

41. The Claimant interprets it in a different manner:

> "A grammatical construction of Article 22 therefore comes to the result that Article 22 is a standing consent to international arbitration with regard to disputes that may fall within the purview of the ICSID Convention. The verb tenses used in Article 22 make clear that the dispute does not already need to be subject to ICSID arbitration for (sic) obligation to submit it to international arbitration to apply. Rather, the dispute must only be one amenable to ICSID arbitration pursuant to the Convention – or one to which the ICSID Convention 'may be applicable'. The combination of the subjunctive mood with regard to the applicability of the ICSID Convention to the dispute and the imperative mood with

[7] Memorial on Objections, ¶ 5.

regard to the submission of the dispute to arbitration unequivocally constitutes a standing ICSID consent by Respondent by the terms to Article 22."[8]

42. The Claimant insists that, not only does a grammatical interpretation lead inexorably to the conclusion that Article 22 of the LPPI contains the consent of Venezuela to ICSID jurisdiction, but also that this position is strengthened by an analysis of the **context** of that article. In this process, it starts by commenting on the provisions of Article 258 of the **Political Constitution** of that country, the terms of which provide that:[9]

> "The Law shall organize the justice of peace in the communities. Peace Justices shall be elected by universal, direct and secret vote pursuant to law.
>
> The Law shall promote arbitration, conciliation, mediation and any other alternative means for the settlement of disputes."

43. The Respondent disagrees with Brandes' position and asserts that the relevant constitutional provision cannot be used as a basis upon which to claim a unilateral submission by the Bolivarian Republic of Venezuela to ICSID, purportedly provided for by Article 22:

> "… Investment Law reflects a consistent policy of expanding domestic, rather than international, arbitral remedies, except in the context of bilateral or multilateral investment treaties granting reciprocal benefits to Venezuelan investors. This preference for Venezuelan arbitration is entirely consistent with both Article 258 of the Constitution, which refers to promotion of multiple forms of alternative dispute resolution within the Venezuelan legal system, and Article 5 of the Investment Law, which requires that Venezuelan investors be given the same treatment as international investors."[10]

44. In Brandes' view, other provisions of the LPPI support its assertion that Article 22 provides Venezuela's consent to ICSID jurisdiction.[11] Venezuela does not share that opinion. In order to bolster their respective points of view, the Parties also analyze **other articles of the LPPI.**

[8] Counter-Memorial, ¶ 53.

[9] *Id*., ¶ 67.

[10] Reply, ¶ 85.

[11] Rejoinder, ¶¶ 62-63.

45. According to Venezuela:

> "Even as so limited, the portion of Article 22's text referring to disputes governed by the ICSID Convention did not define the scope of the dispute to be submitted to arbitration. By contrast, Article 21 referred to disputes 'concerning the interpretation and application of the provisions of this Decree-Law," while Article 23 covered 'any dispute arising in connection with the application of this Decree-Law.' Similar language appeared in each of the BITs executed by Venezuela as of October 1999, usually defining the scope of the dispute to be arbitrated in terms of a violation of the terms of the BIT."[12]
>
> "By giving investors the right to select Venezuelan arbitral tribunals in Article 23, the Republic effectively gave its standing, unilateral consent to national arbitration of disputes arising under the Investment Law. This consent, which was given to both national and foreign investors, represented a significant expansion of rights for investors to the extent that they were offered a forum in which arbitrators of more specialized expertise would consider their claims."[13]

46. Brandes contends the opposite and states that:

> "Provisions of the Investment Law other than Article 22 speak of commercial arbitration in terms of 'may submit' and as such are phrased in terms that are less mandatory than the provision in Article 22. Brandes' argument in its Counter-Memorial and in Professor Caron's expert opinion was *e contrario*: if the legislator would have wished to use optional submission language it could have done so. Thus, Article 18 clearly requires an additional written consent for commercial arbitration to be applicable. Similarly, the reference in Article 23 operates as a "may" submit to arbitration."[14]
>
> "There are also significant questions as to how, structurally, Article 23 would operate as an independent arbitration consent. Thus, one might argue, similar arbitration provisions both require a special juridical stability agreement set out in Article 18 of the Investment Law and are couched in optional terms in Article 23. One therefore could reasonably ask why there would be specific requirements for obtaining a similar commercial arbitration clause as part of an investment agreement that was already applicable as a matter of law? Respondent nevertheless has conceded Article 23 is a standing consent to arbitration. A fortiori, Article 22 also must be considered as consent, given its own mandatory terms."[15]

[12] Reply, ¶ 30.

[13] *Id*., ¶ 32 (emphasis supplied by the Respondent).

[14] Rejoinder, ¶ 62.

[15] *Id*., ¶ 63.

47. In addition to analyzing the context of Article 22 of the LPPI, the Parties refer to the **circumstances** relating to the enactment of that article. They express their positions as set forth in the paragraphs that follow.

48. The Respondent refers to several **decisions of the Venezuelan Supreme Tribunal of Justice**, and in particular to a decision issued in respect of a Request for Interpretation filed by Hildegard Rondón de Sansó, Álvaro Silva Calderón, Beatrice Sansó de Ramírez *et al*, acting on behalf of the Bolivarian Republic of Venezuela, relating to Article 258 of the Political Constitution, (case number 2008-0763), in which the Court examined the text of Article 22 and concluded that:

> "From this it follows then, that the Law on the Promotion and Protection of Investments does not contain in itself a general unilateral statement of submission to the international arbitration governed by the Convention Establishing the Multilateral Investment Guarantee Agency (OMGI-MIGA) or the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID), ***but refers instead to their content to determine whether arbitration may be resorted to,*** which in the case of the Convention Establishing the Multilateral Investment Guarantee Agency (OMGI-MIGA), is confirmed since its content is express in this respect – *Viz.* Articles 57 and 58 of this Convention and 1, 2 and 4 of Annex II; a situation that does not exist in the case of Article 25 of the ICSID Convention mentioned above (and as it has been unanimously sustained in the international arena, as discussed *supra*, where it has been pointed out that the mere signing of the Convention does not constitute alleged purported unilateral offer)."[16]

49. Contrary to Venezuela, Brandes questions the objectivity of the decisions of the Supreme Tribunal of Justice upon which the State places so much emphasis and states that:

> "The decision of the constitutional chamber was subject to a dissent. The dissent noted that the ***constitutional*** chamber had not addressed a constitutional question, at all. It concluded that the interpretation of Article 22 had been reached *ultra vires.*"[17]

[16] *See* Ex. RL-18 (English translation provided by the Respondent), Supreme Tribunal of Justice of Venezuela, Case No. 2008-0763, 17 October, 2008 at p. 48 (emphasis in the original).

[17] Counter-Memorial, ¶ 28 (emphasis supplied by the Tribunal).

> "On June 16, 2009, the constitutional chamber of the supreme court issued what it styled a 'Nota de Prensa', or press release, purporting to summarize prior rulings on sovereign immunity. In its press release, the constitutional chamber stated that it deemed Respondent immune from enforcement of ICSID awards rendered against Respondent pursuant to Article 22 of the Investment Law. Also by press release, the constitutional chamber purports to ***arrogate*** to Respondent the right to 'denounce or modify the agreement signed before 1999 with other countries in which resolution of disputes was submitted to international bodies'."[18]

50. Other elements that the Claimant relies upon to support its position that Article 22 contains the consent of the Bolivarian Republic of Venezuela to ICSID jurisdiction are the **websites** of the embassies of that country in Korea, Switzerland and the United States, and of its consulate in Barcelona:

> "All of these promotional efforts establish ***first*** that Respondent very much wanted the Investment Law read; ***second*** that it knew of and advertised the importance of international arbitration as a dispute resolution mechanism and ***third*** that its statements were express that the Investment Law included an international arbitration mechanism.
>
> As Respondent explains, such promotional efforts have been recognized as significant in prior ICSID decisions … ."[19]
>
> "Venezuela advertised internationally that the Investment Law opened the possibility to resort to international arbitration. For example, the website of the Respondent´s Foreign Ministry for its Embassy in Korea … ."[20]
>
> "… Respondent's assertions in the Reply are contradicted by its own advertisements to foreign investors. For example, contrary to statements in the Reply, Respondent advertised on the websites of its Embassy in Switzerland and its Consulate in Barcelona, as well as in communications to foreign investors, that 'the policy of promoting investment is a reflection of the constitutional design with regard to economics. The Constitution of 1999 foresaw … a preference for mechanisms of alternative dispute resolution, like arbitration, conciliation and mediation … .' In the United States, Respondent's embassy posted similar news reports, stating, for example, 'The Venezuelan Commercial Arbitration Law offers great advantages to our country as a neutral zone for various countries …'."[21]

[18] *Id*., ¶ 29 (emphasis supplied by the Tribunal).

[19] Rejoinder, ¶ 82 (emphasis supplied by the Claimant).

[20] Counter-Memorial, ¶ 84.

[21] Rejoinder, ¶ 5.

51. Venezuela minimizes the relevance of what is expressed in those websites and states that none of them announces its alleged submission to ICSID jurisdiction:

> "Claimant's Statement of Facts cites no contemporaneous speeches, publications or communications by any governmental officials or agencies indicating that Article 22 of the Investment Law was intended to grant the Republic's unilateral offer of consent to submit all investment disputes to international arbitration before ICSID. Nor does it cite any news articles or commentaries on the Investment Law immediately after its enactment."[22]

52. In paragraph 39 of its Rejoinder, Brandes notes that a semi-governmental entity called **CONAPRI** announced the enactment of the LPPI in September 1999. It also stated that the "'policy of promotion of investments' favoring arbitration was advertised as reflected in the Investment Law which provides for international arbitration against the state as a means of investor-state dispute resolution." The same reference is made by Brandes at paragraph 79 of the Rejoinder, where it states that the CONAPRI publication was addressed to foreign investors and referred specifically to dispute resolution mechanisms.

53. The Respondent disagrees with the statements made by Brandes and maintains that the documents, which Brandes uses to show the existence of a purported announcement that Venezuela consented to ICSID jurisdiction, do not support that assertion. Specifically, it alleges that the CONAPRI bulletin referred to above, which was issued before the enactment of the LPPI, supports the Respondent's position that Article 22 recognized the obligations undertaken under the existing treaties but did not create a new obligation and, therefore, does not constitute an open consent to ICSID arbitration.[23]

54. Venezuela also added that:

> "There is no evidence that investors or their Venezuelan legal advisors regarded Article 22 as consent to ICSID arbitration or to be of special significance for foreign investors. There was no mention of this possibility, for example, in the March 2000 study titled 'Legal Regime for Foreign Investment in Venezuela,' which was published by the National Council for the Promotion of Investments (CONAPRI), a public-private entity established to promote investments in Venezuela."[24]

[22] Reply, ¶ 33.

[23] Respondent's Post-Hearing Memorial, ¶ 36(iv).

[24] Reply, ¶ 34.

55. In several of its presentations, Brandes referred to certain materials that it referred to as "contemporaneous documentary evidence."[25] It asserts that the note published on 30 April, 1999, by the Central Office of the Presidency for Coordination and Planning ("**CORDIPLAN**"), was "… the equivalent of legislative history given that Article 22 was an executive decree for which CORDIPLAN had responsibility."[26]

56. The Respondent disagrees completely with this position and says, in brief, the following:

> "The statements attributed to then President-elect Chavez at the January 8, 1999 meeting (Ex. C-10) and the commentary in the CORDIPLAN Economic Transition Plan (Ex. C-30) are general in nature and make no mention of Article 22."[27]

57. The Parties have discussed extensively the relevance of Mr. **Werner Corrales' positions** to the interpretation of Article 22 of the LPPI. As part of its explanation of the circumstances in which the law was enacted, the Claimant contends that, in his publication entitled "Some Ideas Concerning the Design of a Legal Regime of Promotion and Protection of Investments in Venezuela",[28] Mr. Corrales, who was a government official involved in the drafting of the LPPI, affirms that the law contains the consent of Venezuela to ICSID arbitration.[29] Elsewhere in its Counter-Memorial, Brandes emphasizes the important role played by Mr. Corrales and by his publication, as support for its assertion that the LPPI contains the unilateral consent of Venezuela to ICSID arbitration.[30]

58. Likewise, in several parts of its Rejoinder, in particular, at paragraph 21, Brandes notes that Mr. Corrales, like other officials of the Government of Venezuela, confirmed that Article 22 of the LPPI was drafted to provide for Venezuela's consent to ICSID jurisdiction. At footnote

[25] *See* Letter from Brandes to the Tribunal dated 10 January, 2011 with respect to the Decision on Jurisdiction in *Cemex* at p. 2.

[26] *Id*., at pp. 3-4.

[27] *See* Letter from the Bolivarian Republic of Venezuela to the Tribunal dated 10 January, 2011 with respect to the Decision on Jurisdiction in *Cemex* at p. 2.

[28] *See* Ex. C-32,

[29] Counter-Memorial, ¶ 3, fn. 6.

[30] *Id*., ¶ 83, fn. 230.

number 64 to that paragraph, Brandes refers not only to the publication entitled "Some Ideas Concerning the Design of a Legal Regime of Promotion and Protection of Investments in Venezuela", but also to another publication made by Mr. Corrales, together with Mrs. Marta Rivera, entitled "Some Ideas on the New Regime of Promotion and Protection of Investments in Venezuela",[31] and to a lecture by Mr. Corrales at CEDCA.[32]

59. At paragraph 99 of its Reply, Venezuela minimizes the authority of Mr. Corrales and refers to him as "an economist described by Claimant as a 'drafter of the Investment Law'"; in the paragraphs that follow, Venezuela expresses its opinion about him. In paragraph 101, it adds that in the decade following the enactment of the LPPI, "… Mr. Corrales played no discernable role in promoting or commenting upon the Investment Law" and minimizes his involvement in the drafting of this law and his ability to comment on it objectively.

60. In its Post-Hearing Memorial, the Respondent insists on questioning Mr. Corrales' ability to interpret Article 22 and points out that he did not make a declaration as a witness in *Mobil v. Venezuela* or in any other case.[33]

61. In their efforts to interpret the true meaning of Article 22 of the LPPI, the Parties also analyze the **historical circumstances** in which that law was enacted. In its Counter-Memorial,[34] Brandes describes the circumstances prevailing in Venezuela in 1999. In particular, it refers to the following facts:

a. There was a capital flight, which was accelerated as a result of the election of President Hugo Chávez.[35]

b. The negotiations to conclude a BIT between Venezuela and the United States of America (at that time Venezuela's most important commercial partner) had ceased.[36]

[31] *See* Ex. C-6.

[32] *See* Ex. C-11.

[33] Respondent's Post-Hearing Memorial, ¶ 34, fn. 71.

[34] Counter-Memorial, ¶¶ 8-13.

[35] *Id.*, ¶ 3.

c. When President Chávez took office "… Venezuelan heavy crude continued to trade below US$10-a-barrel, a level that provided comparatively little commercial incentive to U.S. investors to shoulder significant Venezuelan political risk."[37]

62. In Brandes' view, these circumstances and the pressing need to attract foreign investment to its territory led the Respondent to make the concession to submit to ICSID arbitration that is contained in Article 22:

> "The law was prepared while BIT negotiations with the United States, Venezuela´s largest trading partner, were stalling. Its stated purpose was to attract foreign investment and provide a stable investment environment – a purpose turned urgent by the capital flight from Venezuela exacerbated by the election of Hugo Chávez to the presidency. The context confirms that Article 22 was meant as a consent to arbitrate investment disputes arising under the law with foreign, and particularly US investors in a neutral forum such as ICSID while such foreign investors were not yet protected by bilateral investment treaties."[38]

63. Brandes concludes that, if the LPPI is analyzed in light of the historical circumstances in which it was enacted, its objective to attract foreign investors becomes evident. Brandes asserts that, for this reason, it was structured in a manner similar to bilateral investment treaties (providing for the definition of an international investment, fair and equal treatment, no discrimination between international and national investors, most favored nation treatment, etc.). It concludes that, for this reason, there is no doubt that Article 22 provides Venezuela's consent to ICSID arbitration, which is characteristic of bilateral investment treaties.

36 *Id.*, ¶ 9.

37 Counter-Memorial, ¶ 10.

38 *Id.*, ¶ 37.

64. The Respondent disagrees with this statement and asserts that, although the LPPI had the clear purpose of attracting investors, the economic situation of the country at that time was not as serious as that described by the Claimant.[39] It adds that the prices of oil – a product that is essential to the Venezuelan economy – had increased strongly in the months during which the LPPI was discussed.[40]

65. At paragraphs 12 to 15 of its Reply, the Bolivarian Republic of Venezuela categorically opposes the analysis made by Brandes and states that it ignores the fact that the price of oil almost trebled during the period between December 1998 and December 1999, thereby completely changing that country's economy (it asserts that the price was US$8.85 per barrel in December 1998, increasing to US$25 at the end of 1999).

66. Venezuela concludes at paragraph 15 that, although the purpose of the LPPI was to encourage foreign investment, the economic circumstances of the country were not so bad as to make a unilateral consent to ICSID arbitration necessary to achieve that purpose.

67. In their Post-Hearing Memorials, both Parties reiterate their respective points of view. Brandes notes at paragraph 23 that in August 1999, CORDIPLAN issued a publication stating that the recession suffered by the country was "the worst in forty years" and, concluded that a massive foreign investment was required to combat this recession. Venezuela, in paragraph 24 of its Post-Hearing Memorial, reaches the opposite conclusion: "… Claimant has failed to prove that the economic situation prevailing in Venezuela in 1999, occasioned by a collapse in oil prices, was so calamitous that the Government had no choice but to give an unprecedented unilateral consent to ICSID arbitration of all investment disputes in order to attract foreign investment."

68. The issue of what **goals** the Law on the Promotion and Protection of Investments was intended to achieve is closely related to the historical circumstances in which the law was enacted. The Parties agree that the general purpose of the law was to attract foreign investment to Venezuela. However, aside from this initial agreement, they disagree entirely as to the key

[39] Reply, ¶ 15.

[40] *Id.*, ¶ 13.

issue under discussion: namely, whether Article 22 of the LPPI provides for the unilateral consent of Venezuela to ICSID arbitration.

69. Brandes maintains in its Counter-Memorial that "… viewed in its context, it is apparent that Article 22 was meant to function as an ICSID consent. Article 22 is part of a decree which is structured like, and provides similar protections than a bilateral investment treaty does, and therefore would reasonably be expected to provide comparable dispute resolution provisions."[41]

70. Venezuela agrees with Brandes that the purpose of the LPPI was to attract foreign investment, but does not accept that Article 22 of that law constitutes a unilateral submission on its part to ICSID jurisdiction.

71. On the basis of its analysis of several decisions of the Supreme Tribunal of Justice, the Bolivarian Republic of Venezuela, at paragraphs 44 to 49 of its Memorial on Objections, asserts that consent to arbitration must be "**manifest, clear, and unequivocal**."

72. In support of its contention, Venezuela also quotes the decision on jurisdiction issued on 8 February, 2005 in the case of *Plama Consortium Limited v. the Republic of Bulgaria* (ICSID Case ARB/03/24, ¶ 198), in which the tribunal stated the following:

> "It is a well-established principle, both in domestic and international law, that such an agreement (of the parties to submit a matter to arbitration) should be clear and unambiguous."

73. The Claimant asserts that, as expressed by Dr. Allan Brewer-Carias, in paragraph 43 of his report,[42] "there is no legal provision in Venezuelan law requiring the consent for arbitration or the arbitration agreement to be clear and unequivocal."

74. Brandes adds that Article 25 of the ICSID Convention only establishes one requirement for consent: namely, that it be granted in writing. It also states that the Report of the Executive

[41] Counter-Memorial, ¶ 37.

[42] *See* Declaration of Allan R. Brewer-Carias, 26 June, 2009.

Directors of the ICSID Convention confirms that there are no additional requirements or standards of "clarity" to express consent.[43]

75. The Respondent claimed that, throughout its history, Venezuela has shown a certain degree of **hostility toward arbitration**:

> "Professor Morles Hernández reviewed the history of arbitration in Venezuela at length. He stated: Venezuela is a country which belongs to a region traditionally viewed as resistant and even hostile towards arbitration, as is the Latin American region. Furthermore, it is the region in the world which has been the slowest to accept this method of dispute resolution."[44]

76. In this respect, Brandes states that:

> "Finally, Respondent argues that the lack of promotional efforts on the part of Respondent either on the Investment Law as a whole or its dispute resolution mechanism means that it did not contain a standing consent to international arbitration. Respondent further alleges that this is consistent with its "traditional hostility" toward international arbitration. Neither statement by Respondent reflects the actual state of the promotional efforts that were ongoing at the time."[45]

77. The Claimant adds that:

> "Respondent's main contextual argument alleges that Article 22 must be read against a purported hostility to arbitration in Venezuela in 1999. Contrary to Respondent's submission in the arbitration, 'hostility' to arbitration is not relevant to the intent of Article 22.
>
> - Respondent in fact admitted that the subject matter of the Investment Law is arbitrable (Slide 128).
> - The same subject matter was subject to international arbitration in BITs (Slide 128).
> - Respondent conceded that key oil agreements concluded before 1999 contained ICC arbitration clauses (Slide 128).

[43] Counter-Memorial, ¶ 70.

[44] Reply, ¶ 89.

[45] Rejoinder, ¶ 78.

- Respondent's postings on embassy websites flatly contradict this statement, advertising that Venezuela is the best country for international arbitration (Slide 129) … ."[46]

78. The Claimant concludes that:

- "The Investment Law was an emergency measure, and as such not business as usual. A generalized hostility thus is not competent context for a specific emergency measure (Slide 128).

- Professor Brewer Carias further explained that the statements relied on by Respondent were taken out of context and referred to a historical attitude in the past and not contemporaneous sentiments about international arbitration in Venezuela.

Hostility to arbitration therefore is neither established nor is part of the circumstances of preparation of Article 22. This assertion is thus not relevant to an international law interpretation of Article 22."[47]

V. THE TRIBUNAL'S POSITION

79. As defined by the Parties at the first session of the Tribunal, at this stage of the proceeding, the Tribunal shall limit itself to the analysis of Article 22 of the LPPI. Other issues, even if related to the Tribunal's jurisdiction were deferred for resolution, together with the substantive issues.[48] Consequently, the role of the Tribunal at this stage of the proceeding is only to decide whether Article 22 of the Law on the Promotion and Protection of Investments contains the consent of Venezuela to ICSID jurisdiction.

80. The Parties discussed extensively whether the interpretation of Article 22 should be made pursuant to the principles and rules of Venezuelan law or under the principles of international law. Venezuela maintains the first position and Brandes the latter.

81. It is clear to the Tribunal that, in view of the fact that Article 22 of the LPPI is a unilateral declaration of the Venezuelan State, it is necessary that the initial process of interpretation be conducted within the parameters set by the Republic's legal system, based on its Political

[46] Claimant's Post-Hearing Memorial, ¶ 35.

[47] *Id.*, ¶ 35.

[48] *See* Letter from the Tribunal to the Parties dated 23 April, 2009.

Constitution, which is the supreme norm of that country. However, because any conclusions that may be reached in the process of interpretation of that article must be applied to determine whether Venezuela granted its consent to ICSID jurisdiction under Article 25 of the ICSID Convention, it is necessary to take account of the principles of International Law to reach a definitive conclusion.

82. This approach has been taken by other arbitral tribunals:

> "… the jurisdictional issue in this case involves more than interpretation of municipal legislation. The issue is whether certain unilaterally enacted legislation has created an international obligation under a multilateral treaty. Resolution of this issue involves both statutory interpretation and treaty interpretation … Thus in deciding whether in the circumstances of the present case, Law N° 43 constitutes consent to the Centre's jurisdiction, the Tribunal will apply general principles of statutory interpretation taking into consideration, where appropriate, relevant rules of treaty interpretation and principles of international law applicable to unilateral declarations."[49]

> "Legislation and more generally unilateral acts by which a State consents to ICSID jurisdiction must be considered as standing offers to foreign investors under the ICSID Convention. Those unilateral acts must accordingly be interpreted according to the ICSID Convention itself and to the rules of international law governing unilateral declarations of State's."[50]

83. In the course of this proceeding, the Claimant and the Bolivarian Republic of Venezuela, in their written and oral presentations, have made significant efforts to interpret Article 22 from **a** grammatical perspective. As part of its efforts, Brandes has asserted that this article provides for Venezuela's consent to ICSID jurisdiction. However, despite its assertion that it is clear, it devotes many pages and much time to reinforce its conclusion that the article contains the Republic's consent to ICSID arbitration.

84. Venezuela also offers a grammatical interpretation and reaches the opposite conclusion, namely, that the State did not consent to ICSID jurisdiction by means of Article 22 of the LPPI.

49 *SPP*, ¶ 61.

50 *Mobil Corporation, Venezuela Holdings, B.V. et al v. Bolivarian Republic of Venezuela* (ICSID Case ARB/07/27), Decision on Jurisdiction dated 10 June, 2010, ¶ 85 ("*Mobil*").

85. In spite of the laborious and thorough efforts of the Parties to scrutinize the meaning of Article 22 through grammatical interpretation, the Tribunal considers it to be unnecessary, for the reasons expressed in the next paragraph, to summarize precisely in the Award what the Claimant and the Respondent stated with respect to their grammatical analyses of that article.

86. The Tribunal has assessed very carefully the written and oral interpretations of the Parties concerning the content of Article 22 of the LPPI and the opinions of their respective experts about this matter. Its conclusion is that the wording of Article 22 of the LPPI is confusing and imprecise, and that it is not possible to affirm, based on a grammatical interpretation, whether or not it contains the consent of the Bolivarian Republic of Venezuela to ICSID jurisdiction.

87. In view of what is stated in the paragraph above, the Tribunal will analyze the **context** of Article 22, the **circumstances** in which the LPPI was enacted and the **goals** that its enactment sought to achieve.

88. To start this process, the Tribunal considers it to be essential to analyze other articles of the LPPI, which constitute the immediate context for Article 22.

89. The Tribunal observes first that, in fact, as pointed out by Brandes, the law has the characteristic structure and contents of many bilateral investment treaties. The following provisions confirm this assertion:

a. "… international investments shall be entitled to fair and equal treatment, in accordance with international law standards and criteria, and shall not be subject to arbitrary or discriminatory measures …" (Article 6);

b. "… international investors … shall have the same rights and obligations as those to which national investments and investors are entitled in similar circumstances …" (Article 7);

c. "There shall be no discrimination in treatment between international investments or investors because of the country of origin of their capital." (Article 8);

d. "International investments and investors shall be entitled to the most favorable treatment …" (Article 9); and

e. "No confiscation shall be ordered or enforced, except in the exceptional cases provided for by the Constitution; and, as concerns the investments of international investors, by international law. Expropriations of investments or measures equivalent to an expropriation may only be made for causes of public or social interest, following the procedure legally established for these purposes, in a non-discriminatory manner and by means of a prompt, fair and adequate compensation." (Article 11).

90. When reading the transcribed texts, several facts call one's attention:

a. The quoted provisions are actually similar to those usually appearing in a bilateral investment treaty;

b. They are written in a direct language, which is easily understandable by any reader;

c. If the drafters of those texts were able to express those ideas so clearly, why did they fail to do the same when establishing a fundamental guaranty for an investor such as ICSID arbitration?; and

d. Articles 18.4 and 21 of the LPPI also refer to several forms of arbitration in a precise and clear manner.

91. Despite the similarities between the content of the LPPI and that of a BIT, the Tribunal does not find in the article that it has analyzed nor in any other article of the LPPI, any provision that would allow it to assert that it provides for Venezuela's consent to ICSID jurisdiction.

92. The clarity of most provisions of the LPPI contrast with the confusing and ambiguous wording of Article 22. This fact obviously weakens the assertion made by Brandes that Venezuela consented to ICSID jurisdiction by means of Article 22.

93. The Tribunal indicated in the foregoing paragraphs that the content of the LPPI is very similar to that of several bilateral investment treaties. Therefore, it considers it to be appropriate to note for purposes of its analysis of the context of Article 22 that, at the time of the enactment of the LPPI, the Respondent had entered into bilateral investment treaties with the following countries: the Kingdom of the Netherlands, Chile, Argentina, Ecuador, Switzerland, Portugal, Barbados, Denmark, the United Kingdom, Lithuania, The Czech Republic, Spain, Perú,

Germany, Canada, Paraguay and Sweden.[51] It subsequently entered into other similar treaties with The United Mexican States and with The Republic of Colombia.[52]

94. Obviously, for purposes of the Award, the analysis of each of those bilateral investment treaties is unnecessary. However, the Tribunal notes that each of these treaties contains a submission to ICSID jurisdiction expressed in a similar manner, and in clear and precise language.

95. As part of its analysis of the context of Article 22, which is aimed at establishing its meaning, the Tribunal has studied the Parties' analyses of the provisions of the Political Constitution of the Bolivarian Republic of Venezuela, but could find only one provision that is relevant for the purposes of this proceeding. It is Article 258, which reads as follows in English:

> "The Law shall organize the justice of peace in the communities. Peace Justices shall be elected by universal, direct and secret vote pursuant to law.
>
> The Law shall promote arbitration, conciliation, mediation and any other alternative means for the settlement of disputes."

96. Although the provision quoted above is clear with respect to arbitration, it is evident that the consent of Venezuela to ICSID jurisdiction cannot be inferred from this constitutional language.

97. The analysis of the context of Article 22 could be completed with the examination of other provisions of the Venezuelan legal system which may shed light on this issue. Nevertheless, the Parties did not submit arguments based on those supposed provisions. Accordingly, the Tribunal assumes that there is no other legal text issued by the relevant authorities of the Bolivarian Republic of Venezuela that may help to clarify the issue discussed in the Award.

98. As noted at paragraphs 48 and 49 of the Award, the Respondent attributes great importance to several decisions of the Supreme Tribunal of Justice, which concluded that the

[51] *See* Ex. RL-5, Table, Consents to Arbitration in Venezuelan Bilateral Investment Treaties in Force as of October 1999. *See also* Reply ¶ 55, fn. 81.

[52] *Id*.

LPPI does not contain the Respondent's consent to ICSID arbitration. This Tribunal has examined very thoroughly the content of the decisions of the highest court of Venezuela as cited by the Parties but reaffirms that such decisions are not binding on this Tribunal with respect to their interpretation of Article 22.

99. In addition to what is stated in the paragraph above, the Tribunal considers that the decisions of the Venezuelan authorities are not determinative for the purpose of resolving this dispute. The same conclusion was reached by the tribunal in *Cemex v. Venezuela*, which concluded that:

> "The Tribunal adds that the same solution has been retained by the Permanent Court of Justice and the International Court of Justice which have made clear that a sovereign State's interpretation of its own unilateral consent to the jurisdiction of an international tribunal is not binding on the tribunal or determinative of jurisdictional issues. Thus the interpretation given to Article 22 by Venezuelan authorities or by Venezuelan courts cannot control the Tribunal's decision on its competence."[53]

100. Brandes maintains that, in its eagerness to attract foreign investors, the Respondent announced and publicized in different ways the enactment of the LPPI, and also underscored that, in several of its announcements, Venezuela emphasized the fact that this law favored arbitration. Among the mechanisms which the Respondent – according to Brandes – used for this purpose, are the websites of its embassies in the United States of America, Korea and Switzerland, as well as that of its consulate in Barcelona. The Tribunal has analyzed those references thoroughly and has failed to find in them any express manifestation by the Respondent of its consent to ICSID jurisdiction.

101. Other instruments used by Venezuela to inform prospective investors about the enactment of the Law on the Promotion and Protection of Investments were the publications of the National Council of Promotion of Investments (CONAPRI), an entity established to promote investments in Venezuela. The Parties also disagree about the scope of those publications, as noted at paragraphs 52, 53, and 54 of the Award. Leaving aside the issue of whether a non-

[53] *Cemex*, ¶ 70 (citing *Electricity Company of Sofia and Bulgaria* (Preliminary Objections) (Belgium v. Bulgaria) dated 4 April, 1939, PCIJ Reports, Ser. A/B No. 77 (1989); *Aegean Sea Continental Shelf* (Greece v. Turkey) dated 19 December, 1978, ICJ Reports (1978) at p. 3; *Fisheries Jurisdiction* (Spain v. Canada) dated 4 December, 1998, ICJ Reports (1988) at p. 432). *See also Mobil*, ¶ 75.

governmental entity such as CONAPRI could express the intention of the Venezuelan government, the Tribunal has not found in the CONAPRI publications filed in the record, any assertion that supports the statement that Article 22 provides for Venezuela's consent to ICSID jurisdiction.

102. In the Tribunal's judgment, neither CORDIPLAN's publications nor the relationship of that entity with Mr. Werner Corrales may be used as a basis to support the statement made by Brandes that Article 22 of the LPPI provides for Venezuela's consent to ICSID jurisdiction.

103. As set forth above at paragraphs 57 and 58, Brandes insists on ascribing a dominant role in the drafting of the LPPI to Mr. Werner Corrales. To the contrary, as described at paragraphs 59 and 60 above, Venezuela questions his objectivity and the role that he allegedly played in the drafting of the LPPI. The Tribunal considers it to be unnecessary, for purposes of resolving this dispute, to establish the actual role played by Mr. Corrales in the drafting of the LPPI, his knowledge of the issue under discussion and the relevance of his publications about this issue. What is apparent to the Tribunal is that Mr. Corrales' opinion cannot provide the basis for finding that Article 22 of the LPPI contains the consent of the Bolivarian Republic of Venezuela to submit to ICSID arbitration.

104. At paragraphs 61 to 67 above, the Tribunal summarizes the positions of the Parties concerning the economic situation in Venezuela in 1999 and the influence that those circumstances may have had on the enactment of the LPPI. The Tribunal has no doubt that, in view of the difficulty of concluding a bilateral investment treaty with the United States of America, Venezuela sought several mechanisms to attract investors and the LPPI was one of those instruments.

105. Although the Tribunal understands Venezuela's eagerness to attract foreign investment to its territory, it does not consider it to be logical to find that Venezuela – which was already having many disagreements with the United States of America – was willing, as Brandes has asserted, to grant a broad unilateral consent to ICSID jurisdiction without any reciprocity. This point of view is especially difficult to accept considering that many of the prospective investors would have been companies of the United States of America.

106. It may be correct to assert, as the Respondent does,[54] that due to particular historical circumstances the Bolivarian Republic of Venezuela, like some other Latin American countries, traditionally did not favor arbitration. However, this assertion does not necessarily lead to the conclusion reached by Venezuela that, in view of this historical attitude, it is possible to ascertain that Article 22 does not provide the consent of that State to ICSID arbitration. There are other valid arguments to support the contention that Article 22 of the LPPI does not provide for such consent, but such alleged hostility toward arbitration is not one of them.

107. Based on the decisions of its highest court, Venezuela states categorically, in several of its presentations that the consent to arbitration has to be **manifest, clear, and unequivocal**. The Claimant maintains that there is no provision that requires the consent to ICSID jurisdiction to have those characteristics and that Article 25 of the ICSID Convention only requires that consent be expressed in writing. In the following paragraphs, the Tribunal addresses this fundamental difference between the Parties.

108. Article 253 of the Political Constitution provides that:

> "The power to administer justice emanates from the citizens and is exercised in the name of the Republic by the authority of the Law.
>
> The bodies comprising the Judicial Power shall deal with the cases and matters within their competence, through the procedures determined by law, and shall execute or enforce their judgments … ."

109. Accordingly, it is evident that the general rule in Venezuela is that the function of administering justice is entrusted to the State, which performs it through the courts.

110. It is also an unquestionable fact that the basis for arbitration is consent.[55] There cannot be an arbitration, national or international, *ad hoc* or institutional, before ICSID or any other entity that administers arbitration proceedings, if the parties do not agree to arbitrate.

[54] Reply, ¶¶ 89-91.

[55] *See* Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March, 1965, ("Consent of the parties is the cornerstone of the jurisdiction of the Centre. Consent to jurisdiction must be in writing and once given cannot be withdrawn unilaterally (Article 25(1)).").

111. The statement made in the previous paragraph is definitive. Even in the case of a dispute between private citizens, the rule is that they must settle their disputes in court. The exception is that, only if they agree, they may resolve their dispute through arbitration. If this is true in the ambit of private law, it is even more so when a State is involved, because when a State submits to arbitration proceedings, it is waiving the possibility of resorting to its own courts.

112. As expressed in a well-known award:

> "Article 25 of the ICSID Convention is by no means an exception to the law of the land. It is limited to defining the conditions of ICSID jurisdiction, which include the fundamental condition of consent. Without doubt, the consent to an arbitration proceeding constitutes a renunciation or a derogation from the right to have recourse to national courts. Therefore such consent should not be presumed."[56]

113. Even if there is no requirement that consent to ICSID arbitration should have any characteristic other than to be expressed in writing in accordance with Article 25 of the Convention, it is self-evident that such consent should be expressed in a manner that leaves no doubts.

114. Brandes has argued repeatedly that this Tribunal had information before it (namely, CORDIPLAN's and CONAPRI's documents),[57] that the arbitral tribunals in the *Cemex* and *Mobil* cases did not have. This Tribunal has examined the relevant information thoroughly, as well as Brandes' arguments in this regard, and has not found anything that may lead it to depart from the conclusions arrived at by those tribunals with respect to the specific matter at issue here.

[56] *Société Ouest Africaine des Bétons Industriels v. Republic of Senegal* (ICSID Case No. ARB/82/1), Award dated 25 February, 1988, ¶ 4.09.

[57] *See* Letter from Brandes to the Tribunal dated 10 January, 2011 at pp. 4-5; Brandes' presentation at the Hearing on 15-16 November, 2010 at pp. 43 and 124.

115. This Tribunal sees no reason to depart from the conclusions reached by these two tribunals in comparable cases as follows:

> "The Tribunal thus arrives to the conclusion that such intention is not established. As a consequence, it cannot conclude from the ambiguous text of Article 22 that Venezuela, in adopting the 1999 Investment Law, consented in advance to ICSID arbitration for all disputes covered by the ICSID Convention. That article does not provide a basis for jurisdiction of the Tribunal in the present case."[58]

116. Although in connection with the interpretation of the verb "to submit", contained in Article 22 of the LPPI Brandes referred briefly to the principle of *effet utile*,[59] the Tribunal considers that its interpretation of Article 22 in the foregoing paragraphs does not contravene that principle in any way.

117. To refute one of Venezuela's arguments, Brandes refers in its Rejoinder to the notification about the LPPI made by the Respondent to ICSID in 2000,[60] and to the fact that the enactment of that law was communicated to the World Trade Organization. The Tribunal does not find in those documents any statement by Venezuela to the effect that Article 22 provides for its consent to ICSID jurisdiction.

118. Based on the findings in the paragraphs above, in the Tribunal's opinion, it is obvious that Article 22 of the Law on Promotion and Protection of Investments does not contain the consent of the Bolivarian Republic of Venezuela to ICSID jurisdiction. Therefore, this Tribunal lacks competence to resolve the dispute that has been submitted to it.

VI. COSTS

119. While the Respondent prevails to the effect that this Tribunal finds that it does not have competence in this case, each Party has prevailed in respect of a number of the arguments that it put forward.

[58] *Mobil*, ¶ 140; *Cemex*, ¶ 138.

[59] Counter-Memorial, ¶ 62.

[60] Rejoinder, ¶ 36.

120. Therefore, the Tribunal, in accordance with Art. 61(2) of the ICSID Convention and 47(1)(j) of the ICSID Arbitration Rules, concludes that the Parties shall bear on an equal basis the fees and expenses of the members of this Arbitral Tribunal and the fees and expenses of the International Centre for Settlement of Investment Disputes, and that each party shall bear the fees and expenses incurred by it in relation to this proceeding.

VII. DECISION

121. For the above reasons and pursuant to Articles 41, 48 and 61 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and ICSID Arbitration Rules 41 and 47, the Arbitral Tribunal declares unanimously that:

a. The objection to the jurisdiction of the International Centre for Settlement of Investment Disputes made by the Bolivarian Republic of Venezuela is admitted.

b. Accordingly, the International Centre for Settlement of Investment Disputes has no jurisdiction to hear this matter and this Arbitral Tribunal has no competence to decide the merits of the case.

c. The Parties shall bear on an equal basis the fees and expenses of the members of this Arbitral Tribunal, and of the International Centre for Settlement of Investment Disputes.

d. Each party shall bear the fees and expenses incurred by it in relation to this proceeding.

Professor Brigitte Stern
Arbitrator
27 July, 2011

Professor Dr. Karl-Heinz Böckstiegel
Arbitrator
18 July 2011

Rodrigo Oreamuno Blanco
President of the Tribunal
29 July 2011

International Centre for Settlement of Investment Disputes

Salini Costruttori S.P.A. and Italstrade S.P.A. *v.* Kingdom of Morocco
Decision on Jurisdiction

ICSID Case No. ARB/00/4, 23 July 2001

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID): SALINI COSTRUTORRI S.P.A AND ITALSTRADE S.P.A V. KINGDOM OF MOROCCO (DECISION ON JURISDICTION)*

[July 23, 2001]

+Cite as 42 ILM 609 (2003)+

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

SALINI COSTRUTTORI S.P.A.
AND
ITALSTRADE S.P.A.
Claimants

v.

KINGDOM OF MOROCCO
Respondent

Case No. ARB/00/4

DECISION ON JURISDICTION

Members of the Tribunal

***Maître* Robert Briner, President**
***Maître* Bernardo Cremades, Arbitrator**
Professor Ibrahim Fadlallah, Arbitrator

Secretary of the Tribunal

Gabriela Alvarez-Avila

For the Claimants

Professor Antonio Crivellaro
Bonnelli Erede & Pappalardo

Professor Giorgio Sacerdoti

For the Respondent

Mr. Ahmed Zejjari
Head of the Legal Department, Ministry of Infrastructure

Mr. *le Bâtonnier* Mohammed Naciri
Casablanca

Maître Aurélia Antonietti
Maître Christian Camboulive
Gide Loyrette & Nouel, Paris

FACTS:

1. A dispute has been referred to the Arbitral Tribunal between the following Italian companies:

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— Salini Costruttori S.p.A.

— Italstrade S.p.A.

and the Kingdom of Morocco.

2. The *Société Nationale des Autoroutes du Maroc* (hereinafter "ADM"), incorporated in 1989 as a limited liability company, builds, maintains and operates highways and various road-works, in accordance with the Concession Agreement concluded with the Minister of Infrastructure and Professional & Executive Training, acting on behalf of the State.

In August 1994, within the context of this Agreement, ADM issued an international invitation to tender for the construction of a highway joining Rabat to Fès. The above-mentioned Italian companies submitted a joint tender for the construction of section No. 2 Khémisset-Meknès Ouest (West Meknès), which is approximately 50 kilometres long. The construction of this section was awarded to the Italian companies for a price of MAD 280,702,166.84 and JPY 3,122,286,949.50.

The negotiations that followed the award of section No. 2 resulted in the signature of Contract 53/95 on October 17, 1995.

3. The two Claimants created the *Groupement d'Entreprises Salini-Italstrade* (hereinafter "the Group") for the performance of the contract giving rise to the present dispute. The Group is not a legal entity. As a result, the Italian companies take part in the present arbitration as joint Claimants.

4. A provisional Taking Over of the work took place on July 31, 1998.

The works were completed on October 14, 1998. The works therefore took 36 months to complete, 4 months longer than stipulated in the contract (32 months).

The final Taking Over took place on October 26, 1999.

5. A draft of the final account was sent to the Italian companies by ADM. They signed it on March 26, 1999 (with reservations).

On April 29, 1999, the Italian companies sent ADM's Head Engineer a memorandum setting out the reasons for the reservations put forward: technical reservations, exceptionally bad weather, project upheaval, modifications concerning the dimensions of the work, extension of contractual time limits, financial burdens, unforeseeable fluctuations of the value of the Yen. On September 14, 1999, following the rejection of all of their claims by ADM's Head Engineer, the Italian companies sent a memorandum relating to the final account to the Minister of Infrastructure, in accordance with Article 51 of the *Cahier des Clauses Administratives Générales* [Book of General Administrative Clauses]. No reply was received from either the Minister of Infrastructure or ADM.

PROCEDURE

6. On May 1, 2000, the Italian companies filed a Request for Arbitration against the Kingdom of Morocco with ICSID. The Secretary-General registered the Request on June 13, 2000.

The Italian companies claimed ITL 132'639'617'409, as compensation for damages suffered.

7. The Arbitral Tribunal was constituted in accordance with the Parties' wishes. The Italian companies appointed Maître Bernardo Cremades as arbitrator. The Kingdom of Morocco appointed Professor Ibrahim Fadlallah. These two arbitrators jointly appointed Maître Robert Briner as President of the Arbitral Tribunal. The Parties agreed that the arbitration would take place in Paris.

8. The Kingdom of Morocco raised an objection to jurisdiction in a letter sent to ICSID on July 17, 2000. A preliminary hearing took place on October 27, 2000 in Paris. The Respondent reiterated its objection to jurisdiction in its memorial of December 20, 2000, to which the Italian companies had to reply by February 2, 2001 at the latest. This time limit was extended, at the Claimants' request, until February 15 of the same year. Consequently, the President of the Arbitral Tribunal extended the deadlines for the submission of the Parties' reply and rejoinder. The Respondent submitted its reply on March 16, 2001 and the Claimants their rejoinder on April 16, 2001. A hearing dealing exclusively with the questions of the admissibility of the Request and the Arbitral Tribunal's jurisdiction was held in Paris on May 3, 2001.

LEGAL DISCUSSION

9. In their Request for Arbitration, the Italian companies base the jurisdiction of ICSID on Article 8 of the Treaty between the Government of the Kingdom of Morocco and the Government of the Republic of Italy for the reciprocal promotion and protection of investments, signed on July 18, 1990, which came into force on January 1, 1992 in favour of Italian investors, by way of letters exchanged between the Ministers of Foreign Affairs for both Governments, dated November 26, 1991. The Kingdom of Morocco no longer contests the coming into force of this Bilateral Investment Treaty for the protection of investments.

In fact, during the hearing on jurisdiction, held on May 3, 2001 in Paris, Counsel for the Kingdom of Morocco acknowledged that "*the Parties agree to consider that, in effect, the exchange of letters authorises the early implementation of the Treaty — not for prior investments (which the text does not say), but authorises an earlier coming into force of the Treaty in its totality*" (transcript of the hearing on jurisdiction of May 3, 2001, p. 2).

10. The Kingdom of Morocco has raised various objections to the referral of this matter to the Arbitral Tribunal. It maintains, on the basis of Article 8 of the aforementioned Treaty, that the Request is not admissible because it is premature (I), that the Tribunal has no jurisdiction *ratione personae* and *ratione materiae* (II) and that the Italian companies have waived all jurisdiction other than that of the administrative courts of Rabat (III).

I. THE INADMISSIBILITY OF THE REQUEST DUE TO ITS PREMATURE NATURE

A. The claims of the Parties

11. In its memorials on jurisdiction and its oral presentations, the Kingdom of Morocco states that the Claimants' Request was premature under Article 8.2 of the Bilateral Treaty. Essentially, it maintains that this provision required:

- that the grounds for complaint contained in the Request for Arbitration be presented in the form of a request for amicable settlement addressed to the Kingdom of Morocco at least six months before the Request for Arbitration was filed;

- that these grounds for complaint constitute violations of the Bilateral Treaty, the arbitration proceedings provided for under Article 8.2 being inseparable from the other provisions of the said Treaty.

12. This second argument concerns the question of the *ratione materiae* jurisdiction of the Tribunal. As a result, it will be assessed during the examination of this issue. With regard to the assertion that the Request is premature, the only pertinent point to ascertain is whether the Italian companies actually made the request for amicable settlement referred to in paragraphs 1 and 2 of Article 8.

13. Concerning the first argument, the Respondent alleges that the Italian companies' claims were sent to ADM's Chief Executive Officer (Head Engineer) and the Minister of Infrastructure, in his capacity as ADM's President and not that of Minister. Thus, these claims could not have been transmitted to the Kingdom of Morocco.

The Italian companies contend that such a request was made and produce the following documents in support of this assertion:

- memorandum setting out claims relating to the final account, presented to the Minister of Infrastructure and President of ADM, on September 14, 1999;
- letter sent to the Ambassador of Morocco in Rome, dated April 10, 1998;
- letter sent to the Prime Minister of Morocco, dated May 15, 1998.

B. Decision

14. In light of the documents exchanged between the Parties and their oral presentations, in order to rule on the premature nature of the Request for Arbitration, the Arbitral Tribunal must determine if:

a) a request for amicable settlement of disputes arising from the contract at issue was submitted to the Kingdom of Morocco;

b) the request for amicable settlement related to the claims formulated in the Request for Arbitration;

c) a period of at least six months passed between the submission of the two requests.

a) Was a request for amicable settlement of the disputes arising in connection with the contract submitted to the Kingdom of Morocco?

15. Article 8 of the Bilateral Treaty provides that:

"*1) All disputes or differences, including disputes related to the amount of compensation due in the event of expropriation, nationalisation, or similar measures, between a Contracting Party and an investor of the other Contracting Party concerning an investment of the said investor on the territory of the first Contracting Party should, if possible, be resolved amicably.*

2) If the disputes cannot be resolved in an amicable manner within six months of the date of the request, presented in writing, the investor in question may submit the dispute either:

a) to the competent court of the Contracting Party concerned;

b) to an ad hoc *tribunal, in accordance with the Arbitration Rules of the UN Commission on International Trade Law;*

c) to the International Centre for Settlement of Investment Disputes (ICSID), for the application of the arbitration procedures provided by the Washington Convention of March 18, 1965 on the settlement of investment disputes between States and nationals of other States.

3) The two Contracting Parties shall refrain from handling, through diplomatic channels, all questions pertaining to an arbitration or to pending legal proceedings, as long as these proceedings have not come to an end and that one of the said Parties has not complied with the judgment of the arbitral tribunal or the designated ordinary court, within the term for enforcement fixed by the judgment or to be otherwise established, on the basis of the rules of international or national law applicable in the case."

16. The disputes addressed by these provisions are those in which the respective parties are necessarily an investor and a State. The compulsory attempt to come to an amicable settlement imposed by Article 8.2 applies to such parties. Therefore, the Italian companies, Italian investors, must have tried to reach an amicable settlement with the Kingdom of Morocco.

17. It is not disputed that the contract concluded between ADM and the Italian companies is a public procurement contract.

Article 2.2.1 of the CCAP provides:

"*Moreover, the Contractor is subjected to the following general texts which are not contained in the Project File*:

The Cahier des Clauses Administratives Générales (CCAG) to be applied to projects undertaken on behalf of the Ministry of Public Works and Communications approved by Royal Decree n° 209-65 of 23 Joumada II 1385 (October 19, 1965) made applicable to public authorities by Royal Decree n° 151-66 of 29 Safar 1386 (June 18, 1966), except for derogations expressly stipulated in the present Cahier des Clauses Administrative Particulières [CCAP]."

Article 18, paragraph 1 of the CCAP provides that:

"*In case of disputes between the Owner and the Contractor, recourse shall be made to the procedure provided for by Articles 50 and 51 of the CCAG.*"

Article 18 does not create an exception to the CCAG provisions; on the contrary, it explicitly refers to them.

Under the title "Representation of the Owner", Article 23 of the CCAP provides that: "*In all the general texts mentioned in Article 2, the functions are attributed as follows:*

— Minister — President

— Head Engineer — Chief Executive Officer"

18. The Kingdom of Morocco rightly emphasises the fact that the CCAP, a *contractual* document whose purpose is to govern the relations between ADM and the Italian companies, cannot amount to the *attribution* of the function of President of ADM to the Minister. But, it cannot infer that the CCAP has removed the Contractor's claims from the Minister's control to place them under the distinct control of the President of ADM. The confusion surrounding the positions held by the Minister, which results from the organisation of structures of implementation put in place

by the Moroccan Authorities regarding highways, cannot be invoked to uphold the premise that what the Minister was aware of in one of his capacities, as can be implied from the reference to Article 51 CCAG, was unknown to him in another capacity.

19. The Tribunal notes that Article 8.2 of the Treaty does not set out any procedure to be followed in relation to reaching an amicable settlement of the dispute between the two Parties. This Article only fixes a term of six months during which the Parties should try to resolve their disputes amicably. The mission of this Tribunal is not to set strict rules that the Parties should have followed; the Tribunal is satisfied to determine if it is possible to deduce from the entirety of the Parties' actions whether, while respecting the term of six months, the Claimants actually took the necessary and appropriate steps to contact the relevant authorities in view of reaching a settlement, thereby putting an end to their dispute.

Therefore, the Tribunal concludes that the various above-mentioned documents constitute a written request aimed toward the amicable settlement of the dispute and satisfy the requirement set out in the Bilateral Treaty in relation to the addressee of the request.

b) Did the request try to put an amicable end to the disputes submitted to the Arbitral Tribunal?

20. The Tribunal considers that the attempt to reach an amicable settlement should essentially include the existence of grounds for complaint and the desire to resolve these matters out-of-court. It need not be complete or detailed.

21. The Tribunal considers that the above-mentioned condition is fulfilled in the present case: the various documents constitute a "written request aimed toward the amicable settlement of the dispute," referring to the grounds for complaint raised in the current proceedings; furthermore, these documents allowed or, at least, should have allowed the Kingdom of Morocco to become aware of the dispute and to take the necessary steps to enable the resolution of the dispute.

c) Was the six-month time limit respected?

22. The Request for Arbitration was submitted on May 4, 2000, 8 months after the transmission of the memorandum setting out the claims relating to the final account, presented to the Minister of Infrastructure and President of ADM on September 14, 1999. This last document is the most recent of those considered by this Tribunal as constituting an attempt to reach an amicable settlement prior to arbitration.

23. In conclusion, the Arbitral Tribunal considers that the ground for complaint alleging that the Request for Arbitration was premature is not founded in light of the requirements of Article 8.2 of the Bilateral Treaty.

II. OBJECTIONS TO THE JURISDICTION OF THE ARBITRAL TRIBUNAL

24. The Kingdom of Morocco raised objections as to the Arbitral Tribunal's jurisdiction, founded on the alleged waiver, from its point of view, by the Italian companies of the option of choosing the forum under Article 8 of the Bilateral Treaty (1), as well as a lack of jurisdiction *ratione personae* (2) and *ratione materiae* (3).

1) The waiver of the option of choosing the forum under Article 8 of the Bilateral Treaty.

25. The Kingdom of Morocco considers that the Italian companies are bound by Article 18 CCAP that refers to a procedure provided for by Articles 50 and 51 of the CCAG, which gives the courts of Rabat jurisdiction over disputes arising from the performance of the contract for services.

26. For their part, the Italian companies maintain that the consent given by the Kingdom of Morocco, and by themselves, to ICSID jurisdiction by way of the Bilateral Treaty should prevail over the contractual acceptance of another forum. Thus, submitting the matter to the courts of Rabat would not imply a waiver of ICSID jurisdiction, particularly since the above-mentioned referral to the administrative courts respects the requirements flowing from the public nature of the contract, which calls for the mandatory application of the provisions of the *Cahier des Clauses Administratives* and, consequently, of Article 52 of the CCAG.

27. Generally, ICSID jurisdiction arises from the consent of the Parties to the dispute; that is to say, a Contracting State and the national of another Contracting State.

Concerning the formal conditions required in order to have valid consent, Article 25.1 of the Washington Convention (hereinafter "the Convention") states only one condition: that the consent be given in writing. Regarding the moment at which consent must be expressed, one may deduce from the Convention that it must have been given prior to the filing of a request for conciliation or arbitration, since this request must, in order to be registered, state the date and the nature of the documents relating to the consent of the Parties (*G.R. Delaume, Le Centre International pour le règlement des Différends relatifs aux Investissements (CIRDI), in JDI 1982, p. 775 et seq.).*

The consent to which Article 25.1 of the Convention refers may have three sources: a clause contained in a contract concluded between the State and the investor; national law, usually a Code or an Act on investments; or international law, by way of a clause contained in a bilateral or multilateral agreement.

Article 8 of the Bilateral Treaty provides that:

> "2) *If the disputes cannot be resolved in an amicable manner within six months of the date of the request, presented in writing, the investor in question may submit the dispute either:*
>
> a) *to the competent court of the Contracting Party concerned;*
>
> b) *to an* ad hoc *tribunal, in accordance with the Arbitration Rules of the UN Commission on International Trade Law;*
>
> c) *to the International Centre for Settlement of Investment Disputes (ICSID), for the application of the arbitration procedures provided by the Washington Convention of March 18, 1965 on the settlement of investment disputes between States and nationals of other States.*"

The necessary and sufficient nature of the consent expressed by means of a forum-selection clause, such as the above-mentioned clause, was acknowledged in the *Asian Agricultural Products Ltd (AAPL) vs. Republic of Sri Lanka* award (*Yearbook Commercial Arbitration XVII (1992), p. 103*).

In summary, Article 8 paragraph 2(c) constitutes a State's unilateral engagement toward the national State of the investor to submit itself to ICSID jurisdiction as Respondent against the foreign investor who will have chosen to submit the case to the Centre.

In light of these considerations, the notification of a Request for Arbitration to ICSID by the Claimants constitutes valid proof of their consent to the Centre's jurisdiction, among those set forth by Article 8 of the Agreement.

As the jurisdiction of the administrative courts cannot be opted for, the consent to ICSID jurisdiction described above shall prevail over the contents of Article 52 of the CCAG, since this Article cannot be taken to be a clause truly

extending the scope of jurisdiction and covered by the principle of the Parties' autonomy. Thus, the reasoning proposed by the Kingdom of Morocco, as expressed in its observations of July 2, 2001, p. 2 *et seq.*, according to which the Claimants could no longer choose to submit the dispute to ICSID jurisdiction due to their participation in a dispute-settlement process in accordance with Articles 50 and 51 CCAG, cannot be sustained.

2) *Ratione personae* jurisdiction

A. The claims of the Parties

28. The Kingdom of Morocco alleges that the Arbitral Tribunal lacks *ratione personae* jurisdiction because the action was founded on acts attributed to ADM, which is not a State entity. ADM is a private legal entity, with its own assets. The fact that the State exercises its rights as shareholder and licensor should not have any effect on the legal autonomy of ADM. The nature of the public procurement contract, which automatically follows from any construction works contract within the public domain, should have no influence on ADM's nature, nor should the levying of a special tax, the benefit of which may be granted to public or private legal entities.

29. The Italian companies allege that ADM is a public legal entity, notwithstanding its incorporation as a limited liability company. The composition of its assets and its Board of Directors at the time of its creation and the direct involvement of the Minister of Infrastructure in all fundamental decision-making relating to the contract establish the active participation of the State. The said construction contract is governed by the CCAG, as are all the works carried out on behalf of the State, and falls under the jurisdiction of the administrative courts, which logically implies that it is a public procurement contract. ADM is directly or indirectly financed by the Moroccan State. The road network construction projects are accounted for by the State. Thus, being a public entity bound by a public procurement contract, all the conditions required to assimilate ADM to the State are satisfied.

B. Decision

30. Since the claims of the Italian companies are being directed against the State and are founded on the violation of the Bilateral Treaty, it is not necessary, in order to determine whether the Tribunal has jurisdiction, to know whether ADM is a State entity. However, as this issue has been discussed at length by the Parties and may possibly, as the case may be, have an influence on the merits of the case, the Tribunal considers that it is of use to rule on the matter in order to satisfy the legitimate expectations of the Parties.

31. Article 25.1 of the Convention provides that:

> "*The jurisdiction of the Centre shall extend to any legal dispute [. . .], between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State . . . .*"

Neither the Convention nor the Bilateral Treaty gives the slightest indication of what should be understood by "Contracting State". The reference made to "*any constituent subdivision*" or "*agency of a Contracting State*" is of no importance in this regard, because ADM does not fulfil the conditions required by the Washington Convention to be a party to these proceedings. Generally, any commercial company dominated or predominantly controlled by the State or by State institutions, whether it has a legal personality or not, is considered to be a State-owned company. (Various authors support this definition: *L.J. Bouchez, The Prospects for International Arbitration: Disputes Between States and Private Enterprises: 8 Journal of International Arbitration p. 81-115 (1, 1991). —K.-H. Böckstiegel, Arbitration and State Enterprises: Survey on the National and International State of Law and Practice: Arbitration International, vol. 1, n° 2, 1985, p. 195-199).*

In order to determine the degree of control and participation of a State in a company, the Tribunal, referring to an ICSID award rendered in a case between Emilio Agustín Maffezini and the Kingdom of Spain (*ICSID Case No. ARB/97/7*), considers that it must take into account the international rules governing the liability of States. The assessment of the degree of State control and participation in a company is based on two criteria: the first, structural, in other words, related to the structure of the company and, in particular, to its shareholders; the other, functional, related to the objectives of the company in question.

32. From a structural point of view, the Tribunal considers that:

- ADM is a commercial company incorporated as a limited liability company, in accordance with the Act governing limited liability companies of June 2, 1989, registered with the Trade Register since August 3, 1989, thereby having its own legal personality.

- ADM's share capital is held in the following manner: the Treasury holds a participation of 77.79%; the participation of public establishments is 10.57%; that of banks and financial institutions is 5.17%; that of insurance companies is 3%; that of commercial and industrial companies is 2.67%; and lastly, that of research departments is 0.81%.

Thus, the Kingdom of Morocco, through the medium of the Treasury and various public entities, holds at least 89% of ADM.

- The functioning and management of ADM are governed by Article 20 of its Memorandum and Articles of Association:

> "*The company is managed by a Board made up of at least five members and at most twenty, appointed by the Ordinary General Meeting or co-opted by the Board.*"

Moreover, Article 35 of the Memorandum and Articles of Association states that:

> "*General Meetings are made up of all the shareholders, irrespective of the quantity of their shares, as long as amounts that are due have been fully paid up.*"

In virtue of what has been set out above, the majority stake of the Moroccan State in ADM's capital significantly determines the extent of its representation within the General Meeting, and also within the Board of Directors. Persuasive evidence of this can be found in reading the Minutes of the Board of Directors' Meeting of March 18, 1998 (*Exhibit M 43*), which lists its members. Among these are notably the Minister of Infrastructure, who is also President of the company at the same time, the Secretary General of the Ministry of Infrastructure, the Director of Highways and Road Traffic, the Head of the Moroccan Port Authorities, the President of the Board of the National Bank for Economic Development, the Director of the Budget, all of whom depend upon the Ministry of Economy and Finance, etc.

- The majority stake of the Moroccan State in the company's Board of Directors translates into control *de facto* of the latter since, in accordance with Article 27 of ADM's Memorandum and Articles of Association:

> "*The Board of Directors has widespread powers to act in the name of the Company and to authorise all acts or transactions in relation to its object, to the sole exclusion of acts expressly reserved for the General Meeting by the Memorandum and Articles of Association or by Law.*"

— Finally, two other facts reflect the obvious interest that the Moroccan State has in the functioning and management of ADM. First of all, the Minutes indicate that the post of President of the Board of Directors should be held by the natural person holding the title of Minister of Infrastructure at that time. In addition, the Tribunal recalls that in 1995 it was the Minister of Infrastructure and Professional & Executive Training who, in his capacity as ADM's President, put out the invitation to tender that gave rise to the signing of the contract at issue in the present arbitration. Secondly, the Tribunal draws attention to ADM's practice of forwarding a copy of the Minutes of its Board of Directors' meetings to the Prime Minister of the Kingdom of Morocco, as well as to the Secretariat of the Government (*Exhibit G 14*).

Consequently, from a structural point of view, one cannot deny that ADM is an entity controlled and managed by the Moroccan State through the medium of the Minister of Infrastructure and various public organs.

33. From a functional point of view; in other words, if one now looks to the role and the functions carried out by ADM:

— In accordance with its Memorandum and Articles of Association, "*ADM's main activity is the construction, maintenance and operation of the highways and communication routes of a large dimension, granted by the State.*"

Thus, it is clear that ADM's main object is to accomplish tasks that are under State control (building, managing and operating of assets falling under the province of the public utilities responding to the structural needs of the Kingdom of Morocco with regard to infrastructure and efficient communication networks).

34. The administrative nature of the contract and of the laws that govern it corroborate the view of the Tribunal. The provisions of the CCAG, applicable to public procurement contracts performed on behalf of the Ministry of Public Works and Communications and approved by two royal decrees, as well as the conditions and methods of concluding contracts, and also specific provisions related to their control and management, provided for by Royal Decree n° 2-98-482 of 11 Ramadan 1419, illustrate what has previously been said.

35. Lastly, the Tribunal notes that the fact that a State may act through the medium of a company having its own legal personality is no longer unusual if one considers the extraordinary expansion of public authority activity. In order to perform its obligations, and at the same time take into account the sometimes diverging interests that the private economy protects, the State uses a varied spectrum of modes of organisation, among which are in particular semi-public companies, similar to ADM, a company mostly held by the State which, considering the size of its participation (over 80%), directs and manages it. All these factors resolutely imprint a public nature on the said company.

Thus, since ADM is an entity, from a structural as well as a functional point of view, which is distinguishable from the State solely on account of its legal personality, the Tribunal, in spite of the observations of July 2, 2001 made by the Kingdom of Morocco, concludes that the Italian companies have shown that ADM is a State company, acting in the name of the Kingdom of Morocco.

3) *Ratione materiae* jurisdiction

A. The claims of the Parties

36. The Kingdom of Morocco submits that the *ratione materiae* jurisdiction of the Arbitral Tribunal is dependent on:

a) the existence of an investment, both within the meaning of the Bilateral Treaty as well as that of the Washington Convention;

b) the existence of claims founded on the violation of the Bilateral Treaty.

a) The notion of investment

37. With regard to the Bilateral Treaty, the Italian companies consider that the contract at issue is an investment within the meaning of Articles 1(c) and 1(e), which deal with "*rights to any contractual benefit having an economic value*" and "*any right of an economic nature conferred by law or by contract.*" The dispute arose out of the non-performance of the said contract. The contract gives the Claimants a right of an economic nature, the right to damages.

38. The Kingdom of Morocco alleges that, considered in isolation, these provisions dilute the notion of investment into a broader notion of economic rights. Articles 1(c) and 1(e) should, therefore, be read in conjunction with paragraph 1 of Article 1, which refers to the laws and regulations of the host State of the investment. Therefore, it is Moroccan law that should define the notion of investment.

According to Decree n° 2-98-482 of December 30, 1998, the transaction in question should be characterized as a contract for services and not as an investment contract.

The Italian companies characterize the said contract as an investment pursuant to the Bilateral Treaty.

They consider that the reference to the laws and regulations of the host State only relate to the means of realising the investment and not to its definition. The notion of investment should, therefore, not be limited by reference to the laws and regulations referred to in Article 1 paragraph 1, but by reference to Article 1(g). This provision requires that the rights referred to notably in Articles 1(c) and 1(e) should have been the object of contracts approved by the competent authorities. This condition would seem to be satisfied in the present case. The Kingdom of Morocco contests this.

39. With regard to the Washington Convention, the Kingdom of Morocco alleges that the contract in question does not constitute an investment within the meaning of the said Convention.

40. The Italian companies allege the applicability of the Convention at the same time as the characterization of the contract at issue as an investment in light of the said Convention.

b) The grounds for the claims

41. The Kingdom of Morocco considers that the grounds for complaint formulated by the Italian companies do not relate to violations of the Bilateral Treaty, but mere contractual breaches. Moreover, it considers that the jurisdiction of the Arbitral Tribunal could only arise from alleged violations of the Bilateral Treaty, its consent to ICSID arbitration only having been expressed in the said Treaty.

42. The Italian companies argue that contractual failures as well as violations of the Bilateral Treaty may be submitted to ICSID arbitration.

B. Decision

a) On the existence of an investment

1) Within the meaning of the Bilateral Treaty

43. The protection of investments is the basis for the option of choosing the forum stipulated in Article 8.2 of the Bilateral Treaty. This Article, therefore, seeks to define the investments that come under the protection of the Bilateral Treaty.

44. However, insofar as the option of jurisdiction has been exercised in favour of ICSID, the rights in dispute must also constitute an investment pursuant to Article 25 of the Washington Convention. The Arbitral Tribunal, therefore, is of the opinion that its jurisdiction depends upon the existence of an investment within the meaning of the Bilateral Treaty as well as that of the Convention, in accordance with the case law.

Various arbitral tribunals have ruled in this manner in rendering awards in cases in which the notion of investment was at issue (*cf.* Award of March 9, 1998 in the *Fedax N.V. vs. the Republic of Venezuela case: JDI 1999, p. 294 et seq.).*

45. Article 1 of the Bilateral Treaty provides that:

> "*Pursuant to the present Agreement,*
>
> *1. the term "investment" designates all categories of assets invested, after the coming into force of the present agreement, by a natural or legal person, including the Government of a Contracting Party, on the territory of the other Contracting Party, in accordance with the laws and regulations of the aforementioned party. In particular, but in no way exclusively, the term "investment" includes:*
>
> *a) chattels and real estate, as well as any other property rights such as mortgages, privileges, pledges, usufructs, related to the investment;*
>
> *b) shares, securities and bonds or other rights or interests and securities of the State or public entities;*
>
> *c) capitalised debts, including reinvested income, as well as rights to any contractual benefit having an economic value;*
>
> *d) copyright, trademark, patents, technical methods and other intellectual and industrial property rights, know-how, commercial secrets, commercial brands and goodwill;*
>
> *e) any right of an economic nature conferred by law or by contract, and any licence or concession granted in compliance with the laws and regulations in force, including the right of prospecting, extraction and exploitation of natural resources;*
>
> *f) capital and additional contributions of capital used for the maintenance and/or the accretion of the investment;*
>
> *g) the elements mentioned in (c), (d) and (e) above must be the object of contracts approved by the competent authority.*"

The Parties, therefore, agreed upon a number of non-exhaustive hypotheses that they considered to be investments.

45. The construction contract creates a right to a "*contractual benefit having an economic value*" for the Contractor, mentioned in Article 1(c). The Contractor also benefits from a "*right of an economic nature conferred . . . [. . .] . . . by contract*" dealt with by Article 1(e). Moreover, the Respondent does not deny that the rights of the Italian companies are of the same nature as those referred to in (c) and (e) of Article 1.

46. The Tribunal cannot follow the Kingdom of Morocco in its view that paragraph 1 of Article 1 refers to the law of the host State for the definition of "investment". In focusing on "*the categories of invested assets (. . .) in*

accordance with the laws and regulations of the aforementioned party," this provision refers to the validity of the investment and not to its definition. More specifically, it seeks to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal.

Yet, in the present case, the Claimants took part in the tender process in conformity with the legal rules applicable to invitations to tender. At the end of this procedure, they also won the bid and concluded the corresponding contract for services in conformity with the laws in force at that time.

Thus, whether one looks to the pre-contractual stage or that corresponding to the performance of the contract for services, it has never been shown that the Italian companies infringed the laws and regulations of the Kingdom of Morocco.

47. To be considered as investments, the rights enumerated under letters (c) and (e) "*must be the object of contracts approved by the competent authority*" under the terms of Article 1(g).

The Bilateral Treaty does not indicate who the competent authority is, this being likely to vary according to the contract in question. The competent authority is determined according to the laws and regulations of the State on the territory of which the investments are made (*cf.* Article 1, paragraph 1).

48. The Tribunal considers that the contract in question was indeed the object of an authorisation from the competent authority for the following reasons:

- The allocation of the contract to the Italian companies occurred in accordance with the rules and procedure fixed by the President of ADM, acting in virtue of the powers conferred on him by the Board of Directors of this company. As previously mentioned, no infringement of the laws and regulations of the Kingdom of Morocco has been alleged with regard to this phase. The Tribunal points out, without having to determine if ADM was or was not a mere entity of the Moroccan State, that in its capacity of licensor, the Ministry of Infrastructure approved the conclusion of public procurement contracts by ADM in accordance with the mandatory procedure, which was not alleged to have been violated.

- The different stages leading to the signature of the construction contract involved various interventions by the authorities concerned. Thus, the invitation to tender was put out by the Minister of Infrastructure and Professional & Executive Training, President of ADM; the presentation of the bid was made to ADM's Chief Executive Officer; the evaluation and awarding of this bid were carried out by a commission chaired by ADM's Chief Executive Officer and composed of various public organs; and lastly, it was ADM's Chief Executive Officer, as Owner, who signed the construction contract for the project at issue.

49. As a result, the Tribunal considers that the condition of Article 1(g) is satisfied. The contract concluded between ADM and the Italian companies is an investment within the meaning of the Bilateral Treaty. The option of choosing the forum contained in Article 8.2 could, therefore, be exercised in favour of arbitral proceedings under the auspices of ICSID.

2) Within the meaning of the Washington Convention

50. ICSID jurisdiction is determined by Article 25 of the Washington Convention which stipulates that:

"*The jurisdiction of the Centre shall extend to any legal dispute arising directly out of relation to an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting*

State designated to the Centre by that State) and a national of another Contracting State, which the Parties to the dispute consent in writing to submit to the Centre."

51. No definition of investment is given by the Convention. The two Parties recalled that such a definition had seemed unnecessary to the representatives of the States that negotiated it. Indeed, as indicated in the Report of the Executive Directors on the Convention:

"*No attempt was made to define the term "investment" given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (art. 25(4)).*"

52. The Tribunal notes that there have been almost no cases where the notion of investment within the meaning of Article 25 of the Convention was raised. However, it would be inaccurate to consider that the requirement that a dispute be "*in direct relation to an investment*" is diluted by the consent of the Contracting Parties. To the contrary, ICSID case law and legal authors agree that the investment requirement must be respected as an objective condition of the jurisdiction of the Centre (*cf.* in particular, the commentary by *E. Gaillard, in JDI 1999, p. 278 et seq.*, who cites the award rendered in 1975 in the *Alcoa Minerals vs. Jamaica* case as well as several other authors).

The criteria to be used for the definition of an investment pursuant to the Convention would be easier to define if there were awards denying the Centre's jurisdiction on the basis of the transaction giving rise to the dispute. With the exception of a decision of the Secretary General of ICSID refusing to register a request for arbitration dealing with a dispute arising out of a simple sale *(I.F.I. Shihata and A.R. Parra, The Experience of the International Centre for Settlement of Investment Disputes: ICSID Review, Foreign Investment Law Journal, vol. 14, n° 2, 1999, p. 308.)*, the awards at hand only very rarely turned on the notion of investment. Notably, the first decision only came in 1997 (*Fedax* case, cited above). The criteria for characterization are, therefore, derived from cases in which the transaction giving rise to the dispute was considered to be an investment without there ever being a real discussion of the issue in almost all the cases.

The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction (*cf. commentary by E. Gaillard, cited above, p. 292*). In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.

In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and the duration of performance of the contract. As a result, these various criteria should be assessed globally even if, for the sake of reasoning, the Tribunal considers them individually here.

53. The contributions made by the Italian companies are set out and assessed in their written submissions. It is not disputed that they used their know-how, that they provided the necessary equipment and qualified personnel for the accomplishment of the works, that they set up the production tool on the building site, that they obtained loans enabling them to finance the purchases necessary to carry out the works and to pay the salaries of the workforce, and finally that they agreed to the issuing of bank guarantees, in the form of a provisional guarantee fixed at 1.5% of the total sum of the tender, then, at the end of the tender process, in the form of a definite guarantee fixed at 3% of the value of the contract in dispute. The Italian companies, therefore, made contributions in money, in kind, and in industry.

54. Although the total duration for the performance of the contract, in accordance with the CCAP, was fixed at 32 months, this was extended to 36 months. The transaction, therefore, complies with the minimal length of time

upheld by the doctrine, which is from 2 to 5 years *(D. Carreau, Th. Flory, P. Juillard, Droit International Economique: 3rd ed., Paris, LGDJ, 1990, p. 558-578. —C. Schreurer, Commentary on the ICSID Convention: ICSID Review-FILJ, vol. 11, 1996, 2, p. 318-493).*

55. With regard to the risks incurred by the Italian companies, these flow from the nature of the contract at issue. The Claimants, in their reply memorial on jurisdiction, gave an exhaustive list of the risks taken in the performance of the said contract. Notably, among others, the risk associated with the prerogatives of the Owner permitting him to prematurely put an end to the contract, to impose variations within certain limits without changing the manner of fixing prices; the risk consisting of the potential increase in the cost of labour in case of modification of Moroccan law; any accident or damage caused to property during the performance of the works; those risks relating to problems of co-ordination possibly arising from the simultaneous performance of other projects; any unforeseeable incident that could not be considered as *force majeure* and which, therefore, would not give rise to a right to compensation; and finally those risks related to the absence of any compensation in case of increase or decrease in volume of the work load not exceeding 20% of the total contract price.

56. It does not matter in this respect that these risks were freely taken. It also does not matter that the remuneration of the Contractor was not linked to the exploitation of the completed work. A construction that stretches out over many years, for which the total cost cannot be established with certainty in advance, creates an obvious risk for the Contractor.

57. Lastly, the contribution of the contract to the economic development of the Moroccan State cannot seriously be questioned. In most countries, the construction of infrastructure falls under the tasks to be carried out by the State or by other public authorities. It cannot be seriously contested that the highway in question shall serve the public interest. Finally, the Italian companies were also able to provide the host State of the investment with know-how in relation to the work to be accomplished.

58. Consequently, the Tribunal considers that the contract concluded between ADM and the Italian companies constitutes an investment pursuant to Articles 1 and 8 of the Bilateral Treaty concluded between the Kingdom of Morocco and Italy on July 18, 1990 as well as Article 25 of the Washington Convention.

b) On the grounds for the claims

59. Article 8 of the Bilateral Treaty offers the option of choosing the forum with respect to:

> "*All disputes or differences, including disputes related to the amount of compensation due in the event of expropriation, nationalisation, or similar measures, between a Contracting Party and an investor of the other Contracting Party concerning an investment of the said investor on the territory of the first Contracting Party . . .* "

The terms of Article 8 are very general. The reference to expropriation and nationalisation measures, which are matters coming under the unilateral will of a State, cannot be interpreted to exclude a claim based in contract from the scope of application of this Article.

60. However, the Tribunal considers that its scope of application regarding the nature of disputes is limited as to the persons concerned. In the case where the State has organised a sector of activity through a distinct legal entity, be it a State entity, it does not necessarily follow that the State has accepted *a priori* that the jurisdiction offer contained in Article 8 should bind it with respect to contractual breaches committed by this entity.

61. In other words, Article 8 compels the State to respect the jurisdiction offer in relation to violations of the Bilateral Treaty and any breach of a contract that binds the State directly. The jurisdiction offer contained in Article 8 does not, however, extend to breaches of a contract to which an entity other than the State is a named party.

62. But, this restriction of the Arbitral Tribunal's jurisdiction only applies to claims that are based solely on a breach of contract.

However, the Arbitral Tribunal retains jurisdiction in relation to breaches of contract that would constitute, at the same time, a violation of the Bilateral Treaty by the State.

The Italian companies have expressly specified in their Request for Arbitration that "the claims submitted to the present arbitration [. . .] also include claims addressed directly to the Government of Morocco and which relate to the infringement of the Contractor's rights as a foreign investor according to the international regulation of foreign investments (the so-called "treaty claims")."

63. The claims of the Italian companies, to the extent that they correspond to violations of the Bilateral Treaty, are included within the ambit of the Arbitral Tribunal's jurisdiction. It will be for the Claimants to establish the merits of these claims in the subsequent stages of the arbitral proceedings.

64. The Tribunal reserves the question of costs and arbitration fees.

FOR THE ABOVE REASONS

The Tribunal declares that it has jurisdiction over the Italian companies' claims, as they are formulated, but specifies that it does not have jurisdiction over mere breaches of the contract concluded between the Italian companies and ADM that do not simultaneously constitute a violation of the Bilateral Treaty.

July 16, 2001

Maître Robert Briner

Maître Bernardo Cremades

Professor Ibrahim Fadlallah

International Centre for Settlement of Investment Disputes

Emilio Agustín Maffezini *v.* The Kingdom of Spain
Decision of the Tribunal on Objections to Jurisdiction

ICSID Case No. ARB/97/7, 25 January 2000

(English Translation from Spanish Original)

INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES
WASHINGTON, D.C.

IN THE PROCEEDING BETWEEN

EMILIO AGUSTÍN MAFFEZINI
(CLAIMANT)

and

THE KINGDOM OF SPAIN
(RESPONDENT)

CASE NO. ARB/97/7

DECISION OF THE TRIBUNAL ON OBJECTIONS TO JURISDICTION

Members of the Tribunal

Professor Francisco Orrego Vicuña, President
Judge Thomas Buergenthal, Arbitrator
Mr. Maurice Wolf, Arbitrator

Secretary of the Tribunal

Mr. Gonzalo Flores

Representing the Claimant

Dr. Raúl Emilio Vinuesa
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Representing the Respondent

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Abogado del Estado
Subdirección General de los Servicios Contenciosos del Ministerio de Justicia
Madrid
Spain

Date of decision: January 25, 2000

A. Procedure

1. On July 18, 1997, the International Centre for Settlement of Investment Disputes (ICSID or the Centre) received from Mr. Emilio Agustín Maffezini, a national of the Argentine Republic (Argentina), a Request for Arbitration against the Kingdom of Spain (Spain). The request concerns a dispute arising from treatment allegedly received by Mr. Maffezini from Spanish entities, in connection with his investment in an enterprise for the production and distribution of chemical products in the Spanish region of Galicia. In his request the Claimant invokes the provisions of the 1991 "Agreement for the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Argentine Republic" (the Argentine-Spain Bilateral Investment Treaty or BIT).[1] The request also invokes, by way of a most-favored-nation (MFN) clause in the Argentine-Spain BIT, the provisions of a 1991 bilateral investment treaty between the Republic of Chile (Chile) and Spain.[2]

2. On August 8, 1997, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules), acknowledged receipt of the request and on the same day transmitted a copy to the Kingdom of Spain and to the Spanish Embassy in Washington, D.C. At the same time, the Centre asked Mr. Maffezini to provide (i) specific information concerning the issues in dispute and the character of the underlying investment; (ii) information as to the complete terms of Spain's consent to submit the dispute to arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention); (iii) information as to the basis of his claim that the MFN clause in the Argentine-Spain BIT would allow him to invoke Spain's consent contained in the Chile-Spain BIT; and (iv) documentation concerning the entry into force of the bilateral investment treaties invoked in the request. Mr. Maffezini provided this information in two letters of September 10 and September 29, 1997.

[1] Agreement between Argentina and Spain of October 3, 1991. Hereinafter cited as the Argentine-Spain BIT.

[2] Agreement between Chile and Spain of October 2, 1991. Hereinafter cited as the Chile-Spain BIT.

3. On October 30, 1997, the Secretary-General of the Centre registered the request, pursuant to Article 36(3) of the ICSID Convention. On this same date, the Secretary-General, in accordance with Institution Rule 7, notified the parties of the registration of the request and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.

4. On December 22, 1997, the Claimant proposed to the Respondent that the Arbitral Tribunal consist of a sole arbitrator, to be appointed by agreement of the parties. The Claimant further proposed that, if the parties fail to agree in the name of the sole arbitrator by January 31, 1998, the sole arbitrator shall be appointed by ICSID's Secretary-General.

5. On March 5, 1998, Spain having failed to respond to the Claimant's proposal and more that 60 days having elapsed since the registration of the request, the Claimant informed the Secretary-General that he was choosing the formula set forth in Article 37(2)(b) of the ICSID Convention. The Tribunal, therefore, would consist of three arbitrators, one appointed by Mr. Maffezini, one appointed by Spain, and the third, presiding arbitrator, appointed by agreement of the parties.

6. On March 18, 1998, the Centre received a communication from the Spanish Ministry of Economy and Finance, whereby Spain anticipated having objections to the jurisdiction of the Centre and to the competence of the Tribunal, providing the Centre with a summary of the grounds on which such objections were based. The Centre promptly informed the Respondent that a copy of this communication, as well as copies of the request for arbitration and its accompanying documentation, of the notice of registration and of the correspondence exchanged between the parties and the Centre would be transmitted, in due course, to each of the Members of the Tribunal, noting that the question of jurisdiction was one for the Tribunal to decide.

7. On April 24, 1998, Mr. Maffezini appointed Professor Thomas Buergenthal, a national of the United States of America, as an arbitrator. On May 4, 1998, Spain appointed Mr. Maurice Wolf, also a national of the United States of America, as an arbitrator. The parties, however, failed to agree on the appointment of the third, presiding, arbitrator. In these circumstances, by means of a further communication of May 14, 1998, the Claimant requested that the third, presiding, arbitrator in the proceeding

be appointed by the Chairman of ICSID's Administrative Council in accordance with Article 38 of the ICSID Convention.[3]

8. Having consulted with the parties, the Chairman of ICSID's Administrative Council appointed Professor Francisco Orrego Vicuña, a Chilean national, as the President of the Arbitral Tribunal. On June 24, 1998, ICSID's Legal Adviser, on behalf of the Centre's Secretary-General, and in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), notified the parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. On the same date, pursuant to ICSID Administrative and Financial Regulation 25, the parties were informed that Mr. Gonzalo Flores, Counsel, ICSID, would serve as Secretary of the Arbitral Tribunal.

9. On July 3, 1998, the Respondent filed an application for provisional measures, requiring the Claimant to post a guaranty in the amount of the costs expected to be incurred by Spain in defending against this action. By further filing of August 7, 1998, the Claimant requested the Tribunal to dismiss such application.

10. After consulting with the parties, the Tribunal scheduled a first session for August 21, 1998. On August 20, 1998, counsel for the Respondent hand-delivered a document containing Spain's objections to the jurisdiction of the Centre. A copy of Spain's filing was distributed by the Centre to the Members of the Tribunal on that same date. A copy of Spain's filing was later handed by the Secretary of the Tribunal to the Claimant's representative in the course of the Tribunal's first session with the parties.

11. The first session of the Tribunal with the parties was held, as scheduled, on August 21, 1998, at the seat of ICSID in Washington, D.C. At the session the parties expressed their agreement that the Tribunal had been properly constituted in accordance with the relevant provisions of the

[3] Under Article 38 of the ICSID Convention, if the Tribunal is not yet constituted within 90 days after the notice of registration of the request has been dispatched, the Chairman of ICSID's Administrative Council shall, at the request of either party, and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed and designate an arbitrator to be the President of the Tribunal.

ICSID Convention and the Arbitration Rules and that they did not have any objections in this respect.

12. During the course of the first session the parties agreed on a number of procedural matters reflected in written minutes signed by the President and the Secretary of the Tribunal. The Respondent, represented at the session by Mr. Rafael Andrés León Cavero, drew the Tribunal's attention to its objections to the jurisdiction of the Centre. The Tribunal, after briefly ascertaining the views of the parties on this matter, fixed the following time limits for the written phase of the proceedings: the Claimant would file a memorial, with all of his arguments on the question of jurisdiction and on the merits within 90 days from the date of the first session; the Respondent would then file a counter-memorial, with all of its arguments on the question of jurisdiction and on the merits within 90 days from its reception of the Claimant's memorial. The Tribunal left open the possibility of requiring the submission of a reply and a rejoinder to the parties. The Tribunal also left open the possibility of holding a hearing on the issue of jurisdiction.

13. In accordance with the above-described schedule, the Claimant submitted to the Centre his memorial on the merits and on the question of jurisdiction on November 19, 1998. On April 9, 1999, after a request for an extension of the time limit for the filing of its counter-memorial was granted by the Tribunal, the Respondent submitted its written pleadings on the merits and on the question of jurisdiction.

14. On May 14, 1999, the Tribunal invited the parties to submit any further observations they may had on the question of jurisdiction, calling for a hearing on jurisdiction to be held on July 7, 1999, at the seat of the Centre in Washington, D.C. The parties filed their final observations on the question of jurisdiction on June 3, 1999 (the Claimant) and June 18, 1999 (the Respondent). Due to consecutive requests filed first by counsel for the Respondent, and later by counsel for the Claimant, the hearing on jurisdiction was postponed until August 9, 1999.

15. At the August 9, 1999 hearing, Dr. Raúl Emilio Vinuesa addressed the Tribunal on behalf of the Claimant, referring to the arguments put forward in his written pleadings. Mr. Rafael Andrés León Cavero addressed the Tribunal on behalf of the Kingdom of Spain. The Tribunal then posed questions to the representatives of the parties, as provided in Rule 32(3) of the Arbitration Rules.

16. Having heard the views of the parties, the Tribunal rendered, on August 26, 1999, Procedural Order No 1, deciding that, in accordance with Article 41(2) of the ICSID Convention and Rule 41(3) of the Arbitration Rules, it would deal with the question of jurisdiction as a preliminary matter, therefore suspending the proceedings on the merits.

17. On October 28, 1999, the Tribunal issued Procedural Order No. 2, addressing Spain's request for provisional measures. The Tribunal, pointing out that the recommendation of provisional measures seeking to protect mere expectations of success on the side of the Respondent would amount to a pre-judgement of the Claimant's case, unanimously dismissed Spain's request.

18. The Tribunal has considered thoroughly the parties' written submissions on the question of jurisdiction and the oral arguments delivered in the course of the August 9, 1999 hearing on jurisdiction. As mentioned above, the consideration of the merits has been postponed until the issue of the Centre's jurisdiction and Tribunal's competence is decided by the Tribunal. Having considered the basic facts of the dispute, the ICSID Convention and the 1991 Argentine-Spain BIT, as well as the written and oral arguments of the parties' representatives, the Tribunal has reached the following decision on the question of jurisdiction.

B. Considerations

Exhaustion of Domestic Remedies

19. The Kingdom of Spain first challenges the jurisdiction of the Centre and the competence of the Tribunal on the ground that the Claimant failed to comply with the requirements of Article X of the Bilateral Investment Treaty between Argentina and Spain. Article X of this Treaty reads as follows:

"Article X
Settlement of Disputes Between a Contracting Party
and an Investor of the other Contracting Party

1. Disputes which arise within the terms of this Agreement concerning an investment between an investor of one Contracting Party and the other Contracting Party shall, if possible, be settled amicably by the parties to the dispute.

2. If the dispute cannot thus be settled within six months following the date on which the dispute has been raised by either party, it shall be submitted to the competent tribunal of the Contracting Party in whose territory the investment was made.

3. The dispute may be submitted to international arbitration in any of the following circumstances:

a) at the request of one of the parties to the dispute, if no decision has been rendered on the merits of the claim after the expiration of a period of eighteen months from the date on which the proceedings referred to in paragraph 2 of this Article have been initiated, or if such decision has been rendered, but the dispute between the parties continues;
b) if both parties to the dispute agree thereto.

4. In the cases foreseen in paragraph 3, the disputes between the parties shall be submitted, unless the parties otherwise agree, either to international arbitration under the March 18, 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States or to an ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

If after a period of three months following the submission of the dispute to arbitration by either party, there is no agreement to one of the above alternative procedures, the dispute shall be submitted to arbitration under the March 18, 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, provided that both Contracting Parties have become parties to the said Convention. Otherwise, the dispute shall be submitted to the above mentioned ad hoc tribunal.

5. The Arbitral Tribunal shall decide the dispute in accordance with the provisions of this Agreement, the terms of other Agreements concluded between the parties, the law of the Contracting Party in whose territory the investment was made, including its rules on conflict of laws, and general principles of international law.

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> 6. The Arbitral Award shall be binding on both parties to the dispute and each Contracting Party shall execute them in accordance with its laws."

20. Respondent makes two interrelated arguments based on Article X. The first is that Article X(3)(a) requires the exhaustion of certain domestic remedies in Spain and that Claimant failed to comply with this requirement. The second contention is that Claimant did not submit the case to Spanish courts before referring it to international arbitration as required by Article X(2) of the BIT.

21. The Tribunal will first address the contention that Article X(3)(a) requires the exhaustion of domestic remedies. The starting point for its analysis of Respondent's submission is Article 26 of the ICSID Convention. It permits the Contracting States to condition their consent to ICSID arbitration on the prior exhaustion of domestic remedies. Article 26 reads as follows:

> "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."

22. The language of Article 26 makes clear that unless a Contracting State has conditioned its consent to ICSID arbitration on the prior exhaustion of domestic remedies, no such requirement will be applicable. Article 26 thus reverses the traditional international law rule, which implies the exhaustion requirement unless it is expressly or implicitly waived.

23. In determining whether Spain conditioned its acceptance of the Centre's jurisdiction and the Tribunal's competence on the prior exhaustion of domestic remedies, the Tribunal notes that in ratifying the ICSID Convention, Spain did not attach any such condition to its acceptance of Article 26. But since Spain was free to do so in the BIT, the Tribunal must now examine whether Article X of that treaty requires the prior exhaustion of domestic remedies. Although Article X does not condition the reference to ICSID arbitration *expressis verbis* on the prior exhaustion of domestic remedies, it does speak of proceedings in domestic courts. It must be determined, therefore, whether that language can be interpreted to require the exhaustion of domestic remedies and, if so, what the scope of that requirement is.

24. Paragraph 2 of Article X provides that, if a dispute arises between an investor and one of the Contracting Parties to the BIT, and if that dispute cannot be resolved amicably within a period of six months, it shall be submitted to the competent tribunals of the Contracting Party in whose territory the investment was made. Paragraph 3 of Article X then stipulates that the dispute may be submitted to an international arbitral tribunal in any of the following circumstances:

> a) at the request of one of the parties to the dispute, if no decision has been rendered on the merits of the claim after the expiration of a period of eighteen months from the date on which the proceedings referred to in paragraph 2 of this Article have been initiated, or, if such decision has been rendered, but the dispute between the parties continues;
>
> b) if both parties to the dispute agree thereto.

25. The Respondent reads Article X(3)(a) to mean that, if a domestic court has rendered a decision on the merits on the issues in dispute within the prescribed period of eighteen months, the case can no longer be referred to international arbitration, irrespective of the holding of the court. This conclusion follows, in Respondent's view, because once the decision has been rendered, the dispute cannot be said to continue. Hence, if Claimant had referred the case to the Spanish courts and if those courts had passed on the merits of the case within the eighteen-month period, the dispute could no longer be submitted to the Centre under Article X. It follows, in Respondent's view, that Claimant's failure to give Spanish courts the opportunity to resolve the issues in dispute requires the Tribunal to rule that it is not competent to hear the instant case.

26. Claimant admits that the dispute was not referred to a Spanish court prior to its submission to the Centre. He contends, however, that an analysis of the here relevant provisions of Article X indicates that a dispute does not have to be referred to a domestic court before it is submitted to international arbitration as long as the dispute continues and the eighteen-

month period has expired. In Claimant's view this conclusion follows from the fact that Article X(3)(a) permits the reference of a case to international arbitration whether or not a domestic court decision has been rendered and regardless of its outcome.

27. Like all other provisions of the BIT and in the absence of other specified applicable rules of interpretation, Article X must be interpreted in the manner prescribed by Article 31 of the Vienna Convention on the Law of Treaties. It provides that a treaty is to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Applying this principle, it is to be noted that Article X(3)(a) does not say that a case may not be referred to arbitration if a domestic court has rendered a decision on the merits of the dispute within a period of eighteen months. It provides merely that if such a decision has been rendered and if the dispute continues, the case may be referred to arbitration.

28. The Tribunal notes, in this connection, that Article X(3)(a) does not require the exhaustion of domestic remedies as that concept is understood under international law.[4] It speaks merely of a decision on the merits, which Respondent admits does not even have to be a final or non-appealable decision under Spanish law, and thus fails to require the exhaustion of all available domestic remedies.

29. But even if Article X(3)(a) were to be characterized as a provision requiring the exhaustion of domestic remedies, that requirement would not have the effect, contrary to Respondent's arguments, of preventing the subsequent reference of the case to international arbitration under the BIT. This is so because, where a treaty guarantees certain rights and provides for the exhaustion of domestic remedies before a dispute concerning these guarantees may be referred to an international tribunal, the parties to the dispute retain the right to take the case to that tribunal as long as they have exhausted the available remedies, and this regardless of the outcome of the domestic proceeding. They retain that remedy because the international tribunal rather than the domestic court has the final say on the meaning

[4] C. Schreuer, "Commentary on the ICSID Convention. Article 25", *Foreign Investment Law Journal, ICSID Review*, Vol. 12, 1997, 59, at 201.

and scope of the international obligations—in this case the BIT—that are in dispute.[5]

30. Here it is to be noted that the requirements of the exhaustion of domestic remedies differs depending on whether the appeal to an international tribunal contends that the domestic tribunal was guilty of a denial of justice, or whether the claim seeks the vindication of rights guaranteed in a treaty, for example, which empowers the tribunal to interpret and apply the treaty. In the former case, the right to appeal to an international tribunal, if it exists at all, can only be based on a denial of justice by the domestic courts. In such a case, if there was no denial of justice, the case will have to be rejected, whether or not the domestic court committed errors of law or fact in rendering its judgement. This is not true in a case where, as here, the parties have a treaty right to obtain a final determination from the international tribunal on the scope of their rights under the treaty, provided they have first exhausted all available domestic remedies.

31. The foregoing analysis is relevant in determining the soundness of Respondent's interpretation of Article X(3)(a) and its contention that pursuant to this provision a dispute cannot be deemed to continue if the domestic court has rendered a decision on the merits which addressed all issues raised by the parties. Leaving aside for a moment the wording of paragraph 3(a), Respondent's argument is based on the assumption that a case may be referred to international arbitration under the BIT only if there was a denial of justice by the domestic court. This proposition, if accepted, would have the effect of denying the party to a dispute the right to challenge the domestic court's interpretation of the BIT. Respondent's interpretation can be reconciled neither with the language nor object and purpose of the dispute resolution provisions of BITs in general and the instant BIT in particular. This is so because these clauses are designed to give foreign investors the right to have their disputes under a BIT decided either exclusively or ultimately by international arbitration.[6]

[5] See International Law Commission, Draft Articles on State Responsibility, Art. 22 and related Commentary, *1977 Yearbook of the International Law Commission,* Vol. II, Part 2, 1978, at 30 et seq. For the 1996 Draft and its referral to the 1977 Draft on this point, see *International Legal Materials*, Vol. 37, 1998, 444. See also C. F. Amerasinghe: *Local remedies in international law,* 1990, at 45-51.

[6] Schreuer, loc. cit., supra note 4, at 199-202.

32. Moreover, the wording of paragraph 3(a) does not support Respondent's submission on this subject. It contains no guidelines for deciding whether or under what circumstances a dispute may be deemed to continue. In the Tribunal's view, the absence of such objective criteria leaves each party free to decide for itself whether the dispute continues, that is, whether its claim has been vindicated by the domestic court, and to refer the case to international arbitration if it is not satisfied with the domestic court judgment. Had the Contracting Parties to the BIT wished to establish a different procedure, they would have done so.

33. The Tribunal considers that Article X(3)(a) serves two important functions, which are not affected by the above interpretation. First, it permits either party to a dispute to seek redress from the appropriate domestic court. Second, it ensures that a party accessing the domestic court will not be prevented and will not be able to prevent the case from going to international arbitration after the expiration of the eighteen-month period. This is so whether or not the domestic court has rendered a decision and regardless of the decision it may have rendered.

34. Turning to the second part of Respondent's argument, it must now be asked whether a party to a dispute, which has not referred the case to a domestic court, as required by Article X(2), must be deemed to have waived or forfeited the right to submit the matter to international arbitration. Here it is to be noted that paragraph 2 provides that the dispute "shall be submitted" (*será sometida*) to the competent tribunals of the State Party where the investment was made, and that paragraph 3(a) then declares that the dispute "may be submitted" (*podrá ser sometida*) to an international arbitral tribunal at the request of a party to the dispute in the following circumstances: if the domestic court has not rendered a decision on the merits of the case within a period of eighteen months or if, notwithstanding the existence of such a decision, the dispute continues.

35. This language suggests that the Contracting Parties to the BIT—Argentina and Spain—wanted to give their respective courts the opportunity, within the specified period of eighteen months, to resolve the dispute before it could be taken to international arbitration. Claimant contends, however, that this could not have been the intended meaning of Article X(2), if only because at the end of that period either party would still be free to take the case to international arbitration, regardless of the outcome of the domestic court proceedings.

36. Had this been the Claimant's sole argument on the issue, the Tribunal would have had to conclude that because the Claimant failed to submit the instant case to Spanish courts as required by Article X(2) of the BIT, the Centre lacked jurisdiction and the Tribunal lacked competence to hear the case. This is so because Claimant's submission on this point overlooks two important considerations. First, while it is true that the parties would be free to seek international arbitration after the expiration of the eighteen-month period, regardless of the outcome of the domestic court proceeding, they are likely to do so only if they were dissatisfied with the domestic court decision. Moreover, they would certainly not do so if they were convinced that the international tribunal would reach the same decision. In that sense the courts of the Contracting Parties are given an opportunity to vindicate the international obligations guaranteed in the BIT. Given the language of the treaty, this is a role which the Contracting Parties can be presumed to have wished to retain for their courts, albeit within a prescribed time limit. Second, Claimant's interpretation of Article X(2) would deprive this provision of any meaning, a result that would not be compatible with generally accepted principles of treaty interpretation, particularly those of the Vienna Convention on the Law of Treaties.

37. As noted above, had the Claimant's contention regarding Article X(2) stood alone, the Tribunal would have had to reject it. However, in view of the fact that Claimant argues in the alternative that he has the right to rely on the most favored nation clause contained in the BIT, dismissal of the application to the Tribunal without due consideration of this other argument would be premature. The Tribunal will accordingly now address the Claimant's alternative argument.

Most Favored Nation Clause

38. The argument based on the most favored nation clause raises a number of legal issues with which international tribunals are confronted from time to time. As is true of many treaties of this kind, Article IV of the BIT between Argentina and Spain, after guaranteeing a fair and equitable treatment for investors, provides the following in paragraph 2:

> "In all matters subject to this Agreement, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country."

39. As noted above, the Argentine-Spain BIT provides domestic courts with the opportunity to deal with a dispute for a period of eighteen months before it may be submitted to arbitration. However, Article 10(2) of the Chile-Spain Bilateral Investment Treaty, imposes no such condition. It provides merely that the investor can opt for arbitration after the six-month period allowed for negotiations has expired.

40. Claimant contends, consequently, that Chilean investors in Spain are treated more favorably than Argentine investors in Spain. He argues, accordingly, that the most favored nation clause in the Argentine-Spain BIT gives him the option to submit the dispute to arbitration without prior referral to domestic courts. Claimant submits, in this connection, that although the Argentine-Spain BIT provides for exceptions to the most favored nation treatment, none of these apply to the dispute settlement provisions at issue in the instant case.

41. The Kingdom of Spain rejects these contentions. In its view, the treaties made by Spain with third countries are in respect of Argentina *res inter alios acta* and, consequently, cannot be invoked by the Claimant. Respondent further argues that under the principle *ejusdem generis* the most favored nation clause can only operate in respect of the same matter and cannot be extended to matters different from those envisaged by the basic treaty. In Spain's view, this means that the reference in the most favored nation clause of the Argentine-Spain BIT to "matters" can only be understood to refer to substantive matters or material aspects of the treatment granted to investors and not to procedural or jurisdictional questions.

42. In this respect, Spain has also argued that since it is the purpose of the most favored nation clause to avoid discrimination, such discrimination can only take place in connection with material economic treatment and not with regard to procedural matters. Only if it could be established that resort to domestic tribunals would produce objective disadvantages for the investor would it be possible to argue material effects on the treatment owed. It follows, in the same line of argument, that it would have to be proved that the submission of the dispute to Spanish jurisdiction is less advantageous to the investor than its submission to ICSID arbitration.

43. The arguments outlined above are familiar to international lawyers and scholars. Indeed, many of the issues mentioned have been addressed in

the *Anglo-Iranian Oil Company Case (Jurisdiction)*,[7] in the *Case concerning the rights of nationals of the United States of America in Morocco* [8]and in the *Ambatielos Case (merits: obligation to arbitrate)*,[9] as well as in the proceedings of the *Ambatielos case* before a Commission of Arbitration.[10]

44. In addressing these issues, it must first be determined which is the basic treaty that governs the rights of the beneficiary of the most favored nation clause. This question was extensively discussed in the *Anglo-Iranian Oil Company Case*, where the International Court of Justice determined that the basic treaty upon which the Claimant could rely was that "containing the most-favored-nation clause".[11] The Court then held that:

> "It is this treaty which establishes the juridical link between the United Kingdom and a third-party treaty and confers upon that State the rights enjoyed by the third party. A third party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom and Iran: it is *res inter alios acta*".[12]

45. This discussion has practical consequences for the application of the most favored nation clause. For if, as the Tribunal believes, the right approach is to consider that the subject matter to which the clause applies is indeed established by the basic treaty, it follows that if these matters are more favorably treated in a third-party treaty then, by operation of the clause, that treatment is extended to the beneficiary under the basic treaty.

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[7] International Court of Justice, *Reports*, 1952, p. 93. See also Sir Gerald Fitzmaurice: *The Law and Procedure of the International Court of Justice, 1951-1954: Points of Substantive Law. Part II*, p. 84.

[8] International Court of Justice, *Reports*, 1952, p. 176.

[9] International Court of Justice, *Reports*, 1953, p. 10. See also generally, *International Law Reports*, 1953, p. 547.

[10] Award of the Commission of Arbitration established for the Ambatielos claim between Greece and the United Kingdom, dated March 6, 1956, United Nations: *Reports of International Arbitral Awards,* Vol. XII, 1963, p. 91.

[11] International Court of Justice, *Reports*, 1952, at 109.

[12] Ibid., at 109. For a discussion of this and other decisions relating to the most favored nation clause, the writings of authors and the work of the International Law Commission on the subject, see *Yearbook of the International Law Commission*, Vol. II, 1970, p. 199; Vol. II, 1973, p. 97; Vol. II, Part One, 1978, p. 1; Vol. II, Part Two, 1978, p. 7.

If the third-party treaty refers to a matter not dealt with in the basic treaty, that matter is *res inter alios acta* in respect of the beneficiary of the clause.[13]

46. The second major issue concerns the question whether the provisions on dispute settlement contained in a third-party treaty can be considered to be reasonably related to the fair and equitable treatment to which the most favored nation clause applies under basic treaties on commerce, navigation or investments and, hence, whether they can be regarded as a subject matter covered by the clause. This is the issue directly related to the *ejusdem generis* rule.

47. The question was indirectly but not conclusively touched upon in the *Case concerning the rights of nationals of the United States of America in Morocco*. Here, the International Court of Justice was confronted with the question of whether the clause contained in a treaty of commerce could be understood to cover consular jurisdiction as expressed in a third-party treaty. However, the Court did not need to answer the question posed because its main finding was that the treaties from which the United States purported to derive such jurisdictional rights had ceased to operate between Morocco and the third states involved.[14]

48. The issue came into sharp focus in the *Ambatielos case*. Greece contended before the International Court of Justice that her subject—Ambatielos—had not been treated in the English courts according to the standards applied to British subjects and foreigners who enjoyed a most favored nation treatment under treaties in force. Such most favored nation treatment was relied upon as the basis of the claim and the request that the dispute be submitted to arbitration. The Court did not deal with the matter of the most favored nation clause, but this task would be undertaken by the Commission of Arbitration.

49. The Commission of Arbitration, to which the dispute was eventually submitted, subsequently confirmed the relevance of the *ejusdem generis* rule. It affirmed that "the most-favored-nation clause can only attract

[13] It was on this basis that the International Court of Justice ruled against the extension of principles of international law envisaged in treaties between Iran and third parties to the United Kingdom, as these principles were unrelated to the basic treaty containing the clause, Judgment cit., supra note 11.

[14] International Court of Justice, *Reports,* 1952, p. 191.

matters belonging to the same category of subject as that to which the clause itself relates ".[15] However, the scope of the rule was defined in broad terms:

> "It is true that the 'administration of justice', when viewed in isolation, is a subject-matter other than 'commerce and navigation', but this is not necessarily so when it is viewed in connection with the protection of the rights of traders. Protection of the rights of traders naturally finds a place among the matters dealt with by treaties of commerce and navigation.
>
> Therefore it cannot be said that the administration of justice, in so far as it is concerned with the protection of these rights, must necessarily be excluded from the field of application of the most-favored-nation clause, when the latter includes 'all matters relating to commerce and navigation'. The question can only be determined in accordance with the intention of the Contracting Parties as deduced from a reasonable interpretation of the Treaty".[16]

50. The Commission accepted the extension of the clause to questions concerning the administration of justice and found it to be compatible with the *ejusdem generis* rule. It concluded that the protection of the rights of persons engaged in commerce and navigation by means of dispute settlement provisions embraces the overall treatment of traders covered by the clause. On the merits of the question, the Commission determined, however, that the third-party treaties relied upon by Greece did not provide for any "privileges, favours or immunities" more extensive than those resulting from the basic treaty and that "accordingly the most-favored-nation clause contained in Article X has no bearing on the present dispute...".[17]

51. It is in the light of this background that the operation of the most favored nation clause in bilateral investment treaties must now be considered by this Tribunal. In the case *Asian Agricultural Products Limited v. Republic of Sri Lanka*,[18] an ICSID Tribunal had the occasion to examine

[15] United Nations, *Reports of International Arbitral Awards,* 1963, p. 107.

[16] Ibid.

[17] Ibid., at 109, 110.

the operation of the most favored nation treatment agreed to between Sri Lanka and the United Kingdom in light of the argument that a Sri Lanka-Switzerland treaty contained more favorable provisions on which the investor sought to rely. The provisions discussed, however, were not related to dispute settlement but only to the liability standards under the treaties in question. As in the *Ambatielos* decision rendered by the Commission of Arbitration, the ICSID Tribunal held that "...it is not proven that the Sri Lanka/Switzerland Treaty contains rules more favourable than those provided for under the Sri Lanka/UK Treaty, and hence, Article 3 of the latter Treaty cannot be justifiably invoked in the present case".[19]

52. A number of bilateral investment treaties have provided expressly that the most favored nation treatment extends to the provisions on settlement of disputes. This is particularly the case of investment treaties concluded by the United Kingdom. Thus, Article 3(3) of the Agreement between the United Kingdom and Albania, stipulates: "For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement".[20] Among the enumerated provisions are the clauses on dispute settlement and the consent to submit to conciliation or arbitration under ICSID. Here it is beyond doubt that the parties intended the most favored nation clause to include dispute settlement in its scope, thereby meeting the test proposed by the *Ambatielos* Commission of Arbitration. Furthermore, the parties included this model clause in the Agreement with the express purpose of "the avoidance of doubt".

53. In other treaties the most favored nation clause speaks of "all rights contained in the present Agreement"[21] or, as the basic Argentine-Spain BIT does, "all matters subject to this Agreement". These treaties do not provide expressly that dispute settlement as such is covered by the clause. Hence, like in the *Ambatielos* Commission of Arbitration it must be established whether the omission was intended by the parties or can reasonably be inferred from the practice followed by the parties in their treatment of foreign investors and their own investors.

[18] *Asian Agricultural Products Limited v. Republic of Sri Lanka*, ICSID Case NoARB/87/3, Award of June 27, 1990, *ICSID Reports,* Vol. 4, p. 246.

[19] Ibid., at 272.

[20] Agreement between the United Kingdom and Albania, March 30, 1994. Twelve other agreements made by the United Kingdom, which the Tribunal has examined, contain the same model clause.

[21] Agreement between Chile and the Belgian-Luxembourg Economic Union, July 15, 1992, Article 3 (3).

54. Notwithstanding the fact that the basic treaty containing the clause does not refer expressly to dispute settlement as covered by the most favored nation clause, the Tribunal considers that there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce. Consular jurisdiction in the past, like other forms of extraterritorial jurisdiction, were considered essential for the protection of rights of traders and, hence, were regarded not merely as procedural devices but as arrangements designed to better protect the rights of such persons abroad.[22] It follows that such arrangements, even if not strictly a part of the material aspect of the trade and investment policy pursued by treaties of commerce and navigation, were essential for the adequate protection of the rights they sought to guarantee.

55. International arbitration and other dispute settlement arrangements have replaced these older and frequently abusive practices of the past. These modern developments are essential, however, to the protection of the rights envisaged under the pertinent treaties; they are also closely linked to the material aspects of the treatment accorded. Traders and investors, like their States of nationality, have traditionally felt that their rights and interests are better protected by recourse to international arbitration than by submission of disputes to domestic courts, while the host governments have traditionally felt that the protection of domestic courts is to be preferred. The drafting history of the ICSID Convention provides ample

[22] See, for example, *Magno Santovincenzo* v. *James F. Egan*, United States Supreme Court, Decision of November 23, 1931, *U.S. Reports*, Vol. 284, p. 30, where it was held that "...the provisions of Article V of the Treaty were of special importance, as they provided for extraterritorial jurisdiction of the United States in relation to the adjudication of disputes. It would thwart the major purpose of the Treaty to exclude from the important protection of these provisions citizens of the United States who might be domiciled in Persia". For this and other domestic decisions concerning the most favored nation clause see International Law Commission, Decisions of national courts relating to the most-favoured-nation clause, Digest prepared by the Secretariat, Doc. A/CN.4/269, *Yearbook of the International Law Commission*, Vol. II, 1973, p. 117.

evidence of the conflicting views of those favoring arbitration and those supporting policies akin to different versions of the Calvo Clause.[23]

56. From the above considerations it can be concluded that if a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the *ejusdem generis* principle. Of course, the third-party treaty has to relate to the same subject matter as the basic treaty, be it the protection of foreign investments or the promotion of trade, since the dispute settlement provisions will operate in the context of these matters; otherwise there would be a contravention of that principle. This operation of the most favored nation clause does, however, have some important limits arising from public policy considerations that will be discussed further below.

57. The negotiations leading to the Argentine-Spain BIT evidence similar policy conflicts between the capital exporting country and the host country, that is, Spain and Argentina respectively, except that in the present case the roles were later reversed, with Argentina becoming the capital exporter and Spain the host country. The Claimant has convincingly explained that at the time of the negotiations of the Agreement, Argentina still sought to require some form of prior exhaustion of local remedies, while Spain supported the policy of a direct right of submission to arbitration, which was reflected in the numerous agreements it negotiated with other countries at that time. The eventual role the treaty envisaged for domestic courts, involving the submission of the dispute to these courts for a period of time, not amounting to the traditional exhaustion of local remedies requirement as explained above, coupled with ICSID arbitration, was an obvious compromise reached by the parties. Argentina later abandoned its prior policy, and like Spain and Chile, accepted treaty clauses providing for the direct submission of disputes to arbitration following a period of negotiations.

58. The Tribunal has also examined in detail the practice followed by Spain in respect of bilateral investment treaties with other countries. These treaties indicate that Spain's preferred practice is to allow for arbitration,

[23] See generally ICSID: *Analysis of Documents Concerning the Origin and the Formulation of the Convention,* 1970.

following a six-months effort to reach a friendly settlement, which is what the Chile-Spain BIT provides. In most cases there is a choice of arbitration under ICSID, but other options are available as well. This is the situation, for example, with regard to the treaties concluded by Spain with Algeria,[24] Chile,[25] Colombia,[26] Cuba,[27] Czechoslovakia,[28] Dominican Republic,[29] Egypt,[30] El Salvador,[31] Honduras,[32] Hungary,[33] Indonesia (twelve-month direct settlement effort),[34] Kazajstan,[35] Republic of Korea,[36] Lithuania,[37] Malaysia,[38] Nicaragua,[39] Pakistan,[40] Peru,[41] Philippines,[42] Poland[43] and Tunisia.[44]

59. Spain's treaty practice also shows that in a few cases a six-month or nine-month effort at a direct settlement is followed by arbitration between the Contracting Parties, but not involving the choice of the investor. This is, for example, the case of the treaties with Bolivia,[45] Morocco[46] and the USSR.[47] Only one other treaty, namely that with Uruguay,[48] follows the

[24] Agreement of December 23, 1994.
[25] Agreement of October 2, 1991.
[26] Agreement of July 9, 1995.
[27] Agreement of May 27, 1994.
[28] Agreement of December 12, 1990.
[29] Agreement of March 16, 1995.
[30] Agreement of November 3, 1992.
[31] Agreement of February 14, 1995.
[32] Agreement of March 18, 1994.
[33] Agreement of November 9, 1989.
[34] Agreement of May 30, 1995.
[35] Agreement of March 23, 1994.
[36] Agreement of January 17, 1994.
[37] Agreement of July 6, 1994.
[38] Agreement of April 4, 1995.
[39] Agreement of March 16, 1994.
[40] Agreement of September 15, 1994.
[41] Agreement of November 17, 1994.
[42] Agreement of October 19, 1993.
[43] Agreement of July 30, 1992.
[44] Agreement of May 28, 1991.
[45] Agreement of April 24, 1990.
[46] Agreement of January 15, 1992.
[47] Agreement of November 28, 1991.
[48] Agreement of April 7, 1992.

model of the Argentine-Spain BIT, probably because of the similarity of policies pursued by the two River Plate nations.

60. The Tribunal also notes that of all the Spanish treaties it has been able to examine, the only one that speaks of "all matters subject to this Agreement" in its most favored nation clause, is the one with Argentina. All other treaties, including those with Uruguay and Chile, omit this reference and merely provide that "this treatment" shall be subject to the clause, which is of course a narrower formulation.

61. The Spanish treaty practice is also relevant in connection with another aspect of the clause. Most treaties concluded by Spain have a model clause to the effect that "...Each Party shall guarantee in its territory fair and equitable treatment for the investments made by investors of the other Party...This treatment shall not be less favourable than that extended by each Party to the investments made in its territory by its own investors...".[49] While this clause applies to national treatment of foreign investors, it may also be understood to embrace the treatment required by a Government for its investors abroad, as evidenced by the treaties made to ensure their protection. Hence, if a Government seeks to obtain a dispute settlement method for its investors abroad, which is more favorable than that granted under the basic treaty to foreign investors in its territory, the clause may be construed so as to require a similar treatment of the latter.

62. Notwithstanding the fact that the application of the most favored nation clause to dispute settlement arrangements in the context of investment treaties might result in the harmonization and enlargement of the scope of such arrangements, there are some important limits that ought to be kept in mind. As a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question, particularly if the beneficiary is a private investor, as will often be the case. The scope of the clause might thus be narrower than it appears at first sight.

63. Here it is possible to envisage a number of situations not present in the instant case. First, if one contracting party has conditioned its consent

[49] See, for example, the Algeria-Spain Agreement of December 23, 1994, Article 4.

to arbitration on the exhaustion of local remedies, which the ICSID Convention allows, this requirement could not be bypassed by invoking the most favored nation clause in relation to a third-party agreement that does not contain this element since the stipulated condition reflects a fundamental rule of international law.[50] Second, if the parties have agreed to a dispute settlement arrangement which includes the so-called fork in the road, that is, a choice between submission to domestic courts or to international arbitration, and where the choice once made becomes final and irreversible,[51] this stipulation cannot be bypassed by invoking the clause. This conclusion is compelled by the consideration that it would upset the finality of arrangements that many countries deem important as a matter of public policy. Third, if the agreement provides for a particular arbitration forum, such as ICSID, for example, this option cannot be changed by invoking the clause, in order to refer the dispute to a different system of arbitration. Finally, if the parties have agreed to a highly institutionalized system of arbitration that incorporates precise rules of procedure, which is the case, for example, with regard to the North America Free Trade Agreement and similar arrangements, it is clear that neither of these mechanisms could be altered by the operation of the clause because these very specific provisions reflect the precise will of the contracting parties. Other elements of public policy limiting the operation of the clause will no doubt be identified by the parties or tribunals. It is clear, in any event, that a distinction has to be made between the legitimate extension of rights and benefits by means of the operation of the clause, on the one hand, and disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other hand.

64. In light of the above considerations, the Tribunal is satisfied that the Claimant has convincingly demonstrated that the most favored nation clause included in the Argentine-Spain BIT embraces the dispute settlement provisions of this treaty. Therefore, relying on the more favorable arrangements contained in the Chile-Spain BIT and the legal policy adopted by Spain with regard to the treatment of its own investors abroad, the Tribunal concludes that Claimant had the right to submit the instant dispute to arbitration without first accessing the Spanish courts. In the

[50] *The Mavrommatis Palestine Concessions* (Greece v. U.K.), Permanent Court of International Justice, 1924, Series A. No. 2, 12; *Interhandel Case* (Switzerland v. United States of America), International Court of Justice, *Reports 1959,* 27.

[51] See, for example, the Chile-Spain BIT of October 2, 1991, Article 10(2).

Tribunal's view, the requirement for the prior resort to domestic courts spelled out in the Argentine-Spain BIT does not reflect a fundamental question of public policy considered in the context of the treaty, the negotiations relating to it, the other legal arrangements or the subsequent practice of the parties. Accordingly, the Tribunal affirms the jurisdiction of the Centre and its own competence in this case in respect of this aspect of the challenge made by the Kingdom of Spain.

The Claimant's Standing

65. The Respondent has also challenged the jurisdiction of the Centre and the Tribunal's competence on a different ground, namely, that the Claimant lacks standing to file this request for arbitration because he is not an investor within the meaning of Article 25(1) of the ICSID Convention. Respondent points out that under Article 25(1), the Centre has jurisdiction only over disputes arising directly out of an investment "between a Contracting State and a national of another Contracting State." Although Claimant is an Argentine national, his claim against the Kingdom of Spain is based, in Respondent's view, on injuries allegedly suffered by EAMSA, a Spanish juridical entity established and largely owned by Claimant. As a Spanish company, EAMSA has a juridical personality separate and distinct from its shareholders. Respondent argues that as long as the company continues to exist *qua* company, a shareholder in Claimant's position has no standing to seek to lift the corporate veil and sue in his personal capacity for damages sustained by the company. According to this view, the Claimant would have only very limited grounds upon which to sue for eventual wrongdoings that might affect him personally, but in any event such acts could not be attributed to the Kingdom of Spain.

66. Claimant emphasizes that he is not bringing this case on behalf of EAMSA. He contends, instead, that he has filed this action in his personal capacity as a foreign (Argentine) investor in the Spanish company (EAMSA) to protect his investment in that company. In support of his arguments, Claimant points, *inter alia*, to Articles I(2) and II(2) of the BIT and argues that these provisions define "investments" broadly in the sense that they cover all types of property and rights to property, including investments made or acquired in the host country.

67. The Tribunal notes that Article 25 of the Convention must be read together with two provisions of the BIT, which are of particular relevance

in analyzing the above contentions of the parties. The first of these is Article I(2) of the BIT, which reads, in part, as follows:

> "The term 'investment' means every kind of asset, such as goods and rights of whatever nature, acquired or made in accordance with the laws of the Contracting Party in whose territory the investment is made, and shall include, in particular though not exclusively, the following: shares in stock or any other form of participation in a company."

The other provision is Article II(2), which stipulates:

> "The present Agreement shall apply to capital investments in the territory of one Contracting Party, made in accordance with its legislation prior to the entry into force of the Agreement. However this Agreement shall not apply to disputes or claims originating before its entry into force."

68. These provisions indicate that capital investments are covered by the BIT. They also provide that individuals having the nationality of one of the Contracting Parties, who invest in corporations or similar legal entities created in the territory of the other Contracting Party, are as a general proposition entitled to claim the protection of that treaty. These provisions complement and are consistent with the requirements of Article 25 of the Convention. Claimants' assertions as to his standing to file this case are fully compatible with these stipulations.

69. The foregoing conclusion does not mean that Claimant has in fact proved that he has made out a valid claim for damages sustained by him in his personal capacity. He will have to do that in the proceedings on the merits in order to win his case. At this stage of the proceedings, however, it is enough for him to demonstrate that, if true, his allegations would give him standing to bring this case in his personal capacity.

70. In the Tribunal's view, Claimant has sustained that burden. He is an Argentine investor in a Spanish company, who brings this action ostensibly to protect his investment in that company and for losses incurred by him due to injurious acts he attributes to Respondent. If proved, these facts would entitle Claimant to invoke the protection of the BIT in his personal capacity. (Convention, Art. 25; BIT, Arts. I(2) and II(2)). Accordingly,

Claimant can be said to have made out a *prima facie* case that he has standing to file this case.

SODIGA's Status in the Kingdom of Spain

71. The Tribunal now turns to the Respondent's contention that the instant dispute is not between the Kingdom of Spain and the Claimant, as alleged by the Claimant, but between the Claimant and the private corporation "Sociedad para el Desarrollo Industrial de Galicia" (SODIGA), with which the Claimant made various contractual dealings.

72. The issue here can be summarized as follows. The Claimant argues that the actions and omissions affecting his investment are attributable to an entity owned and operated by the Kingdom of Spain. SODIGA, the Claimant argues, is not only owned by several State entities, but it is also under the control of the State and operated as an arm of the State for the purposes of the economic development of the region of Galicia. Accordingly, as a State entity, its wrongful acts or omission may be attributed to the State.

73. The Respondent maintains, however, that SODIGA is a private commercial corporation established under the commercial laws of Spain and that, consequently, its activities are those of a private entity. Ownership of part of the shares of SODIGA by State entities, the Respondent argues, does not alter the private commercial character of the corporation nor does it transform SODIGA into a State agency. Its acts or omissions cannot, therefore, be attributed to the State.

74. Under the ICSID Convention, the Centre's jurisdiction extends only to legal disputes arising directly out of an investment between a Contracting State and a national of another Contracting State.[52] Just as the Centre has no jurisdiction to arbitrate disputes between two States, it also lacks jurisdiction to arbitrate disputes between two private entities. Its main jurisdictional feature is to decide disputes between a private investor and a State.[53] However, neither the term "national of another Contracting State" nor the term "Contracting State" are defined in the Convention.

[52] ICSID Convention, Article 25(1).

[53] Aron Broches: "The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction", *Columbia Journal of International Law*, Vol. 5, 1966, 263, at 265.

Some elements outlined in the Convention in respect of the standing of a constituent subdivision or agency of a Contracting State or the modalities of consent in their respect,[54] neither help in this case.[55] The Convention contains no criteria dealing with the attribution to the State of acts or omissions undertaken by such State entities, subdivisions or agencies. The Argentine-Spanish BIT does not assist either in this determination. While it speaks of actions of State authorities ("*autoridades de una Parte*"), it does not define the phrase.[56]

75. Accordingly, the Tribunal has to answer the following two questions: first, whether or not SODIGA is a State entity for the purpose of determining the jurisdiction of the Centre and the competence of the Tribunal, and second, whether the actions and omissions complained of by the Claimant are imputable to the State. While the first issue is one that can be decided at the jurisdictional stage of these proceedings, the second issue bears on the merits of the dispute and can be finally resolved only at that stage.

76. Since neither the Convention nor the Argentine-Spanish BIT establish guiding principles for deciding the here relevant issues, the Tribunal may look to the applicable rules of international law in deciding whether a particular entity is a state body. These standards have evolved and been applied in the context of the law of State responsibility. Here, the test that has been developed looks to various factors, such as ownership, control, the nature, purposes and objectives of the entity whose actions are under scrutiny, and to the character of the actions taken.[57]

77. The question whether or not SODIGA is a State entity must be examined first from a formal or structural point of view. Here a finding that the entity is owned by the State, directly or indirectly, gives rise to a rebuttable presumption that it is a State entity. The same result will obtain if an entity is controlled by the State, directly or indirectly. A similar

[54] ICSID Convention, Article 25(1) and 25(3). See C. Schreuer: "Commentary on the ICSID Convention. Article 25", *Foreign Investment Law Journal—ICSID Review*, Vol. 11, 1996, 318, at 380-391; Schreuer, loc. cit., supra note 4, at 140-150.

[55] SODIGA is not a party to this case and no designation has been made or consent has been given by Spain to this effect.

[56] Argentine-Spain BIT, Article V.

[57] Ian Brownlie: *System of the Law of Nations. State Responsibility. Part I*, 1983, 132 et seq.

presumption arises if an entity's purpose or objectives is the carrying out of functions which are governmental in nature or which are otherwise normally reserved to the State, or which by their nature are not usually carried out by private businesses or individuals.

78. The relevance of these standards is clearer when there is a direct State operation and control, such as by a section or division of a Ministry, but less so when the State chooses to act through a private sector mechanism, such as a corporation (*sociedad anonima*) or some other corporate structure. In any event, a State will not necessarily escape responsibility for wrongful acts or omissions by hiding behind a private corporate veil.[58] Paragraph 2 of Article 7 of the International Law Commission's *Draft Articles on State Responsibility*, supports this position:

> "2. The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall be considered as an act of the State under international law, provided the organ was acting in such capacity in the case in question."[59]

79. Because of the many forms that State enterprises may take and thus shape the manners of State action, the structural test by itself may not always be a conclusive determination whether an entity is an organ of the State or whether its acts may be attributed to the State. An additional test has been developed, a functional test, which looks to the functions of or role to be performed by the entity.[60] Although, as noted above, neither the ICSID Convention nor the Argentine-Spain BIT define a Contracting State, the drafting history of the Convention does cover an analogous situation: whether mixed economy companies or government-owned corporations may be considered under the definition of a "national of a Contracting State". While recognizing, of course, that definitions of different terms are not usually interchangeable and that, in this case, a "Contracting State" is different from a "national of a Contracting State",

[58] See generally Brownlie, op. cit, supra note 57, at 135-137.

[59] International Law Commission: "Draft Articles on State Responsibility", 1996, *International Legal Materials*, Vol. 37, 1998, 444.

[60] Brownlie, op. cit., supra note 57, at 136.

there are sufficient similarities which would allow us to utilize jurisprudence developed for one definition in the context of the other. Thus, a determination as to the character of state-owned enterprises in the context of whether it is a "national of a Contracting State", may also be relevant in determining whether a state enterprise may be subsumed within the definition of the term "Contracting Party". In this connection, it is relevant to note, as explained by a leading authority on the Convention, that it would seem that "a mixed economy company or government-owned corporation should not be disqualified as a 'national of another Contracting State' unless it is acting as an agent for the government or is discharging an essentially governmental function".[61]

80. This functional test has been applied, in respect of the definition of a national of a Contracting State, in the recent decision of an ICSID Tribunal on objections to jurisdiction in the case of *Ceskoslovenska Obchodni Banka, A. S.* v. *the Slovak Republic*.[62] Here it was held that the fact of State ownership of the shares of the corporate entity was not enough to decide the crucial issue of whether the Claimant had standing under the Convention as a national of a Contracting State as long as the activities themselves were "essentially commercial rather than governmental in nature".[63] By the same token, a private corporation operating for profit while discharging essentially governmental functions delegated to it by the State could, under the functional test, be considered as an organ of the State and thus engage the State's international responsibility for wrongful acts.

81. It is difficult to determine, *a priori*, whether these various tests and standards need necessarily be cumulative. It is likely that there are circumstances when they need not be. Of course, when all or most of the tests result in a finding of State action, the result, while still merely a presumption, comes closer to being conclusive.

[61] Aron Broches: "The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States", *Recueil des Cours de l'Academie de Droit International,* 1972, at 355.

[62] *Ceskoslovenska Obchodni Banka, A. S.* v. *the Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, May 24, 1999, *ICSID Review—Foreign Investment Law Journal,* Vol. 14, 1999, at 250.

[63] Ibid., par. 20.

82. The Tribunal is also of the view that a domestic determination, be it legal, judicial or administrative, as to the juridical structure of an entity undertaking functions which may be classified as governmental, while it is to be given considerable weight, is not necessarily binding on an international arbitral tribunal. Whether an entity is to be regarded as an organ of the State and whether this might ultimately engage its responsibility, is a question of fact and law to be determined under the applicable principles of international law.[64]

83. In the light of these considerations, the Tribunal notes, first, that SODIGA was created by a decree issued by the Ministry of Industry (*Ministerio de Industria*) which authorized the National Institute for Industry (*Instituto Nacional de Industria*), a national State agency, to establish SODIGA. The characterization of the Ministry and the Institute as State entities is not disputed in this case. Furthermore, in spite of the fact that the government chose to create SODIGA in the form of a private commercial corporation, it did so by providing that the Instituto Nacional de Industria would own no less than 51% of the capital. In fact, as of December 31, 1990, the percentage of governmentally owned capital of SODIGA had increased to over 88%, including the stock holdings of the Xunta de Galicia, also a state entity in charge of the executive power in the Autonomous Community of Galicia,[65] several savings and loans associations (*cajas de ahorros*), other regional development agencies and the Banco Exterior de España.

84. However, the intent of the State to create still another a corporate entity, particularly one which is intended to operate in the private sector, even if State owned, is not sufficient to raise the presumption of an entity being an organ of the State. More is required in terms of the functional test discussed above.

85. In this instance, however, it is clear from the background leading to the establishment of SODIGA that the intent of the Government of Spain was to create an entity to carry out governmental functions. In fact, the proposal to create SODIGA originated in the *Ministerio de Industria*; its

[64] Brownlie, op. cit., supra note 57, at 136. See also International Law Commission, Draft Articles cit., supra note 59, Article 4.

[65] The Xunta is defined as the collegiate body of the Government of Galicia. See http://galicia97.vieiros.com

creation was vetted and approved by the Ministry of Finance (*Ministerio de Hacienda*); and its creation was discussed and approved at a meeting of the Council of Ministers (*Consejo de Ministros*), one of the highest policy organs of the Government of Spain.[66] The participation of these government bodies in the creation of SODIGA points to the fact that it was established to carry out governmental functions in the field of regional development.

86. This intention is evidenced, for example, in the preamble to the decree. It declares that one of the purposes for SODIGA's creation is the promotion of regional industrial development of the Autonomous Region of Galicia. (". . . *[S]e considera urgente la constitucion de una Sociedad que, con la finalidad especifica de impulsar el desarrollo industrial de Galicia,. . .*"). Furthermore, it can be seen that it was the intent of the Government of Spain to utilize SODIGA as an instrument of State action. Among its functions was the undertaking of studies for the introduction of new industries into Galicia, seeking and soliciting such new industries, investing in new enterprises, processing loan applications with official sources of financing, providing guarantees for such loans, and providing technical assistance. Moreover, either through the *Instituto Nacional de Industria* or directly, SODIGA was charged with providing subsidies and offering other inducements for the development of industries. Many of these objectives and functions are by their very nature typically governmental tasks, not usually carried out by private entities, and, therefore, cannot normally be considered to have a commercial nature.

87. While it is possible that the Spanish State could have out-sourced such development activities to a private, non-governmental, corporate entity, this was not the case here. But, as explained above, even if it had been the case, under the functional test this would not have necessarily delinked the Spanish State from the entity as its functions would have been delegated by the State and they could still be government functions in the light of international law.

88. Many countries besides Spain have created regional development agencies. These agencies have been created around the world and operate as governmental entities, whether in the form of direct State agencies, terri-

[66] Decreto 2182/1972, *Boletin Oficial del Estado*, No. 197, August 17, 1972, p. 1536.

torial or regional agencies or, as in the case of SODIGA, as corporations. It is relevant to note, in this connection, that the World Bank has established an office, the Foreign Investment Advisory Service (FIAS), one of whose functions is to provide technical assistance and consulting services to governments to assist with the creation and operation of industrial and other development organizations.

89. In view of the fact that SODIGA meets both the structural test of State creation and capital ownership and the functional test of performing activities of a public nature, the Tribunal concludes that the Claimant has made out a *prima facie* case that SODIGA is a State entity acting on behalf of the Kingdom of Spain. Whether SODIGA is responsible for the specific acts and omissions complained of, whether they are wrongful, whether all these acts or omissions always were governmental rather than commercial in character, and, hence, whether they can be attributed to the Spanish State, are questions to be decided during the proceedings on the merits of the case.

Time of the Dispute

90. A last challenge of the Respondent to the jurisdiction of the Centre and the competence of the Tribunal rests on the argument that the alleged dispute originates in its view before the entry into force of the BIT between Argentina and Spain. This argument is in turn connected with the issue of the existence of a dispute and whether it qualifies as a legal dispute, but these other aspects belong also to the merits of the claim.

91. Article II(2) of the Argentine-Spain BIT provides in part: "However, this agreement shall not apply to disputes or claims originating before its entry into force."

92. The Argentine-Spain BIT entered into force on September 28, 1992, and because of the Claimant's argument about the relevance of the most-favored-nation clause in respect of the Chile-Spain BIT, the Kingdom of Spain also argues that the latter treaty only entered into force on March 29, 1994. Accordingly, Spain submits that for the Centre to have jurisdiction the dispute should originate after this last date or, in any event, after the date of entry into force of the Argentine-Spain BIT. Considering that the Claimant relies on facts and events that took place as early as 1989 and

throughout 1990, 1991, and the first part of 1992, Spain contends that the BIT does not apply to the dispute.

93. The Claimant rejects this view on the ground that a "dispute" arises when it is formally presented as such, and this happened only after both the Argentine-Spain and the Chile-Spain BIT had entered into force. He contends, moreover, that before the dispute can be deemed to have arisen, there may have been disagreements and differences of opinion between the parties, but these events do not amount to a dispute as this concept is understood in international and domestic law.

94. These differing views of the parties as to the meaning of a dispute and when it becomes identified or recognized as such, are quite common in ICSID and other arbitral or judicial proceedings.[67] The International Court of Justice has defined a dispute on various occasions by declaring that it is "a disagreement on a point of law or fact, a conflict of legal views or interests between parties."[68] It has been rightly commented in this respect that the "dispute must relate to clearly identified issues between the parties and must not be merely academic...The dispute must go beyond general grievances and must be susceptible of being stated in terms of a concrete claim".[69]

95. In the present case it is quite clear, as the Kingdom of Spain has argued, that the events on which the parties disagreed began as early as 1989. Issues such as budget estimates, requirements of environmental impact assessment, disinvestment, and other, were indeed discussed during the period 1989-1992. But this does not mean that a legal dispute as defined by the International Court of Justice can be said to have existed at the time.

96. The Tribunal notes in this respect that there tends to be a natural sequence of events that leads to a dispute. It begins with the expression of a disagreement and the statement of a difference of views. In time these

[67] *AGIP* v. *Congo*, ICSID Case ARB/77/1, Award of November 30, 1979, *ICSID Reports,* Vol. 1, 306.

[68] International Court of Justice: *Case concerning East Timor, ICJ Reports 1995,* 90, para. 22, with reference to earlier decisions of both the Permanent Court of International Justice and the International Court of Justice.

[69] C. Schreuer, loc. cit., (1996), supra note 54, at 337.

events acquire a precise legal meaning through the formulation of legal claims, their discussion and eventual rejection or lack of response by the other party. The conflict of legal views and interests will only be present in the latter stage, even though the underlying facts predate them. It has also been rightly commented that the existence of the dispute presupposes a minimum of communications between the parties, one party taking up the matter with the other, with the latter opposing the Claimant's position directly or indirectly.[70] This sequence of events has to be taken into account in establishing the critical date for determining when under the BIT a dispute qualifies as one covered by the consent necessary to establish ICSID's jurisdiction.

97. It should also be noted that the Kingdom of Spain has correctly argued that there is a difference between a dispute and a claim in terms of Article II(2) of the Argentine-Spain BIT. While a dispute may have emerged, it does not necessarily have to coincide with the presentation of a formal claim. The critical date will in fact separate, not the dispute from the claim, but the dispute from prior events that do not entail a conflict of legal views and interests. It follows that if the dispute arises after the critical date it will qualify for its transformation into a claim, while if the dispute has arisen before such date it will be excluded by the terms of the BIT.

98. The Tribunal is satisfied that in this case the dispute in its technical and legal sense began to take shape in 1994, particularly in the context of the disinvestment proposals discussed between the parties. At that point, the conflict of legal views and interests came to be clearly established, leading not long thereafter to the presentation of various claims that eventually came to this Tribunal. That is to say, this dispute came into being after both the Argentine-Spain and the Chile-Spain BITs had entered into force, although the critical date here is the date of entry into force of the former, since this is the basic treaty relevant in this case. It is on this basis that the Tribunal comes to the conclusion that the Centre has jurisdiction and that the Tribunal is competent to consider the dispute between the parties in accordance with the provisions of Article II(2)of the Argentine-Spain BIT.

[70] Ibid., at 337, with particular reference to *AALP* v. *Sri Lanka*, ICSID Case NoARB/87/3, Award of June 27, 1990, *ICSID Reports,* Vol. 4, 251.

C. Decision

99. For the foregoing reasons, the Tribunal unanimously decides that the present dispute is within the jurisdiction of the Centre and the competence of the Tribunal. The Tribunal has, accordingly, made the necessary Order for the continuation of the procedure pursuant to Arbitration Rule 41(4).

[signature]
Francisco Orrego Vicuña
President of the Tribunal

[signature]
Thomas Buergenthal
Arbitrator

[signature]
Maurice Wolf
Arbitrator

International Centre for Settlement of Investment Disputes

CMS Gas Transmission Company *v.* Argentine Republic
Award

ICSID Case No. ARB/01/8, 12 May 2005

Date of dispatch to the parties: May 12, 2005

INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES
WASHINGTON, D.C.

IN THE PROCEEDING BETWEEN

CMS GAS TRANSMISSION COMPANY
(CLAIMANT)

AND

THE ARGENTINE REPUBLIC
(RESPONDENT)

CASE NO. ARB/01/8

AWARD

Members of the Tribunal

Professor Francisco Orrego Vicuña, President
The Honorable Marc Lalonde P.C., O.C., Q.C., Arbitrator
H.E. Judge Francisco Rezek, Arbitrator

Secretary of the Tribunal

Ms. Margrete Stevens

Representing the Claimant

Ms. Lucy Reed

Ms. Sylvia Noury

Freshfields Bruckhaus Deringer LLP

New York, NY

United States of America

Mr. Nigel Blackaby

Freshfields Bruckhaus Deringer

Paris

France

and

Dr. Guido Santiago Tawil

M. & M. Bomchil Abogados

Buenos Aires

Argentina

Representing the Respondent

H.E. Osvaldo César Guglielmino

Procurador del Tesoro de la Nación

Procuración del Tesoro de la Nación

Buenos Aires

Argentina

THE TRIBUNAL

Composed as above,

After deliberation,

Makes the following Award:

A. Introduction

1. The Claimant, CMS Gas Transmission Company, is a company established under the laws of the State of Michigan, United States. It is represented in this proceeding by:

Ms. Lucy Reed

Ms. Sylvia Noury

Freshfields Bruckhaus Deringer LLP

520 Madison Avenue

34th floor

New York, NY 10022

United States of America

Mr. Nigel Blackaby

Freshfields Bruckhaus Deringer

2-4 rue Paul Cézanne

75375 Paris Cedex 08

France

Dr. Guido Santiago Tawil

M. & M. Bomchil Abogados

Suipacha 268, piso 12

C1008AAF Buenos Aires

Argentina

2. The Respondent is the Argentine Republic, represented in this proceeding by:

H.E. Osvaldo César Guglielmino

Procurador del Tesoro de la Nación

Procuración del Tesoro de la Nación

Posadas 1641

CP 1112 Buenos Aires

Argentina

3. By letter of April 8, 2005 the Secretary of the Tribunal informed the parties that the Tribunal had declared the proceeding closed in accordance with Rule 38(1) of the Arbitration Rules. This Award contains the Tribunal's Award on the merits rendered in accordance with Arbitration Rule 47, as well as a copy of the Tribunal's Decision on Objections to

Jurisdiction. In rendering its Award, the Tribunal has taken into account all pleadings, documents and testimony in this case insofar as it considered them relevant.

B. Summary of the Procedure

1. Procedure Leading to the Decision on Jurisdiction

4. On July 26, 2001, the International Centre for Settlement of Investment Disputes (ICSID or the Centre) received from CMS Gas Transmission Company (CMS), an entity incorporated in the United States of America, a Request for Arbitration against the Argentine Republic (Argentina). The request concerned the alleged suspension by Argentina of a tariff adjustment formula for gas transportation applicable to an enterprise in which CMS had an investment. In its request, the Claimant invoked the provisions of the 1991 "Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment." (The Argentina – U.S. Bilateral Investment Treaty or BIT or the Treaty).[1]

5. On July 27, 2001, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules), acknowledged receipt and transmitted a copy of the request to Argentina and to the Argentine Embassy in Washington D.C.

6. On August 15, 2001, the Centre requested CMS to confirm that the dispute referred to in the request had not been submitted by CMS for resolution in accordance with any applicable, previously agreed, dispute-settlement procedure, under Article VII (2)(b) of the

7. On August 24, 2001, the Secretary-General of the Centre registered the request, pursuant to Article 36(3) of the ICSID Convention (the Convention). On this same date, the Secretary-General, in accordance with Institution Rule 7, notified the parties of the registration of the request and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.

8. On August 30, 2001, the Centre reminded Argentina of the Claimant's proposal concerning the number of arbitrators and the method of their appointment. Under this proposal, contained in paragraph 60 of the request for arbitration, the Arbitral Tribunal would consist of three arbitrators, one arbitrator to be appointed by each party and the third, who would be President of the Tribunal, to be appointed by agreement of the parties.

9. On September 13, 2001, Argentina informed the Centre of its agreement to the proposal of CMS concerning the number of arbitrators and the method of their appointment. On the same date the Centre informed the parties that since their agreement on the number of arbitrators and the method of their appointment was equivalent to the formula set forth in Article 37(2)(b) of the Convention, the parties were invited to follow the procedure set forth in Arbitration Rule 3 for the appointment of arbitrators.

10. On October 24, 2001 Argentina appointed H. E. Judge Francisco Rezek, a national of Brazil, as an arbitrator. On November 9, 2001, CMS appointed The Honorable Marc Lalonde P.C., O.C., Q.C., a national of Canada, as an arbitrator. The parties, however, failed to agree on the appointment of the third, presiding, arbitrator. In these circumstances, by letter of December 5, 2001, the Claimant requested that the third, presiding, arbitrator in the proceeding be appointed in accordance with Article 38 of the ICSID Convention.[2]

11. After consultation with the parties, Professor Francisco Orrego Vicuña, a national of Chile, was duly appointed as President of the Arbitral Tribunal. On January 11, 2002, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings notified the parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. On the same date, pursuant to ICSID Administrative and Financial Regulation 25, the parties were informed that Mr. Alejandro Escobar, Senior Counsel, ICSID, would serve as Secretary of the Arbitral Tribunal.

12. The first session of the Tribunal with the parties was held on February 4, 2002, at the seat of ICSID in Washington, D.C. At the session the parties expressed their agreement that the Tribunal had been properly constituted in accordance with the relevant provisions of the ICSID Convention and the Arbitration Rules and that they did not have any objections in this respect.

13. During the course of the first session the parties agreed on a number of procedural matters reflected in written minutes signed by the President and the Secretary of the Tribunal; and the Tribunal, after ascertaining the views of the parties on the matter, fixed the following time limits for the written phase of the proceedings: The Claimant would file a memorial within 120 days from the date of the first session; the Respondent would file a counter-memorial within 120 days from its receipt of the Claimant's memorial; the Claimant would file a reply within 60 days from its receipt of the counter-memorial; and the Respondent would file its rejoinder within 60 days from its receipt of the reply. At the first session it was further agreed that in the event of the Respondent raising objections to jurisdiction, the following time limits would apply: the Respondent would file its memorial on jurisdiction

file its counter-memorial on jurisdiction within 60 days from its receipt of the Respondent's memorial on jurisdiction; the Respondent would file its reply on jurisdiction within 30 days from its receipt of the Claimant's counter-memorial on jurisdiction; and the Claimant would file its rejoinder on jurisdiction within 30 days from its receipt of the Respondent's reply on jurisdiction.

14. On May 24, 2002, the Claimant requested an extension till July 5, 2002 of the time limit fixed for the filing of its memorial. On June 6, 2002, the Tribunal granted the extension sought by the Claimant. In doing so, the Tribunal noted that Argentina would be entitled to an equivalent extension if requested, of the time limit fixed for its counter-memorial.

15. On July 5, 2002, the Claimant filed its memorial on the merits and accompanying documentation. On August 5, 2002, Ms. Margrete Stevens, Senior Counsel, ICSID, replaced Mr. Alejandro Escobar as Secretary of the Tribunal. On September 4, 2002, Argentina requested an extension till October 7, 2002, of the time limit fixed for the filing of the memorial on jurisdiction. On September 11, 2002, the Tribunal granted the extension sought by Argentina. On October 7, 2002, Argentina filed its memorial on jurisdiction.

16. On October 24, 2002, following the Respondent's filing of objections to jurisdiction, the proceeding on the merits was suspended in accordance with ICSID Arbitration Rule 41(3).

17. On December 17, 2002, the Claimant submitted its counter-memorial on jurisdiction. On January 22, 2003, the parties requested an extension of 30 days for each of the remaining two jurisdictional filings. On January 27, 2003, the Tribunal granted the extensions, and

2003; and the time limit for the filing of the Claimant's rejoinder on jurisdiction for March 25, 2003.

18. On February 13, 2003, the Respondent filed its reply on jurisdiction, and on March 25, 2003, the Claimant filed its rejoinder on jurisdiction.

19. On April 7-8, 2003, the hearing on jurisdiction was held at the seat of the Centre in Washington, D.C. Ms. Lucy Reed and Messrs. Nigel Blackaby, Jonathan Sutcliffe and Guido Tawil addressed the Tribunal on behalf of the Claimant. Mr. Ignacio Suarez Anzorena addressed the Tribunal on behalf of Argentina. The Tribunal posed questions to the parties, as provided in Rule 32(3) of the Arbitration Rules.

20. On July 17, 2003, the Tribunal issued its unanimous Decision on the Objections to Jurisdiction raised by the Argentine Republic. In its Decision, the Tribunal rejected the Respondent's contention that the Claimant could not, as a minority shareholder, bring a claim against Argentina and confirmed that the dispute arose directly from an investment made by the Claimant. On this basis, the Tribunal concluded that the Centre had jurisdiction and that the Tribunal was competent to consider the dispute between the parties in accordance with the provisions of the Argentina – U.S. BIT.

21. Certified copies of the Tribunal's decision were distributed to the parties by the Secretary of the Tribunal.

2. Procedure Leading to the Award on the Merits

22. On July 17, 2003, the Tribunal, following its Decision on Objections to Jurisdiction, issued, in accordance with Rules 19 and 41(4) of the Arbitration Rules of the Centre, Procedural Order No. 1 on the continuation of the proceeding on the merits. In that Procedural Order the Tribunal fixed the following schedule for the further procedures: as the Claimant had already filed its memorial on the merits of the dispute, the Respondent was directed to file a counter-memorial on the merits within one hundred and twenty (120) days from the date of the Order; the Claimant would file a reply on the merits within sixty (60) days from its receipt of the Respondent's counter-memorial; and the Respondent would file a rejoinder on the merits within sixty (60) days from its receipt of the Claimant's reply. The Order further contemplated that the Tribunal would propose a date for the hearing on the merits once it had received the above-indicated memorials.

23. By letter of October 2, 2003, the Respondent filed a request for suspension of the proceeding. By letter of October 14, 2003, the Tribunal invited the Claimant to file, no later than October 20, 2003, its observations on the Respondent's request for suspension; by letter of October 17, 2003 the Claimant filed its observations on the Respondent's request of October 2, 2003.

24. By letter of October 22, 2003, the Respondent filed a request for an extension of the time limit for the filing of its counter-memorial on the merits.

25. By letter of October 30, 2003, the Secretary of the Tribunal informed the parties of the Tribunal's decision to grant the Respondent's request for a 30-day extension for the filing

26. By letter of October 31, 2003, the Secretary of the Tribunal informed the parties of the Tribunal's decision not to grant the Respondent's request for suspension of the proceeding.

27. On December 22, 2003, the Respondent filed its counter-memorial on the merits.

28. By letter of December 23, 2003, the Secretary of the Tribunal informed the parties of the Tribunal's proposal to fix the hearing on the merits for two weeks to begin at the end of May 2004.

29. By letter of January 7, 2004, the Respondent requested that the oral hearing be scheduled for the end of July 2004.

30. After consultation with both sides, the Tribunal informed the parties by letter of January 14, 2004 of its intention to fix the hearing on the merits for August 2004.

31. By letter of January 20, 2004, the Claimant filed a request for a five-week extension of the time limit for the filing of its reply on the merits.

32. After further consultations with both sides, the Tribunal informed the parties by letter of February 6, 2004 that the hearing on the merits would be held on August 9-20, 2004. Both parties confirmed their agreement that the hearing be held in Paris, France. By that same letter, the parties were informed that the Tribunal would grant the Claimant a four-week extension for the filing of its reply on the merits, and would similarly grant the Respondent a four-week extension for the filing of its rejoinder on the merits, should it so wish. The new

33. On February 12, 2004, the Respondent filed a "Certificate Confirming the State of Necessity in Argentina."

34. On March 22, 2004, the Claimant filed its reply on the merits.

35. On May 27, 2004, the President held a conference call with counsel for the parties to discuss procedural arrangements for the hearing on the merits.

36. By letter of June 17, 2004, the Tribunal directed the Argentine Republic to file all remaining witness statements and expert reports with its rejoinder on the merits on June 25, 2004. To the extent that such statements and reports would not be available to the Argentine Republic on June 25, 2004, these were to be filed no later than July 9, 2004, i.e. no later than one month prior to the commencement of the hearing on the merits in Paris. In these circumstances, the Argentine Republic was requested to indicate on June 25, 2004, the names of any additional witnesses and experts whose statements or reports would be filed no later than July 9, 2004, and the subject-matter to which their testimony would be directed.

37. On June 28, 2004, the Respondent filed its rejoinder on the merits.

38. By letter of July 12, 2004, the Claimant objected to the late presentation of certain evidence introduced by Argentina with its rejoinder; and reserved its right to respond with additional contemporaneous documents which it indicated would be very limited in number.

39. By letter of July 13, 2004, the President of the Tribunal directed the parties to exchange, on July 20, 2004, lists of the names of those witnesses that each party wished to

examine, and requested that the parties inform the Secretariat of the names of the persons that would be attending the hearing on behalf of each side.

40. The parties filed their respective lists on July 20, 2004.

41. By letter of August 4, 2004, the Tribunal gave directions on the conduct of the hearing.

42. The hearing would commence August 9, 2004, which would be devoted to opening statements. The Claimant would present its statement in the morning; and the Respondent would present its statement in the afternoon.

43. The period from August 10, 2004 – August 19, 2004 would be devoted to the presentation of evidence. The Claimant would begin with its examination of fact witnesses, to be followed by the Respondent's examination of fact witnesses. The same order would be followed (i.e. first the Claimant, to be followed by the Respondent) with respect to the presentation of expert evidence. However, to the extent possible, the parties were invited to organize such expert evidence around subject-matter.

44. The hearing would conclude on August 20, 2004, with each party presenting its closing statement.

45. The hearing on the merits was held, as scheduled, from August 9-20, 2004, at the World Bank's office at 66, avenue d'Iéna, Paris. Present at the hearing were:

Members of the Tribunal

Professor Francisco Orrego Vicuña, President

The Hon. Marc Lalonde, P.C, O.C., Q.C., Arbitrator

Judge Francisco Rezek, Arbitrator

ICSID Secretariat

Ms. Margrete Stevens, Secretary of the Tribunal

On behalf of the Claimant:

Ms. Sharon McIlnay (CMS Gas Transmission Company)

Mr. Julio Mazzoli (CMS Gas Transmission Company)

Mr. Nigel Blackaby (Freshfields Bruckhaus Deringer)

Ms. Lucy Reed (Freshfields Bruckhaus Deringer)

Dr. Lluís Paradel (Freshfields Bruckhaus Deringer)

Mr. Noah Rubins (Freshfields Bruckhaus Deringer)

Ms. Sylvia Noury (Freshfields Bruckhaus Deringer)

Ms. Blanca Montejo (Freshfields Bruckhaus Deringer)

Dr. Guido Santiago Tawil (M. & M. Bomchil Abogados, Buenos Aires)

Dr. Hector Huici (M. & M. Bomchil Abogados, Buenos Aires)

Dr. Ignacio Minorini Lima (M. & M. Bomchil Abogados, Buenos Aires)

On behalf of the Respondent:

H.E. Dr. Horacio Daniel Rosatti (Minister of Justice of the Republic of Argentina, formerly the Procurador del Tesoro de la Nación, Buenos Aires,)

Dr. Andrea Gualde (Procuración del Tesoro de la Nación, Buenos Aires)

Dr. Ana R. Badillos (Procuración del Tesoro de la Nación, Buenos Aires)

Dr. Jorge R. Barraguirre (Procuración del Tesoro de la Nación, Buenos Aires)

Dr. Ignacio Pérez Cortés (Procuración del Tesoro de la Nación, Buenos Aires)

Dr. Bettina Cuñado (Procuración del Tesoro de la Nación, Buenos Aires)

46. Prior to the hearing the Claimant filed with the Tribunal, on August 5, 2004, two new volumes of exhibits and authorities that the Claimant said were responsive to issues that had been raised for the first time in the rejoinder and accompanying statements; and that updated the underlying facts of the dispute since the time of the Claimant's submission of its reply.

47. By letter of August 6, 2004, the Respondent opposed the introduction into the proceeding of the new documents.

48. By letter of September 14, 2004, the Tribunal informed the parties of its decision to allow a limited number of the Claimant's documents into the proceeding insofar as these concerned the process of renegotiation with Argentina of concession agreements in the area of gas production and distribution, and were relevant to the factual and legal issues pending before the Tribunal.

49. On September 20, 2004 the parties filed their post-hearing briefs.

50. By letter of September 24, 2004, the Tribunal informed the parties of its decision to retain independent expert advice so as to better understand the underlying assumptions and methodology relied upon in the valuation reports offered by the parties' experts.

51. By letter of December 16, 2004, the Secretariat transmitted the report on the findings of the independent experts to the parties. By that same letter the Tribunal invited the parties to file their observations on the report no later than January 5, 2005. Such observations were filed in accordance with the Tribunal's directions.

52. Throughout the proceedings, the parties' numerous procedural applications were promptly and unanimously decided by the Tribunal.

C. Considerations

3. The Privatization Program as the Background to the Dispute

53. As had been observed by the Tribunal in its Decision on Jurisdiction,[3] the Argentine Republic embarked in 1989 on economic reforms, which included the privatization of important industries and public utilities as well as the participation of foreign investment. Gas transportation was one of the significant sectors to be included under this reform program. The basic instruments governing these economic reforms were Law No. 23.696 on the Reform of the State of 1989,[4] Law No. 23.928 on Currency Convertibility of 1991[5] and Decree No. 2128/91 fixing the Argentine peso at par with the United States dollar.

54. Within this broad framework specific instruments were enacted to govern the

of 1992, or Gas Law,[6] established the basic rules for the transportation and distribution of natural gas. This instrument was implemented the same year by Decree No. 1738/92 or Gas Decree.[7]

55. As a consequence of the new legislation, Gas del Estado, a State-owned entity, was divided into two transportation companies and eight distribution companies. Transportadora de Gas del Norte (TGN) was one of the companies created for gas transportation.[8] The privatization of the new company was opened to investors by means of a public tender offer[9] and a related Information Memorandum was prepared by consultant and investment firms in 1992 at the request of the Government.[10]

56. A Model License approved by Decree No. 2255/92[11] established the basic terms and conditions for the licenses that each new company would be granted by the Argentine Government. TGN's license was granted by Decree No. 2457/92[12] for a period of thirty-five years, subject to extension for another ten years on the fulfillment of certain conditions.

57. In the Claimant's view, the legislation and regulations enacted, as well as the license, resulted in a legal regime under which tariffs were to be calculated in dollars, conversion to pesos was to be effected at the time of billing and tariffs would be adjusted every six months in accordance with the United States Producer Price Index (US PPI). As will be examined further below, the Respondent has a different understanding of the nature and legal effects of these various instruments.

58. CMS's participation in TGN began in 1995 under a 1995 Offering Memorandum[13] leading to the purchase of the shares still held by the government. CMS's acquisition

thus totaling 29.42% of TGN's shares. This new Offering Memorandum was modeled on the 1992 Information Memorandum and the license.

4. Argentina's Measures in the Period 1999-2002 and the Emergence of the Dispute

59. Towards the end of the 1990's a serious economic crisis began to unfold in Argentina, which eventually had profound political and social ramifications. The nature and extent of this crisis will be discussed below.

60. Against this background, the Argentine Government called in late 1999 for a meeting with representatives of the gas companies in order to discuss a temporary suspension of the US PPI adjustment of the gas tariffs. The companies agreed to a temporary suspension deferring the adjustment due for a period of six months (January 1 – June 30, 2000). The agreement provided that costs of the deferral would be recouped in the period July 1, 2000 – April 30, 2001, that resulting income losses would be indemnified and it was understood that this arrangement would not set a precedent or amend the legal framework governing the licenses. This agreement was approved by ENARGAS, the public regulatory agency of the gas industry, by Resolution No. 1471 on January 10, 2000.[14]

61. Soon thereafter it became apparent that the agreement would not be implemented and requests by TGN for an adjustment of tariffs in accordance with the License were not acted upon; in fact ENARGAS directed the company to refrain from introducing any such adjustment. On July 17, 2000, a further meeting was held with representatives of the gas companies, at which the companies were asked to agree on a new deferral of the tariff

adjustments of tariffs for a two year period while allowing for some increases relating to the earlier deferral and lost income. Income lost as a result of the new deferral was to be gradually recovered and US PPI adjustments were to be reintroduced as from June 30, 2002. Decree No. 669/2000 embodied the new arrangements while recognizing that the US PPI adjustment constituted "a legitimately acquired right" and was a basic premise and condition of the tender and the offers.[15]

62. In a proceeding commenced by the Argentine "Defensor del Pueblo de la Nación," a federal judge issued on August 18, 2000 an injunction for the suspension of both the agreement and Decree No. 669/2000 pending a decision on the challenged legality of the US PPI adjustment. Meanwhile, administrative appeals made by TGN did not change the situation and TGN's applications for tariff adjustments continued to be rejected. In due course, the companies, the Government and ENARGAS appealed the above decision of the federal judge, however, the appeal was rejected. A final appeal of the companies to the Argentine Supreme Court is still pending.

63. Based on these developments, ENARGAS repeatedly confirmed the continuing freeze of the US PPI adjustment of tariffs, resulting in no adjustments being made in accordance with this mechanism as from January 1, 2000, that is since the first deferral. The parties disagree on the nature and extent of the decisions adopted by ENARGAS, as will be discussed below. Against these developments, CMS notified its consent to arbitration under ICSID on July 12, 2001, following the required notification of the dispute to the Argentine Government. The dispute at this stage concerned only the issue of the application of the US PPI adjustment.

64. In late 2001 the crisis deepened as the corrective measures that Minister Domingo Cavallo had set in train did not succeed. Significant capital flight from Argentina followed. In the wake of these further developments, the Government introduced the "corralito" by Decree No. 1570/2001,[16] drastically limiting the right to withdraw deposits from bank accounts. Default was declared and several Presidents succeeded one another in office within a matter of days. Emergency Law No. 25.561 was enacted on January 6, 2002,[17] declaring a public emergency until December 10, 2003 and introducing a reform of the foreign exchange system. Extensions of this period were later introduced, as will be discussed below.

65. The Emergency Law introduced the second type of measures that underlie the dispute in the present case. Thus, the currency board which had pegged the peso to the dollar under the 1991 Convertibility Law was abolished, the peso was devalued and different exchange rates were introduced for different transactions. The right of licensees of public utilities to adjust tariffs according to the US PPI was terminated, as was the calculation of tariffs in dollars. The respective tariffs were redenominated in pesos at the rate of one peso to the dollar. The same rate was applied to all private contracts denominated in dollars or other foreign currencies. It was later clarified by Decrees No. 689/2002 and 704/2002, dated May 2, 2002, that the Emergency Law did not apply to gas exports or the tariffs for its transportation, which consequently were exempt from the conversion to pesos.

66. The Emergency Law envisaged a process of renegotiation of licenses to be conducted by a Renegotiation Commission. The pertinent procedures were defined by Decree No. 293/2002.[18] The renegotiation process began on March 1, 2002 and was later reorganized under other arrangements. Various efforts at initiating an extraordinary review of tariffs or granting small adjustments were blocked by court injunctions. A new Renegotiation Unit

was enacted on October 31, 2003. Renegotiations were to be completed by December 31, 2004. Renegotiation was completed by this date in respect of some public utilities and related companies, but this was not the case in the gas transportation and distribution sector. A witness introduced by the Respondent explained that this was attributable to the inherent difficulty in renegotiating 64 public utility contracts and numerous subcontracts.[19]

67. On February 13, 2002 CMS notified an ancillary dispute concerning the measures enacted under the Emergency Law and related decisions. In its Decision on Jurisdiction, the Tribunal considered that the disputes arising from the one as well as the other types of measures were sufficiently closely related and thus proceeded to the merits phase in respect of both.

5. CMS's Claim for Business and Financial Losses

68. The Claimant explains that it decided to undertake important investments in the gas transportation sector in reliance on the Argentine Government's promises and guarantees, particularly those that offered a real return in dollar terms and the adjustment of tariffs according to the US PPI. The Claimant asserts that it invested almost US$ 175 million in the purchase of shares in TGN and that TGN invested more than US$ 1 billion in the renovation and expansion of the gas pipeline network.

69. The Claimant further argues that the measures undertaken by the Government in the period 1999 – 2002 and in the aftermath have had devastating consequences. The effects relate in part to the loss of income and in part to the fact that the Claimant's ability to pay its debt has been reduced by a factor of more than three because the debt is denominated in US

that the value of its shares in TGN has dropped by 92%, falling from US$ 261.1 million to US$ 21.2 million, this last figure having later been revised to US$ 23.7 million and later yet to US$ 17.5 million.[20]

70. Because no adjustment of tariffs has taken place since January 1, 2000 and because tariffs may no longer be calculated in US dollars, the Claimant explains that TGN's domestic tariff revenue has decreased by nearly 75%. Only export revenues have been kept in US dollars. In the Claimant's view the situation has been aggravated by the assertion by some Provincial governments of the right to pay gas and other invoices in bonds.

71. It is further explained that the devaluation has also had an adverse impact on TGN's costs: taking into account an exchange rate of 3.6 pesos to the dollar, the rate used by the Claimant in its Memorial, it now takes 3.6 times as much revenue as before to pay existing debt. As a result, it is claimed, TGN has defaulted on certain dollar-denominated obligations and on its foreign and domestic debt, thus having been excluded from international capital markets. Dollar-denominated operating costs, it is asserted, have also been affected.

72. In addition to the losses that CMS has suffered as a result of the specific measures referred to above, the Claimant argues that the broader economic implications of the Emergency Law have led to an artificial depression of consumer gas prices in Argentina, particularly as a result of the tariff freeze. Because Argentine gas prices are among the lowest in the world, an effective subsidy benefiting the rest of the Argentine economy has had a negative impact on the regulated gas sector, amounting to several billion dollars for the energy sector as a whole.

73. The end result of these measures, in the Claimant's view, has led to the suspension of investments in new expansion projects and the collapse of the pipeline network. This, in turn, it is argued, has brought about serious gas shortages both in the domestic market and in the supply of neighboring countries, such as Brazil, Chile and Uruguay. A fiduciary fund was established in 2004 to channel investment, in conjunction with private participation, in gas transportation infrastructure, particularly with a view to importing gas from Bolivia to compensate for the domestic shortages. While the Respondent argues that this is evidence of the normal operation of companies and TGN in the gas market, the Claimant is of the view that TGN's participation in this arrangement has not been voluntary.[21]

6. The Respondent's Arguments in Respect of Business and Financial Losses

74. The Government of Argentina argues that the losses incurred by the Claimant are not attributable to the Respondent and that any such losses arise from business decisions of TGN. The effects of the measures on TGN's costs are in the Respondent's view very different from what CMS claims.

75. The Government of Argentina asserts first that it is not true that TGN's domestic tariff revenues have decreased by 75%, as argued by the Claimant—a 50% decrease has also been indicated[22]—in view of the fact that 25%—a figure of 31% has also been mentioned[23]—of the revenues of TGN are related to export contracts. In this area of operation the pertinent tariffs have been kept in dollars and have increased by 11%—12% has also been mentioned[24]—as a result of the periodic adjustment of such export tariffs in accordance with the US PPI.

76. Moreover, the exchange rate used in the Claimant's calculations—3.6 pesos to the dollar—is in the Respondent's view 20% higher than the actual exchange rate at the time of the Answer (December 2003), or 3 pesos to the dollar. It is further argued that the obligation to accept Provincial bonds in payment has also not caused any harm to TGN as these bonds are used for the payment of taxes and in any event most such bonds have now been recalled.

77. The Respondent argues next that TGN's operating costs in dollars amount to only 26.69% of the revenues denominated in that currency. This, it says, is because part of that revenue is export-related and, moreover, it is to be expected that as a result of the devaluation, the share of dollar denominated operating costs would decrease as a consequence of import substitution. The dollar denominated revenue, it is also asserted, amply compensates for the increase in domestic operating costs in pesos arising from inflation.

78. A third line of argument of the Argentine Government relates to the choices available to TGN as sources of financing. These ranged from the use of its own capital, debt in pesos—which would not have been affected by a devaluation—, dollar debt in Argentina—which would have been "pesified"—, and finally to foreign currency debt incurred abroad. It is argued in this respect that TGN chose the last option, which held the highest risks. The Respondent holds that the Claimant cannot now attempt to transfer the consequences of this decision to the Government or the consumer.

79. In the Respondent's view, the Gas Law provides for a structure of tariffs that covers only operating costs and excludes financial costs altogether. Tariffs were fixed on the basis of the cost of capital in Argentina and therefore at a level higher than what would have been

80. It is furthermore explained that ENARGAS warned TGN about the potential difficulties that could arise from its debt profile[26]. In fact, the investment prospectus prepared by the Board of TGN in 1995 had specifically warned about the potential adverse effects of a devaluation on revenues, debt payment in foreign currencies and dividends to shareholders.[27] The latter document stated that

> "In case of a big devaluation of the peso in respect of the dollar, the patrimonial situation and the operational results of the Company could be adversely affected, as would also be the case of the capacity to make payments in foreign currency (including the repayment of debt expressed in foreign currency) and the distribution of dividends in dollars at acceptable levels."[28]

81. The Respondent also argues that the License did not guarantee the profitability of the business because, as stated in Article 2.4 of the Basic Rules of the License, "the Licensor does not guarantee or ensure the profitability of exploitation."[29] Nor, it is argued, can credit rating deterioration be attributed to the Government. It is further asserted that TGN is free to renegotiate its debt in the international financial market at discounts ranging from 55% to 90%, just as other businesses have done.

82. The Government of Argentina also asserts that in spite of the Claimant's argument to the effect that TGN invested over US$ 1 billion in infrastructure, the actual situation is that TGN did not comply with the mandatory investment requirement under the License of US$ 40 million and that TGN has repeatedly been fined because of this failure; instead heavy voluntary investments were made in the expansion of the transportation network for exports. A witness for the Respondent stated that TGN has participated actively in the creation and financing of the fiduciary fund for gas transportation mentioned above.[30]

83. It will be shown below that the Claimant opposes all such arguments. For now the Tribunal wishes to observe that the Argentine Government has not provided in its memorials an alternative valuation of the eventual losses affecting CMS, saying that it is for the Claimant to properly prove its claims. In this regard the Argentine Minister of Justice explained, at the hearing on the merits, that Argentina was "not obliged to propose another valuation."[31] And although the Tribunal requested a clarification on this matter from Argentina's experts, none was provided.[32]

7. CMS's Legal Justification of its Claims

84. The Claimant is of the view that the measures adopted by the Argentine Government are in violation of the commitments that the Government made to foreign investors in the offering memoranda, relevant laws and regulations and the License itself.

85. Such commitments, it is asserted, included the calculation of tariffs in US dollars, the semi-annual adjustment in accordance with the US PPI and general adjustment of tariffs every five years, all with the purpose of maintaining the real dollar value of the tariffs.[33]

86. The Claimant argues that Argentina further agreed expressly not to freeze the tariff structure or subject it to further regulation or price controls; and that in the event that price controls were introduced, TGN would be entitled to compensation for the difference between the tariff it was entitled to and the tariff actually charged.[34] Moreover, the basic rules governing the License could not be altered without TGN's consent.[35]

87. The Claimant is of the view that these guarantees constituted essential conditions for

regime. The Claimant says that the Government of Argentina itself confirmed this in Decree No. 669/2000 by explaining the adjustment mechanism of the licenses as a "legitimately acquired right."[37]

88. It is further argued that the measures adopted are all attributable to the Argentine Government and result in the violation of all the major investment protections owed to CMS under the Treaty. It is claimed in particular that Argentina has wrongfully expropriated CMS's investment without compensation in violation of Article IV of the Treaty; that Argentina has failed to treat CMS's investment in accordance with the standard of fair and equitable treatment of Article II(2)(a) of the Treaty; that the passing of arbitrary and discriminatory measures violates Article II(2)(b); and that it has also failed to observe the many obligations entered into with regard to the investment in violation of the standard of Article II(2)(c) of that Treaty. Unlawful restrictions to the free transfer of funds in violation of Article V of the Treaty were also invoked in the Claimant's memorial, a claim that was later withdrawn.[38]

89. On the basis of its understanding of the measures adopted, their economic impact on the company and the legal violations invoked the Claimant requests compensation in the amount of US$ 261.1 million for Treaty breaches plus interest and costs.

90. The specific arguments invoked by the Claimant in support of its legal contentions will be examined by the Tribunal separately when discussing each of the claims made.

8. The Respondent's Legal Defense

91. In the view of the Argentine Government, the License, and the legal and regulatory framework governing it, provide only for the right of the licensee to a fair and reasonable tariff, encompassing costs of operation, taxes, amortizations, and a reasonable return on investments, but excluding altogether financial costs.[39] It is further asserted that no guarantees were offered in respect of convertibility and currency devaluation and the risk inherent to the investment in these respects was expressly brought to the attention of the company.

92. The Respondent is of the view that any consequences arising from CMS's decision to rely on the report of private consultants for its investment strategies cannot be assigned to the Government. That report was not made by the Government and all responsibility for its contents was the subject of an express disclaimer.[40]

93. The Respondent argues in addition that, under the Gas Law, transportation and distribution of gas is a national public service which must take into account particular needs of social importance. To this end, the Government is under an obligation to ensure the efficient operation of the service and must control the implementation of the contract, including the alternative of amendment or unilateral termination.[41] Thus, the regulation of tariffs is a discretionary power of the Government insofar as it must take social and other public considerations into account.

94. In the Respondent's view, it follows that no commitments could have been made by the Government to maintain a certain economic or exchange rate policy and that the State is

corporations. In this respect, the argument follows, CMS could not have ignored the public law of Argentina and the risks involved in investing in that country.

95. In this context, it is further asserted, tariffs must ensure to consumers the minimum cost compatible with the certainty of supply,[42] as long as the provision of the service is efficient. Because Argentina was characterized by an unstable economy, the tariffs took into account the added risk of investing in that country and were therefore higher than would normally have been the case. As a result profits were also higher.

96. The Respondent is of the view that the licenses did not contemplate the possibility of convertibility being abandoned and that the contractual regime was therefore incomplete.[43] This, the Respondent filled in by means of the pesification in the domestic market and dollarization in the external market, thereby allowing consumers to continue to pay for gas and avoiding the collapse of demand.[44] The Respondent also argues that tariffs did take into account the risk of devaluation, a point that will be discussed further below.

97. As a result of the above considerations, the Respondent argues that there has been no violation of the commitments made, explaining that the loss of value of CMS's shares is the result of recession and deflation, of a major social and economic crisis and the currency devaluation that followed. This devaluation, it is asserted, had already occurred in other important international financial markets.[45] All the measures adopted by the Government, it is further argued, were needed for the normalization of the country and the continuous operation of public services. Had tariffs been adjusted by 300% as CMS would have wanted, public services would have been paralyzed, the income of licensees would have dramatically decreased and public reaction would have been beyond control.[46]

98. The Respondent further explains that, in this legal and regulatory context, there could be no violation of the Treaty and objects, in that regard, particularly to the legal claims of CMS. In the Respondent's view, none of the requirements under international law of indirect expropriation are met. The guarantees invoked by CMS are not the property of the company protected under the Treaty and TGN continues to operate normally. Nor was there a violation of the standard of fair and equitable treatment, or a case of arbitrariness or discrimination. The umbrella clause of the Treaty, the argument follows, cannot be invoked as no obligations were undertaken by Argentina in respect of CMS, only in respect of TGN, and the latter has not made any claim for contractual violation under the License.

99. In the alternative, the Republic of Argentina has invoked national emergency, brought about by the above-mentioned economic and social crisis, as grounds for exemption of liability under international law and the Treaty.

100. As with the Claimant's arguments, all the views expressed by the Respondent will be discussed in greater detail in connection with each claim.

101. Before proceeding any further, however, the Tribunal wishes to address one particular issue raised by the Respondent. The matter concerns the fact that certain loans were granted to TGN by the International Finance Corporation, an affiliate of the World Bank, and the suggestion that this might constitute some form of conflict of interest for an ICSID Tribunal operating under World Bank Group auspices.[47]

102. The Tribunal wishes to state clearly that no connection to this effect has ever interfered with its independent judgment of the case, and it would not permit this to happen.

the IFC or any other Bank affiliate, nor would the Tribunal permit any representation of this kind. The Tribunal learnt about TGN's financing arrangements through the pleadings of the parties alone.

9. Are the Measures Adopted Temporary or Permanent?

103. One particular aspect of this dispute is whether the measures adopted are temporary or permanent in nature, a matter that has importance in the context of the applicable law that will be discussed further below.

104. The Claimant rejects that the measures adopted are temporary insofar as they continue to be in force after several years. Moreover, all draft legislation introduced by the Government in Congress has tended to reinforce the effect of such measures. The Claimant invokes as clear evidence of this being the case the draft Public Utilities National Regulatory Act introduced in 2004, in which the measures in force were turned into permanent features of the tariff regime.[48]

105. The Respondent argues the opposite. In its view, the measures complained of are all of a temporary nature arising from the emergency and subject to renegotiation.[49] The Government, it is argued, has made specific proposals to TGN in its efforts to achieve a successful renegotiation, including a proposal made on July 2, 2004, envisaging a 7% increase in tariffs in 2005 and completing their regularization in 2007.[50] This has been described as a basic or first proposal.[51] It is further stated that the Claimant has not been minded to present any counter-proposal.

106. The Claimant explains on this point that the proposal is insufficient to meet the adjustments necessary to achieve a just and reasonable tariff and to compensate for the losses the company has experienced.[52] This is particularly so in light of TGN's own January 22, 2003 proposal. Under this proposal, TGN had requested four 17.8% increases to take effect between March and September 2003.[53] Such increases would have represented close to a 90% adjustment.

107. The Tribunal can only note in this respect that more than five years have lapsed since the adoption of the first measures in 2000. Delays can be explained with reference the above-mentioned crisis. However, if delays exceed a reasonable period of time the assumption that they might become permanent features of the governing regime gains in likelihood.

10. Applicable Law: The Parties' Views

108. The parties in this case have not chosen a particular law applicable to the resolution of the dispute nor has the Treaty. In the absence of such choice, Article 42(1) of the Convention becomes the rule governing the determination of the law to be applied by the Tribunal:

> "[I]n the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on conflict of laws) and such rules of international law as may be applicable."

109. Yet again the parties have expressed radically different views. The Claimant has argued, first at the jurisdictional stage and again in the merits phase of the proceedings, that only the Treaty and international law are applicable to the dispute while the law of the host State "plays only a marginal role, relevant only as a matter of fact."[54] The Claimant argues

that ICSID's jurisprudence is uniform in respect of the application of the Treaty as *lex specialis*, complemented by customary international law where necessary.[55]

110. On this basis, the Claimant asserts that Argentine law is relevant only in the context of factual matters, such as with regard to the nature of the assurances made to CMS. The Claimant relies in this respect on the decision rendered in the case of *Tecmed v. Mexico* to show that the act of a State must be characterized as internationally wrongful if in breach of an international obligation, "even if the act does not contravene the State's internal law…"[56]

111. The Claimant further explains that, in any event, treaties have a significant place in the Argentine constitutional order and must be observed, and that various courts in Argentina have ruled that some of the measures adopted are themselves unconstitutional.

112. The Respondent has put forth the view that, in the absence of an agreement, the Tribunal must examine and apply the domestic legislation of Argentina, particularly since the investor, like any national investor, is subject to domestic law and the License is specifically governed by Argentine law.

113. The Respondent invokes first the need to apply the Argentine Constitution. It is explained, in this context, that the protection of the right of property enshrined in the Constitution has been interpreted by the Courts as not having an absolute character and that State intervention in the regulation of individual rights is justified, provided such intervention is both legal and reasonable when factoring in social needs. Moreover, the Respondent asserts that a differentiated treatment in certain circumstances does not affect the requirement of uniformity in the application of the law.

114. In respect of the legal regime of treaties in Argentina, the Respondent argues that while treaties override the law they are not above the Constitution and must accord with constitutional public law.[57] Only some basic treaties on human rights have been recognized by a 1994 constitutional amendment as having constitutional standing[58] and, therefore, in the Respondent's view, stand above ordinary treaties such as investment treaties. It is further argued that, as the economic and social crisis that affected the country compromised basic human rights, no investment treaty could prevail as it would be in violation of such constitutionally recognized rights.

11. Applicable Law: The Tribunal's Findings

115. Much discussion has surrounded the meaning of Article 42(1) of the Convention and the interpretations have ranged from a restricted application of international law in a complementary or corrective role, to be relied upon only in case of domestic *lacunae* or where the law of the Contracting State is inconsistent with international law,[59] to a role that calls for the application of international law only to safeguard principles of *jus cogens*.[60]

116. More recently, however, a more pragmatic and less doctrinaire approach has emerged, allowing for the application of both domestic law and international law if the specific facts of the dispute so justifies. It is no longer the case of one prevailing over the other and excluding it altogether. Rather, both sources have a role to play. The Annulment Committee in *Wena v. Egypt* held in this respect:

> "Some of these views have in common the fact that they are aimed at restricting the role of international law and highlighting that of the law of the host State. Conversely, the view that calls for a broad application of

> seems not to be a single answer as to which of these approaches is the correct one. The circumstances of each case may justify one or another solution… What is clear is that the sense and meaning of the negotiations leading to the second sentence of Article 42(1) allowed for both legal orders to have a role. The law of the host State can indeed be applied in conjunction with international law if this is justified. So too international law can be applied by itself if the appropriate rule is found in this other ambit."[61]

117. This is the approach this Tribunal considers justified when taking the facts of the case and the arguments of the parties into account. Indeed, there is here a close interaction between the legislation and the regulations governing the gas privatization, the License and international law, as embodied both in the Treaty and in customary international law. All of these rules are inseparable and will, to the extent justified, be applied by the Tribunal.

118. It is also necessary to note that the parties themselves, in spite of their doctrinal differences, have in fact invoked the role of both legal orders. The Republic of Argentina relies for its arguments heavily on provisions of domestic law, but also resorts to international law, for example in respect of treaty clauses on national security and customary law on state of necessity and other matters. Similarly, the Claimant invokes provisions of domestic law, regulations and the License to explain the rights TGN has under these instruments and the measures affecting them. But also the Claimant invokes Treaty guarantees and customary law on various issues.

119. The Respondent has suggested this arbitration might infringe upon or be in conflict with the Constitution of the Republic of Argentina.[62] The Tribunal, however, does not believe

fact that the arbitration proceeds under both the ICSID Convention and the Treaty. In fact, under Article 27 of the Argentine Constitution

> "The federal Government is under the obligation to consolidate its relations of peace and commerce with foreign powers by means of treaties in conformity with the principles of public law provided for under this Constitution."

120. So too, Article 31 of the Constitution mandates that the Constitution, the laws enacted under it and treaties are "the supreme law of the Nation." Indeed, the Argentine courts have a long-standing record of respect for treaties and have duly recognized their hierarchical standing above the law.[63] While treaties in theory could collide with the Constitution, in practice this is not very likely as treaties will be scrutinized in detail by both the Government and Congress.

121. In this case, the Tribunal does not find any such collision. First because the Constitution carefully protects the right to property, just as the treaties on human rights do, and secondly because there is no question of affecting fundamental human rights when considering the issues disputed by the parties.

122. The specific domestic legislation of Argentina and rules of international law applied by the Tribunal will be discussed in connection with the issues contended. In addition to the Constitution and the Argentine Civil Code, the gas legislation and regulations will be analyzed, together with the measures adopted under the Emergency Law and other pertinent matters. The Treaty and customary international law will also be applied in reaching the pertinent conclusions.

123. Before doing so, however, the Tribunal wishes to address a particular contention made by the Respondent, namely that the Tribunal would be exceeding its powers if it were to decide the dispute on the basis of the provisions of the License, and that such decision would be subject to annulment. The Tribunal must apply the relevant domestic and international law, including the License, as a validly made contract under Argentine law and subject to specific stability clauses, since it has a duty to decide the dispute under Article 42(1) of the Convention.

12. The Limits of the Tribunal's Jurisdiction

124. The Tribunal is mindful that, in its Decision on Jurisdiction, the distinction was made between measures of a general economic nature, such as those concerning the economic and financial emergency, and measures specifically directed to the investment's operation.[64] It then reached the following conclusion:

> "…the Tribunal concludes on this point that it does not have jurisdiction over measures of general economic policy adopted by the Republic of Argentina and cannot pass judgment on whether they are right or wrong. The Tribunal also concludes, however, that it has jurisdiction to examine whether specific measures affecting the Claimant's investment or measures of general economic policy having a direct bearing on such investment have been adopted in violation of legally binding commitments made to the investor in treaties, legislation or contracts."[65]

125. In discussing the rights of the parties and the measures adopted the Tribunal will keep this distinction in mind.

126. It must also be noted that in connection with the merits the Respondent has again raised certain jurisdictional issues that were addressed in the jurisdictional phase of the case, such as the *jus standi* of the Claimant. These issues were decided upon at that stage and will not be reopened in this Award.

13. Did the Claimant have a Right to a Tariff Calculated in US Dollars?

127. The first issue the Tribunal must address in connection with the Claimant's contentions is whether it had a right to a tariff calculated in US dollars and converted into pesos at the time of billing.

128. The Claimant asserts this right under the public tender offer, the Gas Decree, the Information Memorandum issued in 1992 in conjunction with the initial public tender offer, and Clause 9.2 of the License. The Claimant recalls in particular Article 41 of the Gas Decree stipulating that "tariffs for transportation and distribution shall be calculated in dollars."

129. The Respondent, however, believes differently. As already noted, in the Respondent's view the Gas Law only ensures licensees the right to a fair and reasonable tariff. The Gas Decree and TGN's License do provide for the calculation of tariffs in US dollars and their conversion to pesos but, the Respondent argues, only in conjunction with Convertibility Law No. 23.928. It is further explained that once the convertibility and the dollar/peso parity were abandoned, calculation of tariffs in dollars would become redundant and the right to such calculation would lapse, particularly if a devaluation were to reach 300%. In this regard the Respondent recalls that the Gas Decree refers to the parity

calculation and conversion.[66] According to the Respondent, the Government made no promise or guarantee that tariffs would be kept in dollars if the fixed exchange rate regime were abandoned.[67]

130. This relationship between the tariff calculated in US dollars and the Convertibility Law is also discussed by the Respondent in the context of the privatization of the telephone company. In that situation tariffs were originally calculated in local currency and adjusted in accordance with Argentina's consumer price index. The tariffs were later converted into dollars and subjected to dollar adjustment but only as a result of the Convertibility Law, presumably for as long as this law was in force. It has been explained by the Claimant, however, that this was a different situation and that, in its view, it further confirms that tariffs were to be calculated in dollars.[68]

131. The Respondent has also elaborated on the question of the applicable law in the context of this issue, arguing in particular that the Claimant could not have made its investment exclusively on the basis of the public tender offer or the Information Memorandum of 1992, as both were subject to the express provisions of Argentine law and the specific terms of the arrangements for the transfer of TGN's shares. It is also emphasized, as noted, that the information provided by consultant firms was expressly subject to a disclaimer, that no assurance was offered on the part of the Government and that no liability could ensue from the information contained therein.

132. Any such decision to invest, the argument follows, could only have been made on the basis of the applicable rules in force. As the Gas Law only ensured the right to a fair and reasonable tariff, none of the instruments which were subordinate to it, in particular the

legality and the very right of the State to fix the tariffs for its public services and modify contracts in consideration of public interest. Moreover, the Respondent again raises an argument to the effect that the Claimant in any event cannot rely on TGN's License as this was issued to a different company; this, as noted, is an issue that has been resolved by the Tribunal in its jurisdictional decision.

133. While it is true that the Claimant at first relied heavily for its arguments on the Information Memorandum and related consultant reports, the entire legal structure was gradually brought into the pleadings by both parties. This included the Gas Law which contains provisions of a general nature, such as the right to a fair and reasonable tariff, as well as the Gas Decree and the License which specifically provide for the calculation of tariffs in dollars and their conversion into pesos at the time of billing. This guarantee is sufficient to legally give rise to a right of the Claimant to this effect. It is not contrary to the law. Neither is it contrary to the right of the State to amend tariffs, for which purpose specific mechanisms were established in the License itself and other relevant instruments.

134. In addition, in the context of the privatization it was abundantly clear that one of the key elements in attracting foreign investment and in overcoming the economic and financial crisis of the late 1980's was to provide the necessary stability. Declarations by public officials repeatedly confirmed this understanding and the Memorandum, while not legally binding, accurately reflects the views and intentions of the Government. This very same understanding, as the Claimant has emphasized, was expressly confirmed by the Privatization Committee, a step that must be considered as having some legal implications.

135. This Committee in fact recorded in the minutes of its session of October 2, 1992, that

convertible pesos, for which reason, when faced with an eventual modification of the Convertibility Law, they should be automatically re-expressed at the modified rate."[69]

136. The Tribunal is not convinced of the merits of the argument the Respondent has made about the right to a tariff calculation in dollars linked to the Convertibility law. Had the right been conditioned on the existing parity the pertinent provisions could have said so quite clearly. This was not the case and the Privatization Committee understood the guarantee differently, that is, as providing for a tariff in a stable currency. In fact, the provisions in question allow for a reading which is quite different from that argued by the Respondent. If the tariffs were in dollars and had parity changed at the time of billing, the conversion was to be made at the rate of exchange at that moment so as to, precisely, guarantee the fairness and reasonableness of the return. This, however, is an argument linked more to the question of devaluation and it will be examined further below.

137. The Tribunal also notes that it was precisely because the right to tariff calculations in dollars was guaranteed that the privatization program was as successful as it was. The program attracted hundreds of companies to the country with investments that ran into over 10 billion dollars. Numerous bilateral investment treaties were also entered into at the time to provide additional guarantees under international law. It is not credible that so many companies and governments and their phalanxes of lawyers could have misunderstood the meaning of the guarantees offered in a manner that allowed for their reversal within a few years.

138. The Tribunal concludes on this question that the Claimant has convincingly established that it has a right to a tariff calculated in dollars and converted into pesos at the

14. Did the Claimant have a Right to Adjustment of Tariffs in Accordance with the US PPI?

139. The second element that was determinative for the Claimant in deciding to invest in TGN was the assurance of adjustments of the tariff in accordance with the US PPI in January and July of each year. This right, in the Claimant's view, was created by the Gas Law and every other instrument governing the privatization of the gas transportation and distribution industry.

140. The Respondent makes in this connection the same arguments as those advanced above in respect of the calculation of the tariff in dollars. In the Respondent's view, such mechanism was justified only in conjunction with the Convertibility Law and the exchange rate parity, thus avoiding indexation in accordance with Argentine indexation mechanisms and taking advantage of the fact that inflation in the United States was historically lower than that reflected in Argentine indexes.

141. The Respondent further asserts that such adjustment mechanism was justified at the time of privatization in 1992, but that at the end of the decade it had lost all relevance because the Argentine economy went into recession and deflation and domestic prices fell significantly. It is also argued that the United States' inflation at the time was higher than what it had been historically and that the adjustment would therefore no longer reflect TGN's costs but would result in a significant increase of tariffs during the recession. The Respondent held that such increase could be as high as 6.18% resulting from the US PPI adjustment plus some adjustments due to debt repayment.

142. According to the Respondent's argument this was the situation underlying the voluntary postponement of adjustments agreed to in January and July 2000. These were also the reasons invoked by the Federal judge issuing the injunction on adjustments referred to above.

143. Moreover, the Respondent believes that the freezing of tariffs at this point was the measure affecting the licensees the least as resorting to an extraordinary adjustment of tariffs would have led to yet lower tariffs.

144. The same considerations the Tribunal made above in respect of the meaning of the governing legal framework, including the question of the dependence on the Convertibility Law, apply to the issue of adjustment of tariffs in accordance with the US PPI; that is, it was a right established under the legal rules, the License and the context in which the privatization was undertaken. The Claimant has adequately proven its rights concerning this other issue. The question of costs and whether the mechanism was justified at a later point will be discussed separately.

15. Did the Claimant have a Right to Stabilization Mechanisms under the License?

145. A third issue the Tribunal must examine is whether the Claimant had a right under the governing legal framework to additional stabilization clauses. The Claimant invokes in particular two such clauses of the License. The first concerns the Respondent's commitment in clause 9.8 of the License to the effect that the tariff structure would not be frozen or subject to further regulation or price control, and that in the event that a price control

mechanism compelled the licensee to adjust to a lower level of tariff "…the Licensee shall be entitled to an equivalent amount in compensation to be paid by the Grantor."[70]

146. The Claimant next invokes Clause 18.2 of the License which provided that the basic rules governing the License would not be amended, totally or partially, without the Licensee's written consent. The Claimant further asserts that when such consent was given in January and July 2000 for the postponement and rescheduling of adjustments, albeit non-voluntarily in the Claimant's view, the Argentine Government undertook additional obligations to reestablish the operation of the altered adjustment mechanisms.

147. The Claimant argues that all the commitments under the License as well as the 2000 postponement arrangements were simply not observed by the Argentine Government. Moreover, in the Claimant's view, ENARGAS further aggravated the situation by adopting decisions that went beyond the extent of the judicial injunction. It is argued in particular that the injunction affected only the July agreement and the corresponding Decree No. 669/00,[71] but not the January agreement under which a 6% adjustment would be made in July 2000.

148. In the Respondent's view, there is yet again a jurisdictional question in that any stabilization clause would benefit TGN as the licensee but not the Claimant, a matter on which, as explained, the Tribunal has already ruled. It is further believed on the merits of the question that the Government powers could not be subject to a freeze as this would be equivalent to a renunciation prohibited under the law and the constitutional concept of public service.

149. In respect of the argument about aggravating measures adopted in 2000, the

on this basis that it rejected an administrative appeal by TGN purporting to have the January adjustment enforced. Yet later it rejected the tariff application by TGN seeking to retroactively obtain the adjustments corresponding to the year 2000 and to follow on as from 2001.

150. On this last question, the Tribunal considers the argument made by the Argentine Government as pertinent because, even though technically a restrictive interpretation of the injunction might have been correct, it was quite evident that such injunction was aimed at paralyzing the operation of the adjustments as a whole and not just that corresponding to the July agreement.

151. The important question, however, is that concerning the right to benefit from stabilization clauses. This discussion is well known in international law and to the extent this dispute concerns the simultaneous operation of the License and protection under the Treaty, the stabilization ensured a right that the Claimant can properly invoke.[72]

16. Was the Economic Balance of the License Altered in Light of Changing Realities?

152. While the legal meaning of the governing legal framework and the License is quite straightforward and granted rights that are now invoked by the Claimant, the reality of the Argentine economy is more difficult to assess. It may be recalled that the privatization program was conceived to overcome the crisis of the late 1980's. This crisis was characterized by hyper inflation, the inefficient operation of many publicly-owned companies, including those responsible for public utilities, and a dramatic shortage of

investments. The privatization program was very successful but the late 1990's witnessed the emergence of another major crisis.

153. This crisis will be discussed further below, but it should be mentioned at this point that it stemmed basically from economic conditions that made it impossible to maintain the fixed exchange rate and which gradually led to the greatest default on foreign debt in history and the collapse of the Argentine financial markets. Some tend to fault foreign investors and put the blame on excessive privatization and globalization, while others see in it the result of not having carried out the liberalization program in its entirety and having allowed major governmental interferences in the functioning of the economy.

154. Justice, however, is not as blind as it is often thought and this Tribunal acknowledges that changing realities had an impact on the operation of the industry and the governing legal and contractual arrangements.

155. The first major impact arose from the devaluation of the peso. The measures adopted in 2000 in order to postpone US PPI adjustments and to freeze the tariffs were in fact anticipating a major upheaval in the economy and in the economic policies followed by the Argentine Government. The Emergency Law and related measures came to confirm this situation and transformed the freeze into a permanent feature of that policy coupled with the elimination of the Convertibility Board and the exchange rate parity.

156. The Respondent has argued in this respect, first, that the privatization framework never guaranteed that a devaluation would not occur and, next, that the Board of TGN expressly warned in the Investment Prospectus that there were no assurances that changes in

monetary fluctuations, interest rates, social instability and political events.[73] Along the same lines, the Respondent argues that witnesses introduced by the Claimant have recognized that there was no assurance against devaluation.[74]

157. In the Respondent's view, the Claimant cannot pretend that it had a right never to see the returns of the company diminish for reasons other than business risks. The Respondent observes that this would transform the License into the kind of insurance policy which this Tribunal and other tribunals have held are not provided by bilateral investment treaties. Moreover, the Respondent asserts, the Claimant cannot pretend to be insulated from any internal or external condition affecting the operation of the company.

158. The Claimant explains that it does not complain about the economic conditions of Argentina or the right of the Government to devalue the currency, but only about the breach of the specific guarantees offered to investors and the related protection ensured under the Treaty. One of the most significant guarantees in this respect, in the Claimant's view, was that of keeping the tariffs in dollars so as to eliminate monetary and devaluation risks.

159. The Tribunal has noted above that it is not its task to pass judgment on the economic policies adopted by Argentina and hence it is not for it to determine whether the devaluation was the right or the wrong measure to take in the circumstances. However, it is its duty to establish whether such measure had specific adverse consequences for the Claimant in light of the legal commitments made by Argentina both under the applicable domestic and international legal framework.

160. Here again the discussion about the connection between the calculation of tariffs and

the issue. As noted above, two different views have been expressed on this point. For the Respondent, that guarantee only stands as long as the Convertibility Law and the exchange rate parity was in force. For the Claimant, the guarantee works precisely in the context of an alteration of the exchange rate, as the tariffs would still be calculated in dollars and converted into pesos at the newly established exchange rate.

161. For the reasons mentioned above, the Tribunal is of the view that the meaning of the legal framework and the License, particularly in the context of the privatization, was to guarantee the stability of the tariff structure and the role the calculation in dollars and the US PPI adjustment played therein. Devaluation could of course happen at some point, but then the tariff structure would remain intact within the framework of stability envisaged as it would adjust automatically to the new level of the exchange rate.

162. The fact that tariffs were converted from dollars to pesos at a fixed exchange rate of 1 to 1 and that, at the same time, the devaluation was undertaken, meant that the stabilization envisaged in the License was in practice eliminated.

163. The discussions held in this respect in the Privatization Committee, referred to above, are helpful to clarify the real meaning of the guarantees provided. It is reasonable to understand this discussion as having concluded that there was no need to repeat in the License a guarantee that was already provided under the law, as opposed to an agreement to abandon a fundamental guarantee of this kind. The latter option would be entirely contradictory to the intent of the contemporaneous privatization program and the interest in attracting foreign investment.

164. Again, on this issue, the law is clear, but economic realities are indeed more complex to assess. For one thing, it is quite true that, as argued by the Respondent, the peso had already been much devalued in international markets and hence it was entirely artificial to keep it at a parity that was no longer sustainable.[75] For another, capital flight had reached critical proportions as a consequence of a drop in exchange rates and general lack of trust in the economic conditions. In this regard, the change of policy became inevitable.

165. The question for the Tribunal is then how does one weigh the significance of a legal guarantee in the context of a collapsing economic situation. It is certainly not an option to ignore the guarantee, as the Respondent has advocated and done, but neither is it an option to disregard the economic reality which underpinned the operation of the industry.

166. The answer to this conundrum lies in the examination of the effect of the economic situation on the costs of the company, including the question of cost structure, the significance of the export market and the adjustment mechanisms provided for under the License.

17. A Fair and Reasonable Tariff

167. One of the few points on which the parties seem to be in agreement is that tariffs should be fair and reasonable as envisaged under the governing legal regime. Yet, what is fair and reasonable is the subject of substantial disagreement.

168. The Respondent has made the argument that tariffs that were kept and adjusted in dollars could not be fair and reasonable in the context of the recession and deflation that

prices kept falling in the wake of the currency devaluation and hence the costs of the company were greatly diminished, a consequence to which a dollar standard could not adjust. Hence the decisions to abandon the dollar denomination and to freeze the tariffs.

169. The Claimant has explained in this respect that its operating costs did in fact decrease as a result of the devaluation from US$ 70.3 million in 2001 to US$ 37.2 million in 2002. However, during the same period revenue decreased from US$ 253 in 2001 to US$ 125.1 million in 2002. The end result was that operating income fell by 52% in one year. In the Claimant's view, the devaluation did not necessarily lead to a reduction in costs as many expenses remained fixed in dollars and local suppliers quickly adjusted their prices to compensate for the devaluation.

170. As a matter of principle, a devaluation of 300% must necessarily have an effect on the company cost structure. However, costs are unlikely to decrease in the same proportion, in part because some costs are kept in dollars and in part because financial costs must also be considered, not just operating costs. This issue has resulted in disagreement between the parties.

171. The Claimant has explained that its financial costs are reasonable for a capital-intensive infrastructure industry. TGN financed about one half of its investment by debt to be amortized over the life of the project. The total debt of TGN, both domestic and external, amounts to US$ 590 million, of which 93% corresponds to foreign loans and remains payable in dollars. Only 7% of TGN's debt, that is the domestic portion, was pesified. As a result of the tariff freeze, TGN has defaulted on all its loans and has ceased to repay capital, paying approximately only one-third of the interest due.

172. The Claimant has also explained that higher debt resulted in lower capital costs and thus in maximum efficiency. This, in its view, was the very reason that led ENARGAS to use TGN's leverage of 46% debt to 54% equity in the estimates preparatory to the second tariff review, which never took place.[76]

173. In the Respondent's view, such financial decisions are attributable only to the company, as discussed above. In fact, the Government of Argentina believes that TGN, in relying on foreign debt, chose the worst of all financial options to the detriment of other alternatives, such as the use of its own capital or debt in Argentina, in pesos or even in dollars, which was later pesified.[77] It follows, in the Respondent's view, that the risk entailed in this decision cannot now be attributed to Argentina and that, in any event, such proportion of debt was unwise and the company was so warned by ENARGAS. The Respondent explains that TGN increased its debt-equity ratio from approximately 0.50 in 1997 to over 1.00 in 2001; had TGN's ratio been used in calculating tariffs, these would have been lower, not higher, because the rate of return required would also have been lower.[78]

174. The Claimant believes differently. It could not borrow on the domestic capital market as it did not have capacity to absorb large borrowing. Moreover, no one could have foreseen that devaluation and decoupling of tariffs from dollars would be forthcoming as all the guarantees offered pointed in the opposite direction. Thus, at the time it made sense to borrow in international markets thereby taking advantage of low interest rates.

175. As to the discussion about the debt-equity ratio, the Claimant also explains that a 62% debt to total capital is standard in the gas industry, and thus a 50% ratio as that of TGN is perfectly reasonable, particularly when taking into account the stability surrounding the

the Government on a 33:67 debt to equity ratio, allowing for a lower cost of capital and higher bidding for the licenses.

176. A related point of contention is that while the Respondent argues that the company opted to distribute profits to shareholders instead of reinvesting it, and thus failed to increase its own capital contribution as opposed to having financed debt, the Claimant asserts that this is simply patently erroneous as 70% of its profits were reinvested and merely US$ 168 million paid in dividends, a figure representing only a 4% annual return.

177. The Claimant is also of the view that debt restructuring as a mitigating alternative mentioned in Argentina's argument is simply not possible because creditors are not in a position at present to forecast companies' revenues. The difficulty experienced by the very Government of Argentina in restructuring its foreign debt proves in the Claimant's view that the exercise was not easy to carry out, and even less so could this be done by way of reorganization under the aegis of Argentine courts.

178. The conclusion of this discussion calls for a determination of whether financial costs are a factor in the calculation of tariffs so as to reach the fair and reasonable result mandated by the Law. In Respondent's view, it is not. In the Claimant's view, it is an essential factor.

179. The Tribunal has no doubt that financial costs are included as an element of the calculation of tariffs. This is so, first, because no project of this magnitude could be carried out without its financing being calculated within the return necessary to make it viable. Second, the legal meaning of the Gas Law unequivocally leads to the same conclusion. Indeed, Article 38(a) of the Law provides that the service providers who operate

recover all reasonable operating costs applicable to the service, taxes, depreciation ("amortización" in Spanish) and a reasonable rate of return…". So too Article 2(4) of the Gas Decree provides for the recovery of all reasonable costs "including the cost of capital."

180. In the Tribunal's view it is quite clear that "depreciation" or "amortización" refers, in particular, to the debt financing which is written off over the years. There is yet a another reason supporting this conclusion. Debt was a part of the tariff as calculated before the freeze and it is quite unlikely that the Government and the regulatory agency, as well as all the companies, would have read the Law mistakenly. Neither is there any reason to believe that experienced companies would not have operated economically and prudently.

181. It follows that the freeze adopted cannot be reconciled with the objective of a fair and reasonable tariff, not just because of the dollar connection and adjustment discussed above, but also because, by not taking into account the financial reality of the project, such frozen tariffs do not reflect the real costs of the operator. This is why financial costs were taken into account by ENARGAS both in the first and the second five-year tariff review, even if the latter was never finalized. Presumably this was also reflected in the Government's 2000 tariff increases, which were subject to the court injunction, and might also be included in the new increases that government officials have repeatedly assured are a necessary step under the renogotiation process.

182. The effects of the devaluation have quite evidently given rise to profound adjustments in the economy of Argentina, but not all such effects have benefited the operator. Far from it: the combined effect of tariff freezes and devaluation, even if the latter resulted in a decrease of operating costs, led to the evaporation of operating income, prompted constant negative

results in the balance sheet and caused the default mentioned. A tariff causing these results cannot be judged under any standard to be fair and reasonable.

183. The Tribunal cannot rule out the argument that a tariff kept and adjusted in dollars might be unrealistic in view of the changing economic realities that have been mentioned. But, even within the context of the Argentine legal framework and the License itself, there are ways to take these changes into account without abandoning the legal guarantees offered, as will be discussed further below.

184. The Respondent has argued in addition that the tariffs were higher than normal because they took into account, from the outset, the risk of devaluation expressed in terms of the Argentine country-risk. To this end, the discount rate used was also higher so as to allow for a greater return to the company because of that risk ("WACC" or Weighted Average Cost of Capital), as was also the case with the interest rate. The Stone & Webster consultant report commissioned by ENARGAS in order to make the first five-year review of tariffs had suggested a rate of return of 18.6% on the capital contributed by the company. This was eventually established by the regulatory agency as a 16.07% rate of return, thus reflecting, in the Respondent's view, the effect of the higher country-risk.

185. While this discussion is related more to the question of valuation of damages and the determination of the value of the company made by the Claimant's financial experts, which will be examined separately, it nonetheless reveals an important feature of the tariff regime that, it is argued, did provide for protection against devaluation. While, in the Claimant's view, this protection was a part of the legal promises and assurances given, it appears in the Respondent's view that it was given by means of the financial mechanisms put in place,

186. It follows that the devaluation must not only be considered as a part of the broad economic measures affecting the country as a whole but also as a specific feature applicable to the Claimant and having a direct impact on its operations. As such and to that extent, it falls under the Tribunal's jurisdiction. The Tribunal has noted above that the devaluation indeed did have an adverse economic effect on the operator because, in conjunction with other measures, it resulted in a tariff that was not fair and reasonable.

187. Moreover, the Claimant also explains, the distortions this situation has created are at the very heart of the crisis of the energy sector affecting Argentina. It is further asserted that artificially low tariffs led to an increased demand and, as revenues are insufficient to make further investments in transportation and distribution, the energy market has collapsed and has required new and different arrangements, including the fiduciary fund mentioned above and the importation of gas from Bolivia at high costs.[79] On this basis, the argument about subsidization of other sectors of the economy becomes convincing.

18. Investments and Exports

188. There is yet another element of the discussion relevant to the correct understanding of the cost structure and the implications of devaluation and pesification: the investment program and its connection with the export market.

189. The Claimant asserts that three kinds of investment were made: US$ 40 million of mandatory investment, principally related to the improvement of safety and network integrity; US$ 12 million of non-mandatory investment destined for expansion; and US$ 29.5 million for projects aimed at strengthening efficiency. Not only were these goals achieved,

significant network expansion and distribution to many new users while keeping the gas price among the lowest in the world.[80]

190. The Respondent challenges these assertions and argues that investment targets were not met and that, as a consequence, the Claimant was fined repeatedly and the posting of security required. In Respondent's view, most of the investments made were related to the expansion of transportation networks for export markets. These investments were additional to what was envisaged in the License, the sole purpose of which was the supply of the domestic market and not the international market. This point, however, is also disputed by the Claimant.

191. Tariffs for the export market, as explained above, after the initial clarifications of the measures adopted, have been kept in US dollars and adjusted in accordance with the US PPI. About a fourth of TGN's revenues, the Respondent explains, originate in exports and this, in its view, is an amount sufficient to cover all the costs of the Claimant, including those related to the domestic market and financial costs. Moreover, the Respondent has further asserted, that the export tariffs are "excessive."[81]

192. Clarification of the question became necessary when several Chilean importers of gas began making payments in pesified tariffs.[82] A later request by the Chilean company Colbun, also an importer of gas, to the effect that export tariffs should not be kept in dollars or adjusted in accordance with the US PPI, was turned down by governmental decree in Argentina.[83]

193. The discussion does not end there since the Claimant explains that of the US$ 1

was to be carried out under terms similar to those governing the domestic business. According to the Claimant, Argentina derives many important benefits from this export activity. Finally, the question of fines and security, it is also argued, was raised in a context of political confrontation unrelated to the real facts.

194. But even when taking into account the positive influence of exports on the company's revenues, the Claimant argues, the end result has been that overall revenues have been insufficient to cover operating and other costs and that this shortfall is shown in expert reports which include export revenues.

195. The Tribunal is persuaded that the required investments were made and indeed exceeded by far; it is also persuaded that the export markets have somewhat compensated for revenue shortfalls. However, the compensating effect of export revenues has not fully redressed a situation which carries the heavy burden of the measures in force affecting the domestic market. This situation amplifies the cross-subsidizing effects of the measures adopted in the Argentine economy.

19. Duration of the License

196. The parties have also disputed another aspect relevant for the determination of rights and obligations under the contract: the duration of the License.

197. In the Claimant's view, TGN is entitled to an extension of the license beyond the initial period of 35 years ending in 2027. This extension would, under the terms of the License, be for an additional ten years, ending in 2037. The Respondent believes, to the

performance requirements that have not been met by the Claimant, as well as to other conditions set forth in Clause 3.2 of the License.

198. The Tribunal notes that the License provides for the right to an additional ten-year extension, but that this right is subject to the compliance with performance requirements, and has to be requested by the licensee and approved by the Government. A discussion about performance requirements is unnecessary for the Tribunal to reach a conclusion on this aspect of the dispute.

199. Indeed, the License is very clear about the fact that this right is conditional and subject to a number of steps, both substantive and procedural, which might or might not take place. As it would be impossible to establish at present whether these conditions might be met, the Tribunal is persuaded by the Respondent's argument to the effect that no damages should be considered beyond the year 2027. This will therefore be the year which the Tribunal will rely on for its determination of damages.

20. Discussion of Legal and Contractual Obligations under Argentine Law

200. In view of the conclusions reached by the Tribunal on the question of applicable law it must now examine the effect of the measures with reference to Argentine law and the contracts involved in this dispute.

201. The fundamental legal principle guaranteeing the right to property is established in Article 17 of the Constitution which provides that

> "The right to property is inviolable and no inhabitant of the Nation can be

202. The exercise of this basic guarantee, like other fundamental rights enshrined in the Constitution, is regulated under the law, as indicated in Article 14, but cannot be altered by that law, as expressly mandated by Article 28 of the Constitution. Indeed, this Article mandates that "the principles, guarantees and rights recognized in the preceding articles shall not be altered by the laws regulating their exercise."

203. The argument made by the Respondent to the effect that such guarantees are not absolute and are subject to the requirements of social needs and public interest is indeed correct,[84] but this does not contradict the central role of the right to property and the obligation to pay compensation in case of government interference with its exercise.

204. Article 42 of the Constitution has occasionally been invoked as an example of the social needs restricting rights to property, in that this provision recognizes the right of consumers and users of goods and services to the protection of health, safety and economic interests, adequate and truthful information, freedom of choice and equitable and dignified treatment. This particular legitimate objective, pertains, however, to so-called third generation rights and is embodied in a separate chapter of the Constitution referring to new rights. To this extent such rights should be viewed as future aspirations rather than enforceable rights similar to fundamental constitutional rights.

205. The basic principle of Argentine law governing contracts and the ensuing obligations is contained in Article 1197 of the Civil Code which provides:

> "Conventions made in contracts constitute for the parties a rule that must be observed as the law."[85]

206. This principle is in harmony with the rights protected under the Constitution. There is indeed a long-standing tradition of Argentine court decisions and the writings of distinguished jurists highlighting the importance of the faithful enforcement of contracts as the expression of the will of the parties.[86] There is also the view, however, that the State has the duty to intervene under the law stipulated in the contract so as to redress possible imbalances.[87] Here again the law does not ignore social needs but makes them subject to very precise conditions and requirements. Thus, the need to ensure stability remains a basic concern and any departure therefrom must be in the form of a clearly established legal justification.

207. These various points of view underlie the legal arguments made by the parties in this dispute. The Claimant has argued that there are a number of rights, both under the law and under the contract, with particular reference to the License, that have not been observed by the Respondent and these legal obligations should be given full effect. The Respondent, however, is of the view that if the parties had wished to contract in dollars they could have done so explicitly under Article 1197 of the Civil Code, but they chose instead to contract by reference to the Convertibility Law.[88] It is also argued that even if the Gas Decree and the License had referred to a dollar-related tariff, these instruments could not contradict the Law which itself did not refer to this standard. In any event, the Respondent asserts, the economic conditions of the crisis necessarily resulted in the change of the terms of the contract.

208. The Tribunal must note in this respect that the fact that the Gas Law did not refer explicitly to the dollar-based tariff cannot be taken to mean that this standard was not a part of the legal and contractual commitments made to the investor. It was very much part of those undertakings as the legal and contractual framework of the privatization amply

and the latter could only be ignored had it constituted an undertaking prohibited by law, which is not the case here.

209. Moreover, the fact that the regulations and the contract provided for tariffs in dollars is consistent with Article 619 of the Civil Code to the extent that it provides that the obligation to pay a sum in a particular currency is satisfied when payment is made in the stipulated currency at the time it becomes due. This article amended a prior reference to payment in national currency.

210. The Tribunal has stated above, however, that parallel to legally enforceable obligations arising from the commitments and assurances that Argentina gave in the privatization process, there have been inescapable economic realities that cannot be ignored.

211. There is broad agreement on the fact that Argentina was affected by a deep crisis of an economic, social and political nature. The downturn in the economy commencing in 1999, the rising levels of poverty and the rapid turnover of politicians occupying the highest offices in the nation, coupled with social upheaval and civil disobedience, was a dramatic reality. Witness statements introduced by the Respondent both in writing and in the oral hearing were eloquent in this respect.[89] These developments have been deplored by the Claimant. Needless to say, also the Tribunal has the greatest sympathy for the plight of the Argentine people under the circumstances and respects its efforts to overcome the situation.

212. The issue for the Tribunal to establish is whether, under Argentine law, there is any valid excuse for not complying with the terms of the contractual and legal arrangements Argentina had entered into.

213. The Argentine Government has invoked in the alternative the existence of a state of necessity under international law as an exemption from liability. The state of international law on this question will be examined separately.

214. Under domestic law, the state of necessity is not recognized by the Argentine Civil Code or the law generally.[90] A number of court decisions, however, have from time to time relied on the state of economic emergency to the extent it had been declared by Congress, provided it was temporary and reasonable.[91]

215. In the context of the current Emergency Law, the Supreme Court, relying on the provisions of the Constitution, has emphasized, in addition to those requirements, that the restrictions imposed must be aimed at providing a solution and must not result in a change of the substance or the essence of a right acquired under a contract. The Supreme Court decision relies in part on the following statement:

> "…it is not useless to remind, as the Tribunal has done for long, that restrictions imposed by the State on the normal exercise of patrimonial rights must be reasonable, limited in time, and constitute a remedy and not a mutation in the substance or essence of the right acquired by judicial decision or contract… It follows that the mechanisms devised to overcome the emergency are subject to a limit and this is its reasonableness, with the ensuing impossibility of altering or distorting the economic significance of the rights of individuals… and it is beyond doubt that to condition or limit those rights affects patrimonial intangibility and puts an obstacle to the purpose of consolidating justice."[92]

216. The Tribunal also notes that a decision of the Argentine Supreme Court held, in respect of "pesification," that this measure was compatible with Article 17 of the Constitution and that Articles 617 and 619 of the Civil Code could not be read in a blind manner.[93] Based on the Emergency Law and *force majeure*, the Court overturned a decision of the Federal Court of Paraná. This decision, however, does not overrule other decisions of the Supreme Court and other tribunals in Argentina as it only applies to the case at hand. Moreover, the *Procurador General* based his own report to the Court on the fact that the measures were temporary and that the crisis was largely over, a consideration on which the Court also relied.[94] Dissenting views were also expressed.[95]

217. In light of this discussion, the Tribunal is persuaded that the state of necessity under domestic law does not offer an excuse if the result of the measures in question is to alter the substance or the essence of contractually acquired rights. This is particularly so if the application of such measures extends beyond a strictly temporary period.

218. A second concept under which contractual rights might eventually be adjusted is that of unjust enrichment. Although not formally invoked by the Respondent in this dispute, it underlies some of its arguments, particularly the argument that the dollar-based tariff would result in unfairness and unreasonableness, or more importantly that tariffs would have been excessive either in the domestic or the export markets.

219. A number of provisions of the Argentine Civil Code are inspired by the concept of unjust enrichment and it has often been applied by Argentine courts.[96] However, given the difficulty in establishing who has gained and who has lost without legitimate cause, the application of the concept has been surrounded by uncertainty.

220. In this particular instance, the application of the dollar standard at the time of the recession might, for example, have appeared as an unfair advantage. However, as discussed, the facts point in the opposite direction, namely to where the operator of the service suffers the entire burden of the situation and in fact subsidizes other sectors of the economy which thus become the real beneficiaries. Therefore, although the crisis and the measures taken brought about legal and economic uncertainties, the Tribunal cannot ignore contractual rights on the basis of an alleged unjust enrichment.

221. This Tribunal wishes to add a further observation. In 1968 another mechanism for the adjustment of contracts was introduced in the Argentine Civil Code with the inclusion of Article 1198. Under the terms of this Article, contracts must be done, interpreted and enforced in good faith in accordance with what the parties should have reasonably understood. If the burden of one party were to become excessively onerous as a result of extraordinary and unforeseeable events, it could request the termination of the contract, except if that party was liable and remiss; the other party could then offer more equitable terms as a means to forestall termination. This mechanism has also given rise to important scholarly writings and court decisions.[97]

222. The theory of "imprévision" was thus expressly introduced into the Argentine Civil Code. The Respondent has relied on this theory in explaining the meaning of the Emergency Law and its reference to this particular Article.[98] The purpose of this law, in the Respondent's argument, is to rebalance the benefits of the parties against the backdrop of changing realities.

223. The Federal judge issuing the 2000 injunction had this mechanism in mind as well

the consumers that was sought by the law broke down as a result of emerging economic situations… It would seem possible to argue that the economic and financial equation of the contract would break when the consumer must pay more for the same service even if the economy is evidencing negative figures…"[99]

224. The legal extent of this concept both in civil and administrative law was laid down by the French Conseil d'Etat in the landmark case "Gaz de Bordeaux," which, interestingly, also dealt with the gas industry.[100] The general principles on the application of this theory in administrative contracts, particularly those concerning concessions, were first identified in this decision, pointing out that the event in question had to be unforeseeable and external to the parties, exceed all reasonable expectations, and result in a profound unbalancing of the contract. The redress also had to be temporary as otherwise the long-term life of the contract would become unviable.[101]

225. The provisions of the Emergency Law, however, fail to meet certain essential conditions for the operation of the theory of "imprévision." First, if the imbalance were foreseeable, the theory is not applicable. As explained above, in arguing that the tariff included both the devaluation as well as the country risks, the Respondent is simultaneously admitting that this risk was foreseeable and actually foreseen. In this respect the Claimant believes the risk of devaluation was indeed foreseen as it argues that express guarantees were offered to offset such risk. Second, the concept requires the aggrieved party to request the termination of the contract before a competent court, while in the present dispute the measure was unilaterally decided by one party. In addition, the views of the courts have been rather critical of the measures adopted as noted above. In essence, the pesification was imposed and the target of rebalancing and compensating differences in 180 days was not met.

226. The approach taken by the French Conseil d'Etat, however, as will be explained, is most pertinent for the attribution of liability in the present case.

227. The Tribunal must note that other traditional legal excuses, such as *force majeure*, are not available in this case as the events discussed were foreseeable and foreseen.

21. Adjustment Mechanisms under the License and the Law

228. The Tribunal, however, does not need to look into general principles of law to find an answer as to how the contract in this case could be adjusted to new economic realities. The pertinent mechanisms are embodied in the law and the License itself.

229. The Gas Law provided for a mechanism in which the final price to the consumer would be determined by reference to three factors: first, the price of gas at the wellhead, that is at the point of injection into the transportation system; second, the transportation tariff; and third, the distribution tariff. The Tribunal notes that the first of these factors has already been successfully renegotiated and adjusted.[102]

230. The Respondent explains in this connection that, irrespective of the currency used, the operator must obtain a reasonable return, as this is mandated under the law in conjunction with the concept of a fair and reasonable tariff. It is further explained that, in case of devaluation, the tariff should be reduced as a consequence of lower domestic prices, while, in case of revaluation of the peso, tariffs should increase as costs would also increase.[103]

231. To this end, the Law provided for the periodic revision of tariffs so as to reflect the

explained by the Respondent, three adjustment mechanisms were devised to attain this result. The first was the January and July adjustments of tariffs in accordance with the US PPI. The second adjustment mechanism was to take account of increased efficiency (Factor X),[105] which would apply as from the first five-year review and which could have resulted in the decrease of tariffs if efficiency had increased. The third adjustment mechanism was to apply in connection with investment (Factor K),[106] and was also applicable as from the first five-year review. This third adjustment mechanism could result in the increase of tariffs so as to finance investments that could not otherwise be financed by the tariffs in force. The Claimant believes in this connection that factors X and K could only be introduced in the context of five-year reviews and not in other instances.

232. In addition, the Law provided for a five-year review[107] which would undertake a comprehensive examination of the tariffs and the method used for their calculation, also taking into account as far as possible factors X and K. The parties have different interpretations as to the extent of the five-year review. While, for the Claimant, adjustments would be basically automatic following the application of factors X and K,[108] for the Respondent, this review could be broader and include other elements relevant to tariff determination.[109] Otherwise, the Respondent asserts, the Claimant would have an insurance policy or a super-right under the License that would ensure profits under any circumstances, irrespective of the prevailing economic conditions.

233. The Tribunal is of the view that Argentina's interpretation of this issue is in part correct. While taking factors X and K into consideration, the review might be broader if justified by circumstances. Annex F of the Offer, for example, provides that future reviews of tariffs could include changes in the form of tariffs and the categories of consumers and

234. This interpretation, however, does not mean that the tariff structure envisaged under the law and the License could be dismantled at will. On the contrary, the guiding principles would always have to prevail. Among such principles was the guarantee of a reasonable rate of return; stability, coherence and foreseeability; and the need to avoid significant variations in the tariffs when applying factors X and K.[111] In this sense, as argued by the Claimant, it is not a discretionary power.

235. It must also be kept in mind that the License expressly included a commitment to the effect that it would not be altered unless the written consent of the licensee was first obtained and that tariffs would not be frozen or subject to price controls. Otherwise compensation would be paid.

236. The first five-year review was completed in 1997 but the second review, scheduled to take place in 2002, was never completed.

237. The Gas Law also provides for an Extraordinary Review that can be initiated by the licensees or ENARGAS so as to correct tariffs that might be deemed inadequate, discriminatory or preferential in circumstances which are both objective and justified.[112] The effect of certain taxes can also result in a corresponding adjustment of the related tariffs.[113]

238. The Tribunal can therefore conclude that if a rebalance of the contractual commitments was required because of changing economic circumstances and their effect on costs and returns, the mechanisms to meet this objective were available under the law and the License. The necessary adjustments could be accommodated within the structure of the guarantees offered to the Claimant. This approach, in turn, would have made any unilateral

be lowered within the regulatory framework to reflect the reduction in peso costs and thus also recognizes that the adjustment mechanism, under that scenario, would not have worked to its advantage.[114]

22. Attribution of Liability under Argentine Law

239. From the above discussion, it is clear that the legal commitments made by the Republic of Argentina to the Claimant under the applicable law and the License were not kept. This is so under the legal framework governing the gas sector but it is also so under the applicable provisions of the Civil Code and administrative law. In the absence of any express and clear provision allowing one party to depart from solemn contractual obligations undertaken toward another party, the sanctity of contracts established in the Civil Code and the protection of property mandated by the Argentine Constitution unquestionably prevail as recalled on more than one occasion by the Argentine Supreme Court. The Court has held that

> "…when under a law in force an individual has fulfilled all the substantial acts and obligations and formal requirements provided to be entitled to a right, it must be held as acquired, and its modification by a later norm is inadmissible without infringement of the constitutional right to property."[115]

This is the case in the context of this dispute.

240. There is of course the question of the reality of the crisis that has been described. The Tribunal explained above that this reality cannot be ignored and it will not do so. The crisis, however, can only be taken into account as a matter of fact. And facts of course do not eliminate compliance with the law but do have a perceptible influence on the manner in which the law can be applied.

241. In the case of *Compagnie Générale d'éclairage de Bordeaux*, also known as *Gaz de Bordeaux*, cited above, the French Conseil d'Etat had to decide a dispute in 1916 which, in a number of respects, was similar to the present one. As a consequence of the Great War the price of coal had more than tripled, amply surpassing the price originally envisaged under the concession contract for the provision of public gas lighting to the City of Bordeaux. The concession contract was held to govern the respective obligations of the parties until its expiration, in particular the provision of a public service and its remuneration by means of the tariffs stipulated. Normal market conditions could move the price in a manner favorable or unfavorable to the company and this was to be considered a normal business risk that each party was to have considered at the time of entering into legal obligations.

242. The economic impact of the war led to such price increases that the adjustment envisaged under the contract was clearly insufficient and the economic viability of the contract was profoundly affected. The company could not, therefore, be required to provide the service in such abnormal conditions. The Conseil d'Etat accordingly held that

> "…just as the Company cannot argue that it should not be required to bear any increase in the price…it would be totally excessive if it is admitted that such increases are to be considered a normal business risk; on the contrary, it is necessary to find a solution that puts an end to temporary difficulties, taking into account both the general interest…and the special conditions that do not allow the contract to operate normally…; to this end it is necessary to decide, on the one hand, that the Company is required to provide the concession service and, on the other hand, that during this period it must bear only that part of the adverse consequences that the reasonable interpretation of the contract allows…"[116]

243. On this basis, it was decided that the City of Bordeaux should pay compensation covering the remaining deficit and that, failing agreement of the parties on the amount of compensation, this was to be fixed by the judge to whom the case was remanded.

244. While in the instant dispute the conditions for the operation of the "théorie de l'imprévision" are not met, for the reasons already explained, the fact is that the Claimant cannot ask to be entirely beyond the reach of the abnormal conditions prompted by the crisis, as this would be unrealistic. However, at the same time, it would be wholly unjustifiable that the Claimant be overburdened with all the costs of the crisis. This is particularly so in light of the subsidization that the Claimant has in effect had to meet in respect of other businesses in Argentina, a burden which if necessary has to be born by the Government, at least in part.

245. The Government has the duty to redress this abnormal situation, first, by putting an end to what by definition should be a temporary situation, a step that might be adequately taken in the context of the continuing negotiations between the parties, and next by paying compensation for the damage caused.

246. Similar to what was the case in *Gaz de Bordeaux*, since the parties have as yet been unable to reach an agreement through the process of contract renegotiation, compensation is to be fixed by a judge. As this Tribunal has no judge to whom the case could be remanded for that purpose, it will fix the compensation to that effect on its own authority.

23. Crisis Period Distinguished

247. The Argentine Government has argued that a distinction should be made between two

the gas industry. And on the second hand, those of general economic impact not directly related to the gas industry, which were adopted in 2001 – 2002 in the context of the then unfolding crisis. This distinction of the origin of the measures is not feasible. Thus, it has been shown that the general economic policy measures of 2001-2002 also had very specific effects on the Claimant, effects which the Tribunal is bound to take into account separately from the wider effects or justification of those measures.

248. The factual situation, however, allows the Tribunal to take into account different situations present at distinct periods in time. The crisis had in itself a severe impact on the Claimant's business, but this impact must to some extent be attributed to the business risk the Claimant took on when investing in Argentina, this being particularly the case as it related to decrease in demand. Such effects cannot be ignored as if business had continued as usual. Otherwise, both parties would not be sharing some of the costs of the crisis in a reasonable manner and the decision could eventually amount to an insurance policy against business risk, an outcome that, as the Respondent has rightly argued, would not be justified. On the other hand, a number of the measures adopted did indeed contribute to such hardship and the burden of those ought not to be placed on the Claimant alone.

249. These events and effects, however, must be separated and distinguished from the situation that has characterized the Argentine economy in the aftermath of the crisis, including the situation that prevails today. The Tribunal does not wish to imply that the crisis in Argentina is fully over, because aftershocks are still felt in the economy, particularly in the social sector, but the repercussions are no longer as intense or widespread. Considering the question of time necessary for recovery, an expert for the Respondent stated that past economic downturns have taken up to eight years to overcome.[117] Be that as it may, the fact

at present clearly heading towards recovery in the short to medium term. All relevant indicators show unequivocally this to be the case.[118]

250. In light of the economic information available, the Tribunal considers that sometime between late 2004 and early 2005 the crisis period came to an end. The Tribunal notes in this respect that the Emergency Law declared emergency until December 10, 2003 and that renegotiation was extended for an additional year.[119] A further extension was enacted in 2004.[120]

251. The Tribunal will take into account these different realities in reaching a determination on the appropriate compensation. However, it must first examine the extent of the protection granted under the Treaty and the issue concerning the state of necessity under international law.

24. Has there been Expropriation of the Investment?

252. Having established that the Respondent did not keep the commitments and obligations it had undertaken under its own legislation, regulations and the Licence to TGN, the question is then what is the legal situation in terms of the protection granted by the Treaty to the investor.

253. The Claimant's first major allegation in this respect is that there has been an expropriation in breach of the express provision of Article IV(1) of the Treaty. This Article provides as follows:

> "Investments shall not be expropriated or nationalized either directly or

> ('expropriation') except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II (2)."

254. The Claimant argues in this connection that expropriation need not be direct or result in the transfer of title or physical possession but that it can also be indirect if the result, as held by the Tribunal in *Metalclad*, is to deprive the owner "…in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."[121] A wealth of cases and scholarly writings are invoked in support of this contention and of the argument that such an expropriation might be entirely independent of the State's intention.[122]

255. The Claimant further asserts that expropriation might be "creeping" in that it may unfold through a series of acts over a period of time.[123] The State's interference with assurances and undertakings offered to the investor, it is also argued, might result in the breach of an acquired right.[124] Not even the public purpose of an expropriation, it is further asserted, can alter the legal obligation to pay compensation.[125] The Claimant also argues that the measures adopted stemmed less from the prevailing economic conditions than from the political antagonism which the Government had developed towards foreign investors generally and towards some companies in particular whether because of electoral strategies or ideological connotations of successive governments.

256. The Claimant argues that the measures adopted by the Argentine Government during the period 2000-2002 resulted in indirect and creeping expropriation of acquired rights in the

Claimant says that as a result, it can no longer rely on the basic conditions that were critical for its decision to undertake the project; that the value of its assets has been wiped out; and that it cannot enjoy the economic benefits reasonably expected of the investment. The specific date of the expropriation is, in the Claimant's view, August 18, 2000, the date that the court injunction was issued and with it the beginning of a process that had the creeping effect described above.

257. The Argentine Government has not been short of arguments to oppose the expropriation claim and has presented a wealth of relevant cases and writers to refute the Claimant's arguments. It is first held that not only has there been no transfer of property of any kind but that none of the measures taken amount to an interference which could be compared to or result in an expropriation. It is also explained that none of the commitments invoked by the investor have the meaning the investor assigns to them and, even less so, could they qualify as an acquired right or constitute a legitimate expectation. This, in the Respondent's view, is particularly so because the commitments invoked arise not from the Government's undertakings, but from the Information Memorandum prepared by private consultants.

258. According to the Respondent, TGN has continued to operate normally and has full use of its property and there has been no redistribution of wealth of any kind nor has there been an intention to do so, unlike the situation characterizing all the decisions invoked by the Claimant;[126] neither has the State derived any benefit from the measures taken, thus meeting the standard set in the *Lauder v. Czech Republic* case when denying the occurrence of expropriation.[127] The Respondent, as noted, also argues that the measures adopted are temporary.

259. Emphasis is placed by the Respondent on the argument that neither has there been substantial deprivation of the fundamental rights of ownership nor have these rights been rendered useless; to the contrary, the value of shares of a comparable company has been increasing since the crisis. In the Respondent's discussion of the issue, it is stated that all the specific criteria used to deny substantial deprivation in the *Pope & Talbot v. Canada* case are met in this case also: the investor is in control of the investment, the Government does not manage the day-to-day operations of the company, no officers or employees of the company is under arrest, the payment of dividends has not been interfered with, the directors and managers of the company are appointed by the company, and the investor has full ownership and control of the investment.[128]

260. The Tribunal has examined with great attention the views expounded by the parties on this issue. Both parties are in agreement that no direct expropriation has taken place. The issue for the Tribunal to determine is then whether the measures adopted constitute an indirect or regulatory expropriation. The answer is of course not quite simple for indeed the measures have had an important effect on the business of the Claimant.

261. The Tribunal in the *Lauder* case rightly explained that

> "The concept of indirect (or *"de facto"*, or *"creeping"*) expropriation is not clearly defined. Indirect expropriation or nationalization is a measure that does not involve an overt taking, but that effectively neutralized the enjoyment of the property."[129]

262. The essential question is therefore to establish whether the enjoyment of the property has been effectively neutralized. The standard that a number of tribunals have applied in

deprivation. In the *Metalclad* case the tribunal held that this kind of expropriation relates to incidental interference with the use of property which has "the effect of depriving the owner, in whole or in significant part, of the use or reasonable-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."[130] Similarly, the Iran – United States Claims Tribunal has held that deprivation must affect "fundamental rights of ownership,"[131] a criteria reaffirmed in the *CME v. Czech Republic* case.[132] The test of interference with present uses and prevention of the realization of a reasonable return on investments has also been discussed by the Respondent in this context.[133]

263. Substantial deprivation was addressed in detail by the tribunal in the *Pope & Talbot* case.[134] The Government of Argentina has convincingly argued that the list of issues to be taken into account for reaching a determination on substantial deprivation, as discussed in that case, is not present in the instant dispute. In fact, the Respondent has explained, the investor is in control of the investment; the Government does not manage the day-to-day operations of the company; and the investor has full ownership and control of the investment.

264. The Tribunal is persuaded that this is indeed the case in this dispute and holds therefore that the Government of Argentina has not breached the standard of protection laid down in Article IV(1) of the Treaty.

265. It remains necessary to examine the extent of the interference caused by the measures on the Claimant's business operations under the other standards of the Treaty. This question will be addressed next by the Tribunal.

25. Has there been a Breach of Fair and Equitable Treatment?

266. The second substantive standard of protection provided to investors under the Treaty is that of fair and equitable treatment. Article II(2)(a) provides:

> "Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law."

267. Under this provision, the Claimant asserts that Argentina has breached the fair and equitable treatment standard and has not ensured full protection and security to the investment, particularly insofar as it has profoundly altered the stability and predictability of the investment environment, an assurance that was key to its decision to invest. The Claimant cites a number of distinguished writers and decisions pointing out the significance of this particular requirement, with particular reference to the *CME* case, where it was held that

> "[The Government] breached its obligation of fair and equitable treatment by evisceration of the arrangements in reliance upon [which] the foreign investor was induced to invest."[135]

268. The Claimant also relies on the following finding of the tribunal in the *Técnicas Medioambientales Tecmed, S.A. v. Mexico* case to the effect that fair and equitable treatment:

> "…requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment…"[136]

269. According to the Claimant's argument, the uncertainty characterizing the period 2000 – 2002 and the final determinations under the Emergency Law that dismantled all the arrangements in reliance on which the investment had been made, are the main events that resulted in the breach of this standard.

270. In the Respondent's view, the standard of fair and equitable treatment is too vague to allow for any clear identification of its meaning and, in any event, it only provides for a general and basic principle found in the law of the host State which at the same time is compatible with an international minimum standard. A deliberate intention to ignore an obligation or even bad faith would be required to breach the standard, the argument adds.

271. The Respondent argues next that the standard is not different from the international minimum standard, citing to this effect a number of authors and cases and in particular the tribunal's holding in the *Robert Azinian and others v. Mexico* case that an "investor should not be dealt with in a manner that contravenes international law."[137] The *Pope & Talbot* case is also discussed by the Respondent in this context, explaining that in spite of the fact that it opted for a NAFTA standard additional to or higher than that of customary international law it still based its test on equity, justice and reasonableness.[138]

272. Argentina believes that none of the measures adopted breaches the standard or for that matter international law as the legislative prerogatives of the State cannot be frozen in time and the Emergency Law is just one such exercise of its prerogative. In the Respondent's view, stability does not mean immobilization and the measures adopted, particularly the "pesification", were the solution necessary to prevent greater social damage and poverty. It is further argued that there is ample precedent upholding the legality of devaluation, both under

in the 1930s. It is also asserted that the Claimant has not proved any damage in connection with its allegation of breach of this standard and the compensation claimed under this item cannot in any way be assimilated to that corresponding to expropriation, as the Claimant requests.

273. The key issue that the Tribunal has to decide is whether the measures adopted in 2000 – 2002 breached the standard of protection afforded by Argentina's undertaking to provide fair and equitable treatment. The Treaty, like most bilateral investment treaties, does not define the standard of fair and equitable treatment and to this extent Argentina's concern about it being somewhat vague is not entirely without merit.

274. The Treaty Preamble makes it clear, however, that one principal objective of the protection envisaged is that fair and equitable treatment is desirable "to maintain a stable framework for investments and maximum effective use of economic resources." There can be no doubt, therefore, that a stable legal and business environment is an essential element of fair and equitable treatment.

275. The measures that are complained of did in fact entirely transform and alter the legal and business environment under which the investment was decided and made. The discussion above, about the tariff regime and its relationship with a dollar standard and adjustment mechanisms unequivocally shows that these elements are no longer present in the regime governing the business operations of the Claimant. It has also been established that the guarantees given in this connection under the legal framework and its various components were crucial for the investment decision.

276. In addition to the specific terms of the Treaty, the significant number of treaties, both bilateral and multilateral, that have dealt with this standard also unequivocally shows that fair and equitable treatment is inseparable from stability and predictability. Many arbitral decisions and scholarly writings point in the same direction.[139]

277. It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dispensed with altogether when specific commitments to the contrary have been made. The law of foreign investment and its protection has been developed with the specific objective of avoiding such adverse legal effects.

278. It was held by the Tribunal in the *Metalclad* case that Mexico had in several ways failed to provide a

> "…predictable framework for Metalclad's business planning and investment. The totality of these circumstances demonstrate a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly…"[140]

279. So too the Tribunal in the *Técnicas Medioambientales* case has held in this respect:

> "The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations…"[141]

280. The Tribunal believes this is an objective requirement unrelated to whether the Respondent has had any deliberate intention or bad faith in adopting the measures in question. Of course, such intention and bad faith can aggravate the situation but are not an essential element of the standard.

281. The Tribunal, therefore, concludes against the background of the present dispute that the measures adopted resulted in the objective breach of the standard laid down in Article II(2)(a) of the Treaty.

282. There is one additional aspect the Tribunal must examine having heard the arguments of the parties. That is whether the standard of fair and equitable treatment is separate and more expansive than that of customary international law, as held by the tribunal in *Pope and Talbot*, or whether it is identical with the customary international law minimum standard, as argued by Argentina.

283. The Tribunal is mindful of the discussion prompted by these arguments, particularly with reference to the NAFTA Free Trade Commission's Note of Interpretation identifying the fair and equitable treatment standard with that of customary international law.[142] This development has led to further treaty clarifications as in the Chile – United States Free Trade Agreement.[143]

284. While the choice between requiring a higher treaty standard and that of equating it with the international minimum standard might have relevance in the context of some disputes, the Tribunal is not persuaded that it is relevant in this case. In fact, the Treaty standard of fair and equitable treatment and its connection with the required stability and

commitments, is not different from the international law minimum standard and its evolution under customary law.

26. Has there Been Arbitrariness and/or Discrimination?

285. Article II(2)(b) of the Treaty provides that

> "Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments."

286. The Claimant invokes the test defined in the *Pope and Talbot* case, and asserts that because the measures adopted are opposed to the rule of law or surprise a sense of judicial propriety, it follows that there has been arbitrary treatment of the investor and hence the Treaty standard has been breached. In the Claimant's view, dismantling the whole legal framework of the gas industry is contrary to any reasonable expectation.

287. The Claimant further asserts that such measures are discriminatory because they result in a dissimilar treatment of investors in similar situations, in accordance with the test defined in the *Goetz v. Burundi* case.[144] In particular, the Claimant explains that other public services relying on dollar-based tariffs, such as telephone companies, water distribution enterprises, banks, waterway transportation companies and other businesses, and significantly, the gas producers, have all been treated in a more favorable manner.[145] It is also argued that discrimination does not relate exclusively to nationality and can result from the compulsory transfer of resources of one economic agent or sector to another, as has happened in the Argentine economy.

288. The Respondent rejects such considerations and argues that the measures adopted were reasonable and proportional to the objective pursued. It is argued, following the findings in the *ELSI* case, that discrimination requires intentional treatment in favor of a national and to the detriment of a foreign investor, a treatment that does not apply to other nationals in a similar situation.[146] The *Genin v. Estonia* case is also invoked by the Respondent to the effect that discrimination and arbitrariness require bad faith or a willful disregard of due process of law.[147]

289. The Respondent also asserts, following Professor Schachter, that arbitrariness can in no case be used to describe legislation to carry out economic, social or political objectives.[148] In any event, it is argued, the standard provides that discrimination is forbidden in respect of similarly situated groups or categories of people, which is not the case in respect of the gas industry. Neither, in the Respondent's view, is there any discrimination based on nationality, this being the only one envisaged by the prohibition under international law.

290. The standard of protection against arbitrariness and discrimination is related to that of fair and equitable treatment. Any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment. The standard is next related to impairment: the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of the investment must be impaired by the measures adopted.

291. In the *Lauder* case, an equivalent provision of the pertinent investment treaty was explained in accordance with the definition of "arbitrary" in Black's Law Dictionary, which states that an arbitrary decision is one "depending on individual discretion; … founded on prejudice or preference rather than on reason or fact."[149]

292. This Tribunal is not persuaded by the Claimant's view about arbitrariness because there has been no impairment, for example, in respect of the management and operation of the investment. Admittedly, some adverse effects can be noted in respect of other matters, such as the use, expansion or disposal of the investment, which since the measures were adopted have been greatly limited. To the extent that such effects might endure, the test applied in the *Lauder* case becomes relevant and could result in a factor reinforcing the related finding of a breach of fair and equitable treatment.

293. The situation in respect of discrimination is somewhat similar. The Respondent's argument about discrimination existing only in similarly situated groups or categories of people is correct, and no discrimination can be discerned in this respect. Admittedly, it is quite difficult to establish whether that similarity exists only in the context of the gas transportation and distribution industry or extends to other utilities as well.

294. Be that as it may, the fact is that to the extent that the measures persisted beyond the crisis, the differentiation between various categories or groups of businesses becomes more difficult to explain. Indeed, the Government of Argentina has successfully concluded renegotiations and other arrangements with a number of industries and businesses equally protected by guarantees of investment treaties. This includes the gas producers, but not the transportation and distribution side of the industry. The gas producers have been allowed to proceed to a gradual tariff adjustment to be completed by mid-2005.[150] The longer the differentiation is kept the more evident the issue becomes, thus eventually again reinforcing the related finding about the breach of fair and equitable treatment.

295. The Tribunal, therefore, cannot hold that arbitrariness and discrimination are present

relate rather to the breach of fair and equitable treatment than to the breach of separate standards under the Treaty.

27. Has the Protection under the Umbrella Clause been Breached?

296. The Claimant invokes yet another ground on which the protection and guarantees of the Treaty have been breached by the Respondent, as under Article II(2)(c) of the Treaty which provides that each party "shall observe any obligation it may have entered into with regard to investments."

297. The Claimant argues in this respect that all the commitments made by Argentina towards the investment, whether under the legislation in force or contractual arrangements, have been breached as a result of the measures adopted and particularly the dismantling of the tariff regime and related matters. Therefore, the argument follows, the umbrella clause of the Treaty has also been breached.

298. In the Respondent's view, first of all no commitments were made under the law, and those that were made under the License were purely contractual. Following the *Azinian* case in respect of concessions contracts,[151] and the *Genin*[152] and *SGS v. Pakistan* cases in respect of Licenses,[153] the Respondent argues that not all contract breaches amount to treaty breaches and hence cannot be protected under a clause of this kind. In any event, it is asserted that the Claimant can invoke no rights or commitments under the License as these concern only TGN.

299. The Tribunal will not discuss the jurisdictional aspects involved in the Respondent's argument, as these were dealt with in the decision on jurisdiction. Regarding the merits of

contract breaches result in breaches of the Treaty. The standard of protection of the treaty will be engaged only when there is a specific breach of treaty rights and obligations or a violation of contract rights protected under the treaty. Purely commercial aspects of a contract might not be protected by the treaty in some situations, but the protection is likely to be available when there is significant interference by governments or public agencies with the rights of the investor.

300. This discussion has been, to an important extent, clarified in recent decisions of arbitral tribunals having to deal with the issue of contract and treaty claims. This is particularly so in the *Lauder v. Czech Republic*, *Genin v. Estonia*, *Aguas del Aconquija v. Argentina*,[154] *Azurix v. Argentina*,[155] *SGS v. Pakistan*, *SGS v. Philippines*[156] and *Joy Mining v. Egypt* cases,[157] among others. In these decisions, commercial disputes arising from a contract have been distinguished from disputes arising from the breach of treaty standards and their respective causes of action.

301. None of the measures complained of in this case can be described as a commercial question as they are all related to government decisions that have resulted in the interferences and breaches noted.

302. While many, if not all, such interferences are closely related to other standards of protection under the Treaty, there are in particular two stabilization clauses contained in the License that have significant effect when it comes to the protection extended to them under the umbrella clause. The first is the obligation undertaken not to freeze the tariff regime or subject it to price controls.[158] The second is the obligation not to alter the basic rules governing the License without TGN's written consent.[159]

303. The Tribunal must therefore conclude that the obligation under the umbrella clause of Article II(2)(c) of the Treaty has not been observed by the Respondent to the extent that legal and contractual obligations pertinent to the investment have been breached and have resulted in the violation of the standards of protection under the Treaty.

D. State of Necessity Contended in the Alternative

304. The Government of Argentina has contended in the alternative that in the event the Tribunal should come to the conclusion that there was a breach of the Treaty the Respondent should be exempted from liability in light of the existence of a state of necessity or state of emergency.[160] *Force majeure*, emergency and other terms have also been used by the Respondent in this context.

305. This contention is founded on the severe economic, social and political crisis described above and on the belief that the very existence of the Argentine State was threatened by the events that began to unfold in 2000. The Respondent asserts in this respect that economic interest qualifies as an essential interest of the State when threatened by grave and imminent peril.

306. It is argued that the Emergency Law was enacted with the sole purpose of bringing under control the chaotic situation that would have followed the economic and social collapse that Argentina was facing. State of necessity based on this crisis would exclude, in the Respondent's argument, any wrongfulness of the measures adopted by the government and in particular would rule out compensation.

307. In support of its argument the Respondent invokes first the existence of the state of necessity under Argentine law and its acceptance under the Constitution and the decisions of courts. The Tribunal has already discussed the meaning of the state of necessity and the state of emergency under Argentine law and its interpretation by the Supreme Court, with particular reference to its temporary nature and the requirement not to upset the rights acquired by contract or judicial decision. These issues will not be discussed here again.

308. The Respondent has also invoked in support of its contention the existence of a state of necessity under both customary international law and the provisions of the Treaty. In so doing, the Respondent has raised one fundamental issue in international law.

28. The Respondent's View of the State of Necessity under Customary International Law

309. The Respondent has mainly based its argument on this question on the ruling of the International Court of Justice in the *Gabcíkovo-Nagymaros* case which held that the state of necessity is recognized by customary international law for "precluding the wrongfulness of an act not in conformity with an international obligation."[161]

310. The *French Company of Venezuelan Railroads* case is invoked so as to justify that the government's duty was to itself when its "own preservation is paramount."[162] Further support is found in the *Dickson Car Wheel Co.* case where it was decided that the "foreigner, residing in a country which by reasons of natural, social or international calamities is obliged to adopt these measures, must suffer the natural detriment to his affairs without any remedy, since Governments …are not insurers against every event."[163]

311. In addition to the discussion of these and other cases, the Government of Argentina also relies on the work of the International Law Commission under the leadership of the Special Rapporteurs F. V. García-Amador, Roberto Ago and James Crawford. In particular the Respondent argues that it meets the criteria set out in Article 25 of the Articles on International Responsibility.[164] The specific terms of Article 25 will be discussed further below.

312. In the Respondent's view the Argentine State was not only facing grave and imminent peril affecting an essential interest, but it did not contribute to the creation of the state of necessity in a substantive way. This situation, it is argued, was prompted for the most part by exogenous factors. It is further asserted that the measures adopted, particularly the pesification of contractual relations, were the only measures capable of safeguarding the essential economic interests affected. By introducing the measures, the Respondent argues, the essential interests of another State that was a beneficiary of the obligation breached or, for that matter, those of the international community as a whole were not affected and foreign investors were also not treated in a discriminatory manner.

29. The Claimant's View of the State of Necessity Under Customary International Law

313. The Claimant first argues in connection with the state of necessity that the Respondent has not met the heavy burden of proof required by the International Court of Justice in the *Gabcíkovo-Nagymaros* case. The Claimant notes that the Court made reference to the work and views of the International Law Commission insofar the latter explained that "…the state of necessity can only be invoked under certain strictly defined conditions which must be

cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met… …Those conditions reflect customary international law." [165]

314. The Claimant asserts next that neither has the Respondent complied with the conditions set down for the operation of state of necessity under Article 25 of the Articles on State Responsibility. In the Claimant's view, severe as the crisis was, it did not involve "grave" or "imminent" peril nor has it been established that the Respondent State did not contribute to the emergency as most of the causes underlying the crisis were endogenous. Moreover, it is asserted that the Respondent has not shown that the measures adopted were the only means available to overcome the crisis.

30. The Tribunal's Findings in Respect of the State of Necessity under Customary International Law

315. The Tribunal, like the parties themselves, considers that Article 25 of the Articles on State Responsibility adequately reflect the state of customary international law on the question of necessity. This Article, in turn, is based on a number of relevant historical cases discussed in the Commentary,[166] with particular reference to the *Caroline*,[167] the *Russian Indemnity*,[168] *Société Commerciale de Belgique*,[169] the *Torrey Canyon*[170] and the *Gabcíkovo-Nagymaros* cases.

316. Article 25 reads as follows:

"1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole;

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) the international obligation in question excludes the possibility of invoking necessity; or

(b) the State has contributed to the situation of necessity."

317. While the existence of necessity as a ground for precluding wrongfulness under international law is no longer disputed, there is also consensus to the effect that this ground is an exceptional one and has to be addressed in a prudent manner to avoid abuse. The very opening of the Article to the effect that necessity "may not be invoked" unless strict conditions are met, is indicative of this restrictive approach of international law. Case law, state practice and scholarly writings amply support this restrictive approach to the operation of necessity.[171] The reason is not difficult to understand. If strict and demanding conditions are not required or are loosely applied, any State could invoke necessity to elude its international obligations. This would certainly be contrary to the stability and predictability of the law.

318. The Tribunal must now undertake the very difficult task of finding whether the Argentine crisis meets the requirements of Article 25, a task not rendered easier by the wide variety of views expressed on the matter and their heavy politicization. Again here the

simply to establish whether the breach of the Treaty provisions discussed is devoid of legal consequences by the preclusion of wrongfulness.

319. A first question the Tribunal must address is whether an essential interest of the State was involved in the matter. Again here the issue is to determine the gravity of the crisis. The need to prevent a major breakdown, with all its social and political implications, might have entailed an essential interest of the State in which case the operation of the state of necessity might have been triggered. In addition, the plea must under the specific circumstances of each case meet the legal requirements set out by customary international law.

320. In the instant case, the Respondent and leading economists are of the view that the crisis was of catastrophic proportions; other equally distinguished views, however, tend to qualify this statement. The Tribunal is convinced that the crisis was indeed severe and the argument that nothing important happened is not tenable. However, neither could it be held that wrongfulness should be precluded as a matter of course under the circumstances. As is many times the case in international affairs and international law, situations of this kind are not given in black and white but in many shades of grey.

321. It follows that the relative effect that can be reasonably attributed to the crisis does not allow for a finding on preclusion of wrongfulness. The Respondent's perception of extreme adverse effects, however, is understandable, and in that light the plea of necessity or emergency cannot be considered as an abuse of rights as the Claimant has argued.

322. The Tribunal turns next to the question whether there was in this case a grave and imminent peril. Here again the Tribunal is persuaded that the situation was difficult enough

of total economic collapse. But neither does the relative effect of the crisis allow here for a finding in terms of preclusion of wrongfulness.

323. A different issue, however, is whether the measures adopted were the "only way" for the State to safeguard its interests. This is indeed debatable. The views of the parties and distinguished economists are wide apart on this matter, ranging from the support of those measures to the discussion of a variety of alternatives, including dollarization of the economy, granting of direct subsidies to the affected population or industries and many others. Which of these policy alternatives would have been better is a decision beyond the scope of the Tribunal's task, which is to establish whether there was only one way or various ways and thus whether the requirements for the preclusion of wrongfulness have or have not been met.

324. The International Law Commission's comment to the effect that the plea of necessity is "excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient," is persuasive in assisting this Tribunal in concluding that the measures adopted were not the only steps available.[172]

325. A different condition for the admission of necessity relates to the requirement that the measures adopted do not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. As the specific obligations towards another State are embodied in the Treaty, this question will be examined in the context of the applicable treaty provisions. It does not appear, however, that the essential interest of the international community as a whole was affected in any relevant way, nor that a peremptory norm of international law might have been compromised, a situation

326. In addition to the basic conditions set out under paragraph 1 of Article 25, there are two other limits to the operation of necessity arising from paragraph 2. As noted in the Commentary, the use of the expression "in any case" in the opening of the text means that each of these limits must be considered over and above the conditions of paragraph 1.[173]

327. The first such limit arises when the international obligation excludes necessity, a matter which again will be considered in the context of the Treaty.

328. The second limit is the requirement for the State not to have contributed to the situation of necessity. The Commentary clarifies that this contribution must be "sufficiently substantial and not merely incidental or peripheral". In spite of the view of the parties claiming that all factors contributing to the crisis were either endogenous or exogenous, the Tribunal is again persuaded that similar to what is the case in most crises of this kind the roots extend both ways and include a number of domestic as well as international dimensions. This is the unavoidable consequence of the operation of a global economy where domestic and international factors interact.

329. The issue, however, is whether the contribution to the crisis by Argentina has or has not been sufficiently substantial. The Tribunal, when reviewing the circumstances of the present dispute, must conclude that this was the case. The crisis was not of the making of one particular administration and found its roots in the earlier crisis of the 1980s and evolving governmental policies of the 1990s that reached a zenith in 2002 and thereafter. Therefore, the Tribunal observes that government policies and their shortcomings significantly

contributed to the crisis and the emergency and while exogenous factors did fuel additional difficulties they do not exempt the Respondent from its responsibility in the matter.

330. There is yet another important element which the Tribunal must take into account. The International Court of Justice has in the *Gabcíkovo-Nagymaros* case convincingly referred to the International Law Commission's view that all the conditions governing necessity must be "cumulatively" satisfied.[174]

331. In the present case there are, as concluded, elements of necessity partially present here and there but when the various elements, conditions and limits are examined as a whole it cannot be concluded that all such elements meet the cumulative test. This in itself leads to the inevitable conclusion that the requirements of necessity under customary international law have not been fully met so as to preclude the wrongfulness of the acts.

31. The Emergency Clause of the Treaty

332. The discussion on necessity and emergency is not confined to customary international law as there are also specific provisions of the Treaty dealing with this matter. Article XI of the Treaty provides:

> "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."

333. Article IV(3) of the Treaty reads as follows:

> "Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the more favorable treatment, as regards any measures it adopts in relation to such losses."

334. The meaning and extent of these clauses has prompted an important debate between the parties and the legal experts requested by them to discuss the issue, namely Dean Anne-Marie Slaughter and Professor José E. Alvarez.

335. The Tribunal will now consider the views of the parties and the experts on this matter, beginning with those of the Claimant.

32. The Claimant's View of the Treaty's Emergency Clauses

336. The Claimant argues that the Treaty clauses provide very narrow and specific exceptions to liability that do not allow the Respondent to invoke the operation of the state of necessity or emergency.

337. The Claimant asserts first that under Article 25(2) of the Articles on State Responsibility necessity may not be invoked if the international obligation in question excludes the possibility of invoking necessity. This, in the Claimant's view, is the case here

circumstances of economic difficulty, exclude reliance on such difficulties for non-performance of the obligations established under the Treaty. Moreover, the Claimant argues, both under the Treaty umbrella clause embodied in Article II(2)(c) and Article X the Respondent has the duty to observe obligations entered into with regard to investments.

338. The Claimant invokes in support of its views the *Himpurna* case where *force majeure* was not accepted as precluding the wrongfulness of acts of devaluation and the contractual obligations were upheld even in circumstances of economic adversity.[175] *Socobelge*,[176] on which the *Himpurna* tribunal relied in part, is also invoked by the Claimant as an example of contract enforcement in spite of an economic crisis. To the same effect the Claimant invokes the *Martini* case.[177]

339. In connection with the specific clause of Article XI of the Treaty the Claimant, following the expert opinion of Professor José E. Alvarez, argues first that this clause is not self-judging, and therefore requires the Tribunal and not the Respondent to decide when or to what extent essential security interests were at stake. The Claimant makes the further point that if the State were to have discretion in this regard, such discretion should be provided expressly. Provisions of this kind include Article XXI of the GATT as well as provisions in the bilateral investment treaties concluded by the United States with Russia[178] and with Bahrain.[179] It is further affirmed, that this requirement was also the conclusion of the International Court of Justice in the *Nicaragua* case,[180] and the *Oil Platforms* case.[181]

340. The Claimant argues next that economic crises do not fall within the concept of "essential security interests," which is limited to war, natural disaster and other situations threatening the existence of the State. In its view, this is also the meaning of Article 25 of the

Articles on State Responsibility, the interpretation given to Article XXI of the GATT and the scope of the *Russian Indemnity* case.

341. A third argument made by the Claimant is that, in any event, Article XI does not exempt the Respondent from liability as this provision does not allow for the denial of benefits under the Treaty.

342. The Claimant discusses in this context the meaning of Article IV(3) of the Treaty which, it is argued, is not intended to reduce the obligations of the host state to investors but rather to reinforce such obligations, and cannot be read to include economic emergency. The ICSID cases *American Manufacturing v. Zaire*[182] and *AAPL v. Sri Lanka*[183] are invoked as precedents supporting this interpretation.

343. It is further argued in this regard that even if the Article were to include economic difficulties the Claimant would still be entitled to full protection under the most favored nation clause (MFNC) of both Articles II(1) and IV(3) of the Treaty, and certainly nothing less than the treatment local investors or those from other countries have received from the Respondent. The MFNC is also invoked in support of the argument that other bilateral investment treaties concluded by the Respondent do not contain provisions similar to Article XI and thus the Claimant is entitled to the better treatment resulting from the absence of such exceptions.

33. The Respondent's View of the Treaty's Emergency Clauses

344. Articles IV(3) and XI of the Treaty provide, in the Respondent's view, for the *lex*

maintain public order, protect its essential security interests and reestablish its connections with the international economic system, all with a view to granting investors treatment not less favorable than that granted to nationals.

345. The Respondent argues first that the object and purpose of the Treaty do not exclude the operation of necessity or emergency, which are expressly provided for in periods of distress. To this effect, the Respondent further argues, the decisions invoked by the Claimant in support of its views are not relevant to the present case.

346. The Respondent particularly rejects the reliance by the Claimant on the tribunal's decision in the *Himpurna* case. The Claimant invoked that decision to draw a comparison with the Indonesian crisis and to show that the tribunal in that case had held that necessity was excluded by specific commitments undertaken by contract and treaty. The present dispute, the Respondent argues, has emerged under circumstances very different from those that prevailed in Indonesia and the *Himpurna* case in no way contradicts the position taken by Argentina in light of extraordinary circumstances.

347. The Respondent also rejects the relevance of the situation of Greece in the 1930s as taken into account in the decision in the *Socobelge* case. This decision was also invoked by the Claimant to show that the obligations under a contract were upheld in spite of financial hardship, in the case of Greece. The Respondent believes the Argentine crisis to have been much worse and deeper and that *force majeure* as discussed in that case was held to be beyond the powers of the Permanent Court of International Justice.

348. As to the *Martini* case, invoked by the Claimant as an example of state of necessity

enforced, the Respondent does not consider it relevant to the present case as it did not deal with a case of institutional abnormality.

349. The expert opinions of Dean Anne Marie Slaughter, introduced by the Respondent on December 15, 2003 and June 23, 2004, elaborate on the meaning and the coverage of the relevant Treaty articles. It is first asserted in this respect that Article XI of the Treaty needs to be interpreted broadly and this in fact was the intention of the parties.

350. Since the very outset of the United States' model bilateral investment treaties it has been apparent, in the expert's view, that this country desired to safeguard certain sovereign interests by means of "non-precluded measures" such as those of Article XI. This trend was strengthened after the decision in the *Nicaragua* case which held that similar provisions of another treaty could not be understood to be self-judging. At the time the Treaty was signed with Argentina, it is further argued, this trend had become manifest as evidenced by the treaties negotiated with other countries and debates in the United States Congress.

351. On the basis of the principle of reciprocity, it is explained next, Argentina should be accorded the benefit of a similar understanding when invoking necessity and emergency. The self-judging character of these provisions, in the expert's view, should not be understood as precluding their submission to arbitration as the Tribunal must determine whether Article XI applies and whether measures taken thereunder comply with the requirements of good faith.

352. The expert's opinions also emphasize that security interests include economic security, particularly in the context of a crisis as severe as that of Argentina, and that, as in many instances of *force majeure*, the State should be released from treaty obligations. It is

held, moreover, that the Claimant has not been treated differently from nationals or other investors under Article IV(3) of the Treaty.

34. The Tribunal's Findings in Respect of the Treaty's Clauses on Emergency

353. The first issue the Tribunal must determine is whether the object and purpose of the Treaty exclude necessity. There are of course treaties designed to be applied precisely in the case of necessity or emergency, such as those setting out humanitarian rules for situations of armed conflict. In those cases, as rightly explained in the Commentary to Article 25 of the Articles on State Responsibility, the plea of necessity is excluded by the very object and purpose of the treaty.[184]

354. The Treaty in this case is clearly designed to protect investments at a time of economic difficulties or other circumstances leading to the adoption of adverse measures by the Government. The question is, however, how grave these economic difficulties might be. A severe crisis cannot necessarily be equated with a situation of total collapse. And in the absence of such profoundly serious conditions it is plainly clear that the Treaty will prevail over any plea of necessity. However, if such difficulties, without being catastrophic in and of themselves, nevertheless invite catastrophic conditions in terms of disruption and disintegration of society, or are likely to lead to a total breakdown of the economy, emergency and necessity might acquire a different meaning.

355. As stated above, the Tribunal is convinced that the Argentine crisis was severe but did not result in total economic and social collapse. When the Argentine crisis is compared to other contemporary crises affecting countries in different regions of the world it may be noted

obligations. Renegotiation, adaptation and postponement have occurred but the essence of the international obligations has been kept intact.

356. As explained above, while the crisis in and of itself might not be characterized as catastrophic and while there was therefore not a situation of *force majeure* that left no other option open, neither can it be held that the crisis was of no consequence and that business could have continued as usual, as some of the Claimant's arguments seem to suggest. Just as the Tribunal concluded when the situation under domestic law was considered, there were certain consequences stemming from the crisis. And while not excusing liability or precluding wrongfulness from the legal point of view they ought nevertheless to be considered by the Tribunal when determining compensation.

357. A second issue the Tribunal must determine is whether, as discussed in the context of Article 25 of the Articles on State Responsibility, the act in question does not seriously impair an essential interest of the State or States towards which the obligation exists. If the Treaty was made to protect investors it must be assumed that this is an important interest of the States parties. Whether it is an essential interest is difficult to say, particularly at a time when this interest appears occasionally to be dwindling.

358. However, be that as it may, the fact is that this particular kind of treaty is also of interest to investors as they are specific beneficiaries and for investors the matter is indeed essential. For the purpose of this case, and looking at the Treaty just in the context of its States parties, the Tribunal concludes that it does not appear that an essential interest of the State to which the obligation exists has been impaired, nor have those of the international community as a whole. Accordingly, the plea of necessity would not be precluded on this

359. The third issue the Tribunal must determine is whether Article XI of the Treaty can be interpreted in such a way as to provide that it includes economic emergency as an essential security interest. While the text of the Article does not refer to economic crises or difficulties of that particular kind, as concluded above, there is nothing in the context of customary international law or the object and purpose of the Treaty that could on its own exclude major economic crises from the scope of Article XI.

360. It must also be kept in mind that the scope of a given bilateral treaty, such as this, should normally be understood and interpreted as attending to the concerns of both parties. If the concept of essential security interests were to be limited to immediate political and national security concerns, particularly of an international character, and were to exclude other interests, for example, major economic emergencies, it could well result in an unbalanced understanding of Article XI. Such an approach would not be entirely consistent with the rules governing the interpretation of treaties.

361. Again, the issue is then to establish how grave an economic crisis must be so as to qualify as an essential security interest, a matter discussed above.

362. It is true that Paragraph 6 of the Protocol attached to the Treaty qualifies the reference to maintenance or restoration of international peace and security as related to obligations under the Charter of the United Nations. Similarly, the letter of submission of the Treaty to Congress in Argentina and the Report of the pertinent Congressional Committee, refer in particular to situations of war, armed conflict or disturbance.[185] However, this cannot be read as excluding altogether other qualifying situations.

363. Since the Security Council assumes to be many times the law unto itself,[186] and since there is no specific mechanism for judicial review under the Charter, it is not inconceivable that in some circumstances this body might wish to qualify a situation of economic crisis as a threat to international peace and security and adopt appropriate measures to deal with a given situation. This would indeed allow for a broad interpretation of Article XI.

364. As explained by Professor Alvarez, in practice the Security Council has, to a limited extent, adopted decisions connecting economic measures with security matters, for example, in the formulation of the sanctions program enacted as a consequence of the 1991 Gulf War and other instances.[187] In such cases, it is explained, there could be a treaty breach under the authority of the Security Council. However, this sort of situation does not have to do with the present case.

365. It is also important to note that in Dean Slaughter's understanding of the reference to the United Nations in the Treaty Protocol, such clause should not be considered as self-judging to the extent that the issue relates to the maintenance or restoration of international peace and security, involving a broader understanding of the concept as opposed to a nation's own security interest. The latter would in her view allow for self-judging insofar as the security interest is not a part of the maintenance or restoration of international peace and security.[188] The question of the self-judging character of these provisions will be discussed next.

366. The fourth issue the Tribunal must determine is whether the rule of Article XI of the Treaty is self-judging, that is if the State adopting the measures in question is the sole arbiter of the scope and application of that rule, or whether the invocation of necessity, emergency or

367. As discussed above, three positions have emerged in this context. There is first that of the Claimant, supporting the argument that such a clause cannot be self-judging. There is next that of the Respondent, who believes that it is free to determine when and to what extent necessity, emergency or the threat to its security interests need the adoption of extraordinary measures. And third, there is the position expressed by Dean Slaughter to the effect that the Tribunal must determine whether Article XI is applicable particularly with a view to establishing whether this has been done in good faith.[189]

368. The Tribunal notes in this connection that, as explained by Dean Slaughter, the position of the United States has been evolving towards the support of self-judging clauses insofar as security interests are affected. This policy emerged after the *Nicaragua* decision, which will be discussed below, and was expressly included in the U.S. – Russia bilateral investment treaty, which has incidentally not been ratified. With some changes it was also included in the U.S. – Bahrain investment treaty, the precise meaning of which is debated by the experts. The GATT self-judging clause was also mentioned above. Other treaties have not included a self-judging clause but this again is debated by the experts, and in any event such policy would also be reflected in the 2004 U.S. Model bilateral investment treaty.

369. The discussion of these treaties in the U.S. Congress allows for a variety of interpretations but does not clearly support the conclusion that all such clauses are self-judging. The record shows that during the discussion of the first round of bilateral investment treaties in 1986 a proposal to allow for the termination of treaties in light of security needs was not accepted, although this discussion apparently did not address specifically the question of self-judging clauses. The expert discussion of the Exon-Florio law has also generated much debate on its meaning.[190]

370. The Tribunal is convinced that when States intend to create for themselves a right to determine unilaterally the legitimacy of extraordinary measures importing non-compliance with obligations assumed in a treaty, they do so expressly. The examples of the GATT and bilateral investment treaty provisions offered above are eloquent examples of this approach. The first does not preclude measures adopted by a party "which it considers necessary" for the protection of its security interests. So too, the U.S. – Russia treaty expressly confirms in a Protocol that the non-precluded measures clause is self-judging.

371. The International Court of Justice has also taken a clear stand in respect of this issue, twice in connection with the *Nicaragua* case and again in the *Oil Platforms* case noted above. Referring to the 1956 Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua, the Court held:

> "Article XXI defines the instances in which the Treaty itself provides for exceptions to the generality of its other provisions, but it by no means removes the interpretation and application of that article from the jurisdiction of the Court… The text of Article XXI of the Treaty does not employ the wording which was already to be found in Article XXI of the General Agreement on Tariffs and Trade. This provision of GATT, contemplating exceptions to the normal implementation of the General Agreement, stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action 'which it considers necessary for the protection of its essential security interests', in such fields as nuclear fission, arms, etc. The 1956 Treaty, on the contrary, speaks simply of 'necessary' measures, not of those considered by a party to be such."[191]

372. As explained above, in the *Gabcikovo-Nagymaros* case the International Court of Justice, referring to the work and views of the International Law Commission, notes the strict and cumulative conditions of necessity under international law and that "the State concerned is not the sole judge of whether those conditions have been met."[192]

373. In light of this discussion, the Tribunal concludes first that the clause of Article XI of the Treaty is not a self-judging clause. Quite evidently, in the context of what a State believes to be an emergency, it will most certainly adopt the measures it considers appropriate without requesting the views of any court.[193] However, if the legitimacy of such measures is challenged before an international tribunal, it is not for the State in question but for the international jurisdiction to determine whether the plea of necessity may exclude wrongfulness. It must also be noted that clauses dealing with investments and commerce do not generally affect security as much as military events do and, therefore, would normally fall outside the scope of such dramatic events.

374. The Tribunal must conclude next that this judicial review is not limited to an examination of whether the plea has been invoked or the measures have been taken in good faith. It is a substantive review that must examine whether the state of necessity or emergency meets the conditions laid down by customary international law and the treaty provisions and whether it thus is or is not able to preclude wrongfulness.

375. The Tribunal must still consider the question of the meaning and extent of Treaty Article IV(3) in light of the discussion noted above. The plain meaning of the Article is to provide a floor treatment for the investor in the context of the measures adopted in respect of the losses suffered in the emergency, not different from that applied to nationals or other

that any measures directed at offsetting or minimizing losses will be applied in a non-discriminatory manner.

376. As noted above, the Tribunal is satisfied that the measures adopted by the Respondent have not adversely discriminated against the Claimant.

377. Although the MFNC contained in the Treaty has also been invoked by the Claimant because other treaties done by Argentina do not contain a provision similar to that of Article XI, the Tribunal is not convinced that the clause has any role to play in this case. Thus, had other Article XI type clauses envisioned in those treaties a treatment more favorable to the investor, the argument about the operation of the MFNC might have been made. However, the mere absence of such provision in other treaties does not lend support to this argument, which would in any event fail under the *ejusdem generis* rule, as rightly argued by the Respondent.

378. The Tribunal must finally conclude in this section that the umbrella clauses invoked by the Claimant do not add anything different to the overall Treaty obligations which the Respondent must meet if the plea of necessity fails.

35. Temporary Nature of Necessity

379. The Tribunal is also mindful that Article 27 of the Articles on State Responsibility provides that the invocation of a circumstance precluding wrongfulness is without prejudice to "(a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists."

380. The temporary nature of necessity is thus expressly recognized and finds support in the decisions of courts and tribunals. The Commentary cites in this connection the *Rainbow Warrior*[194] and *Gabcikovo-Nagymaros* cases. In this last case the International Court of Justice held that as soon "as the state of necessity ceases to exist, the duty to comply with treaty obligations revives."[195]

381. This does not appear to be contested by the parties as various witness statements did in fact clearly establish that the crisis had been evolving toward normalcy over a period of time. The Claimant invokes to this effect the statements of Ambassador Remes Lenicov and Doctor Folgar, who explained how the crisis was subsiding by the end of 2002.[196] This was also the view of the Argentine Supreme Court and the *Procurador General* noted above. It may be observed that this positive trend continued to evolve thereafter.

382. Even if the plea of necessity were accepted, compliance with the obligation would reemerge as soon as the circumstance precluding wrongfulness no longer existed, which is the case at present.

36. Necessity and Compensation

383. Article 27 also expressly provides that any circumstance precluding wrongfulness is without prejudice to "(b) the question of compensation for any material loss caused by the act in question". Again this conclusion finds support in the *Gabcikovo-Nagymaros* case, where the Court noted that "Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner."[197]

384. This criterion was also the basis for the decisions in earlier cases, such as the *Compagnie Générale de l'Orinocco* case[198] and the *Properties of the Bulgarian Minorities in Greece* case[199] invoked by the Claimant, or the *Orr & Laubenheimer* case.[200] In these cases the concept of damages appears to have been broader than that of material loss in Article 27.

385. The Respondent has argued in this connection that the *Compagnie Générale de l'Orinocco* dealt with a totally different set of issues, all involving illicit acts, and is therefore not relevant to the present case. The Respondent further invokes the *Gould Marketing, Inc.* case, where the Iran-United States Tribunal held that injuries caused as a result of social and economic forces beyond the power of the State to control through due diligence are "not attributable to the state for purposes of its responding for damages."[201]

386. The Claimant, however, contends that "[i]n any event, Article XI does not exempt Argentina from liability," since it "provides only a temporary and limited suspension of benefits, and Argentina is still therefore obliged to provide compensation for the permanent losses [...]".[202] It recalls that the Treaty shows a difference between clauses that (a) "do not preclude or do not impede certain measures", (b) "permit a Party clearly to deny treaty benefits", or (c) "permit treaty termination"—Articles XI, I (2) and XIV (2), respectively.

387. Because the Argentine crisis, as explained above, gradually subsided, the Claimant asserts that "[e]ven assuming that at the beginning of 2002 Argentina was experiencing an emergency of the sort covered by Article XI, Argentina has not demonstrated that the crisis persists today. Argentina's measures promise to remain in effect indefinitely, and [...the Respondent] must therefore compensate CMS for the harm it has suffered, regardless of the applicability of Article XI."[203]

388. The Claimant's reasoning in this respect is supported by Article 27 and the decisions noted above, as well as by the principle acknowledged even in the generality of domestic legal systems: the plea of state of necessity may preclude the wrongfulness of an act, but it does not exclude the duty to compensate the owner of the right which had to be sacrificed. Still more stringent are the requirements of emergency under Argentine case law as discussed above.

389. The Respondent contends to the contrary that no compensation is due if the measures in question were undertaken in a state of necessity, under the rule contained in Article XI of the Treaty,[204] and that the norm which prescribes that the Parties shall avoid uneven treatment of investors does not otherwise establish a duty to compensate even if the investor had been submitted to unfair or unequal treatment.[205]

390. The Tribunal is satisfied that Article 27 establishes the appropriate rule of international law on this issue. The Respondent's argument is tantamount to the assertion that a Party to this kind of treaty, or its subjects, are supposed to bear entirely the cost of the plea of the essential interests of the other Party. This is, however, not the meaning of international law or the principles governing most domestic legal systems.

391. The Tribunal's conclusion is further reaffirmed by the record. At the hearing the Tribunal put the question whether there are any circumstances in which an investor would be entitled to compensation in spite of the eventual application of Article XI and the plea of necessity.[206]

392. The answer to this question by the Respondent's expert clarifies the issue from the

difficult to reach a determination as long as the crisis is unfolding, it is possible to envisage a situation in which the investor would have a claim against the government for the compliance with its obligations once the crisis was over; thereby concluding that any suspension of the right to compensation is strictly temporary, and that this right is not extinguished by the crisis events.[207]

393. The Tribunal also notes that, as in the *Gaz de Bordeaux* case, the International Law Commission's Commentary to Article 27 suggests that the States concerned should agree on the possibility and extent of compensation payable in a given case.[208]

394. It is quite evident then that in the absence of agreement between the parties the duty of the Tribunal in these circumstances is to determine the compensation due. This the Tribunal will do next.

E. Remedies

37. The Parties' Submissions

395. The Claimant has argued that its investment has been expropriated by the Respondent without prompt, adequate and effective compensation and that the_Respondent has also violated the standards of treatment set out in Article II of the Treaty. The Claimant requests the Tribunal to grant full compensation for these breaches in terms of recovering the fair market value of the investment calculated immediately before the date of expropriation, with interest paid at the rate of six-month certificates of deposit in the United States, compounded semi-annually. The Claimant also undertakes to relinquish title to its shares to the

396. To this end, the Claimant asserts that the fair market value is the price of an asset in a hypothetical market, which in the case of an income-producing asset or "going concern" is also the measure of future prospects. The discounted cash flow method (DCF) is favored, in the Claimant's view, in both international finance and international arbitration. It is also asserted that the relevant date of valuation in this case is August 17, 2000. Relying on the Report prepared by its expert, the Claimant submits that the fair market value at that date is US$ 261.1 million in the event that the Government of Argentina decides to take title to CMS' shares in TGN, or US$ 243.6 million in the event that title to the share remains with CMS.[209]

397. The Respondent objects to the dates and estimates used by the Claimant because it has chosen the worst moments of the crisis to undertake the downside valuation and has not taken into account the sharp decline of all the economic indicators for that period. The Respondent objects in particular to the assumption that no renegotiation will succeed and that the emergency will continue until 2037, as well as to the assumption that income and costs denominated in US dollars will not change. The Respondent also argues that the rate of exchange used between Argentine pesos and U.S. dollars in the valuation process is too high. Other issues raised by the Respondent have been examined above, such as debt restructuring, export tariffs and the duration of the license.

398. The Respondent also asserts that the DCF method is not appropriate and that it has resulted in gross overvaluation of the shares. In the Respondent's view, the discount rate used in the pesification scenario is also grossly exaggerated. The Respondent argues that a more accurate method is the stock exchange valuation of shares of similarly situated companies. It also asserts that what CMS paid for its shares in 1995 and 1999 was overvalued

by 50% and 26.53% respectively at the date of valuation chosen.[210] As noted above, the Respondent has not submitted its own valuation.

38. The Standards of Reparation under International Law

399. It is broadly accepted in international law that there are three main standards of reparation for injury: restitution, compensation and satisfaction.[211] As this is not a case of reparation due to an injured State, satisfaction can be ruled out at the outset.

400. Restitution is the standard used to reestablish the situation which existed before the wrongful act was committed,[212] provided this is not materially impossible and does not result in a burden out of proportion as compared to compensation. The Permanent Court of International Justice concluded in the landmark *Chorzow Factory* case that

> "restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."[213]

401. Compensation is designed to cover any "financially assessable damage including loss of profits insofar as it is established."[214] Quite naturally compensation is only called for when the damage is not made good by restitution.[215] The decision in *Lusitania*, another landmark case, held that "the fundamental concept of 'damages' is…reparation for a *loss* suffered; a judicially ascertained *compensation* for wrong. The remedy should be

402. The loss suffered by the claimant is the general standard commonly used in international law in respect of injury to property, including often capital value, loss of profits and expenses.[217] The methods to provide compensation, a number of which the parties have discussed, are not unknown in international law. Depending on the circumstances, various methods have been used by tribunals to determine the compensation which should be paid but the general concept upon which commercial valuation of assets is based is that of "fair market value." That concept has an internationally recognized definition which reads as follows:

> "the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arms length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts."[218]

403. In the case of a business asset which is quoted on a public market, that process can be a fairly easy one, since the price of the shares is determined under conditions meeting the above mentioned definition. However, it happens frequently that the assets in question are not publicly traded and it is then necessary to find other methods to establish fair market value. Four ways have generally been relied upon to arrive at such value. (1) The "asset value" or the "replacement cost" approach which evaluates the assets on the basis of their "break-up" or their replacement cost; (2) the "comparable transaction" approach which reviews comparable transactions in similar circumstances; (3) the "option" approach which studies the alternative uses which could be made of the assets in question, and their costs and benefits; (4) the "discounted cash flow" ("DCF") approach under which the valuation of the assets is arrived at by determining the present value of future predicted cash flows,

discounted at a rate which reflects various categories of risk and uncertainty.[219] The Tribunal will determine later which method it has chosen and why.

404. Decisions concerning interest also cover a broad spectrum of alternatives, provided it is strictly related to reparation and not used as a tool to award punitive damages or to achieve other ends.[220]

405. The Tribunal will now consider these various options in the light of the present dispute.

39. Restitution by Means of Negotiation

406. Restitution is by far the most reliable choice to make the injured party whole as it aims at the reestablishment of the situation existing prior to the wrongful act. In a situation such as that characterizing this dispute and the complex issues associated with the crisis in Argentina, it would be utterly unrealistic for the Tribunal to order the Respondent to turn back to the regulatory framework existing before the emergency measures were adopted, nor has this been requested. However, as the Tribunal has repeatedly stated in this Award, the crisis cannot be ignored and it has specific consequences on the question of reparation.

407. Just as an acceptable rebalancing of the contracts has been achieved by means of negotiation between the interested parties in other sectors of the Argentine economy, the parties are free to further pursue the possibility of reaching an agreement in the context of this dispute. As long as the parties were to agree to new terms governing their relations, this would be considered as a form of restitution as both sides to the equation would have

accepted that a rebalancing had been achieved. This was in fact the first major step for the settlement of the dispute in the *Gaz de Bordeaux* case.

40. Compensation

408. The Tribunal, however, cannot leave matters pending until an agreed settlement is reached; this is a matter strictly in the hands of the parties and its outcome is uncertain. In the absence of such agreed form of restitution, the Tribunal must accordingly determine the amount of compensation due.

41. The Applicable Standard

409. A first question the Tribunal needs to address is that of the standard of compensation applicable in the circumstances of this dispute. As was the situation in the *Feldman v. Mexico* case,[221] the Tribunal is faced with a situation where, absent expropriation under Article IV, the Treaty offers no guidance as to the appropriate measure of damages or compensation relating to fair and equitable treatment and other breaches of the standards laid down in Article II. This is a problem common to most bilateral investment treaties and other agreements such as NAFTA. The Tribunal must accordingly exercise its discretion to identify the standard best attending to the nature of the breaches found.

410. Unlike the circumstances in the *Feldman* case, however, the Tribunal is persuaded that the cumulative nature of the breaches discussed here is best dealt with by resorting to the standard of fair market value. While this standard figures prominently in respect of expropriation, it is not excluded that it might also be appropriate for breaches different from

because this is not a case of expropriation, the Claimant has offered to transfer its shares in TGN to the Argentine Republic, and the Tribunal will address this question in due course.

42. The Valuation Method to be Used

411. The Tribunal has concluded that the discounted cash flow method it the one that should be retained in the present instance.

412. First of all, the shares of TGN are not publicly traded on a stock exchange or any other public market. The Respondent has argued that, in order to estimate the value of TGN, reference should have been made to TGS, another natural gas transporter, and three other natural gas distributors which were listed on the Argentine stock exchange. However, as noted by Mr. Bello, "(…) market capitalization in illiquid markets as Argentina is not the most adequate method to value companies (…)".[222] Moreover, as noted also by Mr. Bello, there were significant differences between TGN and those companies regarding asset levels, business segments, financing policy, and other issues. In the circumstances, the Tribunal has come to the conclusion that this approach would not be appropriate.

413. As to the asset value approach, it would be inappropriate in the present circumstances. CMS is a minority shareholder in TGN which is an ongoing company with a record showing profits.

414. As to the comparable transaction approach, the Tribunal has not been provided with any significant evidence of such transactions and it would be a most speculative enterprise to try and determine the compensation due to CMS on that basis.

415. As to the option valuation method, it does not appear to be of any help in this case. TGN is a gas transportation company and it is very difficult to imagine what uses or options there could be for gas transmission lines other than to transport gas.

416. This leaves the Tribunal with the DCF method and it has no hesitation in endorsing it as the one which is the most appropriate in this case. TGN was and is a going concern; DCF techniques have been universally adopted, including by numerous arbitral tribunals, as an appropriate method for valuing business assets; as a matter of fact, it was used by ENARGAS in its 1996/7 tariff review. Finally, there is adequate data to make a rational DCF valuation of TGN.

417. The Tribunal also notes that in spite of the disagreement between the parties as to the appropriate application of the valuation method, experts from both sides have shared the view that DCF was the proper method in this case for determining losses that extend through a prolonged period of time.[223]

43. The Valuation of Damages

418. This leaves the Tribunal with the assessment of the damages claimed. In this task, the Tribunal was greatly helped by the submissions and the testimonies of the experts produced by the Parties in this case. As will be seen below, the Tribunal however is of the view that certain assumptions and arguments of those experts require some adjustments. In its study of those submissions and testimonies, the Tribunal was ably assisted by its own experts, Professors Jacques Fortin and Alix Mandron of the Ecole des Hautes Etudes Commerciales de Montreal. The Parties were informed of their appointment and given an opportunity to

comment on their analysis of the parties' expert submissions. Those comments were the subject of careful review by the Tribunal. The Tribunal wishes to express its gratitude to all the experts for their contribution.

419. In arriving at its own estimates of the value loss suffered by the Claimant, the Tribunal will discuss a number of points mentioned in the experts' reports which it questions. The word "estimates" is quite appropriate in trying to establish value loss in a case involving a license valid until 2027. This task is all the more challenging in that, in order to arrive at a value loss, it is necessary to evaluate not only what the years 2000 to 2027 would have been like had TGN's license and regulatory environment remained unchanged but also to foresee what the future holds for TGN under the new (and not completely known) regulatory environment. The uncertainty surrounding Argentina's future economic health, the exchange rate with the US dollar, the evolution of production costs, required future investments for the maintenance of the pipeline system's efficiency and security are only some of the factors to be taken into account.

420. This being said, such estimates need not be arbitrary or analogous to a shot in the dark; with the appropriate methodology and the use of reasonable alternative sets of hypotheses, it is possible to arrive at figures which represent a range of values which can be rationally justified, even though there is general agreement that their accurateness can only be fully assessed some 22 years later.

44. Methodology Used

421. As already stated, all the experts consulted on this matter agree that the best methodology to be used in a case like the one before the Tribunal is the discounted cash flow methodology and the Tribunal shares that conclusion.

422. As far as the parties are concerned, Mr. Wood-Collins is the only expert to have estimated the value loss suffered by CMS on its TGN's shares. In doing so, he used the forecasted figures prepared by TGN for internal use in 2000, in the context of an unchanged regulatory environment. From this basis, he produced two scenarios, one for the "no regulatory change" context (or "without pesification," as the Tribunal will describe it) and the other for the "new regulatory context" (or "with pesification"). The use of a company's internal forecast prepared in the normal course of business is quite acceptable as a starting point in the valuation of a company. The Tribunal sees no reason to reject it.

423. However, the Tribunal will wish to revisit some the more crucial assumptions contained in those scenarios, some of which were questioned in Mr. Bello's report. But before doing so, the Tribunal will address a preliminary issue raised by Mr. Bello concerning the capital structure of TGN and the opportunity for debt renegotiation.

45. Optimal Capital Structure and Debt Renegotiation

424. Mr. Bello has argued, both in his report and in his oral testimony, that an excessive level of debt was partly responsible for the precipitous drop in TGN's value, that TGN would

terms of an agreement with the lenders should be considered to compute the true value of CMS's share in TGN.

425. Mr. Bello's argument raises two questions: (1) whether or not the degree of indebtedness affected the size of the equity value loss; and (2) whether the issue of renegotiation needs to be considered in order to assess the equity value loss. The answer of the Tribunal to those two questions is in the negative.

426. As to the first question, the Tribunal believes that, even if TGN had maintained a much lower debt ratio than the 50.3% it had in 2000, its shares would have lost the same value because of Argentina's decision (in absolute terms, not in relative terms), except under extremely adverse circumstances. In fact, contrary to what Mr. Bello assumes, in extremely adverse situations, the absolute value loss is smaller, not higher, with a highly leveraged capital structure. It can easily be demonstrated that, in that case, the shareholders of such a company may suffer smaller absolute losses in adverse times (compared with the shareholders of a less leveraged company), because of their limited liability.

427. Since the problem at hand is not the percentage loss but the absolute value loss suffered by the Claimant as a shareholder, the issue of TGN's "excessive" leverage does not need to be considered. There is no firm ground to believe that the absolute change in value of those shares would have been smaller had TGN opted for less debt in its capital structure before 2000, quite the contrary.

428. Moreover, the evidence put before the Tribunal does not indicate that TGN's debt/equity ratio was significantly different from the one commonly found in pipeline

taken in this regard in the normal course of business. For the purpose of its analysis, the Tribunal will endorse the 50% debt/equity ratio adopted by Mr. Wood-Collins in his scenario.

429. As to the question of debt renegotiation, the Tribunal is also of the view that it can be ignored in the present case because, whichever way one looks at the future, shareholders will bear the consequences of the current default, except in the most improbable circumstances where the creditors would renounce repayments that had come due. The Tribunal cannot envisage such gross inefficiency or irrationality in the market. On the contrary, in the real world, creditors would require to be paid first, one way or the other, at the expense of the shareholders. Moreover, since the Claimant has offered to transfer its shares in TGN to the Respondent, upon payment of compensation, the Respondent would stand to benefit after the transfer of shares if, as argued by the Respondent, a favorable renegotiation were eventually to be concluded.

46. Computing the Value of Equity

430. There are two recognized ways of computing the value of a firm and its securities on a DCF basis. One can start computations with the cash flows to the firm before interest and debt repayments, discount such flows at the weighted average cost of capital (the "WACC") and add the discounted cash flows to the firm to establish its value; then, the value of debt is subtracted and the residual value is the value of equity ("the indirect equity value"). Alternatively, one can compute first the cash flows to equity (cash flows from operations, minus interest and debt repayments), discount them at the cost of equity ("COE") and add the discounted cash flows to equity to establish the value of equity ("the direct equity value"); then, one adds the value of debt to establish the value of the firm. The Tribunal has been

advised that, by and large, analysts have tended to favor the first method. This is the approach taken by Mr. Wood-Collins but he appears to have applied it in a circular way. Having computed the cash flows to equity and the cash flows to creditors, he then adds them up and discounts them at the weighted average cost of capital (the "WACC"); the sum of these discounted cash flows represents the value of the firm, from which the value of the debt is subtracted to arrive at the present value of equity. In fact, Mr. Wood-Collins goes from equity to debt to the firm and then back to equity.

431. The Tribunal does not see the need for this detour and shares the view of its own experts that having computed the cash flows to equity, Mr. Wood-Collins needed then only to discount them at the cost of equity ("COE") to obtain the present value of TGN's equity.

432. The distinction between the two methods of computing value is not a purely academic matter. In general, under the first method, the computed value is larger than under the second one, because the WACC implicitly assumes that shareholders and creditors will receive a proportional share (according to the weights included in the WACC) of the firm's cash flows. Such appears to be the case when cash flows to the firm are larger than, or equal to what the creditors are due and such was the result of the calculations made by Mr. Wood-Collins in this case, where the Tribunal has calculated, on the basis of Mr. Wood-Collins' hypotheses, a net difference of some USD$40 million between the two methods.

433. In making its own calculations, the Tribunal will use the second method (the direct equity value).

47. The Tribunal's Evaluation of Damages

434. Notwithstanding the reservations expressed above, the Tribunal is of the view that the general approach of Mr. Wood-Collins to the evaluation of damages suffered by the Claimant remains a valid one. However, as will be seen, the Tribunal will apply a number of changes to his assumptions.

435. Since the Tribunal was not provided with the algorithms sustaining the figures contained in the TGN forecast prepared in 2000, the Tribunal, with the help of its experts, has built its own model; it then tested its model by applying the same hypotheses as the ones embedded in Mr. Wood-Collins' forecasts of equity cash flows. The Tribunal obtained essentially the same results as Mr. Wood-Collins would have obtained, had he applied the direct equity valuation method to his own data.

436. From that model, the Tribunal tested a number of scenarios by changing different variables; the Tribunal focused on the most important determinants of value (as well as the main sources of uncertainty). Not surprisingly, depending on the choices of variables to which changes were made and the size of such changes, significantly disparate results were reached. Some, like a reduction of the discount rate under the "with pesification" scenario, produced a rather small decrease in value loss, if Mr. Wood-Collins' revenue forecast were maintained at the pessimistic level he has selected. However, as soon as modest rates of sales growth and an upward tariff revision every five years were assumed, the value loss was significantly decreased.

437. However, all other things being equal, assumptions about ENARGAS' tariff decisions and about additional investments and operations and maintenance costs under the "no pesification" case have an even larger impact.

438. Under the "no pesification" case, the crucial factors would have been ENARGAS' decisions about tariff revisions and investments. Under that scenario, the question is: "Would ENARGAS have lowered tariffs to keep the rate of return on equity within reasonable bounds?" In contrast, in the "pesification" case, the question is: "Would ENARGAS raise tariffs to provide shareholders with a positive return?" To a large extent, the estimate of value loss depends on the answer to these two questions.

48. The Modifications to Mr. Wood-Collins' Assumptions

i) The Duration of the Contract

439. For the reasons previously mentioned, the Tribunal has eliminated the ten year potential extension of the License to 2037. In the Tribunal's calculations, the License expires in 2027. Under the Tribunal's assumptions, this decision leads to a reduction by some US$ 10 million of the value loss suffered by CMS.

ii) The Reference Years for Valuation

440. Mr. Wood-Collins computes the changes in share value between August 2000 and May 2002 (in his first report) and December 2003 (in his second report). The Tribunal has concluded that, it would be more logical and mathematically correct to assess the value lost by shares as of a single date. Moreover, as a consequence of this decision, the large discrepancy noted between the TGN and Wood-Collins forecasted (US$ 73 million) and the

actual (US$ 36 million) capital expenditures for 2001 (a proportional discrepancy for 2002, 2003 and 2004 would be likely) becomes a non-issue; in using August 2000 as the reference point, all the investments budgeted are assumed to have taken place and "justify" the revenues forecast for all the years up to 2027. The negative drag crated by the "theoretical" investments is compensated by the boost caused by a long series of "theoretical" (boosted) revenues.

441. The Tribunal has concluded, in this regard, that the date to be relied upon for the computation of values (with and without pesification) will be August 17, 2000, the day before the Argentine court action referred to above was taken. In order to arrive at the value at that date under the pesification scenario, the Tribunal has used Mr. Wood-Collins' forecast for 2000-2002 under the without pesification scenario and subtracted the amount resulting from the non-indexation under PPI, as it appears in the relevant TGN Annual Reports & Accounts, non-indexation being the sole factor at play during that period.

iii) The Demand for Gas and Revenues

442. In discussing the demand for gas, the Tribunal has only addressed the issue of domestic sales. The export sales have been kept as forecasted by Mr. Wood-Collins.

443. Under the no pesification scenario, Mr. Wood-Collins assumes that the major economic crisis suffered by Argentina would have had no negative impact on the demand for gas transported by TGN and that there would be a 2.5% yearly increase until 2007 (a combination of increased volume, until the pipeline is fully utilized, and indexation to PPI) and then a regular 1.5% increase in prices (PPI adjustment) every year until the end of the license.

444. The Tribunal believes it would be inappropriate to assume that the demand for gas would have remained stable, had the tariffs been set in US dollars despite the economic crisis. CMS has argued that since at least some of its contracts were on ship-or-pay basis, its revenues would not have been affected by a reduction in demand; but, taking into account the magnitude of the crisis faced by Argentina, it would be highly unrealistic to assume that some adjustments to those ship-or-pay contracts would not have been made between the parties concerned. In any event, if such adjustments had not been made, the net result would have meant that the peso price of transportation would have more than tripled, with the consequential impact on the final consumer's bills and use of gas. Already, in its 2001 Annual Report & Accounts, TGN mentions that "The year 2001 was strongly influenced by Argentina's economic crisis which drove the company's production decrease and the postponement of investment in different industry sectors which resulted in a stagnation of consumption. Industrial and residential consumption decreased by 5% and 1.5% respectively as compared with the prior year." (p.32). Residential consumption representing only 22% of the gas transported by TGN,[224] the overall decline in domestic demand would have been around_4%. This was for 2001, the year during which the Argentine GDP declined by 4.4%[225] and while the application of the PPI was suspended. It is true that, between 2000 and 2001, the sales revenues remained stable but this was probably the result of an increase in export revenues. The GDP declined a further 10.9% in 2002.

445. It is difficult to believe that, with a tripling of the gas transportation costs under the no pesification scenario, there would not have been a further reduction in demand and/or a significant rise in delinquent accounts, with its consequent impact upon TGN's cash flows. To figure a more precise impact of such a situation upon the volume of gas transported by TGN, and on its revenues, studies of the Argentine elasticity of demand with respect to gas

446. The Tribunal has concluded that it is reasonable to assume that sales revenues would have decreased by 5% in each of 2002 and 2003 and by 1% in 2004. This would reflect the delayed impact of the decline of the Argentine GDP in 2001(-4.4%) and 2002 (-10.9%), somewhat mitigated by the maintenance of the non-pesification of export revenues which continued in addition to be adjusted to the PPI. On the other hand, in 2003 and 2004, the Argentine GDP rose significantly, by 8.8% and 7.8% respectively.[226] It would be normal that that turnaround would manifest itself in an increase in the industrial and residential demand for gas. Moreover, there would have been, by the end of 2004, an excess capacity of some 19% (6% original surplus capacity existing in 2001 plus 13% additional capacity created by the reduced demand between 2002 – 2004). The Tribunal is of the view that a gradual increase in demand over the following years would have taken place until full capacity would have been achieved in TGN's pipelines. The Tribunal has therefore forecasted an increase in sales of 3% in 2005, 6% in each of 2006, 2007and 2008, 4.5% in 2009, 3.5% in 2010 and 3% in 2011. This would allow for the full recuperation of the excess capacity in the gas transportation system of TGN. Thereafter, the sales would only increase by 1.5% each year under the PPI formula.

447. Then, under the pesification regime, Mr. Wood-Collins has assumed 0% increase in revenues until 2027. The Tribunal does not find this assumption realistic. While the price for gas would probably not have been adjusted during the crisis and the first few years following it, it is reasonable to assume that, with pesification, there would have been a gradual absorption of most of the surplus capacity in TGN's pipeline system. The Tribunal has therefore provided for a 1% yearly increase in sales revenues between 2003 and 2008 inclusive. Then, it is also fair to assume that, taking into account the rate of inflation in

notes that, although Argentina has known a decline to 4.4% of its rate of inflation in 2004, it had rates of 25.9% in 2002 and 13.4% in 2003.[227] While it is to be hoped that the declining trend will continue, there is obviously no guarantee to that effect.

448. In this regard, the Tribunal has introduced in its scenario, from 2008, a very moderate yearly increase of 1.5% in the tariff.

iv) The Exchange Rate

449. Under the pesification scenario, Mr. Wood-Collins has assumed a peso exchange rate to the US dollar of 3.59. This was indeed the rate prevalent at the time he did his first valuation in 2002, but there has been since then an appreciable improvement in the peso rate. For the last year, it has moved between 2.90 and 2.97. In these circumstances, the Tribunal has concluded that it would be appropriate to fix an exchange rate of 2.97 as fairly representative of what the value of the peso could be expected to be in a stabilizing or a reasonably stable environment.

v) The Equity Discount Rate

450. Under the pesification scenario, Mr. Wood-Collins has assumed an equity discount rate of 45.04% when valuing from May 2002 to the end of 2037 and of 41.05% when valuing from January 1, 2004 to the end of 2037. Under the no pesification scenario, a discount rate of 13.45% was used. The Tribunal finds the first rate excessive and the second too low.

451. Under the first scenario, Mr. Wood-Collins bases his figures on the cost of defaulted securities in May 2002 and in December 2003. Because of that default, their value was low compared with their nominal value, yielding therefore a very high rate of discount. But

proceeding this way is implicitly assuming that TGN will, until 2027, repeatedly live through shocks of the same magnitude as the pesification shock. The impact of that measure is already impounded in the cash flows being valued, pesified tariffs translating into much lower dollar cash flows. That negative event has taken place and has had its negative impact upon cash flow, current and future, but some kind of normalcy should rule in the future. Already, there are encouraging signs in that regard in the Argentine economy.

452. Under the circumstances, the Tribunal has concluded that an equity discount rate of 18% would be a reasonable assumption under the pesification scenario.

453. Under the second scenario, the Tribunal estimates that the proposed discount rate of 13.45% should be increased to 14.5%.

454. To arrive at the first figure, Mr. Wood-Collins used a “risk-free” rate of 5.94%, a country-risk premium of 5.21% based on the country-risk premium of TGN’s debt over the US Treasury rate and a 2.296% equity risk premium (market equity risk premium of 5.6% multiplied by TGN’s beta factor of 0.41). It appears that Mr. Wood-Collins has in fact equated the country risk premium on equity and the country risk premium on TGN’s debt. While it is true that the risk borne by shareholders is also borne by debtholders, it is well recognized that shareholders bear a significantly larger risk, because their claims are residual. Mr. Wood-Collins argues that ENARGAS in its 1997 tariff review had settled on a cost of equity very close to the one computed by him. It is quite understandable that, in setting the equity country risk, a State regulatory agency would adopt a conservative approach; first of all, such an agency would wish to project a positive image of that country as a foreign investment venue and, secondly, the higher the cost of equity it would set, the higher the

in the 1996-1997 tariff review was 16%[228] and that, for the 2002 review which was never completed, a rate of 15% was envisaged by ENARGAS.[229]

455. The Tribunal is of the view that, taking into account the historical evidence on the economic and political performance of Argentina and the above facts, the cost of the equity investment made by the Claimant should be increased from 13.45% to 14.5%.

vi) The Tariff Adjustments

456. Under the no pesification scenario, Mr. Wood-Collins assumes an average yearly rate of revenue increase of 2.5% up to 2007 and of 1.5% thereafter. However, this leads to very high rates of return gradually increasing from about 20% in 2012 to close to 100% in 2027. The Claimant argues that those rates of return would allow a catch-up for lower rates of return in earlier years. While the Tribunal is willing to concede that a certain amount of recuperation might have been allowed by ENARGAS, it is difficult to conceive that it could have tolerated the kind of escalation described above, without making downward adjustments to the tariff on the occasion of its Five Year Reviews starting in 2013. Therefore, the Tribunal has decided to introduce a 5% decrease in tariffs at the time of each of the tariff reviews in 2013, 2018 and 2023. This still leaves growth in the return on equity which amply covers the catch-up mentioned by the Claimant.

457. Under the pesification scenario, Mr. Wood-Collins assumes that there will be no increase in tariffs for the whole duration of the License. The Tribunal considers this hypothesis unrealistic. It has received evidence that Argentina has already offered to TGN a 7% tariff increase, albeit accompanied by some conditions that have been turned down by TGN. With the disappearance of the US PPI adjustment, it would be strange to say the least

that TGN would be left in a situation where, as forecasted by Mr. Wood-Collins, its domestic sales revenue would remain completely flat for the next 22 years; under that scenario, TGN's equity remains negative until 2023 (according to Mr. Wood-Collins' report of May 22, 2002) or until 2019 (according to his March 19, 2004, report). Here again, it is difficult to believe that TGN would not have been able to convince ENARGAS that this was an unacceptable situation and that some increase in the tariff was required on the occasion of its Five Year Reviews. The Tribunal has already indicated that, in its forecast, it has allocated a yearly increase of 1.5% in the tariff from 2008 to take account of Argentine inflation. The Tribunal also concludes that, starting in 2008, a 5% increase on the occasion of each Five Year Review should be assumed, in order to advance the moment when TGN could again be equity positive.

vii) Operations and Maintenance Expenditures ("O&M")

458. In its report, Mr. Wood-Collins projects the following percentages to sales for O&M: 10.20% to the end of 2004, 9.40% to the end of 2014, 8.40% to the end of 2020 and 7% to the end of 2037. The Tribunal considers those projections too conservative for three reasons.

459. To begin with, they are significantly below the levels which were achieved during the years previous to 2002.

460. Secondly during a period of steep decline in sales, it would be unrealistic to expect that there would not be an appreciable increase in the proportion of O&M to sales. There is significant amount of rigidity in this type of expenditures in a regulated industry where the maintenance of safety has to be paramount.

461. Thirdly, even when growth in sales has returned, the requirements for safety do not decrease and with aging equipment, maintenance expenditures will tend to rise rather than decline.

462. However, noting the fact that sales are expected to increase over the years after 2005, the Tribunal is willing to recognize that there would be a certain decline in the percentage of O&M but it is not ready to endorse as steep a decline as the one envisaged by Mr. Wood-Collins. Consequently, the Tribunal has adopted the following percentages for O&M in its scenario: 11.5% to the end of 2004, 11.00% to the end of 2014, 10.00% to the end of 2020 and 8% to the end of 2027.

viii) Other Hypotheses

463. A number of other factors were part of Mr. Wood-Collins scenario and the Tribunal sees no valid reason to modify those. We refer, in particular, to US$ export sales, tax rate, depreciation, interest tax rate, target debt ratio and additional capital expenditures.

ix) Value of the Shares

464. The Claimant has requested an order that "Argentina compensate CMS in the amount of $261.1 million in the event that (…) Argentina determines to take CMS's shares in TGN or $243.6 million in the event that title to the shares remain remains with CMS,"[230] which attributes a value of US$17.5 million to those shares. This last amount represents the value of those shares on May 29, 2002.

465. Asking for the value of the shares remitted to the Government of Argentina is a legitimate claim, so long as CMS is ready to transfer to the Respondent the title to those shares, which it has indicated willingness to do.

466. The question remains whether the amount claimed for the value of the shares is the correct one. On the basis of the scenario relied upon by the Tribunal, as described above, the value of the shares is significantly lower than the one claimed by CMS. The Tribunal has arrived at a value of US$7,443,700, on August 17, 2000. In addition, from that value, one has to deduct any dividend received by CMS after August 17, 2000, as it would otherwise be doubly compensated. According to the 2001 TGN Annual Report & Accounts (pp. 48 and 51), TGN made two dividend distributions of US$9 million each after that date. On the basis of a 29.42% share ownership in the company, the Claimant did receive a total of US$5,295,600. This leaves a net value of US$2,148,100 for CMS' shares in TGN on August 17, 2000. Additional amounts, if any, received by CMS since August 17, 2000, as equity holder in TGN should also be deducted from the residual value just mentioned.

467. As the dividends paid were deducted from the shares value, in order to avoid double counting, the counter point that interest from August 17, 2000 should be paid equally holds and the Tribunal will so order.

49. Amount of Compensation for Damages and Value of the Shares

468. After the modifications mentioned above, the Tribunal arrives at a DCF loss valuation of US$133.2 million for the Claimant, on August 17, 2000, representing the compensation owed in that regard by the Respondent to the Claimant at that date.

469. Moreover, the Tribunal concludes that the Claimant must transfer to the Respondent the ownership of its shares in TGN, upon payment by the Respondent of the additional sum of US$2,148,100. Additional amounts, if any, to the US$5,295,600 already received by CMS as dividends, which would have been received by it in its capacity of shareholder should be deducted from the price to be paid by Argentina, when it exercises its right to buy those shares. On the other hand, the Tribunal does not consider that it would be appropriate to leave that option open-ended; it therefore rules that the Government of Argentina will have a time limit of one year from the date of this Award to purchase CMS' shares in TGN.

50. Interest

470. The Claimant has requested that the interest should be set at the average rate applicable to U.S. six-month certificates of deposit, compounded semi-annually starting on August 18, 2000.

471. The Tribunal is of the opinion that the U.S. Treasury Bills rate is more appropriate under the circumstances and that the interest should be simple for the period extending from August 18, 2000, to 60 days after the date of this decion or the date of effective payment if before. For this period the interest rate shall be 2.51% which corresponds to the annualized average rate for the U.S. Treasury Bills as reported by the Federal Reserve Bank of St. Louis.[231] Thereafter, the interest shall be the arithmetic average of the six-month U.S. Treasury Bills' rates observed on the afore-mentioned date and every six months thereafter, compounded semi-annually. That amount shall be calculated from the same source as the

one mentioned above. Interest shall apply to both the value loss suffered by CMS and the residual value of its shares.

51. Costs of the Proceedings

472. Each party shall bear the expenses incurred by it in connection with the present arbitration. The arbitration costs, including the fees of the members of the Tribunal, shall be borne in equal shares by the parties.

NOW THEREFORE THE ARBITRAL TRIBUNAL

DECIDES AND AWARDS AS FOLLOWS

1. The Respondent breached its obligations to accord the investor the fair and equitable treatment guaranteed in Article II (2) (a) of the Treaty and to observe the obligations entered into with regard to the investment guaranteed in Article II (2) (c) of the Treaty.

2. The Respondent shall pay the Claimant compensation in the amount of US$133.2 million.

3. Upon payment of the compensation decided in this Award, the Claimant shall transfer to the Respondent the ownership of its shares in TGN upon payment by the Respondent of the additional sum of US$2,148,100. The Respondent shall have up to one year after the date this Award is dispatched to the parties to accept such transfer.

4. The Respondent shall pay the Claimant simple interest at the annualized average rate of 2.51% of the United States Treasury Bills for the period August 18, 2000 to 60 days after the date of this Award, or the date of effective payment if before, applicable to both the value loss suffered by the Claimant and the residual value of its shares established in 2 and 3 above. However, the interest on the residual value of the shares shall cease to run upon written notice by Argentina to the Claimant that it will not exercise its option to buy the Claimant's shares in TGN. After the date indicated above, the rate shall be the arithmetic average of the six-month U.S. Treasury Bills rates observed on the afore-mentioned date and every six months thereafter,

5. Each party shall pay one half of the arbitration costs and bear its own legal costs.

6. All other claims are herewith dismissed.

The Arbitral Tribunal

(signed)

Marc Lalonde, Arbitrator
Date: 15/04/05

(signed)

Francisco Rezek, Arbitrator
Date: 25/04/05

(signed)

Francisco Orrego Vicuña, President
Date: 20/04/05

NOTES

[1] Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, November 14, 1991, in force from October 20, 1994. Hereafter cited as the U.S.-Argentina BIT or the Treaty.
[2] Under Article 38 of the ICSID Convention, if the Tribunal is not constituted within 90 days after the notice of registration of the request has been dispatched, the Chairman of ICSID's Administrative Council shall, at the request of either party, and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed and designate an arbitrator to be the President of the Tribunal.
[3] CMS Gas Transmission Co. v. Republic of Argentina, Decision of the Tribunal on Objections to Jurisdiction, July 17, 2003, 42 *ILM* 788 (2003).
[4] Law No. 23.696 of 1989 on the Reform of the State.
[5] Law No. 23.928 of 1991 on Convertibility.
[6] Law No. 24.076 of 1992 on the Privatization of the Gas Sector (Gas Law).
[7] Decree No. 1738/92 on the Implementation of the Gas Law (Gas Decree).
[8] Decree No. 1189/92 establishing TGN and other companies.
[9] Pliego de Bases y Condiciones, Llamado a Licitación Pública Internacional para la Privatización de Gas del Estado, July 17, 1992.
[10] Information Memorandum on the Privatization of Gas del Estado, prepared by N. M. Rothschild & Sons Ltd. and Goldman, Sachs & Co., September 1992.
[11] Decree No. 2255/92, December 2, 1992.
[12] Decree No. 2457/92, December 18, 1992 (License).
[13] Offering Memorandum of July 7, 1995.
[14] ENARGAS Resolution No. 1471, January 10, 2000.
[15] Decree No. 669/2000, August 4, 2000, with particular reference to Preambular paragraph 5.
[16] Decree No. 1570/01, December 3, 2001.
[17] Law No. 25.561, January 6, 2002 (Emergency Law).
[18] Decree No. 293/02, February 14, 2002.
[19] Statement by Dr. Jorge G. Simeonoff, August 13, 2004, Hearing, Vol. 5, at 1010-1011; Written Witness Statement of Dr. Jorge G. Simeonoff, annexed to Argentina Rejoinder; Alegato Final de la República Argentina, September 20, 2004, at 8. All citations to the Argentine Memorials are to the Spanish text.
[20] Statement by Mr. John Wood-Collins, August 16, 2004, Hearing, Vol. 6, at 1336.
[21] Statement by Mr. Bernardo Velar de Irigoyen, August 11, 2004, Hearing, Vol. 3, at 604-605.
[22] Argentina Rejoinder, para. 464, 465, with reference to CMS Reply, para. 353. All citations to the Claimant's Memorials are to the English text.
[23] Argentina Rejoinder, para. 393.
[24] Argentina Rejoinder, para. 394.
[25] Argentina Answer, paras. 100-110.
[26] ENARGAS note No. 1906, April 27, 1999, and note No. 3735, September 3, 1999.
[27] TGN Investment Prospectus, July 7, 1995.
[28] Cited in Argentina Answer, para. 287.
[29] Argentina Answer, para. 298.
[30] Statement of Dr. Cristian Folgar, August 12, 2004, Hearing, Vol. 4, at 797-800.
[31] Statement by Minister Horacio Daniel Rosatti, August 20, 2004, Hearing, Vol. 10, at 2254.
[32] Statement of Dr. Fabian Bello, August 19, 2004, Hearing, Vol. 9, at 1999-2004.
[33] See in particular Gas Decree, Article 41.
[34] License, Para. 9.2.
[35] License, Para. 18.2.
[36] Statement of Mr. Thomas L. Miller, August 10, 2004, Hearing, Vol. 2, at 438-442; Written Witness Statements of Mr. Thomas L. Miller were prepared on June 10, 2002 and March 16, 2004.
[37] Decree No. 669/2000, August 4, 2000, with particular reference to Preambular paragraph 5.
[38] CMS Reply, at 58.
[39] Gas Law, Article 2, Article 38 (a), as discussed in Argentina's Answer, at 56.
[40] Argentina Rejoinder, at 5-6.
[41] With reference to Miguel S. Marienhoff: Tratado de Derecho Administrativo, Vol. II, 1993, Chapter IV; Argentine Supreme Court, *Raúl Fernández c/ Poder Ejecutivo Nacional*, Fallos 322:3008 (1999).
[42] Gas Law, Article 38 (d).
[43] Argentina, Post-hearing brief, at 14-15; Witness Written Statement of Dr. Christian Folgar, at 7-9, annexed to Argentina Rejoinder.

[44] Expert Statement of Professor Nouriel Roubini, August 18, 2004, Hearing, Vol. 8, at 1690-1692; Argentina, Post-hearing brief, at 16-17.
[45] Argentina Rejoinder, at 199, with reference to the Written Witness Statement of Dr. Jorge Remes Lenicov, para. 30, annexed to the Rejoinder.
[46] Written Witness Statement of Dr. Jorge Remes Lenicov, explaining the nature and extent of the crisis, annexed to Argentina Rejoinder.
[47] Argentina Opening Statement, August 9, 2004, Hearing, Vol. 1, at 233-234, 302; Argentina Post-hearing brief, August 20, 2004, Hearing, Vol. 10, at 2328-2329.
[48] Public Utilities National Regulatory Act, Draft bill submitted to the Argentine Congress on August 24, 2004, as cited by the CMS Post-hearing brief, at 6-7.
[49] Statement of Dr. Eduardo Ratti, August 13, 2004, Hearing, Vol. 5, at 1155-1156; Written Witness Statement of Dr. Eduardo Ratti, annexed to Argentina Rejoinder.
[50] Nota UNIREN No. 258/04, July 2, 2004.
[51] Statement by Dr. Jorge G. Simeonoff, August 13, 2004, Hearing, Vol. 5, at 1036-1042.
[52] TGN, letter to UNIREN, July 19, 2004; Statement by Dr. Bernardo Velar de Irigoyen, August 11, 2004, Hearing, Vol. 3, at 544-547; Written Witness Statements of Dr. Velar de Irigoyen were prepared on June 13, 2002 and March 16, 2004; Statement by Dr. Francisco A. Mezzadri, August 11, 2004, Hearing, Vol. 3, at 649-650; Written Witness Statements were prepared by Dr. Mezzadri on June 4, 2002 and March 12, 2003.
[53] TGN, letter of January 22, 2003 to UNIREN.
[54] CMS Reply, at 59.
[55] CMS Reply, at 60, with reference to *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka* (Case No. ARB/87/3), Final Award of June 27, 1990, 6 *ICSID Rev. —FILJ* 526 (1991); 30 *ILM* 577 (1991); *Int'l Arb. Rep.*, No. 5, at Sec. A (May 1991); 4 *ICSID Rep*. 246 (1997), and other ICSID cases at footnote 277.
[56] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (Case No. ARB(AF)/00/2) *(Tecmed)*, Award of May 29, 2003, <http://www.worldbank.org/icsid/cases/laudo-051903%20-English.pdf>; 43 *ILM* 133 (2004), para 56.
[57] Argentine Constitution, Articles 27, and 75 (22).
[58] Guillermo Barrera Buteler: "La dignidad de la persona humana como fuente de los derechos fundamentales", Derecho Constitucional, Facultad de Derecho y Ciencias Sociales, Universidad Nacional de Córdoba, 2004, 143-156, at 146-147.
[59] *KlöcknerIndustrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* (Case No. ARB/81/2), *ad hoc* Committee Decision on Annulment of May 3, 1985, 2 *ICSID Rep.* 95 (1994), para. 69; *AMCO Asia Corporation and others v. Republic of Indonesia* (Case No. ARB/81/1), *ad hoc* Committee Decision on the Application for Annulment of May 16, 1986, 1 *ICSIDRep.* 509 (1993), at 515; and discussion of both cases by Emmanuel Gaillard and Yas Banifatemi: "The Meaning of 'and' in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process", 18 *ICSID Review—FILJ* 375 (2003), at 389-393.
[60] W. M. Reisman: "The Regime for *Lacunae* in the ICSID Choice of Law Provision and the Question of Its Threshold", 15 *ICSID Review—FILJ* 362 (2000).
[61] *Wena Hotels Limited v. Arab Republic of Egypt, ad hoc* Committee Decision on Application for Annulment of February 5, 2002, 41 *ILM* 933 (2002), at 941.
[62] Argentina Opening Statement, August 9, 2004, Hearing, Vol. 1, at 301-302; also Argentina Post-hearing brief, at 24.
[63] Argentine Supreme Court, Decision in *Ekmekdjián v. Sofovich*, July 7, 1992.
[64] *CMS Gas Transmission Company v. Argentine Republic* (Case No. ARB/01/8), Decision of the Tribunal on Objections to Jurisdiction, July 17, 2003, 42 *ILM* 788 (2003), paras. 25-32.
[65] *CMS Gas Transmission Company v. Argentine Republic* (Case No. ARB/01/8), Decision of the Tribunal on Objections to Jurisdiction, July 17, 2003, 42 *ILM* 788 (2003), para. 33.
[66] Argentina Rejoinder, at 21, para. 70.
[67] Statement of Dr. Christian Folgar, August 12, 2004, Hearing, Vol. 4, at 744-745; also Argentina post-hearing brief, at 2.
[68] CMS Opening Statement, August 9, 2004, Hearing, Vol. 1, at 20-24.
[69] Committee on the Privatization of Gas del Estado. Minutes of the meeting held on October 2, 1992, Section 2; also CMS post-hearing brief, at 2-3.
[70] Decree No. 2457/92, Basic Rules Governing the License, Clause 9.8.
[71] Decree No. 669/2000, approving Act No. 2 on the July 2000 postponement.
[72] Rosalyn Higgins: "The Taking of Property by the State: Recent Developments in International Law", Recueil des Cours de l'Académie de Droit International, Vol. 176, 1982-III, 259.

[73] Argentina Answer, at 44, with reference to TGN's Public Offer of July, 1995, which devotes a Section to Convertibility and exchange rate risks.
[74] Argentina Post-hearing brief, at 2-4, with reference to the Statement by Dr. Patricio Carlos Perkins, August 10, 2004, Hearing, Vol. 2, at 396; and the Statement of Dr. Bernardo Velar de Irigoyen, August 11, 2004, Hearing, Vol. 3, at 552.
[75] Expert Statement of Professor Nouriel Roubini, August 18, 2004, Hearing, Vol. 8, at 1681-1684; Argentina, Post-hearing brief, at 5.
[76] CMS Post-hearing brief, at 5, with reference to ENARGAS Note 5498 and the calculation of the cost of capital for the second five-year review, November 13, 2001, Annex I.
[77] Statement of Dr. Christian Folgar, August 12, 2004, Hearing, Vol. 4, at 748-757; Expert Statement by Dr. Fabian Bello, August 19, 2004, Hearing, Vol. 9, at 1958-1967; Written Expert Report of Dr. Fabian Bello, annexed to Argentina Rejoinder.
[78] Argentina Reply, at 66-68. Expert Statement by Dr. Fabian Bello, August 19, 2004, Hearing, Vol. 9, at 1964-1967.
[79] CMS Reply, at 7.
[80] Statement by Dr. Francisco A. Mezzadri, August 11, 2004, Hearing, Vol. 3, at 654-660.
[81] Argentina Answer, at 250.
[82] CMS Memorial, at 53.
[83] Argentina Rejoinder, at 89, 140, with reference to Colbun's S. A., Complaint introduced before ENARGAS on February 5, 2003; and ENARGAS Decree No. 2812, March 25, 2003, rejecting the complaint. Colbun later requested judicial intervention and protective measures, rejected by the competent Appeals Court on September 22, 2003. Both Colbun (Courbis to TGN, letter of June 29, 2004) and Metrogas (Morandé to TGN, letter of July 14, 2004) complained about the terms and conditions of the supply of gas to those companies.
[84] Argentine Supreme Court, *Ercolano c. Lanteri*, Fallo 136:161 (1922).
[85] Argentine Civil Code, Article 1197.
[86] Guillermo A. Borda: Tratado de Derecho Civil, 1971; Obligaciones, 1989.
[87] Rubén S. Stiglitz: Contratos Civiles y Comerciales, 1998, at 503-505.
[88] Argentina Opening Statement, August 9, 2004, Hearing, Vol. 1, at 210-219.
[89] Statement by Dr. Carmelo Angulo Barturen, August 13, 2004, Hearing, Vol. 5, at 1189 et seq.; and Written Witness Statement of June 24, 2004, attached to Argentina Rejoinder; Vivian Foster: "Impacto Social de la Crisis Argentina en los Sectores de Infraestructura", World Bank Office for Argentina, Chile, Paraguay and Uruguay, Documento de Trabajo No. 5/03, April 2003, Annex V to Written Witness Statement of Dr. Christian Folgar, annexed to Argentina Rejoinder; Written Witness Statement of Mrs. Angela Cristina Calvo, annexed to Argentina Rejoinder; Expert publication of Equis, Investigación Social: "La Crisis Argentina", June 2004, annexed to Argentina Rejoinder.
[90] Rubén H. Compagnucci de Caso: Manual de Obligaciones, 1997, at 209.
[91] Rubén S. Stiglitz: Contratos Civiles y Comerciales, 1998, at 28-30.
[92] Argentine Supreme Court, Judgment in the case "*Provincia de San Luis c. P. E. N. –Ley 25561, Dto. 1570/01 y 214/02 s/ amparo)*", March 5, 2003. Translation by the Tribunal.
[93] Argentine Supreme Court, Judgment in the case "*Bustos, Alberto Roque y otros c/Estado Nacional y otros s/amparo*", October 26, 2004, in www.csjn.gov.ar/documentos/novedades.jsp
[94] Report of the Procurador General, October 22, 2004, in www.csjn.gov.ar/documentos/novedades.jsp
[95] Dissenting Opinion of Supreme Court Judge Carlos S. Fyat.
[96] Rubén H. Compagnucci de Caso: Manual de Obligaciones, 1997, at 82.
[97] Witness Statement by Dr. Eduardo Ratti, August 13, 2004, Hearing, Vol. 5, at 1139-1144.
[98] Argentine Answer, at 241, with reference to Article 11 of the Emergency Law and its connection to Article 1198 of the Civil Code.
[99] Court Injunction of August 18, 2000, as cited in Argentine Answer, at 86-87. Translation by the Tribunal.
[100] Conseil d'Etat, *Compagnie Générale d'Eclairage de Bordeaux*, Rec. 125, concl. Chardenet, 30 Mars 1916, in M. Long, P. Weil et al. Les Grands Arrêts de la Jurisprudence Administrative, 2003, at 188-189 (hereinafter *Gaz de Bordeaux*).
[101] CMS Memorial, at 53.
[102] Agreement between the Secretary of Energy and the gas producers signed on April 2, 2004, and Resolution 208/2004 related thereto.
[103] Argentina Answer, at 60.
[104] Gas Law, Article 41.
[105] Gas Decree, Article 41; Clause 9.4.1.2 of the License.
[106] Gas Decree, Article 41 (2); Clause 9.4.1.3 of the License.
[107] Gas Law, Article 42.

[108] CMS Reply at 22; Witness Statement of Dr. Patricio Carlos Perkins, August 10, 2004, Hearing, Vol. 2, at 342-343; Written Witness Statement of Dr. Patricio Carlos Perkins of March 12, 2004.
[109] Argentina Answer, at 69-73, with reference to the preparatory documents of the second five-year review (RQT II).
[110] Public Offer of July 17, 1992, Annex F, 1.3; Consultants Report concerning RQT II, March 8, 2001; Argentina Answer, at 68.
[111] CMS Reply, at 23.
[112] Gas Law, Article 47.
[113] Gas Law, Article 41.
[114] CMS Post-hearing brief, at 3; Witness Statement of Dr. Patricio Carlos Perkins, August 10, 2004, Hearing, Vol. 2, at 342-343.
[115] Argentine Supreme Court, Fallos 296:737; 299:379; 303:1877; 307:305, as cited in Argentine Supreme Court, Judgment in the case "*Provincia de San Luis c. P. E. N. – Ley 25561, Dto. 1570/01 y 214/02 s/ amparo)*", March 5, 2003. Translation by the Tribunal.
[116] *Gaz de Bordeaux*, at 188-189. Translation by the Tribunal.
[117] Expert Statement of Professor Nouriel Roubini, August 18, 2004, Hearing, Vol. 8, at 1777; see generally the Written Expert Report of Professor Nouriel Roubini, annexed to Argentina Rejoinder.
[118] United Nations Economic Commission for Latin America and the Caribbean, "Preliminary Overview of the Economies of Latin America and the Caribbean", Doc. LC/G.2265-P/I, December 2004.
[119] Law No. 25.790, Boletín Oficial, October 22, 2003; Argentina Answer, at 199.
[120] Law No. 25.972, approved by Congress on December 17, 2004.
[121] *Metalclad Corporation v. United Mexican States* (Case No. ARB(AF)/97/1 *(Metalclad)*, 40 *ILM* 55 (2001), para. 103; CMS Memorial, at 71-72.
[122] i. e. *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, 6 CTR 219 (1984-II). See also generally UNCTAD: Taking of Property, 2000.
[123] i. e. *Compañía del Desarrollo de Santa Elena S. A. v. Republic of Costa Rica* (Case No. ARB/96/1), Final Award of February 17, 2000, 15 *ICSID Review—FILJ* 169 (2000).
[124] i. e. *CME Czech Republic B.V. (The Netherlands) v. Czech Republic (CME)*, Partial Award of September 13, 2001, as published in <http://www.mfcr.cz/static/Arbitraz/en/PartialAward.pdf>.
[125] i. e. *Santa Elena*, para. 68.
[126] Argentina Answer, at 179, with reference to the table of cases invoked by the Claimant.
[127] *Ronald S. Lauder v. Czech Republic (Lauder)*, UNCITRAL Final Award of September 3, 2001, <http://www.mfcr.cz/static/Arbitraz/en/FinalAward.doc>, para. 203; *S. D. Myers, Inc. v. Government of Canada*, Partial Award of November 13, 2000, http://www.dfait-maeci.gc.ca/tna-nac/documents/myersvcanadapartialaward_final_13-11-00.pdf>, para. 280.
[128] *Pope & Talbot Inc. v. Government of Canada (Pope & Talbot)*, Interim Award of June 26, 2000, as published in <http://www.appletonlaw.com/cases/P&T-INTERIM%20AWARD.PDF>, para. 100; Argentina Answer, at 205-208.
[129] *Lauder*, <http://www.mfcr.cz/static/Arbitraz/en/FinalAward.doc>, para. 200.
[130] *Metalclad*, 40 *ILM* 55 (2001), para. 103.
[131] *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, 6 CTR 219 (1984-II), at 225; see also *Phelps Dodge Corp. v. Islamic Republic of Iran*, 10 CTR 121 (1986-I).
[132] *CME*, <http://www.mfcr.cz/static/Arbitraz/en/PartialAward.pdf>, para. 688.
[133] U.S. Supreme Court, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); Argentina Rejoinder, at 182.
[134] *Pope & Talbot*, <http://www.appletonlaw.com/cases/P&T-INTERIM%20AWARD.PDF>, paras. 96, 102.
[135] *CME*, <http://www.mfcr.cz/static/Arbitraz/en/PartialAward.pdf>, para. 611. See also generally OECD: Fair and Equitable Treatment Standard in International Investment Law, September 2004.
[136] *Tecmed*, Award of May 29, 2003, <http://www.worldbank.org/icsid/cases/laudo-051903%20-English.pdf>; 43 *ILM* 133 (2004), para. 154.
[137] *Robert Azinian and others v. United Mexican States* (Case No. ARB(AF)/97/2) *(Azinian)*, Award of November 1, 1999,14 *ICSID Review—FILJ* 538 (1999); 39 *ILM* 537 (2000); 121 *I.L.R.* 2 (2002); 5 *ICSID Rep.* 272 (2002); *American Manufacturing & Trading, Inc. v. Democratic Republic of the Congo* (Case No. ARB/93/1), Award of February 21, 1997, 36 *ILM* 1534 (1997); 12 *Int'l Arb. Rep.*, No. 4, at Sec. A (Apr. 1997); 5 *ICSID Rep.* 14 (2002), Argentina Answer, at 225-227.
[138] Argentina Answer, at 226.
[139] *Alex Genin and others v. Republic of Estonia* (Case No. ARB/99/2) *(Genin)*, Award of June 25, 2001, 17 *ICSID Rev.—FILJ* 395 (2002); P. Juillard: "L'évolution des sources du droit des investissements", Recueil des Cours de l'Académie de Droit International, Vol. 250, 1994.

[141] *Tecmed*, <http://www.worldbank.org/icsid/cases/laudo-051903%20-English.pdf>; 43 *ILM* 133 (2004), para. 154.
[142] NAFTA Free Trade Commission, Interpretation of NAFTA Article 1105(1), July 21, 2001,< http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp>.
[143] Chile-United States Free Trade Agreement of June 6, 2003, <http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/asset_upload_file1_4004.pdf >, Article 10.4.2.
[144] *Antoine Goetz and others v. Republic of Burundi*, Award embodying the parties' settlement agreement of February 10, 1999, 15 *ICSID Review—FILJ* 457 (2000).
[145] In respect of the renegotiation with gas producers see the Witness Statement of Dr. Bernardo Velar de Irigoyen, August 11, 2004, Hearing, Vol. 3, at 524-525.
[146] *Case Concerning Elettronica Sicula*, International Court of Justice, Judgment of July 20, 1989, ICJ Reports 1989, 15.
[147] *Genin*, Argentina Answer, at 255. Also *Myers*, Argentina Answer, at 257.
[148] Oscar Schachter: International Law in Theory and Practice, 1991, at 313, Argentina Answer, at 259.
[149] *Lauder*, para. 221.
[150] Witness Statement of Dr. Christian Folgar, August 12, 2004, Hearing, Vol. 4, at 765-769; Witness Statement of Dr. Bernardo Velar de Irigoyen, August 11, 2004, Hearing, Vol. 3, at 524-525.
[151] *Azinian*, 14 *ICSID Review—FILJ* 538 (1999); 39 *ILM* 537 (2000); 121 *I.L.R.* 2 (2002); 5 *ICSID Rep.* 272 (2002); Argentina Answer, at 225.
[152] *Genin*, 17 *ICSID Rev.—FILJ* 395 (2002); Argentina Answer, at 223-224.
[153] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (Case No. ARB/01/13) *(SGS v. Pakistan)*, Decision on Objections to Jurisdiction, August 6, 2003, 18 *ICSID Review—FILJ* 301 (2003), para. 35.
[154] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Award of November 21, 2000, 16 *ICSID Review—FILJ* 641 (2001), 641.
[155] *Azurix Corp. v. Argentine Republic* (Case No. ARB/01/12), Decision on Jurisdiction of December 8, 2003, 43 *ILM 262* (2004).
[156] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (Case No. ARB/02/6) *(SGS v. Phillipines)*, Decision of the Tribunal on Objections to Jurisdiction, January 29, 2004, <http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf>.
[157] *Joy Mining Machinery Limited v. Arab Republic of Egypt* (Case No. ARB/03/11) *(Joy Mining)*, Award on Jurisdiction, August 6, 2004,<http://www.asil.org/ilib/JoyMining_Egypt.pdf>.
[158] License, Clause 9.8.
[159] License, Clause 18.2.
[160] Argentina Answer, p. 585; Argentina Rejoinder, p. 833.
[161] International Court of Justice, *Gabcikovo-Nagymaros Project*, ICJ Reports 1997, 7, para. 51.
[162] *French Company of Venezuelan Railroads*, July 31, 1905, UNRIAA, Vol. X, at 353.
[163] *Dickson Car Wheel Co.*, July 1931, UNRIAA, Vol. IV, p. 670-682. The Respondent also cites in this connection the *Sea-Land Service Inc. v. Iran*, June 20, 1984, Iran-United States Claims Tribunal Reports, Vol. IV, p. 149-175.
[164] Responsibility of States for Internationally Wrongful Acts, UNGA Resolution 56/83, January 28, 2002.
[165] *Gabcikovo-Nagymaros Project*, pars. 51-52.
[166] James Crawford: The International Law Commission's Articles on State Responsibility, 2002, at 178 et seq.
[167] The *Caroline* incident of 1837 and related diplomatic correspondence of 1842, as discussed in Crawford, at 179-180.
[168] *Russian Indemnity* case, UNRIAA, Vol. XI, 431 (1912).
[169] Permanent Court of International Justice, *Société Commerciale de Belgique*, 1939, Series A/B, No. 78.
[170] The *Torrey Canyon*, Cmnd. 3246, 1967.
[171] Eric Wyler: L'Illicite et la Condition des Persones Privées, 1995, at 192 et seq.
[172] Crawford, at 184.
[173] Crawford, at 185.
[174] *Gabcikovo-Nagymaros Project*, pars. 51-52.
[175] *Himpurna California Energy Ltd. v. P.T.*, May 4, 1999, as cited in Claimant's Reply, note 403.
[176] Permanent Court of Internacional Justice, *Société Comérciale de Belgique v. Greece*, 1939, Ser. A/B, No. 78, pars. 167-174.
[177] The *Martini* case, as cited in Claimant's Reply, at 102-103.
[178] U. S.- Russia Investment Treaty, June 17, 1992, Para. 8 of the Protocol, as cited in Claimant's Reply, note 442. The treaty is not in force.

[180] International Court of Justice, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, (Merits), ICJ Reports, 1986, at 14, paras. 222, 282; also decision on Jurisdiction and Admissibility, ICJ Reports, 1984, at 392, para. 83.
[181] International Court of Justice, *Case Concerning Oil Platforms*, Merits, November 6, 2003, para. 43.
[182] *American Manufacturing and Trade Inc. v. Zaire*, ICSID Case No. ARB/93/1, February 21, 1997.
[183] *AAPL v. Sri Lanka*, ICSID Case No. ARB/87/3, June 27, 1990.
[184] Crawford, at 185.
[185] Letter from the President of Argentina to Congress submitting the text of the Treaty, January 24, 1992, in Cámara de Diputados, Reunión No. 70, April 30, 1992, at 6722-6723; Report of the Committees of Foreign Affairs and Worship and Economy, ibid.
[186] As discussed by an experienced diplomat, "With no higher authority to gainsay it, threats to international peace and security are what the Security Council says they are"; Gareth Evans: "When is it Right to Fight?", Survival, Vol. 46 (3), 2004, 59-82, at 69.
[187] Statement by Professor José E. Alvarez, Hearing, Vol. 7, August 17, 2004, at 1633-1637.
[188] Statement by Professor Anne Marie Slaughter, Hearing, Vol. 8, August 18, 2004, at 1947-1949.
[189] Statement by Professor Anne Marie Slaughter, Hearing, Vol. 8, August 18, 2004, at 1844.
[190] Exon-Florio Amendment to the 1988 Trade Act, 50 USC app. para. 2170, (Supp. 1989). See generally the discussion in Hearing, Vol. 7, August 17, 2004, and Hearing, Vol. 8, August 18, 2004, with particular reference to the discussion by the parties and experts of José E. Alvarez: "Political Protectionism and United States International Investment Obligations in Conflict: The Hazards of Exon-Florio", Virginia Journal of International Law, Vol. 30, 1989, 1.
[191] *Nicaragua*, 1986, para. 222.
[192] *Gabcikovo-Nagymaros*, pars. 51-52. The reference to the International Law Commission's work is to International Law Commission, Yearbook, 1980, Vol. II (Part Two), at 34-52, para. 36.
[193] International Law Commission, Yearbook, 1980, Vol. II (Part Two), at 34-52, para. 36.
[194] *Rainbow Warrior*, RIAA, Vol. XX, 1990, 217, at 251-252, para. 75; Crawford at 189.
[195] Crawford, at 189.
[196] Claimant's post-hearing brief, at 11.
[197] *Gabcikovo-Nagymaros*, paras. 152-153; Crawford, at 190.
[198] *Compagnie Générale de l'Orinocco*, 1905, UNRIAA, Vol. X, 184.
[199] *Properties of the Bulgarian Minorities in Greece*, Yearbook of the International Law Commission, 1980, Vol. II (Part Two), 34, para. 13, as cited in Claimant's Reply, note 494.
[200] *Orr & Laubenheimer*, June 16, 1900, RSA, Vol. XV, 37, at 40, as cited in Wyler, at 193-194.
[201] *Gould Marketing, Inc.*, Iran-U. S. C. T. Reports, Vol. 3, 147, as cited in Argentina Reply, note 702.
[202] Claimant's Rejoinder, para. 304.
[203] Claimant's Rejoinder, para. 307.
[204] Argentina Rejoinder, paras. 960 et seq.
[205] Argentina Rejoinder, para. 981.
[206] Hearing, August 18, 2004, Vol. 8, at 1940-1941.
[207] Hearing, August 18, 2004, Vol. 8, at 1941-1942.
[208] Crawford, at 190.
[209] Statement by Ms. Lucy Reed, 20 August, 2004, Hearing, Vol. 10, at 2211.
[210] See generally the Report of Mr. Fabián Bello on TGN's indebtedness and the Word-Collins Report, June 11, 2004.
[211] Responsibility of States for Internationally Wrongful Acts, UNGA Resolution 56/83, January 28, 2002, Article 34.
[212] Responsibility of States for Internationally Wrongful Acts, UNGA Resolution 56/83, January 28, 2002, Article 35.
[213] Permanent Court of International Justice, *Chorzow Factory* case, Merits, 1928, Series A No. 17, at 47; and comments by F. V. García-Amador: The Changing Law of International Claims, Vol. II, 1984, at 578-580.
[214] Responsibility of States for Internationally Wrongful Acts, UNGA Resolution 56/83, January 28, 2002, Article 36.2.
[215] Responsibility of States for Internationally Wrongful Acts, UNGA Resolution 56/83, January 28, 2002, Article 36.1.
[216] *Lusitania*, RIAA, Vol. VII, 1923, p. 32, at 39, emphasis in original; and comments by James Crawford: The International Law Commission's Articles on State Responsibility, 2002, at 178 et seq.
[217] James Crawford: The International Law Commission's Articles on State Responsibility, 2002, at 225, para. 21.
[218] International Glossary of Business Valuation Terms, American Society of Appraisers, ASA website, June 6,

[219] Damodaran, "Investment Valuation", John Wiley & Sons, New York, 2002, pp.946-949.
[220] Responsibility of States for Internationally Wrongful Acts, UNGA Resolution 56/83, January 28, 2002, Article 38.
[221] *Marvin Feldman v. Mexico*, Award of December 16, 2002, 18 *ICSID Review—FILJ* 488 (2003), par. 194.
[222] Expert Report of Dr. Fabian Bello, June 11, 2004, at 24.
[223] Mr. John Wood-Collins states: "DCF valuation, by contrast, is an appropriate and practical approach for the valuation of CMS's interest in TGN", Valuation Report of 17 June 2002, p.5; Dr. Fabian Bello also states: "In order to value a company, there's different mechanisms that can be used. I consider that the most adequate ones are those that use the cash flow method, which is the method used by Mr. Wood-Collins because that method is the most effective one, the discounted method", 19 August, 2004, Hearing, Vol. 9, at 1969. Dr. Bello, however, questions the way Mr. Wood-Collins has proceeded in applying the DCF method; expert report of Dr. Fabián Bello, June 11, 2004, par. 94.
[224] Statement of Mr. Nigel Blackaby, August 20, 2004, Hearing, Vol. 10, at 2183.
[225] The Economist Intelligence Unit, Argentina Country Report, March 2005, p. 7, <www.eiu.com>.
[226] The Economist Intelligence Unit, Argentina Country Report, March 2005, p. 7, <www.eiu.com>.
[227] The Economist Intelligence Unit, Argentina Country Report, March 2005, p. 7, <www.eiu.com>.
[228] Rebuttal Statement of witness for CMS Mr. T. Miller, March 16, 2004, p.5.
[229] Statement by Ms. Lucy Reed, August 9, 2004, Hearing, Volume 1, at 28.
[230] Statement by Ms. Lucy Reed, 20 August, 2004, Hearing, Vol. 10, at 2211.
[231] Federal Reserve Bank of St. Louis, Series "6 month t. Bill, Secondary Market Rates, Weekly."

International Centre for Settlement of Investment Disputes

CMS Gas Transmission Company *v.* Argentine Republic
Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic

ICSID Case No. ARB/01/8, 25 September 2007

CMS Gas Transmission Company

v.

Argentine Republic

(ICSID Case No. ARB/01/8)
(Annulment Proceeding)

DECISION OF THE *AD HOC* COMMITTEE ON THE APPLICATION FOR ANNULMENT OF THE ARGENTINE REPUBLIC

Members of the *ad hoc* Committee

Judge Gilbert Guillaume, President
Judge Nabil Elaraby
Professor James R. Crawford

Secretary of the *ad hoc* Committee

Mr. Gonzalo Flores

Representing the Claimant:
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and

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and

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Dr. Héctor Huici
Dr. Ignacio Minorini Lima
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Buenos Aires, Argentina

Representing the Respondent:
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Procurador del Tesoro de la Nación
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London, U.K.

Date of dispatch to the parties: **September 25, 2007**

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DECISION

A. Introduction

1. On 8 September 2005, the Argentine Republic (Argentina) filed with the Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID) an application in writing, requesting the annulment of an Award dated 12 May 2005 rendered by the Tribunal in the arbitration between CMS Gas Transmission Company (CMS) and the Argentine Republic.

2. The Application was made within the time provided in Article 52(2) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). In it, Argentina sought annulment of the Award on two of the five grounds set out in Article 52(1) of the ICSID Convention, specifically that the Tribunal had manifestly exceeded its powers and that it failed to state the reasons on which it was based.

3. The Application also contained a request, under Article 52(5) of the ICSID Convention and Rule 54(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the Arbitration Rules), for a stay of enforcement of the Award until the Application for Annulment was decided.

4. The Secretary-General registered the Application on 27 September 2005 and on the same date, in accordance with Rule 50(2) of the Arbitration Rules, transmitted a Notice of Registration to the parties. The parties were notified that, pursuant to Arbitration Rule 54(2), the enforcement of the Award was provisionally stayed.

5. By letter of 30 September 2005, the Claimant made a request under Arbitration Rule 54(2) for the stay of enforcement of the Award to be lifted unless Argentina provided adequate assurances as to the payment of the Award should the application for annulment fail.

6. By letter of 18 April 2006, in accordance with Rule 52(2) of the Arbitration Rules, the parties were notified that an *ad hoc* Committee (the Committee) had been constituted, composed of Judge Gilbert Guillaume, of French nationality, Judge Nabil Elaraby, of Egyptian nationality, and Professor James Crawford, of Australian nationality. The parties were also informed that Mr. Gonzalo Flores, Senior Counsel, ICSID, would serve as Secretary of the Committee.

7. By letter of 20 April 2006, the parties were notified that Judge Gilbert Guillaume had been designated President of the Committee.

8. By letter of 2 May 2006, the Centre sent to the parties copies of the declarations signed by each Member of the Committee pursuant to Arbitration Rule 52(2).

9. The parties disagreed on the effects of the provisional stay of enforcement of the Award over Argentina's option to purchase CMS's shares in Transportadora de Gas del Norte (TGN), as provided for in sub-paragraph 3 of the *dispositif* of the Award.

10. After due deliberation, the Committee decided that, since the payment of compensation has been stayed, the condition precedent to the transfer of shares in TGN for the time being could not be met and thus the time limit set forth in the Award for such transfer must be considered as likewise provisionally stayed. The decision of the Committee was notified to the parties by the Secretariat on 10 May 2006.

11. By letter of 16 May 2006, the Argentine Republic requested that the provisional stay of enforcement of the Award be continued until the Committee had the opportunity to hear both parties on the matter. By letter of that same date, the Claimant reiterated its request that the stay be discontinued unless adequate assurances were provided by the Argentine Republic that it would comply with the Award in the event its annulment application was rejected.

12. By letter of 17 May 2006, the Committee informed the parties of its decision to continue the stay of the Award until 5 June 2006 (the date previously fixed for the first session of the Committee with the parties).

13. The first session of the Committee was held, as scheduled, with the agreement of the parties, on 5 June 2006, at the premises of the World Bank in Paris, France, and several issues of procedure were agreed and decided. During the session, both parties addressed the Committee on the question of the continuance of the stay of enforcement of the Award.

14. After having heard the parties' arguments, the Committee requested a written statement on behalf of the Argentine Republic, to be filed within seven days, with respect to its compliance with the Award under the ICSID Convention if the Award were not annulled. It further decided that it would be open to CMS to comment within the further seven days on such statement. At the same time, it decided to continue the stay of enforcement of the Award until it had taken a decision.

15. In accordance with the Committee's directions, the Argentine Republic submitted on 12 June 2006, a written statement signed by Dr. Osvaldo César Guglielmino, Argentina's Attorney-General, in which it stated that:

"The Republic of Argentina hereby provides an undertaking to CMS Gas Transmission Company that, in accordance with its obligations under the ICSID Convention, it will recognize the award rendered by the Arbitral Tribunal in this proceeding as binding and will enforce the pecuniary obligations imposed by that award within its territories, in the event annulment is not granted."

16. In a letter dated 19 June 2006, CMS contended that Dr. Guglielmino's letter did not provide additional comfort, that it must be viewed in context and that it did not bind Argentina.

17. On the invitation of the Committee, on 26 June 2006 Argentina submitted a copy of the decision rendered by its Supreme Court in *Ekmedjián v. Sofovich*.[1]

18. By letter dated 27 June 2006, Argentina expressed the view that the matters raised by CMS in its letter of 19 June 2006 did not require any further response. It did,

[1] Argentina, Supreme Court, *Ekmekdjian, Miguel Ángel v. Sofovich, Gerardo y otros*, Fallos: 315:1492 (7 July 1992).

however, provide a copy of the Argentine regulations relating to the power of the *Procurador del Tesoro de la Nación Argentina*.

19. By letter dated 30 June 2006, CMS made further comments and submitted to the Committee relevant passages of the Argentine Constitution.

20. After considering the parties' written and oral arguments on the matter and due deliberation, the Committee issued on 1 September 2006 its *Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award*.

21. In its Decision, the Committee ordered that the stay of execution be continued pending its decision on Argentina's application for annulment without the need for Argentina to provide a bank guarantee. In the Committee's view, Argentina had demonstrated that CMS would not be prejudiced by the grant of a stay, other than in respect of the delay which is, however, incidental to the Convention system of annulment and which could be remedied by the payment of interest in the event the annulment application was unsuccessful.

22. In accordance with the timetable set forth by the Committee during the 5 June 2006 session, Argentina filed its Memorial on Annulment on 13 September 2006.

23. By letter dated 15 September 2006, the law firm of Mayer, Brown, Rowe and Maw LLP informed the Committee that it would no longer represent the Argentine Republic in this proceeding.

24. By letter dated 22 September 2006, CMS claimed that 48 of the 60 legal and factual authorities referred to in Argentina's Memorial were missing. By letter dated 29 September 2006, the Argentine Republic responded, stating that the authorities referred to in CMS' letter were in the public domain and easily available to the Claimant. The Argentine Republic noted that it did enclose with its Memorial the Argentine legal authorities cited, which would not be of easy access to non-Argentine lawyers.

25. Through letter from the Secretary of the Committee dated 12 October 2006, the Committee, noting that, in fact, the documents in question were publicly available,

invited CMS to indicate, by 13 October 2006, which of the legal authorities Argentina referred to in its Memorial it would need to receive, and instructed Argentina to provide copies of such documents to counsel for CMS in Buenos Aires, by 18 October 2006. By letter dated 13 October 2006, counsel for CMS informed the Committee that they had been able to collect all of the legal authorities referred to in Argentina's Memorial.

26. On 21 December 2006, CMS filed its Counter-Memorial on Annulment; the Argentine Republic filed its Reply on 22 January 2007, and CMS filed its Rejoinder on 22 February 2007.

27. After consultation with the parties, the President of the Committee held a preliminary organizational telephone conference call with counsel for both parties on 19 March 2007. The conference call was attended by Ms. Lucy Reed, Mr. Nigel Blackaby and Dr. Guido Santiago Tawil, on behalf of CMS and by Dr. Gabriel Bottini, on behalf of the Argentine Republic. During the conference call the parties agreed on the manner in which the hearing on annulment would be conducted. These agreements were reflected in a letter from the Secretary of the Committee to the parties dated 20 March 2007.

28. As agreed, a 2-day hearing was held at the World Bank offices in Paris on 27-28 March 2007, at which counsel for both parties presented their arguments and submissions, and responded to questions from the Members of the Committee. Present at the hearing were the Members of the Annulment Committee: Judge Gilbert Guillaume, Judge Nabil Elaraby and Professor James Crawford; the Secretary of the Committee: Mr. Gonzalo Flores; CMS' representatives: Ms. Lucy Reed, Mr. Nigel Blackaby, Dr. Lluis Paradell, Mr. Reza Mohtashami and Ms. Daina Bray of Freshfields Bruckhaus Deringer LLP; Dr. Guido Santiago Tawil and Dr. Ignacio Minorini Lima of M. & M. Bomchil and Ms. Sharon McIlnay and Mr. Thomas Miller of CMS Gas Transmission Company; and representatives of the Argentine Republic: Dr. Osvaldo César Guglielmino, Procurador del Tesoro de la Nación Argentina, Dr. Gabriel Bottini, Dr. Ignacio Torterola, Dr. Jorge Barraguirre, Dr. Ignacio Perez Cortés, Dr. Diego Gosis, Dr. Verónica Lavista and Dr. Juan José Zurrro, from Argentina's Procuración del Tesoro de la Nación and Professor Philippe Sands, QC and Ms. Alison MacDonald of Matrix Chambers.

29. The President of the Committee declared the proceeding closed on September 21, 2007. During the course of the proceedings, the Members of the Committee deliberated by various means of communication, including meetings in Paris on 15 May and 3 July 2007, and have taken into account all pleadings, documents and testimony before them.

B. The Dispute

30. In order to put an end to the economic crisis of the late 1980s, Argentina adopted in 1989 an economic recovery plan which included a privatization program of government-owned industries and public utilities. For that purpose, it enacted Reform of State Law N° 23.696 of August 1989, Currency Convertibility Law N° 23.928 of March 1991 and Decree N° 2.128/91 pegging the Argentine currency to the United States dollar.

31. Within this framework, Gas Law N° 24.076 of May 1992, implemented by various decrees, established the legal framework for the privatization of the gas industry and regulated the transport and distribution of natural gas. The Law established a new regulatory regime with ENARGAS, the public regulatory agency of the gas industry, supervising the proper functioning of the industry, and in particular determining the tariffs charged by the transporters to the distributors.

32. Gas del Estado, a national State-owned monopoly, was thus divided into two transportation companies and eight distributor companies to be privatized. Transportadora de Gas del Norte was one of the companies established as a result of this restructuring. In December 1992, TGN was granted a license to transport gas in Argentina through the operation of the North and Central West pipelines in conformity with Decree 2.255/92.

33. At the same time, Argentina sold 70% in TGN to a consortium of investors. It placed 5% in an Employee share program and retained 25%. This 25% was purchased in 1995 by CMS Gas Argentina, a wholly owned subsidiary of CMS Gas Transmission Company. In 1999, CMS Gas Argentina purchased from third parties a further 4.42% share in TGN.

34. As recalled by the Tribunal,[2] in CMS's view, under the regime established by those laws and decrees and by the license granted to TGN, tariffs were to be calculated in dollars, conversion to pesos to be effected at the time of billing and tariffs adjusted every six months in accordance with the United States Producer Price Index (US-PPI). As noted again by the Tribunal, Argentina had a different understanding of the nature and legal effects of those various instruments.

35. Towards the end of the 1990s a serious economic crisis began to unfold in Argentina. The representatives of the gas companies agreed twice, subject to certain conditions, in January 2000 and July 2000, to defer the US PII adjustment of the gas tariffs. However an Argentine court issued in August 2000 an injunction for the suspension of the second agreement and on several occasions ENARGAS later confirmed the continuing freeze of the US-PPI adjustment.

36. In late 2001, the crisis deepened and, on 6 January 2002, Law N° 25.561 declared a public emergency. Under that Law the right of licensees of public utilities to adjust tariffs according to the US PPI was terminated, as well as the calculation of tariffs in dollars. The tariffs were redenominated in pesos at the rate of one peso to one dollar.[3]

37. In July 2001, ICSID had already received from CMS a request for arbitration relating mainly to the decisions taken in August 2000 concerning the application of the PPI to tariffs of the gas industry. The arbitral tribunal was duly constituted in January 2002. In its memorial of July 2002, CMS extended its claim to cover the measures taken later by Argentina, and in particular those adopted in January 2002.

38. By decision taken on 17 July 2003, the Tribunal decided that the whole dispute was "within the jurisdiction of the Center and the competence of the Tribunal".[4] Then, in an Award of 12 May 2005, the Tribunal rejected CMS' claims of expropriation under Article IV and of discriminatory and arbitrary treatment under Article II(2)(b) of the

[2] *CMS v. Argentina* (2005) 44 *ILM* 1205, 1211 (para. 57) ("Award").
[3] From March 2002 onwards the official exchange rate for the peso was in the region of 3-3.85 per US$1, a devaluation of more than 60%.
[4] *CMS v. Argentina (Jurisdiction)* (2003) 7 ICSID Reports 494, 521-522 (para. 131) ("Jurisdictional Decision").

Argentina-US Bilateral Investment Treaty (the BIT).[5] On the other hand it ruled that Argentina had "breached its obligations to accord the investor the fair and equitable treatment guaranteed in Article II(2)(a) of the Treaty and to observe the obligations entered into with regard to the investment guaranteed in Article II(2)(c) of the Treaty".[6] It did not accept Argentina's "defenses" based on necessity and article XI of the BIT. It awarded CMS compensation of US$133.2 million.

39. In sub-paragraphs 3 and 4 of its *dispositif* the Tribunal added:

"3. Upon payment of the compensation decided in this Award, the Claimant shall transfer to the Respondent the ownership of its shares in TGN upon payment by the Respondent of the additional sum of US$2,148,100. The Respondent shall have up to one year after the date this Award is dispatched to the parties to accept such transfer.

4. The respondent shall pay the Claimant simple interest at the annualized average rate of 2.51% of the United States Treasury Bills for the period August 18, 2000 to 60 days after the date of this Award, or the date of the effective payment if before, applicable to both the value loss suffered by the Claimant and the residual value of its shares established in 2 and 3 above. However, the interest on the residual value of the shares shall cease to run upon written notice by Argentina to the Claimant that it will not exercise its option to buy the Claimant's shares in TGN. After the date indicated above, the rate shall be the arithmetic average of the six-month US Treasury Bills rates observed on the afore-mentioned date and every six months thereafter, compounded semi-annually".

The Tribunal specified that "[e]ach party shall pay one half of the arbitration costs and bear its own legal costs."[7] It dismissed all other claims.

40. Argentina asks the Committee to annul this Award.

C. <u>The Grounds for Annulment</u>

41. Before entering into the examination of the case, the Committee will first recall the basis on which it must deal with the submissions of Argentina. Under Article 52 of the ICSID Convention, each Party may request annulment of an award on one or more of the following grounds:

[5] Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, 14 November 1991 (in force 20 October 1994).
[6] Award, sub-para. 1 of the *dispositif*.
[7] Ibid., sub-para. 5 of the *dispositif*.

"(a) that the Tribunal was not properly constituted;
(b) that the Tribunal has manifestly exceeded its powers;
(c) that there was corruption on the part of a member of the Tribunal;
(d) that there has been a serious departure from a fundamental rule of procedure; or
(e) that the award has failed to state the reasons on which it is based."

42. In the present case, Argentina identifies a large number of perceived defects in the Tribunal's jurisdictional findings, in its findings relating to Articles II(2)(a), II(2)(c) and XI of the BIT and to necessity under customary international law, as well as in the calculation of the damages. It submits that the Award must be annulled because, on many of those grounds, the Tribunal manifestly exceeded its powers (Article 52(b)) or failed to state the reasons on which it based its decisions (Article 52(e)).

43. Both parties recognize that an *ad hoc* committee is not a court of appeal and that its competence extends only to annulment based on one or other of the grounds expressly set out in Article 52 of the ICSID Convention. That basic proposition was specified, for example, by the *ad hoc* Committee in *Vivendi v. Argentina*[8] and has been confirmed by other *ad hoc* committees.[9] Argentina, however, submits that "the present case was the first award in the large group of ICSID arbitrations currently pending against Argentina".[10] It stresses the importance of the problems raised by those arbitrations. It concludes that "the extraordinary implications of the Tribunal's decision mandate close scrutiny of its reasoning by the Annulment Committee."[11]

44. At the outset, the Committee must recall that, in the ICSID system, annulment has a limited function. As stated in *MTD v. Chile (Annulment)*, a committee

[8] *CAA & Vivendi Universal v. Republic of Argentina* (2002) 6 ICSID Reports 340, 357-8 (paras. 62, 64) ("*Vivendi*").
[9] *See Klöckner Industrie-Anlagen GmbH & Others v. United Republic of Cameroon* (1985) 2 ICSID Reports 95, 119-120 (para. 61) ("*Klöckner*"); *Amco Asia Corporation and Others v. Republic of Indonesia I* (1986) 1 ICSID Reports 509, 515 (para. 23); *Maritime International Nominees Establishment v. Republic of Guinea* (1989) 4 *ICSID Reports* 79, 87 (para.5.04), 88 (para. 5.08) ("*MINE*"); *Amco Asia Corporation & Others v. Republic of Indonesia* (1992) 9 ICSID Reports 9, 39 (para. 7.19), 51 (para. 8.08); *Wena Hotels v. Arab Republic of Egypt* (2002) 6 ICSID Reports 129, 135 (para. 18) ("*Wena Hotels*"); *CDC Group v. Republic of the Seychelles* (2005) 11 ICSID Reports 237, 248-250 (paras. 34-37); Patrick *Mitchell v Democratic Republic of Congo*, Decision of 1 November 2006, para. 21; *MTD Equity & MTD Chile v. Republic of Chile*, Decision on Annulment, 21 March 2007, para 52 ("*MTD v. Chile*"); *Hussein Nuaman Soufraki v. United Arab Emirates*, Decision on Annulment, 5 June 2007, para. 20.
[10] Argentina's Annulment Memorial, para. 10.
[11] Ibid., paras. 4, 10.

"cannot substitute its determination on the merits for that of the Tribunal. Nor can it direct a Tribunal on a resubmission how it should resolve substantive issues in dispute. All it can do is annul the decision of the tribunal: it can extinguish a *res judicata* but on a question of merits it cannot create a new one. A more interventionist approach by committees on the merits of disputes would risk a renewed cycle of tribunal and annulment proceedings of the kind observed in *Klöckner* and *AMCO*."[12]

45. As Argentine noted, the present arbitration was the first of a long series relating to the Argentine crisis of 2001-2002. Accordingly the Committee will seek to clarify certain points of substance on which, in its view, the Tribunal made manifest errors of law. It remains to be seen, however, whether as a consequence the award should be annulled.

(a) Manifest excess of powers

46. In the present case, Argentina first submits that the Tribunal "manifestly exceeded its powers by exercising jurisdiction over claims by a company's shareholder for income lost by the company."[13] It also contends that it did so "by authorizing CMS, which was not a party to any of the applicable instruments, to claim a breach of obligations" under Article II(2)(c) of the treaty, the so-called "umbrella clause".[14]

47. As the *ad hoc* Committee in *Klöckner I* said:

"Clearly, an arbitral tribunal's lack of jurisdiction, whether said to be partial or total, necessarily comes within the scope of an "excess of powers" under Article 52 (1)(b)."[15]

48. Argentina further submits that the Tribunal manifestly exceeded its powers in transforming the "fair and equitable" and "umbrella" clauses of the BIT into strict liability provisions. According to Argentina, it did so also "by failing to give effect to Treaty Article XI".[16] Moreover Argentina contends that the Tribunal manifestly exceeded its powers in rejecting Argentina's defense of necessity under customary

[12] *MTD v. Chile*, para. 54.
[13] Argentina's Annulment Memorial, p. 25.
[14] Ibid., p. 34.
[15] *Klöckner*, para. 4.
[16] Argentina's Annulment Memorial, p. 52.

international law.[17] More generally it submits that the Tribunal failed to apply the governing law.[18]

49. It is well established that the ground of manifest excess of powers is not limited to jurisdictional error. A complete failure to apply the law to which a Tribunal is directed by Article 42(1) of the ICSID Convention can also constitute a manifest excess of powers

50. However *ad hoc* Committees have sought to distinguish between failure to apply the law and error in its application. For instance the Committee in the *MINE* case stated that:

"[A] tribunal's disregard of the agreed rules of law would constitute a derogation from the terms of reference within which the tribunal has been authorized to function. Examples of such a derogation include the application of rules of law other that the ones agreed by the parties, or a decision not based on any law unless the parties had agreed on a decision *ex aequo et bono*. If the derogation is manifest, it entails a manifest excess of power.

Disregard of the applicable rules of law must be distinguished from erroneous application of those rules which, even if manifestly unwarranted, furnishes no ground for annulment."[19]

51. As the Committee in *MTD v. Chile (Annulment)* said:

"An award will not escape annulment if the tribunal, while purporting to apply the relevant law actually applies another, quite different law. But in such a case the error must be 'manifest', not arguable, and a misapprehension (still less mere disagreement) as to the content of a particular rule is not enough."[20]

52. When considering the submissions of Argentina concerning the Tribunal's findings under Articles II(2)(a), II(2)(c) and XI of the BIT and under customary international law, the Committee will keep those distinctions in mind.

[17] Ibid., paras. 170-180.
[18] Ibid., paras. 181-205.
[19] *MINE*, paras. 5.03-5.04.
[20] *MTD Chile*, para. 47.

(b) Failure to state reasons

53. Argentina submits that the Tribunal in its decision on jurisdiction and in its finding relating to the BIT and customary international law of necessity as well as in its calculation of damages, failed to state the reasons on which the award is based, contrary to Article 52 (e) of the ICSID Convention.[21]

54. Committees have frequently applied this provision. The Committee in the *Vivendi* case stated in this respect:

"[I]t is well accepted both in the cases and the literature that Article 52(1)(e) concerns a failure to state *any* reasons with respect to all or part of an award, not the failure to state correct or convincing reasons. … Provided that the reasons given by a tribunal can be followed and relate to the issues that were before the tribunal, their correctness is beside the point in terms of Article 52(1)(e). Moreover, reasons may be stated succinctly or at length, and different legal traditions differ in their modes of expressing reasons. Tribunals must be allowed a degree of discretion as to the way in which they express their reasoning.

In the Committee's view, annulment under Article (52)(1)(e) should only occur in a clear case. This entails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal's decision. It is frequently said that contradictory reasons cancel each other out, and indeed, if reasons are genuinely contradictory so they might. However, tribunals must often struggle to balance conflicting considerations, and an *ad hoc* committee should be careful not to discern contradiction when what is actually expressed in a tribunal's reasons could more truly be said to be but a reflection of such conflicting considerations."[22]

55. Committees in other annulment cases have expressed similar views. Thus the Committee in the *MINE* case stated that:

"[T]he requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to point B. and eventually to its conclusion, even if it made an error of fact or of law. The minimum requirement is in particular not satisfied by either contradictory or frivolous reasons."[23]

"[T]he requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies that,

[21] Argentina's Annulment Memorial, paras. 166-171, 206-223.
[22] *Vivendi*, paras. 64-65.
[23] *MINE*, para. 5.09.

and only that. The adequacy of the reasoning is not an appropriate standard of review under paragraph 1(e)…"[24]

56. In *Wena Hotels*, the Committee added:

"Neither Article 48(3) nor Article 52(1)(e) specify the manner in which the Tribunal's reasons are to be stated. The object of both provisions is to ensure that the Parties will be able to understand the Tribunal's reasoning. This goal does not require that each reason be stated expressly. The tribunal's reasons may be implicit in the considerations and conclusions contained in the award, provided they can be reasonably inferred from the terms used in the decision."[25]

"It is in the nature of this ground of annulment that in case the award suffers from a lack of reasons which can be challenged within the meaning and scope of Article 52(1)(e), the remedy need not be the annulment of the award. The purpose of this particular ground for annulment is not to have the award reversed on its merits. It is to allow the parties to understand the Tribunal's decision. If the award does not meet the minimal requirement as to the reasons given by the Tribunal, it does not necessarily need to be resubmitted to a new Tribunal. If the *ad hoc* committee so concludes, on the basis of the knowledge it has received upon the dispute, the reasons supporting the Tribunal's conclusions can be explained by the *ad hoc* Committee itself."[26]

57. The Committee agrees, and will consider Argentina's submission based on Article 52(1)(e) on this basis.

D. CMS's *Jus Standi*

(a) The Award

58. The Tribunal analyzed the objections by Argentina to CMS's *jus standi* in observing in its decision on jurisdiction that those objections raised two issues: "First … whether a shareholder can claim for its rights in a foreign company independently from the latter's rights and, if so, whether these rights refer only to its status as shareholder or also to substantive rights connected with the legal and economic performance of its investment. Second … whether the Claimant satisfies the jurisdictional requirements of

24 Ibid., para. 5.08.
25 *Wena Hotels*, para. 81.
26 Ibid., para. 83.

the Convention and the BIT",[27] particularly whether the alleged dispute "arises directly from the investment".[28]

59. The Tribunal examined the first question under Argentine legislation, general international law, the ICSID Convention and the Argentina-United States BIT.[29] It concluded that Argentine legislation was not relevant in this respect.[30] It found "no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned."[31] It arrived at the same conclusion with respect to the ICSID Convention.[32] Finally it decided that CMS had a "direct right of action" as shareholder under the BIT.[33]

60. Passing to the second point, the Tribunal reaffirmed that "the rights of the Claimant can be asserted independently from the rights of TGN and those relating to the License..."[34] It added that "the Claimant has a separate cause of action under the Treaty in connection with the protected investment..."[35] It concluded that the dispute arose directly from the investment.[36]

61. On both grounds the Tribunal decided that CMS had *jus standi*.

(b) The Parties' submissions

62. Argentina submits that "the Tribunal lacked jurisdiction over the case because CMS was claiming compensation for alleged breaches of rights belonging not to it, but to TGN."[37] In its view "the Tribunal manifestly exceeded its powers by exercising jurisdiction over claims by a company's shareholder for income lost by the company."[38]

27 Jurisdictional Decision, 502 (para. 41).
28 Ibid.
29 Ibid., 502-508 (paras. 42-65).
30 Ibid., 502 (para. 42).
31 Ibid., 504 (para. 48).
32 Ibid., 506 (para. 56).
33 Ibid., 508 (para. 65).
34 Ibid., 508 (para. 68).
35 Ibid.
36 Ibid.
37 Argentina's Annulment Memorial, para. 68.
38 Ibid., 25.

63. In this respect Argentina first contends that the Tribunal "erroneously affirmed the non-applicability of Argentine law in the jurisdictional phase."[39] It notes that the Tribunal "nevertheless went on to refer to that law in its process of decision."[40] It adds that in doing so, the Tribunal failed to apply the relevant provisions of Argentine law which specify the rights of shareholders.[41]

64. Criticizing the conclusions of the Tribunal under general international law, Argentina submits that

"in its process of decision, the Tribunal was trying to determine whether shareholders have a direct right of action, when it should have considered (and never did) whether CMS was *invoking it own rights in the proceedings*. In order to determine the latter, it is obviously material whether the investor is a party to a concession agreement or a license agreement with the host State. The Tribunal had limited jurisdiction over that part of the investment dispute that concerned CMS' rights as shareholder; it did not have jurisdiction over any part of any investment dispute concerning the rights of the party to the concession agreement or License."[42]

65. Passing to the issue of *jus standi* under the ICSID Convention, Argentine underlines that, before the Tribunal, "CMS was concerned not with its rights as shareholder, but with the alleged 'dismantling' of a tariff regime that granted rights to TGN, not to CMS."[43] According to Argentina, this was an "indirect claim" which clearly falls outside ICSID's jurisdiction as attested by the *travaux préparatoires* and by Article 25(2)(b) of the ICSID Convention.[44]

66. Argentina concludes that the Tribunal did not have the power to go beyond the "outer limits" of ICSID's jurisdiction set out in Article 25 of the ICSID Convention, even if the 1991 BIT authorized it to do so (which Argentina does not accept).[45] "If the

39 Ibid., para. 77.
40 Ibid.
41 Ibid.
42 Ibid., para. 82 (emphasis in the original).
43 Ibid., para. 86.
44 Ibid., paras. 86-93.
45 Ibid., para. 92.

Tribunal had followed the applicable rules of treaty interpretation, as reflected in the 1969 VCLT, it would have avoided the manifest excess into which it fell."[46]

67. CMS submits that, "[a]s the Tribunal correctly determined, national law is not 'determinant' in establishing the *jus standi* of CMS in the present case."[47] It adds that the Tribunal's holding with respect to Argentine law is *obiter dicta*. It affirms that "no part of CMS's dispute concerned TGN's contract rights as such. Conversely, all aspects of the dispute concerned CMS's own rights as a protected investor" under the BIT and "as a betrayed investor in Argentina's gas privatization."[48] It states that "investment treaty case law overwhelmingly recognizes the right of action of shareholders to complain of acts prejudicial to their shareholding that may be directed at the company in which the shares are held."[49] It adds that article 25(2)(b) of the ICSID Convention has "no impact upon the autonomous right of a shareholder in a company incorporated in the host State to pursue its own BIT claim independently from the local company."[50] Thus the Tribunal correctly analyzed the claim and rightly decided that it had jurisdiction on all aspects of the dispute.

(c) The Committee's view

68. The Committee first recalls that the jurisdiction of the Centre is determined not by Article 42(1) of the ICSID Convention but by Article 25. The competence of the Tribunal is governed by the terms of the instruments expressing the parties' consent to ICSID arbitration, *i.e.* in the present case the Argentina-United States BIT. In consequence, as the Tribunal correctly decided, "the applicable jurisdictional provisions are only those of the Convention and the BIT, not those which might arise from national legislation."[51] Argentine law is irrelevant in this respect, as recognized in the Award and

46 Argentina's Annulment Memorial, para. 92, citing Vienna Convention on the Law of Treaties, 23 May 1969, 1155 *UNTS* 331.
47 CMS' Annulment Counter-Memorial, para. 25.
48 Ibid., para 31.
49 CMS' Annulment Rejoinder, para. 21.
50 Ibid., para. 28.
51 Jurisdictional Decision, 502 (para. 42).

in many other ICSID decisions.[52] The observations which were made in passing by the Tribunal on the piercing of the corporate veil in Argentine law[53] are thus *obiter dicta*.

69. With respect to general international law, the Committee notes that the parties advanced different interpretations of the judgments rendered by the International Court of Justice in the *Barcelona Traction* case[54] and the *ELSI* case.[55] Those cases were concerned with diplomatic protection under customary international law and not with the protection of the rights of investors under treaties relating to the protection of investments.[56] As specified by the Tribunal, those judgments are not "directly relevant to the present dispute".[57] Moreover, as noted in the Jurisdictional Decision of 17 July 2003, nothing in general international law prohibits the conclusion of treaties allowing "claims by shareholders independently from those of the corporation concerned… even if those shareholders are minority or non-controlling shareholders."[58] Such treaties and in particular the ICSID Convention must be applied as *lex specialis*.[59]

70. Under Article 25(1) of that Convention:

"The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre."

71. Article 25 of the ICSID Convention did not attempt to define "investment." Instead this task was left largely to the terms of bilateral investment treaties or other

[52] See e.g. *Azurix Corporation v. Argentine Republic* (2003) 43 *ILM* 262, 276 (para. 72) ("*Azurix*"); *Siemens AG v. Argentine Republic* (2004) 44 *ILM* 138, 161-162 (para. 141); *Continental Casualty Company v. Argentine Republic*, Decision on Jurisdiction, 22 February 2006, para. 82 ("*Continental Casualty*").
[53] Jurisdictional Decision, 502 (para. 42).
[54] *Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, ICJ Reports 1970, p. 3.
[55] *Case concerning Elettronica Sicula S.p.a. (United States of America v. Italy)*, ICJ Reports 1989, p. 15.
[56] This distinction was clearly recognised by the International Court in *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo) (Preliminary Objections)*, Judgment of 24 May 2007, paras. 87-88.
[57] Jurisdictional Decision, 503 (para. 44).
[58] Ibid., 504 (para. 48).
[59] Ibid.

instruments on which jurisdiction is based. In the present case, this definition is provided for by Article I(1) of the Argentina-United States BIT which states:

"(a) "investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes without limitation:

…

) A company or shares of stocks or other interests in a company or interests in the assets thereof."

72. The Committee notes that this definition of "investment" is very broad, as already observed by various ICSID Tribunals in comparable cases.[60] Such a definition remains however compatible with the object and purpose of the ICSID Convention.

73. The Committee observes in particular that, as regard shareholder equity, the BIT contains nothing which indicates that the investor in capital stock has to have a majority of the stock or control over the administration of the company. Investments made by minority shareholders are covered by the actual language of the definition, as also recognized by ICSID arbitral tribunals in comparable cases.[61]

74. One must add that whether the locally incorporated company may itself claim for the violation of its rights under contracts, licenses or other instruments, in particular under Article 25(2)(b) of the ICSID Convention, does not affect the right of action of foreign shareholders under the BIT in order to protect their own interests in a qualifying investment, as recognized again in many ICSID awards.[62]

75. Thus in the present case, and as decided by the Tribunal, CMS must be considered an investor within the meaning of the BIT. It made a capital investment in TGN covered by the BIT. It asserted causes of action under the BIT in connection with that protected

[60] See e.g. *AES Corporation v. Republic of Argentina*, Decision on Jurisdiction, 26 April 2005, para. 88; *Azurix*, para. 73; *Enron Corporation v. Republic of Argentina*, Decision on Jurisdiction, para. 44 ("*Enron*"); *Sempra Energy International v. Republic of Argentina*, Decision on Jurisdiction, 11 May 2005, para. 93 ("*Sempra Energy*").
[61] See e.g. *Camuzzi International S.A. v. Republic of Argentina*, Decision on Jurisdiction, 11 May 2005, para. 81; *Enron*, para. 44; *LG&E v. Republic of Argentina*, Decision on Liability, 3 October 2006, para. 78; *Sempra Energy*, para. 93.
[62] See *e.g. Continental Casualty*, para. 86; *Enron*, para. 49.

investment. Its claims for violation of its rights under the BIT were accordingly within the jurisdiction of the Tribunal. This is without prejudice to the determination of the *extent* of those rights, a question to which the Committee will return.

76. For these reasons, the Committee concludes that there is no manifest excess of powers in this respect.

E. Fair and Equitable Treatment

(a) The Award

77. CMS asserted before the Tribunal that Argentina had breached the provisions of Article II(2)(a) of the BIT according fair and equitable treatment to investments covered by the Treaty. The Tribunal stated that "a stable legal and business environment is an essential element of fair and equitable treatment"[63] and observed that "[t]he measures that are complained of did in fact entirely transform and alter the legal and business environment under which the investment was decided and made."[64] It concluded that those measures "resulted in the objective breach of the standard laid down in Article II(2)(a) of the Treaty."[65]

(b) The Parties' submissions

78. Argentina first submits that the Tribunal failed to determine the scope of international and domestic law as it applied to the dispute. It disregarded the Argentine law theory of "*imprévision*" and the Argentine doctrine of "*contract revision*".[66] Instead, it relied on a single French judgment, the decision of the Conseil d'Etat in *Gaz de Bordeaux*.[67] It thus failed to carry out any proper analysis of the situation in Argentine law.

63 Award, para. 274.
64 Ibid., para. 275.
65 Ibid., para. 281.
66 Argentina's Annulment Memorial, paras. 189-200.
67 Conseil d'Etat, *Compagnie Générale d'Eclairage de Bordeaux*, Rec. 125, 30 March 1916.

79. Argentina adds that "the Tribunal failed to interpret the 1991 Treaty and proceeded to give an award based on an unreasoned and unexplained assumption that investors have an enforceable legitimate expectation of total stability in the economy of the host State, irrespective of the circumstances."[68] It "took no account of Argentina's legitimate right to regulate by way of general measures adopted in the public interest..."[69] It did not "evaluate the propriety of the challenged measures in the light of the dire emergency facing Argentina..."[70] It held, "essentially, that investors have an enforceable legitimate expectation of total stability in the economy of the host State irrespective of the circumstances."[71] It applied Article II(2)(a) in a mechanical manner and transformed that Article into a strict liability clause.[72] It did not give reasons for such a decision and it also manifestly exceeded its powers.

80. CMS contends that the Tribunal did not manifestly exceed its powers in holding that Argentina had violated Article II(2)(a) of the Treaty. It submits that "Argentina's challenge is nothing more than a repeat of its defense at first instance and an appeal of the Tribunal's finding on the merits." It submits that the Award applied Argentine law as appropriate. In its application of the BIT, the Tribunal did not ignore the "context" and did not "apply the fair and equitable treatment standard in a vacuum".[73] "Far from equating fair and equitable treatment with strict liability, the Tribunal recognized that a 'rebalancing' between Argentina and CMS was required due to the changing economic circumstances and that no such rebalancing had taken place – to the detriment of CMS."[74] CMS adds that the Tribunal provided adequate reasons for its holding on this point.

(c) The Committee's view

81. Article II(2)(a) of the BIT provides: "Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law."

68 Argentina's Annulment Reply, para. 43.
69 Ibid., para. 44.
70 Argentina's Annulment Memorial, para. 117.
71 Ibid., para. 123.
72 Ibid., paras. 123-124.
73 CMS' Annulment Counter-Memorial, para. 52.

82. The Tribunal observed that this Treaty "like most bilateral investment treaties, does not define the standard of fair and equitable treatment..."[75] In the light of the Preamble to the Treaty, the Tribunal stated that "a stable legal and business environment is an essential element of fair and equitable treatment."[76] It added that this standard "is inseparable from stability and predictability".[77] According to the Tribunal, the legal framework existing at the time of the investment does not need to be frozen, "as it can always evolve and be adapted to changing circumstances", but it cannot be "dispensed with altogether when specific commitments to the contrary have been made".[78]

83. Passing to the dispute, the Tribunal referred to its previous findings about the tariff regime. It analyzed the general principles of Argentine law applicable in this respect, mentioning the *Gaz de Bordeaux* decision as a landmark decision which was at the origin of the theory of "*imprévision*".[79] It added however that it did not need to look into general principles of law to find an answer as to how the contract in this case could have been adjusted to new economic realities.[80] It observed that the pertinent mechanisms were embodied in the Law and the License itself and that those mechanisms had not been used.

84. The Tribunal concluded that "[t]he measures that are complained of did in fact entirely transform and alter the legal and business environment under which the investment was decided and made."[81] It added that "the guarantees given in this connection under the legal framework and its various components were crucial for the investment decision."[82] It concluded that Article II(2)(a) of the BIT had been breached.

85. In the Committee's view, this part of the Award is adequately founded on the applicable law and the relevant facts. The Tribunal proceeded to a detailed analysis of

74 Ibid., para. 59.
75 Award, para. 273.
76 Ibid., para. 274.
77 Ibid., para. 276.
78 Ibid., para. 277.
79 Ibid., paras. 200-227.
80 Ibid., para. 228.
81 Ibid., para. 275.
82 Ibid.

the rights of the Claimant,[83] of the "reality of the Argentine economy" at the time of the crisis, of the measures then taken and of their consequences,[84] before concluding that the fair and equitable standard had been violated.[85] Contrary to what Argentina contends, the Tribunal evaluated the legality of the challenged measures in the light of all the circumstances of the case and did not transform Article II(2)(a) into a strict liability clause. The Committee has no jurisdiction to control the interpretation thus given by the Tribunal to that Article,[86] still less to reconsider its evaluation of the facts. It is sufficient for the Committee to hold that the Tribunal did not manifestly exceed its powers.

F. The Umbrella Clause

(a) The Award

86. The Tribunal first recalled that according to CMS, the BIT had been breached by Argentina under Article II(2)(c) of the Treaty, which provides that each party "shall observe any obligation it may have entered into with regard to investments" (the so called "umbrella clause").[87] The Tribunal stated that it "will not discuss the jurisdictional aspects involved in the Respondent's argument, as these were dealt with in the decision on jurisdiction."[88] It went on to decide that "the obligation under the umbrella clause of Article II(2)(c) of the Treaty had not been observed by the Respondent to the extent that legal and contractual obligations pertinent to the investment have been breached and have resulted in the violation of the standards of protection under the Treaty."[89]

(b) The Parties' submissions

87. Argentina submits that neither the Republic of Argentina, nor any of its instrumentalities, assumed any obligation to CMS, apart from the provisions of the 1991

83 Ibid., paras. 127-151.
84 Ibid., paras. 53-67, 152-166.
85 Ibid., para. 281.
86 The Committee would only note that the fair and equitable standard has been invoked in a great number of cases brought to ICSID arbitration and that there is some variation in the practice of arbitral tribunals in this respect. See Christoph Schreuer, "Fair and Equitable Treatment in Arbitral Practice" (2005) 6 *Journal of World Investment and Trade* 357.
87 Award, para. 296.
88 Ibid., para. 299.

Treaty itself.[90] Therefore CMS could invoke no obligation under Article II(2)(c) of the Treaty. It stresses that nonetheless the Tribunal authorized CMS to claim for a breach of obligations under the umbrella clause in a manifest excess of powers and without giving any reason.[91]

88. CMS submits that it did not claim for breach of TGN's tariffs rights as such, but for breach of the assurances given it as regards the tariff regime resulting from "the legal instruments relating to the gas privatization, including the License" issued to TGN.[92] Those assurances "constituted undertakings that Argentina was bound to observe under the Umbrella Clause."[93] In the light of findings made in other parts of the award, the Tribunal rightly decided that Argentina did not observe its obligations under that Article. There is no manifest excess of powers and no lack of reasoning.[94]

(c) The Committee's view

89. Article II(2)(c) of the BIT provides that "Each Party shall observe any obligation it may have entered into with regard to investments." It is accepted that by "obligations" is meant legal obligations. Although legitimate expectations might arise by reason of a course of dealing between the investor and the host State, these are not, as such, legal obligations, though they may be relevant to the application of the fair and equitable treatment clause contained in the BIT.[95]

90. CMS stated categorically before the Committee that its claim was not predicated on any Argentine law right of CMS to compliance with the terms of the License.[96] Moreover, this is in conformity with what the Committee understands to be Argentine law. Under that law, the obligations of Argentina under the License are obligations to TGN, not to CMS, and CMS has no right to enforce them.

89 Ibid., para. 303.
90 Argentina's Annulment Memorial, para. 96.
91 Ibid., para. 97.
92 CMS' Annulment Rejoinder, para. 32.
93 Ibid., para. 32.
94 Ibid., paras. 34-36.
95 See *MTD v. Chile*, paras. 67-69.
96 See Hearing on annulment proceedings, 27 March 2007, 206-209, 242-244; also CMS' Annulment Rejoinder, para. 15.

91. During the hearings, CMS referred to the possibility that an investor might acquire an international law right to compliance with undertakings with regard to investments. But it finally accepted that this was not the basis of its claim before the Tribunal or of the Tribunal's own reasoning.[97]

92. In the end, CMS relied on a literal interpretation of Article II(2)(c). It contended that Argentina entered into legal obligations under the License, which were obligations "with regard to investments" under that Article. Although CMS was not entitled as a minority shareholder to invoke those obligations of Argentina under Argentine law (not being the obligee), the effect of Article II(2)(c) was to give it standing to invoke them under the BIT.

93. In paragraph 303 of the Award, the Tribunal concluded that "the obligation under the umbrella clause of Article II(2)(c) of the Treaty has not been observed by the Respondent to the extent that legal and contractual obligations pertinent to the investment have been breached and have resulted in the violation of the standards of protection under the Treaty."

94. It is implicit in this reasoning that the Tribunal may have accepted the interpretation of Article II(2)(c) referred to in paragraph 92 above. But the Tribunal nowhere addressed this point expressly. Instead it repeatedly referred back to the Decision on Jurisdiction of 17 July 2003, where this specific matter was not dealt with at all.[98] Further, the Tribunal's extended discussion of whether CMS had a right to compliance with the terms of the License and of the Argentine Gas Law[99] would have been unnecessary if the basis of its decision was that Article II(2)(c) gave CMS standing to invoke obligations owned to TGN.

95. Moreover there are major difficulties with this broad interpretation of Article II(2)(c).

97 Hearing on annulment proceedings, 27 March 2007, 246; 28 March 2007, 514.
98 See Award, paras. 132, 148, 299, and cf. Jurisdictional Decision, para. 65.
99 Award, paras. 127-151.

(a) In speaking of "any obligations it may have *entered into* with regard to investments", it seems clear that Article II(2)(c) is concerned with consensual obligations arising independently of the BIT itself (*i.e.* under the law of the host State or possibly under international law). Further they must be specific obligations concerning the investment. They do not cover general requirements imposed by the law of the host State.

(b) Consensual obligations are not entered into *erga omnes* but with regard to particular persons. Similarly the performance of such obligations or requirements occurs with regard to, and as between, obligor and obligee.

(c) The effect of the umbrella clause is not to transform the obligation which is relied on into something else; the content of the obligation is unaffected, as is its proper law. If this is so, it would appear that the *parties* to the obligation (*i.e.*, the persons bound by it and entitled to rely on it) are likewise not changed by reason of the umbrella clause.

(d) The obligation of the State covered by Article II(2)(c) will often be a bilateral obligation, or will be intrinsically linked to obligations of the investment company. Yet a shareholder, though apparently entitled to enforce the company's rights in its own interest, will not be bound by the company's obligations, *e.g.* as to dispute settlement.

(e) If the Tribunal's implicit interpretation is right, then the mechanism in Article 25(2)(b) of the ICSID Convention in unnecessary wherever there is an umbrella clause.

(f) There is no discussion in the award of the *travaux* of the BIT on this point, or of the prior understandings of the proponents of the umbrella clause as to its function.

96. In the end it is quite unclear how the Tribunal arrived at its conclusion that CMS could enforce the obligations of Argentina to TGN. It could have done so by the above interpretation of Article II(2)(c), but in that case one would have expected a discussion of the issues of interpretation referred to above. Or it could have decided that CMS had an Argentine law right to compliance with the obligations, yet CMS claims no such right; and Argentine law appears not to recognize it.[100]

97. In these circumstances there is a significant lacuna in the Award, which makes it impossible for the reader to follow the reasoning on this point. It is not the case that

[100] See above, paragraph 90.

answers to the question raised "can be reasonably inferred from the terms used in the decision";[101] they cannot. Accordingly, the Tribunal's finding on Article II(2)(c) must be annulled for failure to state reasons.

98. In these circumstances it is not necessary for the Committee to decide whether it would have been a manifest excess of powers for the Tribunal to decide that Article II(2)(c) allows CMS to enforce the Argentine law rights of TGN.

99. Although the Tribunal's finding of liability must be annulled, it does not follow that the Award as a whole is affected. As the *Vivendi* Annulment Committee found,[102] severable parts of an award which are not themselves annulled will stand, a situation expressly contemplated in Article 52(3) of the ICSID Convention.

100. In the present case the Tribunal's award of damages was made on the basis of independent findings of breach of Article II(2)(a) and (c) of the BIT. Indeed the Tribunal itself noted that "the umbrella clauses invoked by the Claimant do not add anything different to the overall Treaty obligations which the Respondent must meet if the plea of necessity fails."[103] Thus the Committee's finding on the umbrella clause does not entail the annulment of the Award as a whole. It entails only annulment of the provisions of paragraph 1 of the operative part of the Award under which the Tribunal decided that "[t]he Respondent breached its obligations… to observe the obligations entered into with regard to the investment guaranteed in Article II(2)(c) of the Treaty."

G. State of Necessity under Customary International Law and Article XI of the BIT

(a) The Award

101. The Tribunal recorded that "Argentina has contended in the alternative that in the event the Tribunal should come to the conclusion that there was a breach of the Treaty the Respondent should be exempted from liability in light of the existence of a state of

[101] *Wena Hotels*, para. 81.
[102] *Vivendi*, para. 68.
[103] Award, para. 378.

necessity or state of emergency."[104] Argentina invoked the existence of such a state under both customary international law and Article XI of the BIT. The Tribunal noted that in doing so, Argentina raised "one fundamental issue"[105] which it examined under customary international law before doing so under the BIT.

102. The Tribunal considered that Article 25 of the Articles of the International Law Commission (ILC) on State Responsibility[106] "adequately reflects the state of customary international law on the question of necessity."[107] Under that article:

"1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

448 (a) the international obligation in question excludes the possibility of invoking necessity; or

(b) the State has contributed to the situation of necessity."

103. The Tribunal then undertook the task of finding whether the Argentine crisis met the various requirements of Article 25. It expressed doubts as to whether "an essential interest" of the State was involved in the matter and whether there was in this case a "grave and imminent peril".[108] It added that the measures taken by Argentina "were not the only steps available" to safeguard its interest and concluded that the conditions set out under paragraph 1(a) of Article 25 were not met.[109]

[104] Ibid., para. 304.
[105] Ibid., para. 308.
[106] Articles on Responsibility of States for Internationally Wrongful Acts, annexed to UNGA Resolution 56/83, 14 December 2001.
[107] Award, para. 315.
[108] Ibid., paras. 319-322.
[109] Ibid., para. 324.

104. By contrast the Tribunal decided that neither an essential interest of the United States[110] nor an essential interest of the international community as a whole[111] had been seriously impaired by the measures taken by Argentina. Accordingly it stated that the plea of necessity would not be precluded by paragraph 1(b) of Article 25.[112]

105. Passing to paragraph 2 of that Article, the Tribunal examined whether the object and purpose of the BIT excluded necessity. It arrived to the conclusion that "the Argentine crisis was severe but did not result in total economic and social collapse"[113] and that in such a situation the "Treaty will prevail over any plea of necessity."[114]

106. The Tribunal further observed that Argentina's "government policies and their shortcomings significantly contributed to the crisis"[115] and that consequently state of necessity was precluded by paragraph 2(b) of Article 25.

107. Finally the Tribunal observed that all the conditions governing necessity under Article 25 must be cumulatively satisfied.[116] It concluded that "the requirements of necessity under customary international law have not been fully met so as to preclude the wrongfulness of the acts."[117]

108. Then the Tribunal noted that "[t]he discussion on necessity and emergency is not confined to customary international law as there are also specific provisions of the Treaty dealing with this matter."[118] In this respect it first recalled that Article XI of the BIT provides:

"This treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."

[110] Ibid., para. 358.
[111] Ibid., paras. 325, 358.
[112] Ibid., para. 358.
[113] Ibid., para. 355.
[114] Ibid., para. 354.
[115] Ibid., para. 329.
[116] Ibid., para. 331.
[117] Ibid.
[118] Ibid., para. 332.

109. In this respect the Tribunal first determined that "there is nothing in the context of customary international law or the object and purpose of the Treaty that could on its own exclude major economic crises from the scope of Article XI."[119] It added that "[a]gain, the issue is then to establish how grave an economic crisis must be so as to qualify as an essential security interest, a matter discussed above."[120]

110. Then the Tribunal, in the light of a lengthy discussion of the question by the Parties and their experts, expressed the view that "the clause of Article XI of the Treaty is not a self-judging clause".[121] Accordingly it decided that the judicial review it had to perform under that clause was a "substantive review".[122]

(b) Argentina's submissions

111. Argentina recalls that before the Tribunal it relied both on Article XI of the BIT and on the doctrine of necessity reflected in Article 25 of the ILC's Articles on State Responsibility. It adds "[i]t is self-evident that these arguments are related but juridically distinct."[123] It stresses that "the Tribunal has conflated the Article XI argument and the necessity argument and failed to distinguish between treaty and customary claims."[124] By treating these arguments as identical, the Tribunal "has fallen into fundamental error."[125] It incorporated "into the interpretation and application of Article XI the approach imposed by the law of responsibility but without any explanation as to why that is the proper approach."[126] In doing so it entirely failed to carry out the task of interpreting Article XI and ignored the language of that Article.

112. Argentina further contends that the Tribunal wrongly decided that Article XI is not "self-judging" and that it must proceed to a substantive review of the measures taken. It adds that having determined that Article XI required such a review, the Tribunal failed

119 Ibid., para. 359.
120 Ibid., para. 361.
121 Ibid., para. 373.
122 Ibid., para. 374.
123 Argentina's Annulment Memorial, para. 125.
124 Ibid., para. 126.
125 Ibid., para. 127.
126 Ibid., para. 131.

to carry it out, or at least to carry out the good faith review proposed by Argentina.[127] Nowhere in the Award did the Tribunal carry out any "analysis of whether the measures in question had been ... necessary to maintain public security and its essential security interests in the circumstances that prevailed."[128]

113. Argentina adds that the Tribunal also failed to state reasons for its rejection of Argentina's defense of necessity under customary international law and that again on that point it manifestly exceeded its authority.[129] In this regard, it recalls that "[t]he Tribunal rejected Argentina's alternative defense of necessity under customary international law on the basis that two of the factors set forth in Article 25 of the ILC'S Draft Articles on State Responsibility were not satisfied: the measures were not the only steps available, and Argentina itself contributed to the crisis."[130]

114. According to Argentina, the Tribunal based its decision on the first point "on the mere *existence* of different opinions on issues of economic policy, without considering whether the other alternatives were feasible."[131] Moreover it nowhere addressed the impact of either resorting to the adjustment mechanisms provided in the Gas Law and License, or taking no action in response to the emergency.[132]

115. Furthermore the Tribunal asserted that Argentina substantially contributed to the crisis in two ambiguous sentences without engaging into any real analysis of the alleged "shortcomings" in government policies.[133]

(c) CMS' submissions

116. CMS submits that, contrary to what Argentina contends, the Tribunal did not manifestly exceed its powers and that there was no failure to state reasons. It stresses that "[t]o the extent there is any conflating of matters in connection with Article XI and

127 Ibid., paras. 136-144.
128 Ibid., para. 155.
129 Ibid., para. 180.
130 Ibid., para. 170.
131 Ibid., para. 175 (emphasis in original).
132 Ibid., para. 176.
133 Ibid., para. 178.

necessity under customary international law, it is Argentina and not the Tribunal that is at fault"[134] According to CMS the Tribunal considered both defenses step by step, separately, in the order in which Argentina pleaded them.[135]

117. CMS moreover contends that the Tribunal correctly rejected Argentina's defense on necessity under customary international law in stating that Argentina's measures were not the only steps available to it and that Argentina contributed to the crisis.[136] It adds that the Committee has no authority under Article 52 of the ICSID Convention to reconsider the Tribunal's findings of fact.[137]

118. CMS further notes that "after having already rejected Argentina's defense under customary international law, and after having concluded that Article XI is not self-judging, the Tribunal correctly reverted to customary international law standards as applicable in an analysis of Article XI."[138] "[H]aving found that Argentina had failed to satisfy the conditions for establishing that a state of necessity existed, there was no need for the Tribunal to duplicate the same analysis in connection with its review of Article XI."[139] In any case a review of whether the Tribunal correctly interpreted or applied Article XI in its determination of Argentina's defense is beyond the scope of the Committee's mandate.[140] "It is sufficient to note that the Tribunal did – step by step and methodically, whether rightly or wrongly – interpret and apply Article XI in light of customary international law and on the basis of the parties' submissions."[141]

(d) The Committee's view

119. The Committee will first deal with Argentina's arguments relating to failure to state reasons under Article 52(e) before examining its submissions based on manifest excess of powers under Article 52(b).

134 CMS' Annulment Counter-Memorial, para. 81.
135 Ibid., para. 91.
136 Ibid., paras. 115-121.
137 Ibid., para. 120.
138 Ibid., para. 84.
139 Ibid., para. 82.
140 Ibid., para. 91.
141 Ibid.

(i) Failure to state reasons

120. The Committee observes that, in Section D of the Award, the Tribunal dealt with Argentina's defense based on state of necessity or emergency under customary international law before examining Article XI of the BIT.

121. The Tribunal considered that Article 25 of the ILC's Articles on State Responsibility reflects customary international law in that field and examined one by one the conditions enumerated in that Article. It took a decision on each of them giving detailed reasons. It arrived to the conclusion that two of those conditions were not fulfilled, recalled that all conditions must be cumulatively satisfied and concluded that the requirement of necessity under customary international law had not been fully met. In that part of the Award, the Tribunal clearly stated its reasons and the Committee has no jurisdiction to consider whether, in doing so, the Tribunal made any error of fact or law.

122. With respect to the defense based on Article XI of the BIT, the Tribunal examined the Parties' arguments and concluded first that "there is nothing in the context of customary international law or the object and purpose of the Treaty that could on its own exclude major economic crises from the scope of Article XI."[142] Then it addressed the debate which the parties had chosen to engage in as to whether Article XI is self-judging. The Tribunal concluded that under Article XI it had the authority to proceed to a substantive review and that "it must examine whether the state of necessity or emergency meet the conditions laid down by customary international law and the treaty provisions and whether it thus is or is not able to preclude wrongfulness."[143]

123. The problem is, however, that the Tribunal stopped there and did not provide any further reasoning at all in respect of its decision under Article XI. To some extent this can be understood in the light of the arguments developed at the time both by Argentina and CMS. Argentina, on the basis of an expert opinion of Professor Anne-Marie

142 Award, para. 359.
143 Ibid., para. 374.

Slaughter,[144] contended before the Tribunal that Article XI was "self-judging" and that as a consequence the Tribunal had to limit itself to consider whether it acted in good faith in invoking this Article. The expert appointed by CMS, Professor José E. Alvarez, in his statement, opposed that thesis and added that Article XI "must be read in the light of … the well established derogation for necessity now codified in Article 25 of the ILC's Articles on State Responsibility."[145] Endorsing that opinion at the hearing, CMS submitted that "Article XI is not self-judging and… its invocation is subject to satisfaction of the test of necessity under international law.[146] Argentina took the same approach, conflating "state of emergency" and "state of necessity" and adding that state of necessity is included in Article XI.[147]

124. Along those lines, the Tribunal evidently considered that Article XI was to be interpreted in the light of the customary international law concerning the state of necessity and that, if the conditions fixed under that law were not met, Argentina's defense under Article XI was likewise to be rejected.[148] Accordingly, having considered the arguments eventually developed by the Parties with respect to Article XI, it did not find it necessary to revert to its previous assessment concerning the application of customary international law and to repeat the conclusions it had arrived at during the course of examination of Argentina's first defense.

125. The motivation of the Award on this point is inadequate. The Tribunal should certainly have been more explicit in specifying, for instance, that the very same reasons which disqualified Argentina from relying on the general law of necessity[149] meant that the measures it took could not be considered "necessary" for the purpose of Article XI either.

126. Both Parties however understood the Award in that sense and, before the Committee, CMS noted that the Tribunal incorporated into its interpretation of Article XI

144 Statement by Professor Anne Marie Slaughter, Hearing on Merits, 18 August 2004, 1844-1847.
145 Statement by Professor José E. Alvarez, 17 March 2004, para. 32.
146 Hearing on Merits, 9 August 2004, 110.
147 Ibid., 295, 300.
148 See Award, paras. 308, 374.
149 Ibid., 320, 323, 324, 329, 355, 356.

the approach it had adopted to the law of state responsibility.[150] Argentina did not contest that point and only complained that the Tribunal did not "proceed to carry out the substantive examination" which it rightly held was required.[151]

127. In the Committee's view, although the motivation of the Award could certainly have been clearer, a careful reader can follow the implicit reasoning of the Tribunal as indicated in paragraph 124 above. On this point, therefore, the submission of Argentina cannot be upheld.

(ii) Manifest excess of powers

128. As indicated above the Tribunal, as likewise the parties, assimilated the conditions necessary for the implementation of Article XI of the BIT to those concerning the existence of the state of necessity under customary international law. Moreover, following Argentina's presentation,[152] the Tribunal dealt with the defense based on customary law before dealing with the defense drawn from Article XI. Argentina submits before the Committee that in doing so, the Tribunal on both points manifestly exceeded its powers.

129. The Committee observes first that there is some analogy in the language used in Article XI of the BIT and in Article 25 of the ILC's Articles on State Responsibility. The first text mentions "necessary" measures and the second relates to the "state of necessity". However Article XI specifies the conditions under which the Treaty may be applied, whereas Article 25 is drafted in a negative way: it excludes the application of the state of necessity on the merits, unless certain stringent conditions are met. Moreover, Article XI is a threshold requirement: if it applies, the substantive obligations under the Treaty do not apply. By contrast, Article 25 is an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations.

150 Hearing on Annulment Proceedings, 27 March 2007, 179-182.
151 Argentina's Annulment Memorial, para. 131.
152 Argentina's Merits Counter-Memorial, paras. 716-742; Argentina's Merits Reply, paras. 841-996; Hearing on Merits, 9 August 2004, 100-112, 295-296.

130. Furthermore Article XI and Article 25 are substantively different. The first covers measures necessary for the maintenance of public order or the protection of each Party's own essential security interests, without qualifying such measures. The second subordinates the state of necessity to four conditions. It requires for instance that the action taken "does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole", a condition which is foreign to Article XI. In other terms the requirements under Article XI are not the same as those under customary international law as codified by Article 25, as the Parties in fact recognized during the hearing before the Committee.[153] On that point, the Tribunal made a manifest error of law.

131. Those two texts having a different operation and content, it was necessary for the Tribunal to take a position on their relationship and to decide whether they were both applicable in the present case. The Tribunal did not enter into such an analysis, simply assuming that Article XI and Article 25 are on the same footing.

132. In doing so the Tribunal made another error of law. One could wonder whether state of necessity in customary international law goes to the issue of wrongfulness or that of responsibility. But in any case, the excuse based on customary international law could only be subsidiary to the exclusion based on Article XI.

133. If state of necessity means that there has not been even a *prima facie* breach of the BIT, it would be, to use the terminology of the ILC, a primary rule of international law. But this is also the case with Article XI. In other terms, and to take the words of the International Court of Justice in a comparable case, if the Tribunal was satisfied by the arguments based on Article XI, it should have held that there had been "no breach" of the BIT.[154] Article XI and Article 25 thus construed would cover the same field and the Tribunal should have applied Article XI as the *lex specialis* governing the matter and not Article 25.

[153] Hearing on Annulment Proceedings, 27 March 2007, 339-340; 28 March 2007, 69-70, 177.

[154] *Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment on Merits, 6 November 2003, para 34.

134. If, on the contrary, state of necessity in customary international law goes to the issue of responsibility, it would be a secondary rule of international law – and this was the position taken by the ILC.[155] In this case, the Tribunal would have been under an obligation to consider first whether there had been any breach of the BIT and whether such a breach was excluded by Article XI. Only if it concluded that there was conduct not in conformity with the Treaty would it have had to consider whether Argentina's responsibility could be precluded in whole or in part under customary international law.

135. These two errors made by the Tribunal could have had a decisive impact on the operative part of the Award. As admitted by CMS, the Tribunal gave an erroneous interpretation to Article XI. In fact, it did not examine whether the conditions laid down by Article XI were fulfilled and whether, as a consequence, the measures taken by Argentina were capable of constituting, even *prima facie*, a breach of the BIT. If the Committee was acting as a court of appeal, it would have to reconsider the Award on this ground.

136. The Committee recalls, once more, that it has only a limited jurisdiction under Article 52 of the ICSID Convention. In the circumstances, the Committee cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal. Notwithstanding the identified errors and lacunas in the Award, it is the case in the end that the Tribunal applied Article XI of the Treaty. Although applying it cryptically and defectively, it applied it. There is accordingly no manifest excess of powers.

H. Temporary Character of Necessity and Consequences for Compensation

(a) The Award

137. After having decided that the requirements of necessity under customary international law and Article XI of the BIT had not been met and having rejected Argentina's defense in this respect, the Tribunal considered the consequences to be

[155] See the discussion reported in *ILC Ybk 1999* vol II(2), 73-74, 85; ILC, Commentary to Part 1, Chapter V, paras. (2)-(4), (7).

drawn for those conclusions as far as compensation was concerned. It recalled that under Article 27 of the ILC's Articles on State Responsibility:

"The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

(a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(b) the question of compensation for any material loss caused by the act in question."

The Tribunal declared itself "satisfied that Article 27 establishes the appropriate rule of international law on this issue."[156] It added that "[e]ven if the plea of necessity were accepted, compliance with the obligation would reemerge as soon as the circumstance precluding wrongfulness no longer existed, which is the case at present."[157] It concluded that "any suspension of the right to compensation is strictly temporary, and that this right is not extinguished by the crisis events."[158]

138. Passing to the determination of the compensation due, the Tribunal calculated it on the basis of the damages suffered by CMS from 2000 to 2027.[159]

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(b) Argentina's submissions

139. Argentina submits that Article 27 of the ILC's Articles on State Responsibility "does not require the payment of compensation for measures subject to the defense of necessity."[160] According to Argentina, this text only contemplates the possibility of such a compensation in certain cases and does not attempt to specify in which circumstances compensation could be payable. It adds that, in the present case, the matter is governed by Article XI of the BIT, which necessarily excludes compensation.[161]

156 Award, para. 390.
157 Award, para. 382. The Tribunal had already decided that the crisis period came to an end "sometime between late 2004 and early 2005" (para. 250).
158 Award, para. 392.
159 Award, para. 419.
160 Argentina's Annulment Memorial, para. 162.
161 Ibid., para. 161.

140. Argentina moreover contests "the Tribunal's view that the period of necessity was temporary"[162] and contends that "The tribunal entirely failed to consider the possibility that the continuing stability following the crisis *depended upon the continuation* of precisely the type of measures at issue in the case before it … Furthermore, the Tribunal's view that the period of necessity was temporary cannot be reconciled with its award of damages for harm allegedly incurred *during* the period of necessity."[163]

141. Thus, according to Argentina, the Award must on that point be annulled for manifest excess of power.

(c) CMS' submissions

142. CMS submits that "Argentina's requested review of the Tribunal's finding as to the temporary nature of the emergency falls outside the Committee's mandate for several reasons."[164] In fact "[t]he Tribunal's discussion of this issue constituted *obiter dicta* … and could not be identified as a manifest excess of power."[165] Moreover "it is not open to the Committee to second-guess the factual findings of the Tribunal."[166]

143. CMS also contends that "the Tribunal's consideration of Argentina's obligation to pay compensation retroactively in the event of a state of necessity was *obiter dicta*, in light of the Tribunal's prior rejection of Argentina's defenses based on Article XI and customary international law."[167] Moreover, on this point, the Award is consistent with both Parties' positions before the Tribunal.

(d) The Committee's view

144. In paragraphs 379 to 394 of the Award, the Tribunal analyzed Article 27 of the ILC's Articles on State Responsibility concerning the temporary nature of necessity and the conditions under which compensation might be due even if necessity is established.

162 Ibid., para. 160.
163 Ibid., para. 160.
164 CMS' Annulment Counter-Memorial, para. 93.
165 Ibid., para. 94.
166 Ibid., para. 96.
167 Ibid., para. 100.

145. The Committee observes that Article 27 covers cases in which the state of necessity precludes wrongfulness under customary international law. In the present case, the Tribunal rejected Argentina's defense based on state of necessity. Thus Article 27 was not applicable and the paragraphs relating to that Article were *obiter dicta* which could not have any bearing on the operative part of the Award.

146. However the Committee finds it necessary to observe that here again the Tribunal made a manifest error of law. Article 27 concerns, *inter alia*, the consequences of the existence of the state of necessity in customary international law, but before considering this Article, even by way of *obiter dicta*, the Tribunal should have considered what would have been the possibility of compensation under the BIT if the measures taken by Argentina had been covered by Article XI. The answer to that question is clear enough: Article XI, if and for so long as it applied, excluded the operation of the substantive provisions of the BIT. That being so, there could be no possibility of compensation being payable during that period.

147. Moreover the Committee notes that Article 27 itself is a "without prejudice" clause, not a stipulation. It refers to "the question of compensation" and does not attempt to specify in which circumstances compensation could be due, notwithstanding the state of necessity.[168]

148. Paragraphs 379 to 394 of the Award being *obiter dicta*, it remains to be seen on which basis the Tribunal decided that compensation was due by Argentina to CMS for the damage suffered by it from 2000 to 2027.

149. The Tribunal had already decided that Argentina had breached its international obligations under Article II(2)(a) and Article II(2)(c) of the BIT. It also decided that in the present case there was no state of necessity and did so in terms which, by necessary inference, excluded also the application of Article XI. Thus, under the well-known principle of international law recalled in Article 1 of the ILC Articles, Argentina was responsible for the wrongful measures it had taken.

150. The Committee concludes that, whatever may have been the errors made in this respect by the Tribunal, there is no manifest excess of powers or lack of reasoning in the part of the Award concerning Article XI of the BIT and state of necessity under customary international law.

I. Compensation

(a) The Award

151. The Tribunal, in the absence of an agreed form of restitution, determined in paragraphs 409 to 469 the amount of compensation due by Argentina to CMS. For that purpose it decided to resort to the standard of fair market value and to calculate that value in using the discounted cash flow method. It noted that the expert chosen by CMS was the only one who estimated the value loss suffered by CMS on its TGN's shares. It took that estimation as a starting point, but appointed its own experts and in the light of their report modified on a number of points the initial estimation. After that modification, it arrived "at a DCF loss valuation of US$133.2 million for the Claimant on August 17, 2000, representing the compensation owed in that regard by the Respondent to the Claimant at that date".[169] It decided that Argentina must pay that amount. It added that:

> "Upon payment of the compensation decided in this Award, the Claimant shall transfer to the Respondent the ownership of its shares in TGN upon payment by the Respondent of the additional sum of US$2,148,100. The Respondent shall have up to one year after the date this Award is dispatched to the parties to accept such transfer."[170]

The Tribunal then fixed the interest to be paid.[171]

(b) The Parties' submissions

152. Argentina submits that the Tribunal failed "to explain why a percentage of a value of the *company* should be the basis for granting compensation to a *shareholder* in a case where there has been no expropriation. The Award goes on to put this principle into

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168 See the ILC's commentary on Article 27, paras. (1), (6): *Yearbook of the International Law Commission* 2001, vol. II(2), 209, 211.
169 Award, para. 468.
170 Ibid., sub-para. 3 of the *dispositif*.
171 Ibid., paras. 470-471.

practice without any adequate explanation for the figures chosen."[172] Moreover, according to Argentina, the Tribunal contradicted itself in deciding that no expropriation had taken place and in using the standard of compensation applicable in case of expropriation.[173] It made its calculation without giving the reasons of many of its assumptions. "[T]he Award provides no reasons for the conclusion that CMS – rather than simply TGN – had the right to calculate tariffs in dollars, obtain PPI tariff adjustments, and benefit from the purported stabilization clause in the License."[174]

153. CMS, for its part, stresses that the Tribunal highlighted its reasons for adopting the fair market value standard for a breach of Article II of the BIT and clearly explained the methodology it used for that purpose in the light of the various experts' reports.[175] Moreover, no contradiction can be noted in the Award, the substance of which cannot be reviewed by the Committee.[176]

(c) The Committee's view

154. The Committee observes that the Award is one of the most detailed decisions on damages in ICSID case-law. Under the title "Remedies", the Tribunal considered the matter in 25 pages. It declared itself "persuaded that the cumulative nature of the breaches discussed here is best dealt with by resorting to the standard of [compensation known as the] fair market value."[177] It specified that "[w]hile this standard figures prominently in respect of expropriation, it is not excluded that it might also be appropriate for breaches different from expropriation if their effect results in important long-term losses."[178] In doing so, the Tribunal clearly explained its reasons and did not contradict its decision dismissing CMS's claim of expropriation.

155. The Tribunal then listed the various methods which could be retained to calculate the fair market value and concluded for reasons given in paragraphs 411 to 417 of the

172 Argentina's Annulment Reply, para. 99.
173 Ibid., para. 101.
174 Ibid., para. 100.
175 CMS' Annulment Counter-Memorial, paras. 170-173.
176 Ibid., paras. 173-174.
177 Award, para. 410.
178 Ibid.

Award that the discounted cash flow method (DCF) was the one "that should be retained."[179]

156. Passing to the evaluation of the damages, the Tribunal carefully examined the reports of the experts chosen by both parties, in the light of the report of its own experts. It used the "direct equity value" method to compute the value of the firm and its securities.[180] Starting from the assumptions which were the basis of CMS's expert report, it modified them on a number of points in specifying the reasons of each modification. In particular, it examined two different DCF scenarios: one in the "no regulatory change" context ("without pesification") and the other for the post-measures "new regulatory context" ("with pesification").[181] This last scenario was to take into account the impact of Argentina's crisis on TGN's performance in the absence of the measures complained of by CMS. Thus and contrary to what is contented by Argentina this element was taken into consideration.

157. The Committee accordingly concludes that there was no lack of reasoning or contradiction in the reasoning with respect both to the standard of compensation retained by the Tribunal and to the calculation of damages made by it.

J. Conclusion

158. Throughout its consideration of the Award, the Committee has identified a series of errors and defects. The Award contained manifest errors of law. It suffered from lacunae and elisions. All this has been identified and underlined by the Committee. However the Committee is conscious that it exercises its jurisdiction under a narrow and limited mandate conferred by Article 52 of the ICSID Convention. The scope of this mandate allows annulment as an option only when certain specific conditions exist. As stated already (paragraph 136 above), in these circumstances the Committee cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal.

179 Ibid., para. 411.
180 Ibid., paras. 430-433.
181 Ibid., para. 422.

159. In the event Argentina's application for annulment must be upheld as far as the umbrella clause is concerned. The other claims of Argentina are dismissed.

160. As a consequence the stay of enforcement maintained by the Decision of the Committee of 1 September 2006 is automatically lifted as from the date of the present Decision, in accordance with Arbitration Rule 54(3). Consequently, payment by Argentina of the sum awarded is again obligatory: see paragraph 15 above, and this reactivates the Award's stipulation[182] that, on payment of the amount due plus an additional US$2,148,100, CMS' shares in TGN are to be transferred to Argentina. Pursuant to Article 44 of the ICSID Convention (as applied to annulment proceedings by Article 52(4)), the Committee decides that Argentina has 228 days from the date this Decision is dispatched to the Parties to accept the transfer of ownership of CMS' shares in TGN, as provided for in sub-paragraph 3 of the *dispositif* to the Award.

161. The ruling on the costs of the proceedings before the Tribunal stands. It remains to deal with the question of the costs of the annulment proceedings, as to which the Committee has a discretion. In all but one of the concluded annulment proceedings, Committees have held that ICSID costs should be borne equally by the Parties.[183] In the circumstances of the present case the Committee proposes to follow the existing practice.

162. The costs of the Parties' own representation during the annulment proceedings are likewise within the Committee's discretion. In view of the decision of partial annulment, and having regard to all the circumstances, the Committee decides to make no order as to the costs of representation before it.

[182] Award, sub-para. (3) of the *dispositif*, and see paragraph 10 above.
[183] See *MTD v. Chile*, para. 110 (fn 139).

CMS Gas Transmission Co. v. Argentina
(ICSID Case No.ARB/01/8)
Decision on Annulment

K. Decision

163. For the foregoing reasons, the Committee decides:

(1) Sub-paragraph 1 of the *dispositif* of the Award is annulled as far as it provided that "The Respondent breached its obligations... to observe the obligations entered into with regard to the investment guaranteed in Article II(2)(c) of the Treaty."

(2) The other claims of the Argentine Republic are dismissed.

(3) Argentina has 228 days after the date this Decision is dispatched to the Parties to accept the transfer of ownership of CMS shares in TGN as provided for in sub-paragraph 3 of the *dispositif* to the Award.

(4) Each Party shall bear one half of the costs incurred by the Centre in connection with this annulment proceeding.

(5) Each Party shall bear its own costs of representation in connection with this annulment proceeding.

[signature]

JUDGE GILBERT GUILLAUME
President of the Committee
Date: 21 August 2007

[signature]

JUDGE NABIL ELARABY
Member
Date: 12 July 2007

[signature]

PROFESSOR JAMES CRAWFORD
Member
Date: 12 July 2007

Permanent Court of Arbitration

Saluka Investment BV (The Netherlands) *v.* The Czech Republic
Partial Award

17 March 2006

THE MATTER OF AN ARBITRATION
UNDER THE UNCITRAL ARBITRATION RULES 1976

SALUKA INVESTMENTS BV (THE NETHERLANDS)
Claimant
v
THE CZECH REPUBLIC
Respondent

PARTIAL AWARD

Arbitral Tribunal

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Registry

Permanent Court of Arbitration

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DEFINED TERMS

Allianz	Allianz AG
Bankovní	Bankovní Holding a.s. (see also Bivalence and České pivo)
Big Four banks	Ĉeská spořitelna, a.s. ("CS"); Komerční banka, a.s. ("KB"); Ceskoslovenská obchodní banka a.s. ("CSOB"); and Investiční a Poštovní banka a.s. (later known as IP banka a.s., or "IPB")
CI	Česká inkasní, s.r.o.
CNB	Czech National Bank
CS	Ĉeská spořitelna, a.s., one of the Big Four banks
CSC	Czech Securities Commission
CSOB	Ceskoslovenská obchodní banka a.s., one of the Big Four banks
CZK	Czech Republic Koruny
GDP	Gross Domestic Product
Hypo-Vereinsbank	Hypo-und Vereinsbank AG
IPB	Investiční a Poštovní banka a.s./IP banka a.s., one of the Big Four banks
KB	Komerční banka, a.s., one of the Big Four banks
KBC	KBC Bank of Belgium NV
KoB	Konsolidační banka, s.p. ú v likvidaci, State-owned debt consolidation agency
NPF	National Property Fund
OJ	Official Journal of the European Communities
OPC	Office for the Protection of Economic Competition
PCA	Permanent Court of Arbitration
Saluka	Saluka Investments BV
SI	Slovenská Inkasná, spol, s.r.o.
Treaty	Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of The Netherlands and the Czech and Slovak Federal Republic, signed on 29 April 1991
UniCredito	UniCredito Italiano Group

I. INTRODUCTION

A. Commencement of the Arbitration

1. This arbitration arises out of events consequent upon the reorganisation and privatisation of the Czech banking sector as it had formerly existed under the centralised banking system of the Communist period, which ended in 1990. The Czech Government privatised one of the major Czech banks, known as IPB (see below, paragraph 33), by selling the State's shareholding to a company within the Nomura group of companies. The Nomura Group (see below, paragraph 42) is a major Japanese merchant banking and financial services group of companies, which typically operates also through subsidiaries set up in various countries. The Nomura company which bought the shares in IPB transferred them to another Nomura subsidiary, Saluka Investments BV ("Saluka"), a legal person constituted under the laws of The Netherlands.

2. By a Notice of Arbitration dated 18 July 2001 Saluka initiated arbitration proceedings against the Czech Republic as the Respondent, under Article 8 of the Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of The Netherlands and the Czech and Slovak Federal Republic, signed on 29 April 1991 ("the Treaty"). The Czech and Slovak Federal Republic was dissolved on 31 December 1992, and its two constituent parts became independent States as the Czech Republic and the Slovak Republic. The Czech Republic confirmed to the Kingdom of The Netherlands that, upon the separation of the Czech and Slovak Federal Republic into two separate Republics, the Treaty remained in force between the Czech Republic and the Kingdom of The Netherlands.

3. In accordance with Article 8(5) of the Treaty, the arbitration tribunal ("the Tribunal"), in determining its own procedure, has to apply the arbitration rules of the United Nations Commission for International Trade Law ("the UNCITRAL Rules"). Although, inevitably, at the time when the Notice of Arbitration was served the Tribunal had not been constituted, the Claimant's Notice of Arbitration was, as is usual in these circumstances, given to the Respondent pursuant to Article 3.1 of those Rules.

B. Constitution of the Tribunal

4. Article 8 of the Treaty provides that the Tribunal will consist of three persons, each party appointing one member and those two members appointing a third person as Chairman of the Tribunal. Within the time-limits set out in that Article the three appointments were made, Mr Daniel Price being appointed by the Claimant, Professor Dr Peter Behrens being appointed by the Respondent, and Professor Sir Elihu Lauterpacht CBE QC being appointed as Chairman by agreement between the two previously-appointed members.

5. On 5 June 2002 Mr Price tendered his resignation. On 20 June 2002 the Claimant appointed in his place Maître L. Yves Fortier CC QC as a member of the Tribunal.

6. On 24 February 2003 Professor Sir Elihu Lauterpacht tendered his resignation. The two party-appointed members of the Tribunal agreed upon the appointment of Sir Arthur Watts KCMG QC in his place as Chairman of the Tribunal, and the parties were notified of this on 25 March 2003.

C. Procedural Timetable

7. At a Procedural Meeting held in London on 2 November 2001:

a. it was agreed that the UNCITRAL Rules were the applicable rules of procedure in this arbitration;

b. the parties accepted the Tribunal's proposal that registry services for the arbitration should be provided by the Permanent Court of Arbitration ("PCA"), and the PCA agreed to provide such services;

c. Geneva, Switzerland, was selected as the place of arbitration, although this did not preclude the Tribunal from holding meetings at any other place, including The Hague, for the sake of convenience;

d. English was agreed as the language of the arbitration;

e. arrangements were made for the discovery of certain documents;

f. the following timetable for the submission of written pleadings by the parties was laid down (it being agreed that it would be more appropriate to use the international nomenclature for the parties' written submissions rather than the terms used in the UNCITRAL Rules):

Claimant's Memorial – 5 March 2002, and
Respondent's Counter-Memorial – 17 May 2002;

g. the possibility of there being a second round of written submissions was reserved for future decision by the Tribunal, but tentative deadlines were set as follows:

Claimant's Reply – 19 July 2002, and
Respondent's Rejoinder – 13 September 2002; and

h. arrangements were made regarding questions of confidentiality.

8. The timetable laid down for the first round of written pleadings was subsequently amended from time to time, by agreement of the parties.

D. The Written Pleadings

9. Two days before the amended date fixed for the submission of the Claimant's Memorial, the Respondent on 13 August 2002 filed a Notice to Dismiss, by which it requested that the Tribunal dismiss the Claimant's claims.

10. At a Procedural Meeting in London on 10 September 2002 to consider this request, the Tribunal ruled that because the facts alleged in the Respondent's Notice to Dismiss were so closely related to the facts involved in the principal claim, the dismissal issue should be joined to the merits and ruled upon in the Tribunal's final award.

11. Meanwhile, in accordance with the amended timetable, the Claimant filed its Memorial on 15 August 2002.

E. The Respondent's Counterclaim

12. Before the amended deadline set for the filing of its Counter-Memorial, the Respondent submitted on 4 December 2002 a Notice of Counterclaim, setting forth a counterclaim against the Claimant in which it stated that it would elaborate in its Counter-Memorial.

13. By a letter dated 16 December 2002 the Claimant informed the Respondent of its view that the Tribunal lacked jurisdiction under the Treaty to hear a Counterclaim by the Czech Republic. In a subsequent exchange of correspondence, the Claimant proposed that the Tribunal hear its objections to jurisdiction prior to the filing of the Respondent's Counter-Memorial, while the Respondent suggested that any objections to the jurisdiction of the Tribunal to consider the Counterclaim be raised, and resolved by the Tribunal, after the filing of the Counter-Memorial.

14. In a "Direction by the Tribunal" ("Direction") issued on 15 January 2003 the Tribunal permitted the Respondent to proceed in the manner set out in its Notice of Counterclaim, by elaborating such claims within its Counter-Memorial (then due to be filed by 21 February 2003), and ordered the Claimant to respond by 31 March 2003 to the parts of the Counter-Memorial dealing with the Counterclaim by Objections limited to the question of the Tribunal's jurisdiction in that respect.

15. The Tribunal added that it expected the Respondent's elaboration to cover comprehensively the questions of the Tribunal's jurisdiction over the Counterclaim, and whether any connection is required between the Counterclaim and the Claimant's claim as submitted in its Memorial of 15 August 2002 and, if so, the nature and extent of such connection. The Direction reserved the question whether oral proceedings would be necessary on this issue, and suspended the proceedings in respect of the rest of the case until the question of the Tribunal's jurisdiction over the Counterclaim had been decided.

16. The Tribunal set, and at the request of the parties varied from time to time, a timetable for the submission by the parties of their pleadings on the issue of jurisdiction, and the parties duly complied with that timetable as amended.

17. In its Counter-Memorial, submitted on 7 March 2003, the Respondent both set out its response to the Claimant's claims and dealt with the question of counterclaims.

18. As regards its Counterclaim, the Respondent set out the various heads of its Counterclaim in the Counter-Memorial, and addressed separately the question of the

Tribunal's jurisdiction over the Counterclaim. On 15 May 2003 the Claimant filed its "Objections to Jurisdiction over the Czech Republic's Counterclaims" ("the Objections"). This was followed, on 29 September 2003, by the Respondent's "Response to the Claimant's Objections to Jurisdiction over the Czech Republic's Counterclaims" ("the Response"), and on 10 November 2003 by the Claimant's "Reply to the Czech Republic's Response to the Claimant's Objections to Jurisdiction over the Czech Republic's Counterclaims" ("the Reply").

19. On 11 November 2003 the Respondent requested a hearing on the issue of the Tribunal's jurisdiction over its Counterclaim. The Tribunal fixed 6 March 2004 for the hearing, and the Tribunal and the parties met in London on that date for the purpose of hearing oral argument on this issue.

20. On 7 May 2004 the Tribunal handed down its *Decision on Jurisdiction over the Czech Republic's Counterclaim* ("Decision on Jurisdiction over Counterclaims"). For the reasons set out in that Decision, the Tribunal decided

a. that it was without jurisdiction to hear and determine the Counterclaim put forward by the Respondent in its Counter-Memorial;

b. that that Decision was without prejudice to the issue raised by the Respondent's Notice to Dismiss of 15 August 2002, which had been joined to the merits by the Tribunal's ruling of 10 September 2002;

c. that questions of costs arising as a result of the presentation by the Respondent of the Counterclaim set out in its Counter-Memorial were reserved until final consideration could be given to questions of costs in this arbitration as a whole; and

d. that the Tribunal would separately set out a revised timetable for the remaining written pleadings of the parties.

21. In a letter dated 9 June 2004 the Claimant subsequently raised a question as to the effect of the Tribunal's Decision on Jurisdiction over Counterclaims, contending that Part IV of the Respondent's Counter-Memorial (in which the Respondent had set out its arguments on its counterclaims) was to be treated as struck out and that in consequence the Claimant need not in its Reply deal with the matters contained in that Part IV. After obtaining the views of the parties the Tribunal on 26 July 2004 conveyed to the parties its view that its Decision on Jurisdiction over Counterclaims had the consequence that Part IV of the Respondent's Counter-Memorial was no longer relevant to the arbitration in so far as it concerned the question of counterclaims, but that it did not necessarily follow that Part IV was also irrelevant to other questions which might still arise in the arbitration. Since the possible relevance of Part IV to such other questions was a matter to be argued by the parties as part of the further proceedings on the merits, the Tribunal was unable to agree to the Claimant's request that the Tribunal should now order that Part IV be struck out of the pleadings altogether.

F. Subsequent Procedural Timetable

22. Having already received the Claimant's Memorial and the Respondent's Counter-Memorial, the Tribunal on 9 June 2004 endorsed the parties' agreement to the following timetable for the submission of further written pleadings:

Claimant's Reply – 24 September 2004; and
Respondent's Rejoinder – 4 February 2005.

Those further written pleadings were submitted by the parties within the time allowed for them.

G. Oral Hearings

23. In subsequent discussion with the parties, it was agreed that oral hearings would be held in London, at the International Dispute Resolution Centre, from Friday, 8 April 2005 to Wednesday, 20 April 2005. The hearings duly took place between those dates.

24. At those hearings, the Tribunal was addressed by:

On behalf of the Claimant:	Mr Jan Paulsson Mr Peter Turner Professor James Crawford SC
On behalf of the Respondent:	Mr George von Mehren

In addition, the Tribunal heard the following witnesses:

Called by the Claimant:	Mr Randall Dillard Professor Hyun Song Shin
Called by the Respondent:	Mr Michael Descheneaux Mr Pavel Racocha Mr Luděk Niedermayer Mr Jan Mládek Mr Pavel Mertlík Mr Kamil Rudolecký Mr Ivan Pilip Mr Pavel Kavánek Professor Joseph J. Norton Mr Brent Kaczmarek

25. After the conclusion of the oral hearings, the Tribunal allowed the parties, if they so wished, to file post-hearing briefs by 30 June 2005. Both parties filed post-hearing briefs within that deadline.

II. THE FACTS

26. Saluka claims in this arbitration that the Czech Republic acted in relation to Saluka and its investment in a manner inconsistent with the Czech Republic's obligations under the bilateral investment treaty ("BIT") between The Netherlands and the Czech Republic. In particular, Saluka claims that it was deprived of its investment contrary to Article 5 of that treaty, and that, contrary to Article 3, its investment was not treated fairly and equitably.

27. While the parties differed as to some of the facts and as to the interpretation to be made of the facts (those differences will emerge later in this Award), it appears to the Tribunal that the essential facts underlying this dispute were as follows.

A. The Banking System in Czechoslovakia during the Period of Communist Rule

28. As was the case in many sectors of the economy, the banking sector in Communist Czechoslovakia – more formally, the Czech and Slovak Federal Republic – was highly centralised: it was an integral part of central State economic planning. That Communist era came to an end in 1990.

B. The Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic 1991

29. As a step towards encouraging the development of a market economy in this former Communist State, a number of Western States concluded BITs with the Czech and Slovak Federal Republic. One such treaty was the Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic 1991 concluded with The Netherlands on 29 April 1991. The Treaty entered into force on 1 October 1992.

C. The Separation of the Czech Republic and Slovakia

30. Following the end of the Communist era, the Czech and Slovak Federal Republic separated into its two constituent parts on 31 December 1992, and in its place the two independent States of the Czech Republic and Slovakia were created.

31. The Treaty had been concluded with the former State, the Czech and Slovak Federal Republic. By letter of 8 December 1994, the Minister of Foreign Affairs of the Czech Republic confirmed to the Minister of Foreign Affairs of the Kingdom of The Netherlands that the Treaty remained in force between the two States. No question of State succession in relation to the Treaty has been raised by the parties in this arbitration. The Tribunal, and the parties, have therefore proceeded on the basis that the Treaty applies to the situation which has given rise to the present dispute.

D. The Reorganisation and Privatisation of the Banking System in the Czech Republic

32. With the end of the period of Communist rule in 1990 and the subsequent establishment of the Czech Republic, the Czech authorities also took various steps to transform the economy into a more market-based system. This involved amongst other things attracting investment from abroad in order to provide the expertise to assist with this transformation. In particular it was necessary to reorganise the previously centralised banking sector.

33. By about 1994, the distinct segments of the former centralised banking system which revolved around the State Bank of Czechoslovakia had separated into four large State-owned commercial banks which dominated the banking sector in the Czech Republic. These "Big Four" banks were Ĉeská spořitelna, a.s. ("CS"), Komerční banka, a.s. ("KB"), Ceskoslovenská obchodní banka a.s. ("CSOB"), and Investiční a Poštovní banka a.s. (later known as IP banka a.s., or "IPB"). The Czech banking sector was administered and regulated by the Czech National Bank ("CNB").

34. IPB was the result of a merger in December 1993 between a bank known as "IB" (which had been formed in 1990 from part of the State Bank of Czechoslovakia) and the Post Office Bank: this merger gave IPB a right to provide banking services at 3,500 branches of Czech Post Offices until 2008 – the country's largest retail banking network. IPB, however, did not just conduct a banking operation. By early 1996 it also managed a varied industrial portfolio, which included a substantial (83%) holding of shares in Plzeňský Prazdroj, the company that produces Pilsner Urquell beer. IPB's corporate structure involved a Management Board of Directors (responsible for the day-to-day management of the bank) and a Supervisory Board (appointed and/or elected by IPB's shareholders and employees, and responsible for general supervision and control), together with a General Assembly of shareholders. There was also a Chief Executive Officer.

35. With the end of the Communist period of control, the Czech Republic sought to transfer large parts of its hitherto State-owned economy into private ownership. It wanted to do this as rapidly as possible, and embarked upon a system of "mass voucher" privatisation – a system whereby State-owned firms were converted into joint stock companies, the shares in which were sold to Czech citizens for vouchers which they purchased for a nominal price. This process was substantially completed in two waves, and was concluded by 1995. In the case of larger and more strategic enterprises, however, only part of the share ownership was distributed through this mass privatisation procedure. A State agency known as the National Property Fund ("NPF") retained a significant stake in these strategic enterprises, which included the Big Four banks – IPB, CSOB, CS and KB. The Czech State retained (directly or indirectly) a significant minority stake in and control over these banks: while the precise degree of the State's shareholdings varied over time, at the times relevant to these proceedings, the State's stake in CS amounted approximately to 45%, in KB to 48.75%, in IPB to 36%, and in CSOB to 46%. The final sale of the State's remaining stakes in the banks and their privatisation was to follow in the period 1998-2001.

E. The Czech Banking Sector's "Bad Debt" Problem

36. One of the legacies from the Communist era was a large level of outstanding debt, much of which included non-performing loans granted to large State enterprises which were insolvent. A large proportion of this bad debt problem found its way to the balance sheets of the Big Four banks. From them it was passed to the State-owned debt consolidation agency, Konsolidační banka, s.p. ú v likvidaci ("KoB"), which bought specific loans from the banks, whereby the purchase price exceeded the value of the loans. By 1995 most Communist-era bad debts had fed through the system.

37. However, economic practices in the post-Communist period created a substantial further bad debt problem in relation to new loans. It was government policy to continue the supply of credit to newly privatised firms, not necessarily on commercial terms, in order to keep the firms operating while they undertook the necessary restructuring; this liberal credit policy was applied even when, in truth, the firms being assisted were floundering and had ceased to service their loans. The Big Four banks (in which the State retained a significant stake) assisted in the carrying out of this policy. The balance sheets of the Big Four banks were once again seriously affected. By the end of 1999 the stock of non-performing loans in the portfolios of commercial and special institutions associated with the transformation of the economy amounted to one third of total loans or the equivalent of 26% of the Czech Republic's gross domestic product ("GDP"): a World Bank study in 2000 noted that this was one of the highest ratios in the new market economies of Central and Eastern Europe.

38. The problem was exacerbated by the absence at the time in the Czech legal system of an effective procedure to enable creditors to enforce payment of debts owing to them: moreover, collateral security for loans could not be sold without the debtor's consent. The CNB reported in 1997 that "[t]he balance between the rights and obligations of debtors and creditors is, on the long-term basis, tilted in favour of the debtors."[1] Some improvements in the legal regime regarding creditors' rights were made by new legislation, but this only entered into force on 1 May 2000.

39. This combination of relatively liberal credit policies and inadequate creditors' rights created a new "bad debts" or "bad loans" problem for the Czech banking system. By 1998 the Big Four banks again had a large non-performing loan problem, estimated at 34% for KB, 23.3% for CS, 16.6% for CSOB, and 21.75% for IPB.

40. A new Social Democratic Government which came to power in June 1998 sought to address these problems by action directed at business enterprises, through what was referred to as a "Revitalisation Programme"; both the Prime Minister and Minister of Finance expressly rejected the provision of further State aid directly to the banks. The new Government also claimed that it would improve creditors' rights, thereby helping creditor banks to recover their loans, but these promises either were not fulfilled, or were only fulfilled belatedly.

41. Given the continuing inadequacies in the legal regime of creditors' rights, the CNB felt obliged to take tough regulatory action in mid-1998 to protect the stability of the banking system. This action seriously affected the performance of the major banks, which had to

allocate a substantial part of their operating profits to additional provisions and reserves, causing some to return substantial losses for 1998.

F. Nomura's Acquisition of Control over IPB on 8 March 1998

42. Meanwhile, from mid-1996, Nomura began negotiations for the purchase of the State's shares in IPB. At this point the Tribunal must observe that "Nomura" is, in these proceedings, something of a *portmanteau* term. The Nomura Group, as a major international provider of banking and financial services, operates through a complex of associated and subsidiary companies, and it is not always easy to distinguish the separate capacities in which they act. For present purposes, it is convenient to distinguish between (1) the overall Nomura enterprise (which will be referred to as "the Nomura Group", "Nomura International" or sometimes simply "Nomura"), (2) an English-incorporated Nomura subsidiary known as Nomura Europe plc ("Nomura Europe" or sometimes simply "Nomura"), and (3) the Dutch-incorporated Nomura subsidiary known as Saluka Investments BV ("Saluka") and the Claimant in these arbitration proceedings. It is not, however, always possible to distinguish between these various emanations of Nomura, particularly since neither party has consistently made the necessary distinctions, much of the correspondence tendered in evidence is on writing paper headed "Nomura International PLC" even when dealing with the consequences of the Nomura/Saluka shareholding in IPB, and the Respondent indeed avowedly uses the term "Nomura" and "Saluka" interchangeably, in keeping with its view that as a practical matter Saluka is a mere shell used by Nomura for its own purposes.

43. The Nomura Group had had considerable direct experience of the Czech economy since about 1990, including advising the Czech Government on the privatisation of Czech breweries, and experience of the Czech banking sector, having previously advised both the Government and the Big Four banks in general as well as IPB in particular (with whom it had a long-standing relationship); it had also invested in Czech enterprises, and had an office in Prague since 1992.

44. In April 1996 IPB appointed Nomura to manage an equity offering, but ultimately this offering was abandoned. On 26 September 1996 Nomura offered to purchase the Government's shareholding in IPB at the price of CZK 300 per share, and to provide CZK 9 billion of new capital to the bank. The Government's shareholding consisted of 31.5% of IPB's shares held through the NPF, and a further 4.8% through other sources, in particular Czech Post – a total Government holding of some 36.3%.

45. A Nomura delegation led by Mr Yoshihisa Tabuchi (a Director and Counsellor at Nomura) met Mr Václav Klaus (Prime Minister), Mr Ivan Kočárník (Minister of Finance), Mr Josef Tošovský (Governor of the CNB) and others, including the management of IPB, at the end of October 1996 to discuss Nomura's offer. By about that time, Nomura reached an understanding with IPB's management that control over IPB would be exercised through shareholders agreements between Nomura and the management of IPB.

46. On 27 November 1996 the Government announced its intention to sell its shareholding in IPB through a public tender process, and therefore rejected Nomura's offer to buy the shares.

47. An internal Nomura analysis of December 1996 concluded that the viability of IPB as an investment depended on State support. Even so, on 23 December 1996, Nomura, through various subsidiaries, purchased approximately 5% of IPB shares (and by April 1997 had acquired almost 10% of IPB's shares). In or about December 1996 Nomura retained the firm later known as Price Waterhouse Coopers (after the merger of Price Waterhouse and Coopers & Lybrand in July 1998) to conduct due diligence of IPB: previously Nomura, as an "insider" working for IPB's management, had conducted extensive due diligence in connection with the abandoned equity offering of April 1996.

48. On 24 March 1997 the tender for the sale of up to 36% of the shares in IPB was announced by the NPF. The next day, Nomura International wrote to the Vice-Chairman of the NPF to declare its interest (the only other bidder to respond was ING Financial Services International). On 17 April 1997 Nomura presented a proposal to the Government for the purchase of the NPF's minority stake at CZK 300 per share (subject to due diligence and documentation).

49. As it was already a (minority) shareholder in IPB, Nomura then on 16 April 1997 entered into a shareholders agreement with other IPB shareholders whereby Nomura affiliates would offer to purchase the State's interest in IPB, and Nomura and the IPB management would jointly exercise control of IPB. On the same day, a second shareholders agreement which gave certain employment benefits to some of IPB's senior officials was also concluded.

50. On the next day, 17 April 1997, Nomura presented the NPF with a proposal to purchase its IPB shares and strengthen IPB's capital, and it informed the NPF that it had entered into shareholders agreements which gave it a strong position in IPB.

51. On 29 April 1997 Mr Jiři Tesař and Mr Libor Procházka, two senior members of IPB's Managing Board, were detained on charges of embezzlement. They were subsequently released, but nevertheless (and against a background of generally low public confidence in the banking sector) IPB's share price fell and clients began withdrawing funds. The NPF suggested to Nomura that, as a mark of confidence in IPB, a Nomura employee should join IPB's Management Board. Accordingly, in May 1997, Mr Eduard Onderka, a Director within Nomura's Merchant Banking Group, was appointed to IPB's Management Board; Nomura also provided a CZK 5 billion liquidity line to IPB following the drain on its liquidity caused by the outflow of deposits.

52. After receiving a provisional report on IPB from Price Waterhouse Coopers in June 1997, and a further Nomura internal analysis, both of which drew attention to IPB's poor financial position, Nomura International submitted a further proposal to the Government on 16-17 June 1997 whereby Nomura and the NPF would together have a controlling majority of IPB's shares. The Government rejected this proposal as not being consistent with Government policy, and requested Nomura to submit a further proposal on the lines of an outright purchase of the NPF's shareholding.

53. On 7 July 1997 Nomura submitted a new proposal for the purchase of up to 36.29% of IPB's share capital at CZK 285 per share (subject to due diligence and documentation); Nomura also proposed to subscribe a new issue of not more than 60,000,000 shares in IPB

(totalling CZK 6 billion), and an issue of 10-year subordinated bonds with a total face value not exceeding CZK 6 billion, with another similar issue if needed; and Nomura required a 10-year extension of IPB's franchise agreement with the Czech Post Office.

54. On 23 July 1997 this proposal was accepted by the Government. The purchase price was subject to adjustment based on IPB's net asset value (with the transaction capable of being unwound if the adjusted share price was below CZK 100 per share).

55. Matters appear to have rested there for several months. During that time (and particularly in July and August 1997) Nomura conducted further studies of IPB's financial position. These forecast that Nomura's anticipated profit from its IPB transaction would be US$50-88 million, but also made it clear that IPB was in a serious financial state and without a large and immediate injection of capital, IPB could face forced administration, and that there were serious risks to investing in IPB.

56. In September-October 1997 Nomura sought an assurance from Mr Ivan Pilip (then Minister of Finance) that others of the Big Four banks would not be privatised under conditions more favourable to their investors than the conditions being offered to Nomura. Mr Pilip said that if he remained Finance Minister he would privatise other large banks in the same way as IPB, *i.e.* sell them in the condition they were in and without helping them to solve their debt problems prior to their sale, but added that he could not give Nomura any assurance that the privatisation of the other banks would proceed in the same way as the privatisation of IPB, since he could not bind a different future government which might adopt a different policy. Nor was any such assurance included in the eventual Share Purchase Agreement.

57. On 18-19 January 1998 Nomura and the NPF agreed to submit two alternative versions of their prospective share purchase agreement to the Government for approval, each based on different valuations of IPB's shares. The first provided for a share price of CZK 117 plus a commitment by Nomura to subscribe to CZK 6 billion of new share capital in IPB and an underwriting commitment for CZK 6 billion of subordinated debt; the second provided for a share price of CZK 147 and the same commitment to subscribe to CZK 6 billion of new share capital but only a "reasonable efforts" commitment for the issue of the CZK 6 billion of subordinated capital for the bank. On 2 February 1998 IPB's auditors Ernst & Young (on the basis of whose audit the Government insisted on working) confirmed that the net asset value of IPB shares was (as at 31 July 1997) CZK 147 per share. Price Waterhouse Coopers were unable to finalise a parallel audit of IPB on behalf of Nomura. The Government, in choosing between the two alternative versions of the prospective share purchase agreement, selected the alternative with the higher purchase price, namely CZK 147 per share.

58. From 3-4 February 1998, a Nomura International representative, Mr David Thirsk, met with a representative of IPB's senior managers to discuss Nomura's plans for IPB, which linked Nomura's purchase of IPB shares with Nomura's purchase of a shell company to hold IPB's Pilsner Urquell shares (as to which, see below, paragraphs 68-69). On 6 February 1998 Nomura wrote to the NPF emphasizing that Nomura was not entering into IPB as a strategic partner (*i.e.* an investor who acquires a company with a view to integrating the acquisition into its operations), but rather that it intended its role to be that of a limited recourse equity investor in IPB, or portfolio investor (*i.e.* an investor who acquires shares in a company as an investment, with a view to their eventual sale at, it would be hoped, a profit). Consistent with

this view of its position, Nomura Europe limited its shareholding in IPB to less than 50%, holding most (and eventually all) of its shares through Saluka, and allowing Nomura personnel to act only as shareholder representatives on IPB's Supervisory Board, and not as executive directors on IPB's Management Board.

59. At about this time, Nomura had agreed with certain significant counterparties an option – the so-called "Put Option" – whereby Nomura Europe could put its shares in IPB (at an initial price of CZK 115 per share) towards the purchase of other assets (notably IPB's holding of Pilsner Urquell shares), clearing the way for Nomura Europe's eventual acquisition in March 1998 of the NPF's shares in IPB. During this period the complex series of transactions regarding the acquisition and sale of Pilsner Urquell shares taking place (see below, paragraphs 68-69).

60. On 16 February 1998 and 2 March 1998 Nomura Europe submitted to the Czech authorities a paper on a "Strategy of Nomura Europe plc for IPB" in support of its application for CNB approval for its purchase of IPB shares: that approval was required by section 16 of the Czech Banking Act 1998. Nomura Europe did not disclose in this paper the Put Option which it had negotiated, nor its objectives in relation to the Pilsner Urquell shares. On 20 February 1998 Nomura filed for approval by the Office for the Protection of Economic Competition ("OPC") of its acquisition of IPB shares; it did not inform the OPC that Nomura indirectly controlled the Radegast brewery and that IPB indirectly controlled the Pilsner Urquell brewery (the OPC's approval was given on 13 May 1998).

61. On 4 March 1998 the Government approved the sale of the IPB shares held by the NPF to Nomura Europe. On 7 March 1998 Nomura entered into a new shareholders agreement with the other parties to the shareholders agreement of 16 April 1997.

62. On 8 March 1998 Nomura Europe signed a Share Purchase Agreement with the NPF for the purchase of its approximately 36% holding of 20,620,083 IPB shares for about CZK 3 billion. The Agreement contemplated that Nomura Europe could transfer its shares to any special purpose company, trust, foundation, *Anstalt* or other entity, and provided also for a capital increase in IPB by a subscription of 60,000,000 further shares at CZK 100 per share, and for Nomura to reasonably endeavour to procure the underwriting of CZK 6,000,000 of subordinated debt. The total strengthening of IPB's balance sheet was thus some CZK 12 billion (about US$348 million). The Agreement also gave the NPF pre-emption rights for a period of 5 years over the shares sold to Nomura Europe. The issue of the 60,000,000 shares was approved the next day at an extraordinary general meeting of IPB. Nomura Europe subscribed to all of those shares, at CZK 100 per share.

63. Certain important personnel changes were also made at the same time: Mr Randall Dillard and Mr Eduard Onderka were appointed to the Supervisory Board of IPB, Mr Jiři Tesař resigned as Chairman of the Board of Directors and moved to the advisory level of the Supervisory Board, Mr Libor Procházka resigned as Chief Executive Officer and became Deputy Chief Executive responsible for investment banking, and Mr Jan Klacek was appointed Chairman and Chief Executive Officer. Later, on 12 June 1998, Mr Daniel Jackson was appointed to the Supervisory Board of IPB.

64. On 10 July 1998 Nomura provided IPB with access to a US$70 million revolving credit facility.

65. With its existing holding of about 10%, Nomura Europe now held, as a result of these transactions and the acquisition of the further 36%, some 46% of IPB's shares, thus giving Nomura Europe effective (although still minority) control over IPB.

66. The sale to Nomura Europe of the NPF's shareholding in IPB was the first situation in which the Czech Republic had fully disposed of its holding in a major bank. To some extent, therefore, it was a precedent for the projected privatisation of the whole banking sector.

G. Acquisition and Sale of Pilsner Urquell Brewery

67. In September 1997 IPB filed a merger notification with the OPC regarding Radegast and Pilsner Urquell breweries, but the merger was disapproved by the OPC on 10 December 1997 – a decision against which IPB appealed on 17 December 1997, and in which Nomura itself intervened on 19 January 1998 in support of IPB's appeal. That 10 December decision was cancelled on 5 June 1998. Further enquiries were ordered, but the merger was again disapproved on 12 August 1998, and again Nomura appealed but the merger notification was withdrawn on 22 November 1998, and the OPC closed the proceeding on 23 December 1998.

68. An internal "Transaction Structure" paper was prepared on 3 February 1998 by Nomura for its proposed purchase of IPB shares. In that paper IPB's shareholding in the company producing Pilsner Urquell beer was identified as IPB's most valuable strategic holding, and the paper indicated an intention, first, to buy 62.8 million shares in IPB for an amount which would be equal to the purchase price of the Pilsner Urquell shares, and, second, to sell those shares later to an international brewery company for a much greater price. On 3-4 February 1998, a Nomura International representative, Mr David Thirsk, met with a representative of IPB's senior managers to discuss Nomura's plans for IPB, which linked Nomura's purchase of IPB shares with Nomura's purchases of a shell company to hold IPB's Pilsner Urquell shares. On 5 February 1998 Nomura concluded a Cooperation Agreement with IPB's management. Under this agreement IPB would contribute its Pilsner Urquell shares, and Nomura would contribute its substantial (59.22%) interest in Radegast Brewery (which a Nomura affiliate had purchased from IPB on 19 September 1997) to a new entity. As already noted (above, paragraph 60), in its paper on a "Strategy of Nomura Europe plc for IPB" which Nomura Europe submitted to the Czech authorities in support of its application for CNB approval for its purchase of IPB shares, Nomura Europe did not disclose the Put Option which it had negotiated, nor its objectives in relation to the Pilsner Urquell shares. Similarly, in filing on 20 February 1998 for the OPC's approval of its acquisition of IPB shares, Nomura did not inform the OPC that Nomura indirectly controlled Radegast and that IPB indirectly controlled Pilsner Urquell. The OPC's approval was given on 13 May 1998. On 25 February 1998 Bankovní Holding a.s. ("Bankovní" – an affiliate of and controlled by IPB) purchased Bivalence, renamed the next day České pivo, a special purpose company whose only shareholder was Bankovní and whose only assets proved to be the Pilsner Urquell shares it purchased (with deferred payment) from IPB on 26 February 1998 and which it was to administer (Nomura appears never to have transferred its Radegast brewery shares to České pivo as originally planned). On 26 February 1998 České pivo signed an agreement with IPB to buy the bank's majority shareholding in Pilsner Urquell brewery.

69. On about 4 March 1998 Nomura set in motion a complex series of transactions which by June 1998 resulted in Pembridge Investments BV ("Pembridge"), a Nomura controlled entity, having the right to pay for the České pivo shares (*i.e.* holding Pilsner Urquell) with IPB shares. A further series of complex transactions between 31 May 1999 and 3 June 1999 involving three Cayman Islands companies – referred to as Torkmain, Levitan and Tritton – led to Nomura acquiring 84% of the shares of the Pilsner Urquell brewery with the right to pay for them by the delivery of IPB shares. These various transactions successfully operated the Put Option which Nomura had negotiated earlier (above, paragraph 59). In December 1999 Nomura International entered into an agreement which combined the Pilsner Urquell shares and Radegast shares, and then transferred all of those shares to a Dutch company, Pilsner Urquell Investments BV, and then sold that company to South African Breweries for a sum greatly in excess of the amount originally paid by Nomura for the Pilsner Urquell shares.

H. The Transfer of Nomura Europe's IPB Shares to Saluka

70. Meanwhile, Saluka Investments BV ("Saluka") had been established on 3 February 1998 as a special-purpose vehicle for the express purpose of holding the shares in IPB the purchase of which Nomura Europe was contemplating at the time. Saluka was incorporated in The Netherlands on 3 February 1988, and was owned by a Dutch charitable trust, Stichting Saluka Investments, and was managed by Nationwide Management Services BV

71. With its purchase of IPB shares completed, Nomura Europe, pursuant to the Share Purchase Agreement and with the approval of the CNB, transferred its IPB shares to Saluka in two tranches. In this way Saluka acquired ownership of 51,315,283 shares of Nomura Europe's IPB shareholding on 2 October 1998, and Nomura Europe's remaining 10,465,421 shares on 24 February 2000. Saluka bought these shares by issuing promissory notes to Nomura Europe, those notes being secured by a pledge over the shares; that pledge provided that Nomura Europe had the right to vote on the IPB shares. At the same time, Saluka entered into an agreement with Nomura International plc whereby the latter became Saluka's sole sales agent for the IPB shares.

72. Saluka thus became the registered holder of the 61,780,704 shares in IPB which are the subject matter of this arbitration. Saluka subsequently agreed with Nomura Europe in June 2000 to sell the shares in return for the cancellation of the promissory notes which had been issued to pay for them. However, by the time of the hearings in this arbitration and still, so far as the Tribunal is aware, at the date of this Award, Saluka continues to hold the shares pending an instruction from Nomura Europe as to whom to transfer them: no such instruction has been given because of certain unresolved disputes. Consequently, at the time this arbitration was initiated, Saluka continued to be the registered holder of the IPB shares.

73. It is thus apparent that ownership of the controlling shares in IPB – and with it control over IPB's other assets – vested in Saluka. In reality and in substance, however, it is equally apparent that Saluka's rights of ownership seem to have been exercised in accordance with directions given by Nomura Europe or other elements of the Nomura Group. This duality of ownership and control is reflected in the parties' pleadings, which in general do not distinguish carefully or consistently between Saluka and Nomura (whether Nomura Europe or other elements of the Nomura Group).

74. Upon acquiring effective control of IPB, Nomura set about various reorganizations of IPB's senior personnel, its banking strategy, its portfolio activities, its customer relations, its loan and loan recovery strategies, and its operational arrangements – all in the interests of strengthening IPB's market position in the Czech banking sector. These measures had considerable success, and IPB's position improved markedly.

I. The Government's Assistance to the Banking Sector (1998-2000)

75. While IPB is the Czech bank of principal importance for this arbitration, it was, as already noted, just one of the Big Four Czech banks, together with CSOB, CS and KB. In addition was the State-owned bad debt agency, KoB.

76. By mid-1998 the Czech banking sector was in serious difficulties, mainly as a combined result of the existence of a large bad debt problem, inadequate provision for creditors to enforce the rights to recover their loans, and the tough new regulatory steps taken by the CNB. One of the banks' particular problems was their ability or otherwise to maintain a capital adequacy ratio above the 8% minimum limit fixed by the CNB; if the ratio fell below that level, the CNB would have to take remedial measures, possibly involving revocation of a bank's banking licence.

77. The Czech Government embarked on a process of finally privatizing the Big Four banks which had previously only been partially privatised (above, paragraph 35). From early 1998 onwards the Government took a number of steps to assist one or other of the Big Four banks to overcome the difficulties with which they were faced. These varied forms of assistance mainly included, but were not necessarily limited to, those types mentioned hereunder.

78. As regards KB, the CNB at first saw no need for State participation in efforts to resolve KB's bad debt problem. However, in October 1998, the CNB itself proposed State participation in the light of recent developments in the financial markets. State participation in strengthening KB's capital participation was seen as necessary, especially given KB's dominant position in the Czech banking sector and the wider economic destabilisation to which serious weakening in its position could lead. The Czech Government decided by Resolution No. 820 of 28 July 1999 to arrange the purchase of major stocks of non-performing loans which were on KB's balance sheet. Accordingly, in August 1999, KoB purchased CZK 23.1 billion of KB's non-performing loans (at 60% of their face value) amounting to a capital injection into KB of CZK 9.5 million. From December 1999-January 2000 the NPF subscribed to an increase of CZK 6.77 billion in the share capital of KB, thereby increasing the NPF's shareholding in KB from 48.74% to 60%. Despite these injections of State funds, KB reported a loss of CZK 9.2 billion for 1999. On 16 February 2000 the Government resolved to transfer a further CZK 60 billion of KB's non-performing loans, this time to a subsidiary of KoB but again at 60% of face value, amounting to a capital injection into KB of CZK 36 billion. By 2000 its share price had nearly trebled compared with its low point in 1999. The Government renewed its attempt fully to privatise KB by selling its now-majority stake in the bank. To facilitate a sale, KoB guaranteed a portfolio of KB's classified loans up to CZK 20 billion: this guarantee was signed on 29 December 2000, thereby avoiding the need for approval by the Czech Parliament under a new law which came into force on 1 January 2001. The net value of State assistance to KB in the period 1998-2000 thus amounted to some CZK 75 billion (with a further tax break to KB of CZK 4 billion

which only recently came to light). On 28 June 2001 the Czech Republic sold its 60% share in KB to Société Générale S.A. for CZK 40 billion (or EUR 1.19 billion).

79. CS, too, had a major bad debt problem. Its significance as a major element in the Czech banking sector made its continued viability important to the Czech Government. Its ability on its own to maintain the required 8% capital ratio was in doubt, but its private investors were unwilling to participate in any capital injections. The Government stepped into the breach. On 27 May 1998 the Government resolved to transfer CZK 4.1 billion to CS to cover losses of CS related to its deposits in the failed "AB banka." On 9 December 1998 the Government resolved that CZK 10.5 billion of CS' classified loans should be transferred to KoB at a price of CZK 4 billion (although their security value was much less). In December 1998 CS and KoB concluded an agreement for a ten-year loan for subordinated debt amounting to CZK 5.5 billion, which was fully funded by KoB on 23 December 1998. On 10 March 1999 the Government resolved to double CS' share capital from CZK 7.6 billion to CZK 15.2 billion. On 8 November 1999 the Government approved the purchase of CZK 33 billion of CS' non-performing loans by KoB at 60% of their face value, up to a maximum of CZK 20 billion. Meanwhile, in October 1999, the Government had embarked on the privatisation of CS by way of a sale of the NPF's substantial stake in CS to Erste Bank of Austria, to whom the Government gave an exclusive negotiating position. To facilitate the conclusion of this sale the Government gave on 2 February 2000 a State guarantee until 2005 against losses from non-performing loans which were on the balance sheet of CS at the end of 1999 (the guarantee covered a portfolio of loans with a book value of CZK 88 million) and sold its (the NPF's) shares in CS to Erste Bank for CZK 19 billion.

80. In relation to CSOB, the situation was for various largely historical reasons somewhat different from that at the other Big Four banks; in particular it did not suffer in quite the same way from the bad debt problem which afflicted the other banks. CSOB's ability to ride out the economic crisis which affected the other banks was in considerable part due to various Government guarantees which had earlier been given to CSOB in relation to Česká inkasní, s.r.o. ("CI"), and then, on 14 April 1998, in relation to Slovenská Inkasná, spol, s.r.o. ("SI"), for which the Government indemnified CSOB from any liability resulting from Slovakia's refusal to continue to fund that company. On 24 February 1999 the Government resolved to compensate CSOB for loans to industrial borrowers worth CZK 2.3 billion. On 31 May 1999 the Government resolved to assume CSOB's liability on a loan made to failed Banka Bohemia in 1994. CSOB was privatised by virtue of the Government's approval on 31 May 1999 of the sale, for CZK 40 billion, of the State's 65.69% shareholding in CSOB (held through the NPF, the CNB, and the Ministry of Finance) to KBC Bank of Belgium NV ("KBC") (which would eventually come to acquire 80% of CSOB).

81. In addition to these various forms of State assistance to CSOB, the relationship between CSOB and IPB gave rise to a special series of events involving further assistance to CSOB. In circumstances which will become apparent below (paragraph 143 and following), and which lie at the heart of the Claimant's claims in this arbitration, IPB was sold to CSOB in June 2000. That transaction was complex, but a major element of it was the need for CSOB to be "held harmless" for any negative value associated with its purchase of IPB. The Tribunal sees no need for present purposes to set out the relevant provisions in all their complexity, since the main elements are clear and uncontested. These are that (1) CSOB had to pay a symbolic CZK 1 for its purchase of IPB; (2) CSOB benefited from arrangements which enabled it to avoid any downside risks arising from its purchase of any particular

assets of IPB; and (3) a substantial element of State aid was involved in the transaction, estimated at CZK 160-200 billion by the Ministry of Finance in June 2000 and audited by KPMG on 1 June 2001 at 159.9 billion. The acquisition of IPB made CSOB the leading bank in the Czech Republic.

82. Various measures of State assistance to KB, CS and CSOB have been described in the preceding paragraphs. With respect to IPB, assistance given to it by the State appears to have involved certain loss-producing loans worth CZK 16.1 billion being transferred to KoB in early 1998 (before Nomura Europe's purchase of IPB shares in March 1998), and the extension of IPB's past post office franchise when Nomura Europe bought the IPB shares, thereby giving it exclusive access to over 1,000 sales counters across the country. However, when the Government's Revitalization Programme (above, paragraph 40) for industrial enterprises finally received formal approval by the Government on 14 April 1999, its terms excluded IPB from the Programme, and IPB was excluded as a beneficiary.

83. The Big Four banks were of comparable strategic importance for the Czech economy as a whole; they also shared exposure to the bad debt problem, and to the inadequacies of the legal regime relating to creditors' rights. Collectively, these problems threatened the collapse of the Big Four banks, but they were too big to be allowed to fail: State assistance to avert collapse was necessary. The State assistance provided to KB, CS and CSOB amounted to 19% of the Czech Republic's GDP for 1999. It appears from various statements made by the banks and by the Government and the NPF in April-May 1998 that State assistance was given to KB, CS and CSOB on the basis that they were banks in which the State had a major shareholding interest, while IPB was not given such assistance as (after Nomura's investment in March 1998) it was regarded as a private institution whose fate was a matter for its private shareholders.

J. Developments in Respect of IPB (August 1999-end May 2000)

84. Following growing concerns at the CNB during 1998 with regard to IPB's banking practices, and CNB information-finding visits to IPB from mid-April 1999 to end-June 1999, the CNB began a regulatory inspection of IPB on 30 August 1999 which lasted until 5 November 1999. Serious financial deficiencies and irregularities were apparent.

85. In October 1999 Nomura began the search for a strategic partner for IPB. The involvement of the Czech Government was needed in this connection, in order to ensure the necessary level of State support for IPB's financial position (without which private sector investors would not find IPB an attractive proposition). In any event, the Czech Government would need to be involved since the approval of the Czech regulatory authorities would be required for any strategic partnership, and in the event of a merger with any other of the Big Four banks, the Government, as (directly or indirectly) a shareholder in those banks, would also have to give its consent.

86. During the autumn of 1999 it was clear that IPB needed an increase of capital to provide for its bad loans. In October, the CNB requested a significant increase in IPB's equity capital.

87. On 16 November 1999 IPB's General Assembly resolved to increase IPB's share capital, but this resolution was subsequently blocked by a minority shareholder on technical grounds. Another General Meeting was called for 19 February 2000 to seek approval for a capital increase of CZK 2.6 billion, to CZK 13.3 billion.

88. As a result of the CNB's August-November 1999 inspection of IPB, the CNB concluded both that IPB was not performing prudently, and that IPB needed to create at least CZK 40 billion of provisions – an amount the size of which made it clear that a major crisis was possible.

89. Discussions subsequently took place between representatives of the CNB and Ministry of Finance and representatives of IPB and Nomura to seek to identify possible solutions.

90. Meanwhile, IPB's management focussed on securing State aid, while Nomura concentrated on seeking a foreign strategic partner for IPB. A number of institutions showed interest, including in particular Allianz AG ("Allianz") and Hypo-und Vereinsbank AG ("Hypo-Vereinsbank"), with which Nomura signed a confidentiality agreement on 24 November 1999. However, on 26 January 2000 Hypo-Vereinsbank pulled out of the consortium with Allianz, and was later replaced by the UniCredito Italiano Group ("UniCredito").

91. In December 1999 Nomura (with reservations on the part of IPB's management) proposed a merger with CS. Nomura was able to make progress with an offer from Allianz for both IPB and CS, and the parties agreed on a framework for the transaction by 21 January 2000. These arrangements, however, came to nothing: the State had already issued a public tender for its interest in CS, the deadline for bids had passed, the proposal to merge IPB with CS was not specific enough in any event to comply with the rules of the tender, and the State was in the final stages of negotiations with Erste Bank of Austria (to which CS was eventually sold) (above, paragraph 79).

92. IPB's bid for CS attracted some media publicity and in January 2000 this led in turn to media criticism of the CNB, its Governor (Mr Josef Tošovský), and the Minister of Finance (Mr Pavel Mertlík). Mr Tošovský and Mr Mertlík blamed IPB's management for instigating these criticisms, which IPB's management strongly denied. On 4 January 2000 Mr Tošovský informed Mr Mertlík of the gravity of the situation at IPB.

93. On 10 January 2000 Mr Pavel Kavánek of CSOB met Mr Mertlík and expressed CSOB's interest in an acquisition to expand its share of the retail banking market, with IPB amongst possible targets.

94. On 20 January 2000 media reports of a statement by a CNB official, Mr Pavel Racocha, relating to the CNB's investigation of IPB, raised speculation as to the possibility of IPB being subjected to forced administration. Ten days later, on 30 January 2000, the CNB issued a press release stating that the inspection was a routine regulatory matter and had not yet been completed, and that suggestions that IPB's forced administration was under discussion were unfounded.

95. During February and March 2000 IPB and Nomura developed a proposal for a merger between IPB and KB, and later made presentations regarding it to the Government and the CNB, but this proposal came to nothing and was rejected.

96. In mid-February 2000 representatives of Nomura had several meetings with officials from the CNB. During these meetings, the CNB is said to have requested the resignation of two people from their senior positions on IPB's Supervisory and Management Boards – respectively, Mr Jiři Tesař (Chairman of the Supervisory Board) and Mr Libor Procházka (Deputy CEO of the Management Board) (they both resigned on 25 April 2000) – and also asked Nomura to provide the additional capital which IPB needed (*i.e.* for Nomura to take on the role of a strategic investor at IPB), failing which the CNB would seek to denigrate Nomura internationally. For his part, Mr Randall Dillard (Nomura's representative on IPB's Supervisory Board, and Vice-Chairman of that Board) and his colleagues claimed that, in the Share Purchase Agreement, the Czech Republic had agreed not to sell the State's interest in the other major banks on more favourable terms than its sale of IPB shares (a claim denied by the Respondent) (above, paragraph 56), and consequently that Nomura would not act to rescue IPB (*i.e.* provide the necessary additional capital) without State assistance (a position repeated in April 2000) – assistance which the Czech Republic was in the circumstances unwilling to provide.

97. Also during February 2000 Mr Daniel Jackson (Deputy Managing Director, Nomura, and member of the IPB Supervisory Board) began negotiations with Mr Luděk Niedermayer (Vicegovernor of the CNB) for a Memorandum of Understanding intended to establish a framework for their future. Although by the first week in March agreement had seemed close, ultimately the initiative came to nothing.

98. On 19 February 2000 IPB's General Assembly approved a capital increase of CZK 2.6 billion to CZK 13.3 billion.

99. On 25 February 2000 the CNB delivered its formal report regarding its previous year's inspection of IPB and, in March and April 2000, IPB, in accordance with the law, submitted written objections to specific parts of the report. Subsequent legal procedures could not be concluded because IPB's financial condition deteriorated too quickly.

100. In late February 2000 there was renewed and sustained media speculation about the CNB's review of IPB. The earlier rumours of IPB's possible forced administration (above, paragraph 94) persisted. In the week of 28 February 2000 IPB suffered a run on the bank (which was to prove to be the first of two major runs on IPB), and customers withdrew CZK 30 billion in deposits. Banks cut their credit lines to IPB, and froze or restricted their dealings with it. Meetings with high-level official Czech personnel during the week of the bank run led to a statement by IPB denying rumours of forced administration and emphasizing the strength of the bank, and the Minister of Finance, Mr Pavel Mertlík, and a senior official of the CNB, Mr Pavel Racocha, also made public statements seeking to calm depositors. The bank run stopped.

101. It seems that, at about this time, the course of the discussions between Czech officials and Nomura led to the Ministry of Finance and the CNB asserting their loss of trust in Nomura. The Minister of Finance refused to meet Nomura representatives. In mid-March

2000 the Minister of Finance and the Governor of the CNB appointed deputies (respectively, Mr Jan Mládek and Mr Luděk Niedermayer) to deal with Saluka/IPB. Thereafter, it appears that Czech officials had only a "soft mandate" in dealing with Saluka/IPB, and Mr Randall Dillard (then Head of the Merchant Banking Group at Nomura International, and who would later become Chairman of IPB's Supervisory Board upon the resignation of Mr Jiři Tesař) could only have unofficial meetings off Ministry premises with the Deputy Finance Minister, Mr Mládek.

102. On 6 March 2000 the CNB obtained an expert study which showed that the macroeconomic costs which would be associated with IPB's collapse (if it were to occur) would directly lead to a fall of about 4% in nominal GDP, and would probably cause a systemic crisis in the Czech financial sector.

103. On 14 March 2000 Mr Miloš Zeman, the Prime Minister of the Czech Republic, told Mr Dillard that discussions on the provision of State aid to IPB and on a merger between IPB and KB were conditional on Nomura injecting new capital into IPB.

104. Also in March 2000 CSOB approached Nomura for discussions with respect to IPB.

105. On 22 March 2000 Ernst & Young (IPB's auditors) informed the CNB of the possibility that IPB might not comply with the required capital adequacy requirements, as a result of which the CNB formally asked IPB to prepare alternative methods for strengthening its capital should the minority shareholders block an increase in equity capital.

106. On 25 April 2000 the personnel changes at IPB requested by the CNB in February 2000 were made (above, paragraph 96). Mr Jiří Tesař resigned as Chairman of the IPB Supervisory Board and became instead Vice-Chairman, and Mr Libor Procházka resigned from his position as Deputy CEO of the IPB Board of Directors. Mr Randall Dillard took over as Chairman of the Supervisory Board.

107. In mid-April 2000 IPB submitted to the CNB some draft proposals to stabilise IPB, and submitted a further draft to the Government in May 2000, but the proposals were not acceptable as they did not give the State sufficient control over the restructuring process.

108. Nomura continued its attempts to find a strategic partner for IPB. Progress was made with the Allianz/UniCredito consortium. On 4 April 2000 a term sheet was signed providing for a capital increase for IPB and UniCredito's entry as a strategic partner for the bank. By the middle of May active steps were being taken to follow through with this arrangement and on 22 May 2000 UniCredito began its due diligence enquiries on IPB. On 26 May 2000 UniCredito was in a position to propose the purchase of IPB at an opening bid of CZK 25-30 billion (twice its book value, subject to agreement on that book value) with a possibility of paying more.

109. At the same time as these discussions were taking place, Nomura's representatives had since March 2000 also been meeting with representatives of CSOB to discuss CSOB's potential entry into IPB as a Czech domestic partner. These discussions did not proceed smoothly, with CSOB, for example, refusing to sign a confidentiality agreement as a condition for access to IPB's commercially-sensitive information, and insisting on taking

over IPB first and only thereafter negotiating the acquisition. CSOB's attitude by 5 May 2000 was that if IPB wanted Government support, then IPB needed CSOB.

110. The Government had also in April 2000 begun discussions with the potential investors in IPB which had been identified by Nomura, namely Allianz/UniCredito and CSOB. Both wanted to purchase IPB's assets rather than its shares, and both were unwilling to take over IPB without a guarantee and promise of indemnity from the State. Allianz/UniCredito moreover wanted several months to conduct due diligence, so only CSOB was able to take over IPB and continue its banking operations immediately.

111. Discussions between the Government and CSOB led to the preparation of a written presentation of CSOB's plans for IPB, dated 26 April 2000.

112. In May 2000 IPB, at the CNB's request, submitted a revised draft document to the CNB entitled "Measures for the stabilisation of IPB, a.s." This document became available to the press, leading ultimately to a second bank run in June 2000 (below, paragraph 126 and following).

113. On 2 May 2000 the Governor of the CNB, Mr Josef Tošovský, wrote to the Minister of Finance, Mr Pavel Mertlík, indicating the seriousness of IPB's capital position, its need for new capital, the impossibility of finding a strategic investor without State support, IPB's inability (as set out in the "Measures for the stabilisation of IPB, a.s.") to address the problem of capital adequacy without State assistance, and the imminence of the bank's collapse. The Governor saw the options as either stabilising the bank with a private investor and with State support, or nationalising the bank, or imposing forced administration, or revoking the bank's licence.

114. On 5 May 2000 (with follow-up letters on 8 and 9 May), and at the request of the CNB, Nomura wrote to the Ministry of Finance requesting discussions on the entry of a strategic partner into IPB, and stated its willingness to arrange for up to CZK 13.2 billion of new capital on reasonable commercial terms. No reply to these letters was received.

115. On 18 May 2000 Mr Jan Mládek, the Deputy Finance Minister, informed Mr Randall Dillard that the Ministry of Finance wanted to nationalise IPB, and proposed to buy Nomura's shares (*i.e.* by this time, Saluka's shares) at a symbolic price of 1 euro: to this end Mr Mládek wanted Nomura to obtain an additional 5% in IPB.

116. On 24 May 2000 Nomura informed the CNB that, because of the timing of IPB's auditor's statement and the IPB's General Assembly in late June 2000, the deadline for finding a solution was mid-June. Mr Pavel Racocha, for the CNB, explained that if neither IPB nor IPB's shareholders resolved IPB's problems, the CNB would have to impose forced administration on IPB. On 26 May 2000 Ernst & Young, IPB's auditors, informed the CNB that IPB needed provisions of CZK 21 billion.

117. Also on 24 May 2000 Mr Dillard submitted to the Prime Minister a further proposal entitled "Securing future for IPB", involving Nomura assuring a CZK 20 billion capital increase, a sale of 51% of IPB shares to Allianz/UniCredito and CSOB/KBC, and a KoB guarantee of IPB's balance sheet; on 25 May 2000 he gave the same presentation to the

Deputy Finance Minister, Mr Mládek. On 29 May 2000 Mr Mládek replied, rejecting that proposal (because it involved direct aid to IPB without the State having any control over the use of the funds), and reiterating the Government's offer to buy Nomura/Saluka's shares in IPB for a symbolic price of 1 euro. Nomura responded by asking how its proposal might be made acceptable. By 31 May the Ministry of Finance had refused to meet officially with Nomura or to consider any solution relating to IPB.

118. While those various developments were taking place, and despite the Government's appearance of co-operation with Nomura and IPB, the discussions between the Government and CSOB which began earlier in the year (above, paragraphs 109-111) to explore the possibility of CSOB gaining control of IPB should IPB run into serious difficulties, continued. These discussions were to lead to important developments at a meeting at which Mr Mertlík (Minister of Finance) and Mr Tošovský (Governor of the CNB) agreed to meet Mr Pavel Kavánek (CEO and Chairman of the Board of CSOB, aided by Mr Zdeněk Bakala, a well-known political lobbyist) and Mr Remi Vermeiren (President/CEO of KBC, a Belgian bank which was CSOB's largest shareholder): this meeting was to be held on 30 May 2000 in Paris where those concerned would be attending a banking conference.

K. Developments in Respect of IPB (end May 2000-7 June 2000)

119. In anticipation of that Paris meeting on 26 May 2000 Mr Kavánek wrote to Mr Tošovský and Mr Mertlík with certain proposals regarding the future of IPB, describing CSOB's proposed takeover of IPB and CSOB's readiness to act immediately. He enclosed two documents which emphasised the potential advantages of a merger between IPB and CSOB, and setting out CSOB's plan for the integration of IPB and CSOB. Further documents were to be delivered personally on the evening of 29 May 2000. These various documents have been together referred to by the Claimant as "the Paris Plan". It envisaged two possible alternatives for CSOB's takeover of IPB – a negotiated solution, or forced administration. The forced administration solution was presented as having fewer risks (although it appears that later the CNB would have preferred the more co-operative, negotiated solution, while also preparing for forced administration in case of an emergency). A detailed proposal for the carrying out of the forced administration solution was set out in the documents provided by Mr Kavánek, involving only a limited role for the Forced Administrator over the business activities of IPB and a transfer of IPB's day-to-day business to CSOB as quickly as possible.

120. On 30 May 2000 that meeting took place in Paris, to discuss CSOB's entry into IPB, or at least to allow the Government representatives the opportunity to listen to CSOB's proposals as part of their efforts to explore possible solutions to the IPB crisis. Mr Mertlík denied at the time that he participated in the meeting, and denied it also to the Czech Parliamentary Commission which subsequently investigated these matters. He also denied that KBC's entry into IPB was on the agenda of the Paris talks, and stated that, at the meeting, issues related to CSOB were primarily discussed.

121. On 1 June 2000 Ernst & Young, IPB's auditor, informed Mr Dillard that IPB was not a going concern because it was not meeting the CNB's capital adequacy requirements, and this triggered the CNB's obligation to revoke IPB's banking licence. On the same day the Government informed Nomura that State assistance would only be forthcoming if Nomura acquired a 51% stake in IPB (*i.e.* if it acquired a further 5%, since, as already explained, Nomura, through Saluka, already owned 46% of IPB's shares).

122. On 2 June 2000 the Government again repeated its 1 euro proposal. Nomura investigated ways of accommodating that proposal and, on 4 or 5 June 2000, presented three alternative proposals for the sale of IPB to the Government. None of these proposals was acceptable to the Government.

123. By about 6 June 2000 Nomura was focussing on asset sale as a solution.

124. On 7 June IPB's auditor informed the CNB that IPB needed to create provisions of at least CZK 20 or 21 billion, and possibly as much as CZK 40 billion. This meant that IPB could not meet capital adequacy requirements without external support. On 7 June 2000 Mr Mládek told Mr Dillard that IPB would be "toast" if it did not accept the 1 euro offer.

125. At about this time, Mr Mertlík met representatives of Allianz and UniCredito, who made proposals which, in their basic principles, were similar to that made by CSOB. Both banks wished to purchase IPB's assets, and both required a guarantee.

L. The Second Bank Run on IPB and its Aftermath

126. Statements apparently made by CNB officials and reported in the media on 8 June 2000, and a statement on 9 June 2000 by Mr Ladislav Zelinka, Deputy Finance Minister, raised speculation that IPB might be put into forced administration, and media speculation increased the following day (10 June 2000 – a Saturday). On Monday, Tuesday and Wednesday, 12-14 June 2000, there were mass withdrawals from IPB, amounting to CZK 17 billion. Reassuring statements by Government officials that were reported on 15 June had little or no effect.

127. The Parliamentary Commission which later enquired into these matters (below, paragraphs 144-147) found that by Monday, 12 June, documents before the CNB already set out a detailed time schedule of the steps to be taken to sell the enterprise, and that the Friday to Sunday period was essential to avoid the risk of legal actions being filed against the Forced Administrator. The Commission also noted that the CNB had already indicated the need to identify an individual to accept the appointment as Forced Administrator, and to ensure that he was familiar with the proposed measures and the proposed timetable as well as his contemplated role.

128. On 14 June 2000 Mr Kavánek (CSOB) wrote to Mr Niedermayer (CNB) with a detailed proposal for accepting the operations of IPB, which he had been asked to submit at a meeting held the previous day. A written proposal was also received on the same day from Allianz/UniCredito.

129. During the run on IPB, Nomura (on behalf of Saluka) had been involved in intensive negotiations regarding the stabilisation of IPB with strategic investors, officials at the CNB and Ministry of Finance, and the Prime Minister. On 14 June 2000 IPB submitted a proposal to the Ministry of Finance, the CNB and the Prime Minister. The proposal involved a transfer of IPB's banking business to KoB for CZK 1 for on-sale to a long-term commercial banking partner acceptable to the Government (with arrangements for the distribution of such sale proceeds), accompanied by an expressed readiness on IPB's part to execute the proposal on or before Friday, 16 June 2000.

130. Representatives of the CNB and Ministry of Finance met on 15 June 2000 to discuss the 14 June proposal. Discussions lasted into the evening and, after the meeting closed, there was an e-mail exchange. The final e-mail (to IPB's lawyer, Mr Tomáš Brzobohatý) concluded by saying that the Ministry of Finance team was "now leaving for home and will continue tomorrow in the morning". With that e-mail, Nomura's representatives were under the impression (which proved to be mistaken) that the detailed heads of terms to implement their proposal had been substantially agreed and that negotiations would continue the following day. IPB notified both the Ministry of Finance and the CNB that its Supervisory Board had approved, and had recommended the Management Board to approve, this transaction. However, the proposal was seen by the Czech authorities to involve serious economic, legal and organizational risks for the Czech Republic.

131. After the bank run had started the Government and CNB held meetings with Allianz/UniCredito and CSOB on proposals for the takeover of IPB. Allianz/UniCredito's proposal was such that it was not in a position to take over IPB's enterprise quickly.

132. On Wednesday, 14 June 2000, the CNB prepared a report for the Government on IPB's situation and possible solutions, which included forced administration and, in that eventuality, the need for any subsequent sale to a strategic investor to be accompanied by a State guarantee, since otherwise no investor would be interested.

133. Also on that day, IPB wrote to the CNB (the letter being received on 15 June) stating that IPB's liquidity had seriously deteriorated and that its solvency was threatened. On Thursday, 15 June, withdrawals from IPB continued. Representatives of the Government and CNB met those from IPB and Nomura, who were told that, if IPB did not immediately get CZK 10 billion from the State, it would revoke IPB's banking licence. That afternoon Mr Petr Staněk – the prospective Forced Administrator (*i.e.* a sort of trustee in bankruptcy) – was approached by the CNB.

134. On the night of Thursday, 15 June 2000, the Government met to consider the IPB situation. The Governor of the CNB and the Minister of Finance explained the gravity of the situation, with Nomura unwilling to invest the necessary capital and unable to identify a strategic partner and with IPB's failure to comply with capital adequacy requirements leading to the withdrawal of its banking licence with consequential threat to the stability of the banking sector. They presented as solutions either a cooperative solution involving IPB's shareholders, or forced administration coupled with a quick sale accompanied by State guarantees. The Government decided not to adopt the IPB proposal but instead to impose forced administration coupled with a quick sale to a strategic investor, with CSOB as the only bank which could quickly take over IPB. Resolution No. 622 of 15 June 2000 approved the forced administration of IPB with the objective of a subsequent sale to CSOB as the strategic investor, the provision of a government guarantee for the assets of IPB in favour of CSOB, and the issue of guarantees by the CNB to CSOB.

135. Also on 15 June, the Czech Securities Commission ("CSC") applied a preliminary injunction which imposed an immediate suspension of trading in IPB shares.

M. The Forced Administration of IPB and its Aftermath

136. On Friday, 16 June 2000, the CNB put IPB into forced administration. Although IPB considered that it had sufficient liquidity to survive a bank run, the CNB's stated reasons for imposing forced administration were that there was a considerable risk of the bank not being able to make payments (*i.e.* to survive a bank run) and that the CNB had to avoid a situation where panic among the bank's depositors permanently destabilised its operations. Moreover, the CNB explained that IPB's financial situation threatened the stability of the Czech banking system, and that the CNB was entitled to impose forced administration to remedy the bank's shortcomings which the bank's shareholders had failed to take the necessary measures to correct.

137. Late on the morning of Friday, 16 June 2000, the CNB informed IPB of its decision to introduce forced administration upon IPB and appointed Mr Petr Staněk as the Forced Administrator of IPB. The Forced Administrator thereupon assumed the powers of IPB's Board of Directors (*i.e.* took over the management of IPB), and all the powers of all corporate governing bodies of IPB were immediately suspended. The Forced Administrator was to do what was necessary to secure its unproblematic operations and to achieve an accelerated sale of IPB to CSOB, being its strategic partner. His monthly remuneration was also specified, with mention of a special bonus ("extraordinary reward") for the implementation of the sale to CSOB (the figures for the remuneration and the bonus were, however, removed by the Respondent from the copy of the document submitted in evidence). The CNB issued an irrevocable guarantee for all IPB creditors on that day, to prevent any panic.

138. Also on Friday, 16 June, IPB requested a short-term loan of CZK 10 billion from the CNB to maintain its liquidity – a request which was received after the appointment of the Forced Administrator. On that same day, CSOB also informed the Forced Administrator of its interest in purchasing IPB's enterprise.

139. Armed police entered IPB's headquarters and effected the physical removal from the premises of all bank managers.

140. On Saturday, 17 June 2000, and Sunday, 18 June 2000, the Forced Administrator discussed IPB's financial situation with Ernst & Young, IPB's auditor, who, on 18 June, told the CNB that IPB's capital adequacy ratio was in fact negative. The Forced Administrator informed the CNB of this (as required by the Czech Banking Act), whereupon the CNB (also as required by that Act) began the process of revoking IPB's banking licence.

141. In response to an expression of interest by CSOB in purchasing IPB's enterprise, the Forced Administrator engaged in extensive discussions with CSOB and its majority shareholder, KBC (a Belgian bank), on 17-18 June 2000; CSOB and KBC also had discussions with the CNB and the Ministry of Finance. The Forced Administrator, who had only limited options, decided to pursue the sale of IPB's enterprise to CSOB, for which on 18 June 2000 he sought the CNB's approval, which was granted. CSOB, however, had insisted on receiving a State guarantee from the Ministry of Finance, and a promise of indemnity from the CNB.

142. As the State guarantee and the CNB's promise of indemnity to CSOB involved State aid, the approval of the OPC was required. The OPC was accordingly involved in the final stages of the transaction, and reached a preliminary conclusion that State aid under the Sale Agreement and State Guarantee should be exempted from the general prohibition against State aid, characterised as restructuring aid and aid to remedy a serious disturbance in the Czech economy. On around 14 June Mr Kamil Rudolecký (Director of State Aid Department of the OPC) was first officially informed by his superior, Dr Jiří Buchta, of the plans to offer financial assistance to IPB, and, on Sunday, 18 June, he and Dr Buchta met with representatives of CSOB, including Mr Kavánek, to discuss the aid package about to be given to IPB. Subsequently, on the evening of Sunday, 18 June 2000, the OPC informed the Ministry of Finance of its approval of the aid packages under certain conditions, and delivered its formal decision to that effect on Monday, 19 June 2000. This decision (which was in some respects in terms identical with elements in the Paris Plan) had the appearance of retrospectively granting an exemption for the aid given to CSOB in the sale agreed over the weekend.

143. IPB was transferred to CSOB on Monday, 19 June 2000, and the Ministry of Finance signed the State guarantee to CSOB while the CNB signed its promise of indemnity to CSOB.

144. On 3 July 2000 the Ministry of Finance and the CNB prepared a report which was submitted to the Czech Parliament (Chamber of Deputies) to inform the public about the circumstances leading to the forced administration of IPB and its sale to CSOB. The next day the Chamber, at the instigation of the opposition parties, set up an Investigation Commission to clarify the State's decisions. The opposition parties had eight of the ten seats on the Commission. Its findings were summarised in a report submitted to the Chamber of Deputies on 11 August 2001.

145. The circumstances in which the sale of IPB to CSOB was effected were such as to raise questions as to its lawfulness under Czech law. The Parliamentary Investigation Commission appointed a legal expert to consider the matter who, in his report of 10 May 2001, concluded that the CNB was not entitled to put IPB into forced administration, that the Forced Administrator had not (particularly at the speed with which he disposed of IPB) fulfilled his responsibilities correctly, that the CNB's irrevocable guarantee for all IPB creditors of 16 June 2000 was null and void, and that CSOB had provided no consideration for IPB's banking business and accompanying State aid. The Commission itself found that by instructing the Forced Administrator to sell IPB's business to CSOB as quickly as possible the CNB had exceeded its legal powers, and that the way in which the strategic partner had been selected between 16 and 19 June was "unprecedented and non-transparent". The Commission also found that the CSOB Transaction Document signed on 19 June 2000 gave IPB to CSOB "effectively as a gift", that CSOB "obtained an undeserved benefit of many tens of billions of Czech crowns to the detriment of the state budget", and that the Minister of Finance, had he acted as he should have done, would have ensured that CSOB paid an appropriate price.

146. The Commission further found that the CNB had issued instructions to the Forced Administrator and in so doing had acted unlawfully, and that his testimony, in denying that he was acting under the instructions of the CNB, was false. In mid-September 2000 the Chairman of the Parliamentary Commission filed a criminal complaint against Mr Mertlík

and the Forced Administrator in respect of false testimony. The Commission concluded that the Forced Administrator "did not administer the bank. He only fulfilled his task to take over and sell the bank without having an idea of what he was actually selling". In several respects it appears that the Forced Administrator, in selling IPB to CSOB as quickly as possible, may have acted inconsistently with his statutory and fiduciary duties under Czech law. The Commission did not, however, conclude that the Ministry of Finance or the CNB had done anything illegal. Its findings, in the view of the Respondent, were largely speculative and a politically motivated attempt to discredit the Government.

147. Apart from raising questions as to the lawfulness of the transaction under Czech law relating to aspects of the forced administration, the circumstances also raised similar questions as regards the granting of State aid in connection with the transaction. Under Czech law the Public Assistance Act generally prohibited the grant of State aid unless the aid had been notified to the OPC and granted a formal exemption by it: that Act came into force on 1 January 2000, and brought Czech domestic law on State aid into line with the Czech Republic's international obligations under the Agreement of 4 October 1993 establishing an Association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other ("the Europe Agreement").[2] The various guarantees and indemnities which formed part of the transaction whereby CSOB acquired IPB could be regarded as State aid, under both the relevant Articles of the Treaty Establishing the European Community ("EC") ("EC Treaty")[3] and the parallel provisions of the Public Assistance Act.

148. In various respects, it was questionable whether the legal requirements for the granting of State aid were complied with in respect of, in particular, the guarantee announced on 19 June 2000, the Ministry of Finance's non-compliance by the stipulated deadline with certain conditions imposed by the OPC in relation to the exemption granted for that guarantee, the indemnity given by the CNB to CSOB, the agreement of 19 June 2000 between the Ministry of Finance and CSOB whereby the Ministry undertook to compensate CSOB for all of the purchase price which CSOB would become obligated to pay to IPB for the IPB enterprise, and the conclusion, without the OPC's approval, of a restructuring agreement of 31 August 2001 granting to CSOB an asset management contract over IPB's former assets.

149. Nevertheless, the sale of IPB to CSOB went ahead on the basis of the Forced Administrator's actions.

150. On 21 June 2000 the Government approved the provision of a State guarantee to CSOB for the assets of IPB provided that that guarantee would be replaced by a restructuring agreement whereby KoB would assume the security for IPB's assets, and also approved the Ministry of Finance's guarantee to the CNB to cover losses ensuing from the CNB's promise to indemnify CSOB.

151. On 23 June 2000 Ernst & Young, IPB's auditor, reported to the CNB that it had been unable to complete IPB's audit for 1999 because IPB had failed to provide the auditor with necessary information.

152. On 30 June 2000 Saluka transferred 61,780,694 IPB shares back to Nomura. On 7 July 2000 Saluka submitted a Transfer Notice to the NPF, but on 21 July 2000 the NPF informed Saluka that it did not consider the document served to have been a proper Transfer Notice.

153. On 24 August 2000 the OPC approved the exemption of the State aid arising from the indemnity given to CSOB by the CNB.

154. On 6 September 2000 the CSC made a decision on the merits of the suspension of trading in IPB shares which hitherto had been based only on a preliminary injunction (above, paragraph 135). This decision became binding on 25 September 2000 and extended the suspension in trading which had previously been based on the preliminary injunction. The reasons given by the CSC for the actions it took were in the Claimant's view of questionable accuracy but, in the Respondent's view, were in no way improper. So far as the Tribunal is aware, the suspension of trading in IPB's shares still continues, as a result of further successive "temporary" injunctions issued by the CSC. Saluka's appeal to the Presidium of the CSC against the CSC's decision of 6 September 2000 and its imposition of a "new" temporary suspension on 11 October 2000 were rejected by two decisions of 18 January 2001.

155. On 16 January 2001 the CSC, acting under a new amendment to the Czech Securities Act, issued a Notice of Loss of Position as a Participant against Saluka, having the effect that Saluka was no longer considered a party to the "new" suspension proceedings commenced on 11 October 2000, or any other suspension proceedings commenced after 1 January 2001. Shareholders were thereby excluded from challenging suspensions of trading in shares owned by them.

156. On 26 October 2000 a Police Order was issued, at the request of CSOB, which required the CSC permanently to suspend Saluka's right to dispose of its shares in IPB. Saluka appealed against this Police Order to the State Prosecutor and this challenge was upheld on 5 February 2001. However, the Czech police issued a new suspension Order over IPB's shares, which the Securities Centre registered on 31 January 2001. Following a request from Saluka on 1 November 2001 (*i.e.* after the present arbitration had been initiated) for the removal of the suspension Order, and the police's refusal to do so, the Public Prosecutor's Office in Prague ruled on 23 April 2002 that there was no legal basis for the suspension Order against the shares, but ordered that Saluka's IPB shares be held in the custody of the District Court of Prague. On appeal to the Supreme Public Prosecutor's Office on 16 May 2002 the Public Prosecutor's custodial order over Saluka's shares was quashed. The Supreme Public Prosecutor's Office, however, also held – on a point which was not part of Saluka's appeal, and on which Saluka had not been heard – that it was still justifiable to secure Saluka's shares in IPB by suspending trading in them. Since the Supreme Public Prosecutor's Office was the final appellate instance, Saluka lodged a petition with the Czech Constitutional Court on 18 July 2002 seeking an appropriate remedy.

157. On 30 January 2001, the Czech police carried out a search of Nomura's Prague Representative Office and seized documents belonging to Nomura. This police search was subsequently held by the Constitutional Court on 10 October 2001 (*i.e.* after the present arbitration had been initiated) to have violated Nomura's fundamental rights, and the Court ordered the return of the documents seized during the search.

158. On 19 March 2001, the OPC reopened the proceedings which led to its decision of 19 June 2000 (above, paragraph 142) approving the Agreement for the sale of IPB to CSOB and the associated State Guarantee Agreement. On 23 August 2001, *i.e.* after the present arbitration had been initiated, the OPC disapproved the payment to CSOB for the costs of the forced administration, but, in a further decision of 15 December 2003, the OPC approved that item and approved the Sale Agreement and State Guarantee.

159. On 18 July 2001 Saluka filed its Notice of Arbitration initiating the present arbitration against the Czech Republic. All subsequent events (to some of which attention has already been drawn) therefore post-date the commencement of this arbitration.

160. On 16 June 2002 the forced administration of IPB ended and Nomura resumed control over IPB. IPB subsequently filed several claims against the Czech Republic, CSOB and JP Morgan. On 4 December 2002 the Czech Republic and the NPF initiated the NPF arbitration against Saluka and Nomura, and later that month an arbitration tribunal ordered Nomura to transfer the IPB shares to CSOB.

161. On 16 December 2003 and in January 2004 the European Commission ("EC") made decisions which had the effect of establishing that it would not review the compatibility of all State measures towards KB and CS with EC State aid rules.

162. At the end of January 2004 the Board of Directors of IPB (controlled by Nomura) and Mr Petr Beneš (former director of IPB) separately filed for IPB's bankruptcy. On 5 February 2004 IPB was declared bankrupt.

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163. On 16 February 2004 the CSC registered CSOB as the new owner of Saluka's IPB shares.

III. THE PARTIES' ARGUMENTS AND SUBMISSIONS

164. On the basis of the facts and the law as it saw them, the Claimant considered that the Czech Republic had acted in a way which was discriminatory, unfair, inequitable and expropriatory, and was thus in breach of its obligations under the Treaty, in particular those arising under Articles 3 and 5.

165. In its Memorial, the Claimant requested the following relief:

(a) a declaration that the Czech Republic has breached Article 3 of the Treaty by failing to accord Saluka's investment fair and equitable treatment;

(b) a declaration that the Czech Republic has breached Article 5 of the Treaty by depriving Saluka of its investment unlawfully and without just compensation equal to the genuine value of the investment;

(c) an order that the Czech Republic pay Saluka compensation for the damages that it has suffered as a result of the breaches of the Treaty, such damages to be determined by the Tribunal based on further submissions;

(d) interest on the compensation to be awarded to Saluka, in an amount to be determined by the Tribunal; and

(e) an order that the Czech Republic pay the costs of these arbitration proceedings, including the costs of the Tribunal and the legal and other costs incurred by Saluka, on a full indemnity basis.

166. The Claimant's subsequent pleadings, both written and oral, did not vary those requests.

167. For its part, the Respondent, on the basis of the facts and the law as it saw them, denied that there had been any breach of its obligations under the Treaty and, in any event, challenged the entitlement of Saluka to invoke the arbitration provisions of the Treaty.

168. In its pleadings, the Respondent requested the following relief:

(a) In its Notice to Dismiss, "that the Tribunal dismiss with prejudice the arbitration filed by Saluka and award the Czech Republic its attorneys' fees and costs";

(b) In its Counter-Memorial,

(i) a declaration that Saluka breached the Agreement and engaged in other unlawful acts;

(ii) an order that Saluka pay the Czech Republic compensation for the damages suffered as a result of Saluka's unlawful acts presently estimated to be approximately CZK 100 billion to CZK 260 billion (approximately US$3.22 billion to US$8.38 billion);

(iii) interest on the compensation awarded to the Czech Republic, in an amount to be determined by the Tribunal; and

(iv) an order that Saluka pay the costs of these arbitration proceedings, including the costs of the Tribunal and the legal and other costs incurred by the Czech Republic, on a full indemnity basis;

(c) In its Rejoinder (*i.e.* after the Tribunal's Decision on Jurisdiction over the Respondent's Counterclaims), "that the Tribunal render a final Award determining that the Czech Republic has not violated Articles 3 and 5 of the Treaty"; and

(d) At the conclusion of its oral submissions, the Respondent asked that the Tribunal "render an award determining that there was no violation of either Article 3 or Article 5 of the Treaty" and, in its Post-Hearing Brief, "that the Tribunal issue a Final Award determining that the Treaty was not violated".

169. The Claimant in its Memorial stated that it was "appropriate and efficient to postpone precise issues of the quantification of Saluka's loss to a separate phase of the proceedings when the Tribunal's decision on liability is known". In its Counter-Memorial, the Respondent stated that "[l]ike Saluka, the Czech Republic concludes that it is appropriate and efficient to postpone precise issues of the quantification of the Czech Republic's loss to a separate phase of the proceedings".

170. The parties developed their respective arguments fully in their written pleadings, which were submitted in the manner set out in Part I of this Award, the Introduction. They also refined their positions and put forward further arguments in support of their respective cases in the course of the oral hearings which were held in April 2005, as also set out in Part I of this Award.

171. The Tribunal considers that it will be more convenient if, rather than attempting to summarise the parties' arguments as a whole, it instead summarises their contentions separately in the course of its consideration of each of the various particular issues which it is called upon to determine, and so far as they may be relevant to those issues.

IV. THE TRIBUNAL'S JURISDICTION

172. The Tribunal must first address the issue of its jurisdiction to hear and decide the dispute which Saluka has submitted to it.

A. The Parties' Arguments

173. The Claimant's Memorial was due to be filed on 15 August 2002. Two days earlier, on 13 August 2003, the Respondent filed a Notice to Dismiss, by which it requested that the Tribunal dismiss the Claimant's claims.

174. By its Notice to Dismiss, the Respondent argued that (a) Nomura did not buy IPB shares in order to invest in IPB's banking operations, but instead its true purpose was to facilitate its acquisition of Czech breweries in which IPB held a controlling shareholding; (b) Nomura did not disclose that true purpose to the Czech authorities at the time of its purchase of IPB shares; (c) Nomura had thus not acted in good faith and had violated the principle of non-abuse of rights, and was therefore not a *bona fide* investor; and (d) therefore Saluka, to whom Nomura had transferred its IPB shareholding, was precluded from having recourse to arbitration under the Treaty.

175. The filing of such a Notice had not been envisaged in the timetable fixed by the Tribunal, nor is it envisaged in the UNCITRAL Rules.

176. Article 21.3 of those Rules provides:

> A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim.

177. Article 21.4 of the UNCITRAL Rules provides:

> In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.

178. At a Procedural Meeting in London on 10 September 2002 to consider the Respondent's request, the Tribunal ruled that, because the facts alleged in the Respondent's Notice to Dismiss were so closely related to the facts involved in the principal claim, the dismissal issue should be joined to the merits and ruled upon in the Tribunal's final award (above, paragraph 20, Part I.E. of the Decision on Jurisdiction over Counterclaims).

179. Nevertheless, the issue surfaced again in the context of the Respondent's Counterclaims. In the Notice of Counterclaim which the Respondent volunteered on 4 December 2002 the Respondent set out its proposed "counterclaim against Saluka" and stated that it would elaborate on such claims when it filed its Counter-Memorial. The Respondent stated in paragraph 380 of its Counter-Memorial that by its Counterclaim the Czech Republic sought relief on account of the manner in which Saluka (*sic*) handled its "purported investment". Although it thus appeared that the Counterclaim was intended to be directed against the Claimant, under each of the more specific heads of its Counterclaim, the Respondent's Counter-Memorial identified Nomura as the defendant (essentially Nomura Europe, which is a legal person constituted under the laws of England), whereas the Claimant in this arbitration is Saluka (which is a legal person constituted under the laws of The Netherlands).

180. The Claimant attached overriding weight to the fact that Nomura Europe on the one hand and Saluka on the other were separate legal persons constituted under the laws of different States, that only Saluka was the Claimant in this arbitration and within the jurisdiction of the Tribunal, that Nomura Europe could not be brought within the scope of the Czech-Netherlands Treaty, and that a counterclaim against Nomura Europe could not therefore be brought in these arbitration proceedings instituted by Saluka. The Respondent, however, maintained that, in the context of the circumstances which gave rise to this arbitration, the relationship between Nomura and Saluka was so close that they were in effect interchangeable as parties in these proceedings; indeed, in the Respondent's submission, such was the closeness of the relationship that the real party in interest was Nomura, and that Saluka was not a *bona fide* "investor" under the Treaty, for which reason the Respondent requested that the proceedings initiated by Saluka be dismissed.

181. The Tribunal did not, however, find it necessary to touch on those issues for the immediate purpose of reaching a decision on its jurisdiction to hear and determine the counterclaim advanced in this case by the Respondent. For that purpose, the Tribunal found it appropriate to proceed in the first place on the basis that the question of the relationship between Saluka and Nomura was assumed to be determined on the basis most favourable to the Respondent (see Decision on Jurisdiction over the Czech Republic's Counterclaim, paragraphs 41-44 and 81-82). Accordingly, the Tribunal initially proceeded on the assumption, but without deciding, that the relationship between Saluka and Nomura Europe was sufficiently close to enable the Tribunal's jurisdiction in proceedings instituted by Saluka to extend to claims against Nomura. The Tribunal then on that hypothetical basis addressed the several heads of the Counterclaim put forward by the Respondent, and concluded that the

disputes which had given rise to the Respondent's Counterclaim were not sufficiently closely connected with the subject-matter of the original claim put forward by Saluka to fall within the Tribunal's jurisdiction under Article 8 of the Treaty.

182. It followed from that conclusion that the Tribunal did not find it necessary in the context of its decision on its jurisdiction over counterclaims to reach any decision as to the nature of the relationship between Saluka and Nomura Europe and the consequences of that relationship, whatever it may be. Accordingly, the Tribunal's decision that it was without jurisdiction to hear and determine any of the heads of counterclaim put forward by the Respondent was without prejudice to the eventual consideration of that issue, involving in particular Saluka's standing as an "investor" under the Treaty. That issue remained to be considered at the merits phase of these proceedings, as originally decided by the Tribunal in its ruling of 10 September 2002.

183. In its Counter-Memorial and in subsequent pleadings, the Respondent elaborated its "dismissal" arguments, and added further arguments contesting the Tribunal's jurisdiction. In particular:

(a) The Respondent repeated its contention that Nomura had not made its investment in IPB in order to keep IPB viable but to facilitate the acquisition of two valuable Czech breweries through control of IPB's stake in them: Nomura's real objective was not to invest in IPB's banking operations but, by way of a Put Option scheme which in effect eliminated all downside risk from Nomura's purchase of the IPB shares, to acquire and then sell on IPB's shareholding in the brewery companies, which made Nomura's real objective something other than a *bona fide* investment in IPB. The investment had not been lawfully made (as was generally required for investment protection), but was part of a "dishonest scheme to secure enormous benefits". Czech law required Nomura to file a business plan for its investment in IPB, and a false filing was a breach of that legal requirement. Nomura's failure, in its filed business plan, to disclose its true objectives to the Czech authorities had led them to approve the purchase of IPB's shares, which they would not otherwise have done. Nomura had not acted in good faith and had violated the principle of non-abuse of rights, for which reason Saluka was precluded from relying on the international arbitral process provided by the Treaty.

(b) In any event, the Respondent contended that Saluka did not have any real and continuous *bona fide* social or economic factual links to The Netherlands, and should therefore be disqualified from being considered as an "investor".

(c) Moreover, the Respondent maintained that, in the context of the circumstances which gave rise to this arbitration, the relationship between Nomura and Saluka was so close that they were in effect interchangeable as parties in these proceedings and that the terms "Nomura" and "Saluka" could be used interchangeably, Saluka being nothing more than a shell used by Nomura for its own purposes. Indeed, in the Respondent's submission, such was the closeness of the relationship that the real party in interest was Nomura, and Nomura was not an eligible claimant under the Treaty.

(d) Saluka was not, so the Respondent contended, a *bona fide* "investor" as defined in the Treaty and was thus unable to have recourse to arbitration under it. The Respondent accordingly requested that the proceedings initiated by Saluka be dismissed.

184. In its subsequent pleadings (Rejoinder, oral argument, and Post-Hearing Brief), the Respondent contended principally that:

(a) Saluka had not made an investment in the Czech Republic since it had invested nothing, acting merely as a conduit for Nomura's investment: Nomura retained the voting rights associated with the IPB shares, participated in the management of IPB, and conducted all the dealings with the Czech authorities. Saluka was a mere surrogate for Nomura, and a claim under an investment treaty could not be brought by an entity which was a surrogate for another entity which, like Nomura, was not covered by the Treaty. Saluka was an agent for Nomura, not a true investor.

(b) While a simplistic or literal view of Article 1 of the Treaty might suggest that Saluka was a qualified investor, the Treaty had to be interpreted in light of the realities of the situation, and they showed that Nomura and Saluka had not conducted themselves as true investors.

(c) "Piercing the corporate veil" was permissible as an equitable remedy where corporate structures had been utilised to perpetrate fraud or other malfeasance. Nomura had used corporate structures to realise profit and put the banking sector at risk, and to perpetrate fraud against the Czech Republic. The corporate veil should therefore be pierced, the real interest at stake should be recognised to be Nomura's, and, as Nomura was not within the Treaty definition of an "investor", the Tribunal was without jurisdiction.

(d) The Nomura Group had acted fraudulently and dishonestly throughout the events to which the case related. Nomura's circular financing arrangements, the Czech beer deal, the Put Option and the establishment of the "Tritton Fund" (in the Cayman Islands) had all been conducted contrary to international *bonos mores*. This continuing failure to act in good faith and the abuse of process required that Saluka – which had never even been a *bona fide* holder of an investment which might have been injured – should be denied protection under the Treaty. Allegations of harm suffered by Nomura (rather than Saluka), and allegations based on the period before October 1998 when Saluka acquired its IPB shares, were outside the Tribunal's jurisdiction.

(e) Moreover, the Claimant was acting in abuse of rights in instituting the arbitration since its purpose in doing so was to take advantage of the delay which would thereby be occasioned so that Nomura might gain advantage from the running of statutes of limitation in relation to civil or criminal proceedings which might be instituted by the Czech Republic in other fora.

185. In the Claimant's Memorial, the Claimant simply relied on the fact that the Claimant was established under Dutch law for the express purpose of holding the IPB shares which Nomura had purchased, and that consequently it was an "investor" as defined in the Treaty and its shareholding was an "investment" as also so defined. The facts surrounding the purchase of the IPB shares showed that Saluka had fulfilled the requirement of Article 2 of

the Treaty that investments be lawfully made, and this was borne out by the approval given to the share purchase agreement by the Czech authorities. In its more specific written responses to the Respondent's more detailed exposition of its arguments on the question of the Tribunal's jurisdiction over counterclaims (*i.e.* in its Objections to Jurisdiction over the Czech Republic's Counterclaims and its Reply to the Czech Republic's Response to the Claimant's Objections to Jurisdiction over the Czech Republic's Counterclaims), the Claimant attached overriding weight to the fact that Nomura Europe on the one hand and Saluka on the other were separate legal persons constituted under the laws of different States, that only Saluka was the Claimant in this arbitration and within the jurisdiction of the Tribunal, and that Nomura Europe, as an English company, could not be brought within the scope of the Czech-Netherlands Treaty.

186. In its subsequent pleadings (Reply, oral argument, and Post-Hearing Brief), the Claimant repeated its view that Saluka was a Dutch legal entity and thus an "investor" and that its ownership of IPB shares was an "investment". The Claimant added further argument, in particular:

(a) Saluka's shareholding was not negated by allegedly not being "lawfully made" and therefore not *bona fide*; the only illegality which had been alleged concerned the Put Option, for which there was no basis and which in any event had already been held to be valid in an associated arbitration. In connection with obtaining the CNB's approval for the Share Purchase Agreement, Nomura had duly filed its business plan, which had only to relate to its intentions regarding the future conduct of IPB's banking operations.

(b) There was no need to consider whether or not Saluka had any factual links with The Netherlands, since the Treaty adopted the place-of-incorporation test and there was no basis for adding a "factual link" test.

(c) Saluka's investment in IPB was a real investment.

(d) Nomura did not mislead the Czech authorities as to the nature of its investment in IPB, having made clear its role as a portfolio investor all along.

(e) Nomura's acquisition of the brewery shares was a commercial and financial transaction which was not tainted by any impropriety.

(f) Nomura was a *bona fide* investor.

187. At the close of the oral hearings, the Tribunal asked the parties to address, in their post-hearing briefs, the following question:

> [T]o what extent, if at all, (1) can the Tribunal consider and make findings about the conduct of Nomura? (2) is Nomura a necessary party to these proceedings in relation to that conduct?

188. The Claimant's response was that the Tribunal had jurisdiction to consider and make factual findings about the conduct of Nomura in so far as such findings might be relevant to

Saluka's positive case or the Czech Republic's defence, and that the possibility that the Tribunal had to make findings of fact with respect to Nomura's conduct did not require Nomura to be joined as a party to the proceedings.

189. The Respondent's answer to the Tribunal's question was that (1) the Tribunal might make findings of fact regarding Nomura's conduct without considering Nomura to be a "necessary party" to the proceedings, such an approach being typical in BIT arbitrations, and (2) although the Tribunal might make findings of fact regarding Nomura's conduct, Saluka could not recover any damages on the basis of Nomura's alleged loss – and since Saluka's alleged claims for damages were in fact Nomura's claims, Saluka's claims could be dismissed because Saluka is not seeking to recover for any losses that it had itself sustained.

190. In considering the various issues of jurisdiction and admissibility which have been raised, the Tribunal first notes that the Respondent's Notice to Dismiss in substance argues that the Tribunal should decline to entertain the proceedings initiated by the Claimant on the ground that the Claimant is not qualified to bring arbitration proceedings under the Treaty.

191. Accordingly, although the Notice to Dismiss is not worded as an objection to the Tribunal's jurisdiction, it may be assimilated to an objection that the Tribunal is without jurisdiction. As such, it was permissible (although perhaps procedurally unorthodox) for the Respondent to file its Notice making that objection. Doing so by way of the Notice to Dismiss filed on 13 August 2003 was within the time limit prescribed by Article 21.3 of the UNCITRAL Rules. So too was the further elaboration of the Respondent's arguments in its Counter-Memorial.

192. The Tribunal will now address the substantive arguments advanced by the Respondent by which it sought to show that the Tribunal was without jurisdiction to entertain the present proceedings.

B. Relevant Terms of the Treaty

193. The Tribunal's jurisdiction is governed by the terms of the Treaty. The immediately relevant terms of the Treaty are Article 8.1 and Article 1.

194. In relevant part, Article 8.1, to which Article 8.2 refers back, relates to "[a]ll disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter . . .".

195. In these proceedings, the Czech Republic is the relevant "Contracting Party" with which the Claimant claims a dispute exists.

196. In accordance with Article 8, the competence to make use of the arbitral process provided for in Article 8 of the Treaty is possessed by "investors" in respect of their "investments". Those terms are defined in Article 1 of the Treaty.

197. An investor of the "other" Contracting Party (in these proceedings, The Netherlands) must in the first place satisfy the definition of "investors" in Article 1(b)(ii) of the Treaty.

Under that definition, for the purposes of the present proceedings, that term comprises "legal persons constituted under the laws of [The Netherlands]".

198. In the second place, the dispute between the Czech Republic and such an investor must be one "concerning an investment of [the investor]". The term "investments" is defined in Article 1(a) as follows:

> The term "investments" shall comprise every kind of asset invested either directly or through an investor of a third State and more particularly, though not exclusively:
>
> (i) movable and immovable property and all related property rights;
>
> (ii) shares, bonds and other kinds of interests in companies and joint ventures, as well as rights derived therefrom;
>
> (iii) title to money and other assets and to any performance having an economic value;
>
> (iv) rights in the field of intellectual property, also including technical processes, goodwill and know-how;
>
> (v) concessions conferred by law or under contract, including concessions to prospect, explore, extract and win natural resources.

C. The Respondent's Challenges to the Tribunal's Jurisdiction

199. Although the Respondent did not always articulate the various grounds on which it challenged the Tribunal's jurisdiction with the utmost clarity or consistency, and given its contention that Nomura and Saluka were interchangeable, the principal jurisdictional contentions put forward by the Respondent may be considered under the following headings:

(a) the purchase of IPB shares was not an investment since Nomura/Saluka had invested nothing in IPB;

(b) in so far as the purchase of IPB shares was an investment, it had not been lawfully made;

(c) the real party in interest in the arbitration was not the Claimant, Saluka, but Nomura, which was not an eligible claimant under the Treaty;

(d) the relationship between Nomura and Saluka was so close as to make them interchangeable;

(e) Nomura/Saluka was not a *bona fide* investor in IPB;

(f) Nomura/Saluka did not act in good faith in purchasing the IPB shares;

(g) Nomura/Saluka acted in abuse of rights in the purchase of IPB shares;

(h) Saluka had no real and continuous social and economic links with The Netherlands.

200. The Tribunal has concluded that the Claimant's shareholding of IPB shares is an "investment" within the meaning of the Treaty, that the Claimant is in respect of that investment an "investor" within the meaning of the Treaty, and that the Tribunal has jurisdiction to hear claims brought before it by the Claimant.

201. The Tribunal will now address each of the Respondent's contentions.

D. The Purchase of IPB Shares as an Investment and Compliance with Legal Requirements

202. Under a Share Purchase Agreement of 8 March 1998, Nomura Europe bought a controlling (but not majority) holding of shares in the Czech bank IPB. Most of Nomura Europe's shareholding in IPB was transferred to Saluka on 2 October 1998, with the balance being transferred on 24 February 2000. Saluka instituted these present proceedings by a Notice of Arbitration dated 18 July 2001, at a time when it was still the registered owner of the shares, alleging various Treaty breaches in respect of its holding of IPB shares.

203. The first question to be addressed is whether Saluka's holding of IPB shares is an "investment" for purposes of the Treaty. "Investments" are defined in the Treaty very widely. They comprise "every kind of asset invested directly or through an investor of a third State", certain of the more usual kinds of investments then being identified by way of illustration. These illustratively identified assets include in particular "shares, bonds and other kinds of interests in companies and joint ventures, as well as rights derived therefrom".

204. The Tribunal notes in passing that, although not in terms part of the definition of an "investment", it is necessarily implicit in Article 2 of the Treaty that an investment must have been made in accordance with the provisions of the host State's laws. In relevant part, Article 2 stipulates that "[e]ach Contracting Party . . . shall admit such investments in accordance with its provisions of law". Accordingly, and as both parties acknowledge, the obligation upon the host State to admit an investment by a foreign investor (*i.e.* in the present context, to allow the purchase of shares in a local company) only arises if the purchase is made in compliance with its laws.

205. There seems no room for doubt that a qualified investor's holding of shares in a Czech company such as IPB constitutes an investment within the scope of the definition.

206. The Respondent challenges that conclusion on a variety of grounds, notably on the basis that it was not an investment since Saluka had in reality invested nothing in IPB, and that, in so far as the purchase of IPB shares was an investment, it had not been lawfully made.

207. The argument that Saluka had invested nothing in IPB and for that reason the purchase of IPB shares could not be considered an "investment" seems to be based on two

considerations. The first is that Nomura, in making the original purchase of IPB's shares, and Saluka, in subsequently acquiring them, had no intention to make any true investment in the Czech Republic or in IPB's banking operations. The acquisition of IPB shares was never intended, so it is said, to be anything more than a short-term holding of shares with a view to the making of a large profit from the sale of major assets controlled by IPB, to be followed by the sale of the shares at an appropriate moment; Nomura and Saluka, so it is said, showed by their conduct throughout the events to which this case relates that they were not true investors.

208. The Tribunal first notes that the original purchase of IPB shares in March 1998 was not the act of Saluka but of Nomura Europe. Until 2 October 1998 only Nomura Europe held those IPB shares. It is consequently only the subsequent acquisition and holding of those shares by Saluka, from 2 October onwards, in respect of which the Respondent's arguments are relevant.

209. The Tribunal does not believe that it would be correct to interpret Article 1 as excluding from the definition of "investor" those who purchase shares as part of what might be termed bare profit-making or profit-taking transactions. Most purchases of shares are made with the hope that, in one way or another, the result will in due course be a degree of profit on the transaction. It is relevant in this context that, throughout the many discussions which took place between Nomura and the Czech authorities, Nomura insisted that it was only a portfolio investor in IPB and not a strategic investor. Even if it were possible to know an investor's true motivation in making its investment, nothing in Article 1 makes the investor's motivation part of the definition of an "investment".

210. The second consideration which is said by the Respondent to undermine any determination that the purchase of IPB's shares was an "investment" appears to be that Saluka itself invested nothing in IPB but was merely a conduit for the investment made by Nomura, which retained the voting rights associated with the IPB shares, participated in the management of IPB, and conducted all the dealings with the Czech authorities. Saluka was a mere surrogate for Nomura, being no more than an agent for Nomura and not itself a true investor.

211. To a considerable extent, this argument seeks to replace the definition of an "investment" in Article 2 of the Treaty with a definition which looks more to the economic processes involved in the making of investments. However, the Tribunal's jurisdiction is governed by Article 1 of the Treaty, and nothing in that Article has the effect of importing into the definition of "investment" the meaning which that term might bear as an economic process, in the sense of making a substantial contribution to the local economy or to the well-being of a company operating within it. Although the *chapeau* of Article 2 refers to "every kind of asset *invested*", the use of that term in that place does not require, in addition to the very broad terms in which "investments" are defined in the Article, the satisfaction of a requirement based on the meaning of "investing" as an economic process: the *chapeau* needs to contain a verb which is apt for the various specific kinds of investments which are listed, and since all of them are being defined as various kinds of investment it is in the context appropriate to use the verb "invested" without thereby adding further substantive conditions.

212. So far as concerns the lawfulness of the original purchase of IPB shares by Nomura Europe, the Respondent has argued that that shareholding cannot be regarded as a capital

investment through the purchase of IPB shares. These were that Nomura was not investing in IPB in order to support IPB's banking operations and keep IPB viable but to facilitate the acquisition of two valuable Czech breweries through control of IPB's stake in them: this was to be achieved by way of a Put Option scheme which in effect eliminated all downside risk from Nomura's purchase of the IPB shares, so enabling Nomura to acquire and then sell on IPB's shareholding in the brewery companies. This, so it was contended, made Nomura's real objective something other than a *bona fide* investment in IPB: the purchase of IPB's shares was part of a "dishonest scheme to secure enormous benefits". Czech law required a prospective purchaser of controlling shares in a bank to obtain the consent of the Czech authorities for that purchase, which meant that Nomura was required to file a business plan for its investment in IPB, and a false filing was a breach of that legal requirement. Nomura's failure, in its filed business plan, to disclose its true objectives to the Czech authorities had led them to approve the purchase of IPB's shares, which they would not otherwise have done.

213. In this context, the Respondent has invoked the requirements of Section 16(1)(a) and (e) of the Czech Banking Act. This provides (in the translation submitted by the Respondent):

> Prior approval of the Czech National Bank shall be required
>
> (a) for the establishment of an ownership interest by foreign a person in an existing bank,[4]
>
> . . .
>
> (e) acquisitions or transfers of registered capital amounting to more than 15% of a bank's registered capital, in the course of one or more transactions, by/to an individual or several persons acting in concert, unless due to inheritance.

While that provision of the Czech Banking Act establishes the need to obtain the CNB's approval, it says nothing about the investor's obligation to disclose its long-term plans and ultimate objectives.

214. The Respondent has in that respect invoked the provisions of the CNB's Official Communication 23/1995, Article III(2)(c) of which provides:

> The investor shall submit the application to the CNB together with the following documents:
>
> 2. if the investor is a legal entity
>
> . . .
>
> (c) a business plan (in the event that the required volume of shares represents 10% and more of the registered capital of the bank).

While that provision requires the submission of a business plan, the Tribunal has seen nothing to suggest that it imposes a legal obligation upon an investor to disclose its future

long-term plans and objectives going far beyond the immediate purposes of its investment in the bank whose shares are being purchased. A "business plan" is inherently a label of considerable generality, and a Tribunal such as this must hesitate before reading into that label such a particular and far-reaching content.

215. The Respondent has not identified any other specific legal requirements relating to the filing obligation which have allegedly been violated. And although Mr Pavel Racocha (Executive Director of the Banking Supervision Department at the CNB) has testified that, had he been aware of the full story, he would not have approved Nomura's share purchase, the Tribunal does not see in that statement anything to transform full disclosure of future long-term plans and objectives into a legal obligation for the investor.

216. So far as concerns any alleged illegality involved in the creation or operation of the Put Option, the Tribunal notes, and sees no reason to dissent from, the decision of the tribunal in the first arbitration under the Put Option agreement in *Torkmain Investments Ltd et al. v. Pembridge Investments BV et al.*,[5] in its second interim award, that the Put Option agreement was valid, as was the Put Option itself. Moreover, the Tribunal notes that, in the second such arbitration, it was accepted by CSOB (apparently acting on behalf of the Czech Republic) that those two matters were *res judicata* as a matter of Czech law.

217. The Tribunal is accordingly unable to conclude that the circumstances surrounding the original purchase of the shares by Nomura Europe have been shown to involve any breach of the law by Nomura Europe such as to warrant its purchase of IPB shares being considered an unlawful investment and so not entitled to protection under the Treaty. In this connection, the Tribunal notes that, throughout the events giving rise to this arbitration, the Czech authorities have never questioned either the legality of the original transaction by which Nomura acquired the IPB shares, or the legality of Saluka's subsequent ownership of them: on the contrary, the Czech authorities took many steps explicitly acknowledging Saluka's status as properly the owner of those shares after October 1998.

218. In any event, the Tribunal again observes that any illegality allegedly involved in Nomura Europe's conduct at the time of its purchase of the IPB shares would be a failing by Nomura, not by the Claimant in these proceedings, Saluka. To be relevant to the present proceedings, Nomura's failings (if any) at the time of purchasing the IPB shares in March 1998 need also to be in some way attributable to Saluka in relation to its acquisition and subsequent holding of the shares after October 1998.

219. So far as concerns the subsequent transactions by which those shares were transferred to Saluka, the Respondent appears to address this aspect of the matter by arguing that since, as it submitted, Nomura had not lawfully acquired any investment in IPB shares, therefore Saluka, which subsequently acquired the IPB shares from Nomura, was precluded from having recourse to arbitration under the Treaty, possibly (although this is not specified by the Respondent) either on the ground that the original purchase being unlawful, that illegality taints the subsequent holder's title to the shares, or on the ground that since Nomura and Saluka are in effect interchangeable (as to which, see below), Nomura's unlawful conduct is at the same time Saluka's unlawful conduct.

220. Given the Tribunal's finding in paragraph 42 above, the Tribunal has no need to consider these arguments further.

221. The Tribunal accordingly concludes that there are no good reasons for declining to consider the Claimant's holding of IPB shares in issue in this case to be an "investment" within the meaning of the definition of that term in Article 1 of the Treaty.

E. Saluka's Qualification as an "Investor" Entitled to Initiate the Arbitration Procedures under the Treaty

222. The question which must next be considered is whether Saluka is a qualified "investor" for purposes of the Treaty.

223. There is no doubt that Saluka meets the only requirements expressly stipulated in Article 1 of the Treaty for qualification as an investor, namely that it be a "legal person", and be "constituted under the law of [The Netherlands]".

224. The Respondent, however, advances several arguments why Saluka should nevertheless not be considered an "investor" entitled to invoke the arbitration provisions of the Treaty in respect of Saluka's holding of IPB shares. These have been summarised in paragraph 199(c-h) above:

225. The six separate grounds there summarised amount, in substance, to three main arguments involving, first, the closeness of the relationship between Nomura and Saluka, second, the lack of good faith involved in the acquisition of IPB shares, and third, Saluka's lack of real links with The Netherlands.

1. The Corporate Relationship between Saluka and Nomura

226. As regards the first of these main lines of argument, the essential facts regarding the relationship between Saluka and Nomura have already been set out. In brief, "Nomura" or "the Nomura Group" is the convenient group name of a major Japanese merchant banking and financial services group of companies. It typically operates through subsidiaries set up in various countries. One element of the Nomura Group was Nomura Europe plc, a company constituted under the laws of England. (For convenience, where this company needs to be separately identified, it is referred to as "Nomura Europe".) Another part of the Nomura Group was Saluka, the Claimant in this arbitration. Saluka was constituted under the laws of The Netherlands for the sole and express purpose of holding the shares in IPB which Nomura Europe was at the time in the process of purchasing. Saluka was wholly controlled by Nomura Europe.

227. In those circumstances, the Respondent contended that, in the context of the circumstances which gave rise to this arbitration, the relationship between Nomura and Saluka was so close that they were in effect interchangeable as parties in these proceedings, Saluka being nothing more than a shell used by Nomura for its own purposes. Indeed, in the Respondent's submission, such was the closeness of the relationship that the real party in interest was Nomura (which was not eligible to present claims under the Treaty), and that

therefore Saluka was not a *bona fide* "investor" under the Treaty (a use of "*bona fide*" which, in this context, the Tribunal takes to mean something like "genuine" or "real") and was therefore not entitled to have recourse to arbitration under it: Saluka was, in effect, a mere surrogate for Nomura, and a claim under an investment treaty could not be brought by an entity which was a surrogate for another entity which, like Nomura, was not covered by the Treaty. Although this involved looking behind the formal corporate structures of Nomura and Saluka, such "piercing the corporate veil" was permissible as an equitable remedy where corporate structures had been utilised to perpetrate fraud or other malfeasance. Nomura had used corporate structures to realise profit and put the banking sector at risk, and to perpetrate fraud against the Czech Republic. The corporate veil should therefore be pierced, the real interest at stake should be recognised to be Nomura's, and as Nomura was not within the Treaty definition of an "investor", the Tribunal was without jurisdiction.

228. The Tribunal accepts – and the parties have made no attempt to conceal, either from the Tribunal or, in the Claimant's case, from the Czech authorities – the closeness of the relationship between Nomura and Saluka. In that respect, the companies concerned have simply acted in a manner which is commonplace in the world of commerce.

229. In dealing with the consequences of that way of acting, the Tribunal must always bear in mind the terms of the Treaty under which it operates. Those terms expressly give a legal person constituted under the laws of The Netherlands – such as, in this case, Saluka – the right to invoke the protection of the Treaty. To depart from that conclusion requires clear language in the Treaty, but there is none. The parties to the Treaty could have included in their agreed definition of "investor" some words which would have served, for example, to exclude wholly-owned subsidiaries of companies constituted under the laws of third States, but they did not do so. The parties having agreed that any legal person constituted under their laws is entitled to invoke the protection of the Treaty, and having so agreed without reference to any question of their relationship to some other third State corporation, it is beyond the powers of this Tribunal to import into the definition of "investor" some requirement relating to such a relationship having the effect of excluding from the Treaty's protection a company which the language agreed by the parties included within it.

230. While it might in some circumstances be permissible for a tribunal to look behind the corporate structures of companies involved in proceedings before it, the Tribunal is of the view that the circumstances of the present case are not such as to allow it to act in that way. The Respondent acknowledges that this possibility presents itself as an equitable remedy where corporate structures had been utilised to perpetrate fraud or other malfeasance, but, in the present case, the Tribunal finds that the alleged fraud and malfeasance have been insufficiently made out to justify recourse to a remedy which, being equitable, is discretionary.

2. The Alleged Lack of Good Faith and Abuse of Rights

231. As regards the bundle of arguments which are said to involve in one way or another considerations of the alleged lack of good faith shown by Nomura/Saluka in the acquisition of the IPB shares, it seems that the Respondent relies on a variety of circumstances in support of its contention. Principal among these is that Nomura Europe did not, at the time of purchasing the IPB shares, disclose to the Czech authorities that its true purpose in doing so was not to invest in IPB's banking operations, but rather, by way of the Put Option, to

facilitate its acquisition of Czech breweries in which IPB had a controlling interest, and that, by such non-disclosure, Nomura had not acted in good faith and had violated the principle of abuse of rights and was therefore not a *bona fide* investor. Expressed more generally (as set out above in paragraph 184), the Respondent maintained that the Nomura Group had acted fraudulently and dishonestly throughout the events to which the case related. Nomura's circular financing arrangements, the Czech beer deal, the Put Option and the establishment of the Tritton Fund had all been conduct contrary to international *bonos mores*. This continuing failure to act in good faith and the abuse of process required that Saluka – which had never even been a *bona fide* holder of an investment which might have been injured – should be denied protection under the Treaty.

232. The Tribunal does not consider that an investor – and particularly a portfolio investor – shows a lack of good faith in failing to disclose to the seller of shares, or to the host State's regulatory authorities, its ultimate objectives in entering into a share purchase transaction. The seller of shares, and the regulatory authorities, must be taken to be aware that a portfolio investor, particularly one forming part of a very large international financial group, will be making investments as part of a much wider corporate strategy than is involved in the purchase of shares in one particular company. In the Tribunal's view, it is both unreasonable and unrealistic to posit an obligation upon an investor to disclose its ultimate objectives in making a particular investment, whether through the purchase of shares or otherwise. Ultimate objectives will, in any event, often be highly speculative and not susceptible to precise articulation, and will be subject to change over time. An investor may choose to make its long-term plans known to a greater or (in the absence of a clearly legal requirement to the contrary) lesser degree, but that is quite different from establishing an obligation to that effect such as to make non-disclosure a head of "bad faith".

233. The Tribunal has already addressed the Respondent's further argument that Nomura's non-disclosure of its long-term intentions regarding its plans for the acquisition of Czech breweries and the construction of the Put Option involved a breach of the Czech law.

234. So far as specifically concerns the alleged abuse of rights by the Claimant, the right allegedly being abused could be either the right to acquire the shares in IPB, or the right to be regarded as an investor entitled to invoke the Treaty's arbitration provisions: the Respondent appears to assert that the circumstances are in either case sufficient to deprive the Claimant of its standing as an investor entitled to avail itself of those provisions. Those circumstances on which the Respondent relies appear to be Nomura's non-disclosure of its true long-term intentions with regard to its investment in IPB, and its alleged wish to use the delays which would be occasioned by recourse to arbitration so that Nomura might gain advantage from the running of statutes of limitation in relation to civil or criminal proceedings which might be instituted by the Czech Republic in other fora.

235. The Tribunal has already addressed the argument based on non-disclosure, and concluded that an investor – and particularly a portfolio investor – shows no lack of good faith in failing to disclose to the seller of shares, or to the host State's regulatory authorities, its ultimate objectives in entering into a share purchase transaction. Similarly, the Tribunal cannot see in such non-disclosure any circumstance which it could regard as an abuse of the right to acquire the shares or of the right to initiate the Treaty's arbitration procedures.

236. As regards the Respondent's allegation that the Claimant had in mind ulterior litigation motives in instituting the arbitration procedures provided by the Treaty, the Tribunal has to observe that, even if such an ulterior motive could be such as to involve an abuse of the right to invoke the arbitration procedures, that allegation is unsubstantiated and cannot be the basis for a decision by the Tribunal which would deprive it of jurisdiction to proceed with the arbitration which the Claimant has initiated.

237. In any event, the Tribunal again observes that the illegality, lack of good faith, or abuse of rights allegedly involved in Nomura Europe's conduct at the time of its purchase of the IPB shares would be a failing by Nomura, not by the Claimant in these proceedings, Saluka. To be relevant to the present proceedings, Nomura's failings (if any) at the time of purchasing the IPB shares in March 1998 need also to be in some way attributable to Saluka in relation to its acquisition and subsequent holding of the shares after October 1998.

238. The Respondent addresses this aspect of the matter by arguing that since, as it submitted, Nomura was not a *bona fide* or lawful investor, therefore Saluka, which subsequently acquired the IPB shares from Nomura, was precluded from having recourse to arbitration under the Treaty. Since the Tribunal is not persuaded that the original conduct of Nomura involved any illegality, lack of good faith, or abuse of rights, the Tribunal does not find it necessary to examine further the extent to which, had it made any findings of that kind, they might have affected Saluka's right to initiate arbitration proceedings under the Treaty.

3. Saluka's Lack of Factual Links with The Netherlands

239. The Respondent also argues that Saluka did not have *bona fide* (which term again seems to connote genuineness rather than any issue of bad faith), real and continuous links to The Netherlands, and for that reason did not satisfy the requirements which are necessary to qualify as an "investor" able to benefit from the provisions of the Treaty.

240. The Tribunal has some sympathy for the argument that a company which has no real connection with a State party to a BIT, and which is in reality a mere shell company controlled by another company which is not constituted under the laws of that State, should not be entitled to invoke the provisions of that treaty. Such a possibility lends itself to abuses of the arbitral procedure, and to practices of "treaty shopping" which can share many of the disadvantages of the widely criticised practice of "forum shopping."

241. However that may be, the predominant factor which must guide the Tribunal's exercise of its functions is the terms in which the parties to the Treaty now in question have agreed to establish the Tribunal's jurisdiction. In the present context, that means the terms in which they have agreed upon who is an investor who may become a claimant entitled to invoke the Treaty's arbitration procedures. The parties had complete freedom of choice in this matter, and they chose to limit entitled "investors" to those satisfying the definition set out in Article 1 of the Treaty. The Tribunal cannot in effect impose upon the parties a definition of "investor" other than that which they themselves agreed. That agreed definition required only that the claimant-investor should be constituted under the laws of (in the present case) The Netherlands, and it is not open to the Tribunal to add other requirements which the parties could themselves have added but which they omitted to add.

242. The Tribunal is confirmed in the appropriateness of the view which it has taken by the consideration, in the particular circumstances of the present case, that it was always apparent to the Czech authorities that it was Nomura's intention to transfer the IPB shares it was purchasing to another company within the Nomura Group, and that that other company would be a special-purpose vehicle set up for the specific and sole purpose of holding those shares. The Share Purchase Agreement contained express provision to that effect. By applying the provisions of the Treaty in conformity with their express terms, no violence is done to the positions knowingly adopted by the parties at all relevant times.

F. The Tribunal's Conclusions as to Jurisdiction

243. Having thus considered the various challenges to its jurisdiction which the Respondent has advanced, the Tribunal concludes that the Claimant's shareholding of IPB shares is an "investment" within the meaning of the Treaty, and that the Claimant is in respect of that investment an "investor" within the meaning of the Treaty. Accordingly, the Tribunal is satisfied that it has jurisdiction to hear the claims brought before it by the Claimant under the arbitration procedure provided for in Article 8 of the Treaty.

244. In reaching that conclusion, however, the Tribunal wishes to emphasise that, in accordance with the Treaty, its jurisdiction is limited to claims brought by the Claimant, Saluka, in respect of damage suffered by itself in respect of the investment represented by its holding of IPB shares. It follows, therefore, that the Tribunal does not have jurisdiction in respect of any claims of Nomura, or any claims in respect of damage suffered by Nomura and not by Saluka, or any claims in respect of damage suffered in respect of the IPB shares before October 1998 when the bulk of those shares became vested in the Claimant. Although Nomura is not a party to these proceedings, the Tribunal nevertheless has jurisdiction to consider and make factual findings about the conduct of Nomura in so far as such findings might be relevant to the Tribunal's consideration of arguments advanced by the Claimant or the Respondent.

V. SALUKA'S CLAIMS UNDER ARTICLE 5 OF THE TREATY

A. The Treaty

245. Article 5 of the Treaty reads as follows:

> Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with:
>
> a. the measures are taken in the public interest and under due process of law;
>
> b. the measures are not discriminatory;
>
> c. the measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the genuine value of the investments affected and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated

by the claimants concerned and in any freely convertible currency accepted by the claimants.

B. The Parties' Principal Submissions

246. The Claimant asserts that Saluka has been deprived of the value of its shares in IPB by the Czech Republic's intervention which culminated in the forced administration of IPB.

247. The Claimant further maintains that, in this context, the only issue before the Tribunal is whether this deprivation was unlawful in accordance with the criteria of Article 5.

248. The Claimant concludes that the Czech Republic is liable under Article 5 if it can establish that one or more of the conditions set out in Article 5 has not been complied with, *i.e.* that:

(a) the measures depriving Saluka of its investment were not taken in the public interest and under due process of law; or that

(b) the measures were discriminatory; or that

(c) the measures were not accompanied by payment of just compensation.

249. In support of its main contention, Saluka, in brief, maintains that the evidence before the Tribunal demonstrates the following:

(a) The IPB proposal, rejected by the Czech Government, would have cost Czech taxpayers far less than the forced administration option. That option, says Saluka, was thus not in the public interest;

(b) The Respondent's fact and expert witnesses were unable to point to a precise regulation with respect to a bank's liquidity requirements which had been breached by IPB. There was thus, argues Saluka, no due process;

(c) The Forced Administrator never exercised truly independent judgment. Again, says Saluka, the forced administration measure was not taken under due process and was discriminatory;

(d) The Czech Government granted State aid to IPB's competitors, thus infringing, says Saluka, the non-discrimination provision of Article 5;

(e) The Czech Government resorted to its regulatory power unlawfully for the sole purpose of transferring IPB's business to CSOB. The measure, argues Saluka, was thus clearly discriminatory;

(f) The Czech Government never paid any compensation to Saluka after having deprived Saluka of its investment.

250. The Czech Republic denies that it has violated Article 5 of the Treaty. In essence, it submits that the measures which it resorted to in order to address the IPB situation in the spring of 2000 and which culminated in the decision by the CNB to put IPB into forced administration were "permissible regulatory actions" which cannot be considered as expropriatory.

251. In support of its principal defense, the Czech Republic also avers that each of the measures cited by Saluka in its attempt to demonstrate that the Czech Republic's actions were not genuine regulatory measures were indeed authorised by Czech law.

252. Subsidiarily, the Czech Republic argues that, since Saluka sold its IPB shares back to Nomura after June 2000 for the same amount as it purchased them, Saluka "has failed to establish a deprivation of sufficient magnitude to form the basis of an expropriation claim".

C. The Law

253. The Tribunal agrees with Saluka that the principal, if not the sole, issue which it must determine in the present chapter of its Award is whether the actions by the Czech Republic complained of by the Claimant are lawful or unlawful measures.

254. The Tribunal acknowledges that Article 5 of the Treaty in the present case is drafted very broadly and does not contain any exception for the exercise of regulatory power. However, in using the concept of deprivation, Article 5 imports into the Treaty the customary international law notion that a deprivation can be justified if it results from the exercise of regulatory actions aimed at the maintenance of public order. In interpreting a treaty, account has to be taken of "any relevant rules of international law applicable in the relations between the parties"[6] – a requirement which the International Court of Justice ("ICJ") has held includes relevant rules of general customary international law.[7]

255. It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare.

256. Nearly forty-five years ago, the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens ("Harvard Draft Convention"),[8] which instrument is relied upon by the Czech Republic, recognised the following categories of non-compensable takings:

> An uncompensated taking of an alien property or a deprivation of the use or enjoyment of property of an alien which results from the execution of tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health or morality; or from the valid exercise of belligerent rights or otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful.

257. As Saluka correctly reminded the Tribunal, the above-quoted passage in the Harvard Draft Convention is subject to four important exceptions. An uncompensated taking of the sort referred to shall not be considered unlawful provided that:

(a) it is not a clear and discriminatory violation of the law of the State concerned;

(b) it is not the result of a violation of any provision of Articles 6 to 8 [of the draft Convention];

(c) it is not an unreasonable departure from the principles of justice recognised by the principal legal systems of the world;

(d) it is not an abuse of the powers specified in this paragraph for the purpose of depriving an alien of his property.

258. These exceptions do not, in any way, weaken the principle that certain takings or deprivations are non-compensable. They merely remind the legislator or, indeed, the adjudicator, that the so-called "police power exception" is not absolute.

259. The Tribunal further recalls that, in an accompanying note to the 1967 OECD Draft Convention on the Protection of Foreign Property,[9] it is provided that measures taken in the pursuit of a State's "political, social or economic ends" do not constitute compensable expropriation.

260. Similarly, the United States Third Restatement of the Law of Foreign Relations in 1987[10] includes *bona fide* regulations and "other action of the kind that is commonly accepted as within the police power of State" in the list of permissible – that is, non-compensable – regulatory actions.

261. It is clear that the notion of deprivation, as that word is used in the context of Article 5 of the Treaty, is to be understood in the meaning it has acquired in customary international law.[11]

262. In the opinion of the Tribunal, the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are "commonly accepted as within the police power of States" forms part of customary international law today. There is ample case law in support of this proposition. As the tribunal in *Methanex Corp. v. USA* said recently in its final award, "[i]t is a principle of customary international law that, where economic injury results from a *bona fide* regulation within the police powers of a State, compensation is not required".[12]

263. That being said, international law has yet to identify in a comprehensive and definitive fashion precisely what regulations are considered "permissible" and "commonly accepted" as falling within the police or regulatory power of States and, thus, non-compensable. In other words, it has yet to draw a bright and easily distinguishable line between non-compensable regulations on the one hand and, on the other, measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable in international law.

264. It thus inevitably falls to the *adjudicator* to determine whether particular conduct by a state "crosses the line" that separates valid regulatory activity from expropriation. Faced with the question of *when, how and at what point an otherwise valid regulation becomes, in fact*

and effect, an unlawful expropriation, international tribunals must consider the circumstances in which the question arises. The context within which an impugned measure is adopted and applied is critical to the determination of its validity.[13]

265. In the present case, the Tribunal finds that the Czech Republic has not "crossed that line" and did not breach Article 5 of the Treaty, since the measures at issue can be justified as permissible regulatory actions.

D. Analysis and Findings

266. Saluka's shares in IPB were assets entitled to protection under the Treaty. Pursuant to Article 5 of the Treaty, the Czech Republic was prohibited from taking any measures depriving, directly or indirectly, Saluka of its investment in IPB unless one or more of the cumulative conditions set out in that Article were complied with. If the Tribunal finds that the Czech Republic has adopted such measures without having complied with one or more of these conditions, the conclusion will inevitably follow that the Respondent has breached Article 5 of the Treaty.

267. There can be no doubt, and the Tribunal so finds, that Saluka has been deprived of its investment in IPB as a result of the imposition of the forced administration of the bank by the CNB on 16 June 2000.

268. In Part III of the present Award, the Tribunal has reviewed in considerable detail the facts which led the CNB, on 16 June 2000, to "introduce forced administration" of IPB pursuant to Section 26(1)(d) of the Czech Banking Act.[14]

269. A translation of the CNB decision of 16 June 2000 has been produced as an exhibit before the Tribunal. It sets forth the many reasons which convinced the CNB, as the Czech banking regulator, to decide that the time had come to impose forced administration of IPB and appoint an administrator to exercise the forced administration. The decision also refers to the Czech legislation on which the CNB relied.

270. Rather than attempting to summarise the CNB's decision, the Tribunal reproduces it here *in extenso*, in translation supplied by the Respondent:

Decision

On the basis of the establishment that INVESTIČNÍ A POŠTOVNÍ BANKA, akciová společnost, with its registered office in Praha 1, Senovážné nam. 32, IČO (Identification No.): 45 31 66 19 (the "Bank") continually fails to maintain payment ability both in Czech currency and in foreign currencies and, accordingly, fails to comply with its obligation under Section 14 of Act No. 21/1992 Coll., the Banking Act, as amended (the "Banking Act"), the Czech National Bank has decided, pursuant to the provision of Section 26(1)(d), in accordance with the provisions of Section 30, Section 26(2), Section 26(6) and Section 26(3)(b) and with regard to the provisions of Section 27(1)(a) and (b) of the Banking Act, as follows:

I. Forced administration shall be introduced in the Bank as of June 16, 2000.

II. The administrator exercising the forced administration shall be Mr. Petr Staněk, birth number 670725/0847.

Reasoning

Under the provisions of Section 14, of the Banking Act, banks are obligated to continually maintain payment ability both in Czech currency and in foreign currencies. The Czech National Bank has evaluated, on the basis of the findings set forth below, the state of matters as of the date of issue of this Decision with the result that the Bank is in breach of said provision.

In its letter Ref. No. 277/520, dated March 2, 2000, the Czech National Bank requested data on liquidity condition and payment ability of the Bank to be provided by the Bank on a daily basis. In accordance with the Czech National Bank's requirement, the Bank provided, on a daily basis, tables showing the development of primary deposits (deposits from clients) in the preceding two weeks, the development of monitored items of financial market (the so-called liquidity cushion securing the Bank's payment ability) in the preceding two weeks and a summary of the development of primary deposits (deposits from clients) since February 20, 2000. On the basis of the documents provided, the Czech National Bank regularly monitored the development of the Bank's payment ability whose deterioration is shown by the data for the period from February 20, 2000, to June 11, 2000, and further from June 12, 2000 to June 14, 2000.

From the table "Development of primary deposits in the past two weeks in millions of CZK" provided by the Bank in its letter dated June 12, 2000, Ref. No. 1107/00/3-1, the Czech National Bank ascertained that in the period from February 20, 2000, to June 11, 2000, the amount of primary deposits (deposits from clients) decreased in the aggregate from CZK 237,966 million to CZK 204,155 million, i.e., by CZK 33,811 million. At the same time, the Czech National Bank ascertained from the table "Development of monitored items of the financial market in the past two weeks in millions of CZK" provided by the Bank in its letter dated March 6, 2000, Ref. No. 451/2000/3-1 and its letter dated June 12, 2000, Ref. No. 1107/00/3-1 that due to the decrease in the primary deposits (deposits from clients), the financial market balance (the so-called liquidity cushion) decreased from CZK 64,452 million to CZK 38,658 million in that same period.

From the table "Development of primary deposits in the past two weeks in millions of CZK" provided by the Bank in its letter dated June 15, 2000, Ref. No. 1143/00/3-1, the Czech National Bank ascertained that on June 12, 2000, the amount of primary deposits (deposits from clients) decreased in the aggregate from CZK 204,153 million to CK 199,628 million, i.e., by CZK 4,525 million, on June 13, 2000, it decreased from CZK 199,628 million to CZK 193,664 million, i.e., by CZK 5,964 million, and on June 14, 2000, from CZK 193,664 million to CZK 187,173 million, i.e., by CZK 6,491 million. At the same time, the Czech National Bank ascertained from the table "Development of monitored items of the financial market in the past two weeks in millions of CZK" provided by the Bank in its letter dated June 15, 2000, Ref. No. 1143/00/3-1 that due to the decrease in the primary deposits (deposits from clients) in that period, the financial market balance (the so-called liquidity cushion) decreased on June 12, 2000, from CZK 39,385 million to CZK 34,926 million, i.e., by CZK 4,459 million, on June 13, 2000, it decreased from CZK 34,926 million to CZK 25,446 million, i.e., by CZK 9,480 million, and on June 14, 2000, from CZK 25,446 million to CZK 16,625 million, i.e., by CZK 8,821 million.

The Bank's Board of Directors addressed, in accordance with Section 26b of the Banking Act, a letter dated June 14, 2000, Ref. No. GŘ 202/2000 to the Czech National Bank stating that as a result of intensified cash and cash-free withdrawals in the last days, the Bank's liquidity condition had significantly deteriorated and a risk existed that if the current trend continued, the Bank could get into a situation where it would no longer be able to maintain the amount of the mandatory minimum reserves and consequently to comply with its obligations under debit clearing transactions, i.e., it would not be able to perform its clients' payment instructions.

The development in the deposits and liquidity cushion at the Bank constitutes a considerable risk from the point of view of a threat to its payment ability since, as established by the Czech National Bank, the current amount of the liquidity cushion that is constantly decreasing is not adequate for the current and constantly increasing requirements of the clients for deposit withdrawals. All factual findings made as of the date of issue of this Decision evidence that the current trend is continuing.

The Czech National Bank is entitled to introduce forced administration pursuant to Section 26(1)(d) of the Banking Act only after it has established deficiencies in a bank's operation. Under the provisions of Section 26(3)(b) of the Banking Act, "deficiencies in a bank's operation" means, among other things, a breach of the Banking Act. It has been unambiguously established on the basis of the aforementioned findings that the Bank has failed to comply with its obligation under Section 14 of the Banking Act. Accordingly it is in breach of that law, and a fundamental deficiency has been ascertained in its operation which deficiency continues.

Pursuant to the provisions of Section 30 of the Banking Act, the Czech National Bank is entitled to introduce forced administration in a bank if the deficiencies in such bank's operation endanger the stability of the banking system. According to the findings made by the Czech National Bank, this legal condition is fulfilled on the following grounds.

In 1999, the Bank ranked second within the interbank payment system of the Czech Republic in terms of the amount of payments processed – the Bank received and dispatched 2.3 million transactions totaling CZK 2,000 billion.

Second, according to the data stated in the statement "Bil 1-12. Monthly statement of assets and liabilities" as at April 30, 2000, the Bank's share in the amount of deposits from the public within the banking sector of the Czech Republic is 22% while its shares in the aggregate amount of assets within the banking sector of the Czech Republic amounts to 13.2% and the number of its clients is over 2.9 million.

In addition, the Bank is a major shareholder of two other banks operating in the Czech Republic, namely Českomoravská stavební spořitelna, akciová společnost, the leading building and loan association in the building loan market in the Czech Republic, and Českomoravská hypoteční banka, a.s., the leading bank in the mortgage-backed loan market in the Czech Republic. The severe financial condition of the Bank contests its position as the major shareholder or shareholder with the decisive controlling influence of these banks and is a threat to these banks' position.

On the basis of the above, the Czech National Bank holds as evidenced that the Bank directly endangers the stability of the banking system of the Czech Republic.

The Bank is a significant debtor of other banks, consequently its lower payment ability is liable to adversely affect the payment ability of the banks that are its

creditors. In addition, the Bank administers funds of many entities whose inability to pay caused by the Bank (the Bank's low liquidity) would result in serious consequences, whether direct or indirect, for the creditors of such entities including, without limitation, other banks constituting the banking system. Given the above, the Bank participates to a significant extent in the functioning of the entire banking system. The fact that, according to the notice given by its own statutory bodies, it may not be able to maintain its payment ability endangers the stability of the banking system in its entirety.

All the above facts with respect to the Bank's share in the interbank payment system, in the amount of deposits from the public within the banking sector, in the aggregate amount of assets within the banking sector, the number of its clients and its significant position as a shareholder evidence that the serious difficulties in the Bank's payment ability endanger the stability of the banking system in the Czech Republic to a considerable extent.

Pursuant to the provisions of Section 30 of the Banking Act, the Czech National Bank is entitled to introduce forced administration in a bank if such bank's shareholders have failed to take necessary measures to correct deficiencies. The effect of such measures may be measured only by the result, i.e., improvement in such bank's payment ability. According to the data ascertained with respect to the Bank's payment ability, it is evident that the situation of the Bank necessitates an immediate solution. The constant deterioration of the Bank's payment ability demonstrates that either the Bank's shareholders have failed to take appropriate measures securing the permanent payment ability of the Bank or such measures have been insufficient and ineffective as the Bank's payment ability is markedly deteriorating. The foregoing is implied both by the Czech National Bank's own findings and by the information contained in the letter from the Bank's Board of Directors, dated June 14, 2000, delivered to the Czech National Bank on June 15, 2000.

Based on the above, the Czech National Bank holds as evidenced that the conditions for the introduction of forced administration in the Bank, as set forth in the provisions of Section 26(1)(d) and Section 30 of the Banking Act with respect to the introduction of forced administration in a bank, are fulfilled.

Pursuant to the provisions of Section 2 of Act No. 6/1993 Coll., the Czech National Bank Act, as amended (the "Czech National Bank Act"), the responsibilities of the Czech National Bank include the management of monetary circulation and payments including banking clearance, maintaining the continuity and efficiency thereof, exercise of supervision over banking activities and maintaining the safe functioning and purposeful development of the banking system in the Czech Republic.

In addition, the Czech National Bank is responsible, under the provisions of Section 44(1)(a) of the Czech National Bank Act, for the exercise of supervision over banking activities and the safe functioning of the banking system. Given the critical financial condition of the Bank and with regard to the threat to the stability of the banking system constituted by the aforementioned deficiency in the Bank's operations as well as the failure of the Bank's shareholders to take necessary measures to correct such deficiencies, the Czech National Bank must avoid a situation where a panic among the Bank's depositors would result in a permanent destabilization of its operations and consequently in undermined confidence in the banking system in its entirety. By the introduction of forced administration, the Czech National Bank prevents further gradation of the Bank's critical situation.

Pursuant to the provisions of Section 26(2) of the Banking Act, the Czech National Bank is obligated to decide on the introduction of forced administration upon a bank's failure to correct deficiencies on the Czech National Bank's demand made pursuant to Section 26(1)(a) of the Banking Act. However, pursuant to Section 26(2) of the Banking Act, the Czech National Bank may introduce forced administration without a demand for correcting measures under Section 26(1)(a) of the Banking Act if the matter cannot withstand delay.

On the basis of the information ascertained by the Czech National Bank, it is incontestable that the Bank's payment ability is rapidly and significantly deteriorating and, consequently, the Czech National Bank considers the introduction of forced administration to be a matter that cannot withstand delay.

The Czech National Bank has requested, in accordance with the provisions of Section 30 of the Banking Act, the standpoint of the Ministry of Finance with respect to the introduction of forced administration. In its standpoint dated June 16, 2000, the Ministry of Finance consented to the introduction of forced administration.

Pursuant to the provisions of Section 28(1) of the Banking Act, the Banking Board has the obligation to appoint the administrator charged with the exercise of forced administration and determine the amount of his remuneration. However, pursuant to the provision of Section 27(1)(b) of the Banking Act, the decision on the introduction of forced administration must include, in addition to the grounds for the introduction of forced administration, also the name, surname and birth code of the administrator.

Advice on Appeal

An appeal may be lodged against this Decision pursuant to Section 61(1) of Act No. 71/1967 Coll., the Administrative Procedural Code (the Administrative Code), as amended, with the Czech National Bank, Na Příkopě 28, Praha 1, PSČ 115 03, within 15 days of the delivery hereof. In accordance with the provisions of Section 41(1) of the Banking Act, the Banking Board of the Czech National Bank decides on the appeal. An appeal lodged has no suspensive effect.

(Circular Seal)

(signature)	(signature)
Ing. Pavel Racocha, MIA Senior Director	Ing. Vladimír Krejča Director of the Banking Supervision Section

This Decision is addressed to:
INVESTIČNÍ A POŠTOVNÍ BANKA, akciová společnost
Senovazné nam. 32
Praha 1

271. As will be seen, the CNB's decision is fully motivated. Having reviewed the totality of the evidence which the CNB invoked in support of its decision, the Tribunal is of the view that the CNB was justified, under Czech law, in imposing the forced administration of IPB and appointing an administrator to exercise the forced administration.

272. The Czech State, in the person of its banking regulator, the CNB, had the responsibility to take a decision on 16 June 2000. It enjoyed a margin of discretion in the

exercise of that responsibility. In reaching its decision, it took into consideration facts which, in the opinion of the Tribunal, it was very reasonable for it to consider. It then applied the pertinent Czech legislation to those facts – again, in a manner that the Tribunal considers reasonable.

273. In the absence of clear and compelling evidence that the CNB erred or acted otherwise improperly in reaching its decision, which evidence has not been presented to the Tribunal, the Tribunal must in the circumstances accept the justification given by the Czech banking regulator for its decision.

274. The Tribunal notes, additionally, that the decision of the CNB was confirmed by the CNB Appellant Board and subsequently upheld by the City Court in Prague on two occasions, firstly on an appeal lodged by three members of IPB's Board of Directors and later on an appeal lodged by Saluka itself.

275. The CNB's decision is, in the opinion of the Tribunal, a lawful and permissible regulatory action by the Czech Republic aimed at the general welfare of the State, and does not fall within the ambit of any of the exceptions to the permissibility of regulatory action which are recognised by customary international law. Accordingly, the CNB's decision did not, fall within the notion of a "deprivation" referred to in Article 5 of the Treaty, and thus did not involve a breach of the Respondent's obligations under that Article.

E. Conclusion

276. In summary, the Tribunal finds, based on the totality of the evidence which has been presented to it, that in imposing the forced administration of IPB on 16 June 2000 the Czech Republic adopted a measure which was valid and permissible as within its regulatory powers, notwithstanding that the measure had the effect of eviscerating Saluka's investment in IPB.

277. Having so determined, it is not necessary for the Tribunal to address the Respondent's subsidiary argument that, because Saluka sold its IPB shares back to Nomura after June 2000 for the same amount as it purchased those shares, the Claimant has failed to establish a deprivation of sufficient magnitude to form the basis of an expropriation claim.[15]

278. The Tribunal, in this Chapter of the present Award dealing with Saluka's claim that the Czech Republic breached Article 5 of the Treaty, does not consider the Claimant's allegations that the Czech Republic was an accessory to CSOB's alleged plan to take over IPB, that the Forced Administrator did not exercise truly independent judgment or that the Czech Government discriminated against IPB by granting State aid to Saluka's competitors. In the view of the Tribunal, these allegations, even if proven, would not rise to the level of a breach of Article 5. They will in any event be considered in the next Chapter of this Award that addresses the alleged breach by the Respondent of Article 3 of the Treaty.

VI. SALUKA'S CLAIMS UNDER ARTICLE 3 OF THE TREATY

279. The way in which events unfolded with respect to Saluka's shareholding in IPB amounted, in the Claimant's view, to a breach by the Czech Republic of its obligation under Article 3 of the Treaty. The Respondent has denied that it breached Article 3 of the Treaty.

280. Article 3, paragraphs 1 and 2 of the Treaty provided that:

> 1. Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors.
>
> 2. More particularly, each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than that accorded either to investments of its own investors or to investments of investors of any third States, whichever is more favourable to the investor concerned.

281. For reasons set out below, the Tribunal finds that the treatment accorded to Saluka's investment by the Czech Republic

(a) was in some respects unfair and inequitable, and

(b) impaired, by certain unreasonable and discriminatory measures, the enjoyment of such investment by Saluka,

and that the Czech Republic has therefore violated Article 3 of the Treaty.

A. The Content of the Czech Republic's Obligations under Article 3 of the Treaty

282. Article 3.1 of the Treaty requires the signatory governments to treat investments of investors of the other Contracting Party according to the standards of "fairness" and "equity" and to avoid impairment of such investments by measures which are not in compliance with the standards of "reasonableness" and "non-discrimination". It is common ground that such general standards represent principles that cannot be reduced to precise statements of rules.

283. Even though Article 3.2 sets out, "more particularly", obligations to accord "full security and protection" as well as national and most-favoured-nation treatment, these formulations are merely indicative and are not exhaustive of the scope of the general standards laid down in Article 3.1. Furthermore, a violation of the national and most-favoured-nation treatment obligations is not at issue here, and "full security and protection" is not less general a formulation than the standards set out in Article 3.1.

284. This does not imply, however, that such standards as laid down in Article 3 of the Treaty would invite the Tribunal to decide the dispute in a way that resembles a decision *ex aequo et bono*. This Tribunal is bound by Article 6 of the Treaty to decide the dispute on the

basis of the law, including the provisions of the Treaty. Even though Article 3 obviously leaves room for judgment and appreciation by the Tribunal, it does not set out totally subjective standards which would allow the Tribunal to substitute, with regard to the Czech Republic's conduct to be assessed in the present case, its judgment on the choice of solutions for the Czech Republic's.[16] As the tribunal in *S.D. Myers* has said, the "fair and equitable treatment" standard does not create an "open-ended mandate to second-guess government decision-making".[17] The standards formulated in Article 3 of the Treaty, vague as they may be, are susceptible of specification through judicial practice and do in fact have sufficient legal content to allow the case to be decided on the basis of law. Over the last few years, a number of awards have dealt with such standards yielding a fair amount of practice that sheds light on their legal meaning.[18]

B. Fair and Equitable Treatment

1. Meaning of the Standard

a) The Parties' Arguments

285. There is agreement between the parties that the determination of the legal meaning of the "fair and equitable treatment" standard is a matter of appreciation by the Tribunal in light of all relevant circumstances. As the tribunal in *Mondev* has stated, "[a] judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case".[19] There is disagreement between the parties, however, about the limits of such appreciation. These limits are reflected in the threshold that is relevant for the determination of the unlawfulness of the Czech Republic's conduct in the present case.

286. The Claimant argues that the standard is a specific and autonomous Treaty standard. Since it is not in any way qualified, it should be interpreted broadly. The Claimant relies, *inter alia*, on *Pope & Talbot, Inc. v. The Government of Canada*, where the arbitral tribunal stated that guarantees similar to those contained in Article 3 of the Treaty do not limit an investor's recourse to protection only against conduct that is "egregiously unfair", but rather are meant to ensure "the kind of hospitable climate that would insulate them from political risks or incidents of unfair treatment".[20]

287. According to the Claimant, Article 3.1 does not refer to any high threshold of unreasonableness or flagrancy of the conduct constituting a breach and it must be interpreted broadly enough to translate into real and effective protection of the type that would encourage investors to participate in the economy of the host State.

288. The Claimant endorses, however, and commends as a useful guide, even in the present context, the threshold defined by the Tribunal in *Waste Management, Inc. v. United Mexican States*, which held that the fair and equitable treatment standard in Article 1105(1) of the North American Free Trade Agreement ("NAFTA")[21] is infringed if the conduct of the State

> is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest

> failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.[22]

289. The Respondent argues that the standard laid down in Article 3.1 conforms in effect to the "minimum standard" which forms part of customary international law. The Respondent relies, *inter alia*, on the *Genin* award where the tribunal interpreted the "fair and equitable treatment" standard indeed as "a minimum standard". The *Genin* tribunal held that:

> acts that would violate this minimum standard would include acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith.[23]

290. For the determination of the relevant threshold, the Respondent also refers the Tribunal to the historical development of the customary minimum standard and, in particular, to the *Neer* case where it was held that the treatment of aliens, in order to constitute an international delinquency,

> should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would recognize its insufficiency.[24]

The Respondent therefore argues that it is for the Tribunal to determine whether, under the circumstances,

> the governmental action in question was willfully wrong, actually malicious, or so far beyond the pale that it cannot be defended among reasonable members of the international community.

291. Whatever the merits of this controversy between the parties may be, it appears that the difference between the Treaty standard laid down in Article 3.1 and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real. To the extent that the case law reveals different formulations of the relevant thresholds, an in-depth analysis may well demonstrate that they could be explained by the contextual and factual differences of the cases to which the standards have been applied.

292. Also, it should be kept in mind that the customary minimum standard is in any case binding upon a State and provides a minimum guarantee to foreign investors, even where the State follows a policy that is in principle opposed to foreign investment; in that context, the minimum standard of "fair and equitable treatment" may in fact provide no more than "minimal" protection. Consequently, in order to violate that standard, States' conduct may have to display a relatively higher degree of inappropriateness.

293. Bilateral investment treaties, however, are designed to promote foreign direct investment as between the Contracting Parties; in this context, investors' protection by the "fair and equitable treatment" standard is meant to be a guarantee providing a positive incentive for foreign investors. Consequently, in order to violate the standard, it may be sufficient that States' conduct displays a relatively lower degree of inappropriateness.

294. Whichever the difference between the customary and the treaty standards may be, this Tribunal has to limit itself to the interpretation of the "fair and equitable treatment" standard as embodied in Article 3.1 of the Treaty. That Article omits any express reference to the customary minimum standard. The interpretation of Article 3.1 does not therefore share the difficulties that may arise under treaties (such as the NAFTA) which expressly tie the "fair and equitable treatment" standard to the customary minimum standard.[25] Avoidance of these difficulties may even be regarded as the very purpose of the lack of a reference to an international standard in the Treaty.[26] This clearly points to the autonomous character of a "fair and equitable treatment" standard such as the one laid down in Article 3.1 of the Treaty.

295. Moreover, the Tribunal is not convinced that, as the Respondent suggests, Article 3.1 at least implicitly incorporates the customary minimum standard. The *Genin* case on which the Respondent relies does not support this suggestion. The *Genin* tribunal merely held that a BIT standard of "fair and equitable" treatment provides "a basic and general standard which is detached from the host States' domestic law".[27] This standard is characterised by the *Genin* tribunal as "an" international minimum standard, not as "the" international minimum standard. Far from equating the BIT's standard with the customary minimum standard, the *Genin* tribunal merely emphasised that the "fair and equitable treatment" standard requires the Contracting States to accord to foreign investors treatment which does not fall below a certain minimum, this minimum being in any case detached from any lower minimum standard of treatment that may prevail in the domestic laws of the Contracting States. Also, the way the *Genin* tribunal defined the threshold for the finding of a violation of the "fair and equitable treatment" standard[28] does not incorporate the traditional *Neer* formula[29] which reflects the traditional, and not necessarily the contemporary, definition of the customary minimum standard, at least in certain non-investment fields.

b) The Tribunal's Interpretation

296. In order to give specific content of the Czech Republic's general obligation to accord "fair and equitable treatment" to Saluka's investment in IPB shares, this Tribunal, being established under the Treaty, has to interpret Article 3 in accordance with the rules of interpretation laid down in the 1969 Vienna Convention on the Law of Treaties (the "Vienna Convention").[30] These rules are binding upon the Contracting Parties to the Treaty,[31] and also represent customary international law. Article 31.1 of the Vienna Convention requires that a treaty is interpreted

> in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

i) <u>The Ordinary Meaning</u>

297. The "ordinary meaning" of the "fair and equitable treatment" standard can only be defined by terms of almost equal vagueness. In *MTD*, the tribunal stated that:

> In their ordinary meaning, the terms "fair" and "equitable" [...] mean "just", "even-handed", "unbiased", "legitimate".[32]

On the basis of such and similar definitions, one cannot say much more than the tribunal did in *S.D. Myers* by stating that an infringement of the standard requires

> treatment in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective.[33]

This is probably as far as one can get by looking at the "ordinary meaning" of the terms of Article 3.1 of the Treaty.

ii) <u>The Context</u>

298. The immediate "context" in which the "fair and equitable" language of Article 3.1 is used relates to the level of treatment to be accorded by each of the Contracting Parties to the investments of investors of the other Contracting Party. The broader "context" in which the terms of Article 3.1 must be seen includes the other provisions of the Treaty. In the preamble of the Treaty, the Contracting Parties

> recognize[d] that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties and that fair and equitable treatment is desirable.

The preamble thus links the "fair and equitable treatment" standard directly to the stimulation of foreign investments and to the economic development of both Contracting Parties.

iii) <u>The Object and Purpose of the Treaty</u>

299. The "object and purpose" of the Treaty may be discerned from its title and preamble. These read:

> Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic
>
> The Government of the Kingdom of the Netherlands
>
> And
>
> The Government of the Czech and Slovak Federal Republic,
>
> hereinafter referred to as the Contracting Parties,
>
> Desiring to extend and intensify the economic relations between them particularly with respect to investments by the investor of one Contracting Party in the territory of the other Contracting Party,
>
> Recognizing that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties and that fair and equitable treatment is desirable.

> Taking note of the Final Act of the Conference on Security and Cooperation in Europe, signed on August, 1st 1975 in Helsinki.

300. This is a more subtle and balanced statement of the Treaty's aims than is sometimes appreciated. The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty's substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations.

301. Seen in this light, the "fair and equitable treatment" standard prescribed in the Treaty should therefore be understood to be treatment which, if not proactively stimulating the inflow of foreign investment capital, does at least not deter foreign capital by providing disincentives to foreign investors. An investor's decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment as well as on the investor's expectation that the conduct of the host State subsequent to the investment will be fair and equitable.

302. The standard of "fair and equitable treatment" is therefore closely tied to the notion of legitimate expectations[34] which is the dominant element of that standard. By virtue of the "fair and equitable treatment" standard included in Article 3.1 the Czech Republic must therefore be regarded as having assumed an obligation to treat foreign investors so as to avoid the frustration of investors' legitimate and reasonable expectations. As the tribunal in *Tecmed* stated, the obligation to provide "fair and equitable treatment" means:

> to provide to international investments treatment that does not affect the *basic expectations* that were taken into account by the foreign investor to make the investment.[35]

Also, in *CME*, the tribunal concluded that the Czech authority

> breached its obligation of fair and equitable treatment by evisceration of the arrangements in reliance upon which the foreign investor was induced to invest.[36]

The tribunal in *Waste Management* equally stated that:

> In applying [the "fair and equitable treatment"] standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.[37]

303. The expectations of foreign investors certainly include the observation by the host State of such well-established fundamental standards as good faith, due process, and non-discrimination.[38] And the tribunal in *OEPC* went even as far as stating that

> [t]he *stability* of the legal and business framework is thus an essential element of fair and equitable treatment.[39]

304. This Tribunal would observe, however, that while it subscribes to the general thrust of these and similar statements, it may be that, if their terms were to be taken too literally, they would impose upon host States' obligations which would be inappropriate and unrealistic. Moreover, the scope of the Treaty's protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors' subjective motivations and considerations. Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness *in light of the circumstances*.

305. No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well. As the *S.D. Myers* tribunal has stated, the determination of a breach of the obligation of "fair and equitable treatment" by the host State

> must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.[40]

306. The determination of a breach of Article 3.1 by the Czech Republic therefore requires a weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other.

307. A foreign investor protected by the Treaty may in any case properly expect that the Czech Republic implements its policies *bona fide* by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination. In particular, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment.

308. Finally, it transpires from arbitral practice that, according to the "fair and equitable treatment" standard, the host State must never disregard the principles of procedural propriety and due process[41] and must grant the investor freedom from coercion or harassment by its own regulatory authorities.

iv) <u>Conclusion</u>

309. The "fair and equitable treatment" standard in Article 3.1 of the Treaty is an autonomous Treaty standard and must be interpreted, in light of the object and purpose of the Treaty, so as to avoid conduct of the Czech Republic that clearly provides disincentives to foreign investors. The Czech Republic, without undermining its legitimate right to take measures for the protection of the public interest, has therefore assumed an obligation to treat a foreign investor's investment in a way that does not frustrate the investor's underlying

legitimate and reasonable expectations. A foreign investor whose interests are protected under the Treaty is entitled to expect that the Czech Republic will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (*i.e.* unrelated to some rational policy), or discriminatory (*i.e.* based on unjustifiable distinctions). In applying this standard, the Tribunal will have due regard to all relevant circumstances.

2. Application of the Standard

310. In applying Article 3 of the Treaty to the present case, the Claimant contends that the Czech Republic has violated the "fair and equitable treatment" standard in Article 3.1 of the Treaty in a number of ways. The Claimant principally contends that

(a) the Czech Republic gave a discriminatory response to the systemic bad debt problem in the Czech banking sector, especially by providing State financial assistance to the other Big Four banks to the exclusion of IPB, and thereby created an environment impossible for the survival of IPB;

(b) the Czech Republic failed to ensure a predictable and transparent framework for Saluka's investment;

(c) the Czech Republic's refusal to negotiate with IPB and its shareholders in good faith prior to the forced administration was unreasonable and discriminatory;

(d) the provision by the Czech Republic of massive financial assistance to IPB's business, once the beneficiary of such assistance had become CSOB following the forced administration, was unfair and inequitable; and

(e) the Czech Republic's failure to prevent the unjust enrichment of CSOB at the expense of the IPB shareholders, including Saluka, upon the transfer of IPB's business to CSOB and the aforementioned State aid following the forced administration was equally unfair and inequitable.

311. The Tribunal will examine each of these claims separately.

a) The Czech Republic's Discriminatory Response to the Bad Debt Problem

312. The Claimant contends that, whereas the "systemic" bad debt problem which contributed to the serious difficulties of the Czech banking sector from 1998 to 2000 equally affected the Big Four banks (*i.e.* IPB, KB, CS and CSOB), the Czech Republic, in assisting these banks to overcome the problem, treated IPB differently in an unreasonable way which made it impossible for IPB to survive, especially by excluding IPB from the state assistance that was granted to its competitors, and which resulted in Saluka's loss of its investment.

313. State conduct is discriminatory, if (i) similar cases are (ii) treated differently (iii) and without reasonable justification.

i) Comparable Position of the Big Four Banks regarding the Bad Debt Problem

314. According to the Claimant, the Big Four banks were in a comparable position in terms of their macroeconomic significance in the transitional period of the Czech Republic and their resulting share of the systemic bad debt problem.

315. By 1998 all of them had large non-performing loan portfolios and they were equally suffering from inadequacies of the legal regime for the enforcement of collateral rights. The impact of these bad debts was felt by all of the Big Four banks, although to different degrees. IPB, KB and CS suffered heavily, and only CSOB was relatively better off.

316. Another factor that the Big Four banks had in common was that they were all equally exposed to the increasingly rigorous banking supervision by the CNB and to the prudential standards that were drastically tightened by the CNB in order to bring them into line with the norms of the European Union. These measures resulted in major increases in loan loss provisions which caused losses that, in the longer term, none of these banks was able to absorb by drawing upon shareholder equity. Beyond a certain point the survival of all the banks was dependent upon some form of assistance from the Czech State.

317. The Claimant has put much emphasis on the "systemic" nature of the bad loan problem that affected the Big Four banks from 1998 to 2000. The Claimant has referred in this context to an International Monetary Fund ("IMF") Report, defining a problem as "systemic" where the affected banks hold, in the aggregate, at least 20% of the total deposits of the banking system.[42]

318. The Respondent has denied that IPB's position was comparable with the position of the other three of the Big Four banks. Much emphasis is put by the Respondent on the fact that IPB had already been privatised, whereas the State still held large blocks of shares in KB, CS and CSOB. Furthermore, the financial difficulties with which IPB was faced are said to have been caused by mismanagement and irresponsible lending practices. The Respondent has, *inter alia*, referred to a CNB inspection report of 25 February 2000 which had identified serious deficiencies regarding IPB's internal organisation and operation.

319. The Tribunal is not convinced that the increasing financial difficulties with which IPB was faced and that finally resulted in its forced administration were predominantly due to bad banking management and organisational deficiencies. Even though the irregularities identified in the CNB inspection report of 25 February 2000 were serious and must have to some extent contributed to IPB's problems, it can hardly be disputed that the bad debt problem still lay at the heart of IPB's difficulties. In the autumn of 1999 it became abundantly clear that IPB needed more than a correction of the irregularities identified by the CNB. The CNB itself requested a significant increase in IPB's equity capital. It is therefore not plausible that, had IPB solved the organisational problems identified by the CNB, it would no longer have suffered from its large non-performing loan portfolio and from the insufficiency of its regulatory capital.

320. The expert witnesses introduced by the Respondent have reported a number of differences between IPB and its competitors as far as liquidity, credit rating and business

strategies are concerned. The expert witnesses introduced by the Claimant have, however, questioned the validity of these findings and have arrived at the opposite conclusions. The Tribunal does not find that the evidence placed before it enables it to conclude that IPB differed sufficiently drastically from the other Big Four banks with regard to the risks involved in its lending policies so as to warrant a finding that the financial problems with which IPB was faced could not be attributed predominantly to the bad debt problem that plagued all the Big Four banks equally.

321. The Respondent also disagrees with the Claimant's characterisation of the bad debt problem as being "systemic". According to the Respondent, a "systemic" crisis is one affecting the entire commercial banking industry. The Claimant had not shown, however, that this had been the case. More than fifty of the other Czech commercial banks holding more than 30% of the country's banking assets had not at all been taken into consideration by the Claimant.

322. The Tribunal finds that, irrespective of whether the bad debt problem with which the Big Four banks were faced from 1998 to 2000 may properly be characterised as "systemic" or not, these banks were in a sufficiently comparable situation: All of them had large non-performing loan portfolios resulting in increased provisions and consequently in insufficient regulatory capital. None of them was able to absorb the losses by calling on shareholder equity. The survival of all of them was sooner or later seriously threatened unless the Czech State was willing to provide financial assistance. On the other hand, due to the macroeconomic significance of the Big Four banks, the Czech State apparently could not afford to let any one of these banks fail. And, as set out below, the Czech State did in fact sooner or later provide such assistance to all of them, including IPB after it had been acquired by CSOB. The Czech Government therefore has implicitly recognised that all the Big Four banks were in a comparable situation.

323. Consequently, as far as the Claimant is concerned, Nomura (and subsequently Saluka) was justified in expecting that the Czech Republic, should it consider and provide financial assistance to the Big Four banks, would do so in an even-handed and consistent manner so as to include rather than exclude IPB.

ii) Differential Treatment of IPB Regarding State Assistance

324. In 1997 and 1998 the Czech Government began to develop a strategy of dealing with the bad debt problem at the enterprise level. According to this strategy, the Government would directly finance the forgiveness of the indebted companies and provide guarantees for new loans (the so-called "Revitalisation Programme"). Consequently, the Government took a negative position towards financial assistance for the banking sector. This approach was clearly stated by the Czech Government at the time IPB was privatised (by way of the sale of the State's 36% shareholding to Nomura on 8 March 1998). The Czech Government was, however, careful not to give Nomura any assurance that this policy would never be changed by future Governments with regard to the privatisation of one or other of IPB's competitors.

325. Since the bad debt problem became worse, however, the Czech Government changed its policy and did in fact take a number of steps to assist the other of the Big Four banks to

overcome the financial difficulties with which they were faced. These measures were also deliberately taken in order to prepare IPB's competitors for privatisation. CSOB was privatised in 1999 (by way of a sale of the State's 65.69% shareholding to KBC of Belgium), CS was privatised in 2000 (by way of a sale of the State's 53.07% shareholding to Erste Bank of Austria), and KB was privatised in 2001 (by way of a sale of the State's 60% shareholding to Société Générale S.A.). All three banks had received considerable financial assistance from the Czech Republic before privatisation took place. Without such assistance, privatisation would clearly not have been possible.

326. IPB had also received some financial assistance before its privatisation. After Nomura had acquired its IPB shareholding, however, IPB was excluded as a beneficiary from the Revitalisation Programme as well as from the Czech Government's strategy to solve the bad debt problem of IPB's competitors by the provision of direct financial assistance to the banks. Only in the course of CSOB's acquisition of IPB's business during IPB's forced administration was considerable financial assistance from the Czech Government forthcoming. It follows that IPB has clearly been treated differently.

iii) Lack of a Reasonable Justification

327. The Respondent has argued that this differential treatment of IPB was justified for a number reasons.

328. Firstly, the Respondent argues that Nomura was not given any assurance that its competitors would be privatised in the same way as IPB, *i.e.* without previous support allowing them to get rid of the problems involved in the non-performing loan portfolios.

329. The Tribunal finds that the Claimant's reasonable expectations to be entitled to protection under the Treaty need not be based on an explicit assurance from the Czech Government. It is sufficient that Nomura (and subsequently Saluka), when making its investment, could reasonably expect that, should serious financial problems arise in the future for all of the Big Four banks equally and in case the Czech Government should consider and provide financial support to overcome these problems, it would do so in a consistent and even-handed way.

330. Secondly, the Respondent argues that Nomura (and subsequently Saluka) had no reason to expect that the Czech Government would be willing to alleviate IPB's future problems by providing State financial assistance, since Nomura, having gone through an extensive due diligence, had been aware of the risks involved in acquiring the shareholding in IPB. Nomura is even said to have known before it made its investment that the Czech Government planned to give aid to the other three of the Big Four banks during their privatisation. Nomura had therefore voluntarily assumed these risks and they were reflected in the share price paid by Nomura. Once these risks had materialised, Nomura (and subsequently Saluka) should not be allowed to ask for assistance.

331. On the basis of the available evidence, the Tribunal finds that the Czech Government changed its policy of non-assistance only after Nomura had acquired the shareholding in IPB on March 8, 1998. The earliest hint of such policy change was contained in a letter from the

head of the NPF, Mr Ceska, to the chairmen of the boards of directors of KB, CS and CSOB dated 21 April 1998 which contained the following statement:

> We further confirm that, during the period prior to the full privatisation of the banks as aforesaid, we are ready to take such steps within our authority and power as shareholder of each of the banks [to ensure that the banks] comply with all regulatory requirements applicable to them, including capital adequacy and liquidity.

On 27 May 1998 the Government passed the following resolution:

> The Government states that it is aware of its responsibility for the financial stability of the joint stock companies CSOB, KB and CS and that it is ready to secure such financial stability until the completion of the privatisation of those joint-stock companies.[43]

332. Furthermore, whatever the scope of Nomura's due diligence may have been, it could not possibly lead to a reliable forecast as to which policies future governments would adopt should an aggravation of the bad debt problem occur as it did after Nomura had made its investment. Therefore, the Claimant cannot be said to have assumed the risk of being treated differently when the Czech Government in fact decided to step in with financial assistance.

333. Thirdly, the Respondent argues that the Claimant was the dominant shareholder of IPB and should therefore itself have rescued IPB by providing the necessary additional capital. The Czech Republic therefore considers itself justified in expecting that the Claimant would have acted as a responsible strategic investor. Also, by providing the necessary financial support to IPB's competitors, the Czech Republic considers itself to have in fact done no more than act as a responsible shareholder. In doing so, the Czech Republic considers itself to have been justified in limiting its assistance to its own banks.

334. The Tribunal finds that Nomura cannot be said to have entered IPB as a strategic investor. Nomura has made it sufficiently clear from the beginning that it came as a portfolio investor acquiring a considerable block of shares with a view to selling it once IPB had improved and the value of its shares had appreciated. The Claimant as a private investor could not reasonably be expected to provide new capital unless this could be done on commercial terms. In this respect the Claimant was in a position similar to an investor acquiring a shareholding in IPB's still-to-be-privatised competitors: unless the bad debt problem was taken care of by financial assistance from the State, no new (or additional) private investment could reasonably be expected in any of the Big Four banks. The Czech Government implicitly recognised this when it provided considerable support to IPB's business upon the acquisition of IPB's business by CSOB.

335. Furthermore, it is less than plausible that, by granting State aid to one or other of the Big Four banks, the Czech Republic acted exclusively as a shareholder. Even though the Government may have expected to secure a better price for the shares when the other banks were privatised, this would not have been a commercially rational conduct. If that had been the motivation, the Czech Republic could just as well have saved the financial resources used for the provision of State aid and sold the shares at a lower price. Recovering the State aid by selling the shares at a higher price would have merely caused additional transaction costs. Anyway, even when acting in its role as a shareholder of IPB's competitors, the Czech

Republic could not at the same time disregard its role as the regulator of the banking sector who was responsible for somehow resolving the bad debt problem with which all the Big Four banks were faced. Consequently, by insisting on its role as shareholder in the other three banks the Czech Republic cannot reasonably justify the differential treatment of IPB. Also, once IPB's business was acquired by CSOB in the course of IPB's forced administration, the Czech Government abandoned its position and did in fact provide considerable financial assistance for IPB's business.

336. Fourthly, the Respondent argues that the financial assistance granted to IPB's competitors was closely linked to the Czech Government's privatisation strategy. The Czech State still held large blocks of shares in KB, CS and CSOB which could have been privatised either on an "as is" basis or after clearing of the non-performing loan portfolios. It is said to have been in the discretion of the Czech State to make this policy choice.

337. It is clearly not for this Tribunal to second-guess the Czech Government's privatisation policies. It was perfectly legitimate for the Government to sell its stakes in the remaining banks only after they had been relieved from the bad debt problem. This, however, did not at the same time relieve the Czech Government from complying with its obligation of non-discriminatory treatment of IPB. The Czech Republic, once it had decided to bind itself by the Treaty to accord "fair and equitable treatment" to investors of the other Contracting Party, was bound to implement its policies, including its privatisation strategies, in a way that did not lead to unjustified differential treatment unlawful under the Treaty.

338. Fifthly, the Respondent argues that, had IPB also received financial assistance, the benefits from clearing the non-performing loan portfolio would have accrued to IPB's private shareholders, whereas in case of the other three of the Big Four banks the benefits accrued to the Czech State itself which at the time was their dominant shareholder. This position is belied by the fact that at the time the Czech Republic granted financial assistance to CSOB after its acquisition of IPB's business, CSOB had already been privatised (by way of a sale of the State's 65.69% shareholding to KBC of Belgium). The policy on which the Respondent relies was therefore at least not consistently implemented and cannot therefore justify IPB's differential treatment.

339. Sixthly, the Respondent has asserted that IPB did not disclose its desire to receive State financial assistance until April 2000. Consequently, Saluka, and indeed IPB, could not now claim that it has been negatively affected by the Czech Republic's failure to provide such assistance.

340. It is undisputed, however, that at least during the autumn of 1999 it was clear that IPB needed an increase of capital to provide for its bad loans and that the CNB expressly requested a significant increase in IPB's equity capital. Also, in the context of the negotiations that took place during the spring of 2000 in order find a solution for IPB, the Czech Government made it known to Nomura on 14 March 2000 that the provision of State aid to IPB was conditional on Nomura injecting new capital into IPB. Nomura, on the other hand, made it known in the course of these negotiations that it was unwilling to provide such capital unless at the same time the Czech State provided adequate financial assistance to IPB. The parties were, however, unable to bridge this gap in their approaches.

341. The Tribunal therefore finds that the Czech Government was fully aware of IPB's need for State assistance at a time when it was still feasible to prevent IPB from failing.

342. Finally, the Respondent argues that IPB's financial problems that ultimately led to its failure and forced administration were due to IPB's own irresponsible business strategy, especially its lending policy. The Respondent therefore denies that the Claimant could legitimately expect a government bailout.

343. The Claimant denies that IPB differed in any significant way from the other Big Four banks, especially CS and KB: neither in terms of the size and the impact of its non-performing loan portfolio or in terms of its credit rating, nor in terms of its liquidity or in terms of the management of its loan portfolio could IPB be said to have been uniquely bad.

344. The Tribunal finds that the size of the non-performing loan portfolios and their impact on the balance sheet was in fact comparable for all the Big Four banks, with the exception, to some degree, of CSOB. Accordingly, the credit ratings of all these banks were equally downgraded in 1998 and the relative improvement of IPB's competitors in 2000 was due to the State aid they had received in the meantime.

345. As far as the Big Four banks' liquidity position until 1999 is concerned, the parties disagree on the criteria that are relevant for a comparison between IPB and its competitors. In principle, liquidity is defined as the sum of assets that can be easily turned into assets that may be used for the payment of debts in relation to total assets. In order to prove that IPB's liquidity position was worse than its competitors', the Respondent relies on the "liquid asset ratio" and the "cash asset ratio". The Claimant, in order to prove that IPB's liquidity position was even relatively better than its competitors', relies on the "quick asset ratio". The Tribunal finds, however, that "quick assets" are not much different from "liquid assets". Consequently, the parties' diverging calculations are less due to the criteria, but rather to their statistical foundations. Whatever the correct liquidity ratios of the Big Four banks from 1998 to early 2000 may have been, the Tribunal is not convinced that different liquidity ratios warranted different treatment with regard to the provision of State financial assistance in order to overcome the bad debt problem.

346. As far as the Respondent's contention relating to IPB's allegedly flawed business strategy and imprudent loan portfolio management is concerned, the Tribunal notes that IPB's competitors (especially CS and KB) proved not to be able to overcome the bad loan problem without financial assistance from the Czech State, even though they allegedly followed a less flawed business strategy and had a more prudent loan management.

347. The Tribunal therefore finds that the Respondent has not offered a reasonable justification for IPB's differential treatment. Consequently, the Czech Republic is found to have given a discriminatory response to the bad debt problem in the Czech banking sector, especially by providing state financial assistance to three of the Big Four banks to the exclusion of IPB, and thereby created an environment impossible for the survival of IPB.

b) Failure to Ensure a Predictable and Transparent Framework

348. The Czech Republic has failed to ensure a predictable and transparent framework for Saluka's investment, if it has frustrated Saluka's legitimate expectations regarding the treatment of IPB without reasonable justifications.

349. The Claimant argues that the Czech Republic has frustrated Saluka's expectations

(a) by contradictory and misleading declarations about its policy towards the banking sector in crisis and by justifying IPB's exclusion from the State aid granted to save the other banks on the grounds that it had already been fully privatised;

(b) by the unpredictable increase of the provisioning burden for non-performing loans; and

(c) by leaving the banks with no effective mechanisms to enforce loan security.

350. The Tribunal will assess the legitimacy and reasonableness of these expectations and, if they were legitimate and reasonable, whether they have been frustrated by the Czech Republic without reasonable justification.

i) Nomura's Expectation that IPB would not be Treated Differently

351. Firstly, Nomura's expectation that the Government would not address the bad loan problem by support to the banks was initially said to have been based on an express assurance to that effect given by the then Minister of Finance. The Claimant has also argued that this was consistent with the obligations undertaken by the Czech Government in their pre-accession agreement with the European Commission (the Europe Agreement) to adhere to European Union norms on State aid. The Claimant has admitted, however, that whatever assurance the Minister of Finance may have given, he could not bind future Governments. Especially, he could not give any assurance that the privatisation of the other banks would proceed in the same way as the privatisation of IPB, *i.e.* without any State financial assistance. Nomura therefore had no basis for expecting that there would be no future change in the Government's policy towards the banking sector's bad loan problem or in the Government's willingness to adhere during the pre-accession period to the rules on State aid in the Europe Agreement.

352. The Claimant insists, however, that Nomura was justified in expecting that, should the Czech Government change its policy and provide State financial assistance to the banks in order for them to overcome the "systemic" problem of bad loans, that solution would itself be "systemic" and thus non-discriminatory. The Claimant contends that the Czech Government has frustrated this expectation by excluding IPB from the financial assistance provided to IPB's competitors. This discriminatory treatment is said to have been unpredictable.

353. The Tribunal notes that this claim is in substance identical with the Claimant's previous claim according to which the Czech Republic has violated the "fair and equitable

treatment" standard by the discriminatory response of the Czech Republic to the bad debt problem in the Czech banking sector. It has therefore already been dealt with in the context of the Claimant's first claim.

ii) The Unpredictable Increase of the Provisioning Burden for Non-Performing Loans

354. Secondly, the Claimant argues that Nomura's legitimate expectations have been frustrated by the CNB's introduction of more stringent prudential rules for the banks. The CNB should rather have taken a "gradualist" approach so that the banks had time to adjust.

355. The Respondent argues that Nomura was aware of some of the CNB's regulatory amendments at the time the shareholding in IPB was acquired, and others were clearly foreseeable.

356. The Tribunal notes that the increased stringency of the CNB's prudential rules contributed to the distress suffered by the Czech banking system by forcing the banks to increase provisioning. Consequently, it became even more difficult for the banks to meet the regulatory capital requirements than it had been before due to the bad loan problem.

357. However, the CNB's policy of tightening the regulatory regime must be seen in the context of the Czech Republic's preparation for accession to the European Union. It was the CNB's declared intention to bring its regulatory regime into line with the norms in the European Union. In 1999 a "Twinning Programme" for banking supervision had been launched which was deliberately designed to adjust the Czech regulatory methodology and the practical implementation of banking supervision to European Union standards.[44]

358. It can hardly be disputed that these developments could have been anticipated in 1998. Nomura was, therefore, not justified to expect that the CNB would not introduce a more rigid system of prudential regulation and thereby change the framework for Nomura's investment in IPB shares. However, Nomura was unable to anticipate the discriminatory way in which the Czech Government responded to the distress suffered by the Czech banking sector, *i.e.* the exclusion of IPB from any State assistance that was granted to the other three of the Big Four banks in order for them to overcome their inability to meet the regulatory capital requirements. This aspect of the Czech Government's attitude towards the banking sector has, however, already been dealt with in the context of the Claimant's first claim.

iii) Nomura's Expectation regarding the Legal Framework for the Enforcement of Loan Security

359. It is undisputed between the parties that Czech Law failed to provide effective mechanisms to enforce loan security. The CNB expressly acknowledged that its tightening of the prudential regulations and the increase of the provisioning requirements were in fact a response to the shortcomings in the legislation to protect creditors in recovering receivables and exercising liens as well as to other institutional shortcomings that were preventing banks in practice from realising real estate pledged as collateral.

360. The Tribunal finds that the aforementioned legal shortcomings must have been known to Nomura when it made its investment. An expectation that such shortcomings would quickly be fixed by the Czech legislature would have been unfounded. Consequently, even though the lack of adequate protection of creditors' rights will most certainly have contributed to the aggravation of the bad debt problem, the Tribunal is unable to find that the Czech Republic has frustrated Nomura's legitimate and reasonable expectations and violated the "fair and equitable treatment" standard by its failure to improve the legal framework within a timescale of help to Nomura.

c) Refusal to Negotiate in Good Faith

361. The Claimant contends that, whereas Saluka and Nomura as well as IPB were actively engaged in seeking a solution to IPB's financial problems, the Czech Government refused to negotiate in good faith on the proposals made by IPB and its shareholders. The Czech Ministry of Finance and the CNB are said to have instead conspired and taken sides with CSOB, which was interested in acquiring IPB's business. While purporting to negotiate with IPB and its shareholders, the Czech Government is said to have acted as an accessory to CSOB's plan to take over IPB's business. According to this plan (the Paris Plan), IPB's business would be transferred to CSOB upon the pretence of forced administration. The Claimant argues that this conduct of the Czech Government was unreasonable and discriminatory.

362. The Respondent argues that the Claimant's proposition is unfounded. The Czech Government had neither engaged in a conspiracy nor taken sides with CSOB to the detriment of IPB and its shareholders. The Respondent denies that there was a premeditated plan (the Paris Plan) to oust IPB from control over its enterprise by transferring it to CSOB by way of IPB's forced administration. The CNB is rather said to have been compelled to impose forced administration because IPB was no longer meeting the regulatory requirements for its banking business. Also, IPB's banking business had to be transferred to CSOB since there was no other strategic investor capable of saving IPB's business and prepared to step in immediately. The Respondent therefore argues that the Czech Government's conduct was reasonable under the circumstances and that it did not in any way imply an unjustifiable discrimination against IPB and its shareholders.

363. The Tribunal's assessment starts from the proposition that the Czech Republic's conduct was unfair and inequitable if it unreasonably frustrated IPB's and its shareholders' good faith efforts to resolve the bank's crisis. A host State's government is not under an obligation to accept whatever proposal an investor makes in order to overcome a critical financial situation like that faced by IPB. Neither is a host State under an obligation to give preference to an investor's proposal over similar proposals from other parties. An investor is, however, entitled to expect that the host State takes seriously a proposal that has sufficient potential to solve the problem and deal with it in an objective, transparent, unbiased and even-handed way.

364. The Claimant has identified a number of elements of the factual record which are said to support the Claimant's proposition that the Czech Government used its power to unilaterally support CSOB in implementing its strategy to acquire the business of IPB to the detriment of IPB and Saluka. The factual details and especially the inferences and conclusions that may be derived therefrom are, however, highly disputed between the parties.

365. In light of the evidence before it, the Tribunal considers it helpful to contrast two intertwined but distinguishable developments during the first half of 2000: the unfolding of CSOB's acquisition of IPB, on the one hand, and the unfolding of the negotiations between IPB and Saluka/Nomura and the Czech Government, on the other.

i) The Developments during the First Half of 2000

(a) The Government's Role in CSOB's Acquisition of IPB

366. By January 2000 it became clear to CSOB that it could implement its strategic objective of expanding into the retail banking sector only by acquiring IPB. CSOB's interest in this acquisition was, if not "discussed" as the Claimant contends, then at least expressed at a meeting of the CEO and Chairman of the Board of CSOB, Mr Kavánek, with the Minister of Finance, Mr Mertlík, as early as 10 January 2000. It is not clear whether further meetings took place in January and February 2000.

367. In March 2000 CSOB retained Consilium Rothchilds and Boston Consulting Group to start preparing a deal structure for acquiring IPB.

368. On 26 April 2000 CSOB prepared a presentation to the Czech Government about its acquisition plans for IPB. This presentation entitled "Discussion Materials" provided an analysis of IPB's situation, CNB's objectives and the "main options" available to the Czech Government, including "do nothing", "self-help" of IPB, "broker a deal with a third party" and "full intervention". The two last options clearly referred to the entry of a strategic partner into IPB, on the one hand, and to forced administration (which was, however, characterised as being generally seen as the last resort) on the other. Since "self-help" was no longer considered a viable option in IPB's circumstances, "broker a deal" was seen as the next best option in persuading the CNB, whereas "full intervention" should remain a "credible potential stick" for IPB/Nomura to facilitate the process.

369. On 30 May 2000 the CEO and Chairman of the Board of CSOB, Mr Kavánek, presented several documents at a meeting held in Paris by the Czech Minister of Finance, Mr Mertlík, the Governor of the CNB, Mr Tošovský, and the President of CSOB's parent company KBC, Mr Remi Vermeiren, who on that day were attending a banking conference. The documents presented by Mr Kavánek, together referred to by the Claimant as "the Paris Plan", set out a "Preliminary approach to the Carthago-India business case"[45] (in which CSOB explained the potential synergies to be expected from a combination of CSOB and IPB), CSOB's "Readiness to act" (in terms of CSOB's readiness and capability to manage the integration of IPB into CSOB) and a "Summary Transaction Structure" (explaining the procedural steps to be taken for the integration of IPB into CSOB).

370. In the two appendices to the latter document, CSOB explained in more detail two alternative strategies for a takeover of IPB: firstly, the "transaction structure to be used in negotiated transaction with India"; secondly, the "transaction structure to be used in forced administration of India". The first "transaction structure" was characterised as not being without legal, political and implementation risk; but it was emphasised that it would "present a potential (and perhaps only [*sic*]) structure which, in light of the options available under

current Czech law, addresses the goal of a rapid transfer of the India business to Carthago". The second "transaction structure" was characterised as being novel and as not being without legal, political and implementation risk either; it was also emphasised, however, that it would "present a potential (and perhaps only [*sic*]) structure which, in light of the options available under current Czech law, addresses the goals of minimal involvement of the Forced Administrator and of a rapid transfer of the India business to Carthago".

371. In anticipation of the Paris meeting, the Chairman of the Board of CSOB, Mr Kavánek, had written a letter dated 26 May 2000 to the Minister of Finance expressing his expectation that the Paris meeting would "contribute to additional positive progress in the subject matter". Nevertheless, the precise nature and content of the talks at the Paris meeting are a matter of dispute between the parties and remain unclear.

372. On 13 June 2000, after the second run on IPB had already set in, the Vicegovernor of the CNB, Mr Niedermayer, acting on behalf of an *ad hoc* working group whose mission was to determine a solution for IPB including a transfer of IPB's business to a strategic investor, requested CSOB to submit by 9:00 a.m. the next day a "co-operative" proposal for a takeover of IPB.

373. On 14 June 2000 the CEO and Chairman of the Board of CSOB, Mr Kavánek, wrote a letter to the Vicegovernor of the CNB, Mr Niedermayer, setting out a detailed proposal for a takeover of IPB to be negotiated with Nomura. It was clearly stated that State participation in the risks and losses linked with the operation had to be anticipated. The letter stated at the same time, however, that Nomura had declared its lack of interest in the proposal. The Claimant has denied that Nomura had in fact been contacted to discuss the proposal.

374. Also on 14 June 2000 the Director of the State Aid Department of the OPC, Mr Rudolecký, was informed by his superior, Dr Buchta, of the State aid envisaged for IPB/CSOB in case of CSOB's takeover of IPB's business. It was anticipated that an exemption from the prohibition of State aid would be necessary.

375. On 15 June 2000 the Czech Government met to assess the situation of IPB. The Cabinet's deliberations were based on "Materials for the Talks of the Czech Republic's Government" prepared and submitted by the Minister of Finance, Mr Mertlík, and the Governor of the CNB, Mr Tošovský. The "Materials" took two alternative solutions into consideration: a cooperative solution involving IPB's shareholders and a non-cooperative solution involving forced administration coupled with a quick sale to a strategic investor. In Appendix No. 3 to the "Materials" the strategic investor was clearly identified as being CSOB. Also, the "Materials" expressly stated that any solution "necessitates a support on the side of the state".

376. The Claimant contends that only the non-cooperative solution was seriously presented to the Cabinet with CSOB being the only candidate taken into consideration as a strategic investor of IPB. The Respondent insists that the Cabinet was fully briefed on both alternative solutions, including the cooperative solution. In any event the Government, by Resolution No. 622 of 15 June 2000, consented to and recommended the imposition of forced administration upon IPB with the objective of a subsequent sale to CSOB as the strategic investor, the provision of a government guarantee for the assets of IPB in favour of CSOB

and the issuing of government guarantees in favour of the CNB in order to cover the losses resulting from the indemnity to be issued by the CNB in favour of CSOB for the debts assumed from IPB and the losses suffered from the takeover of IPB's business.

377. On 16 June 2000 the CNB decided to introduce forced administration of IPB and appointed Mr Staněk as administrator (*i.e.* a sort of trustee in bankruptcy). Mr Staněk was expressly instructed to "perform all required steps that would result in accelerated sale of the company to [CSOB], being its strategic partner". He was also promised a "special bonus" for the implementation of this instruction.

378. On 19 June 2000 IPB's business was transferred to CSOB. The Ministry of Finance granted the guarantee envisaged in such Resolution No. 622 of the Government and the CNB signed its promise of compensation for any risk and loss that CSOB had requested. Also, on the same day, the OPC (to which the Government's guarantee and indemnity in favour of IPB/CSOB had been formally notified the day before) issued a decision exempting the State's financial assistance from the legal prohibition of State aid provided by the Public Assistance Act.

(b) The Government's Role in IPB's and Saluka's/Nomura's Attempts to Negotiate a Cooperative Solution

379. Nomura began searching for a strategic partner for IPB in October 1999. It was clear from the beginning that the involvement of the Czech Government would be needed, not only in terms of the various approvals required from the Czech regulatory authorities, but especially in terms of State financial assistance without which private investors would find an investment in IPB unattractive given the finding of the CNB that IPB was massively under-provisioned and had insufficient regulatory capital.

380. Discussions began between representatives of the CNB and the Ministry of Finance, on the one hand, and representatives of IPB and Saluka/Nomura on the other.

381. It appears that the CNB and the Ministry of Finance initially expected a Nomura-led solution, because they assumed that Nomura as IPB's largest shareholder (through Saluka) would try to preserve its investment in IPB and lead the effort to solve IPB's problems either by injecting additional capital into IPB or by identifying a strategic investor for IPB. It transpires from the evidence before the Tribunal that some representatives of the Government and the CNB regarded Saluka/Nomura itself as a *de facto* strategic investor whose responsibility it was to assist IPB in overcoming its difficulties.[46] Nomura has, however, always insisted on its role as a portfolio investor and has made its willingness to rescue IPB dependent upon State financial assistance which the Czech Republic was unwilling to provide in the circumstances.

382. It soon turned out that some foreign financial institutions began to show an interest in becoming a strategic partner of IPB, especially a consortium formed by Allianz and Hypo-Vereinsbank which was later replaced by the UniCredito.

383. In December 1999 Nomura proposed a merger of IPB and CS, since Allianz considered an offer for both IPB and CS. This proposal was rejected by the State, because a public tender for the State's shareholding in CS was already underway and negotiations with Erste Bank of Austria (to which CS was eventually sold) were in their final stages.

384. In February and March 2000 IPB and Nomura developed a proposal for a merger of IPB and KB. This proposal was also rejected by the Government, because it would have led to a combination of two banks both of which required consolidation and substantial assistance.

385. Also in February and March 2000 the Deputy Managing Director of Nomura, Mr Jackson, entered into negotiations with the Vicegovernor of the CNB, Mr Niedermayer, on the draft of a "Memorandum of Understanding on the restructuring of IPB by Nomura in co-operation with shareholders of IPB and with the Czech Republic" ("MOU"). The purpose of the cooperation was said "to combine private sector and public sector resources". Nomura expressly declared its willingness to invest in IPB "on commercial terms applicable to comparable investments by private sector investors", including Nomura's participation in an increase of IPB's capital. It was made equally clear, however, that the CNB and the Ministry of Finance were required to assure State measures of support for IPB, including the purchase of subordinated debt and potentially participating in the capital increase. The Memorandum was finally rejected by the Czech side on the ground that it did not specify any concrete steps that Nomura would take to address IPB's problem and that there was no assurance for the State that its financial input would be spent effectively or would not wind up in the hands of IPB's shareholders or management.

386. On 14 March the Prime Minister of the Czech Republic expressed the view that the provision of State aid to IPB was conditional on Nomura injecting new capital into IPB. Nomura for its part reiterated on 3 April 2000 its unwillingness to address IPB's capital adequacy problems without State support.

387. Sometime in mid-March 2000 the Minister of Finance and the CNB are said to have lost trust in Nomura, *i.e.* confidence that Nomura would be able to come up with a viable solution for IPB. The Minister of Finance refused to meet personally with representatives of Nomura any longer. Instead, he and the Governor of the CNB appointed deputies (Deputy Finance Minister, Mr Mládek, and Vicegovernor of the CNB, Mr Niedermayer) to deal with Saluka/IPB. They were merely provided with a "soft mandate" and could only have unofficial meetings off Ministry premises.

388. On 14 April 2000 IPB submitted to the CNB a draft proposal of "Measures for the Stabilisation of IPB". A revised draft of this proposal was submitted to the CNB in May 2000. It explored various possibilities of rescuing IPB from its untenable situation by "bridging measures" as well as by "stabilisation measures" which included again the idea of merging IPB and KB as well as the search for a strategic partner. In any case, all the solutions explored in the proposal required the State's financial assistance. The proposal envisaged, however, that "as for the principal solution related to the entry of a strategic partner, the requested government assistance should focus on that part of [the] loan and asset portfolio which was created before the IPB privatisation and is comparable with portfolios of KB and CS where the government assistance is being provided". The proposal was rejected as

unacceptable, because it did not give the State sufficient control over the restructuring process.

389. In April and May 2000 Nomura's attempt to find a strategic partner for IPB made some progress. The Allianz/UniCredito consortium's interest became more and more concrete. Finance Minister Mertlík met with representatives of the Allianz/UniCredito consortium who made proposals similar to those made by CSOB, *i.e.* they wished to purchase IPB's assets. On 22 May 2000 UniCredito began due diligence enquiries on IPB and on 26 May 2000 UniCredito in fact proposed to purchase IPB's assets at an opening bid for IPB of CZK 25-30 billion (twice its book value, subject to agreement on the book value) with a possibility of paying more. Allianz/UniCredito made it clear, however, that their willingness to acquire IPB's assets was dependent upon a guarantee and promise of indemnity from the Czech State. Also, Allianz/UniCredito wanted several months to conduct due diligence.

390. At the same time representatives of CSOB also had meetings with Nomura's representatives to discuss CSOB's potential entry into IPB as a strategic partner. CSOB made it clear to Nomura that if IPB wanted Government support, it needed CSOB. However, these discussions led nowhere, because CSOB wanted to take over IPB first and negotiate the terms of the acquisition later. This was (perhaps not surprisingly) unacceptable to Nomura.

391. On 2 May 2000 the Governor of the CNB, Mr Tošovský, expressed in a letter to the Minister of Finance, Mr Mertlík, some dissatisfaction with the negotiations between the Czech Government and Saluka/Nomura. He wrote:

> As is well-known to you from a number of working meetings, the CNB, apart from the performance of its legal obligation of banking supervision, has also acted on the grounds of care in regard of the stability of the financial system and together with representatives of the Ministry of Finance and the National Property Fund it entered the talks with the main shareholder of the bank [*i.e.* Saluka/Nomura] and is contributing to the work of a working group whose establishment it initiated some time ago.
>
> The aforesaid work brought about a widening of the awareness of the situation, clarified some opinions and priorities, but has not led as yet to a sufficiently expedite and clear course of action. The problem is not only the slow communication with the main shareholder [*i.e.* Saluka/Nomura], his unclear position at the bank and a certain unwillingness to discuss a specific course of action, but also certain "half-officiality" of communication between the state, the shareholder and the bank at a level other than supervisory.

However, Governor Tošovský also stated in the following terms the basic conditions for a satisfactory solution:

> I believe the most necessary is to expedite and refine the works and prevent thereby the creation of still greater costs. For this reason allow me to acquaint you with the foundation and conclusions which I made together with my colleagues in regard to the situation:

> a) regardless of the specific results of the audit or supervision of the CNB at IPB it is possible to believe that without the substantial strengthening of the capital of the bank or a clean-up of assets, the bank will not be able to further exist,
>
> b) from this point of view it appears to be unlikely that the planned sale of the bank to a new strategic investor is realizable as a commercial transaction without the support of the state.

The letter concluded by setting out three options for action: the stabilisation of IPB by a private entity with the support of the State (the option favoured by the Governor, provided the State would retain a certain control over the whole process), the nationalisation of the bank (an option that was said to involve considerable risk), liquidation or bankruptcy (an option that was characterised as totally undesirable).

392. Shortly thereafter the CNB requested Nomura to approach the Minister of Finance and engage in formal dialogue about the future of IPB. However, letters addressed by Nomura to the Minister of Finance on 5, 8 and 9 May 2000, setting out its willingness to meet the CNB's request for an injection of fresh capital in IPB and to arrange for up to CZK 13.2 billion of new capital for a capital increase, remained without any response from the Minister.

393. Nomura continued its efforts to meet government officials in order to find a solution for IPB. Further letters dated 9, 18 and 24 May 2000 were sent to representatives of the Ministry of Finance and the CNB.

394. On 18 May 2000 Nomura was informed by the Deputy Finance Minister, Mr Mládek, that the Ministry of Finance intended to nationalise IPB and proposed that Nomura should sell Saluka's IPB shares at a symbolic price of 1 euro. Moreover, Mr Racocha for the CNB explained that, if neither IPB nor its shareholders resolved IPB's problems, the CNB would impose forced administration on IPB. Both propositions were not the ones that had been favoured by Governor Tošovský in his aforementioned letter of 2 May 2000 to the Minister of Finance.

395. On 24 May 2000 Nomura submitted to the Prime Minister a further proposal ("Securing future for IPB"). It involved a capital injection by Nomura of CZK 20 billion for a capital increase, a sale of 51% of IPB shares to the Allianz/UniCredito consortium and to CSOB/KBC, and a KoB guarantee of IPB's balance sheet. The same presentation was given to the Deputy Finance Minister, Mr Mládek, on 25 May 2000. On 29 May 2000 Mr Mládek rejected the proposal, the major concern being again that it involved direct aid to IPB without the State having any control over the use of the funds. More precisely, Mr Mládek declared the proposal regarding the guarantee of IPB's balance sheet by KoB to a new commercial bank unacceptable. Instead, Mr Mládek reiterated his proposal that Nomura should sell Saluka's IPB shares at a symbolic price of 1 euro.

396. Nomura subsequently wrote to Mr Mládek suggesting that the Ministry of Finance propose an amendment to Nomura's proposal that would make it acceptable to the Ministry. However, by 31 May 2000, the Ministry had refused to communicate officially with Nomura in order to consider any solution relating to IPB.

397. On 1 June 2000 the Government informed Nomura that State assistance would only be forthcoming if Nomura acquired a 51% stake in IPB (*i.e.* an additional 5%, since Saluka already held 46%).

398. On 2 June 2000 the Government repeated its 1 euro proposal. On 4 and 5 June, Nomura attempted to accommodate that proposal by presenting to the Deputy Finance Minister, Mr Mládek, and the Vicegovernor of the CNB, Mr Niedermayer, three alternative solutions to enable the entry of a strategic investor:

(1) Nomura would procure the transfer of 51% of the shares of IPB to the Government in return for acceptable financial assistance. The purchasing price should be 1 euro for 46.16% (*i.e.* the stake that Saluka already held in IPB) and market price for the remaining shares (which Saluka would have to acquire first). The IPB shares would then be sold for their purchase price to a commercial banking investor that was agreed in advance among the Government, CNB and Nomura. The commercial banking shareholder would recapitalise IPB and take management control on terms agreed in advance.

(2) Nomura would procure the recapitalisation of IPB with CZK 20 billion of new capital in return for acceptable financial assistance. The current and new shares of IPB would then be sold to a commercial banking shareholder who would become a controlling shareholder in IPB. The commercial shareholder would then recapitalise IPB and take management control.

(3) Nomura would procure the sale of 51% shareholder ownership of IPB to the CNB or the Government at fair market value defined as CZK 116 per share, representing the average purchase price of the seller.

None of these proposals was considered acceptable to the Government, mainly because they were seen to involve direct financial assistance by the State in favour of Nomura, or the State's assumption of all of IPB's losses and of the costs of IPB's restructuring.

399. Subsequently, by about 6 June 2000, Nomura was focussing on an asset sale as a solution.

400. On 7 June 2000 the Deputy Finance Minister, Mr Mládek, urged Nomura again to accept the 1 euro proposal, otherwise IPB would be "toast".

401. On Friday, 9 June 2000, the Czech news agency CTK reported the Deputy Finance Minister, Mr Zelinka, to have said that

> [c]ompulsory administration makes sense, because talks with a potential investor are at an advanced stage and there is a danger that the bank will go bankrupt in the meantime.
>
> Even though by law compulsory administration does not mean freezing the deposits, Zelinka does not see any other way of protecting the bank from being invaded by its customers.

402. During the run on IPB, which started the following Monday, 12 June 2000, Nomura, on behalf of Saluka, continued to search for a solution. On 14 June 2000 Nomura submitted a new proposal to the Ministry of Finance, the CNB and the Prime Minister (the "IPB Proposal") that also received the approval of IPB's Board of Directors and of IPB's Supervisory Board. According to this proposal, IPB would transfer its banking business to KoB for CZK 1 for on-sale to a long-term commercial banking partner acceptable to the Government (*i.e.* Allianz/UniCredito or CSOB/KBC). The proposal also stated IPB's readiness to execute the transaction before 16 June 2000.

403. Under this proposal KoB would have provided limited State assistance to accomplish the sale to a strategic partner. The sale proceeds would have been distributed to the Government as reimbursement for the costs of any financial assistance, and any excess would have been shared by IPB and the Government.

404. On 15 June 2000 Nomura's representatives met with representatives of the CNB and of the Ministry of Finance, including the Deputy Finance Minister, Mr Mládek, to discuss the IPB Proposal. From the Czech side the IPB Proposal was seen to involve serious economic, legal and organisational risks. The Czech Republic's main concern was the uncertain scope of the IPB assets that would not be covered by the proposed transfer to KoB but rather retained by IPB, especially the assets belonging to IPB's Tritton Fund. Negotiations continued into the evening and, after their closure, continued by e-mail. The final e-mail concluded by saying that the Ministry of Finance team was "now leaving for home and will continue tomorrow morning". This left Nomura's representatives with the impression that the IPB Proposal had been substantially agreed and that the negotiations would continue the next day. That impression proved to be mistaken.

405. On the evening of 15 June 2000 the Government (*i.e.* the Cabinet Presidium) convened and considered IPB's situation. The materials on which the Cabinet Presidium based its deliberations referred to both cooperative solutions and forced administration. However, the two cooperative solutions (the one relating to Saluka's sale of its shareholding in IPB to the State and the other relating to IPB's partial sale of its assets to KoB) were only briefly mentioned. The focus was on the CSOB proposal for forced administration followed by a quick sale to itself as a strategic investor. The Government preferred anyway the imposition of forced administration upon IPB with the objective of a subsequent sale of IPB's business to CSOB on the terms mentioned before.

406. The Claimant argues that the IPB proposal would have been by far the better deal and the Government has therefore failed to choose the solution with the least cost for the State's budget. The Respondent insists that after the run on IPB had started and IPB's liquidity had deteriorated dramatically, forced administration was unavoidable and CSOB was the only bank that was prepared and able in terms of management capacity to step in immediately to rescue IPB's banking business.

ii) The Tribunal's Finding

407. In light of all the factual elements relating to the Czech Government's role in CSOB's successful acquisition of IPB's business, and IPB's as well as Saluka's/Nomura's unsuccessful attempts to find a cooperative solution, the Tribunal finds, for the reasons set

out below, that the Czech Republic's conduct towards IPB and Saluka/Nomura in respect of Saluka's investment in IPB shares was unfair and inequitable. In particular, the Ministry of Finance and the CNB unreasonably frustrated IPB's and its shareholders' good faith efforts to resolve the bank's crisis. The Czech Government failed to deal with IPB's as well as Saluka's/Nomura's proposals in an unbiased, even-handed, transparent and consistent way and it unreasonably refused to communicate with IPB and Saluka/Nomura in an adequate manner.

(a) The Lack of Even-Handedness

408. The Czech Government failed to deal with IPB and its shareholder Saluka/Nomura, on the one hand, and CSOB, on the other hand, in an unbiased and even-handed way.

409. It transpires from the evidence before the Tribunal that both CSOB as well as IPB and its shareholder Saluka/Nomura clearly needed the cooperation of the Czech Government in order to implement their plans to acquire IPB's business or find a strategic investor for IPB. The involvement of the Czech Government was indispensable in terms of the various approvals needed from the Czech regulatory authorities as well as in terms of State financial assistance without which neither CSOB nor any other private investor, including Saluka/Nomura, would find an injection of new capital, a strategic investment or a takeover of IPB's business attractive given IPB's financial distress. Moreover, the Allianz/UniCredito consortium had made this point sufficiently clear.

410. It is, however, equally clear that only CSOB met with the degree of responsiveness on the part of the Czech Government which was a prerequisite for a successful search for a strategic investment or a takeover of IPB's business. In particular, the Ministry of Finance and the CNB were always open to receive information about CSOB's plan to acquire IPB, to discuss CSOB's strategy and finally to contribute to its implementation both in terms of granting the necessary regulatory approvals and in terms of massive State financial assistance.

411. In principle, there is nothing wrong with a Government deciding in favour of an investor which is determined, ready and capable of maintaining the business of an important bank suffering serious financial problems such as IPB. It is also very doubtful whether a Government can be said to be under an international legal obligation always to choose the least cost alternative and not to waste taxpayers' money. A Government that is bound by the standard of fair and equitable treatment of foreign investors, however, cannot avoid paying due regard to the good faith efforts of a foreign investor holding a considerable block of shares in the bank to solve the bank's problems.

412. In the case before the Tribunal, the Czech Government was determined at a rather early stage to give preference to CSOB. Since mid-March 2000 – three months before IPB had to be put into forced administration – the Minister of Finance refused further meetings with representatives of Saluka/Nomura thereby indicating that he no longer considered proposals from Saluka/Nomura helpful in solving IPB's problems. The seriousness of any negotiations with IPB or Saluka/Nomura on alternative solutions was thereby undermined relatively early on when there was still time for alternative cooperative solutions. The failure to develop a workable cooperative solution in good time led to a situation where the forced

administration of IPB could be regarded as unavoidable and CSOB could appear as the only choice available for an immediate rescue of IPB's banking business whose failure was imminent.

413. An even-handed dealing with the situation would have required that the Government (*i.e.* the Cabinet Presidium) in its meeting on the evening of 15 June 2000 had paid the same attention to the two cooperative solutions proposed by Nomura (the one relating to Saluka's sale of its shareholding in IPB to the State and the other relating to IPB's partial sale of its assets to KoB) as was paid to the non-cooperative solution favoured in the meantime by CSOB. The Tribunal is sufficiently satisfied that in fact the contrary had happened: the cooperative solutions involving Nomura and IPB were not seriously considered because at this point they appeared to the Cabinet Presidium not satisfactory for whatever reasons, whereas it had already been decided that the forced administration and the subsequent transfer of IPB's business to CSOB was the Government's first choice. The Tribunal notes that, the day before the Cabinet meeting (*i.e.* on 14 June 2000), the Director of the State Aid Department of the OPC, Mr Rudolecký, had already been informed by his superior, Dr Buchta, of the financial assistance envisaged for IPB/CSOB in the event of CSOB's takeover of IPB's business, because the Government anticipated that an exemption from the prohibition of State aid would be necessary.

414. Furthermore, the Forced Administrator was not left with his usual discretion to find the most appropriate solution for IPB's future based on an objective and unbiased assessment of all relevant factors. Instead he was instructed by the Government to implement immediately the transfer of IPB's business to CSOB and he was even provided a financial incentive to follow exclusively the Government's instruction.

415. A crucial element in the Czech Republic's preferential treatment of CSOB was once again the Government's willingness to support CSOB's acquisition of IPB's business by granting massive State aid while at the same time refusing to provide similar support for the implementation of the proposals originating from IPB or its shareholder Saluka/Nomura.

416. The justifications offered by the Government for its uneven treatment of IPB and Saluka/Nomura, on the one hand, and CSOB, on the other hand, are unconvincing. The Government's position was largely based on the misconception that Saluka/Nomura was a *de facto* strategic investor in IPB and was therefore itself responsible for solving IPB's problem by injecting new capital. Nomura, however, had always made it clear that this was not so, that Nomura had entered IPB rather as a portfolio investor and that the Government was not justified in imposing upon Nomura a shareholder's responsibility that was unfounded. Furthermore, when CSOB planned its takeover of IPB's business, it did not consider entering IPB as a strategic investor either, but nevertheless successfully relyied on the Government's willingness to provide financial assistance to overcome IPB's financial problem.

(b) The Lack of Consistency

417. The Czech Government's conduct was also characterised by inconsistencies which made it difficult or even impossible for IPB and Saluka/Nomura to accommodate their proposals to the Government's position.

418. IPB's and Saluka's/Nomura's requests for State assistance were always part of their various proposals. Yet, the Czech Government took varying, sometimes even contradictory positions. Basically, the Government's position was that it was Saluka's/Nomura's own responsibility to rescue IPB without any State aid. The MOU on which Nomura had negotiated with the Vicegovernor of the CNB, Mr Niedermayer, in February and March 2000 was, however, aborted on the grounds that there was no assurance for the State that its financial input would be spent effectively or would not wind up in the hands of IPB's shareholders or management. This reasoning implicitly acknowledged at least in principle that State aid was needed for the rescue of IPB, an acknowledgement that was later even expressly stated in the letter from the Governor of the CNB, Mr Tošovský, addressed to the Minister of Finance, Mr Mertlík, on 2 May 2000. On 14 March 2000 the Prime Minister expressed the view that the provision of State aid to IPB was conditional on Nomura injecting new capital: not only was this a suggestion that had in principle always been part of Saluka's/Nomura's own proposals, but it demonstrated that the provision of State aid for IPB was by no means excluded in principle. IPB's draft proposal of "Measures for the Stabilisation of IPB" submitted to the CNB on 14 April 2000 made an attempt to accommodate the request for State financial assistance to the Government's concern that the State would bail out IPB for losses caused after its privatisation by its own imprudent loan policy: the proposal limited the request for State aid to that part of the bad loan portfolio which was created before the privatisation. The proposal was nevertheless rejected. On 1 June 2000 the Government took another turn and informed Nomura that State assistance would be forthcoming, if Nomura acquired a 51% stake in IPB (*i.e.* an additional 5%, since Saluka already held 46%).

419. Moreover, the Czech Republic acted rather inconsistently in its overall communications with IPB and Saluka/Nomura. The MOU on which Nomura had negotiated with the Vicegovernor of the CNB in February and March 2000 was designed to lead to a mutually satisfactory solution still to be determined in detail. Before that could be achieved, however, the "Memorandum" was already aborted on the grounds that it did not specify any concrete steps that Nomura would take to address IPB's problem. Furthermore, since mid-March 2000, the Minister of Finance had refused to meet Saluka's/Nomura's representatives because he had lost confidence in Nomura's ability to develop a solution for IPB, but at the same time he kept the channel for communication formally open by appointing deputies to deal with Saluka/Nomura and IPB on the basis of a "soft mandate" off the Ministry's premises.

(c) The Lack of Transparency

420. The Czech Government's exchange of views with Saluka/Nomura and IPB on possible solutions for IPB also lacked sufficient transparency to allow Saluka/Nomura and IPB to understand exactly what the Government's preconditions for an acceptable solution were.

421. Saluka/Nomura and/or IPB made various proposals all of which the Czech Government simply rejected with varying reasons.

422. Some of the reasons, however, were not totally unfounded. Thus, Nomura's December 1999 proposal of a merger of IPB and CS as well as IPB's and Nomura's proposal for a merger of IPB and KB were rejected on acceptable grounds.

423. The MOU, however, which Nomura had negotiated with the Vicegovernor of the CNB in February and March 2000, was said to lack specific steps that Nomura would take to address IPB's problem, even though the specification of such steps was the very objective of the ongoing negotiations. The Government failed to respond in any constructive way. IPB's proposal of 14 April 2000 submitted to the CNB was refused because it allegedly did not give the State sufficient control over the restructuring process. The proposal submitted on 24 May 2000 to the Prime Minister was rejected on the grounds that it involved direct aid to IPB without the State having any control over the use of the funds.

424. Nomura's proposals of 4 and 5 June 2000, which were designed to lead to the entry of a strategic investor, attempted to accommodate the Government's proposal of 1 June 2000 as well as its 1 euro proposal. They were nevertheless rejected on the grounds that they involved direct financial assistance from the State in favour of Nomura or the State's assumption of all of IPB's losses and of the costs of IPB's restructuring, even though the Governor of the CNB, Mr Tošovský, had already stated in his letter of 2 June 2000 to the Minister of Finance, Mr Mertlík, that a sale of IPB to a new strategic investor was not realizable without the support of the State.

425. Nomura's last proposal of 14 June 2000 also sought to accommodate the 1 euro proposal by offering a partial sale of IPB's assets to KoB for 1 CZK (for on-sale to a strategic investor such as Allianz/UniCredito or CSOB/KBC). The next day representatives of the CNB and of the Ministry of Finance began even to negotiate this proposal with Nomura's representatives and led them to believe that negotiations would be continued the next day, the main point for further clarification being the specification of IPB's assets that would not be covered by the transfer to KoB. This proposal was aborted by the supervening imposition of forced administration upon IPB.

(d) The Refusal of Adequate Communication

426. In light of the serious difficulties IPB was in and the urgency of finding a solution that would rescue IPB, the Czech Government's refusal to actively engage in constructive and direct negotiations with IPB and its major shareholder Saluka/Nomura was unreasonable. There could not have been any doubt that any cooperative solution necessarily made Saluka's/Nomura's involvement indispensable.

427. From mid-March onwards – three months before forced administration was imposed upon IPB – the Minister of Finance, Mr Mertlík, simply gave up communicating directly with IPB's major shareholder Saluka/Nomura. He downgraded the Ministry's communication with Saluka/Nomura to the Deputy level while at the same time he continued communicating personally with the CEO and Chairman of the Board of Directors of CSOB, Mr Kavánek.

428. Even on the Deputy level, communication with Saluka's/Nomura's representatives was not allowed on the premises of the Ministry of Finance.

429. Letters addressed by Nomura to the Minister of Finance on 5, 8 and 9 May 2000, setting out Nomura's willingness to meet the CNB's request for an injection of fresh capital and to arrange for up to CZK 13.2 billion of new capital for a capital increase in IPB simply remained without any response from the Minister.

430. Nomura nevertheless continued its efforts to meet Government officials, although with only limited success. Instead of engaging in meaningful negotiations, Nomura was confronted with the possibility of IPB's nationalisation or forced administration and with the 1 euro proposal.

431. On 31 May 2000, one day after the Minister of Finance, Mr Mertlík, had met with the CEO and Chairman of the Board of Directors of CSOB, Mr Kavánek, in Paris, official communication with Saluka/Nomura was discontinued even on the Deputy level. Saluka's representative, Mr Dillard, had to meet informally with Deputy Minister of Finance, Mr Mládek, in a wine bar.

432. Official communication was resumed on 15 June 2000 in order to discuss Nomura's last proposal. The Tribunal is very doubtful whether these discussions between Nomura's representatives and representatives of the CNB and of the Ministry of Finance were seriously meant as a last-minute effort of the Czech Government to find a cooperative solution. The OPC had already been informed the day before of the imminent takeover of IPB's business by CSOB. Already on 9 June 2000 the Deputy Minister of Finance, Mr Zelinka, had indicated to the Czech news agency CTK that forced administration of IPB was unavoidable.

d) Provision of Financial Assistance to IPB after Acquisition by CSOB

433. The Claimant agues that the Czech Republic acted in violation of the "fair and equitable treatment" standard by illegally granting massive financial assistance to IPB's business, once the beneficiary of such assistance had become CSOB following the forced administration.

434. On 19 June 2000 the Ministry of Finance, following the Government's Resolution No. 622 of 15 June 2000, issued an unlimited and unconditional guarantee of all on- and off-balance sheet assets transferred to CSOB, and the CNB entered into an agreement with CSOB under which the CNB promised to indemnify CSOB for certain other potential risks in connection with the acquisition of IPB's business. The transaction implemented by the Forced Administrator therefore conveyed to CSOB a fully guaranteed bank without requiring any substantial payment for its franchise value.

435. The Claimant, relying on the expert evidence of Professor Piet Jan Slot, contends that the Government Guarantee and the CNB indemnity were State aids provided in contravention of the Czech Public Assistance Act and in breach of the Czech Republic's obligations under the Europe Agreement, concluded between the European Communities and the Czech Republic on 4 October 1993.[47] Article 64 of that Agreement provided:

> (1) The following are incompatible with the proper functioning of the Agreement, in so far as they may affect trade between the Community and the Czech Republic:
>
> ...

> (iii) any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.

436. The OPC's decision of 19 June 2000 exempted the Government's financial assistance for CSOB/IPB from the legal prohibition of State aid, on the grounds that it was "restructuring aid" and especially aid to remedy a "serious disturbance" in the Czech economy consistent with the Europe Agreement as interpreted by the EC Commission in its Guidelines on Rescue and Restructuring Aid. The validity of that decision is questioned by the Claimant, in particular, on the grounds that the assistance did not properly qualify as "restructuring aid" or aid to remedy a "serious disturbance", and that the OPC lacked independence and had also violated the procedural rules of the Public Assistance Act. Furthermore, the Government is said to have illegally implemented its aid for CSOB/IPB before the OPC's exemption decision came into effect.

437. The Claimant has also emphasised that the exemption decision was in any case conditional upon the Ministry of Finance subsequently submitting to the OPC (i) by 19 September 2000 a restructuring plan for IPB; (ii) by 19 September 2000 preliminary information concerning the amount of assistance provided under the Government Guarantee; and (iii) by 19 December 2000 final information concerning the assistance. The Ministry of Finance is said to have failed to comply with the last of these Conditions and to have thereby committed another breach of the Public Assistance Act which was not adequately penalised by the OPC.

438. The Claimant argues that the Czech Republic, by providing illegal State aid and by failing to implement procedural rules giving effect to violations of the prohibition of State aid, violated its international Treaty obligation under the Europe Agreement thereby establishing a *prima facie* violation of the "fair and equitable treatment" standard in Article 3.1 of the Treaty.

439. The Respondent, relying on the expert testimony of Professor Dr Jürgen Basedow, contested the subject matter jurisdiction of the Tribunal as far as the application of the substantive rules on State aid of the Europe Agreement are concerned. Since the Europe Agreement's substantive provisions are not "directly applicable" (self-executing), it is said to be not for this Tribunal to assess the legality of the Czech Government's financial assistance for CSOB/IPB under the Europe Agreement. The Tribunal is said to be only competent to assess the procedural legality of that assistance.

440. In any case, the OPC is said to have been justified in exempting the Government's financial assistance as "restructuring aid" and as a remedy for a "serious disturbance". Also, the State aid could have been exempted as indirect investment aid or operating aid in accordance with the EC Commission's Guidelines on national regional aid. The Claimant's criticism is therefore said to be unfounded.

441. The Tribunal finds, for the reasons set out below, that the Claimant's claim is without merit. The Czech Government's provision of State financial assistance to CSOB/IPB, *i.e.* upon the acquisition of IPB's business by CSOB subsequent to the imposition of forced administration upon IPB, did not amount to a breach of Article 3.1 of the Treaty.

442. The unlawfulness of a host State's measures under its own legislation or under another international agreement by which the host State may be bound, is neither necessary nor sufficient for a breach of Article 3.1 of the Treaty. The Treaty cannot be interpreted so as to penalise each and every breach by the Government of the rules or regulations to which it is subject and for which the investor may normally seek redress before the courts of the host State.

443. As the tribunal in *ADF Group Inc.* has stated with regard to the "fair and equitable treatment" standard contained in Article 1105(1) NAFTA:

> something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements….[48]

Quite similarly, the *Loewen* tribunal stated in the same legal context that

> whether the conduct [of the host State] amounted to a breach of municipal law as well as international law is not for us to determine. A NAFTA claim cannot be converted into an appeal against decisions of [the host State].[49]

444. The Czech Government's conduct of which the Claimant is complaining must therefore be assessed in light of the Treaty's own "fair and equitable treatment" standard. Consequently, the Tribunal does not find it necessary to determine the legality of the financial assistance given to CSOB/IPB under Czech national law or under the Europe Agreement. The only relevant question is whether the Czech Government's provision of financial assistance to CSOB/IPB constituted unfair and inequitable treatment of Saluka irrespective of whether it was in compliance with the Czech Public Assistance Act or the Europe Agreement.

445. The "fair and equitable treatment" standard cannot easily be assumed to include a general prohibition of State aid. Financial assistance is a tool used by States to implement their commercial policies. Even though it tends to distort competition and to undermine the level playing field for competitors, States cannot be said to be generally bound by international law to refrain from using this tool. According to States' treaty practice, prohibitions of State aid are explicitly stated and defined in international agreements such as the Europe Agreement. A similar prohibition cannot be read into general principles such as the "fair and equitable treatment" standard. Consequently, an investor cannot claim to be generally protected against the host State providing State aid to its competitors.

446. Having said this, the Tribunal also emphasises that the host State, in providing State aid, is clearly bound not to frustrate an investor's legitimate and reasonable expectation to be treated fairly and equitably. The host State is therefore obliged to provide financial assistance to firms or industries in a way that does not amount to an unfair or inequitable treatment of a foreign investor. In particular, the provision of State aid to specific firms or industries must not be discriminatory or unreasonably harmful for the foreign investor.

447. In the case before the Tribunal, the Czech Government's guarantees and indemnities in favour of CSOB/IPB were part of the overall transaction whereby IPB's banking business

was transferred to CSOB subsequent to the imposition of forced administration upon IPB. At the time the financial assistance was implemented, IPB had already lost its banking business to CSOB. It is therefore not conceivable that, due to the State aid provided for CSOB/IPB, IPB and its shareholders could have suffered harm in addition to the harm that had already been caused by the forced administration and the subsequent loss of the banking business. After the takeover of IBP's banking business by CSOB, IPB was no longer a competitor of CSOB who's competitive position could be undermined by the State aid provided by the Czech Government.

e) Unjust Enrichment of CSOB at the Expense of Saluka

448. The Claimant contends that the Czech Republic failed to prevent the unjust enrichment of CSOB at the expense of the IPB shareholders including Saluka upon the transfer of IPB's business to CSOB and the provision of the aforementioned State aid following the forced administration.

449. The concept of unjust enrichment is recognised as a general principle of international law.[50] It gives one party a right of restitution of anything of value that has been taken or received by the other party without a legal justification. As the Iran-United States Claims Tribunal has stated more specifically:

> There must have been an enrichment of one party to the detriment of the other, and both must arise as a consequence of the same act or event. There must be no justification for the enrichment, and no contractual or other remedy available to the injured party whereby he might seek compensation from the party enriched.[51]

450. If it is assumed that the "fair and equitable treatment" standard also includes the general principle of unjust enrichment, an investor would therefore also be protected by this standard against unjust enrichment by the host State.

451. In the case before the Tribunal, the question would be whether the Czech State has, by means of the transfer of IPB's business to CSOB and the provision of the aforementioned State aid following the forced administration, taken or received anything of value at the expense of Saluka. For the reasons set out below, the Tribunal would answer this question in the negative.

452. Firstly, it was not the Respondent which received the banking business from IPB, but CSOB. Even though the Czech State was still a (minority) shareholder of CSOB, CSOB cannot be equated with the Czech State. It is a general principle of company law that a company is a legal entity separate from its shareholders. The corporate assets are owned by the company itself, not by the shareholders. The concept of piercing the company's veil would be totally inapposite in this context. Anything acquired by CSOB from IPB was therefore not acquired by the Respondent.

453. Secondly, it was IPB's and not the Claimant's banking business that was transferred to CSOB. IPB's assets were owned by IPB itself, not by its shareholders. Again, the concept of the separateness of the company from its shareholders prevents the Tribunal from equating IPB and Saluka. Consequently, CSOB did not receive anything at the expense of Saluka.

454. The Claimant has in fact acknowledged that the transfer of IPB's business to CSOB resulted in the enrichment, if any, of one private entity at the expense of another. The Claimant has also argued, however, that in order for the Czech Republic to become liable towards Saluka it is sufficient to establish that the Czech Republic actively participated in a conspiracy to enrich one private party at the expense of another by using regulatory powers to effect an illegal transfer of ownership in IPB's business.

455. The Tribunal finds that the Claimant's argument is legally not well founded. It stretches the principle of unjust enrichment beyond its proper scope. The notion of one party being an accessory to an unjustified transfer between two other parties is not part of the concept of unjust enrichment. Even though, according to the Claimant, it is well established in the general international law of State responsibility for wrongful acts, especially in case of unlawful expropriation, that the ultimate beneficiary of the wrongful act of the State need not be the State itself, the Tribunal has not been convinced that this holds true for the principle of unjust enrichment.

456. Since there was no enrichment of the Respondent to the detriment of the Claimant, the Tribunal does not consider it necessary to assess the legal justification of the transfer of IPB's business to CSOB at any length. Suffice it to say that the transfer was based on the Sale Agreement between the Forced Administrator of IPB, and CSOB. It cannot be for this Tribunal to question the validity of this agreement as long as it has not been invalidated by a competent court or tribunal. Questionable as the circumstances surrounding the Sale Agreement may be, it provides, within the context of the principle of unjust enrichment, a sufficient legal justification for the transfer of IPB's banking business to CSOB.

C. Non-Impairment

457. The legal basis of the Claimant's claims is not limited to the "fair and equitable treatment" standard contained in Article 3.1 of the Treaty but includes the non-impairment obligation contained in the same provision. Article 3.1 of the Treaty provides that:

> [W]ith reference to the investments of investors of the other Contracting Party, each Contracting Party . . . shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors.

It is for the Tribunal therefore, to determine whether the Czech Republic has, by certain measures, violated this obligation.

1. Meaning of the Standard

458. "Impairment" means, according to its ordinary meaning (Article 31 of the Vienna Convention on the Law of Treaties), any negative impact or effect caused by "measures" taken by the Czech Republic.

459. The term "measures" covers any action or omission of the Czech Republic. As the ICJ has stated in the *Fisheries Jurisdiction Case (Spain v. Canada)*

> [I]n its ordinary sense the word is wide enough to cover any act, step or proceeding, and imposes no particular limit on their material content or on the aim pursued thereby.[52]

460. The standard of "reasonableness" has no different meaning in this context than in the context of the "fair and equitable treatment" standard with which it is associated; and the same is true with regard to the standard of "non-discrimination". The standard of "reasonableness" therefore requires, in this context as well, a showing that the State's conduct bears a reasonable relationship to some rational policy, whereas the standard of "non-discrimination" requires a rational justification of any differential treatment of a foreign investor.

461. Insofar as the standard of conduct is concerned, a violation of the non-impairment requirement does not therefore differ substantially from a violation of the "fair and equitable treatment" standard. The non-impairment requirement merely identifies more specific effects of any such violation, namely with regard to the operation, management, maintenance, use, enjoyment or disposal of the investment by the investor.

462. The term "investment" is defined in Article 1 of the Treaty so as to include, *inter alia*,

> shares, bonds and other kinds of interests in companies […], as well as rights derived therefrom.

As the Tribunal has already stated earlier, Saluka's shareholding in IPB clearly is an "investment" in this sense.

463. It will transpire from the application of the non-impairment standard to the facts of this case that among the various objects of a potential impairment listed in Article 3.1 of the Treaty only Saluka's "enjoyment" of its investment appears to be relevant in the present context. "Enjoyment" means, *inter alia*,

> [t]he exercise of a right […] [which] includes the beneficial use, interest and purpose to which property may be put, and implies right to profits and income therefrom.[53]

2. Application of the Standard

464. Three different sets of facts need to be assessed in light of the non-impairment obligation:

(a) first, the facts that have given rise to the Tribunal's findings of violations of the "fair and equitable treatment" standard contained in Article 3.1 of the Treaty;

(b) second, the facts on which the Claimant has based its deprivation claim under Article 5 of the Treaty;

(c) third, the facts relating to the second run on IPB which subsequently led to the forced administration of IPB.

The Tribunal will assess these three sets of facts separately.

a) The Facts Underlying the Violations of the "Fair and Equitable Treatment" Standard (Article 3.1 of the Treaty)

465. The Tribunal finds that the Czech Republic, by violating the "fair and equitable treatment" standard of Article 3.1 of the Treaty, at the same time violated its non-impairment obligation under the same provision.

466. The Czech Republic, by

(i) giving a discriminatory response to the bad debt problem in the Czech banking sector, especially by providing State financial assistance to three of the Big Four banks to the exclusion of IPB and thereby creating an environment impossible for the survival of IPB, and

(ii) by refusing to negotiate in good faith on the proposals made by IPB and its shareholders,

impaired the "enjoyment" of Saluka's investment, *i.e.* the shareholding in IPB.

467. There can be no doubt that the Czech Republic's discriminatory response to the bad debt problem in the Czech banking sector and its unfair and inequitable treatment of IPB regarding the provision of State aid as well as its refusal to negotiate in good faith on the proposals made by IPB and its shareholders for the rescue of IPB had a detrimental impact upon IPB and Saluka's shareholding in IPB. The unlawful conduct of the Czech Government contributed to the aggravation of IPB's financial distress and to its subsequent failure and thereby impaired Saluka's beneficial use of and interest in its shareholding in IPB.

b) The Facts Underlying the Deprivation Claim (Article 5 of the Treaty)

468. The Claimant's allegation that the Czech Republic has, by certain measures, unlawfully deprived Saluka of its investment in IPB also includes the allegation that the Czech Republic has, by the same measures, impaired the operation, management, maintenance, use, enjoyment or disposal of Saluka's investment in IPB. A "deprivation" is most certainly at the same time an "impairment".

469. In order for the Tribunal to find in favour of the Claimant, the "measures" assessed in light of Article 5 of the Treaty must be shown, in the context of Article 3.1 of the Treaty, to have been "unreasonable or discriminatory".

470. As far as the Claimant's allegation of an unlawful impairment of Saluka's investment by the Czech Government's imposition of forced administration upon IPB is concerned, the reasons which led the Tribunal, in the preceding Chapter of this Award, to find that the "deprivation" of Saluka's investment caused by the forced administration was lawful and that the Czech Republic did not violate Article 5 of the Treaty also lead the Tribunal to find that the "impairment" of Saluka's investment by the same measure was lawful as well and that the

Czech Republic did not violate Article 3.1 of the Treaty in this respect either. Since in the context of Article 5, the "deprivation" of Saluka's investment by the imposition of forced administration upon IPB was justified on reasonable regulatory grounds, the same applies *a majore ad minus* to the "impairment" of Saluka's investment in the context of Article 3.1. In other words: to the extent that the concepts of "deprivation" and "impairment" overlap, because a "deprivation" is just one variety of possible "impairments", the regulatory power exception (or "police power exception") explained in the previous Chapter of this Award applies to both.

c) The Czech Government's Alleged Triggering of the Second Run on IPB

471. The Claimant contends that the second run on IPB, which began on 12 June 2000 and which led directly to the imposition of forced administration upon IPB, was triggered by the Czech Government's leaks of information. The Respondent has denied any such leaks. The details are highly controversial.

472. The Tribunal finds, for the reasons set out below, that the Government did in fact unreasonably spread negative information on IPB to the public and that this contributed to the aggravation of IPB's financial distress and to its subsequent failure.

473. According to the evidence before the Tribunal, the following appears to be undisputed: In May 2000 IPB submitted to the CNB its revised draft proposal of "Measures for the Stabilisation of IPB". Shortly thereafter, the Czech newspaper *Mladá Fronta DNES* reported that:

> According to a highly reliable source, the central bank received a document titled "Measures for stabilisation of IPB" where the managers of the bank, among others things, propose the transfer of bad debts to the State-owned Konsolidacni banka.

The source quoted in the newspaper was the CNB.

474. On 8 June 2000 Dow Jones Newswires reported that

> a source in the central bank [has told] [there was] a "fifty-fifty" chance forced administration will occur [at IPB].

475. According to the Claimant, on 9 June 2000 the Czech news agency CTK reported the Deputy Finance Minister, Mr Zelinka, as having said that

> [c]ompulsory administration makes sense, because talks with a potential investor are at an advanced stage and there is a danger that the bank will go bankrupt in the meantime.
>
> Even though by law compulsory administration does not mean freezing the deposits, Zelinka does not see any other way of protecting the bank from being invaded by its customers.

476. On 10 June 2000 *Mladá Fronta DNES* wrote:

> According to reliable sources at the central bank, IPB does not have adequate reserves to cover losses from bad loans ... in such a case, the current status of IPB may lead to the withdrawal of its banking licence.
>
> An undisclosed source from the ministry [of Finance] ... said that the intent is to cut off the existing shareholders from any influence on the operations of the bank.
>
> ...
>
> The State has two possibilities for nationalisation of the bank and continuation of operations. It either acquires the majority share from Nomura, or takes over control of the bank via imposing forced administration.
>
> ...
>
> "Both variants are possible", said a source from the ministry that is a party to the negotiations. After the taking over control of the bank and an expensive cleaning up of its portfolio, it is to be sold to a strategic partner. Among the interested parties are, for example, CSOB or Italian Unicredito.
>
> However, Nomura for the present does not want to accept the proposal to assign the shares to the State at a symbolic price of 1.- CZK, since it doesn't want to participate in the stabilisation of the bank.

477. As will be recalled, on 12 June 2000 the second run on IPB began.

478. None of the aforementioned press reports was in any way misstating the situation. Almost all of them contained a clear indication that forced administration of IPB was imminent. All of the reported information was said to have been received from Government sources.

479. The Respondent, by contending that there had been numerous press articles about the bank, some reporting publicly available information in ways that could easily create public panic or cause depositors to begin to make withdrawals, implicitly admits that there have also been press articles reporting confidential information that was not publicly available. There is even reason to believe that certain information was deliberately leaked to the press by "sources" in the CNB and the Ministry of Finance.

480. The crucial question for the Tribunal to determine relates to causation: was the publication of the information referred to a *conditio sine qua non* for IPB's forced administration? The nature of the information was such that IPB's customers could become seriously concerned about the safety of their savings deposited with IPB and start to withdraw their deposits. On the other hand, it is inconceivable that the public was not already to some degree aware that IPB had problems with its bad loan portfolio. It was one thing, however, for the public to have known of IPB's distress in general terms; it was quite another for the public to have been informed that the failure of IPB was imminent and forced administration

unavoidable, as stated by the Deputy Finance Minister, Mr Zelinka, on 9 June 2000 (*i.e.* on the Friday before the Monday when the second bank run set in).

481. Furthermore, there is some indication that the Government "sources" deliberately engineered the circulation of negative information about IPB in order to precipitate IPB's failure. Mr Zelinka's statement of 9 June 2000 may well be interpreted in this sense. Once forced administration was publicly stated to be unavoidable, that statement became a self-fulfilling prophecy, because the bank run was certain to set in the following Monday. This conduct of the Government was unjustifiable and unreasonable and contributed in all probability to the unsustainability of IPB's situation. The Respondent has provided no convincing evidence to the contrary.

D. Full Security and Protection

482. The Claimant has argued that the Czech Republic has also violated its obligation under Article 3.2 of the Treaty which "more particularly" provides that each Contracting Party shall accord to the investments of investors covered by the Treaty "full security and protection".

1. Meaning of the Standard

483. The "full protection and security" standard applies essentially when the foreign investment has been affected by civil strife and physical violence.[54] In the *AMT* arbitration, it was held that the host State "must show that it has taken all measures of precaution to protect the investments of [the investor] in its territory".[55]

484. The standard does not imply strict liability of the host State however. The *Tecmed* tribunal held that "the guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it".[56] The host State is, however, obliged to exercise due diligence.[57] As the tribunal in *Wena*, quoting from *American Manufacturing and Trading*,[58] stated,

> The obligation incumbent on the [host State] is an obligation of vigilance, in the sense that the [host State] shall take all measures necessary to ensure the full enjoyment of protection and security of its investments and should not be permitted to invoke its own legislation to detract from any such obligation.[59]

Accordingly, the standard obliges the host State to adopt all reasonable measures to protect assets and property from threats or attacks which may target particularly foreigners or certain groups of foreigners.[60] The practice of arbitral tribunals seems to indicate, however, that the "full security and protection" clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force. In light of the following findings, it appears not to be necessary for the Tribunal to precisely define the scope of the "full security and protection" clause in this case.

2. Application of the Standard

485. The Claimant contends that the Czech Republic has failed to accord Saluka's investment full protection and security by its oppressive use of public powers, post-forced administration, with a view to depriving Saluka of any residual economic benefit or use of its investment and by harassing its officers and employees. The measures complained of by the Claimant relate more specifically to

(a) the suspension of trading of IPB shares;

(b) the prohibition of transfers of Saluka's shares; and

(c) the police searches of premises occupied by Nomura and its employees.

The Tribunal will assess these three groups of measures separately.

a) The Suspension of Trading in IPB Shares

486. According to the Claimant, the CSC's preliminary injunction of 15 June 2000 imposing an immediate suspension of trading in IPB shares as well as the subsequent successive extensions thereof were unjustified. The Respondent argues that there was nothing improper with the suspension decisions.

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487. Saluka has lodged appeals against the CSC's suspension decisions. The appeals were rejected, however, by the competent Presidium of the CSC.

488. On 1 January 2001, the Czech Securities Act was amended to the effect that shareholders no longer had standing to appeal a CSC's suspension of trading in the shares held by the shareholders. Consequently, after 1 January 2001 Saluka was excluded from challenging suspensions of trading in its IPB shares.

489. The Respondent argues that the amendment to the Czech Securities Act was of general application and was not specifically targeted against Saluka.

490. Even assuming that the suspension of trading of shares may be State conduct within the scope of the "full security and protection" clause, the Tribunal, without deciding that question, finds that this claim of the Claimant is without merit. On this account, the Czech Republic cannot be said to have failed to provide "full protection and security" to Saluka's investment. The reasoning behind the CSC's suspension decisions cannot be said to have been totally devoid of legitimate concerns relating to the securities market. The suspensions of trading in IPB shares were at least justifiable on regulatory grounds. Also, the elimination of shareholders' right of appeal does not *per se* transcend the limits of a legislator's discretion. Shareholder's rights vary greatly in different jurisdictions. The amendment of the Czech Securities Act cannot be said to be totally unreasonable and unjustifiable by some rational legal policy.

b) The Prohibition of Transfers of Saluka's Shares

491. The Claimant also argues that the Police Order issued at the request of CSOB by the Public Investigator's Office on 26 October 2000 as well as subsequent decisions of the police authorities, freezing specifically Saluka's shareholding in IPB, were unjustified.

492. Saluka, however, appealed, with some success, against the freezing orders. Even the Public Prosecutor's Office's order of 23 April 2002 which upheld the freezing order on different grounds was quashed, upon Saluka's appeal, by the Supreme Public Prosecutor's Office. The Claimant still feels aggrieved by a procedural denial of justice due to the fact that the latter office, which was the last instance for appeals, upheld the freezing of Saluka's shares in IPB on still different grounds on which Saluka had not been heard. No further appeal being possible, on 18 July 2002 Saluka lodged a petition with the Constitutional Court seeking an appropriate remedy.

493. Even assuming that the freezing of the IPB shares held by Saluka may be State conduct within the scope of the "full security and protection" clause, the Tribunal, without deciding that question, fails to see a procedural denial of justice that would violate the Czech Republic's Treaty obligations. The absence of further appeals against decisions of the last instance for appeals is not *per se* a denial of justice. The alleged denial of Saluka's right to be heard is the basis for the petition lodged with the Constitutional Court. Nothing therefore emerges from the facts before the Tribunal that would amount to a manifest lack of due process leading to a breach of international justice and to a failure of the Czech Republic to provide "full protection and security" to Saluka's investment.

c) The Police Searches

494. The Claimant furthermore complains of the search of Nomura's (not Saluka's) Prague Representative Office and the seizure of Nomura's documents. According to the Claimant, these police actions were illegal and violated Nomura's fundamental rights to the inviolability of privacy and home, to the protection against unauthorised interference with its privacy and unauthorised gathering of data, and to the protection of ownership rights.

495. Saluka (not Nomura), however, successfully lodged a petition with the Czech Constitutional Court which in a decision of 10 October 2001 held in favour of Saluka.

496. Consequently, having been granted the relief petitioned for, the Claimant can no longer be aggrieved. The Tribunal, without going into the relevance of the distinction between Nomura and Saluka in this context, therefore finds that, on this account also, the Czech Republic cannot be found to have violated its Treaty obligation to accord "full protection and security" to Saluka's investment.

E. Conclusion

497. In summary, the Tribunal finds, based on the totality of the evidence which has been presented to it, that the Respondent's treatment of Saluka's investment was in some respects

unfair and inequitable and violated the "fair and equitable treatment" obligation as well as the "non-impairment" obligation under Article 3.1 of the Treaty.

498. The Respondent has violated the "fair and equitable treatment" obligation by responding to the bad debt problem in the Czech banking sector in a way which accorded IPB differential treatment without a reasonable justification. The Big Four banks were in a comparable position regarding the bad debt problem. Nevertheless, the Czech Republic excluded IPB from the provisioning of financial assistance. Only in the course of CSOB's acquisition of IPB's business during IPB's forced administration was considerable financial assistance from the Czech Government forthcoming. Nomura (and subsequently Saluka) was justified, however, in expecting that the Czech Republic would provide financial assistance in an even-handed and consistent manner so as to include rather than exclude IPB. That expectation was frustrated by the Respondent. The Tribunal finds that the Respondent has not offered a reasonable justification for IPB's differential treatment.

499. The Czech Republic has furthermore violated its "fair and equitable treatment" obligation by unreasonably frustrating IPB's and its shareholders' good faith efforts to resolve the bank's crisis. Saluka was entitled to expect that the Czech Republic took seriously the various proposals that may have had the potential of solving the bank's problem and that these proposals were dealt with in an objective, transparent, unbiased and even-handed way. The fundamentally different approach of the Czech Government towards CSOB's acquisition of IPB, on the one hand, and towards IPB's and Saluka's/Nomura's attempts to negotiate a cooperative solution, on the other, frustrated Saluka's legitimate expectations. The Czech Government's conduct lacked even-handedness, consistency and transparency and the Czech Government has refused adequate communication with IPB and its major shareholder, Saluka/Nomura. This made it difficult and even impossible for IPB and Saluka/Nomura to identify the Czech Government's position and to accommodate it. The Respondent has not offered a reasonable justification for its treatment of Saluka.

500. The Tribunal does not find, however, that the Respondent has violated its "fair and equitable treatment" obligation by a failure to ensure a predictable and transparent framework for Saluka's investment. Neither was the increase of the provisioning burden for non-performing loans unpredictable for Saluka/Nomura, nor could Saluka/Nomura legitimately expect that the Czech Republic would fix the legal shortcomings regarding the protection of creditor's rights and the enforcement of loan security within a timescale of help to Nomura.

501. Nor does the Tribunal find that the Respondent has violated its "fair and equitable treatment" obligation by providing financial assistance to CSOB after its acquisition of IPB. At the time the financial assistance was implemented, IPB had already lost its banking business to CSOB. Therefore, IPB and its shareholders could no longer have suffered harm in addition to the harm that had already been caused by the forced administration and the subsequent loss of the banking business. After the takeover of IPB's banking business by CSOB, IPB was no longer a competitor of CSOB whose competitive position could be undermined by the State aid provided by the Czech Government.

502. The Tribunal also cannot find that the Respondent has violated its "fair and equitable treatment" obligation by a failure to prevent the unjust enrichment of CSOB at the expense of the IPB shareholders, including Saluka, upon the transfer of IPB's business to CSOB and the provision of State aid following forced administration. For there to be an actionable, unjust

enrichment as between the parties, the Respondent must have received something at the expense of the Claimant. It was not the Respondent which received the banking business from IPB, but rather CSOB, nor was it the Claimant's banking business that was transferred to CSOB, but rather IPB's.

503. The Tribunal does find a violation by the Respondent of its "non-impairment" obligation under Article 3.1 of the Treaty. This violation is based firstly on the same grounds which have led the Tribunal to find a violation of the "fair and equitable treatment" standard. The unjustified differential treatment of IPB regarding the Czech Republic's response to the bad debt problem in the banking sector as well as the Czech Government's refusal to negotiate in good faith on the proposals made by IPB and its shareholders were measures that impaired the enjoyment of Saluka's investment, *i.e.* the shareholding in IPB.

504. The violation of the "non-impairment" obligation is based secondly on the Czech Government's unjustifiable and unreasonable conduct regarding the circulation of negative information about IPB during the week before the second run on IPB that led to its failure. This conduct contributed in all probability to the unsustainability of IPB's situation.

505. The Tribunal fails to find a breach by the Respondent of its "full security and protection" obligation under Article 3.2 of the Treaty. Neither the suspension of trading of IPB shares, which was justifiable by legitimate concerns relating to the securities market, nor the prohibition of transfers of Saluka's IPB shares or the police searches of Nomura's Prague Representative Office and the seizure of Nomura's documents, against which Saluka has lodged appeals or petitions to the competent authorities or courts, amount to a breach of that obligation.

VII. OTHER MATTERS

506. The Claimant, in its Memorial, considered it appropriate and efficient to postpone precise issues of the loss it had suffered to a separate phase of the proceedings when the Tribunal's decision on liability would be known. The Respondent, in its Counter-Memorial, was of the same view in relation to losses which were the subject to its counterclaims. Accordingly, neither party pursued questions of *quantum* in any detail in their various pleadings on the merits of the dispute submitted to arbitration.

507. Now that the Tribunal's conclusions of the question of liability are known, and include its finding that there has been a breach by the Respondent of its obligations under Article 3 of the Treaty, it is necessary to address the question of the appropriate redress for that breach, including questions of *quantum* which arise in that context.

508. The Tribunal, pursuant to Article 32.1 of the UNCITRAL Rules, accordingly renders its present Award as only a partial Award. The Tribunal retains its jurisdiction in order to decide the outstanding question of redress, including questions of *quantum*, in a second phase of this arbitration.

509. The Tribunal, bearing in mind Article 23 of the UNCITRAL Rules, will communicate with the parties about appropriate periods of time for the filing by the parties of written statements on the question of redress, including questions of *quantum*.

510. The Tribunal, bearing in mind Article 38 of the UNCITRAL Rules, will address questions of costs within the framework of its eventual decision at the conclusion of the second phase of this arbitration.

VIII. DECISIONS

511. For the foregoing reasons, the Tribunal unanimously renders the following decisions as its Partial Award in the present arbitration:

a. The Tribunal has jurisdiction to hear and decide the dispute which the Claimant, Saluka Investments BV, has submitted to it;

b. the Respondent, the Czech Republic, has not acted in breach of Article 5 of the Treaty;

c. the Respondent has acted in breach of Article 3 of the Treaty;

d. the question of the appropriate redress for that breach, including questions of *quantum*, will be addressed in a second phase of this arbitration, for which the Tribunal retains jurisdiction;

e. the Tribunal will separately determine the timetable for the second phase of this arbitration; and

f. the Tribunal reserves questions of costs until final consideration can be given to the costs of this arbitration as a whole.

- - -

Place of arbitration: Geneva, Switzerland

Dated: 17 March 2006

Sir Arthur Watts KCMG QC
Chairman

Maître L. Yves Fortier CC QC

Prof. Dr. Peter Behrens

[1] CNB Report, The Banking Sector During the Economic Transformation 7 (1997).

[2] Decision of the Council and Commission of 19 December concerning the conclusion of a Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other, OJ (L 360/1), 31 December 1994 [hereinafter Europe Agreement].

[3] Treaty Establishing the European Community, OJ (C 325), 24 December 2002.

[4] *Sic*. Presumably, "by a foreign person" was intended.

[5] Claimant's Reply, para. 30.

[6] Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

[7] *See* Case Concerning Oil Platforms (Islamic Republic of Iran v. USA), Judgment, 6 November 2003, ICJ Reports (2003), paras 23 and 41. *See also* AAPL v. Sri Lanka, 106 ILR 440, para. 41 (1990).

[8] L.B. Sohn & R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AJIL 515 (1961).

[9] OECD Draft Convention on the Protection of Foreign Property (12 October 1967), 71 ILM 117.

[10] Restatement (Third) of Foreign Relations Law § 712 cmt. g (1987).

[11] The tribunal in *ADF Group Inc. v. United States of America* agreed with the position taken by a tribunal in another case (Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2) "that any general requirement to accord 'fair and equitable treatment' … must be disciplined by being based upon State practice and judicial or arbitral caselaw or other sources of customary or general international law". Although the foregoing case deals with "fair and equitable" treatment, the principle quoted applies in the same way to "deprivation". *See* ADF Group Inc. v. USA, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, para. 184.

[12] MethanexCorp. v. USA, Final Award, 3 August 2005, 44 ILM 1343, para. 410 (2005). *See also* Too v. Greater Modesto Insurance Associates, 23 Iran U.S. Cl. Trib. Rep. 378, para. 26 (1989); S.D. Myers, Inc. v. Canada, 40 ILM 1408, para. 281 (2001); Lauder (USA) v. Czech Republic, Final Award, 3 September 2002, para. 198 (*available at* www.investmentclaims.com); Technicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, 29 May 2003, para. 119.

[13] *See Too v. Greater Modesto*, 23 Iran U.S. Cl. Trib. Rep. 378; Robert Azinian and others v. United Mexican States, ICSID Case No. ARB(AF)97/2, Award, 1 November 1999; *and S.D. Myers Inc.*, 40 ILM 1408.

[14] The Presidium of the Cabinet of the Czech Republic had consented to the imposition of forced administration by Resolution on 15 June 2000.

[15] In any event, the Respondent will have the opportunity to raise this argument, if it wishes, in the quantum phase of this arbitration.

[16] *See* NAFTA Arbitration Pope & Talbot Inc. v. The Government of Canada, Award on the Merits of Phase 2, 10 April 2001, para. 155 (*available at* www.naftaclaims.com).

[17] *S.D. Myers, Inc.*, 40 ILM 1408, para. 261.

[18] Guidance may also be derived from some comprehensive surveys that have recently taken stock of States' treaty practice, arbitral jurisprudence, relevant literature and documents prepared by international organisations. *See, e.g.*, OECD, Fair and Equitable Treatment Standard in International Investment Law, Working Papers on International Investment, No. 2004/3 (2004) [hereinafter OECD Working Papers]; R. Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*, The International Lawyer 87-106 (Spring 2005); C. Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, Journal of World Investment & Trade 357-386 (June 2005).

[19] Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, 11 October 2002, para. 118; *see also* Waste Management, Inc. v. United Mexican States, 30 April 2004 (*available at* www.naftaclaims.com) *and* MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, 25 May 2004.

[20] *Pope & Talbot*, 10 April 2001; other arbitral awards referred to by the Claimant in support of its submission include *Lauder v. Czech Republic*, 3 September 2002, para. 292, *and* CME Czech Republic BV (The Netherlands) v. Czech Republic, Partial Award, 13 September 2001, para. 611 (*available at* www.investmentclaims.com), both of which were also based on Article 3 of the Treaty.

[21] North American Free Trade Agreement, 8-17 December 1992, 32 ILM 605 (entered into force 1 January 1994).

[22] *Waste Management*, 30 April 2004, para. 98.

[23] *See* Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2, 25 June 2001, para. 367.

[24] USA (L.F. Neer) v. United Mexican States, 21 AJIL 555, at 556 (1927).

[25] Article 1105(1) of NAFTA, *supra* note 21, provides that:

> Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

[26] *See* G. Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, *Receuil des Cours*, Tome 269, at 341 (1997); R. Dolzer & M. Stevens, *Bilateral Investment Treaties* 60 (ICSID 1995); *see also* United Nations Conference on Trade and Development (UNCTAD), *Fair and Equitable Treatment*, Series on Issues in International Investment Agreements 40 (1999).

[27] *Genin*, ICSID Case No. ARB/99/2.

[28] *Genin*, ICSID Case No. ARB/99/2, para. 289.

[29] *Genin*, ICSID Case No. ARB/99/2, para. 290; see also *Mondev*, ICSID Case No. ARB(AF)/99/2, para. 116.

[30] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331.

[31] The Treaty entered into force on 1 October 1992 for both The Netherlands and the Czech and Slovak Federal Republic.

[32] *See MTD Equity*, ICSID Case No. ARB/01/7, para. 113, where the Tribunal referred to The Concise Oxford Dictionary of Current English (5th ed.).

[33] *S.D. Myers, Inc*., 40 ILM 1408, para. 263.

[34] For a comprehensive account of recent arbitral practice *see* Schreuer, *supra* note 18, at 374-380; *see also* Dolzer, *supra* note 18, at p. 103.

[35] *Tecmed*, ICSID Case No. ARB(AF)/00/2, para. 154 (emphasis added).

[36] *CME v. Czech Republic*, 13 September 2001, para. 155 (emphasis added).

[37] *Waste Management*, 30 April 2004, para. 98 (emphasis added).

[38] *See* the comprehensive account of arbitral practice in OECD Working Papers, *supra* note 18, at 25-39; *see also* Schreuer, *supra* note 18, at 373-385.

[39] Occidental Exploration and Production Company (OEPC) v. Ecuador, 1 July 2004, para. 183 (emphasis added).

[40] *S.D. Myers, Inc*., 40 ILM 1408, para. 263.

[41] For a comprehensive account of arbitral practice *see* Schreuer, *supra* note 18, at 380-383.

[42] IMF, Lessons from Systemic Bank Restructuring: A Survey of 24 Countries (Washington 1997).

[43] Resolution of the Czech Government No. 369, 27 May 1998.

[44] *See* Czech National Bank, Report on Banking Supervision in the Czech Republic 24-28 (December 1999).

[45] In the documents, the following code names were used for CSOB and IPB: "Carthago" for CSOB; "India" for IPB.

[46] Witness Statement of Mr Daniel Jackson, at para. 72: "Mr Niedermayer [Vicegovernor of the CNB] warned that there was little appreciation within the Government or the CNB about the limitations of shareholder liability, and this misapprehension underlay the expectation that Nomura must cover any losses at IPB".

[47] Europe Agreement, *supra* note 2.

[48] *ADF Group*, ICSID Case No. ARB(AF)/00/1, para. 42.

[49] The Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3, 19 June 2003, para. 134.

[50] *See* the Award in the Lena Goldfields, Ltd., Arbitration, 3 September 1930, 36 Cornell Law Quarterly 42, paras. 23-24 (1950); A. Nussbaum, *The Arbitration Between the Lena Goldfields, Ltd., and the Soviet Government*, 36 Cornell Law Quarterly 31, at 41 (1950); C. Schreuer, *Unjustified Enrichment in International Law*, 22 American Journal of Comparative Law 281 (1974).

[51] *Benjamin Isaiah v. Bank Mellat*, 2 Iran U.S. Cl. Trib. Rep., 30 March 1983, 232, at 236-237.

[52] Fisheries Jurisdiction Case (Spain v. Canada), Judgment on Jurisdiction of the Court, 4 December 1998, ICJ Reports (1998), at para. 66.

[53] Black's Law Dictionary (6th ed. 1990).

[54] *See* American Manufacturing & Trading, Inc. (AMT) (USA) v. Republic of Zaire, ICSID Case No. ARB/93/1, 21 February 1997 (lack of protection against loss of investment caused by widespread looting); *Tecmed*, ICSID Case No. ARB(AF)/00/2, paras. 175-177 (alleged lack of the host State's protection against interference with the investor's investment by adverse social demonstrations).

[55] *AMT*, ICSID Case No. ARB/93/1, para. 6.05; *see also* Wena Hotels Ltd. (UK) v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, 8 December 2000 (lack of protection against loss of investment by forced and illegal seizure of investor's hotels).

[56] *Tecmed*, ICSID Case No. ARB(AF)/00/2, para. 177.

[57] Dolzer & Stevens, *supra* note 26, at 61.

[58] *AMT*, ICSID Case No. ARB/93/1, para. 28.

[59] *Wena*, ICSID Case No. ARB/98/4, para. 84.

[60] See OECD Working Papers, *supra* note 18, at 26-28 ("obligation of vigilance and protection").

International Centre for Settlement of Investment Disputes

Daimler Financial Services AG *v.* Argentine Republic
Award

ICSID Case No. ARB/05/1, 22 August 2012

International Centre for Settlement of Investment Disputes
Washington, D.C.

Daimler Financial Services AG
(Claimant)

v.

Argentine Republic
(Respondent)

ICSID Case No. ARB/05/1

AWARD

Members of the Tribunal
Professor Pierre-Marie Dupuy, President
Judge Charles N. Brower, Arbitrator
Professor Domingo Bello Janeiro, Arbitrator

Secretary of the Tribunal
Ms. Anneliese Fleckenstein

Representing the Claimant:

Paul Doyle
Kelley Drye & Warren LLP
101 Park Avenue
New York, New York

Representing the Respondent:

Dra. Angelina María Esther Abbona
Procuradora del Tesoro de la Nación
Procuración del Tesoro de la Nación
Buenos Aires, Argentina

Date of Dispatch to the parties: 22 August 2012

TABLE OF CONTENTS

Defined Terms

Argentine Subsidiaries	DCS, DCCF and DCLA collectively
Argentine Subsidiary	DCS (the parent company of DCCF and DCLA)
Basic Treaty	German-Argentine BIT
BITs	Bilateral investment treaties
Comparator Treaty	Chilean-Argentine BIT
Convertibility Law	Argentine Law 23,928 of 1 April 1991
DAG	Daimler AG
DCAG	DaimlerChrysler AG
DCCF	DaimlerChrysler Compañia Financiera S.A.
DCFS	DaimlerChrysler Financial Services AG
DCLA	DaimlerChrysler Leasing S.A.
DCS	DaimlerChrysler Services, Argentina S.A.
DFS	Daimler Financial Services AG
Domestic courts proviso	Article 10(2) of the German-Argentine BIT
Emergency Law	Argentine Law 25,561 of January 2002
German-Argentine BIT	Treaty Between the Federal Republic of Germany and the Republic of Argentina for the Promotion and Reciprocal Protection of Investments (1991)
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
Parent Company	DCAG, subsequently DAG
PCIJ	Permanent Court of International Justice
MFN	Most-favored nation
Vienna Convention	Vienna Convention on the Law of Treaties (1969)
18-month proviso	Article 10(2) of the German-Argentine BIT

Introduction

1. This Award sets forth the Tribunal's findings concerning the Respondent's objections to the Tribunal's jurisdiction in the matter of *Daimler Financial Services A.G. v. Argentine Republic*. The Tribunal herein makes no findings as to the merits of any of the disputing parties' claims or defenses.

I. PROCEDURE

2. On 2 August 2004, as supplemented by two letters of 5 August and 21 October 2004, DaimlerChrysler Services AG, a company incorporated under the laws of Germany, with its principal offices in Berlin, filed with the International Centre for Settlement of Investment Disputes (the "Centre" or "ICSID") a request for arbitration against the Argentine Republic.

3. On 4 August 2004, the Centre acknowledged receipt of the Request in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings, and transmitted a copy of the Request and its accompanying documents to the Attorney General of Argentina and to the Ambassador of Argentina in Washington D.C.

4. On 14 January 2005, the Secretary-General of ICSID registered the Request and in accordance with Institution Rule 7 notified the parties of the registration, inviting them to proceed, as soon as possible, to constitute an Arbitral Tribunal.

5. On 18 March 2005, the Claimant requested that the Tribunal should be constituted in accordance with the formula set forth in Article 37(2)(b) of the ICSID Convention, according to which one arbitrator was to be appointed by each party, and the third arbitrator, who would serve as president of the tribunal, would be appointed by agreement of the parties.

6. On 4 April 2005, the Claimant appointed Judge Charles N. Brower, a U.S. national, as an arbitrator.

7. On 13 April 2005, the Respondent appointed Professor Domingo Bello Janeiro, a Spanish national, as an arbitrator.

8. By letters of 11 and 17 October 2005, the parties informed the Centre of their agreement that the President of the Tribunal should be appointed by the two party-appointed arbitrators.

9. Given that more than ninety days had elapsed since the date of registration without any Tribunal being constituted, on 30 June 2006 the Claimant invoked Article 38 of the ICSID Convention and ICSID Arbitration Rule 4, and requested the Chairman of the Administrative Council to appoint the President of the Tribunal.

10. On 31 August 2006, the Centre proposed Professor Pierre-Marie Dupuy, a French national, to serve as President of the Tribunal. By letters of September 8, 2006, the parties agreed to the appointment of Professor Dupuy as President of the Tribunal.

11. On 21 September 2006, the Secretary-General of ICSID, in accordance with ICSID Arbitration Rule 6(1), notified the parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to be constituted and the proceedings to have begun on that date. The Tribunal was composed of Professor Pierre-Marie Dupuy (French), President; Professor Domingo Bello Janeiro (Spanish); and Judge Charles N. Brower (U.S.). On the same day, the parties were informed that Ms. Claudia Frutos-Peterson, Counsel, ICSID, would serve as Secretary to the Tribunal.

12. On 27 January 2007, the Tribunal held a first session with the parties at the World Bank headquarters in Paris.

13. On 10 August 2007, the Claimant filed its Memorial on the Merits.

14. On 4 January 2008, the Respondent filed a Memorial raising some objections to jurisdiction ("Memorial on Jurisdiction").

15. On 16 January 2008, following the Respondent's Memorial on Jurisdiction, the Tribunal confirmed the suspension of the proceeding on the merits in accordance with ICSID Arbitration Rule 41(3).

16. On 17 March 2008, the Claimant filed its Counter-Memorial on Jurisdiction. On the same day, the Claimant notified the Centre of the Claimant's change of name from DaimlerChrysler Services AG to Daimler Financial Services AG.

17. On 5 May 2008, the Respondent filed its Reply on Jurisdiction.

18. On 9 June 2008, the Claimant filed its Rejoinder on Jurisdiction.

19. On 19 December 2008, the parties were informed that due to Ms. Claudia Frutos-Peterson's extended leave of absence the Acting Secretary-General of ICSID had, in accordance with ICSID Administrative and Financial Regulation 25, appointed Mr. Gonzalo Flores, Senior Counsel, ICSID, to serve as Secretary of the Tribunal.

20. From October 2007 to March 2009, the parties filed a series of requests for the production of documents. The Tribunal gave the parties opportunities to comment on these requests and issued its decisions concerning the requests in the form of a series of Procedural Orders.

21. On 27 February 2009, the Claimant referred to its letter of 17 March 2008 and requested that the Centre change its name from DaimlerChrysler Services AG to Daimler Financial Services AG.

22. On 4 March 2009, the Centre notified the parties that the Claimant's name would be changed to Daimler Financial Services AG, as requested by the Claimant.

23. On 27 August 2009, at the request of the parties, the Tribunal issued Procedural Order No. 4 joining the objections to jurisdiction raised by the Respondent to the merits in accordance with ICSID Arbitration Rule 41(4), and establishing the procedural calendar for the submissions on the merits of the dispute.

24. On 17 April 2009, the Respondent filed its Counter-Memorial on the Merits.

25. On 3 August 2009, the Claimant filed its Reply on the Merits.

26. On 27 October 2009, the Respondent filed its Rejoinder on the Merits.

27. From 30 November through 7 December 2009, the Tribunal held a hearing on jurisdiction and merits at the seat of the Centre in Washington, D.C. Present at the hearing were Professor Pierre-Marie Dupuy, President; Professor Domingo Bello Janeiro, arbitrator; and Judge Charles N. Brower arbitrator; Ms. Anneliese Fleckenstein, Case Counsel, ICSID and Mr. Gonzalo Flores, Senior Counsel, ICSID. For the Claimant, Mres. Paul Doyle, Philip Robben, Michael H. MacMahon, Nafees Nuruddin, Keith Vena, and Ms. Cathleen Condren, Julia A. Garza Benítez, of Kelley Drye & Warren LLP. For the Respondent, Dr. Osvaldo César Guglielmino, Procurador del Tesoro de la Nación; Dr. Adolfo Gustavo Scrinzi, Sub-Procurador del Tesoro de la Nación; Dr. Gabriel Bottini, Director Nacional de Asuntos y Controversias Internacionales – Procuración

del Tesoro de la Nación; Mr. Mauricio Rosales Markaida, Director de Coordinación Técnica y Administrativa – Procuración del Tesoro de la Nación; Mr. Ignacio Torterola, Enlace Procuración del Tesoro de la Nación/CIADI; and from the Dirección Nacional de Asuntos y Controversias Internacionales, Drs. Cintia Yaryura, Silvina González Napolitano, Mariana Lozza, Carolina Coronado, and Mrs. Igancio Pérez Cortés, Alejandro Turyn, Patricio Arnedo Barreiro, Nicolás Duhalde, Diego Brian Gosis.

28. On 9 December 2009, the Tribunal was informed that due to the re-distribution of the Centre's workload, Ms. Anneliese Fleckenstein, Case Counsel, ICSID, was assigned to serve as Secretary to the Tribunal.

29. On 29 March 2010, the Respondent filed its Post-Hearing brief.

30. On 30 March 2010, the Claimant filed its Post-Hearing brief.

31. On 20 August 2010, the Tribunal requested from the parties further information regarding the Share Purchase Agreement of 12 June 2002 concluded between DCS Berlin (later DCFS, "the Claimant") and DCAG Stuttgart ("the Parent Company").

32. On 28 September 2010, the parties submitted their responses to the Tribunal's request of 20 August 2010.

II. THE FACTS

33. Daimler Financial Services AG (variably "DFS", "DCFS", or "the Claimant") is a corporation organized and existing under the laws of the Federal Republic of Germany, with a principal place of business at Eichhornstrasse 3, D - 10785 Berlin, Germany.[1] DFS is and was at all relevant times throughout the history of this case wholly-owned by Daimler AG ("DAG" or "the Parent Company") or its predecessor DaimlerChrysler AG ("DCAG" or "the Parent Company"), with a principal place of business at Epplestrasse 225, D - 70567 Stuttgart, Germany.[2]

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[1] Claimant's Request for Arbitration, para 1.

[2] Ibid. At the time of the filing of the Request for Arbitration, the Claimant and its Parent Company were known, respectively, as DaimlerChrysler Services AG and DaimlerChrysler AG. The reference to Chrysler was dropped subsequent to the break-up of the Daimler and Chrysler corporations in 2007, and the Claimant's corporate name was eventually changed to Daimler Financial Services. The case name in the present proceedings has been adjusted accordingly. Nonetheless, portions of the parties' pleadings make reference to the old names, and the Tribunal, where necessary, has followed the lead of the parties in

34. The Respondent is the Argentine Republic, represented in these proceedings by its Public Prosecutor's Office, *Procuración del Tesoro de la Nación*, with its principal business address at Posadas 1641, C1112 Buenos Aires, Argentina.

35. The Claimant bases its claim upon provisions of the Treaty Between the Federal Republic of Germany and the Republic of Argentina for the Promotion and Reciprocal Protection of Investments ("the German-Argentine BIT", "the Treaty", or "the BIT"). This Treaty was signed by the Contracting State Parties on 9 April 1991 and entered into force on 8 November 1993.[3]

36. The facts alleged to underpin the claim, insofar as they are relevant to this Tribunal's jurisdiction, are as follows. In the early 1990s, Argentina undertook a series of legal and policy reforms designed to stabilize its economy, which had previously been plagued by episodes of rampant inflation and dramatic vacillations in economic growth. Among the reforms enacted by the Government at that time were several that were intended to encourage foreign investment, including, according to the Claimant's description of the claim, the following:

a) Law 23,928 of 1 April 1991 ("the Convertibility Law")[4], which *inter alia*:
   i) Made the Argentine peso convertible with the U.S. dollar on a 1:1 basis, thereby "pegging" the value of the peso to the dollar; and
   ii) Amended Section 619 of the Argentine Civil Code to provide that a debtor obliged to deliver foreign currency would fulfill that obligation by payment in foreign currency on the maturity date, rather than payment in local currency according to the applicable exchange rate on the maturity date.
b) Law 21,382, as implemented by Decree 1853/1993[5], together permitting foreign investors to:
   i) Invest in Argentina without registration or prior government approval, including through merger, acquisition, or joint venture arrangements, on the same terms as Argentine investors; and
   ii) Repatriate capital and remit earnings abroad at any time.
c) A series of bilateral investment treaties ("BITs") concluded with numerous countries – including the above-mentioned German-Argentine BIT – which guaranteed foreign investors important protections against, *inter alia*, capital movement restrictions, expropriations, unfair treatment, and arbitrary or discriminatory treatment.[6]
d) The ratification of the ICSID Convention,[7] which in concert with the newly enacted BITs provided foreign investors with direct access to a neutral international arbitration forum in the event of an investment-related dispute between a foreign investor and the Government of Argentina.

referring to the Claimant variably as DFS and DCFS. The details of the corporate break-up between Daimler and Chrysler have no bearing upon the jurisdictional questions now before the Tribunal.

[3] Exhibit B to Claimant's Request for Arbitration.

[4] Exhibit G to Claimant's Request for Arbitration.

[5] Claimant's Request for Arbitration, paras 39-40.

37. The Claimant further points to various written and oral representations made by Argentine government officials underscoring that the new regulatory regime established by these reforms could be relied upon and would remain permanently in effect.[8] Key among these, in the Claimant's view, was a 1993 publication prepared in English and aggressively distributed by Argentina's newly created Undersecretariat of Investment, entitled "Argentina, A Growing Country, A Compendium for Foreign Investors".[9] As described by the Claimant, this Compendium:

> "stated that the Convertibility Law, which was the 'cornerstone' of the economic reform, '*virtually removed currency risk*.' It further explicitly represented to prospective investors that, under Argentina's laws, '*[c]ontracts can be denominated and legally enforced in foreign currencies*.'"[10]

38. Beginning in 1995, in reliance upon the legal protections afforded by this new regulatory framework, the Claimant resolved to make a series of investments in the commercial financing business in Argentina. To effectuate this, the Claimant purchased a 99.9971% interest in a local Argentine company then owned by Mercedes-Benz Argentina. Subsequent to the purchase, this local company eventually became known as DaimlerChrysler Services, Argentina S.A. ("DCS Argentina" or "the Argentine Subsidiary"). The Claimant describes the business of DCS Argentina and its subsidiaries DCCF and DCLA (collectively "the Argentine Subsidiaries") as one of "extend[ing] loans and leases to Argentine dealers and purchasers of automotive goods

[6] Respondent's Reply Memorial on Jurisdiction, paras 24-27 and corresponding footnotes; Claimant's Exhibit 80, Core Bundle 16.

[7] Signed by Argentina on 21 May 1991, entered into force 18 November 1994.

[8] Claimant's Request for Arbitration, Exhibit I; Claimant's Memorial, paras 61-65.

[9] Claimant's Memorial, paras 34-36.

[10] Ibid at para 35 (emphasis in original).

manufactured primarily in Argentina by Mercedes Benz Argentina, as well as other non-automotive capital goods".[11]

39. Following this initial acquisition, the Claimant made additional capital contributions into the Argentine Subsidiary at various points.[12] Throughout the history of the investment, the Claimant funded the operations of the Argentine Subsidiary primarily with foreign financing denominated in U.S. dollars.[13] The Claimant asserts that this type of funding was both common practice within the industry internationally and necessary to its particular investment in Argentina, due to the unavailability of sufficient and economically viable domestic financing sources.[14] The liabilities column of the Claimant's balance sheet thus largely consisted of U.S. dollar denominated obligations. To offset this, the Claimant's Argentine Subsidiary also wrote all of its lease and loan contracts with its domestic Argentine customers in U.S. dollars, as was permitted under the then-existing legal regime.[15] The Claimant emphasizes that the promised stability of that legal regime was therefore essential to its decision to invest in Argentina. In the Claimant's words:

> "because DCFS needed to ensure that the Argentine Subsidiaries would have U.S. dollars on hand to repay the foreign U.S. dollar loans, a corresponding legally protected right to denominate and enforce the domestic lease and loan contracts in U.S. dollars was fundamental to undertaking the investment. DCFS would never have entered the market without the legally guaranteed ability to require repayment of the domestic lease and loan contracts in U.S. dollars."[16]

40. The Claimant submits that the business of its Argentine Subsidiaries steadily grew and prospered between 1995 and 2001.[17] By 2001, however, as is by now well known, the Argentine economy had again begun to experience grave difficulties.[18] A full-fledged currency crisis ensued, provoking political, social, and economic consequences so devastating that the

[11] Claimant's Request for Arbitration, para 7.

[12] Ibid at paras 52, 57.

[13] Ibid at para 75.

[14] Claimant's Memorial, paras 58-59.

[15] Claimant's Memorial at para 60.

[16] Ibid.

[17] Ibid at para 98.

[18] The Tribunal need not, for purposes of its jurisdictional findings, probe the precise counters of the crisis or its causes.

Government of Argentina has termed them a "collapse of the state."[19] The Government responded by enacting numerous measures in an attempt to stem the crisis. Some of these measures, promulgated in 2001 and 2002, significantly altered the regulatory environment governing the investment, and it is those measures which now form the basis of this claim.

41. In particular, the Claimant alleges that the following measures, as applied to its investment, violated its rights as a foreign investor under the German-Argentine BIT:

a) The Government's December 2001 limitations on cash withdrawals from bank accounts, restrictions on access to foreign exchange, and prohibitions on transferring cash abroad;[20]
b) Law 25,561 of January 2002 ("the Emergency Law"),[21] which *inter alia*:
    i) Abrogated many provisions of the 1991 Convertibility Law, including the convertibility of the peso into US dollars;[22]
    ii) Authorized the National Executive "to create a new currency system and to restructure the obligations of certain debtors";[23] and
    iii) Provided that "certain dollar-denominated obligations in domestic transactions conducted with financial entities… would be 'pesified' and could be settled by payments in Argentine Pesos at the exchange rate of AR $1 to U.S. $1";[24]
c) Executive Decree 214/2002, which made permanent the "mandatory pesification or compulsory conversion of all U.S. dollar debt governed by domestic law into Argentine pesos";[25]
d) Laws 25,563 and 25,589, which together modified earlier Law 24,522, thereby suspending "important provisions of the bankruptcy law that had previously provided protection for creditors such as DCS Argentina";[26] and
e) The Government's repeated failures to:
    i) Carve out necessary exceptions to pesification;[27]

[19] Respondent's Counter-memorial, Part VI.B.

[20] Claimant's Request for Arbitraiton, para 72.

[21] Ibid at paras 64-71 and Exhibit J.

[22] Ibid at para 66.

[23] Ibid.

[24] Claimant's Memorial at para 121.

[25] Ibid at para 125.

[26] Claimant's Request for Arbitration, paras 73-74; Claimant's Memorial, para 132.

[27] Claimant's Memorial at paras 130-131.

ii) Provide compensatory bonds to non-regulated financial entities such as DCS Argentina on the same terms as those provided to regulated financial entities in similar circumstances;[28] and

iii) Otherwise adequately compensate DCS Argentina, whose liabilities remained denominated in foreign currency but whose assets were forcibly converted to devalued pesos.[29]

42. The Claimant asserts that the combined impact of Argentina's contested measures caused "unique and devastating" losses to its investment,[30] bringing its once profitable Argentine Subsidiary to the brink of bankruptcy.[31] In the Claimant's view, these measures violated several provisions of the German-Argentine BIT, including: the fair and equitable treatment provision, the protection against arbitrary and discriminatory measures, the most-favored nation provisions, the protection against expropriation without adequate compensation, the umbrella clause, and the guarantee of free transfers of capital.[32] The Claimant requests compensation for its alleged losses as a result of these purported violations.

43. The Tribunal emphasizes that it makes no findings at present with respect to the veracity of the above-listed assertions or any of the defenses raised by Argentina thereto. That analysis is reserved for the merits of the case. Rather, the basic contours of the claim are noted here solely for the purposes of determining the jurisdiction of the Tribunal.

44. Before proceeding to an analysis of the Tribunal's jurisdiction, one further factual detail bears mentioning. The Claimant's Request for Arbitration was filed in August of 2004 and officially registered by the ICSID Secretariat on 14 January 2005. It is common cause, however, that the Claimant (DFS Berlin) had transferred the entirety of its shares in the affected Argentine Subsidiary to its Parent Company (DCAG Stuttgart) with effect from 1 April 2002.[33] This transfer was done pursuant to a Share Purchase Agreement (SPA) between the Claimant and its Parent Company, dated 12 June 2002. The transaction was approved by the Argentine Central Bank on 19 June 2003. The Agreement set the initial purchase price at negative EUR 250 million

[28] Ibid at paras 164-172.

[29] Ibid at paras 173-191.

[30] Claimant's Request for Arbitration, para 76.

[31] Ibid at paras 79-81.

[32] Ibid at paras 91-102.

[33] Claimant's Exhibit 70.

and provided that the final price would be adjusted in order to take into account any expenditures which either the buyer or seller might undertake on behalf of the Argentine Subsidiary up until the date of the sale closing. The negative purchase price – which was meant to represent the fair market value of the Argentine Subsidiary in an arm's length transaction between disinterested parties[34] – reflected the large outstanding liabilities of the Argentine Subsidiary relative to its assets subsequent to the pesification of its domestic loan portfolios. The impact of this share transfer upon the Tribunal's jurisdiction will be evaluated below.[35]

III. APPLICABLE LAW

45. In the course of discussing particular objections to jurisdiction, both parties have referred at various points to Article 25 of the ICSID Convention and to the sources of law enumerated in Article 10(5) of the German-Argentine BIT. To the extent that these submissions are relevant, they will be addressed below together with the specific jurisdictional objections to which they refer. The Tribunal nevertheless finds it convenient to set out, as a preliminary matter, its conception of the applicable law for purposes of the Tribunal's jurisdictional findings.

46. This claim arises under the German-Argentine BIT, in conjunction with the ICSID Convention. As both the BIT and the ICSID Convention are international treaties concluded between sovereign States, both are subject to the usual customary law rules governing treaty interpretation under public international law, as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("Vienna Convention"). The Tribunal will apply these rules in discerning whether all of the jurisdictional requirements of the ICSID Convention and the BIT have been met.

47. The ICSID Convention sets forth its jurisdictional requirements in Chapter II. The relevant provision, for present purposes, is Article 25, which states:

> (1) "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State … and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.
>
> (2) 'National of another Contracting State' means:
>
> (a) […]

[34] Ibid at Article 5(2).

[35] See Part V of this award below.

> (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration… ."

48. It is common cause that the Respondent is a Contracting State Party to the ICSID Convention[36] and that the Claimant is a national of the Federal Republic of Germany,[37] the latter State also being a Party to the ICSID Convention. It is further common cause that the Claimant has consented in writing to submit the dispute to the Centre. The sole questions for the Tribunal to determine under the ICSID Convention are therefore: a) whether the Claimant has raised a "legal dispute" between itself and the Respondent; b) whether the dispute arises "directly out of an investment"; and c) whether the Respondent has also consented in writing, pursuant to the relevant provisions of the German-Argentine BIT, to submit the dispute to the jurisdiction of ICSID and consequently the competence of this Tribunal. These questions, in turn, depend upon the specific legal obligations undertaken by the Respondent in the German-Argentine BIT and upon that BIT's definition of "investment". The Tribunal will therefore apply the relevant provisions of the BIT in assessing its jurisdiction in light of the Claimant's claims and in responding to each of the Respondent's objections to the Tribunal's jurisdiction.

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49. Article 10(5) of the BIT specifies as follows the law to be applied by an arbitral tribunal in the context of a dispute between an investor and one of the BIT's Contracting State Parties:

> "The arbitral tribunal shall arrive at its decisions on the basis of this Treaty and, if applicable, other agreements made between the parties, the internal law of the Contracting Party in whose territory the investment was made – including the rules of international private law – and general principles of international law."[38]

50. As to the internal law of Argentina, the Tribunal notes that the Claimant's claim is based in large part upon changes to the domestic regulatory framework governing the investment. The law of Argentina may therefore become relevant, directly or indirectly, to an evaluation of the merits of the claim. For purposes of the Tribunal's jurisdiction, however, the proper law to be

[36] Above note 7.

[37] Above note 1.

[38] Unless otherwise specified, all citations to the German-Argentine BIT refer to the agreed English translation of the BIT as prepared by the disputing parties. In the context of the present quote, the Tribunal notes that the disputing parties' agreed translation is not entirely accurate. The phrase "other agreements made between the parties" actually refers to other treaties in force between the Contracting State Parties (Spanish: "otros tratadoes vigentes entre les Partes"; German: "anderer zwischen den Vertragsparteien geltender Übereinkünfte").

applied is the German-Argentine BIT itself, in concert with the ICSID Convention, as interpreted in the light of the general principles of international law.

51. As will become clear below, Argentina has also raised the 2002 Share Purchase Agreement between the Claimant and its Parent Company as an objection to the Tribunal's jurisdiction. The law to be applied to the interpretation of this Share Purchase Agreement is a distinct matter and will be addressed separately below.[39]

52. Finally, as both parties have in their submissions cited extensively to the awards of various other international investor-State and State-to-State tribunals, the Tribunal deems it appropriate to comment upon the weight to be attributed to such decisions. The Tribunal agrees with the parties in noting that there is no system of precedent in investor-State arbitration,[40] nor indeed could there be, given the large and diverse set of treaties presently applicable to various investor-State claims. Each case must be decided on the basis of the applicable treaty texts and in the light of the relevant facts. On the other hand, the Tribunal acknowledges that it is a fundamental principle of the rule of law that "'like cases should be decided alike,' unless a strong reason exists to distinguish the current case from previous ones."[41] This latter consideration will weigh more or less heavily depending upon: a) how "like" the prior and present cases are, having regard to all relevant considerations; b) the degree to which a clear *jurisprudence constante* has emerged in respect of a particular legal issue; and c) the Tribunal's independent estimation of the persuasiveness of prior tribunals' reasoning.

53. In analyzing the questions raised by the parties in this proceeding, the present Tribunal will therefore have regard for the decisions of prior tribunals in accordance with these criteria.

[39] See below, paras 134-139.

[40] Both parties have urged the Tribunal to embrace the solutions adopted by particular previous tribunals and to disregard the solutions adopted by others.

[41] *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19 and *AWG Group v. The Argentine Republic* (UNCITRAL) (jointly decided), Decision on Liability (30 July 2010), para 189.

IV. THREE PRELIMINARY OBJECTIONS TO JURISDICTION

A. First Objection: The Claim Refers to Contractual Matters over which the Tribunal Has No Jurisdiction in Light of the Contracts' Forum Selection Clauses

1. Position of the Respondent

54. In both its original memorial on objections to jurisdiction and its reply memorial on jurisdiction, Argentina formulated this objection under two separate headings. The first formulation reads: "the claim refers to contractual matters over which the ICSID has no jurisdiction".[42] The second states: "the Tribunal lacks competence because all disputes relating to the instruments invoked by Claimant must be submitted to the Argentine courts, pursuant to the provisions of said instruments and the agreements between the parties."[43] Argentina's arguments on these two points are virtually indistinguishable, as both relate to whether ICSID is the proper forum for the Claimant's claims. The Tribunal will therefore deal with them together.

55. Argentina's submissions concerning these objections are essentially four-fold. First, it asserts that the claims are based upon losses allegedly suffered by the Claimant under its various leasing agreements with its customers, which – according to their explicit forum selection clauses – are subject to dispute resolution not before ICSID but before the domestic Argentine courts.[44] Secondly, Argentina argues that the Claimant's contractual claims may not be brought within the jurisdiction of the Tribunal by means of the BIT's umbrella clause.[45] Relying upon several previous investor-State cases, Argentina asserts that the umbrella clause cannot transform ordinary contract claims into treaty claims, because the contracts' jurisdictional clauses constitute a *lex specialis*, which must prevail over the more general treaty provision.[46]

56. Thirdly, apparently in the alternative, even if the BIT's umbrella clause could theoretically be understood to encompass contractual claims, the Respondent asserts that this cannot be the case here. It points out that it is the Claimant's Argentine Subsidiaries, and not the Claimant itself, who are parties to the leasing contracts.[47] The suggestion seems to be that since

[42] Respondent's Memorial on Jurisdiction, part IV.B; Respondent's Reply on Jurisdiction, part II.B.

[43] Respondent's Memorial on Jurisdiction, part IV.C; Respondent's Reply on Jurisdiction, part II.C.

[44] Respondent's Memorial on Jurisdiction, paras 86-87, 93, 108-110; Respondent's Reply on Jurisdiction, paras 90-97.

[45] Respondent's Memorial on Jurisdiction, paras 88-89.

[46] Ibid at paras 97-104.

[47] Respondent's Reply on Jurisdiction, para 86.

only the direct parties to a contract may rely upon its provisions, and since only German (and not Argentine) investors may bring claims under the BIT, the German Claimant's contract-based claims on behalf of its Argentine Subsidiaries must be excluded from the purview of the Tribunal's jurisdiction.[48]

57. Finally, Argentina asserts that there can be no jurisdiction for claims brought under the BIT's umbrella clause because Argentina has made no specific undertakings to the Claimant.[49] It asserts that only specific investment agreements between the Host State and the concerned investor may potentially be covered by the Treaty's umbrella clause[50] and stresses that no such specific investment agreement exists in the present case.[51] Argentina points out that the Claimant's financial and leasing contracts with its customers cannot be classified as specific investment agreements between Argentina and the Claimant.[52]

2. Position of the Claimant

58. Following Argentina's lead, the Claimant has also bifurcated its submissions on this objection into two headings. Under the first heading, it asserts that its claims are "based upon Argentina's violations of the German-Argentine BIT and are subject to ICSID jurisdiction".[53] The Claimant stresses that it does not raise any breach of contract claims as between itself and its customers under the lease contracts.[54] Rather, it seeks damages from Argentina caused by Argentina's sovereign interference with its contract rights, which, according to the Claimant, violated several BIT provisions.[55]

59. With respect to the umbrella clause, the Claimant suggests Argentina has confused DFS' treaty-based claims under this clause with the unrelated question of "purely contractual"

[48] The question as to whether the Claimant may bring "indirect" claims on behalf of its Argentine subsidiary is addressed separately in the next part of the award.

[49] Respondent's Reply on Jurisdiction, paras 76-77, and 85.

[50] Ibid at para 78.

[51] Ibid at paras 78 and 80.

[52] Ibid at para 85.

[53] Claimant's Counter-Memorial on Jurisdiction, Point II.

[54] Ibid at para 113. The Tribunal notes that the Claimant, in its submissions, does not always distinguish between its own contractual rights and those of its Argentine Subsidiary. The relevance of such a distinction for purposes of this claim is addressed in part IV.B. of the Award below.

[55] Ibid at paras 110, 112-114.

matters.[56] In its counter-memorial on jurisdiction, the Claimant posits its umbrella clause claim as follows:

> "Argentina, in officially written and disseminated documents upon which DFS relied in making its investment, undertook an obligation to investors to permit contracts to be written and enforced in U.S. dollars, and backed that promise with a regulatory and legal regime that entrenched contract rights and the rule of law that it promised it would be 'irreversible'. DFS invested, and maintained its investment, in reliance on those written representations and that legal regime. After freely assuming and proclaiming these obligations, Argentina, by a sovereign act, overrode the very laws that it had represented were permanent and 'irreversible', and unilaterally and fundamentally changed the terms of the Argentine subsidiaries' contracts, ultimately destroying, in significant measure, DFS' investment."[57]

The Claimant thus asserts that its umbrella clause claim stems not from the leasing contracts themselves but from Argentina's sovereign abrogation of DFS' rights under those contracts.[58] The Claimant also disputes Argentina's interpretation of the various investor-State cases cited in its memorials and asserts that they are in any event inapposite or contrary to Argentina's position.[59]

60. Under a second heading, the Claimant asserts that "the dispute resolution provisions contained in the lease and loan contracts between the Argentine Companies and their domestic customers are irrelevant to the issue of this Tribunal's jurisdiction to decide DFS' treaty-based claims against Argentina."[60] The Claimant points out that there was never any contract between Argentina and itself, either with respect to the leasing contracts or otherwise.[61] As such, there is no basis for Argentina's assertion that the Claimant was contractually obligated to submit its claims against Argentina to the domestic courts of Argentina. More fundamentally, the Claimant emphasizes that the question before the Tribunal is whether Argentina violated its Treaty commitments by using its sovereign power to abrogate certain of DFS' rights altogether.[62] As this question arises under the Treaty, the Claimant argues, the dispute resolution provisions

[56] Ibid at para 111.

[57] Ibid at para 112.

[58] This argument is further elaborated in the Claimant's Rejoinder on Jurisdiction, Point II.

[59] Claimant's Counter-Memorial on Jurisdiction, paras 116-122.

[60] Ibid at Point III; see also Claimant's Rejoinder on Jurisdiction, Point III.

[61] Claimant's Counter-Memorial on Jurisdiction, paras 115, 125.

[62] Ibid at para 126.

contained in the commercial contracts between DFS' Argentine Subsidiaries and their customers are entirely irrelevant.[63]

3. Considerations of the Tribunal

61. Argentina's objections under this heading appear to be based upon a fundamental misconception of the Claimant's case. The forum selection clauses contained within DCS Argentina's lease and loan contracts with its customers pertain only to disputes arising between the Claimant's Argentine Subsidiary and its customers in relation to those contracts.[64] Neither DCS Argentina nor its customers are parties to this proceeding. Moreover, the Claimant does not assert before this Tribunal any claims arising out of alleged breaches of the contracts between DCS Argentina and its customers. Thus, the forum selection clauses of the lease and loan contracts can have no bearing upon this Tribunal's jurisdiction.

62. What the Claimant does allege is that the Republic of Argentina used its sovereign powers to substantially diminish the value of the Claimant's rights to returns from its investment.[65] The Claimant asserts that Argentina's sovereign interference with the contract rights held by DCS Argentina and its subsidiaries violated not the contracts (to which Argentina is in any event not a party) but rather several provisions of the German-Argentine BIT, including its provisions on expropriation, fair and equitable treatment, and arbitrary or discriminatory treatment.[66] The Claimant's allegations, if proven, would amount to violations of Argentina's international obligations under the BIT. This brings the claims within the purview of the ICSID Convention's requirement that the Claimant must raise a "legal dispute" between itself and the Respondent. It also brings the claims at least *prima facie* within the purview of the investor-State dispute resolution mechanism set forth in Article 10 of the BIT, which applies to "disputes which arise between a Contracting Party and a national or company of the other Contracting Party concerning an investment <u>under the Treaty</u>… ."[67] Since the Claimant's claims clearly arise out of

[63] Ibid.

[64] The same is true of the lease and loan contracts between DCS Argentina's own subsidiaries and their respective customers.

[65] The question as to whether the Claimant, as shareholder, may make claims for damages suffered by reason of the abrogation of contractual rights held by its Argentine Subsidiary is addressed in the next part of this Award.

[66] Claimant's Request for Arbitration, paras 91-102.

[67] Emphasis added.

the Treaty and not the contracts, Argentina's objections concerning the contracts' forum selection clauses must be rejected.

63. As to the parties' arguments with respect to the Treaty's umbrella clause (Article 7(2) of the BIT),[68] the Tribunal notes that there exists in this case no investment agreement or other specific contractual agreement between the Claimant and the Respondent in respect of the investment. This absence of a contract between the disputing parties distinguishes the present case from other investor-State cases in which tribunals have had to grapple with whether the presence of a forum selection clause within a specific investment or concession agreement could "oust" the jurisdiction of a BIT-based arbitral tribunal with respect to claims concerning violations of the contractual agreement.[69] That question simply does not arise here.

64. In the present matter, the Claimant does not attempt to equate a violation of its Argentine Subsidiaries' customer contracts with a violation of the Treaty's umbrella clause. Instead, the Claimant alleges that Argentina, in making certain representations regarding the stability of its legal and regulatory framework, assumed additional obligations toward the Claimant's investment under Article 7(2) of the BIT.[70] The precise scope of Argentina's obligations under Article 7(2) and whether Argentina violated those obligations on the facts are questions for the merits of the case. They need not be decided for purposes of determining the Tribunal's jurisdiction. What matters for present purposes is that the umbrella clause claim, as with the Claimant's other claims, arises directly under the Treaty.[71] Argentina's jurisdictional objections based upon the BIT's umbrella clause therefore also fall to be rejected.

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[68] Article 7(2) of the German-Argentine BIT provides that "[e]ach Contracting Party shall fulfill any other obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party."

[69] See e.g. *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction (6 Aug 2003) [hereinafter "*SGS v. Pakistan*"]; *Salini Construttori S.p.A. and Italsttade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction (12 Nov 2004) [hereinafter "*Salini*"]; and *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction (6 August 2004).

[70] See above note 68.

[71] As noted by the *Siemens* tribunal:

> "At this stage of the proceedings, the Tribunal is not required to consider whether the claims under the Treaty made by [the Claimant] are correct. This is a matter for the merits. The Tribunal simply has to be satisfied that, if the Claimant's allegations would be proven correct, then the Tribunal has jurisdiction to consider them."

Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/03/07, Decision on Jurisdiction (3 Aug 2004) [hereinafter "*Siemens*"], para 180.

B. Second Objection: the Claimant, as Shareholder, Lacks *Ius Standi* to bring an indirect claim for damages allegedly suffered by the Argentine Subsidiaries

1. Position of the Respondent

65. Argentina asserts that the Claimant lacks *ius standi* to bring any claims arising out of the damage allegedly suffered by its Argentine Subsidiaries.[72] Argentina points out that a company and its shareholders are legally distinct entities and asserts that the latter cannot – absent an explicit legal authorization – exercise any rights on behalf of the former.[73] Thus, in the Respondent's view, the Claimant as a mere shareholder in DCS Argentina cannot claim damages on its behalf.[74] In support of this conclusion, Argentina argues that none of the four sources of applicable law mentioned in Article 10(5) of the BIT – namely the Treaty, other treaties in force between the State Parties, the law of the Host State, and the general principles of international law – allows for "indirect" actions by shareholders.[75]

66. With respect to the Treaty itself, Argentina alleges that the BIT only authorizes indirect claims by shareholders in the limited circumstances set forth in Article 4, as supplemented by Article 3 of the Protocol.[76] Article 4 of the BIT deals with expropriation and nationalization of investments, while Article 3 of the Protocol states:

> "A claim to compensation shall also exist when, as a result of measures named in Article 4 regarding the company in which the investment is made, it suffers a serious economic harm."[77]

Argentina asserts that this protection would apply only if the company in which the investment was made had been expropriated or nationalized. In Argentina's view, since the Claimant has failed to allege that its Argentine Subsidiary was actually expropriated, nationalized or seized, this Protocol provision does not apply.[78] It further asserts that since the BIT does not authorize

[72] Respondent's Memorial on Jurisdiction, paras 119, 121-122.

[73] Ibid at para 120.

[74] Ibid at para 121.

[75] Ibid at paras 123-124. Article 10(5) of the German-Argentine BIT is set forth above in para 50 of this award.

[76] Respondent's memorial on Jurisdiction, paras 125-126.

[77] Unless otherwise noted, all English language quotations from the German-Argentine BIT reproduced in this award are taken from the disputing parties' agreed English translation of the Spanish and German original texts.

[78] Respondent's Memorial on Jurisdiction, paras 132-134.

indirect claims in any situation outside of Article 4, all of the Claimant's other claims must necessarily fall outside of the Tribunal's jurisdiction.[79]

67. Argentina next argues that derivative or indirect actions are not permitted under Argentine law.[80] It asserts that the Claimant's Argentine Subsidiary, given its status as a local Argentine company, is governed by the Argentine Commercial Companies Law (No. 19550).[81] Under this law, only the Argentine Subsidiary – through its management – may exercise defense of the company's rights. The law limits shareholders to two discrete types of remedies: 1) corporate actions (claiming damages allegedly caused to the company by its managers) and 2) individual actions (for alleged direct damage to the shareholder's property).[82] Argentina notes that the Claimant has not attempted to exercise either of these two types of shareholder rights and concludes that its claims are therefore inadmissible under Argentine law.[83]

68. Concerning international law, Argentina raises three separate points in its memorial on jurisdiction. First, it asserts that general international law does not allow for indirect actions by shareholders.[84] Instead, Argentina submits, claimants "can only claim for direct damages to their specific rights" as shareholders.[85] The Respondent quotes extensively from the ICJ decision in *Barcelona Traction*,[86] which held that "a distinction must be drawn between a direct infringement of the shareholder's rights, and difficulties or financial losses to which he may be exposed as the result of the situation of the company."[87] Argentina asserts that this formulation of shareholders' rights under international law is applicable to the present case, notwithstanding the fact that *Barcelona Traction* dealt with a case of diplomatic protection whereas the present proceedings

[79] Ibid at para 127.

[80] Ibid at para 134.

[81] Ibid.

[82] Ibid at paras 137-140.

[83] Ibid at para 141.

[84] Ibid at para 142.

[85] Ibid at para 144.

[86] Ibid at para 147.

[87] *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970, p. 3, at p. 37, para 47.

arise under the ICSID Convention and BIT.[88] It argues that the ICJ's conclusions were not specific to the case of diplomatic protection.[89] In Argentina's view:

> "the difference between diplomatic protection and the protection afforded by the ICSID Convention is related to who files the action: the State of which the affected party is a national in the first case, and the affected party directly in the second case. However, this is not related to what rights can be claimed."[90]

69. Argentina's second contention under the "international law" heading is that "the ICSID Convention does not allow indirect or derivative claims".[91] The Respondent points to the Convention's drafting history as summarized by Professor Schreuer, who remarked, in connection with Article 25(2)(b), that a "suggested solution to give access to dispute settlement not to the locally incorporated company but directly to its foreign owners was discarded."[92] Argentina notes that Article 25(2)(b) of the Convention instead provides for the possibility that a company having the nationality of the Host State but subject to foreign control may be treated as a national of another Contracting State by agreement of the Parties.[93] It asserts, however, that no such agreement exists in this case.[94]

70. Thirdly, Argentina submits that in "conventional international law, indirect claims are exceptional and must be expressly provided for, which is not the case here."[95] It points to the NAFTA, the US-Chile Bilateral Free Trade Agreement, and the US 2004 Model BIT, all of which expressly provide for indirect actions.[96] Argentina stresses that the German-Argentine BIT, by

[88] Respondent's Memorial on Jurisdiction, para 149.

[89] Ibid.

[90] Ibid.

[91] Ibid at IV.D.4.b).

[92] Ibid at para 151, citing CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY (Cambridge University Press, 2001) p. 291 (internal references omitted). The Tribunal notes, however, that the Respondent appears to have taken this quote out of context. In fact, Professor Schreuer states that this suggestion was discarded only because "this would not be feasible where shares are widely scattered and their owners are insufficiently organized." Professor Schreuer was nonetheless unequivocal in stating that Article 25(2)(b) was included because a majority of the delegates who participated in the drafting of the Convention "found that it would be unwise to exclude locally incorporated but foreign controlled companies". CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY, 2d Ed (Cambridge Univeristy Press, 2009), with Loretta Malintoppi, August Reinisch, and Anthony Sinclair [hereinafter "SCHREUER – 2009"] , p. 297 (internal references omitted).

[93] Respondent's Memorial on Jurisdiction, para 152.

[94] Ibid.

[95] Ibid at para 153.

[96] Ibid.

contrast, contains no such special provision.[97] Argentina expands upon this line of argument in its reply memorial on jurisdiction, adding also a discussion of the U.S. federal law on derivative suits by shareholders.[98] It does so in order to underscore the important policy reasons underlying what it identifies as a general presumption against the admissibility of indirect actions.[99]

71. Having thus addressed what it considers to be the applicable bodies of law under Article 10(5) of the BIT, Argentina then adds a further argument. It asserts that the Chile-Argentina BIT, which the Claimant has invoked for other purposes by means of the German-Argentine BIT's most-favored-nation clause, also does not allow for indirect claims.[100] Argentina cites the Chilean BIT's failure to include a provision similar to that of the German BIT's Protocol Article 3 as evidence that the former treaty did not intend to allow indirect claims even in the limited circumstances envisaged by the latter treaty.[101] The Respondent therefore argues that the Claimant's lack of *ius standi* cannot be cured by reference to the Chile-Argentina BIT.[102]

72. Finally, in its reply memorial on jurisdiction, Argentina adds yet another dimension to its arguments concerning *ius standi* by raising a factual challenge. It submits that the Claimant has not sufficiently proven its alleged investor status nor what precisely constitutes its alleged qualifying investment under the BIT.[103] After surveying the information contained in the Claimant's balance sheets for the years 1994-2005, Argentina points out that the shareholdings in the affected Argentine Subsidiary changed hands and the companies holding those shares changed names several times during that period.[104] Argentina particularly notes that the Claimant entered into a purchase and sale agreement on 12 June 2002, by which the Claimant sold the entirety of its shares in the Argentine Subsidiary to its parent company, DaimlerChrysler A.G.[105] Then, in 2005, Argentina alleges, the parent company transferred the entire shareholding in the

[97] Ibid at para 154.

[98] Respondent's Reply on Jurisdiction, paras 106-118.

[99] Ibid at paras 119-128.

[100] Respondent's Memorial on Jurisdiction, Part IV.D.5.

[101] Ibid at para 155.

[102] Ibid at para 158.

[103] Respondent's Reply on Jurisdiction, para 98.

[104] Ibid at para 99.

[105] Ibid at para 100.

Argentine Subsidiary to DaimlerChrysler Argentina – a separate Argentine subsidiary of the parent company.[106]

73. Argentina's reply memorial on jurisdiction does not well explain its motivation for raising these points. The Respondent appears to draw two conclusions from this set of facts. First, Argentina seems to suggest that these share transfers demonstrate that the Claimant's shareholding in the affected Argentine Subsidiary is at most an indirect investment. Since indirect claims are, in Argentina's view, precluded under the BIT, the Claimant lacks *ius standi*.[107] Second, Argentina remarks cryptically that even if the Claimant did have a protected investment in Argentina, its claim "refers to investments that do not belong thereto (at least not directly as the BIT applicable to this case requires)."[108]

74. There are two possible ways of reading this latter assertion. Either it reiterates the Respondent's objection to the indirect nature of the investment (as suggested by the parenthetical), or it raises a separate objection to the effect that the Claimant lacks *ius standi* because it does not itself own the claims which it is now asserting before the Tribunal (by reason of the share transfers pointed out above). Unfortunately, the Respondent's intended meaning does not appear clearly from its reply memorial. The assertion that the Claimant does not actually own the claims before the Tribunal does emerge clearly, however, in the Respondent's rejoinder on the merits.[109] This has led the disputing parties to address the question of ownership during the hearings and in their post-hearing submissions. As such, the Tribunal will address this objection separately below.

2. *Position of the Claimant*

75. The Claimant counters that it has standing under well-established law to assert claims for harm done to its Argentine Subsidiaries.[110] It begins by noting that it was the sole shareholder of DCS Argentina and through that company it indirectly owned 100% of the subsidiaries DCCF

[106] Ibid at para 101. Argentina did not document its source for this assertion. Section V of the Respondent's Rejoinder on the Merits, however, indicates that the Argentine subsidiary allegedly harmed by Argentina's sovereign measures (DCSA S.A.) and the Argentine subsidiary to which the parent company transferred that subsidiary's shares in 2005 (DC Arg. S.A.) are two separate companies.

[107] This seems to be the implication of paras 102-103 of the Respondent's Reply Memorial on Jurisdiction.

[108] Ibid at para 105.

[109] Respondent's Rejoinder on the Merits, paras 67-69.

[110] Claimant's Counter-Memorial on Jurisdiction, point IV.

and DCLA.[111] The Claimant asserts that this ownership position gives it standing to bring claims for harms done to those companies.[112]

76. As a preliminary matter, the Claimant submits that Argentina has raised this same objection concerning indirect ownership "in some 22 other international investment arbitrations, each time without success".[113] It also highlights seven other investment cases not involving

[111] Ibid at para 127. The Tribunal notes, however, that according to the documents filed by the Claimants, DFS owned 99% of each of the three Argentine Subsidiaries, with the other 1% belonging to a Mr. Macarenhas. Claimant's Exhibit 70.

[112] Claimant's Counter-Memorial on Jurisdiction, para 127.

[113] Ibid at para 129, citing: *Lanco International Inc. v. The Argentine Republic*, ICSID Case No. ARB/97/6, Decision on Jurisdiction (8 December 1998), paras 9-10; *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Jurisdiction (17 July 2003) [hereinafter "*CMS – Jurisdiction*"], paras 59, 63-65; *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment (25 September 2007) [hereinafter "*CMS – Annulment*"], paras 68-76; *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction (8 December 2003), para 73; *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (14 January 2004), para 39; *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Ancillary Claim) (2 August 2004), paras 16-22, 25-46; *Siemens*, above note 71 at paras 137-140; *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction (26 April 2005) [hereinafter "*AES*"], paras 86-89; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Jurisdiction (11 May 2005), paras 67-79; *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Jurisdiction (11 May 2005) [hereinafter "*Camuzzi 1*"], paras 67-79; *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Jurisdiction (10 June 2005) [hereinafter "*Camuzzi 2*"], paras 43-46; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Jurisdiction (30 April 2004), paras 60-63; *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Jurisdiction (22 February 2006), paras 84-87; *Gas Natural v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction (17 June 2005) [hereinafter "*Gas Natural*"], paras 33-35; *National Grid PLC v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction (20 June 2006) [hereinafter "*National Grid*"], paras 155-160; *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13 and *BP American Production Company et al v. The Argentine Republic*, ICSID Case No. ARB/04/8 (jointly decided), Decision on Preliminary Objections (27 July 2006), paras 217-218; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction (16 May 2006) [hereinafter "*InterAguas*"], paras 50-51; *Suez, Sociedad de Aguas de Barcelona S.A., and Vivendi S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19 and *AWG Group Limited v. The Argentine Republic* (UNCITRAL Rules) (jointly decided), Decision on Jurisdiction (3 Aug 2006) [hereinafter collectively "*AWG*"], paras 50-51; *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Objections to Jurisdiction (25 August 2006), paras 77-81; *Metalpar S.A. and Buen Aire S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/5, Decision on Jurisdiction (27 April 2006), paras 86-98; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction (27 April 2006), paras 137-139; and *Compañia del Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Jurisdiction (14 November 2005) [hereinafter *Vivendi II* – Jurisdiction], paras 36-41, 88-94. Note that while the Claimant specifically cited to each of these cases, the Tribunal has in some instances altered the citation formats and paragraph references, both to clarify the citations and to more precisely identify what the Tribunal considers to be the relevant passages. The Claimant also appears

Argentina in which it asserts that investment tribunals have allowed indirect claims.[114] The Claimant cites these decisions as evidence that both the ICSID Convention and the German-Argentine BIT, as well as virtually all other BITs, give corporate shareholders the status of investors, "regardless of whether they are majority or minority shareholders."[115]

77. The Claimant then proceeds to raise three main points in support of its right to bring claims for harm done to its Argentine Subsidiaries. First, it submits that the clear language of the BIT permits indirect claims.[116] It argues that the BIT's broad definition of investment encompasses indirect claims and the BIT nowhere requires direct ownership of the assets in question.[117] It points particularly to the *Siemens* tribunal's analysis. That tribunal found that the German-Argentine BIT's references to "investor" and "investment" make no explicit reference to direct or indirect investments and therefore do not exclude indirect investments.[118] The Claimant also disputes Argentina's assertions concerning Article 3 of the Protocol ad Article 4 of the BIT. Again quoting *Siemens*, the Claimant states "there is 'no merit in the allegation that the provision for indirect claims in Article 4 and the corresponding provision of the Protocol are an indication that such claims are not permitted under other provisions of the Treaty.'"[119]

78. With respect to Argentina's reliance upon *Barcelona Traction*, the Claimant submits that this reliance is entirely misplaced.[120] It argues that the reasoning of *Barcelona Traction* applies

to have cited to one additional award in error, as the passage cited deals with the calculation of interest and not the question of foreign shareholders' rights under the ICSID Convention or BITs.

[114] Claimant's Counter-Memorial on Jurisdiction at para 130, citing: *Asian Agricultural Products Ltd (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (27 June 1990) [hereinafter *AAPL v. Sri Lanka*]; *American Manufacturing and Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award (21 February 1997); *Antoine Goetz et consorts c. République du Burundi*, ICSID Case No. ARB/95/3, Award (10 February 1999); *Alex Genin and others v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award (25 June 2001); *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award (13 September 2001); *GAMI Investments Inc. v. the Government of the United Mexican States*, UNCITRAL/NAFTA, Final Award (15 November 2004); and *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction (25 Jan 2000) [hereinafter "*Maffezini*"].

[115] Ibid at para 131.

[116] Claimant's Counter-Memorial on Jurisdiction, Point IV.A.

[117] Ibid at para 134.

[118] Ibid at para 133; see also *Siemens*, above note 71 at para 137.

[119] Ibid at para 136, quoting *Siemens*, above note 71 at para 140.

[120] Ibid at para 141.

only to cases involving diplomatic protection and not to cases under BITs, wherein investors enjoy a direct treaty-based right to arbitrate claims with Host States.[121]

79. Secondly, the Claimant submits that the Treaty's protections extend to the substance of its investment, not merely the free enjoyment of the shares.[122] It underscores the Treaty's provisions protecting the management, use, and enjoyment of the company comprising the investment as evidence that the Treaty's protections are "not confined to the exercise of rights inherent in the position of the investor as a shareholder".[123] On this logic, the Claimant asserts: "rights under a contract held by a local company in which a company of a foreign investor of the other Contracting Party has invested constitute an investment protected by the BIT."[124] The Claimant again cites the decisions of several previous investor-State tribunals in support of this argument.[125]

80. Thirdly, the Claimant denies that Argentine law is relevant to a determination of whether it may bring indirect claims under the BIT.[126] In the Claimant's view, Article 10(5) of the BIT (the BIT's "applicable law" provision) applies solely to the merits of the dispute.[127] For purposes of determining jurisdiction, on the other hand, "only Article 25 of the ICSID Convention and the terms of the Treaty are relevant."[128] This is so, the Claimant submits, because the claims concern breaches of the Treaty, not breaches under Argentine law.[129] The Tribunal's jurisdiction must therefore be established by reference to the provisions of the Treaty, irrespective of whether Argentine law would authorize a derivative suit by shareholders in similar circumstances.[130] Moreover, the Claimant contends, Argentine domestic law is irrelevant because the Treaty takes precedence over Argentina's internal law to the extent that there is any conflict between the

[121] Ibid.

[122] Ibid at Point IV.B.

[123] Ibid at para 142.

[124] Ibid.

[125] Ibid at paras 143-144.

[126] Ibid at Point IV.C.

[127] Ibid at para 148.

[128] Ibid.

[129] Ibid.

[130] Ibid.

two.[131] The Claimant asserts that this is so both under Articles 27 and 31 of the Argentine Constitution and under Article 27(1) of the Vienna Convention on the Law of Treaties.[132]

81. Finally, in a footnote, the Claimant disagrees with Argentina's submissions as to the Chile-Argentina BIT's preclusion of indirect claims. It argues that even if Argentina's assertions concerning that BIT were correct (which the Claimant disputes):

> "a claim for more favorable treatment under a provision of the Chile-Argentina BIT does not entail being subject to all provisions of that BIT, including those that may be less advantageous, and the Chile-Argentina BIT is therefore irrelevant to the issue."[133]

3. Considerations of the Tribunal

82. The Tribunal has already noted that the Claimant's claims, as posited, give rise to a "legal dispute" as required by the ICSID Convention.[134] Argentina's second jurisdictional objection essentially raises the question as to whether this dispute arises out of an "investment" in the sense defined by the German-Argentine BIT. Article 1(1) of the BIT defines investment as follows:

> "The term 'investment' shall include <u>any kind of investment</u> in accordance with the laws of the Contracting Party in whose territory the investment is made in accordance with this Treaty, <u>in particular, but not limited to</u>,
>
> a) moveable and immoveable property and any other property rights such as mortgages and liens;
>
> b) <u>shares or stock</u> in a company or <u>any other form of participation</u> in a company;
>
> c) <u>claims to money which has been used to create an economic value</u> or <u>claims to any performance</u> hailing an economic value;
>
> d) intellectual property rights, in particular copyrights, patents, utility model patents, industrial designs or models, trade or service marks, trade names, trade or business secrets, technical processes, knowhow, or goodwill;
>
> e) business concessions under public law, including concessions to search for or exploit natural resources".[135]

[131] Ibid at para 149.

[132] Ibid.

[133] Ibid at note 158.

[134] See para 63 above.

[135] Emphasis added.

83. Subparagraph b) of this definition makes clear that the Claimant's 99% shareholding in DCS Argentina indeed constitutes a protected investment under the Treaty. Argentina argues that this limits the Claimant's protections under the Treaty to the free exercise of its rights as a shareholder, which, it submits, have not been impinged by the Government's disputed actions. This assertion, however, completely overlooks the fact that shareholdings are only one element in an otherwise broad and non-exhaustive definition that protects "any kind of investment." The Claimant's additional capital infusions into the Argentine Subsidiary, for example, would constitute "claims to money which has been used to create an economic value". Likewise, its right to returns[136] from the repayment (with interest) of the lease and loan contracts falls squarely within the concept of "claims to any performance hailing an economic value" under subparagraph c) of the BIT's definition of investment.

84. That the BIT's protection extends beyond the mere free enjoyment of the Claimant's shares in the Argentine Subsidiary is confirmed by the Protocol, which states:

> "(1) Ad Article 1
>
> a) […]
>
> b) Income from the investment and, in the case of its reinvestment, income from such reinvestment, shall enjoy the same protection as the investment."
>
> c) 'Any other form of participation' within the meaning of Article 1(1)(b) shall in particular include such investments which do not convey any voting or control rights to the holder of the investment.
>
> d) The claims to money referred to in Article 1(1)(c) encompass claims arising from loans related to participation in a company and which in their purpose and scope have the character of participation in a company. The foregoing shall not include loans from third parties such as bank loans under commercial conditions."

Subparagraph b) specifies that not merely the shareholdings themselves but also the income to be generated by the investment (whether through shares or otherwise) is protected by the BIT. Subparagraph c) extends this protection to types of participation which do not include voting or control rights, while subparagraph d) further extends it to forms of participation which do not even constitute a shareholding. Investors falling within the latter category would enjoy no rights as shareholders at all, and yet their participation in "any kind of investment" is protected under the BIT. The breadth of these Protocol provisions thus confirms that the BIT's protections are

[136] Also broadly defined by Article 1(2) of the BIT to include "amounts yielded by an investment and includes profits, dividends, interests, license fees, and other remunerations".

not limited to shareholders' rights *qua* shareholders. The fact that the BIT nowhere distinguishes between "direct" investments or claims and "indirect"/"derivative" investments or claims further supports this conclusion.[137]

85. The Respondent's arguments concerning article 4 of the BIT and article 3 of the Protocol are misguided and do not lead to a different result. Article 3 of the Protocol (ad article 4 of the BIT) provides that "[a] claim to compensation shall also exist when, as a result of measures named in Article 4 regarding the company in which the investment is made, it suffers a serious economic harm."[138] The only portion of article 4 referring to "measures" is found in article 4(2), which states, in relevant part:

> "Investments by nationals or companies of a Contracting Party may not be expropriated, nationalized, or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party except for the public benefit and against compensation."[139]

86. The Respondent submits that article 4 thus authorizes compensation only in cases of "direct" expropriations (*e.g.* the actual expropriation of the shares themselves), whereas article 3 of the Protocol "also" and exceptionally authorizes "indirect" claims by the foreign shareholder for serious economic harm to the local company where that harm is caused by the types of directly expropriatory measures referred to in article 4.

87. The Tribunal, however, notes that neither article 4 of the BIT nor article 3 of the Protocol makes any reference whatsoever to "direct" versus "indirect" measures or harms. There is simply no reason to infer that article 4 applies to "direct" expropriation claims while article 3 of the Protocol applies to "indirect" claims. On its face, article 4 guarantees investors compensation in case of expropriation or measures tantamount to expropriation. Article 3 of the Protocol then adds that investors will "also" be entitled to compensation if the government's expropriatory-like measures cause a "serious economic harm" to the investment. A natural and ordinary reading of the Protocol provision, then, suggests that the Contracting State Parties wished to additionally specify the level of harm necessary to establish a claim to compensation in case of governmental measures that fall short of full and outright expropriation. But the Tribunal need not explore the

[137] On this point, see the analysis by the *Siemens* tribunal, which considered a nearly identical objection by Argentina in relation to the same German-Argentine BIT. *Siemens*, above note 71 at paras 136-144.

[138] Emphasis added.

[139] Emphasis added.

precise scope of these compensation obligations here. It is sufficient to note that these provisions in no way limit the scope of the term "investment" as discussed above. They can therefore have no bearing upon the Claimant's standing to bring the present claims.

88. As to the Respondent's assertion that Argentine law does not authorize derivative actions by shareholders in circumstances such as the present ones, the Tribunal has already stated that its competence in this matter is determined by the relevant provisions of the ICSID Convention and the German-Argentine BIT.[140] The Tribunal has concluded that the Claimant has raised treaty-based legal claims in respect of a protected investment as defined under the BIT. The Argentine law concerning the admissibility of derivative shareholder actions is simply irrelevant to the analysis.

89. The Tribunal also finds Argentina's assertions concerning *ius standi* under international law unpersuasive. As to the ICSID Convention, it is true that article 25(2)(b) of that Convention allows disputing parties to agree to treat a locally incorporated subsidiary as a qualifying foreign investor for purposes of the Convention and that there is no evidence to suggest that the parties in the instant case entered into any such agreement. However, DCS Argentina is not a party to the claim and the Claimant has made no attempt to join its former subsidiary to the proceedings before this Tribunal. Article 25(2)(b) of the ICSID Convention therefore has no application. Article 25(2)(a) of the Convention, on the other hand, does apply, and the Tribunal has already noted that the Claimant satisfies the necessary nationality requirement under that provision.[141]

90. Argentina's arguments regarding the *Barcelona Traction* decision and what Argentina terms "conventional international law" are equally unpersuasive. As noted both by the Claimant and by numerous other investor-State tribunals, the *Barcelona Traction* decision dealt with an attempt by one State to exercise diplomatic protection in favor of its nationals who had invested in a company incorporated in a second State with respect to disputed measures taken against the company by a third State.[142] This is a significantly different factual scenario from the present one. Moreover, in reaching its decision to disallow the claim in *Barcelona Traction*, the ICJ itself noted that international treaties could provide shareholders with a direct right of action against foreign governments for certain claims.[143] The present instance is precisely such a case. As

[140] See part III of the award above.

[141] See above para 49.

[142] *Barcelona Traction*, above note 87 at paras 30-31.

[143] Ibid at paras 61-63.

noted by the *CMS* tribunal and affirmed by the ad hoc Committee in the *CMS* annulment decision:

> "nothing in general international law prohibits the conclusion of treaties allowing 'claims by shareholders independently from those of the corporation concerned… even if those shareholders are minority or non-controlling shareholders.' Such treaties and in particular the ICSID Convention must be applied as *lex specialis*."[144]

91. The present Tribunal agrees with this conclusion. Indeed, some two-dozen previous investor-State tribunals have confirmed that the ICSID Convention, in concert with the definition of "investment" offered by numerous BITs, allows shareholders to bring claims for harms to their investments in locally incorporated companies.[145] The Respondent has not been able to point to a single case in which this objection to an investor-State tribunal's jurisdiction has been upheld. While the Tribunal is not bound to follow the example of prior tribunals, it can find no justification either in the text of the German-Argentine BIT or in general international law to depart from the overwhelming *jurisprudence constante* that has emerged around this particular legal question.[146]

92. Nor does the Respondent's reliance upon the recent U.S. treaty practice provide such a justification. The Respondent has provided no evidence to suggest that the U.S. decision to specifically authorize "indirect" claims in its recent investment agreements was prompted by a desire to depart from what Argentina terms a "conventional international law" rule to the contrary. It is equally plausible that the U.S. introduced this change in order to explicitly endorse as correct the findings of the numerous investor-State arbitral tribunals referenced above. In any event, the Respondent has not proven nor even suggested anything in the treaty practices of Argentina or Germany – the relevant Contracting States for present purposes – that would support its position.

93. Finally, Argentina's reliance upon the Chile-Argentina BIT is equally misguided and must be rejected. The Tribunal expresses no opinion as to whether that BIT does or does not authorize shareholders to bring claims for harms suffered by their locally incorporated investments. What matters, in terms of the present Tribunal's jurisdiction, is that the German-

[144] *CMS – Annulment*, above note 113 at para 69 (quoting *CMS – Jurisdiction*, above note 113 at para 48).

[145] See above notes 113 and 114.

[146] Indeed, none of the considerations mentioned above in para 53 of this Award would justify the Tribunal in adopting a different resolution of the question in this case.

Argentine BIT allows such claims, and nothing in the BIT requires qualifying German investors to be subject to the potentially more restrictive jurisdictional provisions of any third treaty. The Chilean-Argentine BIT is therefore inapposite to the question at hand.

C. Third Objection: The claim refers to the adoption of general measures which exceed the jurisdiction of the Centre

1. Position of the Respondent

94. Argentina asserts that all of the Claimant's claims relate to general measures adopted by the Argentine Government in response to a national emergency,[147] and in particular, to the Government's decision to abandon the currency exchange system.[148] Citing the PCIJ decision in *Serbian Loans*, Argentina insists that the regulation of its currency is a matter falling within its exclusive sovereignty under international law.[149] It argues that since the BIT's preamble indicates its purpose is to increase the welfare of both countries,[150] the Treaty "cannot be interpreted to prevent any of the party States from adopting measures aimed at safeguarding the Nation's welfare."[151]

95. In addition, Argentina submits that the Tribunal does not have competence to review general economic measures unless the Claimant can show not merely that it suffered adverse *factual* effects as a result of the measures but that one of its *legal* rights was prejudiced.[152] Argentina asserts that the Claimant has not shown any adverse legal effect for two reasons. First, it submits that the Claimant does not itself possess any legal rights that could have been affected by the Government's measures, because all of its claims relate to contractual rights held by separate legal entities.[153] This argument repeats Argentina's second objection above and therefore will not be dealt with again here. Second, Argentina reiterates that it never made any specific commitments towards the Claimant.[154] The Respondent acknowledges the *CMS*

[147] Respondent's Memorial on Jurisdiction, para 160.

[148] Ibid at paras 164 & 165.

[149] Ibid at paras 162 & 164

[150] According to the agreed English translation, the relevant phrase of the BIT's preamble reads: "Recognizing that the encouragement and contractual protection of such investments are apt to stimulate private business initiative and to increase the prosperity of both States…".

[151] Respondent's Memorial on Jurisdiction, para 163.

[152] Ibid at para 166.

[153] Ibid.

[154] Ibid at para 168.

tribunal's finding that general measures "adopted in violation of specific commitments given to the investor in treaties, legislation or contracts" could fall within the jurisdiction of an ICSID tribunal.[155] However, it asserts, this principle is not applicable in the present case, where the Claimant has not proven any "specific commitments undertaken to it, negotiated with it, and particularly, specifically and exclusively promised to it."[156] This argument was raised by Argentina under its first jurisdictional objection.[157] The Tribunal has already noted that the tenability of the Claimant's umbrella clause claims is a question for the merits.[158] That analysis will therefore not be repeated here.

96. In its reply memorial on jurisdiction, Argentina adds two further arguments. It asserts that the Claimant's position cannot be accepted, because allowing investment tribunals to review the Government's sovereign monetary policy would effectively nullify the existence of that sovereign power, as it would render it impossible for Argentina to exercise the power without incurring international responsibility.[159] Lastly it argues that the fact that the Claimant does not agree with the general measures taken by Argentina in response to the crisis or does not otherwise appreciate the remedies made available to its subsidiaries under the new laws is not sufficient to bring the claims within the jurisdiction of the Tribunal.[160]

2. Position of the Claimant

97. The Claimant responds that it has clearly raised a legal dispute.[161] It notes that it has explicitly alleged Argentina's violation of its legal rights under the BIT.[162] These allegations, it contends, meet the ICSID Convention's Article 25 requirement of a "legal dispute" as that phrase is understood in international law.[163] Citing several international courts and tribunals and the writings of academic commentators, the Claimant explains that the claims "must raise legal issues in relation with a concrete situation and the determination of the issue must have some practical

[155] Ibid at para 167, quoting *CMS – Jurisdiction*, above note 113 at para 27.

[156] Ibid.

[157] See para 58 of the Award above.

[158] Above, para 65.

[159] Respondent's Reply Memorial on Jurisdiction, para 135.

[160] Ibid at paras 136-137.

[161] Claimant's Counter-Memorial on Jurisdiction, para 152.

[162] Ibid.

[163] Claimant's Memorial on the Merits at paras 212-213.

and concrete consequences."[164] It asserts that its claims arising under the BIT meet this definition.[165]

98. As to the contention that general economic measures cannot fall within the jurisdiction of ICSID tribunals, the Claimant responds, "ICSID tribunals confronting claims related to Argentina's emergency legislation have uniformly found the requisite 'legal dispute.'"[166] The Claimant asserts that some 16 ICSID and UNCITRAL tribunals have confronted the same objection from Argentina, and:

> "[i]n each case, the tribunal found that, although Argentina, as a sovereign State, was able to enact any measure that it saw fit, the tribunal had jurisdiction to determine whether those measures violated binding commitments made by Argentina to its investors and that the dispute thus arose specifically and 'directly' out of the investment rather than out of measures of general applicability."[167]

The Claimant does not dispute Argentina's sovereign right to regulate its currency and economy.[168] However, the Claimant asserts, if in so doing Argentina violates its treaty obligations, it must pay compensation.[169]

99. Finally, the Claimant disputes Argentina's contention that ICSID jurisdiction may arise only where Argentina has violated a specific commitment made to a specific investor, negotiated individually with that investor.[170] It asserts that the very nature of BITs is to provide specific protections to a broad class of investors.[171] This purpose, it submits, would be thwarted if only investors in possession of an individually negotiated commitment from the Host State could invoke the protection of BITs.[172]

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[164] Ibid at para 214.

[165] Ibid at para 215.

[166] Ibid at para 217.

[167] Ibid at para 222.

[168] Claimant's Counter-Memorial on Jurisdiction, para 155.

[169] Ibid.

[170] Ibid at para 156.

[171] Ibid.

[172] Ibid.

3. Considerations of the Tribunal

100. The Tribunal is mindful of the Respondent's right to regulate its economy as it sees fit. This right adheres in the sovereign Government of Argentina both in times of economic crisis and otherwise. But the Respondent's general sovereignty is not at issue in these proceedings. What is at issue is the Respondent's obligation to observe its treaty commitments under the German-Argentine BIT. The Claimant has not alleged that Argentina may not exercise its powers to regulate its economy nor that such regulation may never negatively affect the Claimant. Rather, it has alleged that where Argentina elects to exercise its powers in a manner that contravenes one of Argentina's voluntarily assumed international obligations to German investors under the German-Argentine BIT, and where such contravention specifically harms the Claimant's investment, Argentina must compensate the Claimant for the violation.

101. As stated by the *AES* tribunal in response to a nearly identical objection by Argentina:

> "What is at stake in the present case, as it was in the *CMS* one, are not the measures of a general economic nature taken by Argentina in 2001 and 2002 but their specific negative impact on the investments made by [the Claimant]. As a sovereign State, the Argentine Republic had a right to adopt its economic policies; <u>but this does not mean that the foreign investors under a system of guarantee and protection could be deprived of their respective rights under the instruments providing them with these guarantees and protection</u>. Without anticipating, at this stage, on the consideration of the issue, whether this delicate balance between the respective rights of the Host State and those of the investor were respected in substance, the present Tribunal states that it has jurisdiction for considering [sic] this issue."[173]

102. The present Tribunal agrees with this analysis. As readily conceded by the Claimant, the Tribunal is not authorized to pass judgment in an abstract way upon the measures adopted by Argentina in 2001 and 2002 in response to its economic crisis. Its jurisdiction is limited to deciding the specific impact of those measures upon the Claimant's investment under the German-Argentine BIT.

103. To return to the jurisdictional requirements of Article 25 of the ICSID Convention, the Tribunal has already found that the Claimant meets the Convention's nationality requirement, that it has raised a treaty-based "legal dispute" with the Respondent under the ICSID Convention and the German-Argentine BIT, and that the Claimant's investment is a protected "investment" as that term is defined by the BIT.

[173] *AES*, above note 113 at para 57 (emphasis added).

104. The Claimant has pleaded that its investment suffered specific damages as a direct consequence of the Respondent's disputed measures. In particular, the Claimant has alleged that the value of its lease and loan contracts – which the Tribunal has already found to be a protected stream of income falling within the BIT's definition of "investment – was substantially reduced by the Government's revocation of the legal regime governing dollar-denominated contracts. The Claimant has moreover alleged that this alteration of the legal regime violated some of Argentina's obligations under the BIT and brought its entire investment to the brink of financial collapse, thereby giving rise to a duty of compensation. It is therefore clear that the Claimant's claims, as pleaded, satisfy the ICSID Convention's requirement of a legal dispute "arising directly out of an investment." For all of these reasons, the Respondent's third jurisdictional objection is also rejected.

V. FOURTH OBJECTION TO JURISDICTION: DFS IS NOT THE PROPER CLAIMANT BECAUSE IT NO LONGER OWNS THE CLAIM

A. Admissibility of the objection

1. Position of the Respondent

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105. As noted above, the Respondent's reply memorial on jurisdiction alludes to the factual underpinnings for this objection.[174] Namely, according to the Claimant's Exhibit CX 70, the Claimant (DFS Berlin) sold its shares in the allegedly harmed Argentine Subsidiary (DCS Argentina) to its parent company (DaimlerChrylser AG Stuttgart), by a share purchase agreement dated 12 June 2002 ("the Share Purchase Agreement" or "SPA").[175] It is not until the Respondent's rejoinder memorial on the merits, however, that the essence of Argentina's objection to jurisdiction in consequence of this Share Purchase Agreement becomes clear. In that memorial, Argentina notes that the request for arbitration was filed on 2 August 2004 and objects that by virtue of the sale, DFS no longer owned a protected investment under the BIT as of that date.[176] "As a consequence," Argentina states, "the present case is inadmissible since at the moment of expressing its consent to this arbitration Daimler Financial Services AG was not the

[174] Respondent's Reply on Jurisdiction, para 100. These facts are summarized at para 45 above.

[175] The Tribunal notes that at the time of the share purchase agreement, the Claimant was called DaimlerChrysler Services, AG. Sometime later, however, pursuant to the break-up between the Daimler and Chrysler companies, the Claimant changed its name to Daimler Financial Services (DFS). This is how the Claimant has referred to itself throughout these proceedings.

[176] Respondent's Rejoinder on the Merits, paras 67-68.

owner and/or controlling company of the subsidiaries [which are the] object of the claim."[177] Argentina reiterated this objection during the oral hearings and in its post-hearing written submissions.

106. Argentina points to the ICJ's decision in the *Serbia Genocide* case as evidence that the Tribunal retains the authority to decide upon its own jurisdiction, if necessary *proprio motu*, even at this late stage of the proceedings, since there have not yet been any jurisdictional findings by the Tribunal constituting *res judicata*.[178] The suggestion seems to be that Argentina's late raising of the objection should not render the objection inadmissible.

2. Position of the Claimant

107. At the hearings, the Claimant objected that Argentina raised this point too late and took the position that it is therefore inadmissible. In its post-hearing submissions, the Claimant emphasizes that Argentina first broached the point in its rejoinder memorial on the merits, only one month before the hearings.[179] Therefore, the Claimant asserts, Argentina must be deemed to have waived the objection in accordance with ICSID Arbitration Rule 41(1),[180] which states:

> "Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder – unless the facts on which the objection is based are unknown to the party at that time."

3. Considerations of the Tribunal

108. ICSID Arbitration Rule 41(1) aims at promoting arbitral efficiency by requiring disputing parties to raise jurisdictional objections in a timely fashion, and the present Tribunal does not doubt of its authority to dismiss an untimely objection in appropriate circumstances. The goal of efficiency must be balanced, however, against the Tribunal's duty not to exceed its competence, as evidenced by ICSID Rule 41(2), which permits the Tribunal "on its own initiative [to] consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is

[177] Ibid at para 69.

[178] Respondent's Post-Hearing Legal Submissions, pp. 6-7, citing *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzigovina v. Serbia and Montenegro)*, ICJ, Judgment of 26 Feb 2007, paras 118, 127.

[179] Claimant's Post-Hearing Submissions of Fact, paras 1211-1212.

[180] Claimant's Post-Hearing Legal Submissions, para 68.

within the jurisdiction of the Centre and within its own competence." The Tribunal must in addition observe its duty to ensure that both parties receive a full and fair opportunity to present their cases. These are all matters for the Tribunal's discretion.

109. Under the circumstances, the Tribunal finds that it would not be appropriate to dismiss the Respondent's objection on timeliness grounds. First, both parties here bear some responsibility for the tardy discussion of the objection. The factual bases for the objection were disclosed to the Respondent at an early stage of the proceedings, and certainly before the completion of the written jurisdictional pleadings. The Respondent's failure to sufficiently articulate the objection within the time frame set by Rule 41(1) is therefore regrettable.[181] On the other hand, the Claimant's initial presentation of its claim was worded in such a manner as to lead a reasonable reader to believe that the Claimant still owned the Argentine Subsidiary at the time of the filing of the claim.[182] Moreover, while the Claimant disclosed the fact of the share transfer in its memorial on the merits, it did so fleetingly in a section of its argument dedicated to quantum issues, not jurisdictional matters. The Tribunal can therefore appreciate how the Respondent might have failed to immediately realize the potential jurisdictional implications of the disclosure, which comprised a single paragraph within the Claimant's 229-page memorial. This is particularly the case as the objection raises issues that appear to be novel within ICSID jurisdictional practice, as will become clear below. Indeed, for this reason the Tribunal eventually requested and received from both parties an additional round of briefing devoted solely to the question of the effect of the SPA upon the Tribunal's jurisdiction.

110. Second, the parties here resolved – of their own initiative – to join the jurisdictional and merits proceedings in this case. Thus, while the Respondent's allusions to the SPA in its written jurisdictional pleadings were oblique at best, it nonetheless clarified the grounds for its objection before the close of the jurisdictional proceedings. Third, from the standpoint of fairness, both parties received ample opportunity to address the objection not only at the oral hearings but also in their post-hearing submissions and in a subsequent round of written briefs. There can therefore be no unfairness to the Claimant from considering the objection at this point.

[181] The Claimant first disclosed the sale in its 7 August 2007 Memorial on the Merits, at para 160. It submitted a copy of the disputed Share Purchase Agreement (Claimant's Exhibit CX 70) on the same date. This was nearly a year before the 5 May 2008 filing of Argentina's Reply Memorial on Jurisdiction and more than two years before Argentina's 27 October 2009 Rejoinder on the Merits, in which Argentina first clarified its objection concerning the SPA.

[182] See e.g. Claimant's Request for Arbitration at para 20, stating "this is a legal dispute arising directly out of an investment in Argentina by DCS in its wholly-owned subsidiary, DCS Argentina…".

B. Substance of the objection

1. The Tribunal's request for further submissions concerning the SPA

111. During the oral hearings the Tribunal requested, from both parties, post-hearing written submissions concerning the law applicable to determining the correct meaning and impact of the disputed Share Purchase Agreement. Regrettably, neither Party provided a clear response to this request. The Tribunal therefore wrote to the parties on 20 August 2010 and again requested further clarification of their respective positions. In that letter, the Tribunal provided a list of specific questions to assist the parties in addressing the Tribunal's concerns. The essential thrust of the letter was as follows:

> "The Tribunal notes that the referenced Share Purchase Agreement pre-dates the present ICSID claim, which was registered on 3 August 2004. The Tribunal further notes that the Parties did not, in their post-hearing briefs, respond to the question posed by the Tribunal at the oral hearing concerning the law applicable to the meaning of the Share Purchase Agreement and the corresponding relevance of that Agreement in relation to the Tribunal's jurisdiction (Transcript of Oral Hearings, Day 7, p. 2023, lines 16-22 - p.2024, lines 1-19).
>
> The question as to whether the ICSID claim was transferred to the Claimant's Parent Company along with the shares may turn upon the intention of the contracting parties to the Share Purchase Agreement. The Tribunal invites the Parties, within 25 days, to file any supplementary submissions, including supporting legal authorities, they may wish to lodge concerning the following questions:
>
> 1. The law applicable to the interpretation of the Share Purchase Agreement, whether German law or international law.
>
> 2. The proper interpretation of the Share Purchase Agreement under the applicable law in relation to the ICSID claim, including whether, and if so how, the Agreement governs the ownership of the ICSID claim and/or the legal entitlement to any recovery from the ICSID claim."

112. Both parties duly filed full written responses to the Tribunal's questions, along with supporting witness statements and expert legal opinions. They also provided brief responses to one another's arguments. These submissions have greatly assisted in clarifying the questions before the Tribunal. The key contentions of the parties relating to the SPA objection, as they eventually emerged through these various submissions, are set forth below.

2. *Position of the Respondent*

113. Argentina stresses that the Claimant, before filing the present claim, transferred the entirety of its shares in the Argentine Subsidiary to its Parent Company and that it did so without reserving for itself any right to retain any BIT-based legal claims pertaining to the investment subsequent to the transfer.[183] In support of its assertion that the Claimant did not reserve its right to bring any ICSID claims, Argentina quotes the relevant portion of the 2002 Share Purchase Agreement:

> "… the Buyer [aka the Parent Company] hereby purchases from the Seller [aka the Claimant] all the Seller's present shares in the Company… and all rights to future shares which result from any increase to capital until the Closing Date (hereinafter referred to collectively as "the Sold Shares"), including all the rights to dividends, all the voting rights, and <u>any other rights pertaining to the Sold Shares for all the Company's profits</u> which have not been appropriated to shareholders of the Company until the date of signing of this Agreement."[184]

114. Argentina's position is that the phrase "any other rights pertaining to the Sold Shares" *prima facie* includes the right to bring an ICSID claim for damages allegedly done to the shareholding. In support of this position Argentina makes two alternative arguments, one under international law and the other under Argentine law. Its primary argument is that international law should apply in determining the effects of the SPA upon the Claimant's standing to file an international arbitration claim.[185] The Tribunal should therefore apply the ICSID Convention, the Argentina-Germany BIT, and the relevant rules of international law.[186]

115. As to the latter source of law, the Respondent cites three ICJ cases for the proposition that general international law requires a claimant to hold a legally protected right or interest at the time of filing the claim.[187] Here, it submits, the Claimant no longer held a legally protected right or interest when it filed the claim because it had already transferred the investment to its Parent Company. With respect to the ICSID Convention, Argentina submits that the critical date for

[183] Respondent's Post-Hearing Summary of Arguments, para 2.

[184] Exhibit CX 70, "Share Purchase and Assignment Agreement", Article 1(1) (parenthetical in original) (emphasis added by the Tribunal) (quoted by Argentina in its Post-Hearing Submissions of Fact, p. 69).

[185] Respondent's post-hearing SPA submission of 28 Sep 2010, part I, para 1. Unless otherwise noted, all paragraph numbers referring to this submission refer to the paragraph numbers appearing in parts I-V of the submission and not to the paragraphs appearing in the introduction to the submission (which are separately numbered).

[186] Ibid at paras 2-3, 20-21.

[187] Ibid at paras 5-9 (citing the ICJ's *Barcelona Traction*, *Nottebohm*, and *South West Africa* cases).

determining *jus standi* is the date on which the arbitral proceedings are commenced.[188] It notes that although other ICSID tribunals have held that the transfer of an investment to a third party did not affect their jurisdiction, these tribunals dealt with scenarios in which the transfer was made <u>after</u> the initiation of the arbitral proceedings.[189] Here, the transfer occurred <u>before</u>. For these reasons, the Respondent submits, the Claimant lacks *jus standi* under both the ICSID Convention and general international law.

116. The Respondent's alternative argument is that Argentine law applies in determining the Tribunal's jurisdiction subsequent to the share transfer. It reaches this conclusion in two ways. First, it argues, the international law relevant to the question includes article 10(5) of the BIT, which refers *inter alia* to Argentine law, thereby confirming that Argentine law applies.[190] Second, it submits, if the Tribunal finds that the effects of the SPA upon its jurisdiction are to be determined by a source of law other than international law, then German law applies to the interpretation of the SPA per the SPA's explicit choice of law clause.[191] That clause, found in article 8(4) of the SPA, states:

> "So far as legally permitted, this Agreement shall be subject exclusively to the laws of Germany barring the application of the international private law of both Germany and Argentina."[192]

117. Citing the expert opinion of Professor Wurmnest, a German specialist in private international law, the Respondent maintains that "German law makes a distinction between the agreement to transfer the shares in consideration for the payment of an amount of money [aka the sale obligations under the SPA], and the actual assignment of the shares, rights and/or claims – including ICSID claims."[193] On this basis the Respondent submits that German law applies to the interpretation of the SPA in determining the obligations of the SPA contracting parties *inter se* but that Argentine law – including its rules on private international law and in turn its substantive law – applies to the determination of whether or not the ICSID claim was actually assigned to the

[188] Ibid at para 23 (citing SCHREUER – 2009, above note 92 at p. 92, section 36).

[189] Ibid at paras 24-26 (citing *CSOB v. Slovakia*, ICSID Case No. ARB/97/4, Decision on Jurisdiction (24 May 1999), para 31; and *Vivendi II* – Jurisdiction, above note 113, paras 60-63). The text of Article 10(5) of the BIT is set forth in para 50 of this award.

[190] Respondent's post-hearing SPA submission of 28 Sep 2010, at paras 18-19.

[191] Ibid at paras 10-11.

[192] Article 10(4) of the SPA, Claimant's Exhibit CX-70.

[193] Respondent's post-hearing SPA submission of 28 Sep 2010, at para 12, citing expert opinion of Prof. Wurmnest.

Parent Company.[194] Pointing to the expert opinions of Argentine law professors Nissen and Kielmanovich, who stress that Argentine law prohibits domestic derivative actions by former shareholders except in very limited circumstances not present in this case,[195] the Respondent then reaches the following conclusion:

> "[C]onsidering that, from the very beginning, Claimant has claimed in its capacity as shareholder of the Subsidiaries that were purportedly affected by the measures challenged in the instant case, and that, under Argentine law, the transfer of shares entails the assignment of all claims related to the ownership of such interest, DFS has no standing to bring a claim before ICSID."[196]

118. The Respondent raises several additional points in support of its position. First, it asserts that the defect in the Tribunal's jurisdiction caused by the share transfer is fatal and cannot be cured. It emphasizes that the Claimant has no standing under international law to bring a claim on behalf of its Parent Company and points out that it has not in fact attempted to do so here.[197] It adds that joining the Parent Company to the proceedings at this stage is impossible, as this would require the consent of the Government of Argentina, which consent it emphatically refuses.

119. Second, the Respondent disputes the testimony of the Claimant's witnesses to the effect that the contracting parties to the SPA did not intend to transfer the ICSID claim. According to the Respondent:

- the plain language of the SPA shows that the claim was in fact transferred, whatever the parties' *ex post facto* assertions, because the claim is included in the SPA's use of the phrase "any other rights pertaining to the sold shares"[198];
- email exchanges between Daimler officials which form part of the record and which were brought to the Tribunal's attention at the hearings indicate that the possibility of an ICSID claim was not even considered by DFS until sometime in 2004 (thus, since the SPA was concluded in 2002, the contracting parties to the SPA cannot have intended for the ICSID claim to be excluded from the scope of the transfer);[199] and

[194] Ibid at paras 13-16, 22.

[195] Ibid at paras 29-30.

[196] Ibid at para 31.

[197] Ibid at paras 23, 27.

[198] Respondent's Observations on the New Evidence Presented by Daimler Together with its Responses to the Tribunal's Additional Post-Hearing Questions, 3 December 2010, at para 24.

[199] Ibid at paras 25-28.

- neither the DFS board's resolution approving the share transfer nor the minutes of the meeting at which it was approved mention anything about reserving the right to an ICSID claim.[200]

120. Third, the Respondent asserts that the evidence submitted by the Claimant in corroboration of its witnesses' testimony (set forth in the Claimant's contentions below) is of no probative value and should be disregarded by the Tribunal, because that evidence was not contemporaneous to the conclusion of the SPA, was prepared solely for the purposes of this arbitration, and does not derive from independent sources.[201]

121. Finally, the Respondent disputes that any ambiguity in the meaning of the SPA (as to whether or not the ICSID claim was intended to be transferred) can be cured by the execution of an *ex post facto* interpretive agreement between the SPA contracting parties. This is so, the Respondent argues, because the ICSID claim was undoubtedly transferred upon the transfer of the shares by operation of law – both international and Argentine law – irrespective of the contracting parties' intent.[202]

3. Position of the Claimant

122. The Claimant denies that its rights in the ICSID claim were transferred to the Parent Company under the Share Purchase Agreement.[203] It asserts that the Share Purchase Agreement's reference to "any other rights pertaining to the sold shares" is modified by the subsequent phrase "for all the Company's profits which have not been appropriated to shareholders."[204] The Claimant therefore alleges that the phrase "any other rights", under a plain language reading, encompasses only those rights referring to the Argentine Subsidiary's non-allocated (and presumably already existing) profits, which would not include any potential recoveries pursuant to an investment treaty claim. In the Claimant's view, "[t]here is nothing in the Share Purchase Agreement to indicate that the right to investment treaty claim [sic] was transferred and it was not

[200] Ibid at para 29.

[201] Ibid at para 2. These claims are further elaborated in, inter alia, paras 16-21 and 41-43. The Respondent also complains of certain formal defects in the Claimant's evidence (ibid at paras 13-16), which the Tribunal finds unnecessary to address in light of its below decision.

[202] Respondent's Observations on the New Evidence Presented by Daimler Together with its Responses to the Tribunal's Additional Post-Hearing Questions, 3 December 2010, at para 24.

[203] Claimant's Post-Hearing Submissions of Fact, para 1199.

[204] Ibid.

necessary to specifically reserve those right [sic]."[205] The Claimant buttresses this basic position with arguments from both German law and international law.

123. As to the former, the Claimant states that German law is the law applicable to the interpretation of the SPA. This is so, it argues, because the SPA contracting parties explicitly selected German law to govern the contract (article 8(4) of the SPA) and also because "under the BIT and general international law which applies to ICSID jurisdictional questions, questions specifically pertaining to a corporation, including its capacity, corporate authority and governance are all determined by the law of the state of incorporation or its legal seat, which, in this case is Germany."[206] The Claimant points out that German law, international law, and Argentine law all recognize and give effect to the choice of law selected by the parties to a contract.[207] It further stresses that Argentine legal advice obtained by Daimler at the time of conclusion of the SPA confirmed that German law could govern the contract.[208] Moreover, the Claimant argues, "[t]he Argentine Government expressly accepted the application of German law to the interpretation of the Share Purchase Agreement."[209] The Claimant notes that Argentina, when reviewing the proposed transfer for the purpose of registering the transfer of title to the shares, requested the Claimant to submit legal opinions confirming the legality of the SPA under German law and EC competition law. In approving the transfer, the Argentine Central Bank referenced the German legal opinions provided by Daimler and stated that "[t]he agreement, insofar as it is permitted by Law, will be exclusively subject to German law, preventing the application of both German and Argentine international private law."[210]

124. As to the contention – raised by Argentina's expert, Professor Wurmnest – that German law distinguishes between the law applicable to the interpretation of the contract and the law applicable to the transfer and assignment of the shares, the Claimant and its witnesses appear to accept that this is correct. The Claimant explains that, because the transferred company was an Argentine company and, as a financial entity, subject to regulation by the Argentine Central

[205] Ibid.

[206] Claimant's post-hearing SPA submission, para 3.

[207] Ibid at paras 8-16

[208] Ibid at para 17.

[209] Ibid at para 20.

[210] Ibid.

Bank, its share titles were subject to registration with the Argentine authorities.[211] The phrase "so far as legally permitted" in the choice of law provision in Article 8(4) of the SPA, it submits, was inserted solely "to allow for the approval of the transfer of the shares by the Argentine Central Bank and perfection of the transfer by notification and registration under Argentine law."[212] In short, the Claimant contends that Argentine law applies to the formalities of the title transfer and registration, while German law governs the interpretation of the SPA itself.

125. German law, the Claimant submits, establishes that the right to assert the ICSID claim was not transferred. First, German law would require such a transfer to be explicitly stated in the SPA in order to be valid, and no such explicit transfer was recorded here.[213] Second, German law gives effect to the "wirkliche Wille" or "true intention" of the parties, and it was not the intent of the Claimant or its Parent Company to transfer the ICSID claim under the SPA.[214] This is evidenced, the Claimant submits, both by the terms of the SPA itself and by the subsequent conduct of its contracting parties, including in particular the following facts:[215]

i. The negative purchase price paid for the local Argentine Subsidiary allocated all losses allegedly arising out of the ICSID claim to DFS, not to its Parent Company.

ii. The SPA contracting parties did not adjust the negative purchase price in any way for the estimated value of the ICSID claim.

iii. Financial statements submitted by DFS show that all losses associated with the ICSID claim were not only intended to be born by DFS but were actually born by DFS.

iv. DFS requested and received authorization to pursue the ICSID claim from its own board and not from the board of the Parent Company.

v. Bookkeeping entries submitted by DFS show that DFS, and not the Parent Company, has born the costs of the present arbitration.

vi. The Parent Company has not attempted to participate in the present arbitration in any way and has not filed its own ICSID claim.

[211] Ibid at para 19.

[212] Ibid at para 19.

[213] Ibid at paras 36-42.

[214] Statement of Wolfgang Bauder, Senior Counsel of Daimler AG, at para 5(c).

[215] Ibid at paras 25-36, 40-41, and Claimant's post-hearing SPA submission at paras 90-118.

vii. The Claimant and the Parent Company have submitted an "Interpretive Agreement and Undertaking" confirming that the SPA contracting parties did not intend to, nor did they, transfer the ICSID claim to the Parent Company, and this Interpretive Agreement is valid and binding under German law in light of article 8(3) of the SPA.[216]

126. As to international law, the Claimant asserts that "neither the ICSID Convention nor the Treaty require [sic] that the foreign investor retain continuous ownership of the investment for jurisdictional purposes."[217] The Claimant makes several interrelated points with respect to the ICSID Convention. First, it asserts, the ICSID Convention does not require continuous ownership of the investment, nor that the investor continue to own the investment at the time of the request for arbitration or at any other defined time.[218] Instead, the ICSID Convention's only jurisdictional requirement is that there is a legal dispute arising out of an investment between a Contracting State and a national of another Contracting State.[219] This, the Claimant asserts, it has duly shown.[220]

127. Next, the Claimant stresses that Article 25 of the Convention defines the protected party by its status as a "national" of the other Contracting State, not by its status as a current "investor".[221] It asserts that the Convention's only temporal requirement lies in article 25(2), which specifies that the nationality of the investor is to be determined as of the date of the request for arbitration.[222] It therefore maintains:

> Daimler Financial's claim fully complies with any ICSID or other authority standing for the proposition that jurisdiction is determined on the date of the request for arbitration, because on that date, it was a foreign national, with a legal dispute that arose out of an investment.[223]

[216] Article 8(3) of the SPA states: "All amendments and supplements to this Agreement including this clause must be in writing in order to be legally effective…". The Claimant stressed the validity of the subsequent Interpretive Agreement in its Post-hearing SPA submission at paras 70-73.

[217] Claimant's Post-Hearing Legal Submissions, Part III.A.(d).

[218] Ibid at paras 59, 61, 65, & 66.

[219] Ibid at paras 59, 64.

[220] Ibid at paras 69-84.

[221] Ibid at para 60.

[222] Ibid at para 62.

[223] Ibid at para 64.

128. Even if this were not the case, the Claimant asserts, it is enough that the Claimant is the investor who suffered the actual harm at the time of the measures complained of. This is because "it is not share ownership *per se* which gives standing; it is the share ownership at the time the damage was done to the investment that accords standing."[224] The Claimant cites the decisions in *EnCana v. Ecuador*, *Mondev v. United States*, and *El Paso v. Argentina* as evidence that the arbitral jurisprudence has not recognized any criterion of continuous ownership in investor-State arbitration.[225]

129. As to the BIT, the Claimant submits that the Contracting State Parties to the BIT could have required the investor to own the investment at the time of the registration of the claim. In the Claimant's view, the fact that they did not do so in either the BIT or the Protocol – despite narrowing the concept of qualifying investors and investments in other ways – shows that the Contracting State Parties did not intend to require continuous ownership.[226]

130. The Claimant submits that declining jurisdiction on the basis that the shares were transferred to the Parent Company would also be inconsistent with the objects and purposes of both the ICSID Convention and the BIT. It submits:

> "Such a requirement [continuous ownership of the investment] would foreclose an investor from divesting itself of an investment which is failing due to the treaty breaches of the host State, forcing it to choose between suffering continuing harm or giving up its ICSID claim. It would also permit the State to expropriate an investment with impunity because the foreign investor could not bring a claim since it no longer owns the investment, despite the fact that it suffered the harm and has a legal dispute with the State. Such a requirement would frustrate the very purpose of the applicable treaty and deter foreign investment."[227]

131. Moreover, the Claimant asserts, even if the parties had intended to transfer the ICSID claim (which it denies), the only thing that legally could have been transferred would have been the right to assert damages associated with the investment after the effective date of the transfer of shares.[228] This is because under international law, "the claims of an investor under a BIT arising from damage to its investment at the time it held the investment are not bound to the

[224] Claimant's post-hearing SPA submission at para 34.

[225] Ibid at paras 60-63.

[226] Claimant's Post-Hearing Legal Submissions at paras 66-67.

[227] Ibid at para 63.

[228] Ibid at para 33.

shares of the vehicle that the investor used to make its investment. Rather, such claims are personal to the investor and cannot be transferred merely by the transfer of the shares the investor owns."[229]

132. Finally, the Claimant maintains that the notion of a transfer of the claim makes little sense on the facts, since both DFS and its Parent Company each already possessed an independent right to bring the present ICSID claim against Argentina as a result of the measures complained of – DFS in its capacity as the direct investor, and the Parent Company in its capacity as the indirect investor (given its 100% shareholding in DFS).[230] It cites several ICSID cases in support of the proposition that the existence of multiple potential qualifying investors within a corporate chain does not deprive a tribunal of its jurisdiction over any given qualifying investor's claim.[231] Rather, the Claimant submits, any concerns as to possible multiple recoveries against a Respondent arising out of the same set of facts can be dealt with at the damages phase.[232] The Claimant asserts that such concerns are in any event inapposite here, as "Daimler AG has given an undertaking that should the Tribunal accept jurisdiction over the claims in this proceeding and accept the right of Daimler Financial to assert those claims, Daimler AG will not assert a claim for the damages which has been asserted by Daimler Financial AG in this proceeding."[233]

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4. Considerations of the Tribunal

133. It is convenient to begin by summarizing the points on which the disputing parties agree:

- <u>German law applies to the interpretation of the SPA and the question of intent</u>. Both parties and their relevant experts and witnesses agree that the choice of law clause contained in article 8(4) of the SPA is a valid expression of the consent of the contracting parties to the SPA. Therefore, German law governs the proper interpretation of the SPA, including the question as to whether or not the contracting parties intended, by transferring the shares, to transfer the ICSID claim.
- <u>Argentine law governs the domestic formalities relating to the transfer of the shares</u>. Because the transferred shares were issued by a domestically incorporated and domestically regulated Argentine company, the parties and their experts and witnesses agree that Argentine law governs the transfer of title to the shares and the approval of the sale and registration of the title transfer by the Argentine Central Bank. Both parties also agree that the Argentine Central Bank did in fact approve the sale and that the necessary formalities for transferring the title to the shares were observed. The requirements of Argentine law in these respects were therefore fully met.
- <u>International law applies in determining the Tribunal's jurisdiction and in determining the effect of the SPA upon the Tribunal's jurisdiction</u>. Both parties agree that the ICSID Convention, the BIT, and the relevant rules of general international law apply to this determination.

The Tribunal concurs with the parties in the above-listed points of agreement.

134. The parties' submissions also indicate numerous points of disagreement, the most significant being as follows:

- Which specific provisions of the ICSID Convention and BIT apply in determining the Tribunal's jurisdiction;
- Whether or not Argentine law has any relevance to that determination;
- In what capacity the Claimant brings its claims, whether as a shareholder or otherwise;
- Whether or not the intent of the SPA contracting parties is relevant in determining the effect of the SPA upon the Tribunal's jurisdiction;
- Whether the right to bring the ICSID claim was actually transferred along with the shares by operation of law, irrespective of the SPA contracting parties' intent;
- Whether there exists a continuous ownership criterion under the ICSID Convention, and if so until what relevant date; and of course
- Whether or not the Tribunal ultimately has jurisdiction over the claims.

135. Having carefully reviewed all of the disputing parties' contentions, the submissions of their witnesses and experts, and all of the relevant legal authorities and evidence, the Tribunal concludes that the transfer of the shares occasioned by the SPA does not deprive the Tribunal of its jurisdiction over the Claimant's ICSID claims. This is so whether one analyzes the question as one under international law (the law principally applicable to ICSID claims) or under German law

[229] Ibid at para 45. See also paras 57-64.

[230] Claimant's Post-Hearing SPA Submission at para 75.

[231] Ibid at paras 77-83, 88.

[232] Ibid at paras 84-86.

[233] Ibid at para 89.

(the law applicable to the SPA). As will become clear below, Argentine law is irrelevant to the analysis.

a) Applicable law

136. While the disputing parties agree that international law applies in determining this Tribunal's jurisdiction, they disagree as to which specific provisions of the ICSID Convention and BIT govern the resolution of the present objection. The Tribunal has, however, already decided this point above.[234] That is, article 25 of the ICSID Convention applies, along with the relevant jurisdictional provisions of the BIT – including the BIT's definitions of "investment", "national", "company", "returns", etc along with article 10(2)'s pre-requisites to jurisdiction – all as interpreted in light of the relevant principles of general international law. As noted above, the Claimant has shown that it satisfies all of the requirements of article 25 of the ICSID Convention and that it meets the BIT's definitional requirements as a "national" or "company" of the Federal Republic of Germany having made a qualifying "investment" in Argentina. Also as noted above, Argentine law is irrelevant in determining whether the Claimant has met these treaty-based requirements. The Respondent's assertion that article 42 of the ICSID Convention and article 10(5) of the BIT compel the Tribunal to analyze the question under Argentine law must therefore be rejected.

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137. Argentina's alternative argument that German law, as the law governing the SPA, also requires the Tribunal to apply Argentine law in determining the ownership of the ICSID claim is likewise misguided. It appears to be based upon a misconstrual of the testimony of its expert, Professor Wurmnest, a German specialist in private international law. Professor Wurmnest indeed stressed that German law distinguishes between the law applicable to the interpretation of a share purchase contract and the law applicable to the formal transfer and assignment of the shares sold. On this basis he concluded that German law applies to the interpretation of the SPA while Argentine law governs the formalities of the assignment such as the registration of the title transfer. As to the ownership of the ICSID claim, however, Professor Wurmnest concluded that this must be determined not under Argentine law but under international law. This much is clear from the following excerpts of Professor Wurmnest's carefully considered opinion:

> "Under the German conflict-of-law rules, the law governing the transfer of title to shares is the law applicable to the corporation whose shares are assigned (*lex societatis*). Assuming that Argentine law follows a similar approach… the proper law of the corporation is Argentine law because the Argentine subsidiaries are incorporated in Argentina.[235] […] From a German perspective, the *lex societatis* governs the assignability of the shares as well as the formal and substantive requirements for an effective transfer of title to the shares. Moreover, the *lex societatis* determines which membership, management or financial rights a shareholder enjoys vis-à-vis the corporation.[236]
>
> The law applicable to the assignment of the ICSID claim has to be analysed from a different perspective."[237] […] "With regard to the law governing the formal and substantive requirements to be met in order for DFS to effectively transfer the ICSID claim to Daimler, the German conflict-of-law rules, as has been stated earlier, call in principle for the application of the law governing the assigned claim."[238] […] "Assuming that Argentine conflict-of-law rules follow a similar approach, the issue whether the ICSID claim has been effectively transferred to Daimler is governed by the law applicable to the ICSID claim."[239] "The ICSID claim arises from the Bilateral Investment Treaty concluded between Germany and Argentina itself. Thus, the preconditions for an effective assignment are in principle governed by international law. The same result follows if all legal aspects of the assignment of the ICSID claim are considered to be governed directly by international law without reference to a conflict-of-laws analysis."[240]

138. In short, Argentina's own expert witness agrees with the Claimant and its deponents, all of whom affirm that Argentine law was relevant solely to the formalities of perfecting the share transfer, and it is common cause that these formalities were duly observed. Professor Wurmnest was careful to offer no opinion on the separate question he identified – namely, whether the "preconditions for an effective assignment" of the ICSID claim were actually met under international law.[241] It is upon the answer to this latter question that the Tribunal's jurisdiction hinges.

b) Was the ICSID claim effectively assigned under international law (and does international law have a "continuous ownership requirement")?

139. As a preliminary matter, the Tribunal notes that the opinions of Argentina's experts Nissen and Kielmanovich unfortunately provide no assistance in plumbing the requirements for an effective assignment of an ICSID claim under international law. Professor Kielmanovich, an

[234] See above, Part III.

[235] Expert Opinion of Prof. Dr. Wolfgang Wurmnest, at para 18.

[236] Ibid at para 20.

[237] Ibid at para 21 (emphasis added).

[238] Ibid at para 22.

[239] Ibid at para 23.

[240] Ibid at para 24 (emphasis added).

[241] See ibid at para 9, stating: "This Opinion will limit itself to issues of conflict-of-laws under German law. It will not touch upon issues pertaining to international law or Argentine law."

expert in Argentine civil procedure and family law, opens his opinion by stating: "I have been requested to provide a legal opinion on the effects of the Share Purchase Agreement … under Argentine Law with regard to the Claimant's right to file a claim."[242] Professor Nissen, a specialist in Argentine corporate law, similarly opens by noting: "I was asked to issue a legal opinion regarding the rights that, under the Argentine legal system, derived from the holding of a share in an Argentine company, and regarding the effects of a transfer of shares of the same kind as the one established in the Share Purchase Agreement… under Argentine law."[243] Both experts eventually conclude that under Argentine law, DFS could no longer bring a claim in its capacity as shareholder for damages done to the Argentine Subsidiary once it had transferred the entirety of its shareholding in the Subsidiary to DCAG.[244]

140. This conclusion may well be correct. But as the Argentine law on derivative shareholder actions does not govern the right to bring an ICSID claim under a bilateral investment treaty, it is of no relevance to the question at hand. Moreover, both experts make clear in their reports that their conclusions rest upon the assumption – apparently fed to them by the Respondent – that DFS's present claim is brought in its capacity as a shareholder.[245] The Tribunal has, however, already considered and rejected this assertion above, noting that: a) DFS explicitly grounds its standing on its capacity as an investor, not as a shareholder; b) not all of DFS' claims arise exclusively from its shareholding in the Argentine Subsidiaries; c) the BIT authorizes qualifying investors to bring claims for damages suffered even independent of any shareholding; and d) in any event, the ICSID Convention and the BIT establish a different regime from the one prevailing

[242] Kielmanovich Statement on SPA at para 1 (emphasis added).

[243] Nissen Statement on SPA at para 2 (emphasis added).

[244] See Kielmanovich Statement on SPA at para 5, stating: "[i]f DFS brought a claim in its capacity as shareholder of the two Argentine subsidiaries and it currently (in fact, since 2002) is not a shareholder thereof, it would lack procedural standing to make its claim"; and Nissen Statement on SPA at para 22(3), stating:

> "Pursuant to Argentine law, in order to file a claim for alleged damages directly suffered by the corporation, a person who alleges having suffered said damages in his or her capacity as shareholder for the same cause that affected the corporation and who, after filing the claim, ceased to be a shareholder as a result of relinquishing his or her shares do not have any legal standing."

[245] Professor Kielmanovich, in fact, explicitly acknowledges the possibility that DFS might still retain other claims deriving from other sources of law. He notes that if DFS is attempting to bring a claim before ICSID not in its capacity as a shareholder but rather by virtue of "those rights that remained in its equity once the assignment was completed",[245] then the feasibility of the claim would "depend on the relevant jurisdiction and admissibility rules; that is, the rules allowing the submission of disputes to international arbitration proceedings by relying on the Argentina-Germany BIT and the ICSID Convention. In this report, I do not pose an opinion on the scope and interpretation of these international law instruments."

under customary international law by specifically authorizing investors to claim compensation for certain damages done to their shareholdings.[246] For the same reasons, the Respondent's renewed arguments to the effect that general international law also prohibits derivative actions by shareholders (citing *Barcelona Traction*) are once again inapposite and fall to be rejected.[247]

141. Turning then to the requirements for the effective assignment of an ICSID claim under international law, the parties have focused much attention on the so-called "continuous ownership criterion." Both the Claimant and the Respondent cite to investor-State cases in which a claimant had sold its investment to a third party after initiating the arbitration. These cases have uniformly held that the subsequent sale of an investment does not deprive an investor-State tribunal of its jurisdiction to hear the claim. Some of the decisions have suggested that this is so because the "critical date" under international law is the date upon which the arbitration is commenced.[248] The Respondent argues that this implies that where an investment is sold before the commencement of the arbitration, the tribunal will necessarily lack jurisdiction. However, as pointed out by the Claimant, none of the tribunals cited by Argentina actually addressed that question, and certain *obiter dicta* in the decisions suggest that at least some tribunals would have been prepared to accept jurisdiction even if the sale had occurred prior to the arbitration's commencement. For example, the *EnCana* tribunal held:

> "Provided loss or damage is caused to an investor by a breach of the Treaty, the cause of action is complete at that point; retention of the subsidiary (assuming it is within the investor's power to retain it) serves no purpose as a jurisdictional requirement, though it may be relevant to questions of quantum."[249]

142. Other tribunals have noted there may be good reasons not to impose a continuous ownership requirement. For example, in cases of expropriation, an investor will by definition no longer own the investment at the time of lodging the arbitration claim. Yet this should not

[246] See the Tribunal's discussion in part IV.B.3. above.

[247] Ibid.

[248] See e.g. CHRISTOPH H. SCHREUER, THE ICSID CONVENTION, A COMMENTARY (2009), at p. 92, section 36, stating:

> "Apart from specific rules about critical dates, the date of the commencement of the proceedings is decisive. It is an accepted principle of international adjudication that jurisdiction will be determined by reference to the date on which judicial proceedings are instituted. This means that on that date all jurisdictional requirements must be met. It also means that events taking place after that date will not affect jurisdiction."

[249] *EnCana Corporation v. Ecuador*, Award, LCIA Case No. UN3481, ILC 91 (3 February 2006), para 131.

preclude the investor from obtaining the compensation due under the BIT.[250] Moreover, to impose a continuous ownership requirement may defeat the ends of justice in cases where the sale of the investment was forced – e.g. under domestic bankruptcy laws, where the bankruptcy itself may have been caused by some act of the respondent state in violation of the BIT.

143. To this Tribunal's knowledge, only the *Loewen* tribunal has actually declined jurisdiction on a parallel (though not identical) ground. In that case, a NAFTA tribunal found that it lacked jurisdiction on the basis that the investor failed to maintain a continuous nationality after a cross-border bankruptcy proceeding forced the investor to undergo a corporate re-organization which changed the investor's nationality from Canadian to U.S.[251] But the *Loewen* tribunal's imposition of this continuous nationality requirement has been criticized from many quarters.[252] As one commentator noted:

> "Indeed, in 2000 the International Law Commission's rapporteur on diplomatic protection concluded that there was no rule of customary international law with respect to continuous nationality because opinions and practice as to the range of dates on which a claimant must have the requisite nationality had varied so much."[253]

144. Of course, there is no problem with continuous nationality in the present case, since both DFS and its Parent Company have remained German corporations throughout the history of the present proceedings. But similar arguments can be made against the imposition of the continuous ownership requirement proposed by the Respondent here. As the large and thriving global market for distressed debt attests, most jurisdictions allow for legal claims to be either sold along with or reserved separately from the underlying assets from which they are derived. The reason is that such severability greatly facilitates and speeds the productive re-employment of assets in

[250] See *Mondev Int'l Ltd v. United States*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2001) at para 91, finding that the international protection of investment should not "be overshadowed by technical questions of the application of local property laws and the classification of local property interests affected by foreclosure or other action subsequent to the failure of the investment."

[251] *The Loewen Group Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 June 2003), at paras 225-238.

[252] See e.g. EMMANUEL GAILLARD, LA JURISPRUDENCE DU CIRDI 788 (2004); Maurice Mendelson, *The Runaway Train: The "Continuous Nationality" Rule from the Panavezys-Saldutiskis Railway case to Loewen*, *in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILTATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW (Todd Weiler ed., 2005); Noah Rubins, Loewen v. United States: *The Burial of an Investor-State Arbitration Claim*, 21 ARB. INT'L 1 (2005); Jan Paulsson, *Continuous Nationality in Loewen*, 20 ARB. INT'L 213 (2004).

[253] Andrea K. Bjorkland, "The Emerging Civilization of Investment Arbitration", 113 PENN STATE L. REV 169 (2009) at p. 1280 (citing International Law Commission, Report to the International Law Commission on Diplomatic Protection, A/CN.4/506/Add.1 (April 20, 2000)).

other ventures. The Respondent has pointed to no rule of general or customary international law which would prohibit a similar result from obtaining for ICSID claims. Indeed, the rationale for recognizing the severability of a damages claim from the underlying asset may be even stronger in the case of ICSID claims, since a strong argument can be made that the ICSID Convention and many BITs accord standing only to the original investor and not to any subsequent would-be purchasers of the underlying investment.[254]

145. The better view would seem to be that ICSID claims are at least in principle separable from their underlying investments. The Tribunal therefore rejects the Respondent's contention that the Claimant's ICSID claims (or at least those connected with the shareholding) were necessarily and automatically transferred along with the shares by operation of law. Rather, the Tribunal finds that it should accord standing to any qualifying investor under the relevant treaty texts who suffered damages as a result of the allegedly offending governmental measures at the time that those measures were taken – provided that the investor did not otherwise relinquish its right to bring an ICSID claim.

146. The next question to address is then whether the right to bring an ICSID claim was in fact relinquished by the Claimant in favor of its Parent Company on the facts of the present case. As noted above, the disputing parties disagree as to whether the SPA's use of the phrase "any other rights pertaining to the Sold Shares for all of the Company's profits" indicates that the right to bring an ICSID claim was intended to be transferred along with the shares. This is a question of interpretation, and in interpretational matters, international law typically defers to the intentions of the authors of the instrument in question.[255] As stated by the tribunal in *Sapphire v. National Iranian Oil Company*, "[i]t is a fundamental principle of law, which is constantly proclaimed by international courts, that contractual undertakings must be respected. The rule *pacta sunt servanda* is the basis of every contractual relationship."[256] It is for this reason that international law also respects the choice of law clauses stipulated by parties to international contracts. On the facts, the Claimant and its Parent Company chose German law to govern the interpretation of their Share Purchase Agreement, and both the Claimant and the Respondent in the present

[254] This follows from the nationality requirement of the ICSID Convention and most BITs, as well as from the fact that most BITs afford standing to bring ICSID claims only to "nationals" or "companies" of the other State Party which made an investment in the Respondent State prior to the advent of the facts or circumstances giving rise to the dispute.

[255] Exceptions may exist in certain circumstances, for example where the parties' intentions violate a peremptory norm of international law, but no such exceptions arise on the present facts.

[256] *Sapphire v. National Iranian Oil Co.*, Arbitral Award (15 March 1963), I.L.R. 1967, 136 at 181.

proceedings have accepted the validity of this designation. The Tribunal will therefore apply German law in considering the meaning to be ascribed to the disputed phrase under the SPA.

c) Was the ICSID claim effectively assigned under German law?

147. As summarized above, the Claimant has submitted extensive arguments concerning the proper interpretation of the SPA under German law. In particular, Dr. Wolfgang Bauder, Senior Counsel of Daimler AG – who is a German lawyer with more than 25 years of experience and was the individual responsible for drafting the SPA – has testified:

> "Under German law, a right or claim owned by a shareholder against third parties is not inherent in the share ownership, and cannot be and is not transferred by operation of law. Instead, it must be explicitly delineated as being transferred in the agreement. Consistent with German law in this regard, the Share Purchase Agreement did not explicitly list or delineate any potential claim held by Daimler Financial against the Argentine Republic as one of the rights transferred and assigned by the parties."[257]

This position is commensurate with the above findings of the Tribunal under international law, and the Respondent has not attempted to rebut Dr. Bauder's characterization of German law on this point.

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148. As to whether or not the ICSID claim was encompassed by the phrase "any other rights pertaining to the Sold Shares," Dr. Bauder's statement stresses the following principles of German law on the interpretation of contracts:

i) § 157 of the German Civil Code specifies that "[c]ontracts are to be interpreted as required by good faith, taking customary practice into consideration."[258]

ii) § 133 of the German Civil Code "gives particular weight to ascertaining the will of the parties" and "provides that the 'true intention' or 'true will' (the 'wirkliche Wille') of the parties should prevail over the literal meaning of a declaration."[259]

iii) While "both the subjective intent – 'innere Wille' – and objective factors – 'bekundete Wille' – must be considered,"[260] "[t]he focus in German law is so strongly on the parties' subjective intent that the legal maxim *falsa demostratio non nocet* ('an erroneous designation does not vitiate') is at times applied by the German courts. If the subjective intent of the parties differs from the express agreement, the court will give effect to the subjective intent."[261]

[257] Statement of Wolfgang Bauder on SPA at para 5(b).

[258] Ibid at para 16 (Dr. Bauder's translation).

[259] Ibid at para 15.

[260] Ibid at para 16.

Dr. Bauder then devotes five pages of his testimony to explaining how the factual evidence submitted by the Claimant and recorded by the Tribunal in paragraph 126 above proves that neither DFS nor DCAG intended to transfer the ICSID claim to the Parent Company.

149. This interpretation is likewise endorsed by Gösta Dobler, Senior Counsel of DFS, who executed the SPA at the time of its conclusion on behalf of the Claimant.[262] It is further affirmed by Thomas Gruber, Director of Accounting and Financial Reporting for DFS, who – in explaining how the contracting parties arrived at the SPA's negative purchase price for the shares – categorically states: "I am certain that the calculation of the negative purchase price did not include any sums attributable to the value of any potential legal claims, including the claims asserted in this arbitration."[263] And lest there be any doubt, the SPA contracting parties have now taken the extra step of reaffirming their intent by concluding an Interpretive Agreement and Understanding which "confirms that the Contracting Parties did not intend to, nor did they, transfer the claims at issue in this proceeding."[264] The Claimant submits that German law authorizes this sort of subsequent interpretive confirmation between contracting parties[265] and notes that "[a]rticle 8(3) of the Share Purchase Agreement contemplates the possibility of such a supplemental agreement and specifically authorizes it, provided it is in writing."[266]

150. Again, the Respondent does not call into question the Claimant's characterization of German law on any of these points, and the Tribunal's own analysis of the relevant provisions of the German Civil Code has unearthed no major flaws in the Claimant's analysis. Nor has the Respondent attempted to directly rebut the Claimant's factual evidence or the testimony of its witnesses. Instead, the Respondent questions the probative value of the Claimant's evidence and urges the Tribunal to discount it on the grounds that it does not derive from neutral sources and was prepared solely for the purposes of this arbitration.

[261] Ibid at para 17.

[262] Statement of Gösta Dobler on SPA at para 6.

[263] Statement of Thomas Gruber on SPA at para 9.

[264] Claimant's Post-Hearing SPA Submission at para 114.

[265] Ibid at para 70.

[266] Ibid at para 71.

151. The Tribunal notes, however, that of the items of evidence submitted by the Claimant in corroboration of its assertion that the SPA contracting parties did not intend to transfer the ICSID claim to DCAG, items i) and ii) listed in paragraph 126 above were contemporaneous to the conclusion of the SPA while items iii) through v) were prepared in the normal course of business operations. These items therefore do have probative value and the Tribunal finds them to be highly persuasive indicators of the SPA contracting parties' intent. In particular, by instituting the present arbitration, the Claimant has signaled that it expects the value of its claim to be positive and in fact rather substantial.[267] It would be counter-intuitive for the Parent Company to "pay" a €250 million negative price to the Claimant for the transferred shares while acquiring a valuable claim in exchange.

152. The Claimant's sixth item of evidence concerns the Parent Company's abstention from participation in the present arbitration proceedings. This decision, obviously taken in advance of the Claimant's filing of the ICSID claim, would also make no sense if indeed the SPA contracting parties had intended to transfer the claim to the Parent Company. Finally, with respect to item vii) of the Claimant's evidence, it is undeniable that the Interpretive Declaration was executed by the SPA contracting parties in response to developments in this arbitration. However, given that the Declaration is nonetheless authoritative and binding upon DFS and its Parent Company under applicable German legal principles, the Tribunal would be ill-advised to disregard it entirely. At the very least, it constitutes a relevant circumstantial confirmation of the SPA contracting parties' original intentions.

153. There remains one final evidentiary matter to address. Argentina has pointed to certain email exchanges between DFS and DCAG tending to indicate that the two companies did not even become aware of the possibility of filing an ICSID claim until sometime in 2004 – that is, two years after the conclusion of the SPA. In the Tribunal's view, this can only serve to confirm that the SPA contracting parties did not intend to include the ICSID claim among the rights to be transferred. One obviously cannot intend to transfer a right whose existence is unknown. The Tribunal has already found that the claim was not transferred by operation of law, whether German law or international law. And even if the Tribunal could accept Argentina's assertion that the ICSID claim *prima facie* falls within the scope of the phrase "any other rights pertaining to the Sold Shares", the large negative purchase price set for the shares would have to be read as

[267] The Claimant's damages estimates under various different theories of liability range anywhere from $US 45.7 million to €272.7 million in 2002 currency, not including relevant interest up to the present date.

an implied reservation of the ICSID claim in favor of DFS. In short, all of the available evidence points to the conclusion that DFS did not relinquish its right to bring the ICSID claim upon execution of the SPA.

d) Conclusions

154. The foregoing analysis shows that DFS enjoys standing as a qualifying investor to bring the present ICSID claim for damages sustained during the time when it owned the investment notwithstanding the subsequent transfer of its shareholding in the Argentine Subsidiary to DCAG. As suggested by the *EnCana* tribunal, in the event that the evidence indicates that DFS has already been compensated for its losses in some fashion, the Tribunal can address this at the quantum stage of the proceedings. The fact that DCAG, as the Parent Company and 100% owner of DFS, will be the ultimate beneficiary of any recovery by DFS is not relevant to the question of the Tribunal's jurisdiction to hear DFS' present claim.

155. The Tribunal's jurisdiction is likewise unaffected by the fact that certain investor-State jurisprudence suggests that DCAG may – as the indirect owner of the Argentine Subsidiary at the time of the allegedly offending governmental measures – also enjoy an independent right to bring its own claim for the same damages. The present Tribunal is not called upon to decide whether the German-Argentine BIT authorizes claims by indirect investors and it expresses no opinion on the matter. It notes, however, that in the event that some future tribunal should find itself faced with a parallel claim by DCAG, that tribunal would have ample legal tools at its disposal to prevent any double recovery against the Respondent arising out of the same set of facts and circumstances as the present claim.

156. For all of these reasons, the Respondent's fourth objection to jurisdiction falls to be rejected.

VI. FIFTH OBJECTION TO JURISDICTION: THE MOST-FAVORED NATION CLAUSE DOES NOT AUTHORIZE THE CLAIMANT TO BYPASS THE REQUIREMENTS OF ARTICLES 10(2) AND 10(3) OF THE TREATY

157. Not surprisingly, this objection has given rise to the most heated debate between the disputing parties. Both parties have filed voluminous submissions concerning the Treaty's MFN clauses and their relation to: a) the dispute settlement provisions of the German-Argentine BIT ("the Basic Treaty"), and b) the dispute settlement provisions of other treaties – in particular the Chilean-Argentine BIT ("the Comparator Treaty") invoked by the Claimant. In support of their

respective positions, both parties have extensively discussed numerous investor-State arbitral awards, scholarly commentary, and the decisions of other international courts and tribunals. A complete recitation of all of the parties' arguments is, however, unnecessary and would overly burden this award. The Tribunal instead finds it convenient to enumerate in outline form only the parties' principal submissions. The Tribunal will refer to certain of the cited legal opinions in its below considerations to the extent that it finds these relevant to its analysis.

A. Position of the Respondent

158. Argentina denies that the Basic Treaty's MFN clauses allow this Tribunal to base its jurisdiction upon the Claimant's satisfaction of the pre-arbitral requirements of article X of the Comparator Treaty rather than those of Article 10 of the Basic Treaty.[268] Its principal submissions in support of this position are as follows:

a) The Basic Treaty requires the Claimant, before resorting to an arbitral tribunal, to submit the dispute to the competent Argentine courts for a period of 18-months, which the Claimant has not done.[269] Moreover:
   i) This requirement constitutes a necessary condition of Argentina's consent to arbitration;[270] and
   ii) The requirement is not excessively formalistic.[271]

b) The MFN clauses of the German-Argentine BIT cannot be applied to the BIT's provisions on dispute resolution because to do so would:
   i) Conflict with the language of the MFN clauses themselves;[272]
   ii) Run counter to the demonstrated practice of the Argentine Republic;[273]
   iii) Violate the *ejusdem generis* principle;[274] and
   iv) Violate the principle of effectiveness (*effet utile*).[275]

[268] Respondent's Memorial on Jurisdiction, Part IV.A.

[269] Ibid at paras 7-13.

[270] Ibid at paras 8,9, & 11; Respondent's Reply on Jurisdiction, paras 70-75.

[271] Respondent's Memorial on Jurisdiction, para 12; Respondent's Reply on Jurisdiction, paras 54-69.

[272] Respondent's Reply on Jurisdiction, paras 5-17.

[273] Ibid at paras 18-28.

[274] Respondent's Memorial on Jurisdiction, part IV.A.2.a); Respondent's Reply on Jurisdiction, paras 47-50.

[275] Respondent's Memorial on Jurisdiction, part IV.A.2.b); Respondent's Reply on Jurisdiction, paras 51-52.

c) "Case law" confirms that MFN clauses do not apply to the Basic Treaty's dispute resolution provisions.[276] In particular:
   i) The decisions in *Salini v. Jordan*, *Plama v. Bulgaria*, *Telenor v. Hungary*, and *Wintershall v. Argentina* support Argentina's position;[277]
   ii) Cases such as *Maffezini* and *Gas Natural* differ from the one under consideration and should be distinguished accordingly,[278] or in the alternative, they should not be followed.[279]

B. Position of the Claimant

159. The Claimant maintains that no prior recourse to the domestic Argentine courts was necessary, because this requirement has been superseded by operation of the Basic Treaty's MFN clauses.[280] In support of this position, the Claimant submits the following arguments:

a) The language of the Treaty shows that the Contracting State Parties intended for the MFN provisions to apply to dispute resolution.[281] In particular:
   i) The Treaty's context, including its title and Preamble, support a broad reading of the MFN clauses.[282]
   ii) The ordinary meaning of the Treaty's terms support a broad application of the MFN clauses.[283]
   iii) The Contracting State Parties did not limit the definition of "activities in connection with investments" so as to exclude dispute resolution.[284]
   iv) The additional MFN provision in Article 4 of the Treaty does not limit the broad scope of the MFN provision in Article 3.[285]

[276] Respondent's Memorial on Jurisdiction, part IV.A.3.

[277] Ibid. Argentina raised the *Wintershall* decision, which was issued after the parties' jurisdictional submissions had already been made, on the first day of hearings. See Hearing Transcripts, day 1, pp. 148ff.

[278] Respondent's Memorial on Jurisdiction, paras 42-49.

[279] Respondent's Reply on Jurisdiction, Part II.A.2.

[280] Claimant's Memorial, part III.E.

[281] Claimant's Counter-Memorial on Jurisdiction, Point 1.A.

[282] Claimant's Rejoinder on Jurisdiction, Point I.A.1.

[283] Ibid at Point I.A.2.

[284] Ibid at Point I.A.3.

[285] Ibid at Point I.A.4.

b) Access to international dispute resolution is an essential treaty protection and is encompassed by a treaty's MFN provisions unless explicitly excluded.[286]

c) Access to international dispute resolution following a 6-month negotiating period is more favorable than the requirement to submit the dispute to the domestic courts for 18-months before proceeding to arbitration.[287]

d) The cases cited by Argentina are inapposite because they dealt with factual situations distinguishable from the present one.[288]

   i) On the contrary, investment tribunals have "uniformly" upheld the application of MFN provisions to domestic dispute settlement requirements of arbitration clauses.[289]

e) The *ejusdem generis*[290] and *effet utile*[291] principles both support the application of the MFN clause to the Treaty's dispute resolution provisions.

f) Argentina's treaty practice shows it has no overarching policy to require domestic dispute resolution and therefore the Basic Treaty's MFN provisions should be read to allow the domestic courts requirement to be superseded.[292]

g) The Basic Treaty's 18-month domestic courts provision is a matter of procedure, the strict application of which is unnecessary and would be excessively formalistic.[293] In particular:

   i) The provision is in essence a waiting period and is not a true exhaustion of domestic remedies requirement;[294]

   ii) Mere waiting periods have been repeatedly waived by other tribunals;[295]

[286] Claimant's Memorial on Jurisdiction, Point I.B.

[287] Claimant's Memorial, para 235.

[288] Claimant's Counter-Memorial on Jurisdiction, Point I.C.

[289] Claimant's Rejoinder on Jurisdiction, Point I.C. The Tribunal notes that this submission was lodged prior to the publication of the *Wintershall* decision, which found to the contrary.

[290] Claimant's Counter-Memorial on Jurisdiction, Point I.D.

[291] Ibid at Point I.E.

[292] Claimant's Rejoinder on Jurisdiction, Point I.B.

[293] Claimant's Counter-Memorial on Jurisdiction, Point I.F. This argument is further developed in the Claimant's Rejoinder on Jurisdiction, Point I.E.

[294] Claimant's Counter-Memorial on Jurisdiction, para 96.

[295] Ibid at paras 97-102.

   iii) Despite Argentina's assertions to the contrary, it is "virtually impossible that the dispute would be resolved in or outside Argentina within 18 months to the satisfaction of both parties."[296]

h) Requiring the Claimant to satisfy the 18-month domestic courts provision would run contrary to the Treaty's purpose of promoting favorable conditions for investment[297] and would be futile and lead to a situation which is manifestly absurd,[298] because:

   i) It would subject the Claimant to costs and delays not faced by other investors;[299]

   ii) It would lead to major, nonsensical inefficiencies in the dispute resolution process;[300] and

   iii) In any event, enforcing the provision on the facts of this case would be unjust on account of Argentina's efforts to impede domestic resolution.[301]

C. Considerations of the Tribunal

1. Tribunal's Interpretive Approach under Public International Law

160. The Tribunal is keenly aware that the interpretation and application of MFN clauses has proven to be one of the most controversial issues not only between the disputing parties in this case but also within the world of international investment law more generally.[302] For this reason, the Tribunal considers it prudent to preface its analysis by setting out the general interpretive approach it will apply in considering the parties' respective submissions.[303]

[296] Ibid at para 104. See also ibid at para 107.

[297] Ibid at para 105.

[298] Claimant's Rejoinder on Jurisdiction at Point I.D.

[299] Claimant's Counter-Memorial on Jurisdiction at para 105.

[300] Ibid at paras 107-108.

[301] Claimant's Rejoinder on Jurisdiction, paras 62-69.

[302] For an overview of the divided case law, see Julie A. Maupin, "MFN-based Jurisdiction in Investor-State Arbitration: Is There Any Hope for a Consistent Approach?," *Journal of International Economic Law* 14(1), 157-190 (March 2011).

[303] It will be noted that portions of the analysis contained in this section overlap with the recently issued decision in *ICS Inspection and Control Services Limited (United Kingdom) v. the Argentine Republic*, PCA Case No. 2010-9 (UNCITRAL Rules), Award on Jurisdiction (10 February 2012) [hereinafter *ICS v. Argentina*]. This is because the two tribunals shared the same President, who presided over the drafting of the two awards during the same time period and elected not to burden the parties with duplicative drafting costs in respect of certain general points of law common to both cases.

a) Interpretive principles flowing from the bilateral nature of BITs

161. The investment treaty at the heart of this case is a bilateral investment treaty. In considering its interpretation, it is essential to recall that BITs are reciprocal bilateral treaties negotiated between two sovereign State parties. The general purpose of BITs is of course primarily to protect and promote foreign investment; but it is to do so within the framework acceptable to both of the State parties. These two aspects must always be held in tension. They are the *yin* and *yang* of bilateral investment treaties and cannot be separated without doing violence to the will of the states that conclude such treaties. It is in this context that the exact wording of dispute resolution clauses plays a key role, as such clauses are one of the privileged places where the imbalances between the interests of both parties are often precisely defined as a result of the treaty's negotiation process.

162. It would be an error to start from the assumption that the bilateral and synallagmatic dimension of such treaties is of a mere rhetorical nature. In the present era of globalization and rapid economic change at the world level, a growing number of investments are indeed bi-directional, flowing not only from highly developed to developing countries but also in the opposite direction.[304] Moreover, the very essence of treaties is precisely to protect the respective sovereign international policy decisions of the State parties by means of the formality inherent in the legal nature of such instruments.

163. The Tribunal must also bear in mind the important differences between ordinary contracts and treaties. While both are based upon the will of the parties, the latter are concluded between sovereign States. In this respect, the ever-increasing number of claims based upon an alleged violation of the rules and principles of public international law as incorporated in the provisions of BITs ("treaty claims" as opposed to "contract claims") has changed the overall physiognomy of the international arbitration of investment disputes. Where a treaty claim is invoked, arbitral tribunals are called upon to interpret not merely the asymmetric contractual relationship between a sovereign state and a private foreign investor, but to adjudicate whether a sovereign state has actually respected or violated the international obligations which it accepted with regard to the

[304] For instance, in the *Maffezini* case, the investor was an Argentine citizen and the Host State was Spain, not the contrary. *Maffezini*, above note 114.

investments made by nationals of the other sovereign state party to the same treaty. Jan Paulsson very suggestively qualified this as "arbitration without privity."[305]

164. Now as international treaties, BITs constitute an exercise of sovereignty by which States strike a delicate balance among their various internal policy considerations.[306] For this reason, the Tribunal must take care not to allow any presuppositions concerning the types of international law mechanisms (including dispute resolution clauses) that may best protect and promote investment to carry it beyond the bounds of the framework agreed upon by the contracting state parties. It is for States to decide how best to protect and promote investment. The texts of the treaties they conclude are the definitive guide as to how they have chosen to do so.

165. As explained by Professor Charles de Visscher, one of the most eminent judges at the ICJ, when summarizing the jurisprudence of the Court:

> "The judge is not asked to penetrate the intimate designs of the contracting parties; he is expected to discover by the means at his disposal that part of their intentions that external signs reveal. Now the words freely chosen by the parties are par excellence or at least primarily the instrument of this externalization. This, in turn, is a security factor. The security that the treaty affords the contracting parties is measured by its capacity to withstand pressures that might be brought to promote changes. Of this fundamental contractual guarantee the text, the common work of the parties, is the essential instrument."[307]
>
> […]
>
> What the Court does not allow is that in the course of interpretation the text should be prematurely eclipsed by a teleological scrutiny that might distort its

[305] J. Paulsson, "Arbitration Without Privity," (1995) ICSID Review – Foreign Investment Law Journal 232. See also A. El-Kosheri, "ICSID Arbitration and Developing Countries", (1998) ICSID Review – Foreign Investment Law Journal 107.

[306] The International Court, as far back as the PCIJ's *Wimbledon* decision, has consistently emphasized that international treaties are exercises – and not abdications – of State sovereignty, and for this reason, the will of the contracting State parties must be respected:

> "The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty."

Case of the S.S. "Wimbledon", Judgment of 17 August 1923, Permanent Court of International Justice, Ser. A, no. 1, p. 16, 25.

[307] CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW (revised ed.), translated from the French by P.E. Corbett, (New Jersey, Princeton, 1968), p. 395.

> meaning. Such precipitate reasoning may result in sacrificing respect for the text to subjective considerations…"[308]

166. This reasoning carries equal force in the context of international arbitration – whether *ad hoc* or institutionally-based – between investors and States. International treaties must be presumed to create objective obligations among contracting State parties. The basic interpretive approach applied to such treaties should therefore remain consistent across adjudicative fora. The *Renta4* tribunal recently came to a conclusion similar to Professor De Visscher's, stating in the context of a BIT-based investor-State arbitration:

> "To choose one of the contending policy theses as the reason to read a BIT in a particular way may be presumptuous. The stakes are high and the policy decisions appertain to the State-parties to the treaties. Speculations relied upon as the basis of purposive readings of a text run the risk of encroachment upon fundamental policy determinations. The same is true when 'confirmation' of a hypothetical intention is said to be found in considerations external to the text. The duty of the Tribunal is to discover and not to create meaning."[309]

167. The present Tribunal agrees with this approach. It will therefore endeavor to ascertain the interpretation of the German-Argentine BIT that is at once most consistent with the Treaty's stated objects and purposes and most respectful of the specific framework adopted by the Contracting State Parties as their chosen means for furthering those objects and purposes. Only by satisfying both criteria can the Tribunal properly fulfil its interpretive mandate.

b) Consent as the cornerstone of all treaty commitments

168. Stepping back from the specific case of bilateral treaties, all international treaties – whether bilateral, plurilateral or multilateral – are essentially expressions of the contracting states' consent to be bound by particular legal norms. They encapsulate voluntarily accepted restraints upon the universally recognized principle of state sovereignty. Consent is therefore the cornerstone of all international treaty commitments, at least insofar as those commitments exceed

[308] Ibid at p. 396. It should be noted that the teleological method of interpretation was also soundly rejected by the International Law Commission in its drafting work concerning the law of treaties, which eventually culminated in the text of the 1969 Vienna Convention on the Law of Treaties. See ILC Commentary on Draft Article 27 of the law of treaties, Yearbook of the International Law Commission, 1966, Vol. II, Reports of the Commission to the General Assembly [hereinafter "ILC Commentary on Draft Articles on the Law of Treaties"], at pp. 220ff.

[309] *Renta4 S.V.S.A. v The Russian Federation*, Arbitration Institute of the Stockholm Chamber of Commerce, Award on Preliminary Objections to Jurisdiction (20 Mar 2009) [hereinafter "*Renta4*"], para 93 (emphasis added).

the minimum requirements of customary international law.[310] The primacy of the principle of consent runs through all types of treaty commitments entered into by states. There is no distinction between substantive treatment provisions, MFN clauses, dispute resolution clauses, or otherwise. All are equally valid and equally binding to the full extent of the contracting State parties' consent.

169. Since all international treaty commitments arise from the same source (consent) all must logically be interpreted according to the same basic interpretive principles without distinction as to the type of treaty or type of commitment. This is precisely why the International Law Commission was able to codify into a single convention – with the acceptance of an overwhelming number of the world's states – the now customary law rules on the interpretation of treaties reflected in articles 31 and 32 of the Vienna Convention.[311]

170. In this vein, several investor-State tribunals have rightly pointed out that dispute resolution clauses of BITs should be interpreted no differently than any other treaty clause.[312] This has been the prevailing position in investment arbitration at least since the first *Amco Asia* matter, wherein the tribunal held:

> "[L]ike any other convention, a convention to arbitrate is not to be construed *restrictively*, nor, as a matter of fact, *broadly or liberally*. It is to be construed in

[310] Even in the case of customary international law, it can be argued that consent, or at least the consent of a majority of the world's states, underlies all of the norms reflected in customary international law. Without such consent (as demonstrated by the combination of a sufficiently broad, lasting and consistent state practice and supported by *opinio juris*), those norms would not have evolved into customary law in the first place. The Dissenting Opinion correctly points out that the consent underlying customary international law is of an implied and not express nature. It stresses that "established rules of customary international law can bind States that never granted, explicitly or otherwise, consent to individual acts of the type that gave rise to the principles in question." (Dissenting Opinion of Charles N. Brower at note 8). Yet the existence of the persistent objector doctrine – which allows states not in agreement with an evolving customary norm to avoid becoming legally bound by it – demonstrates that consent is nevertheless fundamental to customary international law. The only major exception to the foundational nature of state consent within public international law arises in the context of peremptory norms, among which a state's submission to the jurisdiction of an international arbitral tribunal cannot be counted.

[311] Whether or not these articles reflected customary international law at the time of their drafting is of course open to debate. Even so, most scholars would concede that they have by now attained customary law status.

[312] See eg *InterAguas*, above note 113 at para 59 ("the Tribunal finds no reason for interpreting the most-favored-nation treatment clause any differently from any other clause in the Argentina-Spain BIT") and para 64 ("dispute resolution provisions are subject to interpretation like any other provisions of a treaty, neither more restrictive nor more liberal"). An identically composed tribunal made nearly identical statements in a joint award concerning two closely related matters in *AWG*, above note 113 at paras 59-60. Further examples of such statements can be found in: *Siemens*, above note 71 at para 81; and *Renta4*, above note 309, Separate Opinion of Charles N. Brower at paras 7-9.

> a way which leads to find out and to respect the common will of the parties; such a method of interpretation is but the application of the fundamental principle *pacta sunt servanda*, a principle common, indeed, to all systems of internal law and to international law."[313]

171. More recently, the prominent tribunal in *Mondev v United States* echoed this *ex ante* neutral approach, observing:

> "there is no principle either of extensive or restrictive interpretation of jurisdictional provisions in treaties. In the end the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties".[314]

Judge and President Higgins came to a similar conclusion when considering a slightly different question in her separate opinion in the *Oil Platforms* case, stating:

> "[i]t is clear from the jurisprudence of the Permanent Court and of the International Court that there is no rule that requires a restrictive interpretation of compromissory clauses. But equally, there is no evidence that the various exercises of jurisdiction by the two Courts really indicate a jurisdictional presumption in favour of the plaintiff. […] The Court has no judicial policy of being either liberal or strict in deciding the scope of compromissory clauses: they are judicial decisions like any other."[315]

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172. Indeed, as a matter of public international law, the uniform applicability of the Vienna Convention's customary law interpretive principles to all treaty clauses is beyond doubt. This truism, however, in no way diminishes the underlying requirement of state consent. In interpreting dispute resolution provisions in BITs – just as with any other treaty provision – the ultimate goal is to determine what the contracting parties actually consented to. Thus, the fact that dispute resolution clauses should be construed neither liberally nor restrictively does not authorize international tribunals to interpret such clauses in a manner which exceeds the consent

[313] *Amco Asia Corporation v. Indonesia* (*Jurisdiction*), 1 ICSID Reports 389 (1983), Award of 25 Sept. 1983 (B. Goldman, I. Foighel and E. Rubin, arbs), *reprinted in* 22 I.L.M. 351, 359 [1983] (emphasis in original) [hereinafter "*Amco I*"].

[314] *Mondev*, above note 250 at para 43 (citing *Amco I*, ibid, at p. 394 of ICSID Reports); and *Ethyl Corporation v. Canada*, UNCITRAL/NAFTA, Award on Jurisdiction (24 June 1998) [hereinafter *Ethyl*], at para. 55.

[315] *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objections, I.C.J. Reports 1996*, p. 857, para 35. It is important to note, however, that Judge Higgins was not specifically addressing whether compromissory clauses should be read more narrowly than other treaty clauses. Rather, she was arguing that the Court should make its jurisdictional findings in the same manner as its findings on the merits – namely, on a definitive (as opposed to provisional) basis.

of the contracting parties as expressed in the text. To go beyond those bounds would be to act *ultra vires*.

173. The Vienna Convention itself unequivocally emphasizes the foundational role of State consent in the law of treaties. The Convention employs the word "consent" no fewer than 62 times, including in the titles to six articles.[316] Within the Convention's interpretive prescriptions, it is well-known that article 31(1) begins by instructing interpreters to interpret a treaty "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." While the article does not explicitly mention consent, the reference to "good faith" nevertheless reinforces the duty of tribunals to limit themselves to interpretations falling within the bounds of the framework mutually agreed to by the contracting state parties. As stated by the International Law Commission in its commentary to the draft version of Article 31, the requirement of interpretation in good faith "flows directly from the rule *pacta sunt servanda*."[317]

174. General respect for State consent is also manifested by the fundamental principle of public international law according to which international courts and tribunals can only exercise jurisdiction over a State on the basis of its consent. As noted by the Permanent Court of International Justice in one of its first judgments, "[i]t is well established in international law that no State can, without its consent, be compelled to submit its disputes … either to mediation or to arbitration, or to any other kind of pacific settlement".[318]

175. This basic rule was often recalled by the International Court of Justice, as in particular in the *Ambatielos* case[319] as well as in the *Monetary Gold* case.[320] Against this background, it is not possible to presume that consent has been given by a state. Rather, the existence of consent must be established. This may be accomplished either through an express declaration of consent to an

[316] Articles 11-15, 17.

[317] ILC Commentary on Draft Articles on the Law of Treaties, above note 308 at p. 221. The Dissenting Opinion adds, and the Tribunal agrees, that the good faith principle is also "meant to encapsulate well-established principles such as *effet utile*, honesty, fairness and reasonableness in interpreting a treaty, protection of legitimate expectations [those of the Contracting State Parties, that is, and] avoidance of abuse of rights" (Dissenting Opinion of Charles N. Brower at para 7).

[318] *Status of Eastern Carelia Case*, Advisory Opinion, (1923) P.C.I.J. Series B. No. 5, p. 27.

[319] *Ambatielos case (merits : obligation to arbitrate)*, Judgment of May 19th, 1953 : I.C.J. Reports 1953, p. 10, 19 [hereinafter "*Ambatielos I*"].

[320] *Case of the monetary gold removed from Rome in 1943*, Preliminary Question, Judgment of June 15th, 1954, I.C.J. Reports 1954, p. 19, 32.

international tribunal's jurisdiction or on the basis of acts "conclusively establishing" such consent.[321] What is not permissible is to presume a state's consent by reason of the state's failure to proactively disavow the tribunal's jurisdiction. Non-consent is the default rule; consent is the exception. Establishing consent therefore requires affirmative evidence. But the impossibility of basing a state's consent on a mere presumption should not be taken as a "strict" or "restrictive" approach in terms of interpretation of dispute resolution clauses. It is simply the result of respect for the rule according to which state consent is the incontrovertible requisite for any kind of international settlement procedure. This was already established by the Permanent Court of International Justice in the famous *Lotus* case of 1927[322] and further recalled by the ICJ in the case of the *Aerial Incident of July 27, 1955*[323] as well as in the *East Timor* case of 1995.[324] What is true of the very existence of consent to have recourse to a specific international dispute resolution mechanism is also true as far as the scope of this consent is concerned.[325]

176. On the basis of the ICJ's *jurisprudence constante* mentioned above, it must be clear that states may elect whatever means of settlement of disputes relating to international investment they so choose. They may also perfectly well decide in the framework of a BIT to extend the bearing of a most-favored nation (MFN) clause to the international settlement of their disputes

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[321] See *Rights of Minorities in Upper Silesia (Minority Schools)*, Judgment, 1928 PCIJ (ser. A) No. 15 (26 April), p. 24, stating: "[T]here seems to be no doubt that the consent of a State to the submission of a dispute to the Court may not only result from an express declaration, but may also be inferred from acts conclusively establishing it." (Emphasis added.) Note 34 of the Dissenting Opinion cites this passage with approval. The Tribunal notes that the *Noble Energy* decision, also cited in note 34 of the Dissenting Opinion, is not to the contrary, finding as it did that "consent is manifest from a number of elements which the Tribunal will review…". *Noble Energy, Inc. and Machala Power Cia Ltd. v. Ecuador and Consejo Nacional de Electricidad*, ICSID Case No ARB/05/12, Decision on Jurisdiction (5 May 2008), para 194 (emphasis added).

[322] *Case of the S.S. Lotus*, P.C.I.J. Series A. No. 10 (7 Sep 1927), p. 18.

[323] *Case concerning the Aerial Incident of July 27th, 1955 (Israel v. Bulgaria)*, Preliminary Objections, Judgment of May 26th, 1959: I.C.J. Reports 1959, p. 127, at 142.

[324] *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 90, at 102, para 29.

[325] The Dissenting Opinion attempts to draw a neat dividing line between the establishment of consent to be bound by a specific dispute resolution mechanism and the scope of that consent, suggesting that the former can be founded on purely "formal indicia" such as the fact of signature and ratification of a treaty, while the latter is a matter of textual interpretation (Dissenting Opinion at n. 15). This distinction is a red herring. If the interpretive analysis reveals that the scope of Argentina's consent to submit to the jurisdiction of an international arbitral tribunal does not extend to the matter at hand, it is difficult to understand in what sense the State's consent to submit to that jurisdiction will have nevertheless been "established" on the basis of the State's mere signature and ratification of the Treaty. The relevant question is not whether the Treaty was ratified – which it was – but what precisely the States consented to in ratifying the Treaty. See e.g. *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 177, at paras 65ff (finding it necessary to determine the "extent of the consent given by the Parties to the Court's jurisdiction").

relating to investments.[326] But this choice cannot be presumed or artificially constructed by the arbitrator; it can only result from the demonstrated expression of the states' will.

177. In addressing the different issues raised by the disputing parties in the present case, the main task of the Tribunal is therefore to identify the true will of the Federal Republic of Germany and the Republic of Argentina as it was stated in the 1991 Treaty which they agreed upon for the "promotion and reciprocal protection of investments". In particular, the Tribunal must determine whether the State Parties, in concluding the German-Argentine BIT, intended to submit to the jurisdiction of an international arbitral tribunal in circumstances wherein the investor has satisfied the procedural requirements for international dispute resolution under a Comparator Treaty but has not fully complied with the investor-State dispute resolution process laid down in the Basic Treaty.

178. Following the order of arguments made respectively by Argentina and by the Claimant, the Tribunal will in turn address the formulation and content of Article 10, which deals with the international settlement of investor-State disputes, and of Articles 3 and 4, which set out the most-favored nation clauses binding upon the two State Parties. The meaning and effect of each of these articles will be examined in accordance with Articles 31 and 32 of the Vienna Convention. That is, the interpretation of each article will be conducted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[327] The Tribunal will also look to supplementary means of interpretation as appropriate in accordance with Article 32 in order to "confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."[328]

[326] This appears to have been done by the United Kingdom in some of its BITs. See eg Article 3(3) of the Agreement Between the United Kingdom of Great Britain and Northern Ireland and Bosnia and Herzegovina for the Promotion and Protection of Investments, signed 2 Oct 2002, which stipulates: "For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above [MFN treatment] shall apply to the provisions of Articles 1 to 11 of this Agreement."

[327] Vienna Convention on the Law of Treaties, art. 31(1).

[328] Vienna Convention on the Law of Treaties, art. 32.

2. *Analysis of the Dispute Resolution Clause in the German-Argentine BIT*

a) Mandatory and sequential nature of the Treaty's investor-State dispute resolution provisions

179. Article 10 of the BIT regulates the settlement of disputes between foreign investors and Host States arising under the Treaty. Article 10 provides:

> (1) "Disputes which arise between a Contracting Party and a national or company of the other Contracting Party concerning an investment under the Treaty, shall, to the extent possible, be settled amicably.
>
> (2) If a dispute *referred to in paragraph 1* cannot be settled within six months from the date either of the parties to the dispute formally announced it, it shall be referred upon the request of either party to the dispute to the competent courts of the Contracting Party in whose territory the investment was made.
>
> (3) Under either of the circumstances referred to below, the dispute may be submitted to an international arbitral tribunal:
>
> (a) at the request of a party to the dispute if, within a period of 18 months of initiation of the judicial proceeding *in accordance with paragraph 2*, the tribunal has not rendered a final decision or if such a decision has been rendered but the dispute between the parties continues;
>
> (b) if both parties have so agreed.
>
> (4) Unless otherwise agreed between the parties to the dispute, *in the instances outlined in paragraph 3* of this Article, disputes between the parties shall either be presented for arbitration in connection with the March 18, 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States or to an ad hoc tribunal established under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).
>
> If within three months of a party to the dispute instituting an arbitration proceeding no agreement has been arrived at, and providing both Contracting Parties are party to the March 18, 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, the dispute shall be subject to an arbitration proceeding under the said convention. Otherwise, the dispute shall be referred to the ad hoc tribunal mentioned above.
>
> (5) The arbitral tribunal shall arrive at its decisions on the basis of this Treaty and, if applicable, other agreements made between the parties, the internal law of the Contracting Party in whose territory the investment was made – including the rules of international private law – and general principles of international law.

> (6) The arbitral decision shall be binding and shall be enforced in accordance with national law."[329]

180. Three observations are immediately evident from this recitation. First, the article phrases its dispute resolution process in mandatory terms. The repeated use of the word "shall", which faithfully reflects similar mandatory language used in both the Spanish and German original versions of the text, indicates that the process laid down in Article 10 is of an obligatory and not an optional character.

181. Among other obligations, the disputing parties shall attempt amicable settlement, failing which the dispute shall be submitted to the domestic courts for at least 18 months. If the matter proceeds to international arbitration, it shall be submitted to either an ICSID or UNICTRAL tribunal. If there is no agreement between the two disputing parties, it shall be submitted to an ICSID tribunal if both States are parties to the Convention; otherwise it shall be submitted to an *ad hoc* UNCITRAL tribunal. This language makes clear that the disputing parties' dispute resolution options are tightly circumscribed under the Treaty. The parties shall – not may, but shall – comply with the provisions as set down. As noted by the *Wintershall* tribunal, "[t]he word 'shall' in treaty terminology means that what is provided for is *legally binding*."[330]

182. Second, by ordering the basic steps of the dispute resolution process into four discrete paragraphs (paras 1-4) and imbuing each step with a mandatory character, Article 10 makes clear that the Contracting State Parties intended for the steps to follow one another in sequential fashion. Article 10 does not provide a menu of dispute settlement options available to disputing parties on an *a la carte* basis. Rather, it provides a specific sequential process whose order must be strictly observed. This is confirmed by the fact that each subsequent step refers explicitly back to the prior step. Thus, paragraph 2 applies only to "a dispute referred to in paragraph 1"; paragraph 3(a) comes into play only after fulfilment of the circumstances mentioned in paragraph 2, and paragraph 4 operates only "in the instances outlined in paragraph 3" of the article. The intention of the Contracting Parties to make each step in the dispute settlement process contingent upon the fulfilment of the prior step could not be clearer.[331]

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[329] Disputing Parties' agreed English translation of the German-Argentine BIT (emphasis added).

[330] *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 Dec 2008) [hereinafter "*Wintershall*"], para 119 (emphasis in original).

[331] See ibid at paras 121-122.

183. Thirdly, the "if-then" structure of paragraph 3 underscores that this mandatory and sequential process applies also in the case of international arbitration. That is, a dispute may be submitted to international arbitration only if: a) it has already been submitted to the domestic courts for 18-months and no final decision has been rendered or the dispute otherwise continues after that time, or b) the disputing parties so agree. The paragraph lists these two circumstances and only these two circumstances. There is no mention of possible alternate scenarios under which international arbitration against the Host States may be commenced. The paragraph does not employ expansive phrases such as "*inter alia*" or "in circumstances including, but not limited to, the following… ." The clear implication is that satisfaction of one of the two stipulated scenarios is a pre-requisite to commencing international arbitration.

b) Does the 18-month domestic courts requirement constitute a condition precedent to Argentina's consent to arbitrate or merely a procedural directive or admissibility requirement?

184. The Claimant argues that the German-Argentine BIT's 18-month domestic courts requirement constitutes a mere procedural directive and not a true jurisdictional pre-requisite. In support of this contention, it cites several investor-State cases wherein tribunals found they had jurisdiction notwithstanding the claimants' non-satisfaction of waiting periods prescribed by certain BITs. It quotes, for example, the *SGS v. Pakistan* tribunal, which held:

> "Tribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature. Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction. … Finally, it does not appear consistent with the need for orderly and cost-effective procedure to halt this arbitration at this juncture and require the Claimant first to consult with the Respondent before re-submitting the Claimant's BIT claims to this Tribunal."[332]

185. The Claimant highlights five other cases in which waiting periods were waived by investor-State tribunals.[333] It asserts that the German-Argentine BIT's 18-month domestic courts provision is "tantamount to a waiting or cooling off period",[334] because "it is virtually impossible

[332] *SGS v. Pakistan*, above note 69 at para 184 (quoted in Claimant's Counter-Memorial on Jurisdiction, para 101).

[333] Claimant's Counter-Memorial on Jurisdiction, paras 98-102.

[334] Ibid at para 104.

that the dispute would be resolved in or outside Argentina within 18 months to the satisfaction of both parties."[335]

186. The Claimant however overlooks the fact that, in *SGS v. Pakistan*, the respondent government had shown no interest in entering into negotiations with the claimant during the long period that had elapsed prior to the registration of the BIT claim. Moreover, the tribunal noted, the Government of Pakistan had no incentive to do so, since the Supreme Court of Pakistan had already issued a binding decision adverse to the claimant's position.[336] The tribunal was therefore of the opinion that requiring the claimant to observe any further negotiation period would have been futile under the circumstances.

187. Likewise, in each of the five other cases cited by the Claimant, the tribunals allowed claimants to skip prescribed waiting periods not as a general principle but rather on the basis of the peculiar factual circumstances of each case.[337] In each and every case, the tribunals stressed that the prescribed waiting periods had, in any event, passed in the interim.[338] It must be noted also that not all investor-State tribunals have agreed that waiting periods may be treated as procedural, rather than jurisdictional, provisions. In *Enron v. Argentina*, the tribunal found that the 6-month waiting period had been satisfied on the facts. But it added, in *obiter dictum*:

> "the conclusion reached is not because the six-month negotiation period could be a procedural and not a jurisdictional requirement as has been argued by the Claimants and affirmed by other tribunals. Such requirement is in the view of

[335] Ibid.

[336] *SGS v. Pakistan*, above note 69 at para 107.

[337] See e.g. *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award (3 Sep 2001), paras 187-91 (waiving waiting period "in the circumstances of this case" because the respondent had failed to accept the claimant's invitation to enter into negotiations and had in fact not responded in any manner to the claimant's original notice of dispute prior to the filing of the request for arbitration); *Bayinder Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 Nov 2005), paras 97-102 (finding government had sufficient actual notice of the dispute and numerous opportunities to engage in negotiations, which it declined to do); *Link-Trading Joint Stock Company v. Moldova*, UNCITRAL, Award on Jurisdiction (16 Feb 2001), pp. 5-6 (noting respondent's refusal to respond to claimant's complaints and fact that more than a year had passed since registration of arbitration without any settlement); *Ethyl*, above note 314 at paras 84-85 (evidence suggested no negotiations were possible and no purpose would be served by requiring claimant to wait, since 6-month waiting period had in any event lapsed in the meantime); *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Jurisdiction (29 June 1999), 41 ILM 881, 885-86 (2002) (respondent had, in any event, withdrawn the objection as to the 3-month waiting period on the grounds that it could have been easily rectified).

[338] See generally ibid.

> the Tribunal very much a jurisdictional one. A failure to comply with that requirement would result in a determination of lack of jurisdiction."[339]

188. Thus, with respect to negotiation periods, the prevailing line of reasoning appears to rest upon two considerations: 1) the futility of the provision in the circumstances of the case, and 2) whether the period has in any event passed.[340]

189. In the present case, it is certainly true that more than 18 months have passed since the institution of the proceedings. Moreover, it is not clear whether a further waiting period would lead to a voluntary settlement between the parties. However, these considerations are not in dispute. What is in dispute is not a mere waiting period but a requirement that the dispute be submitted to the domestic Argentine courts for potential judicial resolution for a period of at least 18 months. The above reasoning must therefore be applied not by rote but rather *mutatis mutandis*.

190. Analogizing the logic of the negotiation period analysis to the case of an 18-month domestic courts submission requirement (as the Claimant has urged the Tribunal to do), the relevant questions become: 1) whether the dispute has, at least in the interim, been litigated for 18 months before the Argentine domestic courts, and 2) whether it would be futile to require the Claimant to do so under the circumstances – as would be the case, for example, if Argentine law permitted no remedy for the Claimant's claims in the domestic courts.[341]

[339] *Enron Corporation and Ponderosa Assets L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, (14 Jan 2004), para 88. At least two other ICSID tribunals have recently taken a similar position. See *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (2 June 2010), paras 310-318; and *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction (15 December 2010), paras 140-157.

[340] Professor Schreuer, upon whom the Claimant also relies, concludes:

> "It would seem that the decisive question is whether or not there was a promising opportunity for a settlement. There is little point in declining jurisdiction and sending the parties back to the negotiating table if negotiations are obviously futile. Negotiations remain possible while the arbitration proceedings are pending. Even if the institution of arbitration was premature, the waiting period will often have expired by the time a decision on jurisdiction is rendered. Under these circumstances, compelling the claimant to start the proceedings anew would be uneconomical. A better way to deal with non-compliance with a waiting period is a suspension of proceedings to allow additional time for negotiations if these appear promising."

SCHREUER – 2009, above n. 92 at p. 239.

[341] As should be evident from this analysis, the Tribunal agrees with Judge Brower's objection, in para 14 of his Dissenting Opinion, that the analogy between the 18-months proviso and "cooling-off" or "good

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191. On the facts, the first question must be answered in the negative. The second cannot, based upon the evidence submitted to the Tribunal, be answered in the affirmative. The Claimant has not demonstrated the futility of resorting to the Argentine courts in the circumstances of this case. While the Claimant submitted an expert opinion suggesting that it would have been "impossible" for the Argentine courts to deliver a final judgment on the Claimant's claims within 18 months,[342] the Respondent rebutted this opinion by citing examples of cases which the Argentine Courts have indeed resolved in 18 months or less.[343] It may be that the delimitation of an 18-month period, after which claimants would be free to proceed instead to international arbitration, would induce the domestic Argentine courts to ensure the prompt and fair adjudication of investment disputes. One can only speculate in the present instance, as the Argentine courts were never presented with DFS' claims. In any event, nothing in either the BIT or in any other source of applicable law guarantees the Claimant the right to have its claims finally resolved within 18 months.[344] The point of Article 10(2) of the German-Argentine BIT is to afford the domestic courts an opportunity to attempt to resolve investment claims in a prompt manner, not to guarantee a specific time horizon for their final resolution. The Claimant has not asserted that it lacked a cause of action before the Argentine courts or that it was in some other way prevented from complying with the requirements of Article 10(2).[345] As such, it has failed to

faith negotiation" periods is not an apt one. The Tribunal nevertheless finds it necessary to discuss this analogy because the Claimant has specifically raised it in its pleadings.

[342] Expert Opinion of Javier Errecondo dated 4 June 2008 (submitted with Claimant's Rejoinder on Jurisdiction); Claimant's Rejoinder on Jurisdiction, paras 65-80.

[343] Respondent's evidentiary submissions A RA 20 ("Judgments of the Argentine Supreme Court") and A RA 22 ("Final Judgments"), both submitted with the Respondent's Reply Memorial on Jurisdiction.

[344] If the ability to reach a final decision within 18 months were the relevant metric, then the present Tribunal would be forced to declare its own proceedings futile, along with the proceedings of the vast majority of investor-State arbitration tribunals. See below at n. 430 (noting the average length of proceedings in ICSID cases).

[345] The recent *Hochtief* award makes much of the fact that Article 10(2) of the German-Argentine BIT allows either disputing party to "request" that the dispute be referred to the domestic courts. The suggestion seems to be that Argentina's failure to institute proceedings against the claimant in its domestic courts constituted a waiver of its right to subsequently invoke the BIT's 18-month proviso. See *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction (24 October 2011) [hereinafter *Hochtief* – Majority Opinion], paras 35-37, 89. This argument overlooks the fact that Argentina most likely lacked a cause of action with which to seize its domestic courts. In the context of a treaty-based investor-State dispute, it is the claimant, and not the respondent, whose treaty rights have allegedly been violated. Thus, the only practicable way for Argentina to "request" a referral to the domestic courts is to exercise its right to insist that the claimant satisfy the BIT's 18-month proviso before instituting arbitral proceedings. If Argentina had wished to waive its right to object to the arbitral tribunal's jurisdiction on these grounds, it could have done so in terms of Article 10(3)(b) of the BIT.

meet the burden necessary to invoke a waiver of the 18-month domestic courts provision on the grounds of futility.

192. One may ask whether the Tribunal may nonetheless waive the 18-month domestic courts requirement on the grounds that it is merely procedural, not jurisdictional, and therefore within the discretionary power of the Tribunal to observe or discard. Such is the case, for example, with admissibility objections before domestic courts and tribunals. However, admissibility analyses patterned on domestic court practices have no relevance for BIT-based jurisdictional decisions in the context of investor-State disputes. In the domestic context, admissibility requirements are judicially constructed rules designed to preserve the efficiency and integrity of court proceedings. They do not expand the jurisdiction of domestic courts. Rather, they serve to streamline courts' dockets by striking out matters which, though within the jurisdiction of the courts, are for one reason or another not appropriate for adjudication at the particular time or in the particular manner in question.[346]

193. All BIT-based dispute resolution provisions, on the other hand, are by their very nature jurisdictional. The mere fact of their inclusion in a bilateral treaty indicates that they are reflections of the sovereign agreement of two States – not the mere administrative creation of arbitrators. They set forth the conditions under which an investor-State tribunal may exercise jurisdiction with the contracting state parties' consent, much in the same way in which legislative acts confer jurisdiction upon domestic courts. That this is so is particularly evident in the case of the German-Argentine BIT, which describes its dispute resolution process in mandatory and necessarily sequential language. In the words of the *Wintershall* tribunal:

> "That an investor could choose at will to omit the second step [the 18-month domestic courts requirement] is simply not provided for nor even envisaged by the Argentina-Germany BIT – because (Argentina's) the Host State's 'consent' (standing offer) is premised on there being first submitted to the courts of competent jurisdiction in the Host State the entire dispute for resolution in the local courts."[347]

[346] Such is the case with the doctrines of ripeness, *forum non conveniens*, etc.

[347] *Wintershall*, above note 330 at p. 99, para 160(2) (parentheticals in original).

194. Since the 18-month domestic courts provision constitutes a treaty-based pre-condition to the Host State's consent to arbitrate, it cannot be bypassed or otherwise waived by the Tribunal as a mere "procedural" or "admissibility-related" matter.[348]

c) Relevance of whether or not the 18-month domestic courts requirement is "nonsensical"

195. The *Plama* tribunal, commenting upon the *Maffezini* tribunal's decision to evade, by means of the MFN clause, the 18-month domestic courts requirement of the Spain-Argentina BIT, stated the following:

> "The decision in *Maffezini* is perhaps understandable. The case concerned a curious requirement that during the first 18 months the dispute be tried in the local courts. The present Tribunal sympathizes with a tribunal that attempts to neutralize such a provision that is nonsensical from a practical point of view. However, such exceptional circumstances should not be treated as a statement of general principle guiding future tribunals in other cases where exceptional circumstances are not present."[349]

196. This raises the question as to whether the Tribunal may waive the 18-month domestic courts requirement on the grounds that it is "nonsensical". Unfortunately, the *Plama* tribunal nowhere explained in what sense the requirement was "curious", "nonsensical", or "exceptional". Perhaps the tribunal referred merely to the fact that the requirement is found only in Latin American BITs. Or perhaps it meant to suggest, as does the Claimant here, that 18 months would not prove sufficient, in most cases, to lead to a satisfactory resolution of the dispute.

197. Whatever the *Plama* tribunal's meaning may have been, Argentina insists that the requirement is sensible, as it was included "for the purpose of giving domestic courts the opportunity to settle the dispute".[350] Such a purpose cannot be said to be nonsensical, particularly in light of the Government's assertions that the Argentine courts can and do frequently resolve disputes in less than 18 months.[351] Even if this were not the case, one can easily imagine good

[348] See in this regard *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections (Decision of 1 April 2011), available at: http://www.icj-cij.org/docket/files/140/16398.pdf, at paras 115-184 (finding that the relevant treaty's requirement of good faith negotiations between the parties constituted a procedural condition for the seisin of the Court and further finding that the Court had no jurisdiction because this precondition had not been met).

[349] *Plama v. Republic of Bulgaria*, Decision on Jurisdiction (8 Feb 2005), ICSID Case No. ARB/03/24 [hereinafter "*Plama*"], para 224.

[350] Respondent's Reply on Jurisdiction, para 54.

[351] Ibid at para 55.

reasons why a country might wish to include such a provision in some, but not all, of its BITs. In the case of Argentina, it may have wished, for example, to provide its courts with occasional opportunities to gain experience in administering treaty-based investor-State claims without running the risk of overwhelming its courts with too many claims under too many treaties at once.[352]

198. More importantly, however, even if Argentina had not asserted sensible reasons for including the provision, and even if the Tribunal were unable to posit such reasons of its own initiative, the requirement for waiving treaty-based jurisdictional pre-requisites in international law is not nonsensicality but futility. Sovereign States are free to agree to any treaty provisions they so choose – whether concerning substantive commitments or dispute resolution provisions or otherwise – provided these provisions are not futile and are not otherwise contrary to peremptory norms of international law. As discussed above, futility has not been established on the facts of the present case.[353] Thus, the Tribunal's estimation of the apparent sensibility of the Treaty's prescribed dispute resolution process is irrelevant to the inquiry.[354]

d) The timing aspect of standing – when may an MFN claim be raised before an international arbitral tribunal?

553

199. The mandatory and sequential nature of the German-Argentine BIT's dispute resolution provisions raises an important temporal question: when, chronologically speaking, does an aggrieved investor acquire standing to raise an MFN claim before an investor-State arbitral tribunal under Article 10? As will be seen later in this decision, the BIT clearly empowers investors to claim and receive compensation for MFN violations. The immediately foregoing analysis, however, has indicated that fulfilment of the 18-month domestic courts submission

[352] It may be argued that such a policy would be akin to placing a tax on certain nationalities of foreign investors for the purposes of developing the Argentine judicial system. This may well be so. But this does not change the fact that the development of a Host State's judiciary cannot be assailed as an illegitimate or arbitrary – let alone nonsensical – policy goal. Instead, the decision to saddle only particular groups of foreign investors with the costs of that development would clearly be discriminatory and therefore compensable under the BIT to the extent that these costs exceed the costs of otherwise directly available investor-State arbitration under other BITs. The Tribunal will return to this issue below.

[353] Nor can the subjugation of a sovereign State to the jurisdiction of an international arbitral tribunal be said to constitute a peremptory norm of international law.

[354] The imprudence of engaging in debates as to the desirability of particular treaty provisions within the context of international arbitral deliberations was neatly demonstrated in the recent *Hochtief* matter. There, the majority found the procedure prescribed in Articles 10(2)-(3) of the German-Argentine BIT to be "pointless" and of "no necessary benefit", while the dissent was able to point out several sensible justifications for the 18-month proviso. Contrast *Hochtief* – Majority Opinion, above note 345, paras 51 & 87-88 with the Separate and Dissenting Opinion of J. Christopher Thomas, Q.C., paras 4-10.

provision constitutes a condition precedent to the Host State's consent to submit a particular dispute to investor-State arbitration.

200. Taken together, these two conclusions suggest that a claimant wishing to raise an MFN claim under the German-Argentine BIT – whether on procedural or substantive grounds – lacks standing to do so until it has fulfilled the domestic courts proviso. To put it more concretely, since the Claimant has not yet satisfied the necessary condition precedent to Argentina's consent to international arbitration, its MFN arguments are not yet properly before the Tribunal. The Tribunal is therefore presently without jurisdiction to rule on any MFN-based claims unless the MFN clauses themselves supply the Tribunal with the necessary jurisdiction.[355]

201. That a prospective claimant wishing to raise an MFN claim must satisfy the conditions precedent to international dispute resolution under the basic treaty is supported by the reasoning of the ICJ in the *Anglo-Iranian Oil* case.[356] In that case, the United Kingdom invoked an obligation in a 1934 treaty between Iran and Denmark to the effect that Iran would provide "the most constant protection" of the persons and property of Denmark's nationals "in accordance with the principles and practice of ordinary international law."[357] The UK attempted to enforce this protection on behalf of a UK company by invoking the MFN clauses contained in two treaties that the UK had concluded with the Government of Persia in 1857 and 1903, respectively.[358] The difficulty was that Iran, in its 1932 Declaration accepting the Court's compulsory jurisdiction, had limited its acceptance to disputes arising out of treaties concluded *after* the coming into effect of the Declaration. Thus, the Iran-Denmark treaty (the "comparator treaty") fell within the scope

[355] This in no way implies that the word "'shall' in Article 10 of the BIT somehow trumps the word 'shall' in Article 3 [one of the MFN clauses] of the same treaty." (Dissenting Opinion of Charles N. Brower at para 13.) First, the Tribunal's underscoring of the word "unless" stresses that the MFN clause may well provide the Tribunal with jurisdiction to hear the case. The Award's separate analysis of both Article 10 (the dispute resolution clause) and Articles 3 and 4 (the MFN clauses) as independent potential bases for the Tribunal's jurisdiction evinces no "trump" of one type of clause over the other. Second, the word "shall" in the context of the MFN clauses relates to Argentina's obligation to provide protected German investors and investments with treatment, in the territory of the Host State, which is no less favorable than the treatment provided to investors and investments from other countries. Argentina's obligation to observe this commitment toward German investors and investments (an obligatory "shall") remains in force irrespective of whether or not a particular German claimant fulfills the necessary conditions precedent to institute an international arbitration proceeding against Argentina under Article 10. Thus, both "shalls" retain their obligatory character within their respective spheres of operation.

[356] *Anglo-Iranian Oil Co. case (jurisdiction)*, Judgment of July 22nd, 1952: I.C.J. Reports 1952, p. 93.

[357] Ibid p. 108.

[358] Ibid p. 108. The 1857 Treaty appears to have related to consular protection, while the 1903 Treaty was a "Commercial Convention." Both parties accepted that the Government of Iran was legally bound by the treaties in question as the legal successor to Persia under international law.

of Iran's Declaration of consent to ICJ jurisdiction, while the two UK treaties (the "basic treaties") did not.[359]

202. In explaining why it lacked jurisdiction to hear the UK's MFN-based claims, the Court said the following:

> "But in order that the United Kingdom may enjoy the benefit of any treaty concluded by Iran with a third party by virtue of a most-favoured-nation clause contained in a treaty concluded by the United Kingdom with Iran, the United Kingdom must be in a position to invoke the latter treaty. The treaty containing the most-favoured-nation clause is the basic treaty upon which the UK must rely. It is this treaty which establishes the juridical link between the United Kingdom and a third-party treaty and confers upon that State the rights enjoyed by the third party. A third party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom and Iran: it is *res inter alios acta*."[360]

203. In other words, in *Anglo-Iranian Oil*, Iran's acceptance of the ICJ's jurisdiction over disputes arising under the two "basic treaties" (the UK-Persia treaties) was a condition precedent to the UK's standing to raise its MFN claims before the Court. Because that condition precedent had not been fulfilled, the UK had no standing and the ICJ had no jurisdiction.[361]

554

204. In the present matter, of course, Argentina's consent to international arbitration is contained within the same instrument as the MFN guarantees giving rise to some of the Claimant's jurisdictional arguments. But the physical location (external instrument versus within the same treaty) of a State's consent to a particular type of dispute resolution does not eviscerate the requirement, stressed by the ICJ, that the State must have consented to the particular type of dispute settlement in question before the claimant may raise any MFN claims before the

[359] The important point to note here is that – just as in the proceedings before the present Tribunal – the ICJ would have had jurisdiction over disputes arising out of the comparator treaty but did not have jurisdiction over disputes arising out of the basic treaties. It was for this reason that the basic treaty's MFN clause could not be invoked.

[360] Ibid p. 109 (emphasis added).

[361] The core problem in *Anglo-Iranian* was one of *ratione temporis*. That is, the ICJ did not have jurisdiction over disputes arising out of the two pre-1932 basic treaties because Iran's declaration was limited to disputes arising out of its post-1932 treaties. The *ratione temporis* problem in the present arbitration differs in that the present Respondent chose to tie its prospective consent to the Tribunal's jurisdiction not to a specific date (as was done in *Anglo-Iranian*) but rather to the satisfaction of a time-bound condition precedent to arbitration. This difference in form does not, however, give the present Tribunal license to disregard the temporal constraint laid down by the Contracting State Parties to the German-Argentine BIT. The principle illustrated by the *Anglo-Iranian Oil* case remains apposite. Namely, a tribunal must have jurisdiction under the basic treaty in order for a claimant to invoke the MFN clause of that treaty and thereby reach the more favorable provisions of a comparator treaty.

designated forum. According to this logic, the Claimant may not yet have standing to raise any MFN arguments at all before the Tribunal. This raises a significant impediment to the Claimant's attempts to bypass the 18-month proviso. However, this impediment might be surmounted by the content of the MFN clauses in question, in particular if those clauses evince an intention, on the part of the Contracting State Parties, to allow the Treaty's conditions precedent to accessing international arbitration to be altered by operation of its MFN provisions. The Tribunal will therefore next consider the parties' arguments as to the scope and meaning of the MFN clauses in the Germany-Argentina BIT.

3. Analysis of the MFN Clauses in the German-Argentine BIT

a) The Treaty's MFN texts and their interdependence

205. The German-Argentine BIT contains two MFN clauses. The first and most general MFN clause appears in Article 3, which addresses both MFN treatment and national treatment. According to the disputing parties' agreed English translation of the German and Spanish original texts, Article 3 reads as follows:

> "**Article 3**
>
> (1) Neither Contracting Party shall accord investments in its territory by nationals or companies of the other Contracting Party, or investments in which nationals or companies of the other Contracting Party are participating, treatment less favorable than the treatment accorded investments of its own nationals or companies or investments of nationals or companies of any third country.
>
> (2) With respect to their activities in connection with investments in its territory, nationals and companies of the other Contracting Party shall not be accorded treatment less favorable by a Contracting Party than its own nationals and companies or nationals and companies of third countries.
>
> (3) Such treatment shall not refer to privileges granted by a Contracting Party to nationals or companies of third countries by virtue of their membership in a customs or trade union, a common market, or a free trade area.
>
> (4) The treatment granted in this Article shall not refer to advantages accorded by a Contracting Party to nationals or companies of third countries under an agreement for the avoidance of double taxation or other agreements regarding tax matters."

206. The second MFN clause appears in Article 4 of the Treaty. Paragraphs (1)-(3) of that article deal with particular substantive protections, while paragraph (4) sets out a special MFN

provision relating exclusively to the subjects covered in Article 4. The full English text is set out in a footnote,[362] but for present purposes the operative portions proceed roughly as follows:

"**Article 4**

(1) … [Full legal protection and security]

(2) … [Expropriation, nationalization, and equivalent measures]

(3) … [Losses owing to war or internal strife]

Nationals or companies of a Contracting Party shall enjoy most-favored-nation treatment in the territory of the other Contracting Party in respect of the matters provided for in this Article."

207. Finally, paragraph 2 of the BIT's Protocol relates to MFN treatment:

"**Protocol**

(1) […]

(2) Ad Article 3

a) "Activity" within the meaning of Article 3(2) shall in particular, but not exclusively, include the management, use, enjoyment, and disposal of an investment. The following shall, in particular, but not exclusively, be deemed treatment "less favorable" within the meaning of Article 3: unequal treatment in the case of restrictions on the purchase of raw or auxiliary materials; of energy or fuel, or of means of production or operation of any kind and unequal treatment in the case of impeding the marketing of products inside or outside the country. Measures which have to be taken for reasons of public safety and public order, public health, or morality shall not be deemed treatment "less favorable" within the meaning of Article 3.

b) The provisions of Article 3 do not oblige a Contracting Party to extend to natural persons and companies residing in the territory of the other Contracting Party tax privileges, exemptions, and tax reductions which according to its tax law are granted only to natural persons and companies resident in its territory.

[…]"

[362] The English translation of the article reads:

(1) Investments by nationals or companies of a Contracting Party shall enjoy full legal protection and security in the territory of the other Contracting Party.

(2) Investments by nationals or companies of a Contracting Party may not be expropriated, nationalized, or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party except for the public benefit and against compensation. Such compensation shall be equivalent to the market value of the expropriated investment before the date on which the actual or threatened expropriation, nationalization, or comparable measure has become publicly known. The compensation shall be paid immediately and shall carry interest at a normal commercial rate until the time of payment; it shall be effectively realizable and freely transferable. The legality of any such expropriation, nationalization, or comparable measure and the amount of compensation shall be subject to review by due process of law.

(3) Nationals or companies of either Contracting Party whose investments suffer losses in the territory of the other Contracting Party owing to war or other armed conflict, revolution, state of national emergency, or revolt, shall not be accorded treatment less favorable by such other Contracting Party than that which the latter Contracting Party accords to its own nationals and companies as regards restitution, indemnification, compensation, or other consideration. Such payments shall be freely transferable.

(4) Nationals or companies of a Contracting Party shall enjoy most-favored-nation treatment in the territory of the other Contracting Party in respect of the matters provided for in this Article.

208. From these recitations, three observations concerning the interrelation of these provisions merit notice. First, the Protocol sheds light on the proper interpretation of Article 3 of the BIT. It does so by illustrating, albeit in a non-exclusive fashion, the potential meanings of the terms "activity" and "less favorable". This makes it necessary to interpret Article 3 in tandem with the relevant portions of the Protocol.

209. Secondly, Article 3, Article 4(4), and the Protocol all make use of the word "treatment", although none of them defines it explicitly. It thus falls to the Tribunal to establish, in good faith, the ordinary meaning of this term in its context and in the light of the Treaty's object and purpose.

210. Thirdly, the MFN clause in Article 4(4) applies only to the particular treatment standards mentioned in Article 4. The MFN clause in Article 3, however, contains no such limitation. On its face, the application of Article 3 is limited only by the proper meaning to be ascribed to such words as "treatment", "activities" and "less favorable". In this sense, one may conceive of Article 3 as a general MFN clause, while Article 4(4) is a more limited one. To the extent that Article 3 – interpreted in the light of its own wording – may also be broad enough to cover the substantive protections listed in Article 4, it may therefore prove necessary to clarify the relationship between the two articles. This will depend upon the meaning that emerges from an interpretive analysis of the two articles, which follows below.

b) Potential reach of the MFN clauses in light of the *ejusdem generis* rule

211. Before scrutinizing the specific texts of the MFN clauses in accordance with the Vienna Convention, it is useful to consider the implications of the *ejusdem generis* rule as a preliminary matter, since both of the disputing parties have raised it in their submissions. As summarized by

the Commission of Arbitration in the *Ambatielos* case, the *ejusdem generis* rule specifies that an MFN clause "can only attract matters belonging to the same category of subject as that to which the clause itself relates".[363] The International Law Commission has characterized the *ejusdem generis* rule as one that is "generally recognized and affirmed by the jurisprudence of international tribunals and national courts and by diplomatic practice".[364] Indeed, the ILC codified the rule as follows in Article 9(1) of its 1978 Draft Articles on Most-Favoured-Nation Treatment:

> "Under a most-favoured-nation clause the beneficiary State acquires, for itself or for the benefit of persons or things in a determined relationship with it, only those rights which fall within the limits of the subject-matter of the clause."[365]

212. Thus defined, the *ejusdem generis* rule advocates a common sense approach to the interpretation of MFN clauses. It is probably for this reason that the rule appears to have gained acceptance. The ILC's Commentary on the Draft Articles on MFN Clauses sheds further light on the operation of the rule:

> "No writer would deny the validity of the *ejusdem generis* rule which, for the purposes of the most-favoured-nation clause, derives from its very nature. It is generally admitted that a clause conferring most-favoured-nation rights in respect of a certain matter, or class of matter, can attract the rights conferred by other treaties (or unilateral acts) only in regard to the same matter or class of matter.
>
> The effect of the most-favoured-nation process is, by means of the provisions of one treaty, to attract those of another. Unless this process is strictly confined to cases where there is a substantial identity between the subject-matter of the two sets of clauses concerned, the result in a number of cases may be to impose upon the granting State obligations it never contemplated. Thus the rule follows clearly from the general principles of treaty interpretation. States cannot be regarded as being bound beyond the obligations they have undertaken."[366]

213. In the present matter, both the Basic Treaty and the invoked Comparator BIT[367] provide not only substantive protections for investments but also investor-State dispute resolution

[363] *Ambatielos Claim (Greece, United Kingdom of Great Britain and Northern Island)*, decision of the Commission of Arbitration (6 March 1956), United Nations Reports of International Arbitral Awards, Vol. XII p. 83 [hereinafter "*Ambatielos II*" to distinguish it from the ICJ matter (*Ambatielos I*), in which the Court upheld the UK's agreement to arbitrate with Greece], at p. 107.

[364] Draft Articles on Most-Favoured-Nation Clauses, with Commentaries, text adopted by the International Law Commission at its thirtieth session, *Yearbook of the International Law Commission*, 1978, vol. II, Part Two [hereinafter "ILC Commentary on Draft MFN Articles"], at p. 27.

[365] Ibid.

[366] Ibid at p. 30, paras 10-11 (internal citations omitted).

[367] The dispute resolution provisions of the invoked Comparator BIT are set forth in note 427 below.

mechanisms for disputes arising out of qualifying investments. There is, in this sense, not only an identity between the subject matter of the two invoked dispute resolution clauses but also between the subject matter of the whole of both treaties.[368] In this respect the two invoked treaties fall within the mainstream of modern international investment agreements, almost all of which include some sort of provision concerning the administration of justice in relation to the private rights of investors arising under the agreements.

214. One may observe in the two treaties, to use the ILC's words, "a substantial identity between the subject-matter of the two sets of clauses concerned".[369] Moreover, there is a clear and logical connection between the subject matter of the clauses and the subject matter of the invoked treaties.[370]

215. As such, the application of the *ejusdem generis* rule cannot on its own categorically exclude international dispute resolution from the potential ambit of the German-Argentine BIT's MFN clauses. Nor, however, can it demonstrate that the ambit of the Treaty's MFN clauses

[368] The Tribunal notes that the *ejusdem generis* rule does not require the overall subject matter of the basic and comparator treaties to be identical, but only the subject matter of the invoked clauses of the basic and the comparator treaties. As the ILC Commentary notes:

> "It is also not proper to say that the *treaty* or *agreement* including the clause must be of the same category (*ejusdem generis*) as that of the benefits that are claimed under the clause. To hold otherwise would seriously diminish the value of a most-favoured-nation clause."

ILC Commentary on Draft MFN Articles above note 364 at p. 30, para 12 (emphasis in original).

[369] Ibid at p. 30, para 11. An interpreter can require no more than a substantial identity between the subject matters of the two clauses. For if the complete identity between the clauses were required, there would be no need to invoke the MFN clause in the first place.

[370] As to the connection between the subject matter of the overall treaties and the subject matter of the specific clauses in relation to which MFN treatment is invoked, the Arbitral Commission in the *Ambatielos II* matter observed more than 50 years ago:

> "It is true that 'the administration of justice', when viewed in isolation, is a subject-matter other than 'commerce and navigation', but this is not necessarily so when it is viewed in connection with the protection of the rights of traders. Protection of the rights of traders naturally finds a place among the matters dealt with by Treaties of commerce and navigation.
>
> Therefore it cannot be said that the administration of justice, in so far as it is concerned with the protection of these rights, must necessarily be excluded from the field of application of the most-favoured-nation clause, when the latter includes 'all matters relating to commerce and navigation'. The question can only be determined in accordance with the intention of the Contracting Parties as deduced from a reasonable interpretation of the Treaty."[370]

The same logic prevails here, although there are some important differences between the *Ambatielos* matter (which involved the domestic administration of justice) and the present one (which involves international dispute settlement).

necessarily includes international dispute resolution. The *ejusdem generis* rule merely identifies the outer limit of the clauses' field of application; it cannot tell us which particular subject matters, within that outer limit, the clauses were actually intended to cover. As stressed by the *Ambatielos* Commission, the latter question "can only be determined in accordance with the intention of the Contracting Parties as deduced from a reasonable interpretation of the Treaty".[371] This is so, in the ILC's words, because "States cannot be regarded as being bound beyond the obligations they have undertaken."[372]

216. As applied to the German-Argentine BIT, then, the outer limits set by the *ejusdem generis* rule are broad enough to encompass international dispute resolution within the meaning of the Treaty's MFN clauses. Argentina's assertions to the contrary must therefore be rejected. This conclusion renders the Claimant's proposed interpretation plausible. It does not, however, in any way diminish the present Tribunal's duty to determine, upon a preponderance of all the arguments, whether Germany and Argentina intended to include international dispute resolution within the reach of the Treaty's MFN clauses. The Tribunal therefore turns to examine the meaning of those MFN clauses in light of their wording and context.

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c) Ordinary meaning of the term "treatment" in the BIT's two MFN clauses

217. The Treaty nowhere defines what constitutes "treatment", despite employing the word 13 times across five different provisions of the Treaty and Protocol.[373] What may be observed, however, is that in none of these instances does the text indicate that the word carries a special or technical meaning. Nor has either of the disputing parties attempted to attach a special meaning to the term, in the sense of Article 31(4) of the Vienna Convention. The Tribunal must therefore endeavour to interpret the word in a manner which makes sense of all 13 usages in an ordinary fashion.

218. In common usage, "treatment" evokes one party's manner of dealing with or behaving towards another party. In the international law setting, the term typically carries with it the sense of how a State or other legal authority regulates, protects, or otherwise interacts with specified actors, whether public or private. Within the investment law context, one arbitral tribunal has defined treatment to include "the rights and privileges granted and the obligations and burdens

[371] *Ambatielos II*, above note 363 at p. 107.

[372] ILC Commentary on Draft MFN Articles, above note 364 at p. 30, para 11.

[373] "Treatment" is used in arts 1(1), 2(1)-(4), 4(3)-(4), 7(1), and Protocol para (2)(a).

imposed by a Contracting State on investments made by investors covered by the treaty."[374] Another has stated that "'[t]reatment' in its ordinary meaning refers to behavior in respect of an entity or a person."[375] Each of these formulations is extremely broad, and none suggests anything inherent in the word "treatment" which would automatically include or exclude certain categories of acts or omissions in relation to a defined investor. What is nevertheless beyond dispute is that "treatment" deals with the actual behavior of the Host States towards a foreign private investment as measured against the international obligations binding upon the State on the basis of treaty law and general international law.

219. Notwithstanding this generality, public international lawyers have in recent years engaged in a lively debate over whether the term should be understood to comprise only "substantive" treaty protections, or whether it may also include "procedural" ones.[376] Commentators also split over whether international dispute resolution provisions in treaties should be viewed as substantive protections in and of themselves, or whether they are merely procedural mechanisms for enforcing the treaty's other (presumably substantive) obligations.[377] The present Tribunal is not convinced that this debate is the most appropriate one.[378] What matters is not how the general term treatment potentially could or "should" be interpreted but rather what meaning the Contracting State Parties to the specific Treaty in question have attached to the term.

[374] *InterAguas*, above note 113 at para 55.

[375] *Siemens*, above note 71at para 85.

[376] There appears to be broad consensus among the community of scholars, as well as between the disputing parties in this case, that the term "treatment" in treaties relating to international trade, investment, and commerce generally encompasses most, if not all, of the so-called substantive protections of such treaties. In the case of BITs, this would typically comprise guarantees relating to expropriation, fair and equitable treatment, etc – provided, of course, that the MFN clause in question does not itself indicate limits to its subject matter scope. The question at hand, however, is whether the term treatment as used in MFN clauses, or more precisely the German-Argentine BIT's MFN clauses, also extends to its international dispute resolution provisions.

[377] See, in this regard, the comments of the *Renta4* tribunal, above note 309 at paras 88-101, and especially its conclusion in para 101, stating: "Rights and obligations may be classified as substantive or jurisdictional or procedural. Such classifications are not watertight and in any event primarily of pedagogical use."

[378] In this respect, the Tribunal agrees with the Dissenting Opinion's position that "it is difficult to imagine a more fundamental aspect of an investor's 'treatment' by a host Government than that investor's ability to exercise and defend its legal rights by prompt access to dispute settlement mechanisms, and fair and efficient administration of justice." Dissenting Opinion of Charles N. Brower at para 20. This uncontroversial observation does not however imply an automatic entitlement to initiate international dispute settlement against a State.

220. In order to shed light on whether the Contracting State Parties intended for the term "treatment" to encompass the BIT's international dispute settlement provisions, one must apply the classical rule of interpretation known as the principle of contemporaneity. This principle, particularly pertinent in the case of bilateral treaties, requires that the meaning and scope of the term "treatment" be ascertained as of the time when Germany and Argentina negotiated the BIT. This BIT was adopted in 1991. Unfortunately neither disputing party has submitted any direct evidence – for example from the Treaty's drafting history – revealing the particular understanding of "treatment" maintained by Germany and Argentina as of that date. The Tribunal must therefore look for clues to the meaning generally ascribed to the term by the broader international community of States at the time.

221. 1991 was a time when the distinction between "treaty claims" and "contract claims", as inaugurated by the *AAPL v Sri Lanka* award[379] (facilitating the direct access of private investors to ICSID tribunals) remained obscure. As a consequence, dispute resolution clauses were still predominantly perceived in the context of international contracts, whether "state contracts" or otherwise, between a private foreign investor and a sovereign state. At that time, inspired by international commercial arbitration, scholars as well as arbitral awards insisted on the autonomy or severability of the arbitral clause, aimed at protecting in any situation the right of the investor to obtain reparation in case of arbitrary revocation or nullity of the contract by the state party[380]. Treaty-based questions concerning the relation of MFN clauses to international investor-State dispute resolution mechanisms had not yet arisen and remained entirely unexplored.

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222. Also at that time, as reflected one year later by the World Bank Guidelines on the Treatment of Foreign Direct Investment,[381] and in particular its Part III devoted to "treatment", the prevailing view among the Development Committee of the World Bank (an essentially universal international organization and the host body of ICSID) was that treatment was meant to cover discrete principles of conduct applicable to the State hosting the foreign investment, with a view to safeguarding the investment from any discriminatory or unfair and inequitable practices

[379] *AAPL v. Sri Lanka*, above note 114.

[380] Fouchard, Gaillard, Goldmann, On International Commercial Arbitration, Kluwer Law Int'l (1999), 197-217; S. Schwebel, International Arbitration: Three Salient Problems, 2 (1987); P. Sanders, "L'autonomie de la clause compromissoire," in *Hommage à Frédéric Eisemann* 32 (1978); C.M. Svernlöv, The Current Status of the Doctrine of Separability, *Journal of International Arbitration,* 1991, Vol. 8, N° 4, 37-50.

[381] World Bank, Guidelines on the Treatment of Foreign Direct Investment (1992) [hereinafter "World Bank Guidelines"], available at: http://ita.law.uvic.ca/documents/WorldBank.pdf.

within the Host State's territory. That is, the treatment of investments was perceived as dealing with the legal regime of the investment to be respected by the Host States in conformity with its international obligations, whatever the national organs (whether legislative, executive, or judicial) concerned with the actual application of this regime.

223. Part III of the World Bank Guidelines illustrates this basic approach. In its discussion of "treatment", it covers in particular: fair and equitable treatment;[382] treatment as favorable as that accorded to national investors in similar circumstances;[383] full protection and security;[384] treatment that does not discriminate among foreign investors on the grounds of nationality;[385] the prompt issuance of necessary licenses and permits;[386] authorizations for the employment of key foreign personnel;[387] the free transfer of revenues earned by or related to the investment;[388] the reinvestment of proceeds of the investment within the territory of the Host States;[389] and finally the prevention and control of corrupt business practices and the promotion of accountability and transparency in dealings with foreign investors.[390] While some of these concepts encompass well-known customary international law obligations binding upon States in respect of foreign investors' access to fair and efficient procedures for the domestic administration of justice,[391] nothing within the Guidelines' discussion of "treatment" even touches upon the international (as

[382] World Bank Guidelines, above note 381, Part III.2.

[383] Ibid at Part III.3(a).

[384] Ibid.

[385] Ibid at Part III.3.(b).

[386] Ibid at Part III.5(a).

[387] Ibid at Part III.5(b).

[388] Including salaries earned by foreign personnel, debt payments related to the investment, liquidation proceeds of the investment, and any amounts paid to the investment by reason of the Host State's expropriation of or other interference with the rights of the investment. Ibid at Part III.6.1(a)-(e).

[389] Ibid at Part III.7.

[390] Ibid at Part III.8.

[391] The Dissenting Opinion points out that the concept of fair and equitable treatment "includes proper and timely access to dispute settlement, as well as observance of judicial and administrative due process. Relatedly, there is no doubt that under customary international law as well as modern investor-State jurisprudence denial of justice is closely linked to, if not a part of, the fair and equitable treatment requirement." (Dissenting Opinion of Charles N. Brower at para 20.) The Tribunal agrees. Yet this does not alter the fact that these concepts, along with all of the case law to which the Dissenting Opinion points in its footnotes 59-60, concern States' obligations in carrying out the domestic administration of justice. There is no basis for asserting that the inability of a claimant to proceed directly to international arbitration against a State constitutes a denial of justice, or that the 18-months proviso somehow prevents claimants from obtaining proper and timely access to dispute settlement or otherwise violates Argentina's duty to observe judicial and administrative due process.

distinguished from domestic) settlement of disputes. In fact, the Guidelines reference the international settlement of investor-State disputes only once, and in an entirely separate section,[392] thus suggesting that "treatment" and international dispute settlement were viewed at the time as separate issues.[393]

224. The Tribunal recognizes that the World Bank Guidelines of 1992 were and are a "soft law" instrument by nature and that they do not purport to shed any direct light on the meaning of the word "treatment" as used in the German-Argentine BIT's MFN clauses. The Guidelines nevertheless provide an indication of the prevailing view among the community of states during the period contemporaneous to the adoption of the German-Argentine BIT. Neither disputing party has adduced any evidence to suggest that either Argentina or Germany maintained a distinctive definition of treatment in the early 1990s that departed from the basic concept prevailing among the international community of states at that time, as reflected in the Guidelines. This leads the Tribunal to observe that there is, at the least, some evidence that the term "treatment" was likely meant by the two State Parties, at the time of the conclusion of the BIT, to refer to the Host State's direct treatment of the investment and not to the conduct of any international arbitration arising out of that treatment. While this evidence runs counter to the Claimant's position, it is not of a sufficient weight to be outcome determinative. The Tribunal would indeed hesitate to make a definitive pronouncement as to the intended scope of the Treaty's MFN clauses on the basis of an isolated examination of the quite general word "treatment". The Treaty however provides several other textual clues all pointing in the same direction. When considered in the aggregate, these textual clues do lead to a definitive conclusion. The Tribunal now continues to examine each in turn.

[392] In a most classical way, Section V of the Guidelines provides for the possible resolution of investment disputes either by recourse to national courts or to "the agreed mechanisms including conciliation and binding independent arbitration", the latter including "any ad hoc or institutional arbitration agreed upon in writing by the State and the investor or between the State and the investor's home State where the majority of the arbitrators are not solely appointed by one party to the dispute".

[393] The Dissenting Opinion suggests that, because the overall document title is "World Bank Guidelines on the Treatment of Foreign Direct Investment," this somehow implies that each and every topic discussed within the Guidelines constitutes a type of "treatment". This suggestion is puzzling. A document's title cannot function as more than a summary of its general topic, let alone an exhaustive statement of its entire contents. Shakespeare's *Hamlet*, for example, contains many passages which do not directly refer to the fictional person in question.

d) Limiting effect of the words "in its territory" on the scope of the MFN clauses

225. One salient textual feature of the German-Argentine BIT's three MFN provisions is that all three guarantee MFN treatment by the Host States in its territory.[394] In other words, the MFN guarantees are territorially limited. Notably, the concept of territorial application is explicit throughout the German-Argentine BIT. Article 1(1) defines qualifying investments territorially; Article 2 territorially limits the States' obligations in respect of fair and equitable treatment and arbitrary or discriminatory measures; Article 4 does likewise for the States' obligations concerning full legal protection and security, expropriation, and losses in cases of war or other conflict. Indeed, nothing in the Treaty obligates the State Parties to act in any particular manner outside of their own territories.

226. The territorial limitation upon the German-Argentine BIT's MFN formulations appears quite standard within the investment treaty universe. Indeed, with only one exception, every MFN clause addressed in each of the publicly available investor-State awards that the Tribunal has been able to examine has contained a territorial reference.[395] The ubiquity of the phrase is striking. This is particularly so when one considers how the words "in its territory" may operate

[394] The English translation of Article 4(4), as prepared by the disputing parties, faithfully conveys the territorial limitation of the original languages, translating the German ("genießen… im Hoheitsgebiet der anderen Vertragspartei Meistbegünstigung") and Spanish ("gozorán en el territorio de la otra Parte Contratante del trato de la nación más favorecida") as "shall enjoy most-favored-nation treatment in the territory of the other Contracting Party". In Articles 3(1) and 3(2), however, the disputing parties' English translation misconstrues the qualifier "in its territory" by attaching it to the word "investments" rather than to the word "treatment". The mistake is perhaps understandable, as the translation was prepared primarily from the German original, which – because of the highly complex sentence structure of the German language – arguably renders the intended reference point of the phrase "in its territory" uncertain. By contrast, Articles 3(1) and 3(2) of the Spanish text both clearly attach the phrase "in its territory" to the word "treatment". Since the final sentence of the BIT states that both the Spanish and German versions of the text are equally "binding" or "authentic", this minor inconsistency is easily resolved by Article 33(3) of that Vienna Convention, according to which the terms of a treaty are presumed to have the same meaning in each authentic text. In case of difference, Article 33(4) directs that the meaning which "best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted." Applying these rules to the present discrepancy: since the Spanish text is clear as to the proper placement of the qualifier "in its territory" while the German text leaves the question open, the interpretation given by the Spanish text must be preferred.

[395] The sole exception is the MFN clause in the Belgium/Luxembourg-Soviet BIT discussed in *Vladimir Berschader and Moise Bershcader v. The Russian Federation*, Case No. 080/2004, Arbitration Institute of the Stockholm Chamber of Commerce, Award (21 April 2006) [hereinafter "*Berschader*"] (Todd Weiler dissenting). That BIT states rather generically that "the most favoured nation clause shall be applied to investors of the other Contracting Party in all matters covered by the present Treaty", without bothering to define the content of "the most-favoured nation clause" so referenced. However, given that the words "in its territory" have been consistently included in nearly all other BITs' MFN clauses, it seems at least likely that the BelgoLux-Soviet BIT's reference to "the MFN clause" also implicitly incorporates this phrase.

to limit an MFN clause's use of the general word "treatment". Where an MFN clause applies only to treatment in the territory of the Host State, the logical corollary is that treatment outside the territory of the Host State does not fall within the scope of the clause.[396]

227. This observation is of critical importance. It is noteworthy that the resolution of an investor-State dispute within the domestic courts of a Host State would constitute an activity that takes place within its territory. Thus, if a Host State were to accord to the investors of some third State more favorable rights in relation to domestic dispute resolution than the rights accorded to the investors of the other contracting State party to the BIT, this could give rise to a violation of the MFN clause.[397] This position indeed accords with general international law principles on the international responsibility of States.[398] As is well known, a state is internationally responsible for the conduct of its internal organs, including judicial ones, as reflected in Article 4 of the ILC's Draft Articles on State Responsibility.[399]

228. The same cannot be said, however, of international arbitration, which almost without exception takes place outside the territory of the Host State and which per definition proceeds independently of any state control. This leads to an important result. Assuming, contrary to the Tribunal's above findings, that an unbounded reference to the word "treatment" was generally understood by the international community of states in 1991 as encompassing not only

[396] Despite its professed affinity for the Roman law maxim *expressio unius est exclusio alterius*, the Dissenting Opinion overlooks this problem with the Claimant's proposed interpretation of the MFN clauses.

[397] The *Ambatielos* dispute provides a classic example of a case falling squarely within the bounds of the traditional territorial limitation on the operation of MFN clauses. In *Ambatielos*, Greece invoked an MFN clause in order to obtain for its national a type of treatment in the domestic courts of the Host State (the UK) which the UK had accorded by treaty to the nationals of certain third states and which Greece alleged to be more favorable than the treatment accorded to Greek nationals within the UK's domestic courts.

[398] Under a State responsibility analysis, there is no doubt that a number of principles of treatment – including in particular the non-discrimination and fair and equitable treatment principles – bind Host States not only during the period of the carrying out of the investment but also after it, if and when the occasion for dispute resolution arises. This much is certain at least in so far as the adjudicative bodies engaged in this dispute resolution are acting at the national level. In other words, a State must be held responsible for any breach of the rules of treatment binding upon it which has been committed by any of its organs, including its national courts when acting at the "procedural" stage. If, knowing of the investor's claim, a national court ignores one of the rules of treatment binding upon the Host State, it will create a situation giving rise to the international responsibility of that State toward the other State party to the BIT. Within the framework of a treaty claim under a BIT, this implies that the Host State also becomes directly internationally responsible toward the foreign investor having the nationality of the other State.

[399] Article 4 states: "the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions… ." (emphasis added).

"substantive" protections but also the international dispute resolution provisions of investment treaties, the German-Argentine BIT's specific MFN clauses nevertheless do not reach international arbitration here. The Host State's obligation extends no further than providing the covered investor with "treatment" in respect of domestic dispute resolution (aka dispute resolution "in its territory") that is no less favorable than the domestic dispute resolution treatment provided to third-State investors.[400]

229. Nor can it be said that a Host State's consent to grant foreign investors access to particular forms of international dispute resolution under particular conditions necessarily takes place within the Host State's territory, such that the Host State's consent to such arbitration would fall within the scope of the MFN obligation. States are at liberty to give their consent to international treaty commitments anywhere in the world; they need not do so within their own territories.[401]

230. In short, it seems that the very concept of extra-territorial dispute resolution and a Host State's consent thereto are both ill-fitted to the clear and ordinary meaning of the words "treatment in its territory" as found in many BIT's MFN clauses, including those in the present matter. It is difficult to see how an MFN clause containing this phrase could be applied to international arbitration proceedings without discounting the explicit territorial limitation upon the scope of the clause. This pragmatic incongruity prevents the Tribunal from presuming – in the absence of any supporting evidence – that the Contracting Parties to the present Treaty implicitly intended to include international dispute resolution within the purview of the MFN clauses. If such were their intent, it would seem strange that they should impose a territorial limitation so at variance with that aim.

231. More importantly, to base a conclusion solely upon the arguably open-textured nature of the word "treatment" without giving due account to the limiting effect of the words "in its territory" would be to run afoul of the Vienna Convention's requirement that a treaty be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context". To do so would also risk violating the principle of effectiveness in relation to the limiting phrase "in its territory", as those words would essentially be

[400] The present Claimant has not alleged that it would receive less favorable treatment than other foreign investors within the Argentine courts.

[401] Indeed, many international treaties are concluded in locations lying outside of the territory of both of the contracting state parties. They are not, for this reason, any less binding, nor is their territorial application altered by the place of their conclusion.

disregarded.[402] With respect, the Dissenting Opinion commits a fundamental error in finding that Article 10(2) of the BIT (the domestic courts proviso) itself constitutes treatment "in the territory" of Argentina. Article 10(2) is a provision of an international treaty – nothing more or less. It no more constitutes treatment in the territory of Argentina than does the BIT's preamble, its definition of investment (Article 1), or for that matter its provisions on ratification and entry into force (Article 12).[403] The present Tribunal therefore holds that the Treaty's clearly expressed territorial limitation upon the scope of its MFN clauses establishes that the Contracting State Parties to the German-Argentine BIT did not intend for the Treaty's extra-territorial dispute resolution provisions to fall within the scope of those clauses.

e) Significance of distinction between treatment of investments and treatment of investors "with respect to their activities in connection with investments"

232. Turning to the next textual query, it has already been noted that the Treaty contains more than one MFN provision. Article 3(1) guarantees MFN treatment to qualifying investments, while Articles 3(2) and 4(4) guarantee MFN treatment to qualifying investors "with respect to their activities in connection with investments". This raises the question as to whether the Contracting State Parties intended for the word treatment to mean something different when used in connection with "investments" as opposed to "investors." The Tribunal finds no support in the

[402] The *Maffezini* tribunal appears to have erred in this respect when it cited Spain's practice of pursuing direct access to international arbitration for Spanish investors abroad as evidence of its intent to allow direct access to international arbitration for foreign investors in Spain (in circumvention of the basic BIT's clear 18-month domestic remedies requirement). Whatever may have been Spain's practices in soliciting protections for its own investors abroad, those were activities which occurred outside the territory of Spain, and thus could not possibly run afoul of either the MFN standard or the national treatment standard. In the BIT that was under consideration in *Maffezini*, both of those standards contained the usual limiting territorial phrase. See *Maffezini*, above note 114 at paras 61 and 64.

[403] For the same reason, the Tribunal cannot accept the *Hochtief* majority's recent characterization of Argentina's decision to invoke the Treaty's 18-months proviso as an act taking place within the territory of Argentina. (See *Hochtief* – Majority Opinion, above note 345, paras 107, 111.) If sovereign states are free to conclude international treaty provisions amongst themselves, then surely they are entitled to rely upon those treaty provisions without this reliance itself constituting a treaty-violating or treaty-altering type of "treatment" of third-party beneficiaries. The *Hochtief* tribunal posited an alternative ground for finding that the German-Argentine BIT's territorial limitation was satisfied – namely, because the consequences or effects of the domestic courts proviso would be felt by the claimant within Argentina.[403] This argument, though more subtle, is equally misplaced. One can conceive of myriad international agreements whose provisions may impact upon investors operating within the territorial boundaries of Argentina. Examples include treaties addressing climate change, intellectual property rights, financial regulation, competition policy, human rights, peace and security, and countless other topics. Argentina's negotiation of and adherence to such treaties would not automatically constitute direct "treatment" of foreign investors by Argentina within its territory merely because they generate some effects which are felt within Argentina.

text for such a difference. The Treaty defines both "investment"[404] and "activities in connection with an investment" in broad terms.[405] The parallel breadth of these definitions suggests that the Treaty's grant of MFN treatment to both investors and investments was intended to be complementary and not differential. The MFN guarantees offered to the two categories might even be co-extensive, for it is difficult to imagine a type of MFN treatment enjoyed by an investment that could not correspondingly be claimed by a qualifying investor in connection with that investment.[406]

233. Moreover, the explanation for the Treaty's distinction between investments and investors in Article 3 becomes evident when one recalls the second major guarantee provided by Article 3: that of national treatment. Investors are granted MFN and national treatment only in respect of their "activities in connection with investments" so that they may not lay claim to the myriad of non-investment-related personal rights and privileges that may be afforded by the Host State to its own citizens.[407] No such limitation was necessary in Article 4(4), since that MFN clause applies only in respect of the particular investment protections enumerated in sub-paragraphs 4(1)-(3). In

[404] Article 1(1) of the Treaty provides:

> "The term 'investment' shall include any kind of investment in accordance with the laws of the Contracting Party in whose territory the investment is made in accordance with this Treaty, in particular, but not limited to:
>
> (a) moveable and immoveable property and any other property rights such as mortgages and liens;
>
> (b) shares or stock in a company or any other form of participation in a company;
>
> (c) claims to money which has been used to create an economic value or claims to any performance hailing an economic value;
>
> (d) intellectual property rights, in particular copyrights, patents, utility patent models, industrial designs or models, trade or service marks, trade names, trade or business secrets, technical processes, know-how, or goodwill;
>
> (e) business concessions under public law, including concessions to search for or exploit natural resources".

[405] Paragraph 2 of the Protocol, reproduced in para 208 above, is careful to emphasize that its broad definition of "activity" is illustrative and not exclusive.

[406] The *Renta4* tribunal articulated it well:

> "Whether MFN treatment is stated in the relevant BIT to relate to investors rather than investments is in principle of no moment. Investors will not claim access to international arbitration by way of MFN treatment in the abstract. They will assert a breach and harm in connection with a qualifying investment under the relevant BIT."

Renta4, above note 309 at para 101.

[407] Examples might include rights to health care, education, pension schemes, or even the right to vote in political elections.

any event, since all three MFN provisions utilize the general word "treatment" and all three are limited by the territorial qualification, the Treaty's distinction between MFN treatment for investors and MFN treatment for investments cannot constitute evidence that one or the other type of MFN protection was intended to encompass the Treaty's international dispute resolution provisions. The Tribunal's above analysis applies equally to all three MFN clauses.[408]

f) Significance of the MFN clauses' failure to refer to "all matters" subject to the Treaty

234. The disputing parties have also debated whether the German-Argentine BIT's promise of MFN treatment to investors and their investments evinces a narrower intended field of application than other BITs promising MFN treatment "in all matters subject to" the BIT. Several arbitral tribunals interpreting BITs of this latter variety have stressed the "broader" formulation of this phrase, citing it as evidence that such BITs were intended to include international dispute resolution within the scope of the MFN clause, even if BITs specifying only MFN "treatment" were not. Likewise, some tribunals interpreting BITs lacking the phrase "all matters" have cited the omission in support of their decisions to deny the extension of the MFN clause in question to the treaty's dispute resolution provisions.[409] Within the investor-State dispute context, this line of argument extends back to the *Maffezini* tribunal, which stated:

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> "The Tribunal also notes that of all the Spanish treaties it has been able to examine, the only one that speaks of 'all matters subject to this Agreement' in its most favored nation clause, is the one with Argentina. All other treaties, including those with Uruguay and Chile, omit this reference and merely provide that 'this treatment' shall be subject to the clause, which is of course a narrower formulation."[410]

235. The *Berschader* tribunal, however, devoted ten paragraphs to the observation that "all matters" cannot really refer to all matters, since some matters covered in BITs – such as their

[408] For this reason the Tribunal finds it unnecessary to parse the meaning of Article (2)(a) of the BIT's Protocol. The Tribunal agrees that, "[t]aken in their ordinary meaning, the 'management use, enjoyment, and disposal of an investment' necessarily entail the defense and exercise of legal rights via dispute settlement mechanisms" (Dissenting Opinion of Charles N. Brower at para 22). This explains why the MFN clauses must be read as guaranteeing most-favored nation treatment to German investors in respect of Argentina's domestic administration of justice. But the Protocol nowhere authorizes the Tribunal to jettison the MFN clauses' clear territorial limitation.

[409] This was in particular the view of the *Wintershall* tribunal, which addressed the interpretation of the very same BIT that is at issue here. See *Wintershall*, above note 330 at para 172.

[410] *Maffezini*, above note 114 at para 60. See also *Gas Natural*, above note 113 at para 30; *InterAguas*, above note 113 at para 55. Indeed, even before *Maffezini*, the arbitral commission in the *Ambatielos* matter seemed to suggest that this type of phrase might be particularly significant. See *Ambatielos II*, above note 363 at p. 107.

temporal and territorial application, their provisions on denunciation and renewal, etc – cannot be extended by means of an MFN clause.[411] By logical inference then, if some matters are necessarily omitted from the MFN clause's reference to "all matters", who is to say whether international investor-State dispute resolution is or is not among the omitted matters? The *Plama* tribunal, which denied extension of an MFN clause to a BIT's international dispute resolution provisions, considered that the omission of the phrase "with respect to all matters" could "not alleviate the doubt".[412] The *Siemens* tribunal, which reached the opposite outcome, seems to have agreed that the phrase was not determinative,[413] and at least two tribunals besides *Siemens* have found that a BIT's MFN clause could extend to international dispute settlement provisions even absent any reference to "all matters" subject to the agreement.[414]

236. The position of the present Tribunal is simply that the absence of the expression "all matters" – a phrase that is indicative of an intention on the part of some contracting State parties to cover the largest scope possible – is consistent with the conclusions which the Tribunal has already reached on the basis of its analysis of the terms "treatment" and "in its territory" in the German-Argentine BIT. The omission constitutes a supplementary indication that Germany and Argentina, at the time of the conclusion of the Treaty, did maintain a distinction between the Host State's direct treatment of investments within its territory and the international settlement of investor-State disputes.

g) Significance of the exceptions to MFN treatment listed in Articles 3(3) and 3(4)

237. Some tribunals have relied upon the Roman law principle *expressio unius est exclusio alterius* to conclude that, where a treaty lists certain exceptions to MFN treatment, any treatment not specifically excluded is necessarily covered by the MFN clause.[415] These tribunals have pointed to exceptions concerning preferential treatment accorded by one State to investors of a third State by reason of a customs union, regional economic integration area, or double taxation

[411] See *Berschader*, above note 395 at paras 184-194.

[412] *Plama*, above note 349 at para 205;

[413] *Siemens*, above note 71 at para 103.

[414] See *National Grid*, above note 113 and *RosInvest v. The Russian Federation*, Case No: Arbitration V 079/2005 Arbitration Institute of the Stockholm Chamber of Commerce, Award on Jurisdiction (Oct 2007) [hereinafter "*RosInvest*"].

[415] See eg *National Grid*, above note 113 at para 82. See also *InterAguas*, above note 113 at para 56 (applying the principle without naming it); and *Siemens*, above note 71 at paras 83-86 (same).

treaty as evidence that the contracting parties intended to include international dispute resolution provisions within the scope of the MFN clause.

238. The German-Argentine BIT also includes these standard exceptions.[416] The present Tribunal does not, however, view the presence of these exceptions as an indication that the State Parties intended to include the Treaty's international investor-State dispute resolution provisions within the scope of its MFN commitments. This is so for two reasons. First, the MFN treatment exceptions mentioned in the German-Argentine BIT – like those found in most BITs – refer exclusively to types of treatment normally occurring within the territory of the Host State. Tax treatment, the extension of trade advantages resulting from customs unions, etc – all of these standard exceptions conform to the MFN clause's territorial limitation while the availability or form of international dispute resolution does not. It is therefore necessary for contracting State parties to explicitly exclude the former but not the latter from the scope of a territorially bound MFN clause if such is their intent.

239. Second, wherever one may stand on the debate over "substantive" investment protections versus "procedural" dispute resolution mechanisms – it cannot be denied that all of the typical exceptions to MFN treatment observed in international investment treaties (at least in treaties concluded prior to the advent of the *Maffezini* decision) deal exclusively with the contracting States' direct treatment of foreign investments, never with the international resolution of investor-State disputes arising out of that treatment.[417] Overlooking the obvious differences between rights and remedies would seem to push the principle *expressio unius est exclusio alterius* too far. One cannot use the principle to prove the non-existence of apples based upon the existence of

[416] See Articles 3(3) and 3(4) of the BIT, reproduced in para 206 above.

[417] The Dissenting Opinion attempts to explain away this fact, stating: "the Award neglects to mention that most if not all species of allegedly 'direct' treatment enumerated as exceptions to MFN treatment in the BIT entail specific mechanisms of dispute settlement, usually outside the territory of the host State" (Dissenting Opinion of Charles N. Brower at para 35). This argument amounts to a sleight of hand, since all of the examples cited by the Dissenting Opinion involve State-to-State international dispute resolution, not investor versus State. There would have been no need for the Contracting State Parties to specify that the BIT's MFN clauses could not be invoked by investors to reach the State-to-State international dispute resolution provisions of these other treaties. Investors may not initiate such proceedings in any event. It must further be noted that at the time of the conclusion of the German-Argentine BIT, there were no known examples of regional trade agreements containing investor-State dispute settlement provisions. The first such hybrid agreement – the North American Free Trade Agreement – was signed by Canada, the United States and Mexico in 1992 and went into force in 1994. (See generally the materials available at: http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta). And even the *Maffezini* tribunal disavowed the invocation of a BIT-based MFN clause to reach the international investor-State dispute settlement provisions of that "highly institutionalized system of arbitration." (*Maffezini*, above note 114 at para 63.)

oranges. The exclusion of certain types of domestic substantive treatment from the German-Argentine BIT's Article 3 MFN clauses therefore does not imply the inclusion of particular types of extra-territorial dispute resolution procedures. Indeed, it seems more likely that the Contracting State Parties, acting as they were prior to *Maffezini*, did not explicitly exclude international investor-State dispute resolution provisions from the scope of the MFN clauses simply because they never considered such an invocation of the clause to be possible.[418]

h) Requirement that the comparator treatment invoked must be more favorable

240. Pursuant to the MFN guarantees in Article 3 of the BIT, the Contracting State Parties may not, in their territory, subject the investments or investors of the other Contracting Party to treatment that is "less favorable" than that accorded to third States' investors and investments. Article 4(4), within its more limited sphere of application, articulates the same idea in inverse terms, requiring the Contracting States to afford "most-favored-nation treatment". Thus, the BIT's MFN clauses apply only where the treatment accorded under the Basic Treaty is <u>less</u> favorable or the treatment under a comparator treaty is <u>more</u> favorable. Since this Tribunal has already concluded that the wording of Articles 3 and 4 of the BIT as centred on the phrase "treatment in its territory" does not permit it to agree with the Claimant's thesis, it is not strictly necessary to examine the requirement that the comparator treatment invoked must be more favorable. Even if such an examination were necessary, the Tribunal could not at present reach the same conclusion as the Claimant on this point.

241. The words "less" and "more" are, by their nature, relative terms. They necessitate a comparison between the two types of treatment invoked. Arbitral tribunals have adopted varying approaches, but surprisingly few have actually engaged in any kind of comparative scrutiny. Some appear to have accepted without question the claimant's characterization of a comparator treaty's dispute resolution provisions as more favorable. This was the case, for example, with the *Maffezini* and *Siemens* tribunals.[419] Other tribunals have made explicit findings, but in

[418] The Tribunal addresses this issue in paras 262-279 below (discussing the relevance of prior and subsequent treaty practice).

[419] *Maffezini*, above note 114 and *Siemens*, above note 71. A variation on this approach was employed by the *Renta4* majority, which suggested that since investors rationally believe international arbitration may be more favorable to them than domestic dispute resolution, this necessarily renders "greater access" to international arbitration more favorable. *Renta4*, above note 309 at paras 86 and 100.

conclusory fashion, without providing any reasoning.[420] Still other tribunals appear to have equated "no less favorable" with "same". In the words of one tribunal:

> "granting a treatment to Spanish investors that is no less favorable than that granted to French investors would mean that the Spanish investors would be able to invoke international arbitration against Argentina on the same terms as French investors."[421]

242. Yet neither the ILC in its Draft Articles on MFN clauses nor the much-cited *Ambatielos* arbitral commission conflated MFN treatment with equal treatment, nor did they express any unease with the task of objective comparison. The ILC specifically eschewed any reference to the word "equal" in its Draft Articles on MFN clauses.[422] In explaining why, the Commission's Commentary acknowledged that "the notion of 'equality of treatment' is particularly closely attached to the operation of the most-favoured-nation clause."[423] It also pointed out, however, that "equal" is not the same as "identical". This implies "different" does not automatically mean "less favorable". Rather, the point of MFN clauses is to ensure overall equality of treatment in the sense of creating a level playing field between foreign investors from different countries, even if this is sometimes accomplished through non-identical means.

243. More fundamentally, however, the "different = less favorable" hypothesis proves false in situations where the provisions of the basic treaty may actually be more favorable than those of the comparator treaty. As the ILC noted, "while most-favoured-nation treatment excludes preferential treatment of third States by the granting State, it is fully compatible with preferential treatment of the beneficiary State by the granting State".[424] Any tribunal called upon to interpret and apply an MFN clause must therefore satisfy itself that the comparator treaty provision invoked by means of the clause is indeed more favorable than that of the basic treaty. This

[420] See eg *Gas Natural*, above note 113 at para 31 ("access to [international] arbitration only after resort to national courts and an eighteen-month waiting period is a less favorable degree of protection than access to arbitration immediately upon expiration of the negotiation period").

[421] *InterAguas*, above note 113 at para 55 (emphasis added). See also *AWG*, above note 113 at para 55 (same quote, but referring to investments rather than investors).

[422] ILC Commentary on Draft MFN Articles, above note 364 at p. 22, para 5.

[423] Ibid.

[424] Ibid.

requires an objective determination by the tribunal; an invoking party's bald assertions will not suffice.[425]

244. Applying these principles to the present matter, the Tribunal could not endorse the Claimant's proposed use of the MFN clause unless it could determine that the dispute resolution provisions of Article 10 of the German-Argentine BIT (the "Basic Treaty") are objectively less favorable than those of Article X of the Chilean-Argentine BIT (the "Comparator Treaty").[426] Article X of the Comparator Treaty allows investors to proceed to international arbitration immediately upon fulfilment of a 6-month negotiation period.[427] The Claimant asserts that this is

[425] The arbitral commission's decision in *Ambatielos* provides a classic example. In that decision, the tribunal undertook a searching comparative analysis of the basic and comparator treaties' provisions on the administration of justice. It eventually found that the comparator treaties' provisions were not actually more favorable, and therefore the MFN clause did not apply to the matter before it. *Ambatielos II*, above note 363 at pp. 107-110. Despite frequently citing to the decision and lauding its finding that dispute resolution provisions may potentially fall within the reach of an MFN clause, many recent investor-State arbitral tribunals seem to have overlooked this crucial aspect of the commission's approach.

[426] As noted by one commentary, "it would be invidious for international tribunals to be finding (in the absence of specific evidence) that Host State adjudication of treaty rights was necessarily inferior to international arbitration." McLachlan, Shore and Weininger, International Investment Arbitration, Substantive Principles (Oxford University Press, 2008), p. 257.

[427] Article X of the Chile-Argentina BIT, titled "Settlement of disputes relating to investments", provides as follows:

> (1) "Any dispute relating to an investment within the meaning of the present Treaty, between one Contracting Party and a national or company of the other Contracting Party, shall, to the extent possible, be resolved by amicable consultations between the parties to the dispute.
>
> (2) If the dispute has not been resolved within a period of six months from the moment when a complaint was lodged by one or other of the parties, it shall be submitted at the option of the national or company:
>
> - either to the national jurisdiction of the Contracting Party implicated in the dispute;
> - or to international arbitration in the conditions described in paragraph 3.
>
> Once a national or company has submitted the dispute to the jurisdiction of the relevant Contracting Party or to international arbitration, this election of one or the other of these proceedings shall be definitive.
>
> (3) In case of recourse to international arbitration the dispute shall be raised before one of the following designated arbitral organs at the election of the national or company:
>
> - The International Centre for Settlement of Investment Disputes (ICSID), created by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature in Washington the 18th of March 1965, if each State party to the present agreement has ratified that Convention. So long as this condition is not fulfilled, each Contracting Party gives its consent that the dispute may be submitted to arbitration in accordance with the Additional Facility Rules of ICSID;

more favorable than Article 10 of the Basic Treaty, which requires investors to first submit the dispute to the domestic courts of Argentina for 18 months before proceeding to international arbitration. On the other hand, Article X of the Comparator Treaty contains a fork-in-the-road clause, whereas Article 10 of the Basic Treaty does not. Thus, an investor operating under the Basic Treaty's dispute resolution provisions receives two bites at the apple: once before the domestic courts, and – if the investor is still not satisfied – again before an international arbitral tribunal. An investor operating under the Comparator Treaty, by contrast, receives only one chance to obtain a satisfactory outcome. Such an investor must choose either domestic or international dispute resolution, and once the choice is made, it is irrevocable.[428] Which provision is more favorable, then?

245. It might be tempting to simply accept the Claimant's assertion that the Comparator Treaty is more favorable under the assumption that it must be more favorable if the Claimant prefers it. The problem, however, is that claimants' preferences are subjective. It is certainly conceivable that some future claimant may instead prefer to have two successive chances for a favorable outcome under the Basic Treaty rather than proceed immediately to international arbitration under the Comparator Treaty. This is particularly so since recent trends indicate that the costs of international arbitration may be quite high relative to the costs of domestic dispute

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- An ad hoc arbitral tribunal established in accordance with the rules of the United Nations Commission on International Trade Law (UNCITRAL).

(4) The arbitral tribunal shall decide on the basis of the provisions of the present Treaty, the law of the Contracting Party to the dispute, including its rules on conflict of laws, and the terms of any specific agreement concluded in relation to the investment as well as the relevant principles of international law.

(5) The decisions of the arbitral tribunal shall be definitive and binding upon the parties to the dispute.

(6) The Contracting Parties shall abstain from pursuing, through diplomatic channels, arguments concerning any arbitration or judicial process in progress and up until after the proceedings have been concluded, unless the parties to the dispute have not complied with the award of the arbitral tribunal or the sentence of the ordinary court under the terms of implementation established in the award or sentence."

(Tribunal's translation).

[428] See Article X(2) of the Chile-Argentina BIT ibid. The Tribunal notes that the both of the other comparator BITs invoked by the Claimant contain similar fork-in-the-road clauses. See United States-Argentina BIT at Article VII(3)(a) and Panama-Argentina BIT at Article 9(2).

resolution,[429] and the average time required to resolve disputes via international arbitration may equal or exceed that of domestic court processes.[430]

246. Simply accepting a claimant's assertions, therefore, could lead to a situation wherein the terms "more" and "less" favorable have no objective meaning at all, but rather depend upon the whim of the individual claimant in each particular case. It is difficult to believe that the Contracting State Parties to the BIT intended to commit themselves to international legal obligations which derive not from an objective appreciation of the text of the Treaty but from the subjective perceptions of individual claimants.

247. Moreover, under Article 10 of the Germany-Argentina BIT, if the Claimant submits its claims to the domestic courts of Argentina for 18 months and does not obtain satisfactory results within that period, it remains at liberty to pursue international arbitration thereafter. Should it opt to do so, it will be in a position to submit to an international arbitral tribunal objective evidence of its treatment in the domestic courts of Argentina – including the actual costs expended therein, any recompense obtained, and any opportunity costs suffered by reason of the delay in the full satisfaction of its claims. In other words, the Claimant could add to its other claims an additional claim concerning its treatment in the Argentine courts, which if proven would be fully compensable, with interest, in the same manner as any other treaty violation. That is to say, any

[429] A 2005 UNCTAD study (now probably somewhat outdated) stated the following concerning the costs of international investment arbitration:

> "A cursory review of cost decisions in recent awards suggests that the average legal costs incurred by Governments are between $1 million and $2 million, including lawyers' fees, the costs for the tribunal of about $400,000 or more, and the costs for the claimants, which are about the same as those for the defendant."

"Investor-State Disputes Arising from Investment Treaties: A Review", UNCTAD Series on International Investment Policies for Development (2005), available at: www.unctad.org/en/docs/iteiit20054_en.pdf at p. 8.

[430] The present arbitration, which was first registered on 2 August 2004 (nearly 8 years ago), provides a case in point. As a statistical matter, one recent study found that the average duration of ICSID cases decided through 1 July 2009 was 3.6 years (1325 days), with the shortest case lasting 1.2 years and the longest lasting 10.5 years. Sinclair, Fisher, and Macrory, "ICSID Arbitration: How long does it take", *Global Arbitration Review Journal*, Vol. 4, Issue 5 (2009). The present arbitration has already exceeded the ICSID average. The Tribunal was not provided with reliable independent information indicating the average duration and cost of domestic Argentine court proceedings. Argentina has asserted, however, that its courts can and do regularly dispose of some matters within less than 18 months. Respondent's Reply Memorial on Jurisdiction, para 55 and note 81, citing Respondent's Exhibits: "Judgments of the Argentine Supreme Court" (A RA 20), "Injunctions (A RA 21), and "Final Judgments" (A RA 22).

violation due to less favorable or discriminatory treatment would be compensated in accordance with the ordinary general international law principle of full reparation.[431]

248. The BIT provides two avenues under which the Claimant could proceed. The first is provided by the MFN clauses themselves[432] and the second by its arbitrary and discriminatory treatment clause.[433] Both sets of clauses protect German investors such as the Claimant from suffering less favorable treatment than that enjoyed by foreign investors under other BITs. If domestic dispute resolution turns out to be ineffective, the Claimant can recuperate the costs of this process in its subsequent international arbitration proceedings.[434] On the other hand, if the Claimant's claims are resolved to its satisfaction in the Argentine courts in a timely and cost efficient manner, then the Claimant will have no basis for either an MFN claim or a discriminatory treatment claim and will have no need to proceed to international arbitration.

[431] This principle would allow the Tribunal to take account not only of the Claimant's actual legal costs within the Argentine courts for the duration of the 18-month requirement, but also the opportunity costs associated with the delay in the resolution of the claims. Such a calculation presents its challenges, to be sure, but no more so than the calculation of damages due for the violation of any other treaty provision.

[432] Since the treatment received by the Claimant in the Argentine courts would constitute treatment within the territory of the Host State, the territorial limitation of the BIT's MFN clauses would no longer pose a problem. The subsequently concerned arbitral tribunal could therefore consider, in light of the objective evidence, whether Argentina has violated its MFN commitments by forcing the Claimant – in order to vindicate its legal rights – to incur costs and delays in excess of those faced by similarly situated claimants under third-state BITs. This would, of course, require said tribunal to make a definitive finding to the effect that the treatment of an investor within the Host State's domestic courts does fall within the purview of the Treaty's MFN clauses, even if international dispute resolution does not. In this Tribunal's view, such a finding follows naturally from a plain reading of the MFN clauses.

[433] Even if the BIT's MFN clauses did not provide sufficient protection, Article 2(3) of the BIT provides the Claimant with a second avenue for remedying any less favorable treatment ultimately experienced by reason of its compliance with the 18-month domestic courts requirement. Under Article 2(3):

> "Neither Contracting Party shall in any way impair by arbitrary or discriminatory measures the management, use, enjoyment, or disposal of investments of nationals or companies of the other Contracting Party in its territory."

Requiring German investors to fruitlessly (if such turns out to be the case) expend time and resources in the domestic Argentine courts in order to vindicate their treaty-based legal rights while exempting Chilean investors from the same requirement could be viewed as a discriminatory impairment of German investors' rights. This is so even if Argentina could articulate a good policy reason for requiring some foreign investors, but not others, to first submit their claims to the domestic courts.

[434] It should be noted that this would not require the Claimant to make out a denial of justice claim concerning its treatment in the Argentine courts. Nor would it require the subsequent arbitral tribunal to sit in review over the actions of the domestic courts. Rather, the sole question would be whether the Claimant, in order to vindicate its legal rights, was discriminatorily (on the grounds of its nationality) forced to bear costs in excess of those imposed upon investors from third countries.

249. In either case, the basic purpose of the MFN clauses will have been fulfilled. The Claimant will have been treated at least as well as the investors of third States. It will have experienced no competitive disadvantage as a result of the 18-month domestic courts submission requirement.[435] At the end of the day, the Claimant will have enjoyed, alongside other foreign investors, a "fundamental equality without discrimination among all of the countries concerned".[436]

250. This Tribunal need not worry, therefore, that rejecting the Claimant's bid to skip over the Basic Treaty's 18-month domestic court submission requirement will result in the Claimant receiving treatment, in the territory of the Host State, that is ultimately less favorable than that extended to Chilean investors under the Comparator Treaty. The Claimant may have to follow a different procedural route than similarly situated Chilean investors. But that route will, at worst, ultimately protect the Claimant's rights[437] on an equal par with those investors. At best, it may even do so more quickly or cheaply. The weight of the arguments therefore does not indicate that the Comparator Treaty's dispute resolution provisions are objectively more favorable than those of the Basic Treaty. As a consequence, the Basic Treaty's MFN clauses do not presently come into play. This finding is without prejudice to any MFN claims the Claimant may present at the merits stage upon satisfaction of the Treaty's jurisdictional pre-requisites.

i) Relationship between the Article 3 MFN clauses and the Article 4 MFN clause

251. The final textual puzzle to be addressed is as follows: does the relationship between the MFN clauses in Articles 3 and 4 of the Treaty reveal anything about whether or not the Treaty's international dispute resolution provisions fall within the ambit of one or more of the clauses? The parties have once again made disputing submissions concerning this question. As the Tribunal has noted, Article 4(4)'s MFN clause applies only in respect of the specific protections enumerated in Article 4, whereas the MFN clauses in Articles 3(1) and 3(2) appear to apply more generally. In the present matter, the Claimant's claims concerning expropriation as well as full

[435] The Dissenting Opinion expresses concern that if a foreign investor "subjected itself willingly to a process prescribed under the BIT, foregoing MFN protection in the process," it would then be foreclosed from bringing an MFN claim in a subsequent arbitral proceeding (Dissenting Opinion of Charles N. Brower at para 38). This concern is unfounded, since the claimant would not have "foregone" MFN protection but would have rather fulfilled the necessary condition precedent to claiming such protection before an international tribunal.

[436] *Case concerning rights of nationals of the United States of America in Morocco*, Judgment of August 27th, 1952, I.C.J. Reports 1952, p. 176.

[437] Including its MFN rights.

legal protection and security fall within the scope of Article 4(4). Its claims concerning fair and equitable treatment, arbitrary and discriminatory treatment, and the free transfer of payments all fall within the scope of Articles 3(1) and 3(2). What is not clear is whether the specific protections provided in Articles 4(1)-(3) of the Treaty simultaneously enjoy the MFN guarantees of Articles 3(1)-(2) and that of Article 4(4), or whether the latter MFN clause ousts the operation of the former two in respect of Article 4.

252. The *Siemens* tribunal concluded that Article 4(4) of the German-Argentine BIT was inserted *ex abundante cautela*, because the protections listed in Articles 4(1)-(3) are of particular importance to foreign investors.[438] This may be so, although recent trends in investor-State arbitration suggest that the fair and equitable treatment guarantee (which appears in Article 2) may be at least as important to many investors, if not more so.

253. Whatever the explanation for the separate MFN clauses, it is in any event irrelevant to the present inquiry. The disputing parties have submitted no persuasive evidence as to the overlapping or distinctive scope of application of the Treaty's MFN clauses. Even if they had done so, a determination one way or the other would have no effect upon the outcome. As discussed above, the use of the word "treatment" is common to all three MFN clauses, as are the limitations that the treatment invoked must be one occurring within the territory of the Host State and must be either "more" or "less" favorable than the parallel treatment under some comparator treaty. It makes little difference, therefore, whether the Claimant requests that an allegedly more favorable comparator dispute resolution provision be applied to all of its claims under Articles 3(1) and 3(2) or whether it invokes Articles 3(1)-(2) in relation to some claims and Article 4(4) in relation to others. The same considerations apply in either case.

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j) Meaning of the MFN clauses in light of the objects and purposes of the BIT

254. The Tribunal has analyzed the meaning of the constituent components of the German-Argentine BIT's MFN clauses by probing their ordinary meaning in context. In so doing, the Tribunal has throughout its analysis born in mind the objects and purposes of the Treaty, as required by Article 31(1) of the Vienna Convention. It has not undertaken a separate three-step analysis of each Treaty term – one step focusing on ordinary meaning, another on context, and another on the "light" of the Treaty's object and purpose – because in the Tribunal's view the

[438] *Siemens*, above note 71 at para 90.

Vienna Convention posits these as interrelated elements of a holistic approach to treaty interpretation rather than as a set of discrete and sequential steps. It nevertheless seems prudent to make a few explicit comments about the objects and purposes of the BIT so as to clarify the Tribunal's approach.

255. The German-Argentine BIT expresses its objects and purposes in rather general terms in its Preamble, which reads:

> "Desiring to intensify economic cooperation between both States,
>
> Intending to create favorable conditions for investments by nationals or companies of one State in the territory of the other State,
>
> Recognizing that the encouragement and contractual protection of such investments are apt to stimulate private business initiative and to increase the prosperity of both States,
>
> Have agreed as follows:"

256. As formulated, the States resolved to encourage, protect, and create favorable conditions for investments in order to: a) intensify economic cooperation (an amity objective); b) stimulate private business initiative (an economic growth objective); and c) increase the prosperity of both States (a welfare objective). It is important to note that these latter three points represent the ultimate or outcome-based objectives of the States in concluding the Treaty, for which the encouragement, protection, and creation of favorable conditions for investment serve as the chosen instruments.

257. Articles 1 through 11 of the Treaty, as well as the Protocol, go on to specifically define the manner in which the Contracting Parties mutually agreed to promote and protect investments in pursuit of the Treaty's specified objectives. The German-Argentine BIT thus conforms to the classical nature of bilateral treaties between States: it commits the Contracting Parties to mutually and reciprocally pursue a chosen set of objectives within a framework that both Parties have deemed to be acceptable.

258. In considering the application of this framework to the present matter, one must bear in mind that the Contracting State Parties adopted all of the provisions of the Treaty together as a whole. In one fell swoop they nodded their assent not only to the BIT's objects and purposes, as expressed in the Preamble, but also to the various treatment standards set forth in Articles 1 to 9 (including the MFN clauses) as well as the international dispute resolution procedures set forth in Article 10. This indisputably evinces the State Parties' belief that all of these provisions –

including Article 10's requirement of an 18-month submission of any claims to the domestic courts of the Host State – are perfectly consistent with the objects and purposes of the Treaty.

259. The Claimant asserts that dispensing with the 18-month requirement, as the Argentina-Chile BIT has done, would be more consistent with the objective of investment protection and promotion. In a similar vein, the Dissenting Opinion asserts that allowing investors to choose between different types of international dispute settlement "options" is inherently more favorable to investors and therefore more conducive to investment promotion than not providing them with options.[439] With respect, both of these approaches confuse the real issue. The question is not whether allowing the Claimant to import all or portions of a comparator BIT's investor-State dispute resolution clause would better protect and promote investment,[440] nor whether the Claimant would prefer to be able to do so,[441] but rather whether Germany and Argentina, in concluding the BIT, agreed to protect and promote investment in that particular manner. This question cannot be answered by reference to external opinions as to which types of dispute resolution may best protect and promote investment in the abstract. Nor can it be answered by reference to a claimant's preference for more options over fewer options. It can only be answered by reference to the scope of the State Parties' consent as expressed in the German-Argentine BIT.

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260. The foregoing analysis of the Treaty's text has revealed no indication whatsoever that the Contracting Parties did, in fact, consent to protect and promote investment in the specific manner invoked by the Claimant. Indeed none of the formal textual indicia examined herein – let alone the balance of the indicia when examined collectively – affirmatively establishes the Contracting State Parties' consent to submit themselves, at the whim of individual investors, to a wide variety of different possible combinations of international dispute resolution provisions contained within third-party treaties.[442] The same conclusion holds even if one were to limit the Claimant's

[439] Dissenting Opinion of Charles N. Brower at para 36.

[440] Whether in the Claimant's view or that of the Tribunal.

[441] For another critique of this investor "choice" argument, see *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award (21 June 2011) [hereinafter "*Impregilo*"], Concurring and Dissenting Opinion of Brigitte Stern, at paras 11-12 and 105-107.

[442] In this regard, the Tribunal notes that the Dissenting Opinion of Judge Brower provides no indication whatsoever that the State Parties consented to submit to the jurisdiction of an international arbitral tribunal in the circumstances raised by this case. The most that can be said is that the word "treatment," standing on its own, is general enough to potentially encompass international investor-State dispute settlement. But this argument falls away as soon as the word "treatment" is examined in connection with the limiting phrase "in its territory." Thus, the open-textured nature of the word "treatment" falls well short of fulfilling the international law requirement that a State's consent to submit to the jurisdiction of an international tribunal must be established and not merely presumed.

"options" to supplanting the entirety of the Basic Treaty's investor-State dispute resolution article with the entirety of the Comparator Treaty's corresponding article. Since, as noted above, the international dispute resolution provisions of Article 10 of the Basic Treaty are not objectively less favorable than those of the applicable Comparator Treaty,[443] it would be incorrect to characterize the Claimant's position as more compatible with the Treaty's objects and purposes then the Respondent's position. For these reasons, a separate consideration of the Treaty's objects and purposes does not assist the Claimant here.

k) Supplementary indications from state practice and international jurisprudence

261. The Tribunal's interpretation of the Treaty's text in accordance with Article 31 of the Vienna Convention has shown that the Claimant's proposed use of the BIT's MFN clauses does not fall within the scope of the ordinary meaning of those clauses in their context and in the light of the Treaty's object and purpose. An examination of relevant supplemental materials pursuant to Article 32 of the Vienna Convention serves to confirm this conclusion. The Tribunal will begin with a consideration of the state practice of Argentina in the period immediately surrounding the conclusion of the German-Argentine BIT.

262. In relation to the 18-month domestic courts proviso, Argentina presented evidence of its prior and subsequent treaty practice in its submissions at the oral hearings. Appendices 1 and 2 below show 29 of Argentina's bilateral investment treaties in chronological order according to the date of signing and the date of entry into force, respectively. The tables also indicate, for each treaty, whether or not it included the 18-month domestic courts requirement that is in contention in this case. According to this evidence, of the 29 BITs signed by Argentina with various States between 22 May 1990 and 17 May 1994, ten treaties contained the 18-month domestic courts submission requirement while the other 19 did not. Only 17 of the 29 treaties concluded have so far entered into force. Of these, nine contain the 18-month domestic courts requirement while eight do not.

263. It is instructive to consider the chronology of these treaties in light of the principle of contemporaneity and the principle of effectiveness ("*effet utile*"). As can be seen from Appendix 1, if Argentina had intended for its BITs' MFN clauses to apply to their international dispute resolution provisions, then it included the 18-month domestic courts submission requirement in

[443] See above, paras 241-251.

no less than five subsequent treaties (those with Spain, Canada, Austria, the Netherlands, and South Korea) for no good reason at all. If one takes dates of entry into force (Appendix 2) as the relevant metric, then Argentina needlessly and inexplicably included the domestic courts provision in nine subsequent treaties,[444] including the German-Argentine BIT.

264. These patterns would seem strange indeed if the Claimant's assertions concerning the MFN clauses were accepted. In that case, the principle of effectiveness would be violated with respect to the noted treaties, because the 18-month domestic courts requirement would have been void *ab initio* – immediately superseded by means of the treaties' MFN clauses.[445] The principle of contemporaneity avoids this incongruity by preferring the interpretation consistent with Argentina's demonstrated treaty practice – namely, that Argentina did not in 1991 understand the phrase "treatment in the territory of the host state" as extending to the BIT's international arbitration procedures.

265. As to the state practice of Germany, a cursory examination reveals that the 18-month proviso does not feature in the vast majority of Germany's other contemporaneous BITs. This suggests that while Germany was willing to agree to the proviso in the context of its negotiations with specific Latin American countries,[446] it did not place particular importance upon the 18-month domestic courts requirement as a general policy matter. This does not imply, however, that the German Government in 1991 embraced the Claimant's proposed interpretation of the MFN clauses. On the contrary, there are indications within Germany's state practice suggesting that the German Government – like the Argentine Government – never contemplated (let alone endorsed) a possible invocation of the MFN clauses in the manner now proposed.

[444] Those with Spain, Sweden, the UK, Canada, Italy, Germany, Belgium/Luxembourg, the Netherlands, and Austria. The Tribunal notes that two of these treaties (the Netherlands and South Korea treaties) were negotiated and signed at a time when at last one treaty omitting the 18-month requirement (the Poland treaty) was already in force.

[445] The Dissenting Opinion suggests that Argentina's practice of including the18-month proviso in some later treaties would not have been pointless, since claimants remain at liberty to comply with the proviso should they so wish (Dissenting Opinion of Charles N. Brower at para 28). This "choice" argument is disingenuous in light of the Dissenting Opinion's insistence that direct access to international arbitration is inherently more favorable to claimants than international arbitration only following a mandatory 18-month domestic court proceeding. In addition, if, in concluding its later treaties, Argentina understood compliance with the 18-month proviso to have become optional, then it is difficult to understand why it continued to word the proviso in mandatory terms.

[446] See also Treaty between the Republic of Chile and the Federal Republic of Germany concerning the promotion and reciprocal protection of investments, signed 21 October 1991, at art. 10 (containing the same 18-month domestic courts requirement), available at: http://www.unctad.org/sections/dite/iia/docs/bits/chile_germany_sp.pdf.

266. Prior to concluding its BIT with Argentina, Germany had concluded other BITs authorizing investors to access international arbitration without any sort of prior recourse to the domestic courts.[447] The Claimant's theory would imply that Germany, upon signing the German-Argentine BIT, already recognized and accepted the inapplicability of the 18-month domestic courts proviso to any potential investment claims by Argentine investors against the German Government. In that case, one would expect Article 10 of the BIT to reflect this asymmetrical state of affairs. Yet the Contracting State Parties worded Article 10 in entirely symmetric language. There is no indication that – despite the reciprocal and bilateral nature of the rest of the Treaty – Germany consciously consented to proceed directly to binding international arbitration with Argentine investors in circumstances in which similarly situated German investors would not be entitled to proceed directly to binding international arbitration against Argentina.[448] This inconsistency provides yet another indication that the Contracting State Parties did not subscribe to the Claimant's proposed interpretation of the MFN clauses at the time of the Treaty's conclusion.

267. From this starting point, it becomes necessary to examine whether the meaning of the phrase "treatment in its territory" has evolved over time in order to see whether an evolutive interpretation is required in the present instance.[449] Such an interpretation would only be permissible in the face of convincing evidence, reflected by state practice, doctrinal analysis and international case law, that a coherent and generally accepted new meaning of the phrase has since been accepted by states, and in particular by Argentina and Germany. In this regard, it is striking to note that movements towards an enlargement of the scope of this phrase have stemmed not primarily from state practice but from the investor-State arbitral case law. It was the *Maffezini* decision of 25 January 2000 that, for the first time, initiated an enlarged interpretation of the scope of "treatment" so as to cover not only investment protection standards but also

[447] See e.g. Treaty between the Federal Republic of Germany and Bolivia concerning the promotion and mutual protection of investments (with protocol), signed 23 March 1987, at art. 11, available at: http://www.unctad.org/sections/dite/iia/docs/bits/germany_bolivia.pdf.

[448] Since Argentina had not yet concluded any BITs omitting the 18-month requirement.

[449] Contrary to the assertion of the Dissenting Opinion, this does not entail an "abandonment" of the principle of contemporaneity. (Dissenting Opinion of Charles N. Brower at para 27.) Rather, the principle of contemporaneity has revealed that the Contracting States did not likely endorse the Claimant's proposed interpretation of the MFN clauses' use of the phrase "treatment in the territory of the host State" at the time of the conclusion of the BIT. The Tribunal now turns to consider whether, in the alternative, the Contracting States have since altered their original understanding of the Treaty's terms so as to subsequently embrace the Claimant's proposed interpretation.

international dispute resolution provisions of BITs.[450] It need hardly be stated that a BIT's MFN clause should not now be interpreted in an evolutionary manner solely because some investor-State tribunals have followed, either in toto or in part, the interpretation initiated by one arbitral award which, with due respect to its talented authors, remains one of the most highly controversial awards in the history of contemporary investor-State arbitration.

268. A brief look at the ways in which various investor-State tribunals and States have since resolved the question proves that neither the arbitral community nor more importantly (as public international law is not made primarily by arbitrators) common state practice has yet reached a consensus whereby an MFN clause's reference to "treatment in the territory of the host State" may nowadays be understood as covering the international settlement of disputes. To-date, at least nine known investor-State arbitral panels have found that a particular BIT's MFN clause could be used to modify its international dispute resolution provisions[451] while another ten have reached the opposite result.[452] Eminent arbitrators have come down on opposite sides of the debate, sometimes with respect to the very same treaty – including the Treaty presently under consideration.[453] This relatively even split shows that there is as yet no established *opinio juris*.

269. The Dissenting Opinion attempts to discount the bulk of the contrary authority by asserting that those cases dealt with factually distinct situations.[454] With respect, this is a distinction without a difference. It is true that nine out of eleven arbitral panels have allowed claimants to circumvent the 18-month domestic courts requirement of various Argentine BITs in

[450] *Maffezini*, above note 114 at paras 38-64.

[451] See *RosInvest*, above note 414; *Maffezini*, above note 114; *Siemens*, above note 71; *National Grid*, *Gas Natural*, *Camuzzi 2*, *InterAguas*, and *AWG*, all above note 113 (in contrast to the dissent, the Tribunal considers the *InterAguas* and *AWG* awards as comprising only a single finding, as they were issued around the same time by the same panel of arbitrators and are, in large part, nearly verbatim identical); *Impregilo* above note 441 (Brigitte Stern dissenting); and *Hochtief*, above note 345 (Christopher Thomas dissenting).

[452] See *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003); *Salini v. Jordan*, above note 69; *Plama*, above note 349; *Berschader*, above note 395; *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15 Award (13 Sep 2006); *Wintershall*, above note 330; *Renta4*, above note 309 (Charles Brower dissenting), *Mr. Tza Yap Sum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence (19 June 2009); *Austrian Airlines v. the Slovak Republic*, UNCITRAL, Final Award (9 Oct 2009) (redacted version) (Charles Brower dissenting); and *ICS v. Argentina*, above note 303

[453] The *Wintershall* and *Siemens* tribunals reached opposite conclusions concerning the German-Argentine BIT whose interpretation is at issue in the present case. Most recently, the *Hochtief* majority came down on the side of the *Siemens* tribunal, while the dissent sided with the *Wintershall* outcome.

[454] Dissenting Opinion of Charles N. Brower at paras 23-24.

reliance upon MFN clauses.[455] It is also true, however, that several of the ten arbitral tribunals denying the applicability of MFN clauses to BITs' international dispute resolution provisions have severely criticized both the reasoning and the outcome of the cases embraced by the Dissenting Opinion.[456] This is not surprising, given that none of the cases finding in favor of MFN-generated extensions of jurisdiction has pointed to any principled textual basis for distinguishing between those international dispute settlement provisions which <u>may</u> be altered by operation of an MFN clause and those which may <u>not</u>. Nor does the Dissenting Opinion identify any such basis.[457]

270. The legal question before the Tribunal is: did the Contracting State Parties intend for the MFN clauses of the Basic Treaty to alter the scope of their consent to submit to the jurisdiction of an international arbitral tribunal, at the option of the investor, by reference to the international dispute settlement provisions of all existing and future comparator treaties? The particular type of alteration sought by the Claimant is of no moment in answering this question, because the treaty clauses themselves do not distinguish as to type. The Dissenting Opinion's attempt to draw a distinction is especially baffling in light of the fact that its distinguished author has already

[455] Ibid at n. 67.

[456] See e.g. *Salini*, above note 69 at paras 113-115; *Plama*, above note 349 at paras 216-227; *Wintershall*, above note 330 at paras 179-184. See also *Impregilo*, above note 451, Separate Opinion of Brigitte Stern. For scholarly critiques, see Zachary Douglas, "The MFN Clause in Investment Treaty Arbitration: Treaty Interpretation Off the Rails," *Journal of International Dispute Settlement*, Vol. 2, No. 1, (2011), pp. 97-113; Brigitte Stern, "ICSID Arbitration and the State's Increasingly Remote Consent: A Propos the Maffezini Case," in STEVE CHARNOVITZ, DEBRA STEGER AND PETER VAN DEN BOSSCHE (EDS) LAW IN THE SERVICE OF HUMAN DIGNITY. ESSAYS IN HONOUR OF FLORENTINO FELICIANO (Cambridge University Press, 2005), pp. 246-260.

[457] The Dissenting Opinion criticizes the *Wintershall* tribunal for expressing concern that expansive interpretations of MFN clauses could allow claimants even to change the Basic Treaty's designated arbitral forum, e.g. from ICSID to UNCITRAL (Dissenting Opinion of Charles N. Brower at para 25). But the Tribunal notes that the Dissenting Opinion is careful not to disapprove of that possibility. In fact, Judge Brower has on at least one occasion gone so far as to suggest the application of MFN clauses to achieve a still greater feat. Namely, in footnote 6 to his *Austrian Airlines* dissent (above note 452), he stated:

> "While we need not decide the point, as it has not been put before us, I pose the question whether, even if the Treaty is interpreted as barring arbitration of all claims for violation of substantive provisions of the Treaty itself, it properly can be construed as precluding an importable 'new' substantive provision [an umbrella clause, in that case] from bringing with it an associated right to arbitration."

In other words, Judge Brower envisions some circumstances wherein an MFN clause may authorize a claimant to engage in international arbitration against a state under a basic treaty which contains <u>no</u> investor-State arbitration clause at all.

found in favor of MFN-generated enlargements of a tribunal's jurisdiction in some of the very circumstances he now distinguishes and on the basis of the same reasons he now cites.[458]

271. As far as the evolution of state practice is concerned, one must respectively consider the practice of the Treaty's Contracting State Parties and that of other states. The disputing parties have submitted no evidence concerning the subsequent state practice of Germany that would tend to indicate any change in or clarification of that country's position.[459] The Tribunal notes that the most recent German Model BIT neither explicitly accepts nor rejects the *Maffezini* holding. It does, however, retain the territorial limitation upon the scope of the MFN clause.[460]

272. As for Argentina, as noted by the *National Grid* tribunal:

> "after the decision on jurisdiction in *Siemens*, the Argentine Republic and Panama exchanged diplomatic notes with an 'interpretive declaration' of the MFN clause in their 1996 investment treaty to the effect that, the MFN clause does not extend to dispute resolution clauses, <u>and that this has always been their intention</u>."[461]

Obviously, an interpretive declaration issued by a State after a treaty-based interpretive dispute has already arisen cannot be considered as a definitive guide to the State's original intentions – particularly when the declaration relates to a different treaty. It merits notice, however, that the Panama-Argentina BIT does not include the 18-months domestic courts proviso. Its dispute resolution provisions are instead similar to those of the Chile-Argentina BIT relied upon by the Claimant. The fact that Argentina and Panama nevertheless went out of their way to distance themselves from the understanding adopted by the *Siemens* tribunal is therefore indicative of their mutual disapproval of that holding.

[458] See *Austrian Airlines*, above note 452, Separate Opinion of Charles N. Brower (finding, in circumstances where the basic treaty stipulated that the scope of an international arbitral tribunal's jurisdiction was limited to claims concerning the amount or method of payment of compensation once the occurrence of an expropriation had already been found by the domestic authorities, that an MFN clause nevertheless entitled the tribunal to: 1) determine the preliminary question as to whether an expropriation had occurred, and 2) decide the claimant's fair and equitable treatment and full protection and security claims); see also *Renta4*, above note 309, Separate Opinion of Charles N. Brower, at paras 5-24 (reaching the same result on the basis of an MFN clause whose application was expressly limited to the fair and equitable treatment standard).

[459] The Tribunal is not aware of any instance in which Germany, as a respondent State in a BIT-based arbitral claim, has had to take a position on the legal question raised by these proceedings.

[460] German Model BIT, 2008, available at: http://www.italaw.com/investmenttreaties.htm.

[461] *National Grid*, above note 113 at para 85 (emphasis added).

273. Like the Contracting States' own treaty practices, the recent treaty practices of other States may prove illuminating. This is so because they may clarify whether the understanding of the MFN clause's scope of operation that prevailed among the general international community at the time of the conclusion of the German-Argentine BIT has since evolved to acquire a larger scope. In this regard, it should be noted that the only known clarifications issued by other States since the advent of the *Maffezini* decision have gone in the direction of confirming that the Contracting State Parties did <u>not</u> intend for the MFN clauses that are the subject of the clarifications to reach international dispute resolution. This is the case, for example, with the Central America-Dominican Republic-United States Free Trade Agreement (DR-CAFTA), wherein the parties inserted a footnote into the negotiating history indicating:

> "The Most-Favored-Nation Treatment Article of this Agreement is expressly limited in its scope to matters 'with respect to the establishment, acquisition, expansion, management, conduct operation and sale or other dispositions of investments.' <u>The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms</u> such as those contained in Section C of this chapter, and therefore could not reasonably lead to a conclusion similar to that of the *Maffezini* case."[462]

274. Switzerland and Colombia likewise appear to have clarified their investment treaty practice in reaction to *Maffezini* on at least one occasion. In an agreement signed on 17 May 2006, the parties included an annex, which reads:

> "For greater certainty, it is further understood that the most favourable nation treatment … does not encompass mechanisms for the settlement of investment disputes provided for in other international agreements concluded by the Party concerned."[463]

275. Finally, the European Commission (DG Trade), in view of its impending competence to negotiate investment treaties on behalf of the European Community, published an Issue Paper on 30 May 2006 in which it advanced its suggested scope for any MFN clauses to be included in future EU BITs. It recommended that "[t]he scope of the MFN clause is focused and limited to

[462] Reprinted in A.R. Ziegler, "*The Nascent International Law on Most-Favoured-Nation (MFN) Clauses in Bilateral Investment Treaties (BITs)*", European Yearbook of International Economic Law 77 (Dec 2009), p. 93 (emphasis added). The same "vanishing footnote" was also inserted in the draft text of the Free Trade Area of the Americas, which has yet to be adopted. (See fn. 13 to chap. XVII, Free Trade Area of the Americas, draft of 21 November 2003, FTAA.TNC/w/133/Rev.3, available at: http://www.ftaa-alca.org/ftaadraft03/ChapterXVII_e.asp.)

[463] Ibid at p. 95.

establishment, thus clearly signaling that it could not extend to BIT provisions on expropriation and dispute settlement."[464]

276. It is striking that these statements by Argentina, Panama, Colombia, the DR-CAFTA countries (including the US[465]), the EU Commission, and Switzerland (the latter three together representing a majority of the world's highly developed and capital exporting countries) all converge in signaling that the specified MFN clauses do not, and were never intended to, reach the international dispute resolution provisions of the respectively mentioned investment agreements. By contrast there have been no known clarifications issued in which states have embraced the *Maffezini* holding.[466]

277. The Dissenting Opinion attempts to turn all of this evidence on its head, arguing that the clarifications issued by some states in respect of particular treaties prove that the MFN clauses in all other treaties were in fact intended to extend to international investor-State dispute settlement provisions. This argument once again gets the default rules of public international law

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[464] Ibid at p. 94. It is of course obvious that this White Paper does not represent settled European policy on the question, since the EU organs are still in the process of charting the future EU-wide investment treaty policy. (See Dissenting Opinion of Charles N. Brower at para 32.) What may nevertheless be observed is that no EU document has yet been issued endorsing the *Maffezini* approach or suggesting its incorporation into EU policy.

[465] The Tribunal notes that the United States recently concluded a review of its 2004 Model BIT. As part of that process, the US State Department commissioned an expert report from the Advisory Committee on International Economic Policy. A sub-group of the Committee members addressed the question of the scope of application of the Model BIT's MFN clause and recommended that the BIT be revised so as to clarify that the MFN commitment does not extend to any international commitments – whether substantive or procedural – undertaken by the United States in its treaties with third countries. (See Report of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty, presented to the Department of State, 30 Sep 2009, Annex B: Particular Viewpoints of Subcommittee Members, Collective Statement from Sara Anderson, Linda Andros et al, Part III, Recommendation 5, available at: http://www.state.gov/e/eeb/rls/othr/2009/131118.htm#1.) The newly released US Model BIT of 2012, however, includes no new provisions relevant to the proper interpretation of any MFN clauses as may in future appear in any new US treaties to be concluded subsequent to the adoption of the 2012 US Model BIT. It remains to be seen whether the US will adopt the same tactic of incorporating "vanishing footnotes" into its BIT negotiations as it has used when negotiating the investment chapters of its recent preferential trade agreements. In short, no conclusions as to the future state practice of the United States can yet be drawn. All one can say at present is that the US has chosen to disavow the *Maffezini* holding on at least one occasion.

[466] The Dissenting Opinion points to the UK-Bosnia BIT as an example of a post-*Maffezini* treaty which "explicitly applies that BIT's MFN clause to that treaty's dispute settlement provisions" (Dissenting Opinion of Charles N. Brower at para 30). The UK-Bosnia BIT, however, does not appear to constitute a change in or clarification of the UK's policy, as it appears to have been based on a UK model BIT that was already in effect prior to *Maffezini*. The UK's distinctive and consistent policy thus does not imply an evolution in the general understanding shared by the majority of states comprising the international community.

backwards. International law does not construe a State's silence as consent. Neither does it require states to run around disavowing the jurisdiction of international tribunals in order to avoid being ensnared by unanticipated jurisdictional tentacles every time a claimant invents a clever new argument. Each state's consent to submit to the jurisdiction of an international tribunal must be established on the basis of objective indicators. The fact that some States – including Argentina – have chosen to speak out against what they regard as errant rulings by certain investor-State arbitral tribunals provides no such indication here.

278. In sum, none of the treaty materials which the Tribunal has been able to examine in any way suggests that the Contracting State Parties to the German-Argentine BIT intended to include international dispute resolution within the purview of the MFN clauses' references to the Host State's treatment of investments within its territory. Nor do these materials authorize the Tribunal to interpret the MFN clauses of the German-Argentine BIT in an evolutive way so as to achieve the enlarged meaning desired by the Claimant. On the contrary, all of the relevant supplementary materials confirm the conclusion reached by the Tribunal on the basis of the Treaty's text.

l) The Dissenting Opinion and the Concurring Statement

279. Judge Brower has seen fit to append a Dissenting Opinion in which he disagrees with the Tribunal's MFN analysis in vivid terms. The Tribunal has carefully considered each of the points raised but has found that they fail to establish the consent of the Contracting State Parties to submit to the jurisdiction of an international arbitral tribunal in the circumstances of the present case. Notwithstanding this disagreement, the Tribunal has greatly benefited from the exchange of views which has taken place among the Tribunal members in the course of the deliberations. The Tribunal expresses its sincere gratitude to Judge Brower for the technical precision which his criticisms have contributed to this Award.

280. Professor Bello Janeiro appends a Concurring Statement. He does so in order to explain his reasons for subscribing to this Award, the result of which differs from that of the earlier *Siemens* case, in which Professor Bello Janeiro also participated.

4. Summary of Tribunal's MFN analysis

281. The Tribunal's above analysis has led to the following conclusions:

(1) The Claimant does not yet have standing to assert its claims under the German-Argentine BIT, because it has not yet satisfied the Treaty's Article 10 conditions precedent to invoke international arbitration. As such, the Tribunal lacks jurisdiction at present to entertain the Claimant's MFN or any other claim.

(2) The most-favored-nation clauses contained in Articles 3(1), 3(2), and 4(4) of the BIT do not alter this conclusion , as they do not authorize the Claimant to circumvent the conditions precedent to arbitration laid down in Article 10 of the BIT.

(3) The Treaty's MFN guarantees do not presently apply in any event, as the Claimant has not shown that the dispute resolution process prescribed by Article 10 of the German-Argentine BIT is objectively less favorable to the Claimant than that of any comparator treaty.

(4) The Claimant remains at liberty, however, upon satisfaction of the Treaty's conditions precedent to arbitration, to assert any retrospective MFN claims it may have in any future arbitration proceeding, including any claims relating to its treatment by Argentina pursuant to the Treaty's 18-month domestic courts proviso.

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VII. COSTS

283. Each disputing party has requested the Tribunal to assess the costs of these proceedings against the other party. The Tribunal sympathizes with the Claimant's request in respect of Argentina's first three jurisdictional objections. The first objection was patently groundless while the second and third objections largely repeated objections which Argentina has raised in myriad other cases – each time without success. Nevertheless, the Respondent's assertion of these objections in the context of the present proceedings cannot be said to have been vexatious, particularly considering that it chose to rest on its written pleadings without insisting upon any further discussion of the issues at the oral hearings.

284. With respect to the fourth and fifth objections, the analysis of these questions was difficult and complex. The fourth objection concerned a question that is novel in ICSID jurisdictional practice, while the fifth concerned a point on which the existing jurisprudence is dramatically split. Both parties presented sound legal arguments, and each side ultimately prevailed on some points but failed on others.

285. In light of these considerations, the Tribunal finds it appropriate for the costs of the arbitration to be split evenly between the parties, with each side bearing its own legal costs.

VIII. DECISION OF THE TRIBUNAL

286. For the reasons stated above:

(1) The Tribunal rejects the Respondent's first, second, third, and fourth objections to the jurisdiction of the Tribunal.

(2) The Tribunal upholds the Respondent's fifth objection to jurisdiction, and all claims are accordingly dismissed in their entirety.

(3) All costs of the present arbitration proceedings to-date shall be split evenly between the disputing parties, with each party bearing its own legal costs.

287. It is so ordered.

Done in English and Spanish, both versions being equally authoritative.

Pierre Marie Dupuy
President of the Tribunal

Charles N. Brower
Arbitrator
August 15, 2012

Domingo Bello Janeiro
Arbitrator
August 10, 20

August 7, 2012

APPENDIX 1: SELECT ARGENTINE BITS BY DATE OF SIGNING

BITs Entered into by Argentina	Signed	18-Month Requirement
Italy	22 May 1990	YES
Belgium/Luxembourg	28 June 1990	YES
United Kingdom	11 Dec 1990	YES
Germany	09 April 1991	YES
Switzerland	12 April 1991	YES
France	03 July 1991	NO
Poland	31 July 1991	NO
Chile	02 Aug 1991	NO
Spain	03 Oct 1991	YES
Canada	05 Nov 1991	YES
United States	14 Nov 1991	NO
Sweden	22 Nov 1991	NO
Turkey	08 May 1992	NO
Egypt	11 May 1992	NO
Tunisia	17 June 1992	NO
Austria	07 Aug 1992	YES
Netherlands	20 Oct 1992	YES
China	05 Nov 1992	NO
Denmark	06 Nov 1992	NO
Hungary	05 Feb 1993	NO
Armenia	14 Apr 1993	NO
Romania	29 July 1993	NO
Bulgaria	21 Sep 1993	NO
Finland	05 Nov 1993	NO
Venezuela	16 Nov 1993	NO
Jamaica	08 Feb 1994	NO
Ecuador	18 Feb 1994	NO
Bolivia	17 Mar 1994	NO
South Korea	17 May 1994	YES

APPENDIX 2: SELECT ARGENTINE BITS BY DATE OF ENTRY INTO FORCE

BITs Entered into by Argentina	Entered into Force	18-Month Requirement
Poland	01 Sep 1992	NO
Spain	28 Sep 1992	YES
Sweden	28 Sep 1992	YES
Switzerland	06 Nov 1992	NO
United Kingdom	19 Feb 1993	YES
France	03 Mar 1993	NO
Canada	29 Apr 1993	YES
Italy	14 Oct 1993	YES
Germany	08 Nov 1993	YES
Egypt	03 Dec 1993	NO
Belgium/Luxembourg	20 May 1994	YES
China	01 Aug 1994	NO
Netherlands	01 Oct 1994	YES
United States	20 Oct 1994	NO
Armenia	20 Dec 1994	NO
Austria	01 Jan 1995	YES
Chile	01 Jan 1995	NO

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